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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

ELECTRICAL DEVELOPMENT CO. OF ONTARIO LIMITED v. ATTORNEY-GENERAL FOR ONTARIO.

Constitutional Law—Action against Attorney-General for Declaration that Order in Council Ultra Vires—Order Setting aside Writ of Summons on Summary Application—Appeal.

Appeal by the plaintiffs from the order of MIDDLETON, J., in Chambers, ante 329.

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

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

Edward Bayly, K.C., for the defendant, respondent.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

FERRIS v. EDWARDS.

Vendor and Purchaser—Agreement for Sale of Land—Action by Vendor for Specific Performance—Misrepresentations by Vendor—Failure to Prove—Purchaser Acting upon his own Judgment—Inspection of Land—Impossibility of Placing Parties in Original Positions—Failure of Claim for Rescission—Findings of Trial Judge—Appeal.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 14 O.W.N. 311.

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

J. H. Fraser, for the appellant.

A. R. Bartlet, for the plaintiff, respondent.

The judgment of the Court was read by FERGUSON, J.A., who said that a perusal of the whole evidence had convinced him that the testimony of the plaintiff as to the representations made was to be preferred to that of the defendant and his wife, and that the true reason for the defendant seeking to be relieved of his contract was to be found in the fact that the defendant realised, when too late, that he had undertaken more than, with his limited capital and facilities, he could hope to carry out successfully. It was admitted that the plaintiff represented to the defendant that the whole block of 240 acres, except about 15, was wheat-land and in that sense fit for crop; and that statement was not untrue. The plaintiff also represented that about 90 acres had been at some time broken and about 30 acres had been summer-fallowed in 1916. These representations were substantiated in evidence, except that the amount of fallow was somewhat less, and the work thereon had not been done in as thorough a manner as it might have been; but it could not be found that the fallow was not fit for crop or that the plaintiff represented that there were neither weeds nor thistles on the farm, or that the whole farm was in such a state of cultivation that all of it, except about 15 acres, might be cropped in 1917, or even 1918. The difference in the amount of fallow-land was not such a material difference as to justify the Court in refusin to order specific performance of the agreement; and the other alleged misrepresentations were not made out.

The defendant did not rely upon the plaintiff's statements, but went from Windsor, Ontario, to Manitoba, for the express purpose of seeing the property, verifying the plaintiff's statements, and judging for himself whether or not he would enter into the proposed contract; and, having done so, he caused the plaintiff to go to Winnipeg, and there entered into the contract sued upon.

The proper conclusion from the whole evidence was, that the defendant then knew—if he at any other time believed the contrary—that no part of the whole 240 acres, except what had been fallowed or cropped during 1916, was ready for crop or could be cropped before the season of 1918; and that he knew or ought to have known that there were both weeds and thistles on the farm.

A rescission of the agreement would leave the plaintiff in a position substantially different from and worse than he was in originally.

The judgment appealed from was right, and should be affirmed; but it was a case in which, in the interests of both parties, a settlement should be made.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

*ABELL v. VILLAGE OF WOODBRIDGE AND COUNTY OF YORK.

Highway—Dedication of Land as Public Highway Subject to Right of Land-owner to Maintain Raceway under it—Municipal Act, 1913, secs. 432, 433—Repeal of sec. 601 of Municipal Act, 1903—Effect of—Removal of Qualification—Soil and Freehold of Highways Vested absolutely in Municipal Corporations.

An appeal by the defendants from the judgment of MASTEN, J., 39 O.L.R. 382, 12 O.W.N. 146.

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

O. L. Lewis, K.C., and C. W. Plaxton, for the appellants the Corporation of the County of York.

W. A. Skeans, for the appellants the Corporation of the Village of Woodbridge.

J. H. Moss, K.C., and W. Lawr, for the plaintiff, the respondent.

MEREDITH, C.J.O., read a judgment in which he said that the contest was as to the right of the respondent to maintain a raceway, in connection with his mill-property, under the surface of a highway called Pine street, in the village of Woodbridge.

At the trial there was nothing to shew the origin of the highway; and Masten, J., presumed a lost grant of an easement to which the highway was subject.

Since the argument, the Court had been put in possession of documentary evidence from which the origin of the highway was satisfactorily shewn.

The inference to be drawn from these documents was, that what is now Pine street was originally a road leading to the mill of one Burr, a predecessor in title of the respondent, and that the raceway crossed this road. In the progress of time, the road became, by reason of its use by the public, with the permission of the owner of the mill-property, a public highway by dedication, and the road as dedicated was subject to the right of the mill-owner to maintain the raceway. It was unnecessary to determine whether this right was an easement or whether the land occupied by the raceway was the property of the mill-owner subject to the public right of passage over it.

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

As the law stood down to the passing of the Municipal Act of 1913, 3 & 4 Geo. V. ch. 43, Pine street was vested in the Corporation of Woodbridge subject to the right of the mill-owner to maintain the raceway. The law previously applicable was contained in sec. 601 of the Municipal Act of 1903, 3 Edw. VII. ch. 19, which provided that "every public road, street, bridge or other highway in a city, township, town or village, except . . . shall be vested in the municipality, subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway." The effect of this section was to vest not merely the surface but the freehold as well, subject to any rights reserved by the person who laid out the highway: Roche v. Ryan (1892), 22 O.R. 107; Cotton v. City of Vancouver (1906), 12 B.C.R. 497.

But sec. 433 of the Act of 1913 provides that the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities the council or councils of which for the time being have jurisdiction over it under the provisions of the Act (sec. 433); and, by sec. 432, all roads dedicated by the owner of land to public use are declared to be common and public highways.

There is no escape from the conclusion that the effect of this legislation and of the repeal of 3 Edw. VII. ch. 19, which was concurrent with it, is to remove the qualification to which under that Act the vesting of the highways was subject, and to vest absolutely and without qualification the soil and freehold of them in the municipal corporations. The respondent's action therefore failed.

The appeal should be allowed without costs, and the action dismissed without costs.

MACLAREN, MAGEE, and HODGINS, JJ.A., concurred.

MIDDLETON, J., read a dissenting judgment. He was of opinion that full effect could be given to the words of the statute as it now stands by confining their operation to vesting in the municipality the title which had been conveyed subject to all existing reservations.

Appeal allowed (MIDDLETON, J., *dissenting*)

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

*LOWRY v. ROBINS.

Contract—Breach of Promise of Marriage—Evidence—Corroboration of Promise—Findings of Jury—Sanity of Plaintiff—Mental Unfitness for Marriage—Appeal—Ground not Taken in Notice—Defence not Passed upon by Jury.

An appeal by the defendant from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury at the trial, in Toronto, in favour of the plaintiff for the recovery of $10,000 damages in an action for breach of promise of marriage.

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

I. F. Hellmuth, K.C., and W. N. Tilley, K.C., for the appellant.

D. L. McCarthy, K.C., and T. L. Monahan, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the appellant, besides denying the promise of marriage, pleaded that the respondent, at the time of the pleading, was, "and subsequent to the month of August, 1915," in which month the promise was alleged to have been made, "became mentally unfit to marry, and that such unfitness existed in the month of January, 1917, and has ever since continued."

The questions submitted to the jury and their answers were:—

(1) Did the defendant promise to marry the plaintiff? A. Yes.

(2) If so, did he break that promise? A. Yes.

(3) And, if so, what sum of money is reasonable compensation to the plaintiff, under all the circumstances of the case, for the injuries sustained by her through that breach of promise? A. $10,000.

(4) If the promise was made and broken, was the plaintiff sane at the time when it was made? A. Yes.

(5) And was she sane at the time it should have been fulfilled? A. Yes.

The grounds stated in the notice of appeal were:—

(1) That the learned Judge misdirected the jury in, among other things: (a) stating that the defendant was a marrying man and could not remain single; (b) stating that the ultimate result of the acquaintanceship between the parties would be either seduction or marriage; (c) stating that the defendant was infatuated by the beauty of the plaintiff; (d) stating the law as to corroboration of the promise of marriage.

(2) That the findings of the jury were contrary to the evidence and against the weight of evidence.

Upon the argument in this Court it was contended that the jury were misdirected on the question of the alleged mental condition of the respondent and as to the issue raised as to that condition rendering her unfit to marry. The objection was not taken in the notice of appeal and was not open to the appellant.

Although the evidence as to the promise was contradictory, there was evidence which, if believed, warranted the jury's finding that the promise was made as the respondent alleged; and the Court could not interfere with the finding unless it could say that it was one that no reasonable jury could make; and that the learned Chief Justice was not prepared to do.

Sufficient corroboration to satisfy sec. 11 of the Evidence Act, R.S.O. 1914 ch. 76, was to be found in the testimony of the respondent's father and mother and in the admitted acts and conduct of the appellant himself.

The other objections to the charge set out in the notice of appeal were not pressed upon the argument.

The appeal should be dismissed with costs.

HODGINS, J.A., read a judgment in which he said that the chief contention was that there was such a mental unfitness, not necessarily insanity, as justified the appellant in refusing to marry the respondent. The omission of this ground from the notice of appeal did not in itself justify the Court in refusing to hear and determine the question raised. But there was a weighty reason for refusing to give effect to it. It was not presented to the jury in the way now argued. Before disposing of it in this Court, it would be necessary to consider the exact scope of such a defence, to lay down a precedent, and then to decide whether the evidence brought the case within the precedent. But this would be an invasion of the province of the jury, in regard to a matter not considered by the trial Judge or by the jury.

There was corroboration; the evidence was conflicting; and the findings of the jury could not be interfered with.

FERGUSON, J.A., read a judgment, in which he stated reasons for agreeing that the findings of the jury must stand and that there was sufficient corroboration. He also discussed the defence of "mental unfitness" and said that it was not one of those meritorious defences which the appellant ought to have another opportunity to litigate.

MACLAREN and MAGEE, JJ.A., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

*REX v. RANKIN.

Ontario Temperance Act—Magistrate's Conviction of Physician for Offence against sec. 51 — Prescription — "Actual Need" — Evidence—Honest Belief.

Appeal by the complainant from the order of ROSE, J., in Chambers, ante 29, quashing a conviction of the defendant by the Police Magistrate for Stratford for an offence against the Ontario Temperance Act.

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

Edward Bayly, K.C., for the appellant.

H. H. Dewart, K.C., for the defendant, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the conviction was dated the 3rd July, 1918, and the offence was stated to be that the respondent, on the 25th June, 1918, at the city of Stratford, did give to one R.O. an order or prescription, addressed to E.B.S., a licensed vendor of liquor, for one quart of whisky, the occasion not being a case of actual need, in violation of sec. 51 (1) of the Ontario Temperance Act.

Rose, J., was of opinion that there was no evidence that it was not a case of actual need, and he therefore quashed the conviction.

The learned Chief Justice said that the Act was ill-drawn, and he went over the provisions of secs. 51 and 128 (1), pointing out inconsistencies and difficulties in construction.

The Chief Justice then said that he was not prepared to decide that a physician who honestly believes that liquor is necessary for the health of his patient, and prescribes it in accordance with the provisions of the Act, is guilty of an offence against the Act because the patient did not in fact need liquor for his health. A physician must necessarily depend very much upon what his patient tells him as to his condition and symptoms, and it would be intolerable that a physician, who had no reason to disbelieve what his patient had told him, and had formed the honest opinion that liquor was necessary for the health of the patient and had prescribed it, must be adjudged guilty of an offence against the Act if it were shewn that he had been imposed upon by a false statement of his patient as to his condition and symptoms.

It was argued, however, that the respondent's own testimony before the Police Magistrate shewed that he did not believe that

R.O. was in actual need of the liquor which he (the respondent) prescribed.

The Chief Justice said that he was quite unable to understand the theory upon which the respondent came to the conclusion that R.O. needed the quart of whisky for which he gave him a prescription, and the respondent did not throw any light upon the subject. He was dealing with a man who, upon his (the respondent's) own shewing, was coming to him too often, and he refused to give him a prescription—that is, a prescription for 6 ounces—on that account, and yet he gave to that man a prescription for a quart of whisky, trusting him to take it in the quantities in which he was directed to take it. In view of this evidence, it could not be said that there was no evidence upon which it was open to the Police Magistrate to find, as he had found, that there was no actual need for the liquor that was prescribed by the respondent.

For the purpose of this decision, it should be assumed that it would suffice to justify the respondent that he honestly believed that the occasion was one of actual need.

If there was any evidence warranting the Police Magistrate's conclusion, it could not be disturbed—and there was some evidence, in the judgment of the Chief Justice.

The learned Chief Justice said that he had assumed without deciding that the conviction could not be supported on the ground that a larger quantity than is permitted was prescribed, if that were all that was done in contravention of the Act.

The appeal should be allowed, and the motion to quash should be dismissed; no costs to either party.

MAGEE, J.A., in a brief memorandum, said that there was some evidence to support the conviction, and he reluctantly agreed that the appeal should be allowed.

HODGINS, J.A., agreed with MEREDITH, C.J.O.

FERGUSON, J.A., read a dissenting judgment. He said that the defendant was not prosecuted for prescribing more liquor than was necessary or for evasion of the Act or for assisting another person to evade the Act or for enabling any person to obtain liquor for use as a beverage—all of which are made offences by sec. 51. The evidence must, therefore, be considered on the assumption that none of these offences had been committed, and consequently on the assumption that the defendant actually and in good faith deemed liquor necessary for the health of R.O., and it must then be ascertained if there was any evidence to justify the magistrate in saying that the defendant had arrived

at an erroneous conclusion, and that there was in fact no actual need of R.O. having liquor as a medicine. There was no evidence to that effect.

The appeal should be dismissed.

MACLAREN, J.A., agreed with FERGUSON, J.A.

Appeal allowed (MACLAREN *and* FERGUSON, JJ.A., *dissenting*).

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

REX v. McBRADY.

Criminal Law—Theft—False Pretences—Evidence—Stated Case—Form of.

Case stated by WINCHESTER, Senior Judge of the County Court of the County of York.

The prisoner was charged in the County Court Judge's Criminal Court for that he, in the month of January, 1918, did steal from Arthur Kelly the sum of $25, contrary to the Criminal Code; did receive or retain in his possession the sum of $25, the property of Arthur Kelly, knowing the same to have been stolen, contrary to the Criminal Code; did by false pretences obtain from Arthur Kelly a cheque for $25, made by Alexander Longwell, with intent to defraud, contrary to the Criminal Code; and he was also charged for that he, in the month of November, 1917, did by false pretences obtain from Percy A. Brawley and the Royal Bank of Canada $315, with intent to defraud, contrary to the Criminal Code; did by false pretences obtain from Percy A. Brawley and the Royal Bank of Canada $95, with intent to defraud, contrary to the Criminal Code.

The prisoner was found guilty on "the charge of theft laid against him in the Kelly case and of false pretences laid against him in the Brawley case," and was sentenced to and underwent 60 days' imprisonment.

The questions asked by the County Court Judge were:—

(1) Was I right in law and on the evidence in finding the defendant guilty of the offence No. 1 of the charges against the defendant known as the Kelly charges?

(2) Was I right in law and on the evidence in finding the defendant guilty of the offences Nos. 4 and 5 in the charges against the defendant known as the Brawley charges?

The stated case was heard by MEREDITH, C.J.O., MACLAREN MAGEE, HODGINS, and FERGUSON, JJ.A.

T. L. Monahan, for the defendant.

J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.O., read the judgment of the Court. He said that the Court was of opinion that there was evidence upon which a conviction on the Kelly theft charge might be made. The finding—and there was evidence to support it—was that the prisoner (a solicitor) obtained the cheque for $25 for the purpose of paying the money into Court. Instead of doing that, the prisoner converted it to his own use; and that was theft. There was also the further fact that the representation that the money had to be paid into Court was untrue, and was made to induce Kelly to part with the cheque; and the inference that might properly be drawn was that it was made in order to enable the prisoner to convert the money to his own use, as he did.

There was not evidence to warrant a conviction of false pretences as to the cheque for $315. There was no statement made that the prisoner had $500 at his credit in the bank. That was the inference that Brawley drew from what was said by the prisoner, but that was not sufficient to support the charge.

There was evidence to warrant a conviction as to the $95—the prisoner knew that there were not funds to meet the cheque which he gave Brawley for that amount. The money was got on the representation that it was to be used to provide funds to meet the $315 cheque; and the inference might properly be drawn that the prisoner did not intend to use it for that purpose, but for other purposes of his own.

The questions submitted should be answered as follows:—

(1) There was evidence upon which the prisoner might properly be convicted on the charge of theft in the Kelly case.

(2) There was evidence upon which the prisoner might properly be convicted of false pretences with regard to the $95, but not with regard to the $315.

The learned Chief Justice again called attention to the improper form in which questions are frequently submitted. A Judge has no authority to ask whether he has come to a proper conclusion on the evidence. What he may and should ask is: was there any evidence upon which the prisoner could properly be convicted?

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

AUSTIN & NICHOLSON v. CANADA STEAMSHIP LINES LIMITED.

Contract—Formation—Written Offer to Carry Goods at Named Price—Oral Acceptance—Evidence—Credibility of Witnesses—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of LENNOX, J., 14 O.W.N. 191.

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

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

R. S. Robertson, for the plaintiffs, respondents.

FERGUSON, J.A., read a judgment in which he said that, giving the witnesses Cowan and Deeble credit for intending and endeavouring to state truthfully the facts and circumstances as they each remembered and recalled them, he (the learned Judge) was, after a careful consideration of the testimony and of the exhibits, of opinion that the testimony of both of these witnesses was so contradictory of their prior statements, and in part so inconsistent with circumstances adduced in evidence, that their testimony should be disregarded in arriving at a conclusion upon the question whether the plaintiffs had or had not established the contract alleged. The rejection of the evidence of Cowan and Deeble did not, however, establish the plaintiffs' case; that required the Court to accept the testimony of the plaintiffs, as making out affirmatively that the letter of the defendants to the plaintiffs, dated the 3rd September, 1915, was prepared and delivered as a statement of a bona fide proposal or offer, on the faith of which it was intended that the plaintiffs might contract with the Ontario Pulp and Paper Company, and that the plaintiffs did in good faith act upon such statement by so contracting, and did thereafter, in September, accept the defendants' proposal at the times and in manner sworn to by the plaintiffs.

The letter of the 3rd September was intended as a statement of a proposal which the plaintiffs might act upon and turn into a contract by acceptance; but there was much in the correspondence that was difficult to reconcile with the position now taken by the plaintiffs, that this offer was accepted in September, and was ever after considered and treated by them as evidencing a binding contract between the parties. The plaintiffs' explanation was that the correspondence should be read as being part of endeavours by

them to secure an enlarged further or additional contract from the defendants, providing for the carriage of another quantity of pulp sold by the plaintiffs to the Ontario Pulp and Paper Company, under contract dated the 2nd November, 1915.

The learned trial Judge, after hearing the plaintiffs' witnesses and observing their manner and demeanour, gave full credit to their testimony and explanations, and it could not be said that the statements in the correspondence were not to be explained in the way the plaintiffs said, or that the trial Judge was clearly wrong in his findings of fact, made largely on the credit given to the oral statements of witnesses examined before him.

The appeal should be dismissed with costs.

MACLAREN, MAGEE, and HODGINS, JJ.A., concurred.

MEREDITH, C.J.O., read a dissenting judgment. He was of opinion, upon a close examination of the documentary and oral evidence as transcribed, that the plaintiffs had not established the making of a binding contract.

Appeal dismissed (MEREDITH, C.J.O., *dissenting*).

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

BAKANAWSKI v. MANN MINES LIMITED.

Mines and Mining—Injury to Miner—Negligence—Mining Act of Ontario, 1908, 8 Edw. VII. ch. 21, sec. 164, as Amended by 2 Geo. V. ch. 8, sec. 18—Protection of Miners—Rule 40—Daily Examination of Levels and Raises—Dangerous Condition of Level—Failure of Manager to Examine—Absence of Contributory Negligence—Findings of Jury—Findings of Appellate Court on Evidence—Avoidance of New Trial.

An appeal by the plaintiff from the judgment of ROSE, J., at the trial at Haileybury, upon the findings of a jury, dismissing the action, which was brought to recover damages for personal injuries sustained by the plaintiff when working for the defendants in their mine at Gowganda.

The questions given to the jury and their answers were as follows:—

(1) Was the accident which resulted in the injury to the plaintiff caused by the negligence of the defendants? A. Yes.

(2) If so, what was the negligence? A. In allowing the track to be raised so that the car was uncontrollable.

(3) Did the plaintiff, by failing to exercise reasonable care, cause or contribute to the accident? A. Yes.

(4) If so, in what did his want of care consist? A. By raising the track.

And the jury assessed the plaintiff's damages at $1,500.

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

A. G. Slaght, for the appellant.

R. McKay, K.C., for the defendants, respondents.

MACLAREN, J.A., read the judgment of the Court. He said that in the course of the argument, when it appeared that a new trial might be the outcome of the appeal, counsel on both sides desired the Court, if it reached the conclusion that the judgment below could not stand, to pass upon the evidence and say which party was entitled to succeed, thus avoiding another trial.

The contingency thus provided for had happened. The learned trial Judge had erred in not instructing the jury as to sec. 164 of the Mining Act of Ontario, 1908, 8 Edw. VII. ch. 21, as amended in 1912 by 2 Geo. V. ch. 8, sec. 18. On the subject of contributory negligence, also, the jury were not sufficiently instructed, and the evidence did not warrant their answers to questions 3 and 4.

It was necessary for the Court to consider the whole evidence, without regard to the answers of the jury, and to render its decision as if the trial had taken place before it.

The mine had two levels—the first 100 feet below the surface, and the second 50 feet lower than the first. The plaintiff was working on the upper level at the time of the accident—the 15th October, 1913. He was an ore-shoveller, and he and another man filled with ore a bucket which had been placed on a low, flat car, which ran on light rails from the ore-dump to the shaft, about 20 or 25 feet. When the bucket was filled, the two men pushed the car from behind, stopping it when near the shaft. One of them then went forward and closed the heavy doors of the shaft so as to form a platform or flooring of them with rails which joined those in the drift. The car was then pushed into the shaft, and the bucket hoisted by a cable to the surface. The drift of the mine was nearly level. The track opposite the dump, where the bucket was filled, was also level, but it had been raised—towards the shaft it had first a down-grade and then an up-grade, so that, after being once started, the impetus it acquired on the down-grade would drive it over the up-grade, and it did not require to be pushed

again until it approached the level track near the shaft. This was manifestly dangerous, and was the cause of the accident, as the jury found. When the empty bucket was taken to the dump, the plaintiff placed a wooden wedge in front of one of the car-wheels to prevent the car from moving forward, and the bucket was nearly filled when the car started forward, the wedge having from some unexplained cause slipped out. The plaintiff ran after the moving car, caught hold of it and tried to check it; but it had acquired too great an impetus; it broke through the cross-bar, plunged into the open shaft, and the plaintiff fell after it to the bottom, sustaining very severe injuries.

Rule 40, prescribed by sec. 164 of the Act (as amended), provides that the manager or captain of every mine shall examine at least once every day all working shafts, levels, raises, etc., to ascertain that they are in a safe and efficient working condition.

The evidence was that the track had been in the dangerous condition described for 2 or 3 months before the accident. The examination was not shewn to have been made as required by the rule.

The rule was made for the protection of miners; the plaintiff was a miner, and could claim the benefit of it. The defendants were liable for the negligence of their officers, and that negligence was clearly the cause of the accident.

The evidence failed to establish any responsibility on the plaintiff's part for the accident.

There should be judgment for the plaintiff for $1,500 with costs of the action and appeal.

Appeal allowed.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

SHAW v. CLARKSON-JONES.

Negligence—Collision of Motor-vehicles in Highway—Negligence of Defendants—Contributory Negligence of Plaintiff—Dismissal of Action—Findings of Trial Judge—Appeal—Costs.

An appeal by the plaintiff from the judgment of DENTON, Jun. Co. C.J., dismissing with costs an action, brought in the County Court of the County of York and tried without a jury, to recover damages for injury caused to the plaintiff in a collision between his motor-car and a motor-truck of the defendants, at the intersection of Dale avenue with Glen road, in the city of Toronto, on the 8th July, 1918.

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

R. McKay, K.C., and Gideon Grant, for the appellant.

George Wilkie, for the defendants, respondents.

FERGUSON, J.A., reading the judgment of the Court, said, after stating the facts, that he was convinced that the learned trial Judge was right in finding that the plaintiff's car was on the wrong side of the street, and could not have got to the position sworn to by Miss Shaw, who was driving it, unless she had either cut the corner or driven into Glen road from the wrong or south side of Dale avenue; in either case she was negligent; and the fair result of the evidence was that her negligence contributed to the accident; and, therefore, the appeal failed.

But the defendants (or their driver) were much more to blame than Miss Shaw, and it was to be regretted that the Court was unable to make them bear some of the loss occasioned by their reckless disregard for the rights and safety of others. The most the Court could do was to deprive them of costs.

Appeal dismissed without costs.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

BANK OF OTTAWA v. CARSON.

Guaranty—Indebtedness of Company to Bank—Action against Guarantors—Defences—Innocent Misrepresentation by Bank-manager as to Security to be Transferred to Guarantors—Security not Actually Transferred—Election, after Discovery of Mistake as to Security, to Stand by Transaction—Leave to Adduce Further Evidence upon Appeal.

Appeal by the defendants Carson, Lafrenière, and Garneau from the judgment of LENNOX, J., at the trial at Ottawa, in favour of the plaintiff bank for the recovery of $8,800 upon a guaranty.

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

W. N. Tilley, K.C., and A. E. Honeywell, for the appellants.

I. F. Hellmuth, K.C., and H. P. Hill, for the plaintiff bank, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the guaranty on which the action was brought was dated the 29th November, 1913, and was under the hands and seals of the appellants and three other defendants (who suffered judgment by default), and by it they guaranteed to the bank the repayment of all advances made or to be made by the bank to an incorporated company, "Currie-Livock Limited."

The defences were: (1) that the bond was signed by the appellants on the representation of the manager of the bank that the bank held, as security for $3,800 of the indebtedness guaranteed, a first mortgage on the house and lot of the defendant Currie, and that that security would be given to the appellants in trust for the guarantors, whereas the mortgage did not cover that property, but it was on other property of no substantial value; (2) that the bond was signed by the appellants on the representation by the bank that it would be signed by one Marshall, who, in fact, did not sign; (3) that the appellants were not liable for the $3,800, which was not an indebtedness of the company, but of a partnership whose business was taken over by the company; (4) that the bank had collected on collateral securities held by it sufficient to satisfy its claim over and above the $3,800.

The evidence established that the mortgage held by the bank did not cover the lot on which the house stood, but a vacant lot adjacent to it; that the house-lot belonged, not to Currie, but to his wife; that the mortgage was taken by the bank under the belief, induced by Currie, that it covered the house-lot, and that any statement made by the manager of the bank as to the mortgage was made in good faith and in the honest belief that it was a first mortgage on the house-lot; that all the parties to the transactions which led to the giving of the guaranty, except Currie, believed that the mortgage was a first mortgage on the house-lot; and that it was part of the arrangement with the bank that the mortgage security which it held should be transferred to the guarantors.

The evidence also shewed that a mortgage for $2,000 had been executed on the 4th January, 1916, by Currie's wife to the appellant Carson on the house-lot. The circumstances in which and the purposes for which it was given were not shewn; and there was no evidence as to the circumstances surrounding the giving of the guaranty or as to what led to its being given. The company went into liquidation some time before the 13th January, 1916; and the guarantors filed their claim with the liquidator for the full amount of the bank's claim on the guaranty.

If the arrangement that was made had been carried out, and the bank's mortgage had been assigned to the guarantors, the appellants—unless there was a ratification of the transaction

after the mistake was discovered—would have been entitled to succeed; but, that not having been done, the case could not be put on any higher ground than that a representation was made by the manager to persons who, he knew, were about to enter into a transaction which involved the taking of security on the house-lot, that that lot was the property covered by the bank's mortgage—a representation that was in fact untrue, but was made under the honest belief that it was true.

In the view of Banbury v. Bank of Montreal, [1918] A.C. 626, possibly the bank would be liable to the guarantors in an action for the recovery of the damages they sustained owing to their having acted on the faith of the representation that was made; but that the representation was made was no answer to the action on the guaranty.

There was also evidence that the appellants, after the mistake had been discovered, elected to stand by the transaction.

The appeal should be dismissed.

Should the bank prefer to give further evidence as to the circumstances in which and the purposes for which the mortgage was given by Currie's wife and to put in evidence the claims filed with the liquidator of the company, leave to adduce that evidence should be given, and no judgment would in that case be given until further evidence should be before the Court; the bank must elect whether or not to accept this leave; and, if it is accepted, the bank should pay the costs occasioned by the taking of the evidence and the costs occasioned by any further argument on the new evidence, unless the Court should otherwise order.

MACLAREN and MAGEE, JJ.A., concurred.

FERGUSON, J.A., read a dissenting judgment.

Appeal dismissed with costs (FERGUSON, J.A., *dissenting*).

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

*SILVERMAN v. LEGREE.

Principal and Agent—Authority of Agent to Sell Land—Authority to Obtain Offer to Buy and Receive Deposit—Right of Agent to Commission where Sale Falls through by Fault of Principal—Action by Purchaser against both Principal and Agent to Recover Deposit—Repudiation of Agent by Principal—Uncertainty as to Proper Person to Sue—Recovery against Principal—Costs of Agent—Written Agreement to Pay Commission—Oral Enlargement of Scope—Right of Agent to Deduct Commission from Deposit—Statute of Frauds, sec. 13 (6 Geo. V. ch. 24, sec. 19).

An appeal by the defendant Legree from the judgment of DENTON, Jun. Co. C.J., in an action, brought in the County Court of the County of York and tried without a jury, to recover a deposit of $200 paid to the defendant Dodds Limited by the plaintiff on the delivery by the plaintiff of an offer to buy a house and land, the property of the defendant Legree, for whom the defendant Dodds Limited purported to act as agent.

The judgment was against the defendant Legree for $200 and in favour of Legree against Dodds Limited for $75—the difference, $125, being the amount of commission for which the trial Judge considered Legree liable to Dodds Limited; the defendant Legree was also ordered to pay the costs of her co-defendant.

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

J. T. Loftus, for the appellant.

T. H. Barton, for the defendant Dodds Limited, respondent.

D. W. Markham, for the plaintiff, respondent.

HODGINS, J.A., read the judgment of the Court. He said that the finding of the facts by the trial Judge was borne out by the testimony of the appellant and the respondents. There was authority in writing to sell, and it was never revoked but treated as subsisting when the appellant sent Silverman to the agent. And, when Silverman first approached the appellant and discussed the price, he was expressly sent by her to the agent, and directed to make his offer through the agent and to deal with it. This answered the contention that authority to sell does not confer authority to obtain an offer. Dodds Limited had both, and was entitled to receive the deposit. There was authority to receive an offer; and, as the making of the deposit was a part

of that offer, in the sense that a deposit is in the nature of an earnest and guaranty for the fulfilment of the offer—Hall v. Burnell, [1911] 2 Ch. 551—the agent was not going beyond its authority in receiving it.

The agent earned the commission: it did what the defendant Legree wanted it to do; and she alone was to blame for the sale falling through.

In the circumstances, Silverman was entitled to get back his deposit. The agent received it for and on account of its client, and as against Silverman the agent could not hold it. The money was not the agent's property, and, if sued alone, it would have had no defence. The general rule is, that the principal and agent are not both liable, but the plaintiff may, when uncertain of his rights, sue both. The plaintiff might well be in doubt, for the appellant expressly repudiated the agent's right to receive the money. It was not a case in which the plaintiff should pay the agent's costs.

Before action, Dodds Limited sent the appellant a cheque for the $75, and she refused to receive it. In view of the findings of the trial Judge and the appellant's pleadings, the order on her for payment of the agent's costs was justified: see Williams v. Lister (1914), 109 L.T.R. 699.

A question was raised as to the effect of sec. 13 of the Statute of Frauds, as enacted by 6 Geo. V. ch. 24, sec. 19, providing that no action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith. The original authority in writing was dated the 18th May, 1917. If Dodds Limited was compelled to sue for its commission, it would probably meet with difficulty in recovering for anything done short of exact performance of its authority. But, having, while fulfilling its duty as agent, whether under the writing or the subsequent verbal enlargement of its scope, come into possession of enough of its principal's money, it does not need to sue. It can set off against or appropriate to the earned commission enough to pay and satisfy it, and the statute does not apply to prevent it. The contract to pay commission is a good agreement, though, if not in writing, unenforceable by the Court. Here the Court has not to enforce it, but to decide whether what had been done with the deposit, as between the appellant and her agent, was justified.

The learned trial Judge had made a proper disposition of the whole case.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

*ASHTON v. TOWN OF NEW LISKEARD.

Highway—Nonrepair—Snow and Ice on Sidewalk—Injury to Pedestrians—Negligence—"Gross Negligence"—Municipal Act, sec. 460 (3)—Contributory Negligence—Findings of Trial Judge—Reversal on Appeal.

An appeal by the plaintiffs from the judgment of the Junior Judge of the District Court, of the District of Temiskaming, dismissing an action brought by a man and his wife against the Corporation of the Town of New Liskeard to recover damages for bodily injuries sustained by the wife by a fall on an icy sidewalk, in the town, and consequent loss and expense to the husband.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. G. Slaght, for the appellants.

Peter White, K.C., for the defendants, respondents.

MACLAREN, J.A., read the judgment of the Court. He said that about 8 o'clock in the evening of the 23rd March, 1917, the plaintiffs were proceeding eastward on the north side of the principal street of the town, on their way to the post-office, when Mrs. Ashton slipped and fell, breaking her arm and receiving other injuries. The street had naturally a considerable downward grade at the point in question. After passing a cross-street, there were two vacant buildings, and east of them the store of one Thorpe. The town had two snow-ploughs, which were drawn by horses, and were used to clear the sidewalks after each snow-fall. Thorpe kept his sidewalk cleaned bare down to the cement. Opposite the vacant lots there was a considerable depth of hard snow and ice all winter, rising in the centre to what some of the witnesses called a "hog's back," and having a less depth on either side. The thickness of the hard snow and ice 3 or 4 feet west of Thorpe's line was variously estimated by witnesses at from 8 to 12 inches, sloping from the above thickness to nothing at Thorpe's line. Seeing that it was so icy and slippery and dangerous and that pedestrians fell there from time to time during the winter, Thorpe used to sprinkle ashes on the slope, and sometimes hacked it with an axe. Several of the witnesses had slipped and fallen—some of them twice—on this slope shortly before Mrs. Ashton fell.

For the defence it was urged that there was not the "gross negligence" on the part of the defendants which the statute requires; that the sidewalk was kept reasonably clear of snow;

that on the day of the accident there was the first thaw of the season, with a drizzling rain, which towards evening was frozen; that the sidewalk had been sanded; and that Mrs. Ashton was guilty of contributory negligence by not taking sufficient care on the icy sidewalk.

An employee of the defendants testified that he had put sand on the sidewalk on the day of the accident opposite the vacant lots, but did not assert that he put any sand on the dangerous slope in question, and indeed went so far as to say that "there was not any slope there," although this was abundantly proved by the witnesses on both sides.

The learned Judge referred to sec. 460 (3) of the Municipal Act, providing that except in case of "gross negligence" a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk, and to cases decided upon that enactment, referred to in the Municipal Manual of Meredith & Wilkinson, p. 636; especially City of Kingston v. Drennan (1897), 27 S.C.R. 46; and for a criticism of the term "gross negligence" to Halsbury's Laws of England, vol. 21, p. 361, note (*i*).

The case was almost on all fours with the Kingston case, and it must be held that gross negligence was shewn.

The learned Judge said that he could not find any evidence whatever of contributory negligence on the part of Mrs. Ashton.

The appeal should be allowed and judgment entered for $150, the damages assessed by the trial Judge, with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

*PERRY v. VISE.

Land Titles Act—Mistake as to Number of Lot in Making Entry of Transfer—Rectification of Register—Powers of Court—R.S.O. 1914 ch. 126, sec. 115—Addition of Parties—Amendment of Pleadings.

An appeal by the defendant Vise from the judgment of FALCONBRIDGE, C.J.K.B., in favour of the plaintiff, after the trial of the action without a jury at a Toronto sittings.

The action was brought for the rectification of the register in the Land Titles Office, Toronto, by substituting for the name of the appellant that of the plaintiff as owner of parcel 1184, free from incumbrances, and for a declaration that the respondent was

the actual owner of lot 287 (the same parcel) according to plan No. 1742, and for an injunction restraining the appellant from entering or in any wise dealing with that lot, and from transferring or mortgaging it; and that relief was granted by the judgment given at the trial.

After the land was brought under the Land Titles Act, a plan, No. M. 372, was registered in the Land Titles office, and lot 287 bore the same number on that plan, but for the purposes of the Land Titles office was called parcel 1184.

The Sterling Trusts Corporation and Nellie McBride were added as defendants by leave granted at the trial, and the judgment declared that the appellant purchased lot 285 according to plan M. 372, and that it was intended that the mortgage given by the appellant and now held by the defendant McBride should be on that lot, and that the appellant "is and should be the owner" of lot 285, subject to that mortgage; and it was adjudged that the Master of Titles should rectify the register so as to register the appellant as owner of lot 285 and the defendant McBride as first mortgagee, "under the terms of the mortgage now registered against lot 287."

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

A. Cohen, for the appellant.

V. H. Hattin, for the plaintiff, respondent.

MEREDITH, C.J.O., read the judgment of the Court. After setting out the facts, he said that it was clear that the appellant did not purchase or intend to purchase lot 287. What she bought was Robert McBride's lot. McBride did not buy or intend to buy lot 287, but bought and intended to buy lot 285, of which he took possession.

It was satisfactorily shewn that the lot which the appellant intended to purchase and did purchase was lot 285.

The registration of the appellant as owner of lot 287 would not enable her to hold it against the true owner. The Court was not powerless to undo the wrong that had been done to the respondent. The register may be rectified by order of the Court in such manner as may be deemed just: Land Titles Act, R.S.O. 1914 ch. 126, sec. 115.

The appellant did not, by registration, acquire any estate or interest in lot 287. She did not buy that lot from McBride, nor did he buy it from the Grand Valley Realty Company, and neither she nor he ever owned it. It was competent for the Court to direct the rectification of the register as to the ownership of lot 287 as it had been directed to be rectified.

The statement of claim should be amended by adding a claim for the relief that had been awarded in respect of lot 285; and, upon that being done, the appeal should be dismissed.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

PENBERTHY v. CORNER.

Contract—Excavation Work—Difficulty in Completing—Work to be Executed "according to Plans"—Abandonment—Money Expended in Completion—Damages—Ascertainment of—Reference—Election—Costs.

Appeal by the defendant from the judgment of LATCHFORD, J., 14 O.W.N. 275.

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

W. R. Smyth, K.C., for the appellant.

C. W. Kerr, for the plaintiff, respondent.

HODGINS, J.A., read the judgment of the Court. He said that the action was for damages for non-performance of a contract to do the excavation work in connection with a Hydro sub-station; and judgment had been given upon the plaintiff's claim for $1,000 damages and dismissing the appellant's counterclaim.

The contract between the parties must be held to be in the terms written by the appellant—that he was to excavate for the Hydro building according to plans and to keep water pumped out of excavation till excavation is done and to shore up banks.

The fair conclusion was, that the appellant began his work and was allowed to continue it upon the terms of his letter of the 2nd May, and that the respondent did not succeed in incorporating into that letter the detailed specifications.

According to the appellant's own theory, and to the contract as alleged by him in regard to what he had to do, certain work was not done when he left, which he said one Reeves offered to do for $250—an offer which the appellant jumped at. The price named accorded with the yardage still short on his work when he gave up. If to this were added the want of proper shoring, the cost of the necessary pump, the work in keeping the cellar free of water, and the difficulties caused by quicksand, the amount

allowed by the trial Judge as damages did not seem, upon the evidence, to be at all unreasonable on a contract for $2,400. The appellant was paid $700 on account of his work, which comprised the least costly part of the whole.

The contention that the respondent took the work off the appellant's hands and that Reeves contracted to finish it for $250 was disproved on the appellant's own testimony.

The appellant, not being experienced in dealing with quicksand, found himself involved in a job which he could not do within his contract price, and on which he had great difficulty in getting men to work. The result, while serious, did not include all the consequences with which the respondent sought to charge the appellant. For instance, delay was caused by the piling of the sump-pit, which took one month, and the piling was charged by the respondent to his principals as an extra and paid for as such. Yet, if the respondent was correct, it was within his own contract with his principals. Delay would have been caused by the quicksand, no matter how the contract was performed—all of which had been charged against the appellant.

The learned trial Judge's conclusions were supported by the evidence, and the appeal should be dismissed.

If the appellant, after this judgment, should desire a reference, he must be held to what was stated in his letter, as well as what was fairly shewn on the plans, no matter whether the work was to be done during or in connection with the main excavation, or required him to come back at a later time. The drains, ducts, and roadway, if shewn on the plans in such a way as to be part of the excavating work, should be part of the appellant's work, but not otherwise. If the damages assessed against the appellant, on a reference asked for by him, should be less than $1,000, costs of the reference should be in the discretion of the Master. If equal to or greater, the appellant should pay the costs. The appellant must elect within two weeks.

Appeal dismissed.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

McPHERSON v. NIAGARA GRAIN AND FEED CO. LIMITED.

Sale of Goods—Grain Sold by Sample—Consignment to Order of Bank—Property Passing on Acceptance of Draft—Appropriation to Contract of Particular Car-load Specified in Bill of Lading—Failure to Deliver Grain—Recovery by Buyer of Amount Paid—Wrong Car-load Delivered by Reason of Mistake as to Number of Car—Car-load Actually Delivered in Damaged Condition—Right of Rejection—Notice.

Appeal by the defendants from the judgment of LATCHFORD, J., 14 O.W.N. 271.

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

I. F. Hellmuth, K.C., and H. H. Shaver, for the appellants.

R. T. Harding and W. G. Owens, for the plaintiff, respondent.

MEREDITH, C.J.O., read the judgment of the Court. After stating the facts, he said that he agreed with the contention of the appellant's counsel that the property in the barley in car 296212 did not pass to the respondent by the mere appropriating of it to the contract of sale, in the circumstances of this case. The car was consigned to the order of the Royal Bank of Canada; and the proper inference was, that it was not intended that the property should pass until the respondent had accepted the draft that had been drawn upon him for the price of the barley; but that it did pass when the draft was accepted was equally clear: Mirabita v. Imperial Ottoman Bank (1878), 3 Ex. D. 164, 172; Re Annie Johnson, [1918] P. 154, 162 et seq.; The Parchim, [1918] A.C. 157; Denny v. Skelton (1916), 115 L. T. R. 305.

The property in the barley in car No. 296212 had passed to the respondent, and he had paid the purchase-price. The appellants had delivered that barley to Clutton, and sought to treat the respondent as if there had been no appropriation and as being in default in not taking prompt delivery of the barley that was sent to Breslau and to treat the payment he made as payment for it.

An endeavour was made at the trial to shew that the appellants did not intend to appropriate to the contract the barley in car 296212, and that the mention of that car in the invoice that was sent to the respondent and in the draft was due to a mistake of a clerk in the appellants' office; but it was clear that that was not the case.

The appellants sought to throw upon the respondent the responsibility for the condition of the barley when it reached

Bothwell, and contended that the respondent should have discharged the cargo from the car within a reasonable time after it reached Breslau, and that the condition of the barley when it reached Bothwell was due to the car having been left standing on the track for 16 days during the hot weather. That contention was not well-founded. If the sending of car 296214 to Breslau was not warranted, the respondent was under no duty as to it. The mistake was the appellants', and not even the trouble of informing the respondent that it had been made was taken.

It was also contended that the respondent, when he paid the draft, knew that he was paying for the contents of car 296214. As proof of that knowledge, the fact that that was the number mentioned in the notice, sent to the respondent, of the arrival of the car, was relied on; but that was not enough to fix the respondent with notice of the change. He had a right to expect that the car would be 296212, and he might easily have overlooked the difference in the number. Much more would be needed to shew that the respondent had accepted and paid for the barley in car 296214, intending to take it in lieu of the barley which should have been sent to him.

Even if it were considered that the respondent was bound to accept and pay for the barley in car 296214, the result might be the same. The condition of the barley when it reached Breslau was such that the respondent would have been entitled to reject it; and the only ground upon which he, in that case, could have been liable would be that notice of his rejection was not promptly given, and that he dealt with the car as it was dealt with by him.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

*CARROLL v. EMPIRE LIMESTONE CO.

Landlord and Tenant—Lease of Beach of Lake in Front of Lot—Expiry of Lease—Action by Reversioner to Recover Possession—Right of Tenant to Set up against Landlord Title Derived from Crown—Application to Great Lakes of English Common Law Rule as to Ownership to Middle of Lake of Riparian Owner—Bed of Navigable Waters Act, 1914 ch. 31, sec. 2—Description of Land in Lease—Boundaries of Land Conveyed to Reversioner—High or Low Water Mark—Payment of Rent—Estoppel.

Appeal by the defendant company from the judgment of FALCONBRIDGE, C.J.K.B., 13 O.W.N. 411.

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

W. M. German, K.C., for the appellant company.

Wallace Nesbitt, K.C., and H. D. Gamble, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the action was brought for the recovery of possession of the beach in front of lot 5, from Lake Erie to high water mark or bank, in the 1st concession of Humberstone. The respondent alleged that the appellant was his tenant of the land in dispute, under a lease dated the 20th January, 1904, which expired on the 1st January, 1917.

By its defence the appellant denied the alleged tenancy, and alleged that the respondent had no title to the land, and that it formed part of the water-lot in front of lot 5, the title to or ownership of which was in the Crown as represented by the Government of the Province of Ontario, and that the appellant was in possession and occupation of it under lease and license from the Crown; and that, if the beach did not form part of the lot, it was the property of the appellant.

After reciting the subsequent pleadings and referring to a series of conveyances of land, the learned Chief Justice said that the first question to be considered was as to the position of the south boundary of lot 5 on Lake Erie. The contention of the respondent was, that the lot extends, at least, to the water's edge —low water mark—and the contention on the other side was that the south boundary was at high water mark.

If the common law of England was applicable, lot 5 doubtless extended to the middle of Lake Erie. The question of its applicability to the Great Lakes of this Province was referred to in Keewatin Power Co. v. Town of Kenora (1908), 16 O.L.R. 184, 190, 191; Stover v. Lavoia (1906), 8 O.W.R. 398; Servos v. Stewart (1907), 15 O.L.R. 216.

In the opinion of the Chief Justice, the common law of England was not applicable to the Great Lakes of this Province. The common law is elastic enough, when introduced into this Province, to adapt itself to conditions here; and, in any case, the presumption of the common law that lands bordering on an inland lake extend to the middle of the lake, if there be any such presumption, is, in the case of the Great Lakes, rebutted. Any doubt is removed by sec. 2 of the Bed of Navigable Waters Act, R.S.O. 1914 ch. 31.

That the bed of Lake Erie extends only to low water mark is unquestionable; but in the Crown grant the description of lot 5 is that it begins at the south-east angle of lot 6 "on the bank of

Lake Erie," and two of the courses are south "to the bank of the lake" and westerly "along the bank" to the place of beginning.

Following Williams v. Pickard (1908), 17 O.L.R. 547, it must be held that the south boundary of lot 5 is the water's edge or low water mark; and, the lease of the 20th January, 1904, having expired, the respondent is entitled to recover whatever passed to him by the conveyance of the 20th April, 1906, from Annie Benner to him.

According to the description in the conveyance to Halpin, from whom Annie Benner derived title, the boundaries of the land conveyed to him were fixed monuments; and, according to the plan put in by the respondent at the trial, that description does not embrace any part of the land in question. The respondent could not, therefore, recover on the strength of his own title.

But the respondent contended that the appellant was estopped from disputing the respondent's title and from setting up the title of any one else—that the appellant became, by the lease of the 20th January, 1904, from Annie Benner to the appellant, her tenant of the beach in front of lot 5 from Lake Erie to high water or bank (the land described in that lease), and that, the respondent being, by virtue of the conveyance by her to him of the 20th April, 1905, assignee of the reversion expectant on the determination of the lease, the appellant was estopped from denying the respondent's title to the land embraced in the lease, notwithstanding that the term of it had expired.

It was proved that the appellant paid rent to the respondent, and that cheques drawn in favour of the respondent were expressed to be for rent payable under the lease.

Assuming that this would have raised the estoppel for which the respondent contended, had the conveyance to the respondent embraced the land covered by the lease, the insuperable difficulty was that, according to the view above expressed as to what passed by the conveyance to Halpin, the respondent was not the owner of the reversion, because the land demised by the lease did not pass by the conveyance to him.

The appeal should be allowed with costs and the action be dismissed with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. JANUARY 27TH, 1919.

TORONTO AND HAMILTON HIGHWAY COMMISSION v. COLEMAN.

Contract—Construction of Public Highway—Agreement of Land-owner to Pay Bonus—Construction of Drain—Agreement to Pay Proportion of Cost—Counterclaim—Cost of Removing Buildings—Injuries to Property of Land-owner—Findings of Trial Judge—Appeal.

Appeal by the defendant from the judgment of BRITTON, J., 14 O.W.N. 317.

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

S. H. Bradford, K.C., for the appellant.

R. S. Robertson, for the plaintiff, respondent.

FERGUSON, J.A., read a judgment in which he said that, though the legal effect of the agreement for the granting of the right of way and the deed thereof was to vest in the plaintiffs the title to the buildings, the true intent of the parties was that the defendant should have a right to remove the buildings; and the request of the plaintiffs' engineer should not be construed as a request by the plaintiffs to the defendant to do some work for the benefit of the plaintiffs so as to entitle the Court to infer that the plaintiffs agreed to pay for the work, but should be construed as a request to the defendant to exercise for his own benefit the right of removal, which it was intended he should have.

Flatt was not in any sense an agent of the plaintiffs, and it seemed plain from the defendant's evidence and correspondence that, though he told Davis that he expected to be paid, Davis never assented to such an arrangement.

The defendant's counterclaim for $1,178, cost of removing the buildings, failed .

The appeal against the judgment pronounced in the main action should be dismissed with costs. The judgment pronounced on the counterclaim should be varied by allowing the items of $115 and $15, thus increasing the amount awarded from $17.50 to $147.50; no costs of the appeal as to the counterclaim.

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

HODGINS, J.A., dissented in part, for reasons stated in writing. He was of opinion that the defendant should have judgment on his counterclaim for $1,325.50, with costs of the counterclaim, and that there should be no costs of the appeal.

Judgment below varied.

FIRST DIVISIONAL COURT. JANUARY 28TH, 1919.

CLARKSON v. VICTOR EDELSTEIN & SON LIMITED.

Assignments and Preferences—Creditors of Insolvent Receiving Payment in Full—Intent to Delay or Prejudice other Creditors—Evidence—Onus—Failure to Satisfy—Pressure—Presumption—Assignment or Transfer of Goods—Claim to Recover Value of Goods—Assignee for Benefit of Creditors—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of ROSE, J., 14 O.W.N. 272.

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

W. W. Vickers, for the appellant.

W. J. McWhinney, K.C., and F. J. Dunbar, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. JANUARY 29TH, 1919.

*RE BAILEY COBALT MINES LIMITED.

BAILEY COBALT MINES LIMITED v. BENSON.

Company—Winding-up—Claim upon Assets by Assignee of Judgment against Company—Judgment Obtained by Company against Assignor (Director) for Damages for Misfeasance—Set-off—Equitable Right to Retain Dividend until Amount of Judgment against Assignor Contributed—Determination of Existence and Nature of Indebtedness of Assignor—Master's Report—Appeal—Reference back.

An appeal by Bailey Cobalt Mines Limited, a company in liquidation, and the liquidator, from the order of MASTEN, J., ante 95, upon appeal from an interim report of the Master in Ordinary.

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

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

R. S. Robertson, for the Profit Sharing Construction Company, respondents.

THE COURT, at the conclusion of the hearing, expressed the opinion that the judgment against Benson proved no more than the existence of a debt at the date of the judgment, and that that was not sufficient to warrant the application of the equitable rule invoked by the appellants, the judgment having been recovered after the assignment to the respondent of the Benson judgment. The proper course was to express no opinion as to the application of the equitable rule until the existence and nature of Benson's indebtedness had been determined, but to refer back the matter to the Master in Ordinary for determination. Upon the reference back, the opinion expressed by Masten, J., as to the application of the rule, was not to be binding on the Master or the parties. Costs of this and the former appeal reserved to be dealt with when the matters in controversy have been determined by the Master, or, in case of an appeal from his report, by the Judge who hears the appeal.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1919.

RE HAY AND ENGLEDUE.

Mines and Mining—Order Vesting Mining Locations in Applicant—Mining Act of Ontario, R.S.O. 1914 ch. 32—Application to Set aside Order after Expiry of three Years—Order Made on Notice—Delay not Satisfactorily Accounted for—Refusal of Application—Appeal.

Appeal by John S. Whiting and E. F. Kendall from the order of SUTHERLAND, J., in Chambers, 14 O.W.N. 90.

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

J. W. Bain, K.C. and M. L. Gordon, for the appellants.

T. R. Ferguson, for E. Hay, executrix of Alexander M. Hay, deceased, respondent.

THE COURT dismissed the appeal without costs.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1919.

*GREENFIELD v. CANADIAN ORDER OF FORESTERS.

Insurance (Life) — Friendly Society—Dues of Member — Payment to Agent of Proper Officer—Authority to Receive—Ministerial Act—Finding of Jury.

Appeal by the defendants from the judgment of the Judge of the County Court of the County of Brant, in favour of the plaintiff, upon the findings of a jury, in an action to recover the amount of an insurance upon the life of William H. Greenfield, deceased.

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

S. F. Washington, K.C., and L. Lee, for the appellants.

W. S. Brewster, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., delivering the judgment of the Court at the conclusion of the argument, said that the question which arose was not a question of waiver; the question was whether the dues of the deceased were paid to Watson, who was the proper person to receive them.

The evidence established that there had been a practice, extending over a great number of years, for members who lived outside of the village in which Watson lived of paying to Keefer their dues. A book was kept in which the names of the members were entered, and Keefer signed the receipt as financial secretary —the office that Watson occupied. Watson called regularly—about the 7th of the month—and received these moneys that had been paid to Keefer.

Watson and Keefer say that the latter was not an agent to receive the dues; that may be perfectly right, in the sense that he was not formally appointed as agent, but the conduct throughout of the parties leads to the conclusion—the only possible conclusion—that these payments were made to Keefer, and that he was receiving them, for Watson; it is true that this was a convenience to the members who paid in that way, but Watson recognised the payments as having been received by him. Therefore the respondent had proved that there was a payment to Watson of the dues as to which it was said that there was a default disentitling the respondent to recover. There was, beside, the finding of the jury that Keefer had authority to receive the dues.

Reference to Rossiter v. Trafalgar Life Assurance Association (1859), 27 Beav. 377.

Though an agent may not appoint a sub-agent to do anything as to which the agent has to exercise a discretion, he may appoint a sub-agent to do mere ministerial acts, such as the receipt of payments. Reference to Halsbury's Laws of England, vol. 1, p. 170, para. 368; Corpus Juris, vol.. 2, p. 689; Bowstead on Agency, 5th ed., p. 110, the 6th case given in which the authority of the principal in implied.

It seemed probable that no question would have been raised in this case but for the unfortunate dispute as to whether the dues were actually paid: Keefer stoutly denied that he had received them—the jury found that he had.

Appeal dismissed with costs.

HIGH COURT DIVISION.

ROSE, J., IN CHAMBERS. JANUARY 29TH, 1919.

RE SUN LIFE ASSURANCE CO. OF CANADA AND McLEAN.

Insurance (Life)—Endowment Policy—Insurance Moneys Payable to Assured at End of Fixed Period—Appropriation of Policy and Assurance by Assured for Benefit of Wife—Policy in Force and Assured Living at End of Period—Assured Entitled to Optional Benefits—Revocation of Appropriation and New Appropriation in Favour of Mother as Beneficiary after End of Period—Subsisting Policy—Right of Assured to Select Benefit other than Payment in Cash—Insurance Act. sec. 171.

Motion by the company for leave to pay into Court the amount said to be sufficient to discharge the company of all liability upon a certain endowment policy.

L. Macaulay, for the company.
J. W. Payne, for the assured and for Ophelia McLean.
J. F. Holliss, for Adèle Caroline McLean.

ROSE, J., in a written judgment, said that the policy was dated the 4th October, 1898. By it the company assured the life of D. B. McLean in the sum of $1,000, and contracted to pay that sum to the assured on the 1st October, 1918, or, should the assured die before that day, then to his mother, Ophelia McLean; and it was provided that, should the policy be in force on the 1st October, 1918, the assured should be entitled to certain

optional benefits: e.g., to convert the sum assured and profits into a paid-up policy payable at the death of the assured, or to withdraw a certain sum in cash and receive in addition a paid-up policy for $1,000.

By an instrument dated the 21st August, 1906, D. B. McLean declared "that the said policy and the assurance thereby effected" should "be for the benefit of Adèle Caroline McLean, and" did thereby "specially appropriate the said policy accordingly, and revoke all interest any other person or persons" might "have in it." Adèle Caroline McLean was the wife of the assured.

After the 1st October, 1918, the company issued a cheque in favour of Adèle Caroline McLean for a sum said to be the amount of the policy with profits, less the amount of a loan standing against the policy, and sent the cheque to the assured for delivery to the payee. The assured returned the cheque, and filed with the company a new designation of beneficiary, in which he declared that "the said policy and the assurance thereby effected" should be for the benefit of his mother "in the place and stead of Adèle Caroline McLean," and that he did "specially appropriate the said policy accordingly and revoke all interest of the said Adèle Caroline McLean or of any other person or persons in it."

Adèle Caroline McLean asserted that on the 1st October, 1918, she became entitled to payment of the sum assured and profits, and that neither the assured nor his mother has any present interest. She, therefore, supported the company's application, and asked that the money be paid into Court and be paid out to her. The assured and his mother opposed the application, the assured alleging that it was his desire to exercise the option to convert the sum assured and profits into a paid-up policy payable at his death.

A question was raised as to whether the instrument of the 21st August, 1906, which did not purport to be an assignment of the policy, but merely an "appropriation" made "in accordance with the terms of the statutes in that behalf," had the effect simply of substituting Adèle Caroline McLean for Ophelia McLean, as the person to receive the sum assured in case D. B. McLean should die before the 1st October, 1918, or really amounted to a designation of Adèle Caroline McLean as the person entitled not only to receive whatever money might become payable upon the death of D. B. McLean before the 1st October, 1918, but also to receive any sum that might be payable by reason of D. B. McLean surviving until the 1st October, 1918, and to exercise whatever options might, but for the instrument, have been exercised by D. B. McLean after the day mentioned.

It was not necessary or desirable to express any opinion upon that question on the present application: because, as regarded the relief now sought, the result was the same whichever view of the effect of the instrument was correct. The company's contract was with D. B. McLean: he was the assured; and, whether his designation of Adèle Caroline McLean as beneficiary had the effect of designating her merely as the person to receive the money in case of his death, or designated her also to receive the money (or, instead of receiving the money, to receive, e.g., some money and a new policy) in case he lived, nothing was found in the Insurance Act, R.S.O. 1914 ch. 183, to deprive him, during his life and prior to the discharge of the policy by payment or otherwise, of his statutory right to substitute a new beneficiary. Notstanding the fact that the company had issued a cheque, which had not reached the hands of Adèle Caroline McLean, if she was the proper person to receive payment, the policy was a subsisting policy, and the company's contract with D. B. McLean had not been discharged, when, in November, 1918, he attempted to revoke the benefits theretofore conferred upon his wife and to substitute his mother as beneficiary. The learned Judge was of opinion that the assured's attempt was successful, and that whatever rights Adèle Caroline McLean had theretofore possessed passed to Ophelia McLean. See sec. 171 of the Act. From this it seemed to follow that D. B. McLean or Ophelia McLean had some right to select some benefit other than the payment of the cash which the company desired to pay into Court, and that the order asked for could not be made without defeating that right.

The motion should, therefore, be dismissed. Adèle Caroline McLean must pay the costs of the assured and his mother—the issue was really between her and them; the company should neither receive nor pay costs.

No issue was raised between D. B. McLean and Ophelia McLean, and no opinion was expressed as to their respective rights under the policy and the instrument of November, 1918.

LATCHFORD, J. JANUARY 29TH, 1919.

J. G. BUTTERWORTH & CO. LIMITED v. CITY OF OTTAWA.

CITY OF OTTAWA v. J. G. BUTTERWORTH & CO. LIMITED.

Municipal Corporations—City By-law Passed in 1912 Requiring Coal to be Weighed on City Scales and Fees to be Charged—Powers of City Council—Municipal Act, 1903, sec. 582—Erection of Weighing Machines within City Limits—Power to Lease—Power to Employ Weighmasters—Validity of Leases—Estoppel—Operation of By-law Limited to Cases where Buyer or Seller Requires Weight of Load to be Ascertained—Several Actions—Consolidation—Costs.

Two actions were brought by the company against the city corporation, and two by the city corporation against the company.

All four actions arose out of the demand of the city corporation that the company should weigh all coal delivered in the city upon the scales or weighing machines provided by the city corporation and should pay fees for weighing all loads, under the provisions of a city by-law, No. 3358, passed in 1912.

The four actions were tried together at a non-jury sittings in Ottawa.

Taylor McVeity, for the company.

F. B. Proctor, for the city corporation.

LATCHFORD, J., in a written judgment, after stating the facts, referred to Rex v. Butterworth (1917), 13 O.W.N. 263, and said that the question of the validity of by-law 3358 was not determined in that case. In the two actions brought by the company the provisions of that by-law were attacked; and the learned Judge proceeded to determine whether or not they were valid.

The Municipal Act in force in 1912 was the Act of 1903, 3 Edw. VII. ch. 19; and sec. 582 provided: "The councils of townships, cities, towns and villages may pass by-laws for erecting and maintaining weighing machines in villages and other convenient places, and charging fees for the use thereof." It was argued that this enactment enabled the city council to pass by-laws for the erection and maintenance of weighing machines only in villages or other convenient places of the same genus—in other words, outside the municipality; but the learned Judge was unable to agree with that contention. However ill-chosen or obscure the

language of a statute might be, it was entitled to a liberal construction; and, so regarding it, the city council was authorised to pass a by-law providing for the erection and maintenance of weighing machines in convenient places within the city limits and to charge fees for the use of the machines.

Those sections of by-law 3358 which provided for the establishment of weighing machines at certain places in the city must, therefore, be regarded as valid.

No express power to lease was given when power was conferred to erect and maintain weighhouses, nor was the appointment of weighmasters authorised. But the greater power included the lesser. It was obvious, too, that the scales could not be maintained and fees collected for their use without employing persons to do the weighing and collect or record the fees.

The operation of the weighing machines in the weighhouses at the Broad street and Arlington avenue yards of the company was carried on by the city corporation at the instance of the company and for the company's benefit. The scales were on property owned by the company and leased by the company to the city corporation. Rentals to the 31st December, 1917, had been paid and accepted, and the leases had not been determined.

In the second action a claim was made that the leases should be declared invalid and the city corporation be ordered to vacate the leased properties. As the power to lease existed, the company, even if not estopped by their own acts, were not entitled to the possession of the weighhouses and scales at Broad street and Arlington avenue.

The company were entitled in their first action to a judgment declaring that, upon the true construction of by-law 3358, it was not compulsory on persons delivering coal in the city from a vehicle to have the coal weighed in all cases upon a weighing machine of the city corporation, but only in cases where the buyer or seller required that it should be so weighed. The company should have their costs of the first action up to and inclusive of the statement of defence and subsequent costs as of a motion for judgment—they could have moved for judgment after the decision in Rex v. Butterworth, supra.

The company's second action failed and should be dismissed. In view, however, of the invidious, though not illegal, treatment of the company in connection with the payment of a weighmaster at the St. Lawrence and Ottawa Railway Station, the dismissal should be without costs.

In the two actions brought by the city corporation, they were entitled to recover the amounts claimed, and there should be judgment against the company for $1,189.60, with costs of both actions up to and inclusive of the costs of the order consolidating them, and with subsequent costs as of one action.

LOGIE, J. JANUARY 30TH, 1919.

SIMPKIN AND MAY v. TOWN OF ENGLEHART.

Municipal Corporations—By-law—Water Supply of Town—Collection of Water-rates from Person not Using Town Water—Provision for Drawing Water from Hydrants in Streets—"Supplied"—"Supplying"—Public Utilities Act, R.S.O. 1914 ch. 204, secs. 26, 27, 45—Municipal Act, R.S.O. 1914 ch. 192, sec. 399 (70), (72)—Illegal By-law—Declaration—Damages—Injunction—Costs.

Action for a declaration that the defendants, the Municipal Corporation of the Town of Englehart, could not lawfully assess, levy, or collect water-rates from the plaintiffs; that the provisions of by-law 88 of the defendants, under which they purported to assess, levy, and collect water-rates from the plaintiffs, were illegal and invalid, for an injunction restraining the defendants from assessing or collecting such rates; and for damages.

The action was tried without a jury at Haileybury.

George Ross, for the plaintiffs.

W. A. Gordon, for the defendants.

LOGIE, J., in a written judgment, said that it was admitted that the plaintiffs had never used the town water, but were being charged with water-rates under sec. 27 of the Public Utilities Act, R.S.O. 1914 ch. 204. There were only 22 owners or occupants in the town of Englehart directly connected with the water-mains; more than 500 drew water from the public hydrants placed in the streets for the purpose.

By-law 88 purported to be a by-law for the management, maintenance, and regulation of the Englehart waterworks, passed by the council under the authority of the Municipal Waterworks Act and amendments, and thereby the council established, under schedule A. thereof, the rates complained of.

By sec. 26 (1) of the Public Utilities Act, the council may pass by-laws for the maintenance and management of the works . . . and for the collection of the rates or charges for supplying the public utility and for fixing such rates, charges, and rents; and, by sub-sec. 2, in fixing the rents, rates, or prices to be paid for the supply of a public utility, the corporation may use its discretion as to the rents, rates, or prices to be charged to the various classes of consumers and also as to the rents, rates, or prices at which a public utility shall be supplied for the different purposes for which

it may be supplied or required; and, by sub-sec. 3, the corporation may, in default of payment, shut off the supply, but the rents or rates in default shall nevertheless be recoverable. By sec. 27, the sum payable by an owner or occupant of any building or lot for the public utility supplied to him there, or for the use thereof, shall be a lien and charge on the building or lot.

The learned Judge referred also to sec. 45 of the Public Utilities Act and to sec. 399 (70) and (72) of the Municipal Act, R.S.O. 1914 ch. 192.

The plaintiffs were admittedly not consumers of municipal water, and were not among the 22 owners or occupants who had direct connection with the mains; and they were not "supplied" within the meaning of secs. 26 and 27 of the Public Utilities Act or sec. 399 (72) of the Municipal Act.

The words "supplied" and "supplying" must be given their ordinary meaning—"supply," to "furnish" or "provide."

The defendants were not entitled to assess, levy, or collect any water-rates from them.

The plaintiffs had paid no water-rates and suffered no damage; and, if the judgment now given should stand, there would be no necessity for an injunction.

The judgment should be for a declaration as asked by the plaintiffs, with costs.

SUTHERLAND, J. JANUARY 31ST, 1919.

BARLOW v. BARLOW

Husband and Wife—Action by Husband for Declaration of Nullity of Marriage or Form of Marriage—Physical Defects Preventing Consummation—Supreme Court of Ontario—Jurisdiction—Separation Agreement—Provision for Payment of Allowance to Wife.

Motion by the plaintiff for judgment on the statement of claim in default of defence.

The motion was heard in the Weekly Court, Toronto.

C. W. Kerr and C. A. Ghent, for the plaintiff.

No one for the defendant.

SUTHERLAND, J., in a written judgment, said that the plaintiff and defendant were married on the 25th January, 1916. They lived together, except for a brief interval, until the 29th June,

1918, when they entered into an agreement in writing to live separate and apart. It contained a clause providing that the plaintiff should pay to the defendant $25 a month, upon terms mentioned.

On the 24th July, 1918, the plaintiff began this action for a judgment "declaring the annulment of" the "alleged contract of marriage or form of marriage," on the ground of physical defects on the part of the defendant preventing "the consummation of marriage" and "procreation of children;" and the defendant entered an appearance by her solicitor.

The plaintiff filed a statement of claim, in which he asked that the form of marriage or contract be annulled and declared of no effect, and further that the said agreement be set aside.

The defendant did not, within the time limited therefor, file a statement of defence; and, though notice of this motion was duly served on her solicitor, she was not represented thereon.

Upon the authorities, the learned Judge was of opinion that he had no power to pronounce a judgment annulling the marriage; and, since it must be considered valid until it had been found otherwise by competent authority, the agreement of separation made between the plaintiff and the defendant as husband and wife could not meantime be disturbed on the grounds put forward.

The Attorney-General for Ontario should have been notified of the motion.

Reference to T— v. B— (1907), 15 O.L.R. 224; Peppiatt v. Peppiatt (1915-16), 34 O.L.R. 121, 36 O.L.R. 427.

Motion refused; no order as to costs.

ROSE, J. JANUARY 31ST, 1919.

CENTRAL CONTRACTING CO. LIMITED v. HORRIGAN.

Damages—Trespass to Land—Cutting and Removing Pulpwood—Ascertainment of Quantity Taken—Damages Limited to Value of Wood—Negligent but not Wilful Trespass—Replevin Order—Security—Pleading—Payment into Court—Amendment—Costs.

Action for damages for trespass upon the plaintiffs' mining location and cutting and carrying away pulpwood.

The action was tried without a jury at Port Arthur.

D. R. Byers, for the plaintiffs.

A. J. McComber, for the defendants.

ROSE, J., in a written judgment, said that there was no doubt that the trespass was committed; the difficulty was in the ascertainment of the quantity of wood taken, and in fixing the price per cord that ought to be paid by the defendants.

As to the quantity of wood there was a great divergence between the opinions of the witnesses, the estimates ranging from between 500 and 600 cords down to 130 cords or less; but the learned Judge accepted the estimate made by Mr. Flook, a land surveyor, that not more than 130 cords were taken.

As to the damages: there was nothing to justify a finding that over and above the value of the trees taken there was any serious injury to the mining location or any material diminution in the selling value of the trees still standing; and the only question was as to the amount to be paid for the 130 cords.

The trespass was not wilful—there was no intention of cutting and stealing the plaintiffs' trees; but there was, apparently, no difficulty in locating the boundaries of the plaintiffs' property, and there was negligence in trespassing. Moreover, some of the wood was cut and taken away after the defendants had been warned by their contractor that it was probable that the cutting was being done upon the plaintiffs' location. In these circumstances, it could not be well argued that the value of the wood on the stump was the limit of the defendants' liability; and the question must be as between its value cut and piled on the mining location, and its value on the shore of Lake Superior, where it was when the plaintiffs, having learned of the trespass, claimed it. The value should be placed at $10 a cord at the water's edge, and $6 a cord piled on the plaintiffs' mining location. If there was a doubt as to the real value, the defendants, who were wrongdoers, ought not to have the benefit of it.

When the plaintiffs discovered that the pulpwood had been taken, they commenced replevin proceedings, and an order was made that, upon the defendants paying into Court $5,500 or delivering to the plaintiffs an undertaking on the part of the company to which the defendants had sold the wood that the company would hold in its hands, to satisfy the plaintiffs' claim, $5,500 out of the moneys payable by the company to the defendants, the defendants might remove the wood. Apparently the money was paid into Court or the undertaking was given. Then the statement of claim was delivered. In it the plaintiffs alleged the trespass and the carrying away of 500 cords of wood, asserted that the value of the wood, on the shore of Lake Superior, was $5,500, and claimed that sum as "damages for the said pulpwood wrongfully cut and taken by the defendants," and also damages for the trespass. The defendants pleaded denying the trespass, and paid into Court $1,430.

There was an inconsistency in the statement of claim: if the action was in trespass, the value of the wood on the shore of Lake Superior is not the measure of damages: Union Bank v. Rideau Lumber Co. (1902), 4 O.L.R. 221; but it was contended that the effect of the order made in the replevin proceedings was to make the money represent the wood, so that the contest was in reality what it would have been in form if the claim had been for conversion in refusing to give up the logs when they were demanded. Upon the pleadings as they stood, there was no room for a suggestion that the defendants were taken by surprise by evidence as to the value of the logs at the lake, and the evidence was admitted. At the close of the case counsel for the plaintiffs asked leave to amend so that an award of the higher value might be made; and he should have such leave.

It was said that the reason why the plaintiffs were not allowed to take possession of their logs was that these logs had been mixed with the defendants' own logs, and that it was impossible to identify the plaintiffs' property. In those circumstances it was, no doubt, better that the order for security should be made than that the plaintiffs should be allowed to take from the whole lot an equivalent in number and quality to those cut on their location: see McDonald v. Lane (1882), 7 S.C.R. 462, 466; particularly as they claimed so many more than the defendants thought had been taken; but the plaintiffs were not responsible for the mixing; and the fact that they framed their statement of claim in trespass ought not to stand in the way of their being put now as nearly as possible in the position in which they would have been if, when the demand was made, the defendants had been able to say, and had said: "Here are your logs which we have kept separate from our own; take them."

Accordingly the amendment should be allowed, and there should be judgment for 130 cords at $10 a cord—$1,300.

The amount recovered being less than the amount paid into Court by the defendants, the plaintiffs should have their costs down to the time of the payment in, and the defendants their costs subsequent to payment in, and the money in Court should be paid out accordingly.

BOOTH v. PROVINCIAL MOTORS LIVERY—FALCONBRIDGE, C.J.K.B. —JAN. 28.

Contract—Share or Interest in Business—Written Agreement not Executed—Oral Evidence—Corroboration—Account—Valuation of Stock—Expert Testimony—Finding of Fact of Trial Judge.]—Action for a declaration that the plaintiff is entitled to a one-third interest in the business carried on by the Provincial Motors Livery, for an account, an injunction, and a receiver. The action was tried without a jury at a Toronto sittings. FALCONBRIDGE, C.J.K.B., in a written judgment, found the agreement set up in paragraph 4 et seq. of the statement of claim to have been well-proved. The plaintiff's evidence was corroborated, and his demeanour was to be preferred to that of the defendant Allen. That agreement was reduced to writing and settled; but, owing to oversight or neglect, it was never executed. The evidence as to the figures and bookkeeping took many days, and included the consideration of elaborate statements and counter-statements of expert accountants. An exhaustive factum on each side had been delivered. The Chief Justice preferred the evidence and the accounting and the arguments of the plaintiff, and adopted his counsel's factum as the basis of a judgment. He felt some doubt only as to the valuation of the motors, but the plaintiff's automobile expert was of a higher class than those called by the defendants, and he valued the machines as a going concern, and not, as they did, as on a forced sale. As to some of the motors, he was the only one called who had any knowledge or experience. The plaintiff had proved his case on both branches, and all things had happened and all times elapsed to entitle him to performance of the contract. The plaintiff should have judgment as prayed, with costs. S. H. Bradford, K.C., and B. N. Davis, for the plaintiff. W. T. J. Lee, for the defendants the Provincial Motors Livery and Allen. J. F. Holliss and T. H. Wilson, for the defendants the executors of J. S. Saunders.