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JUNE 29TH, 1906.

C.A.

CLARKE v. LONDON STREET R. W. CO.

Damages—Quantum—Personal Injuries of Married Woman—Negligence of Street Railway Company—Expenses Incurred by Husband—Excessive Verdict—New Trial.

Appeal by defendants from judgment of MEREDITH, C.J., at the trial, upon the findings of a jury, in favour of plaintiff Frances Clarke for $1,000 damages and of plaintiff John Clarke, her husband, for $1,200 damages, in an action for injuries sustained by the wife owing to the negligence of defendants, as alleged, and for expenses and loss incurred by the husband in consequence.

The appeal was confined to the ground that the damages were excessive.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for defendants.

J. F. Faulds, London, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

OSLER, J.A.:—. . . The action was originally brought by plaintiff Frances Clarke alone to recover damages for injuries sustained by reason of the alleged negligence of defendants.

The case made by her at the trial was, that she was getting on defendants' car as a passenger, and while in the act of

passing from the lower to the upper step, the car was suddenly started and she was swung off and thrown to the ground. The result was that her right arm was badly broken in 3 places, her shoulder severely and her knee slightly hurt. She suffered great pain, was in the doctor's hands for several months, and the arm and hand are not likely ever to be again as useful as they were before the accident.

After counsel had addressed the jury at the close of the case, the Court suggested that it might be well that plaintiff's husband should be joined as co-plaintiff to avoid any difficulty as to the wife's right to recover damages for the expenses incurred in respect of the employment of a nurse during her illness and for the doctor's charges, etc., and by consent, and to avoid further litigation about these and any other possible claims the husband might have, it was agreed that he should be, and he accordingly was, added as a co-plaintiff.

The appeal from the judgment in favour of the wife is answered, in my opinion, by the recital of the injuries she appears to have suffered. It may be said, perhaps, considering her age, that the amount of the verdict is liberal, yet no one can say that it is extravagant or more than a jury acting reasonably might, under all the circumstances, properly allow.

The husband's case stands in a different position. He sustained no personal injury, but has had a verdict $200 larger than that given to the wife. Apparently he had no thought of suing for himself, the expectation evidently being that the expenses he had been put to or would incur in the future would be recoverable in the wife's suit. He is entitled to recover medical expenses, some $110; whatever might be thought reasonable to pay his daughter for her services as a nurse, and for which what appears to be an extravagant charge was suggested; and also, having regard to the ages of the parties and their position in life, a reasonable sum for the occasional services, should it be thought they would be necessary, of some one to assist his wife in the housework. It may be properly said that in respect of all these matters there was no evidence to justify a verdict for anything like such a sum as $1,200.

The appeal as to the wife's judgment is, therefore, dismissed with costs.

As to the husband, the finding and judgment in his favour must be set aside and a new assessment of damages directed;

the costs of so much of the appeal as relates to him being costs to defendants in any event. But if the husband plaintiff is willing to accept $400, which has been already offered by defendants, and the latter are still prepared to pay that sum, the judgment may be entered accordingly, and in that case this branch of the appeal will also be dismissed with costs.

JUNE 29TH, 1906.

C.A.

ONTARIO BANK v. O'REILLY.

Warehouse Receipts — Partnership — Banks and Banking— Fraud — Misrepresentations — Bank Act — Liability of Partners—Bankruptcy and Insolvency—Promissory Notes —Extinguishment of Debt — Securities — Release—Bona Fides.

Appeal by plaintiffs from judgment of MEREDITH, J., at the trial, dismissing the action.

Plaintiffs' claim was to recover from defendants, or some of them, as members of a partnership carrying on at Ottawa the business of warehousemen, under the name of "The Ottawa Cold Storage and Freezing Co.," the value of a large quantity of eggs, butter, and cheese.

The statement of claim alleged, in substance, that defendants the Ottawa Cold Storage and Freezing Co. issued certain warehouse receipts to defendant James A. MacCullough, whereby they acknowledged the receipt on his account of the goods mentioned in the receipts, and acknowledged the value of the goods to be in the aggregate $39,715; that MacCullough assigned and indorsed the warehouse receipts to plaintiffs, in consideration of moneys lent and advanced to the amount of $33,452.30, including interest; that plaintiffs duly demanded the delivery of the goods, but, except to the extent of $5,383.03, defendants neglected and refused to deliver the same; that (in the alternative) the defendant company, when the warehouse receipts were offered to plaintiffs by way of security for the advances, falsely and fraudulently represented that the quantity of goods mentioned in

them had in fact been received in store in the warehouse, and in consequence plaintiffs were induced to make the advances, but the goods were never in fact received in store, and plaintiffs suffered damage to the extent of $33,542.30. Plaintiffs claimed payment of this sum with interest to judgment.

Defendant Frank O'Reilly denied that he was a partner in the firm of the Ottawa Cold Storage and Freezing Co.; alleged that plaintiffs had agreed not to attempt to hold him as a partner in that company in respect of certain promissory notes upon which plaintiffs were then suing; and further that if the warehouse receipts were given, they were collateral to the promissory notes; and he pleaded the Statute of Limitations.

Defendant George O'Reilly denied the allegations of the statement of claim, and set up that if documents purporting to be warehouse receipts were given, they did not comply with the provisions of the Bank Act, and were not proper warehouse receipts, but were illegal, invalid, and void, and passed no title in the goods to plaintiffs. He also pleaded the Statute of Limitations, but nothing turned on this.

The trial Judge held that defendant Anthony O'Reilly was not a member of the partnership known as the Ottawa Cold Storage and Freezing Co., and plaintiffs acquiesced in that. Defendant MacCullough was not charged as liable on the warehouse receipts.

The action was dismissed as against all the defendants, and plaintiffs appealed as against defendants Frank and George O'Reilly.

A. B. Aylesworth, K.C., and Glyn Osler, Ottawa, for plaintiffs.

H. M. Mowat, K.C., for defendant George O'Reilly.

G. F. Henderson, Ottawa, for defendant Frank O'Reilly.

The judgment of the Court (Moss, C.J.O., Osler, Garrow, Maclaren, JJ.A.), was delivered by

Moss, C.J.O.:—It appeared that in the early part of 1898 defendants Frank and George O'Reilly were engaged in storage business in the city of Ottawa. They contemplated extending the business into two branches to be carried on in separate parts of the same building. One branch was to consist of the business of commission merchants, buying and

selling eggs, butter, and other farm produce. The other branch was to continue as a cold storage and warehouse business. In April, 1898, as the result of negotiations between defendants Frank O'Reilly, George O'Reilly, and James A. MacCullough, the latter, who had been engaged in business in Montreal, became a partner in the commission and produce business, and thereafter until July, 1900, when both businesses failed, the two branches were carried on as separate and distinct businesses. Defendant MacCullough had no interest in the storage or warehouse business. There were separate books of account for the commission and produce business, in which he was a partner, in which any moneys that happened to be received on account of the storage business were credited to defendant George O'Reilly, who received them on behalf of the storage business. It is much in dispute whether defendant Frank O'Reilly was a partner in the commission and produce business. MacCullough asserts that the arrangement for the partnership with him was that the profits were to be divided, 50 per cent. to him and the other 50 per cent. between defendants Frank and George O'Reilly. On the other hand, the two latter contend that defendant Frank O'Reilly was not a partner in either branch of the business. It is very probable that he was a partner or financially interested in both branches, but, at all events, the evidence supports the finding of the trial Judge that he was a partner in the storage and warehouse branch of the business, in which, according to his statements to MacCullough when he was inducing him to go into the commission and produce branch of the business, he was a partner from the first.

While MacCullough was a partner in the commission and produce branch, the firm account was kept at plaintiffs' bank. The course of dealing was that, for the purpose of enabling the partnership to purchase the produce in which they were dealing, plaintiffs gave them a line of credit in the form of an overdraft on their account. From time to time plaintiffs discounted their promissory notes, the proceeds of which were placed to the credit of the account. The goods purchased by them were warehoused with the storage branch of the business, and receipts signed in the name of the Ottawa Cold Storage and Freezing Co. by defendant George O'Reilly were given to defendant MacCullough on behalf of the commission and produce business. These warehouse re-

ceipts were from time to time indorsed over to and hypothecated with plaintiffs as promissory notes were discounted. The method adopted was that the warehouse receipts were indorsed to plaintiffs by defendant MacCullough, and contemporaneously a memorandum of hypothecation signed by defendant George O'Reilly, as manager of the commission business, with a certificate of valuation by him, was handed to plaintiffs. The proceeds of the discounts were placed to the credit of the commission and produce business, on behalf of which the dealings with plaintiffs were entered into and carried on. This course of dealing continued from June, 1898, to July, 1900. All the transactions of the years 1898 and 1899 were retired and closed up. The transactions involved in this action extend from 24th April to 30th July, 1900, and are represented by 10 warehouse receipts indorsed and hypothecated as before described, and by 10 promissory notes made on behalf of the commission and produce business to the order of defendant MacCullough and indorsed by him and the defendant George O'Reilly for sums representing in the aggregate $30,000. In or about the latter part of July, 1900, the business got into difficulties, there were dissensions between the partners, and MacCullough retired from the partnership, and shortly afterwards defendant George O'Reilly left Ottawa. These facts were communicated by defendant Frank O'Reilly to plaintiffs' manager, who thereupon went to the warehouse, and on checking the goods in store ascertained that there was a large discrepancy between them and the amounts specified in the warehouse receipts. Accordingly he assumed possession, appointing one Lewis, the man who had been in charge, to continue in charge for plaintiffs. Subsequently defendant George O'Reilly was induced to return, and he took charge for plaintiffs. In the end something like $4,700 was realized from the goods in store, the remainder being unaccounted for. After plaintiffs took possession, the Merchants Bank of Halifax, which had obtained a judgment against the Ottawa Cold Storage and Freezing Company, issued execution thereon and seized the goods in the warehouse, and, upon plaintiffs claiming them, interpleader proceedings were taken. While these were pending plaintiffs were desirous of procuring the testimony of defendant Frank O'Reilly. He expressed his reluctance to testify lest he should complicate himself with the Merchants Bank of Halifax, if

it appeared that he was liable to plaintiffs upon the promissory notes. And in order to remove this difficulty, and, as plaintiffs' manager testified, being assured by defendant George O'Reilly that the two businesses were separate and distinct, and not being sure whether defendant Frank was interested in the commission business or not, he caused a letter to be written by the plaintiffs' solicitors to defendant Frank O'Reilly's solicitor as follows:

"Ottawa, Dec. 15th, 1900.

"M. J. Gorman, Esq., Barrister, &c., Ottawa.

"Re Ottawa Cold Storage.

"Dear Sir,—We are instructed by Mr. Simpson, the manager of the Ontario Bank, that the bank has no evidence that Mr. Frank O'Reilly is a member of the commission partnership known as the Ottawa Cold Storage and Freezing Company, which is liable to the bank upon certain promissory notes to the extent of about $30,000, and he has authorized us to undertake, as solicitors on behalf of the bank, that the bank will not attempt to hold Mr. Frank O'Reilly liable for the said notes or any of them, as a partner in the said Ottawa Cold Storage and Freezing Company.

"Yours truly,

"O'Gara, Wyld, & Osler."

The interpleader proceedings were afterwards settled between plaintiffs and the Merchants Bank of Halifax—the latter receiving a portion of the proceeds of the goods sold. Plaintiffs, failing to obtain payment of their claim, brought this action on 1st February, 1905.

The trial Judge found that defendant Frank O'Reilly was a partner in both branches of the business, and upon the evidence as developed at the trial there is no good ground for a different conclusion. If that were the sole defence, it would follow that plaintiffs were entitled to judgment as claimed in respect of the warehouse receipts. The Judge did not deal with the defence of the want of validity of the warehouse receipts. But he held that the letter of 15th December, 1900, from plaintiffs' solicitors to defendant Frank O'Reilly's solicitors was the difficulty in plaintiffs' way. He was of opinion that if plaintiffs were willing to take judgment against defendant Frank O'Reilly upon the promissory notes, it should be granted notwithstanding the letter. But, inasmuch as plaintiffs adhered to the letter and did

not seek judgment upon the promissory notes, he considered that he must hold, as he did, that the letter was an absolute unconditional discharge of defendant Frank O'Reilly from the promissory notes, and that his co-defendants, who were liable on the notes, were also discharged, and the warehouse receipts, being only security for the promissory notes, could not be enforced—or, as he expressed it, "the defendants cannot be held liable upon the security which is given for a debt which has been extinguished." He therefore dismissed the action.

Upon the appeal defendants, besides relying upon the ground taken by the trial Judge, urged strongly that it should not have been found that defendant Frank O'Reilly was a partner in either branch of the business, and that in any case the warehouse receipts were invalid because not given in compliance with the provisions of the Bank Act. It was also urged, apparently for the first time, that there was no sufficient proof that the goods were not in the warehouse at the time of taking possession.

As already stated, the evidence fully sustains the finding of partnership in the storage and warehouse business, if not in the commission and produce business as well.

And there remain only the one question dealt with and the two others not dealt with by the trial Judge, the last not being raised before him nor mentioned in the reasons against the appeal.

Whatever may be the effect in law of the letter, it cannot be said upon the evidence that it was the intention of the parties to extinguish the debt owing to plaintiffs for which the promissory notes were given, or to release or discharge defendants George O'Reilly and James A. MacCullough from liability in respect of it. It is to be borne in mind that according to defendant Frank O'Reilly's evidence his position at the time when the letter was written was that George O'Reilly and MacCullough were the only persons interested in the commission and produce business. And the thought that they were to be discharged would be the most unlikely one to occur to any of the parties. If such has been the result it must be by virtue of the terms of the letter itself.

Does it in terms or by reasonable implication operate to extinguish the debt in respect of which defendant Frank

O'Reilly was probably liable, but in respect of which defendants George O'Reilly and James A. MacCullough were undoubtedly liable? So far from its terms indicating an intention to extinguish the debt, they clearly recognize the continuance of the liability in the other partners in the Ottawa Cold Storage and Freezing Company. The statement is that the bank has no evidence that Mr. Frank O'Reilly is a member of the commission partnership known as the Ottawa Cold Storage and Freezing Company, "which is liable to the bank upon certain promissory notes to the extent of about $30,000." That is, the partnership is liable, but we have no evidence that Frank O'Reilly is a partner. And because of this the solicitors undertake that the bank will not attempt to hold him liable. There is in this a sufficient reservation of plaintiffs' rights against the partnership, and those who were undoubtedly members of it, to prevent the letter from being treated as having any greater effect than a covenant not to sue. The language affords a strong presumption that the parties were dealing with the liability of defendant Frank O'Reilly, and not with the liability of the other two. The surrounding circumstances already referred to lead to the same conclusion. It is well established that in dealing with a document such as that relied upon in this case, the surrounding circumstances must be regarded. In Ex p. Good, In re Armitage, 5 Ch. D. 46, which resembles this case in many respects, Sir George Jessel, M.R., said (p. 58): "After all, this is not a release properly so called, that is, a release by deed; it is in form a receipt, and, like all other documents not under seal, it must be construed with reference to the surrounding circumstances, of which there is evidence not contradicted." In In re Wolmershausen, 62 L. T. 541, Stirling, J., said (p. 545): "In such a case, however, it has to be determined whether what has occurred amounts to a release, and where, as here, no formal release is given, but what is relied on is an agreement not under seal, then in determining the effect of that agreement, the surrounding circumstances must be regarded."

The circumstances in the case of Ex p. Good (supra) were stronger in favour of the claim for an absolute release than in this case, for there there had been a payment of money by one who was held to be a partner in respect of partnership liabilities, and there was a document in the form of a receipt expressed to be in payment and discharge of a guarantee.

and also of all claims in reference to or in connection with the partnership firm. There was a question whether the released debtor was a partner in fact or an ostensible partner merely, and Bacon, Chief Judge, held that if he was only an ostensible partner his release would not discharge the other partners, a view quite applicable to this case.

In view therefore of the terms of the letter, the nature of the transaction, and the surrounding circumstances, full effect may be given to the letter by confining its operation to the liability of defendant Frank O'Reilly. See also Dewar v. Sparling, 18 Gr. 633, particularly at p. 636.

The result is that the debt as security for which the warehouse receipts were given to plaintiffs was not extinguished, and still exists, and plaintiffs are entitled to the benefit of the securities if otherwise valid in their hands.

Defendants, however, contend against their validity—and argue that they were not acquired by plaintiffs in such manner as to pass the property to them or confer a title to the goods—or render the receipts legal securities in their hands.

There can be no doubt that the dealings and transactions through which plaintiffs acquired the warehouse receipts were conducted by them in good faith, and that the intention of the parties was to give to plaintiffs a valid security for the advances which they were making in order to enable the makers of the promissory notes to carry on the commission and produce business. Their account with plaintiffs was an active running account. From time to time they discounted notes, and at the same time indorsed and hypothecated warehouse receipts as collateral security. The proceeds were placed to the credit of the account, and there was no restriction upon the customers drawing cheques or paying out other than the margin established when the account was opened.

In regard to the warehouse receipts now in question, each one was transferred by indorsement and instrument of hypothecation contemporaneously with the discount of a promissory note made by the holders or owners of the warehouse receipts. As a result of each transaction plaintiffs acquired and became the holders of a promissory note, on which the makers were liable, and the latter received in their current account the proceeds of the discount, and in consideration thereof made a transfer or hypothecation of a warehouse receipt. There was therefore a negotiation of a note

and an actual advance at the time of the acquisition of the warehouse receipt. No doubt it was the case that on most occasions when a discount was effected the account was overdrawn, but that was in the course of dealing, and the circumstance did not deprive the transaction of its character of a negotiation of the note, for the proceeds were placed freely at the disposal of the customers, and the drawings on the account continued as before. Therein lies the broad distinction between this case and Halsted v. Bank of Hamilton, 27 O. R. 435, affirmed in this Court 24 A. R. 132, and in the Supreme Court, 28 S. C. R. 235, a distinction which renders this case analogous to the decision of the Master of the Rolls in In re Carew's Estate, 31 Beav. 39, to which reference is made by the Chief Justice of the Common Pleas in 27 O. R. at p. 439. On the same page the Chief Justice states his reasons for thinking it impossible to treat any of the notes in respect of which the securities in question were given as having been "negotiated," in the sense in which the term is used in sec. 75 of the Bank Act. He says: "It is true that the form was gone through of taking the notes and passing the amount of them to the credit of one of the accounts, but contemporaneously with this an equal amount was placed to the debit of another of the accounts, and not a farthing of the amounts which the notes represented could be attached by Zoellner or made available by him for any purpose, unless he should bring to the defendants and leave for collection or discount customers' paper which would entitle him to credit in account No. 2 for an amount equal to that which he proposed to withdraw."

In other words, the proceeds of the discounts were placed entirely out of the control of the customer, and he could make no use of them except upon further securing the amount of the withdrawals.

No such state of facts exists in this case, and the decision does not assist defendants.

Then it was argued that the warehouse receipts having been given by the Ottawa Cold Storage and Freezing Company, of which defendant George O'Reilly was a member, it was a giving of a warehouse receipt by the firm of its own property to one of its members. But there were two distinct firms. That by which the warehouse receipts were given was not the firm to which they were given, which consisted of the defendants Frank O'Reilly and George O'Reilly and

the defendant James A. MacCullough. He was not a member of the storage and warehouse firm, which consisted of the defendants Frank O'Reilly and George O'Reilly alone. And the warehouse receipts were given by the latter firm to MacCullough as representing the commission and produce firm, the owners of the goods. Two distinct entities were dealing with each other, and defendant George O'Reilly in signing the warehouse receipts on behalf of the storage and warehouse firm was not in any sense giving receipts "as of his own property" within the meaning of sub-sec. (d) of sec. 2 of the Bank Act.

Before the Judicature Act there might have been difficulty by reason of the rule which prevented the partners in one house of trade from maintaining an action at law against the partners in another house, where there was a common partner. But, even under the ancient jurisprudence, a suit in equity could be maintained in aid of the right. And since the Judicature Act there exists no reason why if two firms have a common partner an action should not be maintained by one against the other: Lindley on Partnership, 7th ed., p. 303 and note (s); and see note to Bosanquet v. Wray, 16 R. R. p. 677; Con. Rules 222 to 230 inclusive.

The last point urged for defendants was that plaintiffs failed to prove that the goods were not in the warehouse when possession was taken. Plaintiffs produced the warehouse receipts covering produce of the specified quantities. Plaintiffs' manager shewed that he from time to time and about every two weeks or month visited the warehouse and checked the goods and supposed and believed they were there, and he proved that they were not there when plaintiffs took possession. The onus was then on the owners or keepers of the warehouse to shew, if they could, that they were removed by plaintiffs or under their order, and to produce their receipts or orders. Nothing of this kind was established.

In the result the appeal should be allowed, and judgment should be entered for plaintiffs for the amount of their claim, unless defendants desire a reference to ascertain the amount, as they intimated at the trial and during the argument of the appeal.

The defendants other than Anthony O'Reilly and James A. MacCullough should pay to the plaintiffs the costs of the action and the appeal.

JUNE 29TH, 1906.

C.A.

WALKER-PARKER CO v. THOMPSON.

Vendor and Purchaser—Contract for Sale of Land—Authority of Agent to Contract for Vendor—Proof of Agency—Sub-agent or Collateral Agent—Specific Performance—Refusal to Enforce.

Appeal by plaintiffs from order of a Divisional Court (7 O. W. R. 125) allowing an appeal by defendant Minnie Hammerton from judgment of TEETZEL, J., in favour of plaintiffs in an action for specific performance of an alleged contract made by her, as vendor, for the sale to plaintiffs of a house and lot in Wellington street west, in the city of Toronto. Defendant Hammerton gave defendants the Real Estate Agency Co., an incorporated company, a written authority to sell the property, and the agreement which plaintiffs sought to enforce was signed by defendant J. Enoch Thompson, who was in fact manager of that company, as agent for the vendor. The latter asserted that she was not bound by Thompson's contract, and the Divisional Court so held.

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

E. E. A. Du Vernet and T. L. Church, for plaintiffs.

H. H. Dewart, K.C., and D. D. Grierson, for defendants Hammerton.

OSLER, J.A.:—I think the judgment of the Divisional Court should be affirmed for the reasons stated by the Chancellor. The authority to sell was given by defendant Hammerton to the Real Estate Agency Co. The only agreement proved was one signed by defendant Thompson, who is not, in my opinion, proved to have been an additional or sub-agent, or, as it was said, a "collateral" agent.

There was, therefore, no contract proved within the Statute of Frauds, which is pleaded, and the appeal fails and should be dismissed with costs.

MACLAREN and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion.

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

JUNE 29TH, 1906.

C.A.

CASSELMAN v. BARRY.

Master and Servant—Injury to Servant—Negligence—Dangerous Work—Proximate Cause of Injury—Findings of Jury—Common Law Liability—Workmen's Compensation Act—Joint Tort-feasors—Death of One—Action against Survivor and Executors of Deceased—Excessive Damages—New Trial.

Appeal by defendants from order of a Divisional Court (7 O. W. R. 328) affirming judgment of CLUTE, J., upon the findings of a jury, in favour of plaintiff for $6,500, in an action for negligence.

E. E. A. Du Vernet and F. W. Hill, Niagara Falls, for defendants.

F. W. Griffiths, Niagara Falls, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

GARROW, J.A.:—The firm of Barry & McMordie, contractors, were constructing a sewer for the city of Niagara Falls, and plaintiff was in their employment, when on 18th April, 1905, he was injured by an explosion of dynamite. The work was through rock which had to be blasted, for which purpose holes were drilled and charges of dynamite inserted and exploded by electricity.

Each blast usually consisted of about 4 holes. The method adopted was to remove it in benches, and at the time of the explosion they were working in what is called the third bench. The drills were operated by steam. The drill at which plaintiff was at work at the time of the explosion

was in charge of one Robert Forsyth as driller, and plaintiff was employed as driller's helper. Both were men of experience in such work.

There is no direct evidence shewing exactly how the dynamite which exploded came to be where it was. The theory put forward and apparently accepted by both sides is that in blasting a former bench a hole had not exploded or fully exploded, and that the hole which Forsyth and plaintiff were engaged in drilling was upon or very near the site of such former hole, with the result that upon the drill coming in contact with the former charge the explosion followed.

The negligence complained of in the statement of claim was in giving negligent orders regarding the drilling of holes near the dynamite which had not been exploded, and in not ascertaining whether such dynamite had exploded before ordering or permitting plaintiff to drill holes near the holes which had been filled with dynamite.

At the trial plaintiff was allowed to add additional causes of action under the Workmen's Compensation for Injuries Act by reason of defective plant, superintendence, &c.

According to the evidence called by plaintiff and undisputed, these old holes are always regarded as sources of danger, and are avoided in drilling the second or lower benches if possible. And the same undisputed evidence shews that it is the duty of the drillers to search for and select sites for new holes about to be drilled which shall be clear of old holes, and that Forsyth in discharge of this duty did search with hand and pick before giving the order to proceed, but found no hole.

Plaintiff did not himself search, but saw Forsyth doing so, and thought, as he deposed, that, as Forsyth was a practical man, he need not do so. Hood, another driller, and Cook, his helper, called by plaintiff, also gave evidence about the danger of old holes, the necessity of avoiding them in drilling new ones, and the duty of the driller to search. And upon the part of defendants it was deposed, and not contradicted, that the drillers had been expressly ordered to avoid all old ones in drilling new ones.

In other respects the evidence seems to have taken a wide range. The trial really concerned the happenings at one spot, but the evidence took in the whole work or system under which the work was being carried on. Other apparently unexploded holes were freely referred to, and the condition of

the battery used to create the spark was made a feature, with the result that apparently the real questions in issue were somewhat obscured.

The jury found: (1) that defendants were guilty of negligence; (2) that such negligence consisted in having no organized system of inspection of the work and appliances in general; the battery was defective; no care had been taken to make such that the charge in every hole had been exploded; (3) no contributory negligence; (4) damages at common law $6,500, or if under the statute $1,800. And the learned Judge directed judgment for the former sum, and his judgment was affirmed in the Divisional Court.

The defendants contend, among other things, that there is no specific finding of negligence causing the accident, and that in any event the damages are excessive.

They also contend that the action cannot be maintained against the executrix of James Barry, who died after the accident. I agree with the Divisional Court upon this objection. To hold otherwise would be to ignore the express provision of the statute R. S. O. 1897 ch. 129, sec. 11. And in addition it may be pointed out, although additional ground is not at all necessary, that the present action grows out of the contractual relation of master and servant.

I am of the opinion that defendants' other objections are well founded. Plaintiff was injured because his fellow servant Forsyth, contrary to his orders and to his duty, selected the site of an old hole upon which to drill a new one, and not because defendants had no organized system of inspection or a defective battery, or exercised no care with reference to old holes. All these might well be conceded, but they were each and all perfectly harmless but for the acts of Forsyth, the real proximate cause of what is complained of. And yet there is no finding directed to ascertaining or characterizing this, the vital issue between the parties.

Forsyth's failure to find the old hole may or may not have been negligent. There was water upon the surface, and perhaps other difficulties, making it not easy to find the old hole. At common law his negligence (if he was negligent) being simply that of a fellow servant would not affect defendants.

But it would be different under the statute if, as there is some evidence, he was in the position of one having authority over plaintiff. And this should have been dealt with by the

jury rather than the far away matters of organized systems and defective batteries, about which it is so easy and so inviting to generalize.

I also think the damages excessive, and upon both grounds am of the opinion that a new trial should be ordered.

The costs of the appeal should be to defendants in any event, and the costs of the last trial should be costs in the cause.

JUNE 29TH, 1906.

C.A.

CONNELL v. ONTARIO LANTERN AND LAMP CO.

Master and Servant—Injury to Servant—Negligence—Defective Condition of Machine—Findings of Jury.

Appeal by defendants from order of a Divisional Court (7 O. W. R. 77) dismissing appeal by defendants from judgment for plaintiff for $1,000 in an action for damages for negligence, tried before MEREDITH, J., and a jury at Hamilton.

E. E. A. DuVernet, for defendants.

P. D. Crerar, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., TEETZEL, J.), was delivered by

OSLER, J.A.:—The action is brought under the Workmen's Compensation for Injuries Act, for injuries sustained by plaintiff by reason of the defective condition of a machine at which he was working.

It appeared that plaintiff was employed in defendants' factory as operator of a stamping machine for cutting out discs from a brass sheet. The sheet was coiled on a roll and fed to the machine by the workman unwinding it from the roll and drawing or leading it into position on the machine

table below a die or punch, which, as it fell upon the sheet, stamped or cut out the disc. The machine was set in motion and the die caused to fall by the operation of a lever pressed by the workman's foot, and as each disc was cut the die, if the machine was in good order, should return to its original position and remain there until the workman again set the machine in motion by repeating the operation.

On the occasion in question, while plaintiff's hand was momentarily between the table and the die in the course of adjusting the brass sheet, the die unexpectedly fell, with the result that plaintiff lost three of the fingers of his right hand. The case made at the trial was that the machine had a habit of occasionally "repeating," that is, of letting the die fall without being set in motion by the operator, and that such defect had been brought to the notice of defendants' foreman, whose duty it was to see that the machine was in proper condition, and that, owing to his negligence, it had not been repaired or remedied.

The defence was that there was no evidence for the jury; that the machine was in a defective condition; that plaintiff had himself set it in motion by moving the treadle; and that there was contributory negligence on his part in having his hand where it was when the die fell and injured it.

The jury found that plaintiff's injury was caused by a defect in the machine; that the defect was weakness of spring owing to a nut coming loose, which could have been rectified by the use of a jam nut; and that the defect was discovered but not permanently remedied owing to the negligence of the company, through their foreman. Other findings of the jury absolved plaintiff from contributory negligence.

An examination of the proceedings discloses no ground upon which we can properly interfere with the order . . . affirming the judgment at the trial. There was evidence which could not have been withdrawn from the jury that the machine had the habit (if that expression may be used) of unexpectedly repeating or letting the die fall when it had not been set in motion by the operator, and when, therefore, it ought not to have done so. It was proved that this ought not to happen with a machine of this kind if in good order

with all its parts tight and well adjusted; and that it did happen was evidence that the machine was in a defective condition and dangerous to the workman. Res ipsa loquitur.

It was strongly urged by Mr. DuVernet that the accident could only have happened by plaintiff's own negligence in accidentally or inadvertently pressing the lever while adjusting the brass sheet upon the table, and, had there been no evidence of the machine ever having misbehaved itself before, there would be great weight in the argument as supporting the contention that in the condition or construction of the machine the occurrence was mechanically impossible. But this was, upon the evidence, a matter for the consideration of the jury, and when the machine is shewn to have had a bad name, it becomes less difficult to condemn it and to accept the workman's denial of carelessness on his part. Suggestions of the plaintiff's negligence in other respects were equally matters for the jury to pass upon. . . .

It was also urged that there was no sufficient finding of any defect in the machine causing the accident. Plaintiff's whole contention at the trial was that the defect in the machine was the bad habit I have spoken of. His counsel took the position, and quite rightly, that it was enough for him to prove this as a fact, and that it was not necessary for him to go further and find out or prove the inner cause of the defect, in other words, the defect which caused the defect he relied on. That might be a thing very difficult to do and more difficult to explain intelligently to a jury. However such evidence was given. The charge of the Judge shews very clearly what was the defect relied upon and about which the parties were contending, viz., the plain unmistakable defect of repeating; but he put a further question to the jury with the object of finding out the cause of this defect. Mr. Crerar was careful to say that he was not bound to satisfy the jury as to this, but the question and answer were useful to shew that the repeating habit is not mechanically impossible, and the answer, though not expressed with verbal accuracy, does suggest what appears to be a very plausible reason for the irregular action of the machine.

On the whole I think we can only dismiss the appeal, with the usual result as to costs.

JUNE 29TH, 1906.

C.A.

OTTAWA ELECTRIC CO. v. CITY OF OTTAWA.

Municipal Corporations — Purchase and Sale of Electrical Energy—Powers of Corporation—Special Act—Construction—By-laws—Ultra Vires — Contract — Debentures — Acquisition of Plant of Going Concern—Purchase of Supply of Power—By-law Creating Debt not Payable within Municipal Year.

Appeal by the plaintiffs from judgment of BOYD, C. (6 O. W. R. 930), dismissing the action with costs.

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

W. Nesbitt, K.C., and G. F. Henderson, Ottawa, for plaintiffs.

G. F. Shepley, K.C., and T. McVeity, Ottawa, for defendants.

MOSS, C.J.O.:—The principal relief sought in the action is a declaration that three certain by-laws passed by the defendants' council, and numbered 2489, 2503, and 2504 respectively, were ultra vires of defendants, and an injunction to restrain defendants from acting upon or under the agreements embodied in by-laws numbered 2503 and 2504.

The Chancellor upheld all three by-laws.

Under an agreement dated 17th June, 1901, made between certain persons representing a company known as the Consumers Electric Company and defendants, the latter were entitled to acquire all the property of the company both real and personal. The property comprised a station building, machinery, and equipment, besides pole lines, transformers, meters, arc lamps, cross arms, and other plant necessary and required for the distribution and supply of electricity. The defendants, having decided to acquire the property under the provisions of the agreement, proceeded to pass by-law No. 2489, acting in this regard under the provisions of a special Act of the legislature, 57 Vict. ch. 75.

The by-law, after reciting the Act and the agreement with the Consumers Electric Company, that defendants had decided in the exercise of their powers to acquire the property, and that, in order to provide for the purchase price, it was necessary to borrow $200,000 and to issue debentures of the city for the said sum, enacted: 1. That the corporation may produce, manufacture, use, and supply to others to be used, electricity for any purpose to which the same may be applied, and to that end acquire the property of the Consumers Electric Company, and reconstruct, alter, or improve the works. 2. In order to provide for the purchase thereof, the sum of $200,000 may be borrowed, and for the purpose of raising the said sum debentures to the amount may be issued and signed by the mayor on 5th June, 1905, and be payable on 5th June, 1935.

Then followed the usual directions as to the preparation, signing, and issue of the debentures and the raising of the special rate for payment of interest and principal, and for submission to the vote of the ratepayers.

The by-law was duly submitted to the vote of the ratepayers in accordance with the provisions of the Municipal Act, was ratified by the ratepayers, and was thereafter finally passed by the council of defendants on 5th June, 1905. It is conceded that all the formalities of the Municipal Act with regard to the passing of by-laws for the issue of debentures were complied with, and it is not alleged or suggested that the by-law is open to attack on any ground of irregularity. It was duly registered on 6th June, 1905, under sec. 396 of the Municipal Act.

This action was commenced on 21st July, but no certificate under the hand and seal of the clerk of the Court stating that the action had been brought was registered within the period of 3 months from the registration of the by-law, as required by sec. 399. The by-law is therefore protected from attack in this action by virtue of sec. 399 unless, as is contended, there was no jurisdiction to pass it. Taken by itself, there is nothing in the by-law to indicate want of jurisdiction in the council.

The special Act, 57 Vict. ch. 75, enacts that defendants shall, in addition to the powers conferred by the Municipal Light and Heat Act, which is thereby incorporated, have power to produce, manufacture, and use and supply to others to be used, electricity for motive power and for any other

purpose to which the same can be applied . . . and to acquire and hold lands, water powers, machinery, and all other property, easements, and privileges necessary therefor, and shall for and with respect to such powers and purposes have all and every the powers which are by the said Act conferred on municipal corporations with respect to light and heat. Then by sec. 2 defendants are empowered for the purposes mentioned in the preceding section of the Act and the Municipal Light and Heat Act, and in the exercise of any other powers possessed by the corporation in connection with the objects in the preceding section referred to or any of them, to borrow any sums of money not exceeding $250,000, and to issue debentures therefor payable in 30 years.

A comparison of the by-law with these provisions shews that it is within the prescribed limits in every respect.

It takes power to produce, manufacture, and use and supply to others to be used in the terms of the Act.

It provides for the acquisition of lands, machinery, and other property necessary for the purpose, and, this being one of the purposes authorized by the Act, it proceeds to provide for the issue of debentures within the prescribed limit. There is nothing by which any person intending to purchase the debentures or otherwise interested in the by-law could detect any overstepping of the powers possessed by the council. And it is scarcely disputed that if this by-law stood alone it could not be successfully impeached on the ground of want of jurisdiction.

But it is said that the subsequent action of the council in passing by-law No. 2504, providing for the execution of an agreement between the defendants and the Ottawa and Hull Power and Manufacturing Company, by which defendants' contract with the company for the acquisition from it of electrical power for the purpose of using it and supplying it to others to be used, by means of the property and plant acquired from the Consumers Electric Company, reflects back upon by-law No. 2489. It is urged that the action of the council in passing by-law No. 2504 shews that defendants never intended to enter upon the production and manufacture of electricity for themselves as they are authorized to do, but to utilize the property purchased in another way, that is, by means of power procured from the Ottawa and Hull Power and Manufacturing Company. In other words, that there was a scheme on the part of defendants to make an illusory

use of their actual powers in order to carry out an illegal and unauthorized undertaking.

No such case is presented by the pleadings, nor is there on the record any material for entering upon and determining such a question.

Upon the pleadings nothing is presented but the bald question of law whether the by-laws are ultra vires. And in the state of the record it ought to be assumed that the council acted in good faith, in the belief that it had the power which it was assuming to exercise. And, so far as by-law No. 2489 is concerned, I agree with the Chancellor that it was in furtherance of the primary object of the special Act to acquire the plant of a going concern by which electrical power was to be supplied to the city and its inhabitants. And, that being so, there was jurisdiction to pass the by-law, and it is not now open to successful attack.

But as regards by-law No. 2504, I am unable to agree that it was competent for the council to pass it. Neither in the special Act nor otherwise is there to be found power or authority to acquire, that is, to purchase, the supply of electricity to be used and supplied to others to be used in the manner contemplated.

The power is "to produce, manufacture, and use, that is, to enter upon the process of production and manufacture, and to use electricity so produced and manufactured and to supply it to others." I am unable to read these words as justifying a contract for the purchase of a supply of the power from another producing and manufacturing concern. And I think that by-law No. 2504, which is aimed at and intended for that purpose, is not within the powers possessed by defendants. It is also bad, in my opinion, as creating a debt not payable within the municipal year. With regard to this by-law, we are all agreed that it cannot be sustained. . . .

In my opinion, by-law No. 2504 ought to be declared invalid and void, and as to the other two the appeal should be dismissed.

Plaintiffs are entitled to the general costs of the action and the appeal, any costs of and occasioned by the attack on the other by-laws to be set off.

GARROW, J.A., gave reasons in writing for the same conclusion.

OSLER, MACLAREN, and MEREDITH, JJ.A., concurred.

JUNE 29th, 1906.

C.A.

SHEA v. JOHN INGLIS CO.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Negligence of Fellow Servant—Person to whose Orders Plaintiff Bound to Conform — Evidence—Findings of Jury—Damages—Claim of Father of Infant Plaintiff for Medical Expenses and Loss of Services—Absence of Evidence to Support — Infant Plaintiff Apprenticed to Defendants—Duty of Defendants to Supply Medical Attendance—Right of Infant to Require Payment of Wages to Himself.

Appeal by defendants from order of a Divisional Court (6 O. W. R. 962, 11 O. L. R. 124), affirming with a variation the judgment of MEREDITH, C.J., upon the findings of a jury, in favour of plaintiffs for $1,500, in an action brought by John Shea, a lad of 18 years of age, by his father as next friend, and by his father in his own right, to recover damages for injuries sustained by the son while in the employment of defendants, and for expenses incurred by the father as the result of the injuries. The boy was an apprentice at the trade of boiler making. He was usually engaged in rivetting, but on 6th September, 1904, he was sent by the foreman of the shop temporarily to replace an absent lad who was the regular helper of Green, the operator of a hydraulic rivetting or bulling machine. The boy was injured while assisting Green in the rivetting of a boiler.

E. E. A. DuVernet and R. H. Greer, for defendants.

W. T. J. Lee, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MOSS, C.J.O.:—. . . Defendants' contentions are: (1) that there was no evidence upon which the jury could properly find, as they did, that one Green was a person in the employ of defendants to whose orders or directions the in-

fant plaintiff John Shea, at the time of the injury, was bound to conform, or make the further finding that Green was negligent in his orders or directions to the infant plaintiff, in consequence of which he received his injuries; and (2) that the award of $1,500 damages was not sustainable either as entered at the trial or as modified by . . . the Divisional Court.

As to the first branch, there is ample evidence to sustain the findings of the jury, and, for the reasons fully and clearly expressed by the Divisional Court, its conclusions in this respect should be affirmed.

With regard to the damages, it is plain from what took place when the jury returned their answers, as well as from a perusal of the evidence and proceedings at the trial, that the jury intended to award . . . $400 to the adult plaintiff, and that that award was intended as a reimbursement to him for a supposed liability for the medical expenses incurred in connection with the injury to his son, the infant plaintiff.

The answer made by the jury to the question addressed to them by the Chief Justice, after they had handed in their answers to the questions submitted, shews that they intended to assess the infant plaintiff's damages at no more than $1,100.

Although it is alleged in the statement of claim that the adult plaintiff had been put to great expense, trouble, and loss in caring for and providing for the infant plaintiff, and had lost his services, neither he nor any other witness gave any evidence in support of the claim. He was examined as a witness, but was not questioned on this point. He was not even asked whether he was liable to pay Dr. Macdonald or whether he had incurred any other expense or liability in the matter. Dr. Macdonald said that he understood that he was called in by defendants to attend the infant plaintiff, and he made no reference to any request for his services by the father. The infant plaintiff was not questioned on the subject.

It appears that the infant plaintiff was apprenticed to defendants for a term of years which had not expired at the date of the trial. It does not appear whether the agreement

of apprenticeship was entered into under R. S. O. 1897 ch. 161, but, even if it were, defendants would, according to the opinion of Patteson, J., in Regina v. W. Smith, 8 C. & P. 153, be bound to provide the infant plaintiff with proper medical advice and medicines. . . . And, although sec. 12 of ch. 161 makes it the master's duty to provide suitable board, lodging, and clothing during the term of the apprenticeship, it may be that defendants, whether knowingly or unknowingly, were in calling in Dr. Macdonald merely fulfilling the greater obligation which, according to the ruling of that very learned Judge, the law imposes upon the master in the case of an apprentice.

It does not appear either whether the contract of apprenticeship was with the infant plaintiff alone, or whether his father was a party, but apparently the infant plaintiff was receiving the wages himself, and the father has not shewn that he was deriving or could derive any benefit from them during the term of the apprenticeship. The infant plaintiff was apparently entitled to require payment of his wages to himself: R. S. O. 1897 ch. 161, sec. 9; Simpson on Infants, pp. 180, 181; Delesdernier v. Burton, 12 Gr. 569; Wilson v. Boulter, 26 A. R. 184 . . . 195, and cases there cited.

There is no evidence on the record to support any claim for loss of services by the adult plaintiff, and, so far as the action concerns claims on his behalf, it fails. That being so, the judgment must be reduced to $1,100.

It is very probable that the disposition of this branch of the case proposed by the Divisional Court would work justice to all parties, but unfortunately, as defendants do not consent to be bound by it, the finding of the jury and the state of the record preclude such a disposition of the matter.

The judgment should be varied by dismissing the action as respects the claim of the adult plaintiff without costs, and by reducing the damages to $1,100, to be paid into Court for the infant plaintiff.

There should be no costs of the appeal to the Divisional Court or in this Court.

JUNE 29TH, 1906.

C.A.

McWILLIAMS v. DICKSON CO. OF PETERBOROUGH.

Timber—Dispute as to Ownership—Crown Lands—Location —Cancellation—Timber Licenses—Settlement—Purchase—Cheque—Acceptance on Account—Accord and Satisfaction —Injunction—Consent Order in Action afterwards Dismissed for Want of Prosecution — Binding Agreement— —Title—Possession—Jus Tertii—Assignment of Location —Regulations of Department—Settlement Duties—Forfeiture—Ruling of Department—Reference.

Appeal by defendants and cross-appeal by plaintiff from judgment of STREET, J. (6 O. W. R. 706), directing a reference to determine what sum plaintiff was entitled to, beyond what had been paid to him before action, for certain logs cut by him, which defendants had taken possession of and appropriated.

G. H. Watson, K.C., and G. M. Roger, Peterborough, for defendants.

R. F. McWilliams, Peterborough, and A. R. Clute, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLAREN, MEREDITH, JJ.A.), was delivered by

MACLAREN, J.A.:—The logs in question had been cut upon some 11 lots in the 3rd and 4th concessions of the township of Cavendish, in the county of Peterborough, which had been covered by timber licenses held by defendants. Plaintiff claimed to have acquired them as the assignee of certain locatees under the Free Grants Act, R. S. O. ch. 29, and under the Veterans' Act, 1 Edw. VII. ch. 6; and took the ground that, by the terms of these statutes and defendants' licenses, the lands were, by such location, taken from under the licenses.

The location of 7 of the lots was set aside by the Crown Lands Department, and these lots restored to defendants' license, it being a part of the departmental order that plaintiff was to be paid the reasonable cost of cutting the timber

on these lands, as if the work had been done in the ordinary course of lumbering operations. The logs from these lots were, however, inextricably mixed with those from the other lots, to which plaintiff retained a good title. Various attempts were made at a settlement, but other litigation and the present action have been the final result. . . .

The appellant took the ground at the trial and before us that the lands in question had been acquired, not by plaintiff for himself, but in reality by and for his father, who was an official of the department under the Public Lands Act, and that consequently no right had been acquired to them. The trial Judge found, on the evidence, that there was a bona fide intention from the beginning that the lands were to be the property of plaintiff and not of his father, and the report of the evidence appears fully to sustain this finding.

Defendants further contended that they had fully paid plaintiff by accepting his order for $500 and sending him a cheque for $5,457.93 as in full payment, which he accepted and cashed. Plaintiff acknowledged receipt of the letter containing the cheque, and stated that he accepted the amount as on account. The trial Judge held that this was not a settlement, and his judgment is in accordance with the law as laid down in Day v. McLea, 22 Q. B. D. 610, and Nathans v. Ogden, 22 T. L. R. 57, and by this Court in Mason v. Johnston, 20 A. R. 412.

The appellants also took the ground that certificates under the Veterans' Act could not be assigned, and that, if they could, plaintiff could not become the holder of so much land as had been assigned to him. The departmental documents dealing with these certificates and the locations under them are very informal, but, as pointed out by Street, J., there is nothing in the Act to prevent the original locatees from contracting to convey before location and conveying after location the land located to them.

The trial Judge has analysed the evidence and traced the title regarding each of the lots in question, and, after a careful perusal of the evidence, I am of the opinion that his conclusions are correct.

I am also of the opinion that he was right in holding that the ruling of the Department of Crown Lands of 1st February, 1904, should control and govern the rights of the parties, as it was practically accepted and acted upon by them. Also that

in any reference or inquiry as to the quantity or value of the logs the terms of the consent order made by Falconbridge, C.J., on 26th May, 1904, in the previous action between the same parties, which was dismissed for want of prosecution, should form the basis of such inquiry, as it is still a valid and subsisting agreement.

The appeal of defendants should therefore be dismissed with costs.

Plaintiff cross-appealed against that part of the judgment which upheld the departmental order cancelling the location of 7 of the lots and giving defendants the logs cut upon these lots, subject to their paying for the cost of cutting, etc. I am of the opinion that this part of the judgment is also right, and that the cross-appeal should be dismissed with costs.

JUNE 29TH, 1906.

C.A.

McLEOD v. LAWSON.

McLEOD v. CRAWFORD.

Contract—Mining Location—Discovery of Minerals—Agreement between Prospectors—Declaration of Interests of Co-owners—Statute of Frauds—Trust—Lease Taken in Name of One—Agreement of Lessee with Stranger—Construction—Ratification by Co-owners—Notice of Interests of Co-owners—License to Mine—Taking out Ore—Share in Proceeds—Fraud—Amendment—Land Titles Act—Injunction—Costs.

Appeal by defendant Herbert G. Lawson from judgment of MABEE, J. (7 O. W. R. 519), in the first action, which was brought by Murdoch McLeod and Donald Crawford to have their rights declared in reference to a certain mining location of 40 acres in the township of Coleman, in the district of Nipissing, a mining lease whereof was granted to defendant Thomas Crawford. Subsequent to the commencement of the action John McLeod and John McMartin were added as defendants. Defendant John McLeod was afterwards declared a lunatic, and Thomas Harold, his committee, was thereafter

also added as a defendant. Defendant Thomas Crawford entered into an agreement under seal with defendant Lawson dated 8th June, 1905, in respect of the location. By the judgment appealed against, plaintiffs and defendant John McLeod were each declared entitled to a one-quarter interest in the location, and an injunction was granted against defendant Lawson, and directions were given for the disposition of the ore which had already been mined and converted into money.

There was also an appeal by defendant Thomas Crawford from the judgment in the first action and from the judgment in the second action, which was brought by John McLeod against Thomas Crawford, Donald Crawford, and Murdoch McLeod, for a declaration that plaintiff was entitled to a one-quarter interest in the mining location mentioned. The judgment declared that John McLeod was so entitled, and from that Thomas Crawford appealed in so far as his rights and interest were affected.

The actions were tried together by MABEE, J.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

S. H. Blake, K.C., W. M. Douglas, K.C., and A. M. Stewart, for defendant Lawson.

I. F. Hellmuth, K.C., and W. H. Irving, for defendant Thomas Crawford.

G. H. Watson, K.C., and J. B. Holden, for plaintiffs Murdoch McLeod and Donald Crawford.

R. McKay, for John McLeod and Thomas Harold.

A. D. Crooks, for defendant McMartin.

MOSS, C.J.O.:—In these two cases there are altogether three appeals. There is first of all the main appeal by defendant Lawson in the first case, to which plaintiffs and all the defendants are respondents; then an appeal by defendant Thomas Crawford, supported by the plaintiffs, in the same case, to which defendant Lawson is the respondent; and finally an appeal by defendant Thomas Crawford in the second case, to which plaintiffs in that action are the respondents. The actions were tried together by Mabee, J., without a jury, and in a considered judgment he has set forth the material facts as he found them. A number of matters

which were more or less in dispute before the trial are now not questioned, but the appellants dispute some of the findings of fact as well as the conclusions of law upon which the judgments are based.

The defendant Thomas Crawford does not deny that plaintiffs are jointly and equally interested with him in the mining location held by him under the lease from the Crown dated 5th January, 1905, but he denies that John McLeod is entitled to any interest therein, and contends that, if he has any, it is only in the shares of plaintiffs in the first action.

The purpose of the second action is to have it declared that John McLeod is entitled to an equal share or interest in the location with defendant Thomas Crawford and the plaintiffs in the first action, each being possessed of a one-quarter share therein.

The trial Judge determined in favour of John McLeod. The defendant Thomas Crawford appeals from the judgment so declaring, and it may be convenient to dispose of this branch of the case at this stage. The evidence establishes that John McLeod was one of the prospecting party by whom the discovery on the location was made, and that under an agreement, assented to and acquiesced in by Thomas Crawford, John McLeod was admitted to an equal one-fourth share or interest with Murdoch McLeod, Donald Crawford, and Thomas Crawford; that this was fully understood and agreed to before it was arranged that the application for the lease was to be made in the name of Thomas Crawford instead of that of Murdoch McLeod, who was the actual discoverer; that Thomas Crawford knew that the application was for the benefit of all 4, and that, if the lease was issued to him, he was to hold for their benefit. It is evident that if before the issue of the lease he had disputed John McLeod's right to share with himself and the others, they would not have agreed to the issue of the lease to him. If at the time when it was agreed that the application should be in his name he had it in his mind that John McLeod was not entitled to an equal share, he did not disclose it to his associates, and by his silence as well as by his acts he led them to believe that he was to hold the lease when issued to him on behalf and for the benefit of all 4 in equal shares. Subsequently to the issue of the lease, and before the time of the dealings with defendant Lawson, he admitted that John McLeod was entitled to a share, and to the witness Bowen he stated it was

a one-quarter share. The trial Judge's finding of fact as to the extent of John McLeod's share or interest should be affirmed. And in the circumstances shewn the defence of the Statute of Frauds presents no difficulty. It is quite plain that Thomas Crawford was not in a position to apply to the Crown Lands Department for a lease in his own right. He was not a discoverer, nor was he a purchaser of rights. It was only as the nominee of the actual discoverer, and with the acquiescence of the others, that he could support an application. But for the action and assistance of the associates in enabling him to apply on the strength of their rights, it would have been a fraud upon the Crown for him to have obtained a lease. In truth he could only apply as representing their rights, and these were only made over to him to hold and exercise in trust for the whole body of associates. To deny the rights and interests of his associates would be a fraud on them as well as upon the Crown. And it is well established law that the Courts will not permit the Statute of Frauds to be made an instrument of fraud by precluding parol evidence shewing the fraud.

The case of Isaac v. Evans, 16 Times L. R. 113, was much relied on by counsel for Thomas Armstrong. As appears from the subsequent report at p. 480 of the same volume, the ruling was upon the opening of counsel at the beginning of the trial, and the case was remitted for trial by the Court of Appeal. And there does not appear to have been any acquiescence by the Court of Appeal in the views of the trial Judge. Assuming the correctness of his views with regard to the facts of the case, it does not govern here, for the facts are not similar. There had been no acquisition by either of the parties to the action of any interest in the lands prior to the grant of the lease to the defendant, while in the present case there were rights entitling the holder to apply for and obtain a lease, and these were in effect made over to Thomas Crawford, not for his own benefit alone, but in order to secure the rights of all parties interested. And in these circumstances the view of the Statute of Frauds taken in such cases as Heard v. Pilley, L. R. 4 Ch. 548, and Rochefoucauld v. Boustead, [1897] 1 Ch. 196, is applicable here. See also Barton v. McMillan, 19 A. R. 602, 20 S. C. R. 404.

The appeal in the second action should therefore be dismissed.

Then with regard to Thomas Crawford's appeal in the first action. His contention is that the agreement between him and defendant Lawson is void as having been procured by fraud, misrepresentation, and concealment of material facts, by defendant Lawson. When the action went to trial there was no issue of this kind raised by the pleadings. The plaintiffs impeached the agreement on the ground that it was made without the knowledge, consent, or authority of the plaintiffs and John McLeod, and in disregard of their rights and interests. The defendant Thomas Crawford in his statement of defence contented himself with denying all the allegations of the plaintiffs' statement of claim. In form this amounted to an affirmation of the validity of the agreement, and at the opening of the trial his counsel applied for leave to add to his defence a paragraph alleging acquiescence by the plaintiffs in the agreement. And it was not until the trial had been adjourned from 14th December, 1905, to 8th January, 1906, and again to 26th February, that an application was made on Thomas Crawford's behalf to set up the contention of fraud. The trial Judge refused the application. But during the continuance of the trial evidence was admitted shewing all the circumstances surrounding and connected with defendant Lawson's dealing with Thomas Crawford, including his knowledge concerning the probable value of the location arising from an inspection made by himself and others and information given to him as to indications discovered upon it. The Judge dealt with the question, and came to the conclusion that no case was made for declaring the agreement void. The Judge properly refused to allow the amendment asked. If sought to raise an issue between co-defendants at a very late stage of the proceedings setting up a claim that defendant Thomas Crawford had never thought of suggesting during the progress of the litigation from July, 1905, and which was doubtless a suggestion of counsel as an afterthought. It may be that having refused the amendment he should not have considered the evidence said to bear upon the question. It was not in issue, and defendant Lawson was not called upon to defend himself against the charge. But a perusal of the evidence leads to the same conclusion as that reached by the trial Judge. It discloses no case of fiduciary or other relationship or any other position towards Thomas Crawford placing Lawson

under any obligation to deal with him otherwise than at arm's length, or to disclose to him the knowledge he possessed of the location or its probable value. He did no more than any purchaser of a property from another is entitled to do. In order to succeed in his contention it was incumbent on Thomas Crawford to shew not only that great advantage had been taken of him and that such advantage arose from superiority of skill or information, but also that there was some obligation resting on Lawson to make disclosure of the circumstances which had come to his knowledge respecting the location. And in this he failed.

In the manner in which the question has been raised it is not a case of the Court being asked to decree specific performance, and Thomas Crawford resisting, in which case perhaps less would be required of him: Walters v. Morgan, 3 DeG. F. & J. 723; Walmsley v. Griffith, 10 A. R. 322. The transaction itself was one in which each probably had good reason to suppose there was a certain risk. Thomas Crawford does not appear from the evidence to be a person likely to be easily overreached. His occupation and dealings seem to fit him for coping with others in a land or mining transaction, and he understood perfectly the nature of the agreement he was entering into. Lawson undertook all the risk of possible failure of the location to develop in paying quantities. He paid $200 and undertook to prospect and develop the location at his own expense, and to give one-fourth of the gross products to Thomas Crawford. And it was not until the lapse of many months that it occurred to Thomas Crawford or his advisers to set up that any unfair advantage had been taken of him in the transaction. His appeal on this branch of the case should also be dismissed.

There remains the appeal of the defendant Lawson against the judgment pronounced in favour of plaintiffs in the first action.

The learned trial Judge, while upholding the agreement as between Thomas Crawford and Lawson, was of opinion that it was not binding on plaintiffs Murdoch McLeod and Donald Crawford and the defendant John McLeod. He appears to have reached this conclusion chiefly upon his view of the Lands Titles Act, R. S. O. 1897 ch. 138, though he also dealt with the effect of the agreement itself. He was of opinion that, although plaintiffs were not aware of the agreement having been made until the evening of the

day on which it was entered into, yet upon learning of it they agreed and intended to ratify it. But because the fact of ratification was not communicated to Lawson, and he did not change his position on the faith of it, no effect was given to their action in that regard.

He was also of opinion, and in this he is supported by the evidence, that Lawson had no notice or knowledge of the rights or interests of plaintiffs and John McLeod. But he appears to have proceeded upon sec. 21 of the Lands Titles Act, and to have come to the conclusion that it prevented him from dealing with the land comprised in the lease in any way so as to affect the interests of plaintiffs or John McLeod. The section should be read in connection with other sections of the Act which have a material bearing, as modifying the provisions of sec. 21 as applicable to letters patent from the Crown demising lands or mining rights in the district of Nipissing. Section 169 puts Crown demises of this kind on the same footing apparently as letters patent granting the land in fee in certain districts, and among others the district of Nipissing. And it seems that sec. 21 is intended to apply to leases or leasehold interests created after the issue of letters patent from the Crown. The rights that are reserved by sub-sec. (4) are in respect of the person who becomes the first registered owner of leasehold land. As against him, where he is not entitled for his own benefit, the registration as first registered owner does not make him the owner nor cut out the unregistered estates, rights, interests, or equities of the persons who are entitled to the land registered. But this does not, at all events in the case of lands or mining rights in the district of Nipissing demised by letters patent from the Crown, affect the rights of the registered owner to deal with third persons or the right of third persons to deal with them in the absence of a caution or useless in the case of fraud. The provisions of sec. 103 indicate the intention of the Act to permit registered owners to deal with the lands and third persons to deal with them in respect of the lands, although it may appear on the register that the registered owner is a trustee. And it could scarcely have been intended that a purchaser from a registered owner of leasehold lands under sec. 21 was to be obliged to take the lands subject to unregistered estates, rights, interests, or equities, even though he had no notice of the existence of any. The effect would be that no persons could

safely deal with the registered owner, lest claims the existence of which there were no means of ascertaining might be set up. The result would certainly not be in accord with the policy of an Act the object of which, as avowed in the title, is to simplify titles and facilitate the transfer of land.

Apart from the Act, the plaintiffs and John McLeod, by joining as they did in enabling the lands to be vested in Thomas Crawford, thereby held him out to third persons as authorized and enabled to deal with the land as his own. Had they desired to preserve their right to be consulted, it was incumbent upon them to file a caution, which they neglected to do until after the agreement with Lawson and after he had filed a caution for his own protection.

There is no pretence that Thomas Crawford was acting in collusion with Lawson, or that he was not acting in the transaction with him in what he supposed to be the best interests of all. He was doing the best he could to make a bargain advantageous to himself and his associates. All his interests were to get the most he could for himself and them.

Lawson dealt with the person duly authorized and empowered to deal with the lands, and, so far as the evidence discloses, he entered into the agreement in good faith and without any notice or knowledge of any rights, interests, or claims which should have prevented him from dealing with Thomas Crawford. And the plaintiffs and John McLeod should be held bound by the agreement as fully and to the same extent as Thomas Crawford.

The next question is, what did Lawson acquire by virtue of the agreement? It was not a term, or a leasehold estate or interest. But it was more than a mere personal license. It was a right to enter upon and win and remove ore and minerals. But there is nothing in the language of the agreement to lead to the conclusion that an exclusive right was granted or intended to be conferred. The highest that can be claimed for it is that it was a profit à prendre, and, as pointed out by Lindley, L.J., in Duke of Sutherland v. Heathcote, [1892] 1 Ch. 475, this is not an exclusive right unless it can be clearly inferred from the language of the grant that it was so intended. He said (p. 484): "A profit à prendre is a right to take something off another person's land; such a right does not prevent the owner from taking the same sort of thing from off his own land; the first right may limit but not exclude the second. An exclusive right to

all the profit of a particular kind can no doubt be granted; but such a right cannot be inferred from language which is not clear and explicit." He then referred to Lord Mountjoy's case, where the words of grant of the right to take ores, etc., were followed by the words "without the let or interruption of the person making the grant," and said that it has always been regarded as a leading authority for the proposition that a grant in fee of liberty to dig ores does not confer on the grantee an exclusive right to dig them, even if the grant is in terms without any interruption by the grantor. Lawson's right was therefore a right not excluding plaintiffs or others claiming under them. And it only extended to 31st August, 1905.

He claims to be entitled to an extension of his rights by virtue of the last clause of the agreement, but, apart from the question of fact as to whether he ever put himself in a position to claim the execution of the terms of that clause, it is in itself of too vague and indefinite a character to be capable of enforcement. Putting upon it the construction that it leaves it with him to name the time for which he may desire to use it—the most favourable for him—it would be necessary that he should do so before 31st August, and he did not place himself in that position, by a formal notice or requisition to that effect.

His rights under the agreement must be considered as ended on 31st August. But the institution of and proceedings in the action prevent the case from being now dealt with wholly on that footing. The injunction order, while restraining Lawson from removing ore or mineral until the trial or other final disposition of the action, gave him liberty to proceed with mining operations subject to supervision by plaintiffs and the keeping of accounts. And under the liberty thus given operations have been carried on probably to the present time. The result of the view of the rights of the parties here taken is that defendant Lawson was entitled to proceed with his operations under and in accordance with the terms of the agreement until 31st August—plaintiffs and defendants Thomas Crawford and John McLeod being entitled to one-fourth of all the ore or mineral mined or taken up to that date, or one-fourth of the value, as they may elect. Plaintiffs and defendants Thomas Crawford and John McLeod are entitled to all mined or taken since that date, subject, however, to the allowance to defendant Lawson of the

actual working expenses of the operations since that date, and to a fair allowance for his care and trouble in connection with such operations.

The judgment appealed against will be varied so as to give effect to the conclusions here stated.

As to the costs, the disposition made by the learned trial Judge of the costs up to and inclusive of the trial should not be disturbed.

Should a reference be necessary in order to determine as to the expenses and allowances to be made to defendant Lawson, the costs of the reference will be reserved.

Plaintiffs should pay to Lawson the general costs of the appeal: all costs of and occasioned by the contentions on which he has failed to be set off.

The other two appeals are dismissed with costs.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented.

ANGLIN, J. JULY 3RD, 1906.

CHAMBERS.

LIDDIARD v. TORONTO R. W. CO.

Costs—Postponement of Trial—Powers of Judge in Chambers after Trial.

Motion by plaintiffs for costs of postponements of the trial of this action by STREET, J., and TEETZEL, J., respectively.

J. E. Cook, for plaintiffs.

G. B. Strathy, for defendants.

ANGLIN, J.:—The motion is refused, on the ground that there is no jurisdiction in a Judge in Chambers to make the order asked. As to the postponement before Street, J., the material rather indicates that it was his intention that there should be no costs. As to the postponement before Teetzel,

J., these costs could probably have been dealt with either by myself, sitting as trial Judge when the action of the younger plaintiff was finally disposed of, or again at the trial before the Chancellor, when the action of the senior plaintiff was finally tried. Plaintiffs appear not to have asked for these costs upon either occasion. Neither as trial Judge nor as a Judge in Chambers have I now jurisdiction to deal with them. There will be no costs of this application.

CLUTE, J. JULY 3RD, 1906.

TRIAL.

ALLAN v. McLEAN.

Bankruptcy and Insolvency — Preference — Chattel Mortgage —Actual Advance by Third Person—Money Applied on Debt Due by Insolvent — Creditor's Knowledge of Insolvency—Absence of Knowledge by Third Person.

Action to set aside a chattel mortgage dated 28th March, 1905, made by George R. Levagood to defendant McLean for $560, as fraudulent and void as against the plaintiff as assignee for the benefit of the creditors of George R. Levagood.

J. J. Drew, Guelph, for plaintiff.

W. M. Douglas, K.C., and J. Watt, Guelph, for defendants the Traders Bank.

N. Jeffrey, Guelph, for defendant McLean.

CLUTE, J.:—. . . The mortgagor, Levagood, came to Guelph in November, 1904, and started a piano business. He made a deposit in defendants' bank on 19th November of $640, and about 6th December commenced business. By 13th December the account was overdrawn. A discount of $140 was made on 20th December, but the account was again overdrawn on 3rd January, and so continued until 4th February, when the overdraft was covered by Levagood's note, which was discounted for $253.70, and towards the end of March there was an overdraft of $295 and an outstanding note for $253.70 and interest, making altogether over $500.

This claim was continually pressed by the manager of the bank, and, about a week or 10 days before the mortgage was given, the manager insisted that the indebtedness must be paid. The manager then applied to defendant McLean to make a loan for Levagood by way of chattel mortgage, and McLean consented to do so if the security was sufficient. Nothing further seems to have taken place except pressure on the part of the bank manager for payment of the claim, until the morning of the day the chattel mortgage was executed. The manager sent for Levagood and insisted upon payment, and Levagood consented to give a chattel mortgage, and the manager then went out to find McLean. He met him at the door of the bank and brought him into his private office, where Levagood then was. It was there arranged that Levagood should give a chattel mortgage upon all his stock in trade and his household furniture, which practically covered all his assets, for the amount of his indebtedness, which was ascertained to be $560, and that the proceeds of such loan should be paid to the bank. . . . The mortgage was then prepared and there executed. A cheque was then drawn by defendant McLean, marked good by the teller of the bank, and handed to Levagood, who immediately handed the same to the manager of the bank, and it passed to the credit of Levagood's account.

The evidence clearly shewed that . . . that the loan was made at the instance of the bank manager for the express purpose of raising a sum of money to pay off Levagood's indebtedness to the bank; that McLean knew the purpose for which the loan was made; that the whole transaction was carried through at the instance and for the benefit of the bank.

It also appeared that at the time the mortgage was given Levagood was insolvent, and he made an assignment 5 days afterwards—on 3rd April, 1905.

I am satisfied that the manager of the bank had reason to believe, and did believe, that Levagood was in financial straits and was on the eve of insolvency. It does not appear that McLean had this knowledge. He made no inquiry whatever as to the title of Levagood to the property, beyond asking him if there were any liens against it. He allowed himself to be used without question by the bank manager for the purpose of raising this money

to pay off the liability to the bank, at a time when Levagood was insolvent, and when the bank manager had reason to believe that he was in financial difficulties. It is not the ordinary case of a debtor applying for a loan in the usual way and obtaining that loan and making application of it as he sees fit. It was the case, having regard to the whole transaction, where the intent of the parties was that a loan should be made for the special benefit of the bank, and, as I find, with the knowledge that if the loan had been made directly to the bank it would be void under the Act as against creditors.

The question is whether the case falls within Gibbons v. Wilson, 17 O. R. 1, or Burns v. Wilson, 28 S. C. R. 207. The facts are not identical with either case, but, having regard to the principle upon which I understand Burns v. Wilson was decided, I think the present transaction falls within that case.

I find it impossible to say that the advance was made bona fide to Levagood. It was, in fact, made for the bank; at the instance of the bank; at the solicitation of the bank; and it had the necessary effect of defeating and delaying the other creditors.

I think that the transaction cannot stand, and that the chattel mortgage should be declared void as against plaintiff, the assignee for creditors, with costs.

MEREDITH, C.J. JULY 4TH, 1906.

WEEKLY COURT.

RE KELEHER.

Will—Construction — Devise — Estate — Fee Simple or Life Estate with Executory Devise over—"Die without Lawful Issue"—Death in Lifetime of Testator—Lapsed Devise.

Motion by James Keleher the younger and Timothy Keleher for a summary order determining certain questions arising upon the will of James Keleher the elder.

W. H. Blake, K.C., for the applicants.

W. M. Douglas, K.C., for James C. Keleher.

W. E. Middleton, for Mary Jane Keleher.

MEREDITH, C.J.:—The will of James Keleher is dated 7th June, 1851. The testator died on 7th February, 1855, being the owner of lot 6 in the second concession of division C. in the township of Guelph.

By his will he gave, devised, and bequeathed to his son Denis Keleher his personal property and this lot 6, to have and to hold the lot "to him, the said Denis Keleher, his heirs and assigns forever, subject nevertheless to and charged and chargeable with the annuity or yearly rent charge and other conditions" thereinafter "mentioned."

Following this provision are bequests of an annuity to the testator's widow and bequests of pecuniary legacies as well as specific legacies of certain of the personal property of the testator. The pecuniary legacies are made payable by the devisee Denis, and the annuity is charged on the lands devised to him.

Following these bequests is a provision in these words: "I further will and bequeath that in case my said son Denis Keleher shall die without lawful issue of his body, that then and in such case the lands, tenements, hereditaments, and premises hereinbefore given, devised and bequeathed to my said son Denis Keleher, shall be equally divided between my two sons Patrick Keleher and Timothy Keleher hereinbefore mentioned, their heirs and assigns forever, on the terms, charges, payments, and conditions hereinbefore mentioned to be imposed upon my said son Denis Keleher."

Timothy Keleher died in 1852, and Patrick Keleher on 15th January, 1894, and Denis Keleher died in the early part of the present year, without ever having married.

Practically but one question was discussed upon the argument, viz., whether, in the events that have happened, upon the true construction of the will, the devise to Patrick and Timothy Keleher took effect as to both or either of them.

It was contended by Mr. Blake that Denis Keleher took an estate in fee simple with an executory devise in fee to Patrick Keleher and Timothy Keleher in the event of Denis Keleher dying without issue of his body living at his death; and the contention of Mr. Douglas was that Denis Keleher, having survived the testator, took an estate in fee simple absolute.

The success of Mr. Douglas's contention depends upon the reference to the death of Denis Keleher without lawful

issue of his body being held to be to his death in the lifetime of the testator.

The testator having died before 1874, the Wills Act has no application, and it was not disputed that, according to the rules applicable to this will, unless there is something in it to indicate a contrary contention, if the event upon which lot 6 was to go over, happened in the lifetime or after the death of the testator, the estate of Denis Keleher was divested.

Mr. Douglas's argument was that there were in this will indications of such a contrary intention, and that the provision that Patrick and Timothy should take, as the will declares, "on the terms, charges, payments, and conditions hereinbefore mentioned to be imposed upon my said son Denis Keleher," shews that the testator was referring to the death of Denis in his own lifetime. . . .

This argument, though an ingenious one, does not appear to me to be entitled to prevail. What the testator intended to declare by the words upon which reliance is placed as evidencing the contrary intention necessary to displace the general rule, was, I think, that if Patrick and Timothy took the land they should take it subject to the performance of the obligations which he had imposed upon Denis in so far as those obligations had not been discharged; in other words, that the gift to them should not take away the benefit which he intended for his widow and the legatees for whom he had made provision by his will. This seems to be to be a more reasonable view as to his intention than that for which Mr. Douglas argued.

It is to be observed further that where the testator intended to refer to the death in his own lifetime of a beneficiary he used language which plainly shewed that such was his intention. . . .

I come therefore to the conclusion that the reference to the death of Denis is not to his death in the lifetime of the testator.

Having come to this conclusion, it is unnecessary to determine whether the gift over is an executory devise or a remainder in fee after an estate in tail in Denis, which depends upon whether the contingency provided for is an indefinite failure of the issue of Denis or the failure of issue at the death of Denis, for, in the events that have happened, the result would follow in either case.

Patrick, having survived the testator, was, in my opinion, at the time of his death, seised of an estate in fee simple in one undivided half of the land, but Timothy having died in the lifetime of the testator, there was a lapse of the devise to him of the other undivided half, which was therefore undisposed of by the testator and passed to his heirs at law.

If the gift over be an executory devise, the fact that there was a lapse as to the share of Timothy did not operate to prevent the whole estate devised to Denis from being divested upon the happening of the event on which the gift over was to take effect: Theobald on Wills, 5th ed., p. 570, and cases there cited. The gift over in this case was of the whole estate devised to Denis, which Patrick and Timothy were to take in fee simple, and not as in such cases as Gatenby v. Morgan, 1 Q. B. D. 685, where the prior estate was a fee simple and the gift over was of a life estate only, to which cases a different rule applies, and the prior estate is divested only so far as is necessary to give effect to the gift over.

There will be a declaration of the rights of the parties in accordance with the opinion I have expressed, and the costs will be paid out of the estate.

MEREDITH, C.J. JULY 4TH, 1906.

WEEKLY COURT.

RE CHURCH.

Will — Construction — Legacies to Nephews and Nieces and Children of Deceased Nephews and Nieces — Children of Persons Predeceasing Testator—Cumulative Legacies—Deficiency of Assets—Abatement of General Legacies—Residuary Bequest—Persons Entitled to Share.

Motion by the executors of the will of George Church for a summary order determining certain questions arising upon the will.

W. E. Middleton, for the executors and certain beneficiaries.

B. N. Davis, for other beneficiaries.

M. C. Cameron, for infant beneficiaries.

T. N. Phelan, for Joseph Church.

MEREDITH, C.J.:—. . . By his will the testator directed his executors to pay his debts and testamentary expenses, and devised and bequeathed all his real and personal estate to them, upon trust to sell and convert it into money. . . . "and divide and distribute the proceeds as follows: the sum of $300 to be given to each of my lawful nephews and nieces, and should any of them die before me then their share shall be equally divided between their children living, share and share alike, except my nephew Joseph Church, who is only to be given $1. The sum of $300 to be equally divided among the children of Joseph Church by his first wife, share and share alike. The widow daughter of Thomas Church and the widow daughter of Harriett Raymond, whose names and residences I do not know, to be each given the sum of $450 absolutely. I give and bequeath to the said George Church, of Essex Centre, yeoman, and the said William Church, of the same place, agent, each the full sum of $450 absolutely. All the rest and residue of my real and personal estate remaining after the said legacies have been paid, I give, devise, and bequeath to the hereinbefore named parties to be divided between them equally, share and share alike.

The "widow daughter of Thomas Church" is Martha A. Poole, and she is a niece of the testator; "the widow daughter of Harriett Raymond" is Nellie Balston, and she also is a niece of the testator, and George Church and William Church are his nephews.

The first question for determination is whether the children of deceased nephews and nieces of the testator who had died before the will was made are entitled to the legacy of $300 which their respective parents would have been entitled to had they been then living and survived the testator.

I am of opinion that this question must be answered in the negative. The language of the will plainly points to death happening after the will was made and in the lifetime of the testator. "And should any of them die before me" are the words used, and they appear to me to be not capable of being read so as to include those who were at the time dead.

The next question is, whether the legatees Martha A. Poole, Nellie Balston, George Church, and William Church, are respectively entitled to the legacies of $300 and $450 mentioned in the will, in other words, whether their legacies are cumulative. I am of opinion that they are cumulative.

The general rule is, that where legacies of unequal amount are given by the same instrument, in the absence of internal evidence of a contrary intention, the legatee is entitled to both. I am unable to find in the language of the testator any such internal evidence, though I have not the slightest doubt that the construction which I am bound to place upon the words which he has used to express his intention is not in accordance with his real wishes.

The next question is, whether all the general legacies must abate pro rata, if the assets are insufficient. I can find nothing in the will to indicate that the testator intended that the general rule that general legatees abate together and proportionally, in case of a deficiency of assets to satisfy them all, should not apply. Mr. Middleton relied upon the word "absolutely" used as to the legacies to Martha A. Poole and Nellie Balston, and the same word and the words "full sum" used as to the legacies to George Church and William Church, as indicating that the testator's intention was that these legacies were not to abate, at all events until after the other legacies had done so. I do not think that this contention is well founded. The words upon which reliance is placed do not, in my opinion, afford any ground for treating them as having the effect contended for.

The next question is as to the persons entitled to the residue.

In my opinion, all those to whom, in the events that have happened, legacies are given, except Joseph Church, share equally in the residue. I include nephews, nieces, children of deceased nephews and nieces, and children of Joseph Church by his first wife.

The last question is, whether Joseph Church is entitled to share in the residue.

I am of opinion that he is not. The testator's intention appears to me to have been that the children of Joseph Church by his first wife should be the recipients of his bounty instead of their father. The language shews that he did not intend that Joseph should benefit to a greater extent than the legacy of $1 which is bequeathed to him, and the scheme of the will would be defeated if not only the children of Joseph but Joseph himself were to share in the residue.

There will be judgment in accordance with the opinion I have expressed, and the costs of all parties will be paid out of the estate.

CLUTE, J. JULY 4TH, 1906.

TRIAL.

BROCKLEBANK v. COLWILL.

Private Way—Deed of Grant—Construction—"A Good and Sufficient Roadway not Less than 10 Feet in Width"—Termini and Location—Loss of Right by Abandonment—Extinguishment by Merger—Obstruction—Action for Removal—Damages—Mandatory Order—Costs.

Action to establish a right of way and to compel defendants to remove obstructions, etc.

W. M. Douglas, K.C., and M. Wilkins, Arthur, for plaintiff.

E. D. Armour, K.C., and J. M. Kearns, for defendants.

CLUTE, J.:—On 2nd December, 1885, one William Henry Drummond was the owner of a piece of land with a frontage of 66 feet 6 inches and a depth of about 200 feet, together with the right to the use of a lane, fronting on George street, in the village of Arthur. On that day he conveyed a portion of the lot, with a frontage of 22 feet and a depth of 90 feet, to Townley Brocklebank, which deed contained the following right of way: "And the party of the first part agrees to give the use of a good and sufficient roadway leading to the rear of the property hereby conveyed, not less than 10 feet in width. On the same day Drummond conveyed to one Skerrit a portion of the land immediately to the east of the land conveyed to Brocklebank, with a frontage of 23 feet on George street and a depth of 80 feet, with a right of way in similar terms to that conveyed . . . to Brocklebank. By several mesne conveyances (the last of which was dated 27th May, 1896), the Skerrit lot was transferred to defendant Gillrie.

On 11th August, 1895, Drummond conveyed to Townley Brocklebank 10 feet in rear of the 90 feet, with a width of 22 feet. On 14th May, 1896, Drummond conveyed to defendant Gillrie the remainder of his lot. On 17th March, 1898, defendant Gillrie by quit claim deed and grant conveyed to David Brocklebank, the plaintiff, 20 feet in rear of the 10

feet with a width of 22 feet, "together with the appurtenances thereto belonging or pertaining."

Townley Brocklebank died on 3rd September, 1897, having first duly made and published his will, whereby he gave to his son, David Brocklebank, "the land and property in the village of Arthur," and on 9th April, 1902, his executors granted and quit-claimed to plaintiff, David Brocklebank, the 100 feet in the village or Arthur, being the 90 feet and 10 feet above mentioned.

In the deed from defendant Gillrie to plaintiff conveying the 20 feet there was also conveyed the party wall on the east side of the Brocklebank lot with a frontage of 16 inches and a depth of 60 feet. . . . Changes had been made in the buildings on each property since 1885. At that time on the Brocklebank lot there stood a small building fronting on George street, 20 by 30, with a smal barn to the rear. On the Skerrit lot there was a small building 20 by 40, and on the remaining portion fronting on George street a building 14 by 24.

Within a week or 10 days after the first conveyance to plaintiff's father in 1885, plaintiff commenced business as a hardware merchant on the premises so purchased, and the property has been used for that purpose ever since.

In 1886 the small barn that was upon the 90 feet at the time of the purchase was removed 10 feet to the rear of the 90 feet line, occupying 22 feet in width, and an addition placed thereto, forming an L along the westerly part of the land adjoining the 90 feet, and leaving an open space next the 90 feet for the remaining easterly 10 feet. This L-shaped building remained till 1889, when it was torn down. The land then remained vacant for some time. In 1887 plaintiff extended his main building back about 60 feet, and added a brick building, 22 by 30, in 1889. This building, as a matter of fact, extended over the 90 feet by about 3 feet. In 1889 plaintiff erected a stairway at the end of the 90 feet, which led up to the door on the second storey. In 1898 plaintiff took down the front buildings and erected a brick front and made one store 90 feet long, and erected a frame storehouse, 20 by 30, in rear thereof. When the brick building on the 90 feet was first erected there was a door left on the east side at the rear of the lot as well as a door at the north side, through which goods were received, and that continued

there from 1889 to 1898, when it was closed up, and plaintiff then used exclusively the door in the wall on the rear of the 90 feet, and also two doors to the east in the frame store house. . . .

Plaintiff states that he did not take any goods in after the spring of 1886, except at the rear of the lot. . . .

In 1896 the buildings on the Skerrit lot and on the lot to the east thereof were also enlarged, and in 1896 the buildings were extended 100 feet from George street. In 1901 a building was erected on the Skerrit property . . . one storey high and used by defendant Gillrie as part of his store. From the time plaintiff's father purchased, in 1885, plaintiff used the lane and crossed over the property of defendant Gillrie and her predecessors in title to the rear of his 90 feet property. Before the building east of the Skerrit property was erected in 1896, this approach was across the corner where that building now stands; but after the building was erected, which was done without complaint on the part of plaintiff, plaintiff and the occupiers of the Skerrit property went to the north of the building, always using the yard and property of defendants and their predecessors in title for the purpose of approaching their premises with loads and using the yard for turning. There was no dispute as to plaintiff's right to get into his premises by the lane and over defendants' property, but no defined right of way except the lane portion was ever used by either party, the whole yard being used freely by plaintiff for the purpose of his trade and business carried on upon the land in question.

This state of affairs continued until about February, 1905, when defendant Gillrie applied to plaintiff for leave to build upon his wall another storey at the rear of the 90 feet. . . . This plaintiff declined to permit, as it would shut out his light from the upper storey of the adjoining building. Gillrie then asked to build upon the property immediately north. This also plaintiff refused, saying that it would prevent him from getting to his land. . . .

This proposed building . . . extends a little past the 10 feet to the rear of the 90 feet lot owned by plaintiff and would close up the door in the 10 feet if built. Without further reference to plaintiff, defendants proceeded with the building, and also erected a board fence 9 feet high to the north, which would close up the other storey of the frame store

house leading into the 20 feet owned by plaintiff from defendants' premises. The effect of this, of course, was to shut off entirely plaintiff's approach to his property across defendants' premises.

An interim injunction was obtained, but was discontinued . . . upon defendants taking down the 9 feet fence so as to permit plaintiff's entrance to his store house, and upon defendants taking the risk of proceeding with the erection of that building.

Plaintiff now asks a mandatory order to remove the buildings and erections which obstruct plaintiff's right of way or interfere with the enjoyment thereof, and to abstain from further interfering with or obstructing the way, and for a declaration establishing plaintiff's right to the use and enjoyment of his right of way, and for damages and other relief.

Defendants answer separately, but in effect deny plaintiff's right of way, and allege that, if any such right ever existed, it was lost by abandonment or extinguishment by merger.

It will be convenient to consider, first, the meaning of the grant of the right of way to plaintiff's father—(a) its termini and (b) its location.

It is plain from the conditions present at the time of the grant, that the right of way was from George street by the lane to the east of the 60 feet. This lane extended for a short distance from George street northerly, leading into a back yard, but beyond about 60 feet the lane was not located on the ground, and until the buildings were extended on the different lots to the rear, the whole yard seems to have been used indiscriminately to reach plaintiff's premises. There was a fence at the rear some 12 feet to the south of where the fence now stands, and which formed an enclosure to the small house at the rear of the property. As the buildings were extended back, this fence was also removed back a short distance to give more room for turning.

The first question is as to whether the lane extended all the way across the rear of the 90 feet and terminated at the westerly boundary, or whether it terminated at the easterly boundary of the 90 feet at the rear thereof.

Mr. Armour supported this last contention, and mentioned the fact that the Skerrit property extended only 80 feet, suggesting that that left 10 feet for the lane to the rear of plaintiff's property. In answer to this it may be said

that the ways granted in both deeds are similar, and, if the contention of Mr. Armour be correct, we should have the curious fact that in one case the grant was to the easterly side of the lot and in the other to the rear, the same words being used in both cases. But, notwithstanding this curious result, I think, having regard to the location upon the ground and the fact that the deeds were executed at the same time, and registered practically at the same time, the Skerrit first, and having regard to the user immediately after and the fact that the door was opened when the brick building was erected within this 10 feet, and chiefly used for many years thereafter and until the additional land was purchased in the rear, I am of opinion that the true construction, evidenced also by user, is that contended for by Mr. Armour, and that there was a substantial compliance with the grant by giving a right of way with one of its termini in the rear of the easterly part of the 90 feet lot, instead of extending all the way across the end thereof.

The next question is as to what the extent of this right of way was. The words are, "a good and sufficient right of way not less than 10 feet wide." Mr. Armour insists that this right of way should leave the lane at right angles, and that it should be limited to 10 feet in width, and that plaintiff is not entitled to turning ground to enable him to get out. . . . Mr. Douglas, on the other hand, contended that a good and sufficient right of way means a right of way sufficient for the purpose of loaded vehicles, and such as would enable them to approach the premises with a full load and turn to get out, and relied upon Knox v. Sansom, 25 W. R. 864. . . .

[References to facts and opinions in that case.]

Examining the words in the present grant, the vendor agrees to give "the use of a good and sufficient right of way." The word "good" there, I think, has reference to the condition of the roadway being suitable for the purpose required, and "sufficient" means, I think, broad enough to enable the occupant of the tenement to use the same conveniently. But it is urged that the words "not less than 10 feet" restricted the grant in its entire length to not more than 10 feet, and Mr. Armour relied upon Westropp v. Commissioners of Public Works, [1896] 2 Ir. 93. . . . I cannot see that the case is of much use in construing the present grant. He also referred to Regina v. Scott, 16 O. R. 454. . . .

It seems to me that the words in the grant "not less than 10 feet wide" were intended not as descriptive of the whole grant, which was to be a right of way good and sufficient, but as indicating that in no part should it be less than 10 feet, and this, to my mind, is very evident from the condition of the premises at the time of the grant. There was a lane leading into the yard, which was then used, and has ever since been used, for an approach to the various occupiers of the premises, and to enable those who entered there to conveniently turn to get out. This yard together with the lane offered good and sufficient right of way to the premises in question. It was not too large for their convenient use. It had been used as such before the grant; it was used as such down to the time this difficulty arose, not only by plaintiff, but by other occupants of the premises, and the meaning of the grant was, I think, to insure this good and sufficient right of way as the means of obtaining access to the land in question. The words "not less than 10 feet" were used as indicating an intention that the lane which was 10 feet leading from George street should be the approach, and that the approach should not be less than the 10 feet. This was good and sufficient for that distance, but it would not be a good and sufficient right of way for the balance of the distance, and, treating the lane and the yard as a right of way intended to be granted, it fully satisfies the words of the grant and the conditions as they existed at the time. The yard was of comparatively small value and of no use except for that purpose. A portion of it was low. This was improved from time to time by defendants. It was filled in and gravelled, and made in fact a good and sufficient right of way, and was, I think, what was intended by the grant.

Mr. Armour contended that having built up the doorway on the east of the wall on the rear of the lot, plaintiff abandoned his right of way—referring to Bell v. Golding, 23 A. R. 485. So far from plaintiff intending to abandon the right of way to his premises, his right was never questioned, and the way was constantly used. When the doorway was closed up, he still continued to use the right of way, bringing his goods in and unloading them through the doorway leading into the store house, and thence through another door into the building placed upon the 90 feet lot. Abandonment is a question of intention. The right claimed did not pertain necessarily to the doorway. It was a right of way to the rear

of the lot. "The material inquiry in every case of this kind must be whether there was an intention to renounce the right:" Gale on Easements, 7th ed., p. 496.

The mere non-user of a way does not, in the absence of the acquisition of right by the parties in consequence of it, amount to an abandonment. It only raises the inference that there has been no occasion to use it: Ward v. Ward, 7 Ex. 789. . . .

[Reference to Cook v. Mayor of Bath, L. R. 6 Eq. 177; Harris v. Flower, 21 Times L. R. 13; Bell v. Golding, 23 A. R. 485.]

Upon the evidence I find as a fact that plaintiff never intended to abandon his right of way, but always claimed the same, and I further find that defendants never made any objection to such claim. It is true that they created a frame building in rear of the Tindale block, which would interfere with the right of way 10 feet wide if it were projected at right angles to the lane from the rear of the 90 feet lot. But, as a matter of fact, the evidence did not establish that the right of way was so located or used or recognized, but that, on the contrary, the yard as a yard was used as a right of way to reach the premises in question. It was really no obstruction to plaintiff's approach to his premises, because in approaching the premises in the most convenient way it was necessary to go to the rear of the yard, and make the approach in the form of a circle, in order to bring the waggon near the place of delivery, and in doing this the building which is said to have formed the obstruction would not be in the way. But, if there were a slight obstruction, the injury to plaintiff was inappreciable, and he did not complain, and all the parties acquiesced in the user of the way, notwithstanding the erection of the building without objection. The fence was moved back for the purpose of giving additional room to turn by reason of the building having encroached on the yard as formerly used, and the authorities are clear that, defendants having placed the obstruction in the way, plaintiff was entitled to use so much more of defendants' land as would be necessary to give him a reasonable use of the right of way. What is a reasonable use is a question of fact. . . .

[Reference to Hawkins v. Carbines, 27 L. J. Ex. 44; Selby v. Bettlefold, L. R. 9 Ch. 111.]

I am therefore of opinion that defendants have wrongfully interfered with plaintiff's right of way by erecting the building complained of.

But it is further objected on the part of the defence that even admitting plaintiff's claim to the right of way to the 90 feet lot, this does not entitle plaintiff to use the right of way for the adjoining premises subsequently acquired, namely, the 30 feet adjoining, and there is no doubt, I think, that this contention is well founded: Harris v. Flower, 21 Times L. R. 13; Purdom v. Robinson, 30 S. C. R. 64.

I may further observe that the present is a general right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, and that the grant is not to be restricted to access to the land for the purpose for which access would be required at the time of the grant: Finch v. Great North Western R. W. Co., 5 Ex. D. 254.

Plaintiff has a right to use the way for his business upon the property to which the way appertains, and he is not restricted to the quantum or nature of business carried on at the time of the grant, but he is not entitled to use it as a way to the property adjoining the dominant tenement, namely, the 30 feet.

In the present case plaintiff, as a matter of fact, for many years used the way in question, not only for the 90 feet, but for the adjoining 30 feet, and it is, as his evidence shewed, largely upon the use of the way for the 30 feet that he now insists. To this he has no right . . . and the judgment should be so limited. Whether such right exists under the deeds of the 10 and 20 feet lots, I refrain from considering, as the question was not raised in the pleadings not taken at bar.

A great deal of evidence was given as to the space required for waggons to conveniently turn in, using the right of way. It was shewn that the waggons ordinarily used were about from 23 to 25 feet in length, and I think the judgment in this respect, following Knox v. Sansom, will do substantial justice in declaring that the right of way which was granted included the right to turn waggons not exceeding 25 feet in length for the purpose of them backing to the place of delivery or leaving the premises.

This is a case where I think a part of plaintiff's claim may be compensated in damages. It fills the requirements

of what is called a good working rule, that the injury to plaintiff is small and one which is capable of being estimated in money and which can be adequately compensated by a small money payment. The case is one in which it would be somewhat oppressive to grant the injunction in its full measure, notwithstanding the risk assumed by defendants in completing the building after notice. I therefore give defendants a right, instead of removing the building they have erected, to allow the same to remain, plaintiff to have the right to use the way as heretofore up to the line of the building, and that the right of way shall be freely used, not only for the 90 feet, but for the whole 120 feet. Doubtless plaintiff will suffer some slight inconvenience by closing the door through which he now receives goods, but from the evidence I am satisfied that the inconvenience will be very slight, and that it has been more than compensated for by his having heretofore used the right of way in question for the 30 feet as well as for the 90 feet lot. Defendants are to signify their election within 30 days; otherwise the mandatory order to go for the removal of the building, and in that case the order is to contain a clause limiting the use of the way to the 90 feet as used heretofore.

I do not think there should be any order as to costs. Plaintiff claimed more than he was entitled to by insisting that he had the right to use the way for the 30 feet lot . . . Defendants denied that plaintiff was entitled to any right of way. Each having succeeded in part and failed in part, there should be no costs.

MABEE, J. JULY 5TH, 1906.

WEEKLY COURT.

RE SINCLAIR AND TOWN OF OWEN SOUND.

Municipal Corporations—Local Option By-law—Motion to Quash—Vote of Ratepayers—Town Divided into Wards—Right of Persons Owning Property in Different Wards to Vote more than once—Voters Deprived of Right—Confusion from Colour of Ballot Papers—Persons Voting without Right—Irregularities in Voting—Effect on Result—Municipal Act, sec. 204.

Motion to quash a local option by-law of the town of Owen Sound.

W. Nesbitt, K.C., J. Haverson, K.C., and W. H. Wright, Owen Sound, for the applicant.

A. G. MacKay, K.C., and E. E. A. DuVernet, for the town corporation.

MABEE, J.:—On 1st January, 1906, a local option by-law was submitted to the electors in Owen Sound, and there were 2,000 votes recorded as having been cast, 1,238 in favour and 762 against the by-law, which was therefore declared carried by a majority of 476.

Upon well-established practice, based upon a long line of authorities, the Courts do not interfere with this preponderating will of the electors except for the clearest and plainest reasons. . . .

The first ground was that the by-law was not "duly approved of" by the electors of Owen Sound, in that the ratepayers in the different wards were not allowed to vote upon the by-law in the different wards where their names appeared upon the voters' lists. It appears that in Owen Sound there are 257 persons rated for property in more than one ward, and these persons have a total of 573 votes among them, and the above objection deals with this class of voters, those who were promoting the by-law contending that this class could only vote once upon this by-law; and, appended to a large poster, over the signature of the town clerk, is the following notice: "Electors are hereby notified that in the coming municipal elections, electors who desire to vote for candidates for mayor or councillors, or for the local option by-law, must vote in the polling subdivisions in which they reside, and there only; and if not qualified to vote in the polling subdivision in which they reside, then at the polling subdivision where they first vote, and there only, excepting for school trustees and by-laws creating a debt. But for the said school trustees and by-laws creating a debt they may vote in every ward in which their names appear on the voters' list. 'Any person who votes more often than he is entitled to under the provisions of this Act shall incur a penalty of $50.' Sec. 162, par. (1), ch. 19, Consolidated Municipal Act."

It was not suggested that there is any authority in the Act for giving a notice of this sort, and it seems to have been a

matter under discussion prior to the vote, . . . whether property owners had the right to vote in each ward where their names appeared upon the lists; those advancing the interest of the by-law, it is said, being advised one way and those opposed being advised the other way. The town clerk was a friend of the by-law, and having issued a notice like the above without any legal authority for so doing, it may not be unfair to assume that the friends of the by-law had feelings of distrust as to the property-owners' vote. All the deputy returning officers were notified by the clerk to refuse ballots to any voter who had voted upon this by-law in another ward. In order that no injustice should be done to the clerk, it should be stated that he was acting upon the advice of solicitors . . . and no bad faith is imputed to him.

It is then necessary to consider which side was right upon this contention.

Sec. 141 of R. S. O. 1897 ch. 245 provides that "local option" by-laws, before being finally passed by the council, must be "duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act." Turning to the Consolidated Municipal Act of 1903 (3 Edw. VII. ch. 19), secs. 338 to 374 are those that provide for the assent of electors being obtained to municipal by-laws, sec. 355 providing that where a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law. It was contended by counsel for the respondents that sec. 355 did not apply, as Owen Sound is not divided into wards, and he relied for this upon by-law No. 853 enacted in 1898; but this by-law does not abolish the wards in the town, and merely provides that the council shall be composed of a mayor and one alderman for each one thousand of the population to be elected from general vote. The clerk says there are 4 wards, Bay, Centre, River, and West, and that all money by-laws since he has been clerk have been voted upon in the different wards; the notice above adverted to recognizes the existence of wards. The original Act of incorporation, 19 Vict. ch. 18, sec. 4, makes provision for the town being divided into 3 wards, and it is said this was increased to 4 in 1889. I

think these continue to exist, and that Owen Sound is divided into wards within . . . sec. 355.

It was then contended that sec. 355 had relation only to the class of by-laws mentioned in secs. 353 and 354, that is, by-laws for "contracting a debt," or more commonly spoken of as money by-laws. These sections appear in their present form in 1903, as pointed out in Re Dillon and Village of Cardinal, 10 O. L. R. at p. 374. "The sections in that behalf in the Municipal Act," that is, the sections providing for the assent of electors to by-laws before being finally passed by the council, referred to in the local option section, 141, are these sections 338 to 374, and they all apply as far as may be necessary to work out the intent of the legislature, and I am of the opinion that sec. 355 must also be read as applicable to a vote upon a by-law of this character, and that each ratepayer had a right to vote in each ward in which his name appeared upon the voters' list.

If this is the proper conclusion upon this point, then what position does this by-law stand in? The persons whose names appeared upon the voters' list in more than one ward were persons owning property in more than one ward. The property owners may be those most interested in a by-law of this nature, and we have, during the progress of the election, a notice, having the official authority of the clerk, that this branch of the electorate will render themselves subject to penalties if they exercise their rights of voting in the way I think the law entitled them. If necessary one might speculate in various ways how this might "affect the result of the election." I think the applicant is entitled upon this motion to have it taken for granted that all the members of the class of persons struck at by this notice would have voted against the by-law, and therefore 316 votes against the by-law were prevented from being polled. It was contended that there was nothing to shew that any of the 573 voted, and that this alone disposed of the majority in favour of the by-law. If this is so, the by-law must clearly be set aside. On the other hand, if the 257 are assumed to have voted, then the majority of 476 is reduced to 160.

Then it is shewn by the applicant that over 100 votes were polled by persons who had for various reasons no right whatever to vote. It was contended this was not open for consideration upon this motion. This point has been discussed

in Re Salter and Township of Beckwith, 4 O. L. R. 51, 1 O. W. R. 266; Re Coe and Township of Pickering, 24 U. C. R. 439; and in Re Dillon and Village of Cardinal, 10 O. L. R. at p. 375, 5 O. W. R. 653, 750. I have no doubt that the fact of persons voting who had no right to vote is an element for the consideration of the Court upon a motion to quash. It may not, standing alone, be sufficient, except in a very extreme case. Of course the sections relating to scrutiny have nothing to do with this feature of the case, but, to my mind, it is one of the matters that must be considered in determining whether the voting "was conducted in accordance with the principles laid down in this Act:" see sec. 204. It is not known how these votes went, although it appears that some at least who had no votes not only voted but were very energetically supporting the by-law. So it is not possible to say that they should not be deducted from the 160 left, thus reducing the majority to below 60.

It seems to me, however, that this motion should not be disposed of as to the point under consideration upon the ground of speculating in figures. The passing of this by-law by the council is one very materially affecting the people of Owen Sound. It should be before the electors for their sanction in a manner perfectly fair to the interests of both sides; let any amount of argument and appeal to reason be advanced by the opposing factions, and upon a fair vote let the result stand. Section 204 makes the widest possible provision for non-interference by the Court for non-compliance with the provisions of the Act as to taking the poll or counting the votes, or by reason of any irregularity, if it appears that the election was conducted in accordance with the principles of the Act, and that the mistake or irregularity did not affect the result. Is an election conducted in accordance with the principles of the Act when, let it be by ever so innocent a mistake, a large class of the electorate, and very possibly those, from a property point of view, the most interested in the vote, have practically a threat of prosecution pointed at them if they exercise their franchise? I think not. To my mind it is utterly opposed to everything that is fair, and is not at all in accordance with the principles of the Act. Then, how can it be said this did not affect the result, even regarding it as a mistake or irregularity? It was done for some object; the statute did not require it; it is not unfair to assume that it was intended to affect the result; who can say what the

result would have been had it been known beforehand by this class of voters that they could poll among themselves alone 316 more votes? I think it did affect the result.

I do not think, however, that sec. 204 can be invoked in favour of the by-law, as I do not think this is the sort of mistake or irregularity that that section is directed at. The free exercise of the franchise by the voter is the corner-stone of the election law, and I do not think the class of electors intended to be affected by this notice were left free to vote as they had the right to do. It is shewn that the instructions to the deputies were carried out and ballots refused to them in wards where they had the right, as I think, to vote, and I think this first objection standing alone is fatal to the by-law.

The next serious point in this matter is the alleged confusion that arose by reason of the colour of the ballots that were used upon this vote. A by-law authorizing the loan of $25,000 to the Keenan Woodenware Company was being submitted to the electors at the same election, and upon these two by-laws coloured ballots were used, for the local option by-law a bright red ballot, and for the Keenan by-law a pinkish red. Frederick W. Lyons, who was a scrutineer in division No. 8 Centre ward and 8 Bay ward, says that during the day at his booth voters had a great deal of difficulty in distinguishing between these ballots, and that they frequently returned to the deputy returning officer to have pointed out to them which was the local option and which the Keenan by-law, and that he believes some voted for the local option by-law believing they were voting for the Keenan by-law. Joseph P. Raven, a banker, says that while he was present at this same poll a clergyman, who had stated his intention of voting for the Keenan by-law and against the local option by-law, voted for the latter by-law, mistaking the ballot used, and that it was not until he was returning his ballots to the deputy that he discovered his mistake, whereupon he spoiled his ballot and received a new one. Mr. Raven further states that from what was stated by several voters at the poll, and from the difficulty he himself had in distinguishing the ballots used from their similarity in size, colour, and the printed matter, he believes several persons at this poll voted for local option who intended to vote against it. Nelson Lefflar was the deputy at this poll, and makes an affidavit in which he states that "in two or three instances I was asked

which was the local option by-law, and in two or three instances which was the Keenan by-law, but this only occurred at the time I was handing out the ballots, and before the parties had an opportunity of reading what was written thereon, and arose, I understood, from the unusual number of ballots and large number of candidates. In no instance, to the best of my recollection, did any voter return from the polling compartments to ask me for such information or anything in relation thereto." He does not notice the affidavit made by Mr. Raven. Many affidavits are filed stating that the various deponents heard of no confusion owing to the similarity of these ballots. I am of opinion that, owing to their similarity in colour, in size and form, . . . the very greatest confusion was likely to arise and did arise. It is true that errors were just as likely to cut one way as the other, and the friends of the by-law were as likely to lose as to gain by reason of mistakes of voters, but this is no answer to the objection. Voters should not be subjected to this sort of confusion; there is no reason why these ballots should have been in such form, colour, and size as to open the door to error; and if a clergyman and banker found difficulty, and the former actually fell into error, and would have been made to vote in a way he did not intend had he not discovered the mistake at the last moment, where may this confusion not have extended among less intelligent and illiterate voters? I think, in view of the greatly reduced majority this by-law must be regarded as having been carried by, if the bad votes are discarded and the votes in different wards added, the confusion arising over these ballots may have affected the result.

The applicant complains of many irregularities connected with this vote, and certainly very many existed. I do not propose dealing with them in detail, as, in my view, the by-law must be set aside upon the grounds already indicated, and most, if not all, of these irregularities would fall within sec. 204. The clerk himself in his examination for discovery says: "The voters' lists used were all mixed up. . . . There has been no revision the last two years. . . . We had two or three elections when the lists were used, and we had to put in a heap of things, and they got all mixed up."

The clerk entirely omitted to comply with the provisions of secs. 152 and 348 of the Consolidated Municipal Act of

1903, but, instead thereof, he seems to have furnished each of the deputies with a large printed column intituled "Voters' Lists of the Town of Owen Sound;" and on the back he wrote the following: "December 26th, 1905. I solemnly declare that this is a true copy of the last revised voters' list. Chas. Gordon, clerk."

Many irregularities are attributable to the carelessness of the deputy returning officers; one instance will suffice. James Buchan was deputy returning officer in No. 10, and Joseph Millburn, poll clerk; the deputy certified that all the entries required by law to be made had been made in the poll book. There were 267 votes recorded at this poll, yet the poll book does not shew that a single voter voted upon either of these by-laws. All the columns provided in the book for shewing the voters voting for mayor, alderman, school trustee, by-law 1172, by-law 1178, plebiscite, are blank.

Many declarations that should have been attached to the books filed upon this motion are missing, and it is suggested they were put in the ballot boxes instead and were all destroyed with the ballots on 24th April.

Very many glaring omissions and irregularities appear in connection with the proceedings upon this vote, leading to the irresistible conclusion that the election officials were selected without regard to fitness, or they exhibited a lack of attention to legal requirements most difficult to understand. These remarks of course do not apply to all connected with the election, but unfortunately to many of them.

I think the by-law must be quashed with costs to be paid by the town corporation to the applicant.

The following authorities were referred to upon the argument: Re Cartwright and Town of Napanee, 11 O. L. R. 69, 6 O. W. R. 773; Re Pounder and Village of Winchester, 19 A. R. 684; Re St. Louis and Reaume, 26 O. R. 460; Re Young and Binbrook, 31 O. R. 108; Re Salter and Beckwith, 4 O. L. R. 51; Re Pickett and Wainfleet, 28 O. R. 464; Re Dillon and Village of Cardinal, 10 O. L. R. 371, 5 O. W. R. 653, 750; Re Vandyke and Village of Grimsby, 7 O. W. R. 739; Re Kelly, 3 O. W. R. 765; Re Huson and South Norwich, 21 S. C. R. 677; Re Tolmie and Campbell, 1 O. W. R. 268.

BRITTON, J. JULY 6TH, 1906.

TRIAL.

GREEN v. GEORGE.

Judgment—Issue as to Validity of Default Judgment—Motion to Set aside Judgment after 15 Years—Personal Service of Writ of Summons—Misrepresentation as to Service—Agreement to Give Time for Payment of Claim Sued for—Form of Judgment — Special Indorsement of Writ — Price of Goods Sold — Interest — Judgment Set aside — Terms — Merits—Costs.

On 30th July, 1809, William George began an action by the issue of a writ of summons against P. J. Green. On 6th October, 1890, judgment was signed against Green for default of appearance for $2,411.84 debt and $23.63 taxed costs.

No execution issued at the time of signing judgment, nor were there any further proceedings then taken against the judgment debtor.

William George died on 29th September, 1904, and Mary George, his widow, obtained letters of administration to his estate. On 20th January, 1906, Mary George as administratrix obtained an order directing that the action be continued in her name as plaintiff against P. J. Green as defendant.

On 25th January, 1906, an order was obtained for the issue of an execution on the judgment, notwithstanding that six years had elapsed since the judgment. Execution was issued, and a seizure was made thereunder. The sheriff of the district of Nipissing was appointed receiver to get in and receive any money coming to Green from or in respect of his interest in the south-east quarter of the north half of lot 14 in the 1st concession of Bucke, in the district of Nipissing, to the extent of plaintiff's judgment and costs.

Green applied to the Master in Chambers to set aside the writ of execution, the receiving order, the order of revivor, and the judgment, upon the following, among other, grounds, viz.:—

1. That he was never served with the writ of summons.
2. That judgment was never signed and entered.

3. That the judgment, if signed, was obtained by misrepresentation as to the service of the writ of summons.

4. That the order of 25th January, 1906, was made ex parte.

5. That he had a good defence to the action on the merits.

Upon the return of the motion the Master directed an issue to be tried. In the issue P. J. Green was made plaintiff, and Mary George, administratrix, defendant, and the issue was "whether or not the said P. J. Green is entitled to have the alleged judgment in this action set aside and vacated."

This issue was tried before BRITTON, J., at Pembroke.

W. R. White, K.C., and J. G. Forgie, Pembroke, for plaintiff in issue.

C. Millar and C. McCrea, Sudbury, for defendant in issue.

BRITTON, J.:—At the close of the evidence and argument I found the facts as follows:

1. The writ of summons, specially indorsed in form, was personally served . . . upon Green on 31st July, 1890.

2. That the alleged agreement on the part of George to give time to Green until he could pay the amount which Green owed to the firm of George and Green, and which Green assumed at the time of the dissolution of the partnership, provided only that Green would pay in instalments of not less than $25 a month, was not proved. . . .

I now deal with the points reserved:

1. Objection that judgment was never signed and entered herein.

Mr. Williams, a student in the office of the solicitors for George, on 6th October, 1890, attended at the office of the local registrar at Pembroke, searched for an appearance, and, finding none, made an affidavit of non-appearance, filed it together with a bill of costs, which the local registrar taxed, and the original writ of summons, with an affidavit of personal service of a copy of it. And there was then written out the form of judgment as follows:

(Style of cause.)

"The 6th day of October, A.D. 1890. The defendant not having appeared to the writ of summons herein, it is this day adjudged that the plaintiff recover against the said defendant $2,411.84 and $23.63 costs."

The local registrar did not on that day sign this paper on its face, but it was properly stamped, and indorsed upon it are the words:

"Minute of judgment. Judgment signed 6th October, 1890." And this indorsement was duly signed "Arch. Thomson, L.R., H.C.J."

Mr. Thomson also indorsed this paper, "Received and filed this 6th day of October, 1890. Arch. Thomson, Clerk."

On the following day a memorandum was made by Mr. Thomson in the judgment book in his office, and in that book Mr. Thomson signed the entry, and then upon the paper above mentioned, on the margin, Mr. Thomson wrote "Entered in Liber C. folio 123, Oct. 7, 1890;" and he signed "A. T., L. R."

I am of opinion that what was done in this case was a substantial compliance with Rules 764 and 775 of the Consolidated Rules of 1888.

I find that there was no misrepresentation as to the service of the writ. It may be that Mr. Green's recollection as to service of writ is not accurate because of his supposing, if he did so suppose, that having made an assignment for the benefit of his creditors—having made a complete surrender—nothing more could be done in the action George had instituted. Mr. Green does not suggest this, nor does he say that there was any understanding or agreement with Mr. Delahaye as a consideration for making the assignment. It appears that shortly after the assignment, Mr. George was willing to accept 25 cents on the dollar in full settlement, so I infer that at that time Mr. George was not very anxious to get a judgment, and that Mr. Green was not very anxious to prevent a judgment going.

Mr. Green—plaintiff in the issue—urged upon the trial the further objection that the judgment by default could not stand, because the writ was not properly specially indorsed. Was this writ specially indorsed so as to entitle plaintiff to sign final judgment by default in case of non-appearance? The point presents considerable difficulty. I have looked at a great many cases—those collected by Mr. Middleton in his

instructive article in 13 C. L. T. 66, and others, and, not without some measure of doubt, I have reached the conclusion that the indorsement under consideration was not sufficient.

The writ was indorsed as follows: "The plaintiff's claim is for the price of goods sold and delivered by the plaintiff to the defendant, the account for which goods has been stated between the plaintiff and the defendant. The following are the particulars:—

"April 4, 1890. To balance due the plaintiff on an account for goods sold and delivered by him to the defendant, and which account has been rendered by the plaintiff to the defendant and admitted by him to be correct and stated between them, and which balance of account has also been rendered by the plaintiff to the defendant and admitted to be correct, and stated at the sum of $2,389 46
July 29, To int. for 3 5/6 months at 6 per cent.. 45 79

$2,435 25

Cr.

April 19. By cash $50 00
July 29. " int. for 3 1/3 months at 6% 83

50 83

$2,384 42

"And the sum of $50 for costs, and if the amount claimed be paid to the plaintiff or his solicitors within eight days from the service hereof, further proceedings will be stayed."

This writ was issued on 30th July, 1890, so proceedings are governed by Rule 245 of the Consolidated Rules of 1888. There were 4 classes of matter for which there would, then, be special indorsement, where the claim was for debt or liquidated demand, with or without interest, arising upon a contract, express or implied, as for instance:

(1) Upon bill or note or cheque or other simple contract debt, or

(2) On bond or contract under seal for payment of a liquidated amount of money, or

(3) On a statute when the sum sought is a fixed sum or in the nature of a debt, or

(4) On a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, etc.

This claim is for a debt or liquidated demand, so far as the indorsement alleges an account admitted by the defendant, and stated between the parties at the sum of $2,389.46. The claim for interest on this amount is not, under the authorities, shewn to be properly the subject of special indorsement. It is not alleged that upon the account as rendered there was any claim for interest, or that interest was in any way demanded, or that defendant would be charged with interest, or that he promised to pay interest. Nothing is set out or stated from which a promise to pay interest can be implied. . . .

[Reference to Rodway v. Lucas, 10 Ex. 667; Huffman v. Doner, 12 P. R. 492; Hay v. Johnston, 12 P. R. 596; MacKenzie v. Ross, 14 P. R. 299; Hollender v. Ffoulkes, 16 P. R. 175; Sheba Gold Mining Co. v. Trubshawe, [1892] 1 Q. B. 674; Wilks v. Wood, ib. 684; Gold Ores Reduction Co. v. Parr, [1892] 2 Q. B. 14; Munro v. Pike, 15 P. R. 164; Solmes v. Stafford, 16 P. R. 78, 264; McVicar v. McLaughlin, 16 P. R. 450; Clarkson v. Dwan, 17 P. R. 92; Appleby v. Turner, 19 P. R. 145; Anlaby v. Prætorius, 20 Q. B. D. 764; Smurthwaite v. Hannay, [1894] A. C. 501.]

Since the cases above cited Rule 603 has been amended by the addition thereto of sec. 3, permitting, upon motion for judgment, any amendment of the writ which might be ordered on a substantive motion.

That does not assist in the present case, where defendant has not appeared. Where an appearance has been entered, the defendant can always resist summary judgment if the writ was really not properly specially indorsed, or if there is reasonable ground for disputing the claim.

In this case there was nothing proved that would entitle George as of right to interest. There was no express or implied promise to pay interest.

The $2,389.46 as indorsed on writ was made up as follows:—

George and Green partnership account, August 22, 1889		$2,672 07
Certain items down to November 19, 1889		23 10
Interest to November 19, 1889		61 00
		$2,756 17
Less cash	$246 25	
Account	7 20	
		253 45
		$2,502 72
April 4, 1890, 3 months' interest		37 54
		$2,540 26
Less cash	$150 00	
Interest	80	
		150 00
		$2,389 46

The beginning of the account was the partnership debt of George & Green to George of $2,672.07. It was not shewn that there was any promise to pay interest on that, nor did it appear that Green knew of the account being increased in amount by the large charges for interest. Merely upon the question of Green's want of knowledge of or indifference to the amount of the claim, it may be noted that, although Green got credit by indorsement on the writ for the $50 paid on 19th April, 1890, and although this same credit was given on the account filed with the assignee, he, by error, omitted the credit in his statement of claim, and George's claim was placed upon the notice to creditors at $2,435.61.

Upon the whole case I am constrained to hold that plaintiff in the issue is upon terms entitled to have the judgment set aside and vacated.

Upon the trial the merits were gone into, and I found, although perhaps not necessary for disposing of points reserved, that plaintiff in the issue was, when the writ of summons issued, indebted to the late William George in the amount claimed apart from interest. The judgment should be set aside only upon such terms as will be a fair and just protection to defendant in the issue.

It would be a great injustice to defendant in the issue not to impose terms. The facts are altogether exceptional. In allowing plaintiff in the issue costs to the extent I do, the imposition of terms is in my power; and, even without that, it is, in my opinion, in my power in this case to do so, and if wrong it must be for an appellate Court to so say. The terms are that an appearance shall be entered by the plaintiff in the issue within 10 days, and that all necessary time shall be extended to defendant in the issue for proceeding with that action. She shall have two weeks from the entry of appearance for the delivery of the statement of claim. The action shall be tried without either party, so far as the Court can prevent it, being prejudiced by the delay. The receiving order will stand, and the receiver will be continued, and the money will remain in his hands for the settlement of such claim as Mary George, administratrix, may establish in the action. Plaintiff in the issue is to get costs of the motion to set aside the judgment to be taxed, and costs of the issue and trial of the issue, which I fix at $100. Plaintiff in the issue set up that the writ was not personally served, and made contentions not established, so that he is not entitled to all the costs of that issue. These costs are to be set off against such claim as the defendant in the issue may establish. The costs of the action and the trial of it are reserved, and may be disposed of by the trial Judge. If these terms are not accepted by plaintiff in the issue, judgment will be entered for defendant in the issue without costs.

TEETZEL, J. JULY 7TH, 1906.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. GRAND TRUNK R. W. CO.

Specific Performance—Contract to Divide Specified Land to be Acquired by Defendants — Acquisition by Defendants of Part only—Claim of Plaintiffs to Half of Land Actually Acquired—Right to Less than Half with Abatement in Price.

Action for specific performance of an agreement to divide certain lands.

E. D. Armour, K.C., for plaintiffs.

M. K. Cowan, K.C., for defendants.

TEETZEL, J.:—In 1901 the Ontario government was proposing to sell a tract of land lying between the tracks of plaintiffs' and defendants' railways and east of Pacific avenue in the city of Toronto. The situation of the property made it of special value to each of the two companies for shunting and storage grounds, and the officers of both companies were desirous of acquiring the whole or a portion of the property.

With a view of preventing competition between the two companies as purchasers, an arrangement was entered into as set forth in a letter from Mr. McNichol, vice-president of plaintiff company, to Mr. Wainwright, . . . comptroller of defendant company, dated 1st June, 1901, as follows:—"As per conversation to-day, we will make no attempt to acquire the land in question, the understanding being, however, that we will have the right to purchase from you the half of such land surrounded green on the enclosed blue print which I have initialled, any time within 5 years from this

date, for one-half the amount you pay for the land in question, plus 5 per cent. per annum."

This proposition was accepted by Mr. Wainwright, but no formal agreement was ever entered into by either of the companies.

The blue print plan referred to in Mr. McNichol's proposition shewed the whole property to be triangular in shape, and "the half of such land surrounded green." . . . to be the northerly half adjoining plaintiffs' railway.

The government withdrew from sale a portion of the land situate at the north-west angle, which I should estimate . . . at about 2 acres, thus reducing to that extent the area of the portion proposed to be acquired by plaintiffs.

Plaintiffs contend that under the agreement they are entitled to a conveyance of the northerly half of the land actually acquired by defendants, and are not limited to the remainder of the northerly half of the original triangle with an abatement from the purchase price, and in this action claim judgment for an equal division of the land acquired by defendants and specific performance by a conveyance of the northerly half.

In order to obtain this equal division it is necessary to throw the dividing line indicated on the blue print further south, in order to take in sufficient extra land to compensate for the loss occasioned by the withdrawn portion. The parties neglected to make provision for any such contingency.

In the conveyance tendered for execution and in the statement of claim there is included a portion of land in respect of which no agreement was made giving plaintiffs any right or interest therein, nor is there any agreement entitling plaintiffs to a declaration that they are jointly interested with defendants in the whole property. The agreement was limited in its terms to specific property, and of course cannot be enlarged by the Court.

For this reason, and without determining whether the agreement was for any purpose binding upon defendants as a railway corporation, I think plaintiffs' action fails and must be dismissed with costs, but without prejudice to any action which plaintiffs may be advised to bring in respect of the remainder only of the northerly half of the original triangle, with an abatement of the purchase price.