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APPELLATE DIVISION.

May 5th, 1914.

Re TAYLOR.

Assignments and Preferences—Assignment for Benefit of Creditors—Claims upon Insolvent Estate—Contestation by Creditor in Name of Assignee—Order of County Court Judge Permitting — Jurisdiction — Assignments and Preferences Act, R.S.O. 1914 *ch.* 134, *sec.* 12, *sub-secs.* 1, 2.

Appeal by the assignee for the benefit of creditors of J. G. Taylor, an insolvent, from an order made by a County Court Judge, under sec. 12 of the Assignments and Preferences Act, R.S.O 1914 ch. 134, giving one John A. Lawson, a creditor of the insolvent, leave to contest the claims upon the estate of certain persons. Leave to appeal was given by Falconbridge, C.J. K.B., ante 175.

The appeal was heard by Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ.

R. W. Hart, for the appellant.

W. H. McFadden, K.C., for Lawson, the respondent.

The judgment of the Court was delivered by Mulock, C.J. Ex.:—The debtor made an assignment of his estate to Blain for the benefit of creditors; and certain of the debtor's relatives filed claims against the estate. The assignee, on instructions from the inspectors, decided not to contest these claims. Thereupon one Lawson, a creditor, on application to the Judge of the County Court, obtained an order authorising Lawson, upon getting security, to contest these claims for his own benefit, but in the assignee's name; and the 3rd clause of the Judge's order

is as follows: "And it is further ordered that any benefit derived from such proceedings shall, to the extent of the claim of the said John A. Lawson and full costs, belong exclusively to the said John A. Lawson."

From this order the assignee appeals, on the ground that the learned Judge had no jurisdiction to grant such an order.

On behalf of Lawson it is contended that sec. 12 of the Act respecting Assignments and Preferences by Insolvent Persons, being R.S.O. 1914 ch. 134, confers such jurisdiction. Sub-section 1 of sec. 12 is as follows: "Except as in this section is otherwise provided, the assignee shall have the exclusive right of suing for the rescission of agreements, deeds and instruments or other transactions made or entered into in fraud of creditors, or in violation of this Act."

Then follows sub-sec. 2 of sec. 12, which declares: "Where a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the assignee, under the authority of the creditors or inspectors, refuses or neglects to take such proceeding, after being required so to do, the creditor shall have the right to obtain an order of the Judge authorising him to take the proceeding in the name of the assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee as the Judge may prescribe, and thereupon any benefit derived from the proceeding shall, to the extent of his claim and full costs, belong exclusively to the creditor instituting the same for his benefit," etc.

We think that these two sub-sections must be read together, and that the proceeding contemplated by sub-sec. 2 is one which, if successful, recovers some asset for the estate.

The successful resistance of a creditor's claim adds nothing to the assets, although it reduces the amount of creditors' claims.

If the learned Judge's order were allowed to stand, then the effect of it would be that, should Lawson succeed in defeating the claims in question, he would rank on the estate with creditors not in respect of a creditor's claim, but because of his defeating a claim to be a creditor.

We are of opinion that the section is not open to such construction, and that this appeal should be allowed.

We are not satisfied with the conduct of the assignee; and, therefore, we give him no costs, either here or below.

JUNE 8TH, 1914.

LANGLEY v. SIMONS FRUIT CO.

Assignments and Preferences—Transfer of Goods by Trader to Creditor—Insolvency of Transferor—Warehouse Receipts —Bills of Sale and Chattel Mortgages Act—Impeachment of Transfer as Fraudulent Preference — Responsibility of Transferee—Measure of—Goods of no Value.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 104, dismissing the action.

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

W. S. MacBrayne, for the appellant.

H. Howitt, for the defendant company, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellant is the assignee for the benefit of creditors of the Better Fruit Distributors Limited, and the action is brought to recover from the respondent the value of a quantity of apples which it received from that company shortly before the assignment was made.

The apples were received by the respondent under the provisions of two documents called warehouse receipts, signed by the company, dated respectively the 7th November, 1912, and the 5th December, 1912, by the first of which the company acknowledged that it held in storage on the respondent's account, and properly and sufficiently protected by fire insurance, 3,000 barrels of apples, which are stated to be "held in the warehouse rented by the company in Hamilton from the Armstrong Cartage and Storage Company, and will be shipped out as requested by you" (i.e., the respondent), and by the other of which the company acknowledged that it held in storage, on the respondent's account, in its warehouse at the top of Victoria avenue, Hamilton, Ontario, 4,500 barrels of apples, which the company agreed to keep insured in the respondent's favour for one month, and were to be shipped to the respondent's houses in either Liverpool or Glasgow from time to time and be "handled on commission there and net proceeds after deducting $1.50 per barrel previously advanced by" the respondent on them "to

be paid over to the company." These documents were given in consideration of large cash advances made by the respondent to the company, no part of which was repaid by the company, and the respondent received from the company 4,021 barrels of apples, which were delivered to them in pursuance of the warehouse receipts between the 7th December, 1912, and the 25th January following, and were shipped to England, and there sold on account of the company.

The respondent realised nothing from these shipments, but, after paying expenses of various kinds, there was, as the learned Chief Justice found, a deficit of $35.51.

The securities held by the respondent are attacked by the appellant on the ground that they are void under the Bills of Sale and Chattel Mortgages Act, and the delivery of the apples to the respondent is impeached as a fraudulent preference.

In the view we take, it is unnecessary to consider the elaborate and lengthy arguments addressed to us as to these contentions. Assuming both contentions of the appellant to be well-founded, the appellant is not entitled to recover, on the short ground that the measure of the respondent's liability is the value of the apples, and that was nothing, as was demonstrated by the result of the respondent's dealing with them.

It was argued by counsel for the appellant that the respondent is chargeable with what is said to have been the value of the apples at the time they were received by the respondent, and that they could have been sold at that time for as much as $1.25 to $2.50 per barrel.

I am not satisfied that the evidence establishes this; but in any case the shipment of the apples to England was the ordinary method of disposing of them, and the company was an assenting party to their being dealt with in that way, and it could not be heard to complain because that course was taken, and the appellant stands in this respect in no better position than the company.

The appeal should be dismissed with costs.

JUNE 8TH, 1914.

MANCELL v. MICHIGAN CENTRAL R.R. CO.

Contract—Agreement of Railway Company to Furnish Special Car for Transport of Horses to Fair—Breach—Damages—Limitation of Liability—Freight Tariff—Failure to Take Initiatory Steps towards Transportation—No Necessity for Tender of Horses—Authority of Agent of Company—Items of Damages—Loss of Advertising by Failing to Shew Horses at Fair—Evidence—Knowledge of Agent.

Appeal by the defendant company from the judgment of FALCONBRIDGE, C.J.K.B., in favour of the plaintiff for the recovery of $1,989, in an action for damages for the defendant company's breach of an agreement to furnish a palace horse-car to take the plaintiff's horses to Guelph Fair, whereby, as the plaintiff alleged, he lost his entry fee, prizes, etc.

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

W. B. Kingsmill, for the appellant company.

J. G. Kerr, for the plaintiff, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The telegraphic correspondence shews a request from Fletcher to St. Thomas for the Ames palace horse-car on the 27th November, 1913, from St. Thomas to Detroit on the 29th November, and from Detroit to Chicago on the 3rd December. On the 4th December, Detroit advises St. Thomas that the New York Central Railroad Company will deliver car at Suspension Bridge, and that it should reach St. Thomas at 6 p.m. on that day. Apparently there was a misunderstanding, as the New York Central on the 6th deny the receipt of any order. On the same day, the respondent notified the appellant that he would make claim against them for damages, it being too late to get ready to load. The tariff put in at the trial as that on file with the agent at Fletcher was relied on as limiting the appellant's liability. But it is apparently one issued and signed by Eugene Morris, and is headed on each page, "Eugene Morris Freight Tariff 130 F." Who Eugene Morris is does not appear, but from a perusal of the book he would seem to hold a power of attorney from numerous railway companies as agent.

This may be a convenient compilation of various tariffs, classifications, and rulings, but, from all that appears, has no authority under the Canadian Railway Act, and may have no official standing in the United States. The general application of the tariff, as stated on pp. 58 and 61, does not cover Michigan Central points in Canada, except to and from United States points. I can see no reason or authority for allowing its provisions to affect the liability of the appellant in this case.

I do not think that the respondent cancelled the order in the sense of abandoning it or calling it off when the appellant was in process of preparing to perform it. The pencil memorandum entry on exhibit 12 filed by the appellant, dated the 6th December, is: "Shipper would not load after midnight Sunday; says will put claim in against company." It was also objected that the respondent should have tendered the horses for carriage. I think the undertaking to have a car in readiness for the horses imposed an obligation to take initiatory steps towards transportation, and that the respondent was justified, on discovering the lack of efficient action, in treating that as a breach of contract sufficient to relieve him from the necessity of bringing the horses forward. I agree with the judgment in appeal that the agent's authority was sufficient to bind the appellant in such a case as this, which does not appear to be an unusual one.

The judgment in appeal allows all the respondent swore to: (1) entry fees, $54; (2) extra labour, etc., fitting horses, $300; (3) extra blacksmithing, $60; (4) extra feed, grain, and hay, $325; (5) extra expense of carrying the animals until the 1st May, $500; (6) loss of advertising, $500. It also allows for loss of profit, $250. The respondent swore that he would have made $1,000 profit on his horses if he had sold them all, as he thought he could, and he figures this on the basis that they would have taken places as prize-winners. I do not think that this item can be disturbed. It is obviously an allowance such as a jury might make. I have, however, doubt as to the award of $500 for loss of advertising.

The respondent, speaking of the loss of opportunity to exhibit as related to value in his business from advertising, says: "Judging from what advertising costs in other ways and the ways of advertising in papers, I figure the loss on advertising that I lost at this show was $1,000." Watson puts it that to sell the horses a man has to establish a reputation, and exhibiting is the principal way he gets advertising.

The respondent admits that this class of advertising depends

somewhat on whether his horses win prizes or not. But I cannot find in the evidence anything that indicates that the agent of the appellant was aware that failure to carry would or might result in such an injury to the respondent's business as a breeder of pure Clydesdale horses.

Hoy admits that he knew that the horses were to be exhibited at Guelph, and it is fair to conclude that he knew that the respondent would or might lose sales if the animals were not there to be seen. But beyond that I do not think the evidence goes.

The respondent says in cross-examination, in reference to his conversation with Hoy: "I just simply asked him to get me a 16-stall palace-car to take the horses to Guelph;" and that was all he said. In re-examination he goes a little more into detail, and says that Hoy knew what was going on at Guelph, as he had told him on previous occasions. But this does not touch the point that, while the probable loss of local sales might be obvious to an agent of the appellant, it is not specially brought home to him that the object or one of the objects of the sender was to obtain such advertising there as would take the place of newspaper advertising, and that the absence of the horses would probably reduce his profits by loss of future custom. For that reason I do not think that the case of Kennedy v. American Express Co. (1895), 22 A.R. 278, applies, as it otherwise would, to support this item of damages. I do not think that possession of this point of view, peculiar to the business and founded on experience in it, can be imputed as knowledge to every wayside agent of a railway company, and it is not suggested in the telegraphic correspondence that any special notice reached any higher official than Hoy.

I think that the judgment should be reduced to $1,489, and that, with that variation, it should be affirmed, but without costs of appeal.

JUNE 8TH, 1914.

ARMOUR v. TOWN OF OAKVILLE.

Contract—Work and Labour—Construction of Sewer System for Municipality — Interpretation of Contract — Bonus—Cost of Work—Extras.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 5 O.W.N. 980.

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

T. N. Phelan, for the appellant.

M. K. Cowan, K.C., and J. P. Crawford, for the defendants, the respondents.

The judgment of the Court was delivered by HODGINS, J.A.:—The argument for the appellant, reduced to its simplest form, is, that the total cost is a mere matter of adding to the $81,418.35 any extras at the contract-price, and deducting any omissions according to the same standard, quite irrespective of the actual cost of the work under the original contract or of the additions.

This seems to be an unreasonable position to put the respondents in, having regard to the fact that they had to finish the work by day-labour and pay the total cost. They must have had it in their minds that the bonus was to repay the appellant for keeping the actual cost down, and not for keeping an account for the purpose of making a calculation, useless for every purpose but that of establishing a fictitious standard of cost. The appellant admits that the account he kept was of the actual cost, but admits that he did not keep an account of how far the extras exceeded the contract figures.

It must be borne in mind that the respondents were the absolute masters of the situation, and, in finishing the work so mapped out in the Lorenzo contract, they were not hampered by any of the distinctions so carefully drawn between essential details under clause 9, and those which were in fact extras or additions. They contemplated finishing the work, but it and any additional extras or essential details would be the work of which the total cost was to be ascertained.

The provisions, so carefully arranged for all these, came to an end when Lorenzo defaulted, and they are only of value in enabling this Court to deal with the meaning and effect to be given to the contract sued on.

The bonus depends first on the total expenditure, and then on certain deductions from that sum. The words "total cost" are ambiguous, and the Court must be guided in their construction by the context and the circumstances in which the parties then were: Bank of New Zealand v. Simpson, [1900] A.C. 182; Gerow v. British America Assurance Co. (1889), 16 S.C.R. 524; Black v. Toronto Upholstering Co. (1888), 15 O.R. 642. The

particulars of the original contract, the default, and the subsequent arrangement for day-labour, as well as the fact that the next highest tender to Lorenzo's was for $103,000, are all relevant to the inquiry, and were properly put in evidence. While mention is made in the contract sued on of the plans and specifications of the Lorenzo contract, and particularly of clause 12, dealing with extra work and omissions, it is worthy of note that where work was not to be done by the respondents themselves, the schedule price in the earlier contract is adhered to. Part of the work known as "disposals" had been let to other contractors, and it is provided that it is to be taken as part of the cost at the agreed amount under the Lorenza contract, viz., $11,374.74. This is in ease of the appellant. Again the "laterals" or private drain connections, although considered an extension under clause 12, are not to be counted in the cost. No provision is made for calculating withdrawals, no doubt because clause 12 allows for them either the arranged contract-cost, or such sum as the engineer considers just and reasonable, and the words "aggregate value" are used only where the amount of these withdrawals is to be deducted from additions and enlargements.

The agreed cost, $115,922.08, is the difference between the total expenditure, $120,388.84, and $4,466.76, the credits given in exhibit 2 for Lorenzo's deposit forfeited and other items realised upon.

From this net total of		$115,922.08
the appellant deducts the cost of disposals	$12,190.79	
and laterals (as calculated on the Lorenzo contract basis)	10,629.70	22,820.49
Leaving a balance of		$ 93,101.59

To this balance		$ 93,101.59
should be added the three items provided for in the appellant's contract:—		
1. Disposals	$11,374.74	
2. Work done by Lorenzo	2,826.18	
3. Plant left by Lorenzo	224.00	$ 14,424.92
		$107,526.51

To this should also be added, as stated in the appellant's contract, his wages at $30 per week, say	1,500.00
	$109,026.51
Deducting the excess of extended over diminished work as stated by the appellant............	17,220.36
Leaves the total cost as arrived at by the appellant's method at	$ 91,806.15

I can find nothing in the ingenious argument of Mr. Phelan that leads me to think that the judgment is wrong. The only clause the reason for which is not clear is that excluding from the cost the excess of additions over withdrawals. But, whatever standard of cost is adopted, the result will be the same, and I would reject as unsound the argument that, if the additions are to be taken at actual cost, the omissions or diminutions must, therefore, be rated at an artificial standard before being deducted. The only reason for allowing the $816.05 in addition to the $11,374.74 (making up the item of $12,190.79) is that it is work actually done, and therefore included in the total of $115,922.08.

On the reference, the Master, in addition to determining the actual cost of the items $22.130.36 and $10,629.70, as directed in the judgment, should ascertain the amount of the appellant's wages and add to the cost as per the contract. With this slight variation, the judgment should be affirmed with costs. The formal judgment does not contain the direction that before the reference is proceeded with each party is to name a sum it is willing to give or receive. That should be embodied in the order on this appeal.

JUNE 8TH, 1914.

MASSIE v. CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO.

Arbitration and Award—Action to Enforce Award or Valuation Made by two of three Arbitrators or Valuers—Construction of Submission-agreement—Validity of Award or Valuation —Claim for Reformation of Agreement—Evidence—New Trial.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., ante 161.

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

H. Cassels, K.C., for the appellants.

Shirley Denison, K.C., for the defendants, the respondents.

The judgment of the Court was delivered by HODGINS, J.A.: —I was under the impression during the argument that Mr. R. S. Cassels had given evidence of an agreement that an award by a majority of the valuators would bind both parties. I find, however, that, in words at all events, his evidence only goes this far, that he was satisfied with the draft form submitted (exhibit 4), provided the referee was agreed upon first.

This position was accepted by the respondents, and accordingly the name of Edward Morgan as third valuator appears in the agreement, exhibit 1. But there is nothing which states or even inferentially suggests that a definite agreement upon the point so fully argued before this Court was made in so many words. . . .

This completely disposes of the claim for reformation, and reduces the dispute to this question: is the effect of the agreement arrived at, and in which the third valuer is named as desired by Mr. R. S. Cassels, to allow an award by the two valuers to govern?

I think it is quite clear that, in dealing with the construction of the document in question, evidence of the intention of one of the parties, or indeed of both, cannot be given. The Court cannot look at the draft, exhibit 4, in order to see whether Mr. R. S. Cassels's view as to its effect when the third valuer's name

was inserted in it, is correct or not, and then compare it with the agreement in question in order to arrive at its meaning. All that the Court can do is to construe the agreement as it stands, bearing in mind that the parties had failed, through their representatives Hickson and Garland, to agree.

Dealing with it then in that way, its contents may be summarised as follows:—

There is by it a reference of the question of the amount of compensation to the "determination of Joseph Hickson, as valuer appointed by the railway company, and Nicholas Garland, as valuer appointed on behalf of the said owner, and His Honour Edward Morgan, as third valuer."

Then follows a provision that if either of the valuers appointed by the parties respectively, i.e., Hickson and Garland, die, refuse or become incapable to act as valuer, another valuer shall be appointed in his place by the party who had previously appointed such valuer. Then follows a similar right of appointment by a Judge of the High Court Division in case the third valuer shall die, refuse or become incapable to act. But, before this new appointment can be made by a Judge, the two valuers appointed by the parties are to have the opportunity of agreeing upon the amount to be paid as compensation, and if they fail to agree they may themselves appoint a third valuer, in which case the decision of any two is to be conclusive and binding without appeal.

The further clauses provide for the payment of the fees of all the valuers by the railway company and for the finality of the decision of "the said valuers," and that that decision "shall not be subject to appeal from the decision of said valuers or any two of them."

The covenant is that "upon tender of the amount payable . . . as such compensation by the said valuers (sic) with interest" the owner will convey in fee simple.

There is also a paragraph providing for a view by the valuers and for the calling of such witnesses and the taking of such evidence or statements on oath or otherwise as the valuers, "or a majority of them, may think proper," and for the giving of "such weight, if any, to such evidence as they in their discretion think proper."

If the agreement in question had contained merely the appointment of three valuers and the clause dealing with procedure which I have just quoted, and that providing for the finality of the decision, it could hardly be said that two valuers

could not make a valid award: for both these two latter provisions contemplate action by a majority or a decision by two. That which is the most important reads: "The decision of the said valuers shall be faithfully kept and observed, and shall be binding and conclusive upon the railway company and owner, and shall not be subject to appeal from the decision of said valuers or any two of them."

It is said that the words "subject to appeal" are not appropriate to the situation, as, if this is a valuation, there is no appeal. But the sentence may be fairly paraphrased thus, "shall be final and conclusive and shall not be subject to appeal," which is a perfectly proper mode of expressing the finality of an award or of a decision. But for the other provisions of the agreement, it would not be unreasonable to construe that clause as meaning that the decision of any two valuers was to be kept and observed and was to be final and without appeal, for, apart from two provisions to which reference will be made, there would be nothing to which the words "decision . . . of any two of them" could apply except in such a case as exists in the present action.

Then do the other contingencies contemplated in the paragraphs to which reference has been made account for the provision in this clause regarding the decision of any two so as to require it to be confined to those other situations alone? These are: (1) the case of the two valuers appointed by the parties agreeing as to amount, if the third arbitrator has died, refused, or become incapable to act; and (2) where the said two valuers, having failed to agree on the amount, appoint a third arbitrator.

Dealing with No. 1, the expression "any two of them" would be inaccurate, as there are only two left, and to apply the words "any two" requires more than two specified persons. The finality clause cannot, therefore, have reference to that.

As to No. 2, while the words "any two of them" are apt, yet in the provision itself it is said that the "decision of any two of the valuers shall be conclusive and binding without appeal." The further provision in the finality clause cannot, therefore, have been intended to refer merely by way of repetition to this event. Besides this, the expression "any two of them," while appropriate to the case dealt with in (2), is equally so in the event which happened, i.e., "any two" may well include two of those originally appointed.

To my mind, the two situations provided for in what I

have called (1) and (2), in which two valuers may make a valid award, do not account for nor exhaust the provision dealing with the finality of the decision. Indeed, No. 2 in words reproduces almost exactly the position which gave rise to the agreement itself: for here the two valuers chosen by the parties did fail to agree, and in consequence a third was appointed; not, it is true, by the two chosen valuers, but by the parties who appointed them—a distinction without a difference in this case.

It seems incredible to me that the parties, in view of the agreement of reference having arisen out of such a disagreement, should have proceeded in it to solve an impasse which might occur again, but which, if it did, would be practically that in which they then found themselves, and yet left entirely out of sight the very thing they had to deal with, thus settling a contingency only, and not the very problem in hand.

The rule which says that, if the parties agree to leave a matter to the determination of more than one person, they cannot be bound by the decision of a less number than the whole of the agreed tribunal, is merely another way of saying that the parties are held to the contract which they have made. There is nothing that requires more than the ascertainment of what the bargain really is, this being a determination in a private reference, not the performance of a public duty. This appears clearly, if authority is needed, in Grindley v. Barker (1798), 1 B. & P. 229; Re O'Connor and Fielder (1894), 25 O.R. 568.

The result seems to be that this agreement in express words contemplates an award by two valuers in two events, and, in the paragraph which is framed so as to give final effect to the decision of the valuers, recognises it, though not perhaps in exceptionally clear language.

One other consideration, drawn from the document itself, points in the same direction. Two valuers may decide what evidence may be taken, and whether under oath or not. Yet the other valuer, who may possibly dissent from their view as to procedure, would, if the respondents' contention be correct, be required to agree in a result obtained in a way which he did not favour, and upon evidence which he did not desire or ask for. Otherwise no award could be had, and the proceedings taken under the discretion vested in the majority would be useless and a waste of time.

It must be borne in mind that the respondents are given the right to retain possession and to proceed with the construction of their railway. If these proceedings are to be treated as

nugatory, what are the appellants' rights? They have agreed that the compensation is to be determined by three valuers, who have now disagreed. Does this failure to ascertain the amount render the agreement void? If it does, then the arbitration clauses apply, or the Court itself has jurisdiction; and in either event a majority of the tribunal will be able to decide the question.

The question asked by Lord Kenyon, C.J., in Withnell v. Gartham (1795), 6 T.R. 388, may well be repeated in this case: "If they cannot all agree in such a case, how is it to be decided?"

The cases cited do not help very much. Thirkell v. Strachan (1848), 4 U.C.R. 136, decides that where a reference is made to three persons and there is a covenant to abide by their award, or that of a majority of them, the word "arbitrators" would, in dealing with their powers, be construed as including a majority. In In re Kemp and Henderson (1863), 10 Gr. 54, the decision was finally put upon the fact that the arbitrators had not decided all that was referred to them. The point of importance here was not necessary to be decided; and, while the opinion of Esten, V.-C., would seem to be adverse to the appellants' contention, it indicates at all events that the meaning of the whole document governs. The agreement here is *sui generis*, and I can find nothing expressly in point.

I think the appeal should be allowed and the judgment set aside. In view of the statement of the learned trial Judge that his judgment was, for the reasons he gives, in effect a nonsuit, and that the respondents were not called on for their evidence, the case should go back for trial with a declaration that the agreement between the parties provides for a valuation by the valuers named therein or a majority of them, and expresses the true agreement between the parties, and that no case for the reformation thereof was made out. The respondents should pay the costs of the appeal and of the former trial.

JUNE 8TH, 1914.

WILLIAMSON v. PLAYFAIR.

Contract—Transfer of Company-shares—Sale or Pledge—Evidence—Finding of Fact of Trial Judge—Appeal—Liability of Pledgee to Account for Price of Shares Sold.

Appeal by the defendant from the judgment of LENNOX, J., ante 174.

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

Leighton McCarthy, K.C., for the appellant.

Hamilton Cassels, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by MAGEE, J.A.:—It would be difficult, upon the evidence in this case, to come to a different conclusion from that arrived at by the learned trial Judge. The defendant will not deny that he supposed the application to him through Grundy for an advance of the money was made really on behalf of the plaintiff, though he asserts, no doubt, with truth, that he did not know how much the plaintiff was to get, and points to the fact that $10 was in fact retained by Grundy. It is impossible to believe that he considered the plaintiff's note and the shares as two separate and unconnected items of property in the hands of either Grundy, the negotiator, or Stewart, whose name appeared as payee of the note, and who endorsed it without recourse. He is in the position either of having notice that the shares were security for the note in the hands of an existing holder, or that an application was being made to him on behalf of the plaintiff, the maker of the note, for a loan secured by the note and by the shares. If the former, then he cannot resist redemption. If the latter, it may be that he refused to advance the money in that way, and that he required that the sums should be absolutely transferred to him to become his property if the note was not paid at maturity, but none the less he required and obtained the note, and therewith the personal liability of the plaintiff for the amount of the advance, which he has never disclaimed being entitled to, and which in the pleadings he has still insisted upon. A purchase of the shares, such as he asserts took place, would be unconnected with any consideration for the note; and the acceptance of and

insistence upon the latter is irreconcilable with the stand now taken by the defendant.

His idea probably was that expressed upon the face of every mortgage, but which, none the less, Courts of Equity did not and do not give effect to. It would not be a collateral stipulation consistent with the right of redemption such as is discussed in Kreglinger v. New Patagonia, etc., Co., [1914] A.C. 25, but would be inconsistent with the doctrine of Equity which is crystallised in the maxim "once a mortgage always a mortgage," and which is so fully referred to in that case.

The appeal should, I think, be dismissed with costs.

JUNE 8TH, 1914.

*SKEANS v. HAMPTON.

Covenant—Restraint of Trade—Agreement between Master and Servant Made after Commencement of Employment—Consideration—Servant Employed in Soliciting Orders for Master's Goods—Undertaking not to "Engage" in Similar Business within Limited Territory for Defined Period after Termination of Employment—Employment by Another Person in Similar Business—Breach of Agreement—Injunction.

Appeal by the defendant from the judgment of BRITTON, J., 5 O.W.N. 919.

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

H. E. Irwin, K.C., for the appellant.

E. E. A. DuVernet, K.C., and J. C. McRuer, for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O., (after setting out the facts):—It was faintly argued by counsel for the appellant that the appellant had not been given an opportunity of reading and understanding the agreement he was called upon to sign, before signing it, and is therefore not bound by it. This contention is fully answered

*To be reported in the Ontario Law Reports.

by the learned trial Judge, and we see no reason for differing from his conclusion as to it.

The substantial grounds upon which the appeal is rested are two: (1) that there was no consideration for the appellant's promise; and (2) that in doing what he has done the appellant has not committed a breach of his agreement.

As to the first ground, it was contended that, as the agreement which contains the promise was executed after the appellant had entered into the service of the respondent, there was no consideration for the promise, and two cases were cited as supporting that contention: Copeland-Chatterson Co. v. Hickok (1907), 16 Man. R. 610, and Oppenheimer v. Hirsch (1896), 5 App. Div. N.Y. 232.

[Consideration of the first of these cases.]

If it was intended to decide the case on the ground that the consideration for the promise was inadequate, the decision is contrary to English law, which, ever since the case of Hitchcock v. Coker (1837), 6 A. & E. 438, is that the Court will not enter into the question of the adequacy of the consideration for such a promise (Matthews on Restraint of Trade, p. 147 et seq., and Halsbury's Laws of England, vol. 27, para. 1099, p. 566, and cases there cited); and it would appear that the American rule does not differ from the English law in this respect: 22 Cyc. 869.

"Mere employment at will is a sufficient consideration, so is the continuation of an existing employment at will. If the covenantor is already in the employment of the covenantee at the date of the covenant, it will depend upon the particular circumstances of the case whether the covenant was really a part of the contract of service; and, even if it was not, there appears to be sufficient consideration in the fact that if the servant refused to sign the covenant the employer might take the first opportunity of legally determining the service:" Halsbury, vol. 27, para. 1097, p. 565.

This statement of the law is fully supported by the cases cited for these propositions.

The latest case cited is Woodbridge & Sons v. Bellamy, [1911] 1 Ch. 326. . . .

The report of Copeland-Chatterson Co. v. Hickok does not shew whether the agreement, part of which is quoted, contained an agreement on the part of the plaintiffs to employ the defendant, and I am inclined to think that it did not. . . . It is unnecessary to express an opinion as to the correctness of

the decision, which may or may not have been right on the facts of that case. The facts of the case at bar are substantially different, for the agreement contains not only the promise of the appellant which is in question, but also an agreement on the part of the respondent to employ him. Before the execution of the agreement, the appellant was employed practically on trial; and, when the respondent decided that he might safely intrust the appellant with a route, the agreement was prepared for the purpose of evidencing the terms of the contract of hiring. An important factor in the case and one on which Mr. Justice Eve laid stress in the Bellamy case is the fact that the employer made it an invariable rule to require his employees to execute an agreement similar to that which was signed by the appellant.

There was, therefore, in my opinion consideration for the appellant's promise, and the proper inference from the circumstances of this case is that, even if the promise of the appellant did not, though I think it did, form part of this agreement of service, there was a sufficient consideration to support the contract.

The contention that what the appellant had done did not constitute a breach of his promise—that being employed by his brother-in-law to sell teas and coffees was not engaging in the business of selling teas or coffees within the meaning of the promise—is not, in my opinion, well-founded. Having regard to the nature of the appellant's employment with the respondent, the promise binds him not to engage in the business within the prescribed area either on his own account or as the servant or employee of another. . . .

[Reference to Watts v. Smith (1890), 62 L.T. 452.]

I am of opinion that the promise of the appellant means that he "should not go and do that within" the limits mentioned in the agreement "which he until then was doing in the employment" of the respondent, and that "it is sufficiently expressed to prevent" the appellant from "being engaged, that is, being occupied, being a servant in a similar business to that carried on by the" respondent.

See also Anderson v. Ross (1906), 14 O.L.R. 683, and cases there cited.

For these reasons, I am of opinion that the appeal fails, and should be dismissed with costs.

JUNE 8TH, 1914.

*BANK OF BRITISH NORTH AMERICA v. HASLIP.

*BANK OF BRITISH NORTH AMERICA v. ELLIOTT.

Bills and Notes—Cheque Drawn on Bank—Presentment—Dishonour—Notice—Time—Discharge of Endorsers—Bills of Exchange Act, sec. 86—*Clearing House Regulations—Canadian Bankers' Association—Incorporating Act,* 63 & 64 *Vict. ch.* 93 (*D.*)

Appeals by the plaintiffs from the judgment of MIDDLETON, J., 30 O.L.R. 299, 5 O.W.N. 684.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. N. Tilley and G. Larratt Smith, for the appellants.

Eric N. Armour, for the defendants, the respondents.

The judgment of the Court was delivered by MACLAREN, J.A., who, after setting out the facts, referred to secs. 10, 32, 70, 77, 85, 86, 165, 166, of the Bills of Exchange Act, R.S.C. 1906 ch. 119; Tindall v. Brown (1786), 1 T.R. 167, 168; Mullick v. Radakissen (1854), 9 Moore P.C. 46; Wallace v. Agry (1827), 4 Mason (U.S.) 336; Rickford v. Ridge (1810), 2 Camp. 537, 539; Down v. Halling (1825), 4 B. & C. 330; Boddington v. Schlenker (1833), 4 B. & Ad. 752, 758, 760; Moule v. Brown (1838), 4 Bing. N.C. 266, 268; Alexander v. Burchfield (1842), 7 Man. & G. 1061; Owens v. Quebec Bank (1870), 30 U.C.R. 382; Blackley v. McCabe (1889), 16 A.R. 295; Lord v. Hunter (1882), 6 L.N. (Que.) 310; Morse on Banking, 4th ed., para. 422; Daniel on Negotiable Instruments, 6th ed., paras. 605, 1594. He then proceeded:—

The appellants seek to justify their tardy presentment by rule 12 of the Toronto Clearing House. . . . It is unnecessary to consider how far this rule may be binding upon the banks concerned in this matter. . . . The evidence falls far short of proving that this rule has become a usage of trade within the meaning of sec. 86, and one with reference to which the appellants and respondents in these appeals would be presumed to have contracted. . . .

[Reference to the Canadian Bankers' Association's Act, 63 & 64 Vict. ch. 93.]

*To be reported in the Ontario Law Reports.

I do not find anything in the present rules of either the Town Clearing House or the Metropolitan Clearing House of London, as given in Grant on Banking, 5th ed., pp. 68 to 71, that would be a precedent for or would justify rule 12 of the Toronto Clearing House, especially if it be given the meaning contended for by the appellants.

There does not appear to have been much discussion in any of the above cases as to the meaning of the words "in the same place" in speaking of the delivery of a cheque and the bank upon which it is drawn. They appear to have been used in their ordinary sense as meaning the same town or city, especially where it is a distinct business or financial entity. This is the meaning given to them by Crompton, J., in Firth v. Brooks (1861), 4 L.T.N.S. 467; and is particularly appropriate to the city of Toronto, within the limits of which all the offices and places of business affected are situate.

By presenting these cheques at the market branch, through their notary, on the 4th October, and sending out the notices of dishonour, the appellants have treated them as having been dishonoured only on that day. If this assumption be correct, then all that has been said will apply with even greater force, as I have throughout assumed that they were presented on the 3rd. There is some evidence of their having been presented and dishonoured on that day, and very little evidence of presentment will suffice when a cheque is lying at the bank on which it is drawn, and there are no funds to meet it. I do not think that the subsequent futile presentment by the notary would be an abandonment of the benefit of any previous presentment that had been made. Protest of the cheque was unnecessary: sec. 114 (2); proper notice of dishonour was sufficient, and the returning of the bill to the appellant bank within proper time might avail to hold the latter liable.

On the whole, I am clearly of opinion that these cheques were not presented within a reasonable time after their endorsement and delivery by the respondents to the appellant bank, having due regard to their nature as cheques, and to the usage of trade with regard to cheques, and the facts of the particular case. Especially am I of opinion that it was not reasonable that the cheques should be allowed to lie at the head office of the Standard Bank nearly twenty-four hours, allowing the proper time for their presentment at the market branch to pass by, when this branch was only three or four blocks and some five minutes' walk from the head office, and there was noth-

ing to prevent the presentment being made at the proper time. In consequence of such delay, I am of opinion that the respondents as endorsers were absolutely released.

Having come to this conclusion, it is unnecessary to consider whether the mistakes and irregularities in connection with the notice of protest and dishonour would have operated as a release of the respondents if the presentment had been made within the proper time.

In my opinion, the appeals should be dismissed with costs.

JUNE 8TH, 1914.

*HARRIS ABATTOIR CO. v. MAYBEE & WILSON AND BOYD.

Bills and Notes—Cheque—Dishonour—Delay in Presentment—Unreasonableness—Banks and Banking—Bills of Exchange Act, secs. 101, 121, 126*—Liability of Endorser—Protest—Clearing House.*

Appeal by the plaintiffs from the judgment of MIDDLETON, 5 O.W.N. 896.

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

R. J. McLaughlin, K.C., for the appellants.

J. W. McCullough, for the defendant Boyd, the respondent.

The judgment of the Court was delivered by MACLAREN, J.A. (after setting out the facts):—The law on the subject is discussed in the case of Bank of British North America v. Haslip, ante, and I need not repeat what is there said. The first question is, was this cheque presented within a reasonable time after its endorsement by the defendant Boyd so as to hold him liable? There are no special circumstances to take it out of the general rule laid down in the Haslip case. Having been endorsed by Boyd and delivered by him to the plaintiff on the 29th September, it should have been presented to the market branch of the Standard Bank on the 30th September. It was not presented until the 3rd October, at the earliest, and possibly

*To be reported in the Ontario Law Reports.

not until the 4th. No valid reason is given for this delay. The result is, that, in my opinion, the defendant Boyd is released from liability. As pointed out in the Haslip case, he need not shew that, if the cheque had been presented sooner, it would have been paid. He is released by the mere lapse of time, if the delay is unreasonable.

It was strongly argued by Mr. McLaughlin that the custom of presenting cheques through the banks and the clearing house has become so general in Toronto that the defendant Boyd should be presumed to have contracted with reference to it. He cited the case of Firth v. Brooks (1861), 4 L.T.N.S. 467, in support of this proposition, and contended that the propriety of presenting a cheque on a banker in an outside town through the London Country Clearing House was recognised and upheld, although the clearing house had been in operation only eighteen months. It is quite true that the propriety of such a presentment was upheld in that case, but it was upon the express ground that the cheque was presented as soon as if it had been sent through the mail after the old method.

Here the bank on which the cheque was drawn was not more than one hundred yards from the office of the plaintiffs, where it was negotiated, and it is not reasonable that it should have taken from the 29th September to the 3rd October to reach its destination.

Such being the view I take of the case, it becomes unnecessary to consider the question of the protest, which would appear to be superfluous and useless, or the question of the sufficiency of the notices of dishonour.

We are not called upon in this case to consider where the responsibility for the undue delay may lie, and no opinion is expressed on that point. All that we decide is, that we see no reason for disturbing the decision of the trial Judge—that the defendant Boyd is released by the cheque not having been presented for payment within a reasonable time after its endorsement and negotiation by him.

The appeal should be dismissed.

APPELLATE DIVISION.

JUNE 8TH, 1914.

ORTON v. HIGHLAND LUMBER CO.

Contract — Manufacturing Lumber — Quantity and Price — Measurements — Extra Payment or Bonus — Voluntary Promise—Absence of Consideration—Non-performance of Contract—Non-compliance with Condition— Termination by Consent—Reservation of Rights—Findings of Trial Judge—Variation on Appeal.

Appeal by the defendant company from the judgment of LENNOX, J., 5 O.W.N. 438.

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

A. E. H. Creswicke, K.C., and A. B. Thompson, for the appellant company.

M. B. Tudhope, for the plaintiff, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The Court is asked in this case to do what the parties might, when the data were at hand, have readily done for themselves. The lumber, the production of which forms the basis of the present action, has been sold and distributed, and it is not possible to reconcile the accounts given of its measurement with the counts and estimates now put in. The learned trial Judge has seized upon the actual tally kept by Gouin, the trimmer in the mill, as forming the best basis for computing the lumber cut under the contract. There is western judicial authority that a count in that position, i.e., at the saw, is the most trustworthy. See Hunter, C.J., in Lequime v. Brown (1905), 1 W.L.R. 193. No record of the scaling in the woods was put in; there was no measurement just prior to the removal of the product of the mill to Sundridge, immediately after or during piling, so that the matter is left between Gouin's measurement, Tate's estimate, Quance's quantities in the piles at Sundridge, and the car shipments. After endeavouring, in the light of the careful arguments of both counsel, to arrive at a solution, my conclusion agrees with that of the learned trial Judge. The only criticism made by Mr. Creswicke upon which I feel any doubt

is one dealing with Quance's figures upon the piles at Sundridge, they being on the piles and counted in 1911—while their then total is added to the sales shewn up to the 26th January, 1912. It is possible that from the earlier figures should be deducted some of the sales, but no evidence was given of a definite enough nature to enable any one to say to what extent this is true as a fact.

The appellant argued that the learned trial Judge had promised to give a reference, and, instead of so doing, he had disposed of the whole case. It is true that during the trial this point was mentioned, but subsequent events indicate that both the Judge and counsel recognised before the trial closed that the former was intending to decide the question of damages himself. The voluminous written argument put in after the trial are some indication of the view of counsel at that period of time.

On another point argued, I am not able to agree with the judgment in appeal in so far as it allows the respondent the $1 per thousand feet, promised as a bonus. The contract was made on the 11th May, 1910. After that, on the 14th May, 1910, the respondent offered or agreed to give 25 cents a thousand extra, and afterwards raised this to 50 cents and then to $1. But this is expressed as a voluntary promise, and only on condition that the agreement of the 11th May, 1910, is carried out, ''and it is in no way to prejudice the said agreement nor have anything to do with it except as herein stated.''

Two objections are made to its allowance in this action. One is that the promise is nudum pactum, and the other that the promise was conditional upon performance of the contract up to one million feet in the first year.

As to the first objection, it is clear that the contract had been entered into, and that the extra $1 was not to be paid for anything other than the performance of that identical contract. The learned trial Judge treats it as part of the contract-price, but the letter of the respondent dated the 29th August, 1910, seems a complete answer to this position, while the reference to a change manifestly relates to the increase to $1 from 50 cents as previously arranged, and not to a change in the contract. In that letter he says: ''This is entirely voluntary on your part and I do appreciate it very much.'' There is no consideration to support this as a contract to pay. See Harris v. Carter (1854), 3 E. & B. 559, and Fraser v. Halton (1857), 2 C.B.N.S. 512; and compare Wigan v. English and Scottish Life Assur-

ance Co., [1909] 1 Ch. 291, per Parker, J., at p. 297. It is also significant that it is declared on as a separate distinct contract, made at a later date, and not as a change in the original contract.

The other objection is equally formidable. It is admitted that the contract was never carried out, and that a million feet were not cut during the first year. Hence, when the contract was put an end to, there had not been effectual compliance with the condition. It is said that a termination by mutual consent is equivalent to performance. But ending a contract by agreement is to discharge it and not to fulfil it. The appellant appears to have given notice of cancellation pursuant to a term in the agreement, and then both parties join in a writing, reciting that condition and the notice following upon it, and a subsequent cancellation by consent. If it had been intended to preserve the right to a bonus, there should have been mention of it. It was an unusual addition and one generally given only for satisfactory completion. When, therefore, the parties agree to drop matters, it ought to be present to the minds of both that all collateral advantages are abandoned. I think the reservation of the rights in the agreement shews this, for it is expressed in this way: "Provided that this" (i.e., the cancellation by mutual consent) "shall not be deemed to affect the right of the said party of the first part to recover payment of the balance owing to him, if any, for lumber cut and delivered under the said agreement prior to this date." There is no reference in the document of cancellation to any agreement other than that of the 11th May, 1910.

It is not shewn that any specific payments were made on the basis of the extra price. Payments seem to have been made generally, and not so as to amount to a special payment at the definite increased price for a particular quantity of lumber. In the account, exhibit 11, all the payments are shewn to have been made in even hundreds of dollars. By the contract, advances amounting to $11 per thousand feet are to be given before any measurement is made, except upon the skids, on the basis of log measure, and the other instalments are provided for as follows: $2 when the logs are hauled to the mills; $3 when sawn into lumber; and $2.50 when the lumber is piled at the Grand Trunk siding. It is only when shipped that "the balance, by actual measurement, shall be paid when the lumber is shipped away," as put by the learned trial Judge. The $9,100 was paid between the 8th October, 1910, and the 10th March,

1911, and the shipments, according to exhibit 9, filed by the respondent, began on the 28th June, 1911. So that it is fairly clear that the payments meantime were on estimates merely and on the basis of not more than $12.25 per thousand. The amount due on the 29th March, 1911, as per exhibit 33 (C. D. Tait's estimate), was $9,013.54, at the rate of $12.25. I do not think that payments made generally and in advance of measurements, and which slightly overrun what is afterwards shewn to be the vendor's liability, can be treated as conclusively establishing any definite price.

On the 29th May, 1911, the balance had not been agreed upon, nor any account stated, so that I am unable to agree with the conclusion that the payment for the respondent's camp outfit must be treated as shewing an acceptance of the position that the overpayment was recognised, and that the basis of $13.25 and not $12.25 per thousand was adopted.

The utmost that can be said is, that the amount overpaid is not specially referred to as recoverable back, but I think the provision in the contract that the balance over $11 was only to become due and be paid "after actual measurement" saves the appellant's right in that regard. I do not see that in any case any additional amount was agreed upon for soft wood lumber.

I think the question of the 28,000 feet said to have been cut outside the appellant's limit should not be finally disposed of now. If the appellant has to pay it, this judgment should not prevent the appellant making a claim therefor against the respondent, and this may be stated in the judgment.

The result would seem to be that the respondent's recovery should be reduced by the sum of $733, made up as follows: $1 per thousand on 660,714 feet of hardwood and on 72,308 feet of soft wood. Judgment will therefore go reducing the amount found due to the respondent from $1,426.55 to $693.55; and, with that variation, and reserving the right spoken of relating to the trespass, the judgment will be affirmed and the appeal dismissed.

There should be no costs of the appeal.

JUNE 8TH, 1914.

COX v. RENNIE.

Trade Name—Right to Use Partnership Name—Similarity in Firm Name of Plaintiffs—Passing-off—Action for Injunction—Evidence.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., ante 293.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

S. H. Bradford, K.C., and W. H. Ford, for the defendants, the respondents.

THE COURT dismissed the appeal with costs.

JUNE 8TH, 1914.

FIELDING v. HAMILTON AND DUNDAS STREET R.W. CO.

Street Railway—Passenger on "Through" Car—Refusal to Stop Car to Set down Passenger at Intermediate Point—Action for Breach of Contract—Act of Incorporation of Defendant Company, 39 *Vict.* (*O.*) *ch.* 87, *secs.* 8, 13—*Agreement with City Corporation—By-law—Ontario Railway Act,* 3 & 4 *Geo. V. ch.* 36, *secs.* 54, 105, 161—*Ontario Railway and Municipal Board—Right of Company to Operate "Through" Cars.*

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Wentworth, dismissing an action brought in that Court to recover damages for breach of an alleged agreement between the appellant and the defendant company to carry her on the company's railway.

The action was tried with a jury, but the trial Judge held that the action failed, and dismissed it accordingly.

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

W. A. Logie, for the appellant.

Frank McCarthy, for the defendant company, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellant was the holder of a ticket of the respondent entitling her to be carried on its railway from any point in the city of Hamilton to any other point within the limits of that city. She took passage at the terminal station in Hamilton, on a car which was routed to run through without stop to Dundas. Her purpose was to leave the car at a stopping place known as Flatt avenue, within the limits of the city of Hamilton. On her presenting her ticket it was refused by the conductor of the car, who told her she must get off at Hess street, where the car was required to stop before crossing an intersecting railway line, and when the car stopped there the appellant left the car.

The car was a through car, routed to run to Dundas without stopping, and upon it was a sign-board with the words, "Hatt street station only—no intermediate stops;" Hatt street station being the terminal station at Dundas. In addition to this, the conductor, before the car left the terminal station at Hamilton, went through the car and called out that it was going through to Dundas, and there would be no intermediate stops. The appellant testified that, if this was done, she did not hear it, and she did not see the sign-board or know that the car would not make intermediate stops between Hamilton and Dundas.

The question for decision is, whether, as the appellant contends, she was entitled, on presentation of her ticket, to be carried on the car on which she had taken passage to the stopping-place at Flatt avenue and to have had the car stop there to enable her to disembark; or, as the respondent contends, it was entitled to run a car which did not stop between Hamilton and Dundas, and to refuse to carry upon it a passenger intending to stop at an intermediate stopping-place or to stop there to let off a person who had mistakenly or otherwise taken passage on the car.

The respondent was incorporated by 39 Vict. ch. 87 (O.) By this Act the respondent was authorised and empowered to construct, maintain, and operate a double or single line of railway upon and along such portions of the streets and highways within the limits of Hamilton as should be authorised by by-law

of that city, and also upon and along the streets and highways in the townships of Barton, Ancaster, and West Flamborough, and the town of Dundas, and upon, along, and over any private property in those townships, under and subject as to the streets and highways to any agreement between the respondent and the municipality, and under and subject to any by-law or by-laws of the council or councils of such municipalities passed in pursuance thereof.

The Act contains no provision as to the places at which the cars are to stop or as to the establishment of stopping-places.

Section 8 defines the powers of the directors, and confers upon them the widest possible powers for the management of the railway, the only limitation of its powers being as to the fares to be charged

By sec. 13, the councils of the municipalities mentioned in the Act and the respondent are authorised to enter into agreements as to, among other things, "the time and speed of running the cars" and "generally for the safety and convenience of the passengers;" but there is nothing that, at all events in express terms, authorises the councils to regulate the places at which the cars shall stop to take on and discharge passengers.

Under the authority conferred by this Act, an agreement was made between the Corporation of the City of Hamilton and the respondent on the 8th May, 1897, and a by-law was passed by the council of the corporation on the 4th June, 1897.

Neither the agreement nor the by-law contains any provision as to the places at which the cars of the respondent shall take on and discharge passengers, except a provision which is found in sec. 14 of the by-law that the respondent shall run cars on its railway "as the public convenience may require, under such directions as the city council may from time to time prescribe," and a provision found in sec. 19 that the cars to be used on the railway "shall be run as the said council shall provide, and as often as public convenience shall require or the said council shall prescribe."

The by-law also provides that the respondent may "charge and collect from every person on entering any of" its "cars or carriages for riding any distance on" its "railway within the city on the same continuous route a sum not exceeding five cents" (sec. 19 (b)); and the respondent is required by sec. 19 (o) to keep tickets for sale at some place in the business portion of the city convenient for the people and on its cars, and to "sell

tickets to persons desiring the same at a rate not exceeding 25 cents for 6 tickets for fare to any point on their line within the city limits."

There is nothing in the Ontario Railway Act, 3 & 4 Geo. V. ch. 36, to control the right of the respondent to regulate the places at which its cars shall stop, although ample power is conferred on the Ontario Railway and Municipal Board to make regulations as to it. By sec. 105 (3c), authority is conferred on the Board to direct railway companies to stop their "cars to take on and discharge passengers at such points as the Board may deem proper," and by sec. 161 railway companies are required, when directed by the Board, "to maintain and operate stations with sufficient accommodation or facilities in connection therewith as are defined by the Board at such points" on the railway as are designated by the order.

So far from there being any limitation imposed by the Act upon the right of railway companies to operate their railways as they may deem best, among the powers conferred upon them by sec. 54 is the power to "take, convey and carry persons and goods on the railway and regulate the time and manner in which the same shall be transported. . . . ." This power is of course subject to be controlled and regulated by the Ontario Railway and Municipal Board under the authority conferred upon it by the Act, and is subject to the terms of any agreement which a company has entered into with a municipal corporation and to the terms of the company's Act of incorporation.

It may be that, under the terms of the agreement with the Corporation of the City of Hamilton, the respondent's rights in respect of the matters to which I have referred are subject to regulation by by-law of the council of the city; but, if the council has that power, it has not been exercised.

It was strenuously argued by counsel for the appellant that the obligation imposed upon the respondent by its Act of incorporation and its agreement with the Corporation of the City of Hamilton as to the fare to be charged for "riding any distance" on the railway "within the city in the same continuous route," has the effect of requiring the respondent to stop its cars at any point in Hamilton at which a passenger desires to disembark; but that is not, in my opinion, the effect of this provision; and it is not inconsistent with the right of the respondent to run a particular car from its terminal in Hamilton to Dundas without making any intermediate stop. One can well understand

that such a service would be a public convenience to persons who desired to travel from Hamilton to Dundas at the time the car upon which the appellant took passage left Hamilton (6.15 p.m.), and that the efficiency of the service would be destroyed if the respondent was bound to stop the car at any point on its line at which a passenger desired to disembark.

Apart from regulation by the Ontario Railway and Municipal Board, or some provision of the Act of incorporation or agreement, I can see no reason why the respondent should not have the same right as a steam railway company to run cars or trains from one point on its line to another without making any intermediate stops; and of the right of a steam railway company to do this there can be no doubt.

It is unnecessary, in the view I take, to consider what is the effect of the direction made by the Board on the application of certain residents of Dundas for a better service between that town and Hamilton. According to the testimony of the respondent's superintendent, the direction was that the respondent should put on a through car between those points to run through without stops, and that the car in question was put on and run in obedience to that direction. It is sufficient to say that, if the other objection to the appellant's contention did not exist, this direction would probably be a formidable difficulty in the way of her success.

In my opinion, the learned Judge of the County Court rightly held that the action failed, and his judgment should be affirmed and the appeal be dismissed with costs.

JUNE 8TH, 1914.

*RE CLANCY and SCHERMEHORN.

Landlord and Tenant—Lease—Agreement to Determine Tenancy—Surrender by Operation of Law—Authority of Solicitor—Necessity for Writing—Landlord and Tenant Act, R.S.O. 1914 *ch.* 102, *secs.* 3, 4.

Appeal by the tenant from an order of the Judge of the County Court of the Counties of Lennox and Addington granting the landlord's summary application, under the Overhold-

*To be reported in the Ontario Law Reports.

ing Tenants sections of the Landlord and Tenant Act, for possession of the demised premises, and directing the issue of a writ of possession, with costs.

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

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

C. A. Moss and J. E. Madden, for the landlord, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The appellant leased a farm from the respondent by indenture of lease dated the 20th February, 1912, for three years from the 1st March, 1912, at a rental of $260 for that year and $300 thereafter, payable on the 1st September and 1st February in each year. The learned County Court Judge made an order under the Landlord and Tenant Act in favour of the respondent, upon the ground that a surrender by parol had taken place which put an end to the term created by the written lease.

There is no doubt that the appellant told the respondent in January, 1914, that he intended to leave the farm on the 1st March, 1914, he having practically rented another farm from one Wood, and that thereupon the accounts between them were taken up by the solicitors for each party. The letters exchanged shew that on the 30th January, 1914, the appellant's solicitor sent a letter containing a statement of account and cheque for $111.85, which he claimed was the balance due on the 1st February, 1914, but up to 1st March, 1914, and stating that, if repairs were not made without delay, the tenant would have to find other premises, and requesting to be notified that the appellant could give up possession. In reply to this the appellant's solicitor was told in writing that the appellant was free to leave any time he wished. Having requested further confirmation that the appellant would be free to leave any time before the 1st March, 1914, the respondent's solicitor on the 6th February, 1914, expressed by letter the willingness of the respondent that the appellant should leave the premises any time that month, provided the balance of the rent was forthcoming, and asking to be advised that the appellant would leave on or before the 1st March, 1914. The reply to this on the 7th February, 1914 (spoken of as exhibit 7), agrees to that understanding, and gives notice that the appellant would leave the farm on the 1st March, 1914, and promises to endeavour meantime to get the

claim for rent adjusted without proceedings. The accounts were adjusted, and the sum of $24.90 was paid on the 9th February as the balance of the rent up to the 1st March, 1914. The respondent relied on the agreement thus come to as a surrender, and based his right to possession thereon. The appellant resisted, upon the ground that what occurred did not amount to a valid surrender in law, not being by deed or in writing signed by him, and that his solicitor's authority was not shewn to be in writing.

On the first branch of the case the learned County Court Judge states his finding as follows: "The evidence satisfies me and I find that the effect of the correspondence between the solicitors was an agreement between the parties to determine the tenancy on the 1st March, 1914, and that the notice contained in exhibit 7 was sufficient in form and substance, coupled as it was with the settlement of the accounts which formed the basis or ground upon which the acceptance of Clancy's offer to free Schermehorn from the lease was given, to estop the tenant from denying that the tenancy has ended."

Reliance was placed upon the case of Fenner v. Blake, 82 L.T. R. 149, 69 L.J.Q.B. 257, [1900] 1 Q.B. 426, as shewing that such an agreement as the above created a new tenancy in lieu of the existing tenancy, thus working a surrender by operation of law. . . .

The reasoning by which such a dealing is held to result in a surrender is, that, the lessor having no power to grant a new lease, except on the footing that the old lease is surrendered, the lessee, being a party to the grant of the new lease, is estopped from denying the surrender. I do not think this case comes within the scope of that decision, if it should be followed. The agreement here was at best but a written notice in February that the appellant would leave the farm on the 1st of the next month, assented to by the respondent. No new tenancy for twenty days can be found, and the learned County Court Judge, while applying the case just quoted, states that "the net result is that the parties here, through their solicitors, made an agreement as to an alteration of the date at which the tenancy was to be determined, and reduced the term by twelve months, and that the tenancy ended on the 1st March instant."

Fenner v. Blake contains another and more satisfactory reason for the conclusion stated in it. It there appeared that the landlord had, relying on the new arrangement, agreed to sell the land, and the rule of estoppel owing to change of position was applied. This factor is absent here, and it may be well

to note that Fenner v. Blake seems upon its first branch to be opposed in principle to Wallis v. Hands, [1893] 2 Ch. 73, and to be cited chiefly upon the second ground taken by the Court. See Redman, 6th ed., pp. 514, 516; Woodfall, 19th ed., p. 353; Foa, 5th ed., p. 615. It was urged here that the respondent had settled the accounts between him and the appellant on the faith of the arrangement to give up possession, and in so doing had given up claims which he might have pressed. This is relied on in the judgment in appeal. It seems, however, to have no foundation in fact. The earliest letter in the correspondence filed, 30th January, 1914, was accompanied by a statement of account which shewed the amount of rent due, the payment and items of set-off claimed by the appellant, and contained a cheque for the balance thus shewn to be due. In the reply the items objected to are detailed, and amount to $24.90, the sum afterwards paid by the appellant.

These two letters shew that the question of leaving had nothing to do with the settlement of accounts; all the items except those making up $24.90 being accepted by the respondent. The appellant in his turn agreed to pay, and did pay, the $24.90 without further question. I am unable to agree with the learned County Court Judge that the respondent gave up anything in consequence of the settlement of accounts. He did so before any agreement was made as to when the appellant might leave, and there was no further rent due. If the latter remained in possession after the 1st March, 1914, he continued liable for the rent and responsible for breaches of covenant, unless these latter have, apart from the agreement in question, been waived by the respondent.

The law laid down in Stait v. Fenner, [1912] 2 Ch. 504, 513, and quoted in the judgment appealed from, is inapplicable, because the term has not been validly terminated. The advertisement for a tenant is not sufficient to estop the appellant. The act done must be one inconsistent with the continuance of the lease: Oastler v. Harrison (1877), 2 Q.B.D. 575; Smith v. Blackmore (1885), 1 Times L.R. 267; Redpath v. Roberts (1800), 3 Esp. 225; Phené v. Popplewell (1862), 12 C.B.N.S. 334; Carpenter v. Hall (1865), 16 U.C.C.P. 90. It is interesting to note the observations made by the authors of Smith's leading Cases, 11th ed., pp. 846-7, and by Mr. Foa in his 5th edition, of the present year, pp. 614-5-6, upon the subject of estoppel by representation such as occurred here, and a change of position consequent thereon.

Upon the other branch of the case, namely, that the authority of the appellant's solicitor to write exhibit 7 should have been, but was not, in writing, the learned County Court Judge deals with this by saying that, if the parties could end the tenancy themselves, it could be equally well done through solicitors, otherwise their usefulness would be gone. This seems to me to overlook the provisions of sec. 3 of R.S.O. 1914 ch. 102, under which no lease of any lands shall be surrendered unless by deed or note in writing signed by the party surrendering the same or his agent thereunto lawfully authorised in writing or by act or operation of law. This section does not apply (sec. 4 of the same Act) to a lease not exceeding the term of three years from the making thereof, the rent upon which reserved to the landlord during such term amounts to two-thirds at least of the full improved value of the thing demised.

The lease here was made on the 20th February, 1912, and is for three years from the 1st March, 1912; so that, apart from the question of the proportion of the rent to the value of the land, it was required to be, and was in fact, made by deed.

I think the appeal must be allowed with costs, and the order appealed from set aside with costs, with an order for re-delivery of possession, if the writ has been executed by the Sheriff.

JUNE 12TH, 1914.

NATTRESS v. GOODCHILD.

Limitation of Actions—Possession of Land for Statutory Period —Sufficiency of Possession—Cesser of Occupation during Winter of each Year—Acquisition of Statutory Title—New Trial.

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 156.

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

M. K. Cowan, K.C., and J. W. Pickup, for the appellant.

M. Sheppard and S. Cuddy, for the defendants, respondents.

THE COURT ordered a new trial; costs of the last trial and of this appeal to be disposed of by the Judge at the new trial.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. JUNE 8TH, 1914.

CANADA PINE LUMBER CO. v. McCALL.

Contract—Sale of Timber—Delay in Delivery—Inspection—Time of Shipment—Evidence—Custom of Trade.

Action to recover $2,868.97, the price of timber sold by the plaintiffs to the defendant.

G. H. Watson, K.C., and A. L. Fleming, for the plaintiffs.
W. E. Kelly, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B.:—I find that the preponderance of evidence is against the defendant as to the matters set up in para. 2a of the statement of defence, and that his recollection is at fault when he thinks that he inspected, or was led to believe that he inspected, every stick in the bay at Kearney; but that the fact is, as stated by H. Brennan, Corcoran, and McKenny, that whatever pines the defendant called for were canted for and inspected by him, constituting about 75 per cent. of the lot, and that the remaining 25 per cent. were not inspected, because he did not ask for them.

The contract is made between two business men, and there is nothing in it about the time of shipment. H. Brennan states that the time of shipment was not even mentioned before the contract was signed. The defendant declares that he had Brennan's assurance as to the time of delivery, and so it did not occur to him to have it in writing. If so, that is his misfortune, for I cannot reform the contract on that contradictory testimony. There has been no such custom of the trade established as would justify me in finding that the parties contracted with reference to it.

It is to be observed that the first complaint of the shipments not being made in time is in the defendant's letter of the 30th September. The delay in delivery was due to matters not within the control of the plaintiffs, viz., the action of the Government in taking stop-logs out of the dam and so lowering the water. This might not excuse the plaintiffs if they had actually contracted to ship within a certain time: Ford v. Cotesworth (1868), L.R. 4 Q.B. 127.

The contract says: "The grade of the timber to be accepted as made, except that the Canada Pine Lumber Company are to keep out what they consider the poorest 10 pines."

I find that the defence fails on all points.

Judgment for plaintiffs for $2,727.38, with interest from the 30th September, 1912, and costs.

MEREDITH, C.J.C.P. JUNE 8TH, 1914.

BRETT v. GODFREY.

Vendor and Purchaser—Agreement for Sale of Land—Writing Evidencing Completed Bargain—Finding of Fact—Inability of Vendor to Make Title—Knowledge of Purchaser—Absence of Deceit—Damages for Breach of Contract—Limitation to Amount of Expense Incurred by Purchaser—Recovery of Small Sum—Costs—Discretion.

Action for specific performance of an agreement for the sale by the defendant to the plaintiff of certain lands in the city of Toronto, or for damages for breach of contract.

J. M. Ferguson, for the plaintiff.

Armour A. Miller, for the defendant.

MEREDITH, C.J.C.P.:—The much greater weight of the testimony, and of the evidence, is on the plaintiff's side of this action: the witnesses are two to one in his favour, and the admitted circumstances surrounding the transaction are quite strong against the defendant's contention; the one circumstance favouring him—the retention by him of the contract in question—is, not unreasonably, explained in the testimony of the plaintiff, and of the land agent through whom the transaction took place, and who has now no pecuniary interest in the matter; whilst the facts of the execution of the contract and the payment of the deposit to be made under its terms, as well as other circumstances, making strongly against the defendant's contention, have not been satisfactorily explained by him, and no other person testified in his behalf; so it cannot but be found that the written agreement in question was intended to be and comprised a completed and binding bargain between the parties, and that it was not merely an escrow; and I so find.

And so the single substantial question now involved in the action is—what is the proper measure of damages? The exception applicable to cases of sale of land, from the usual rule respecting damages for breach of a contract of sale, which is exemplified and fully discussed in such cases as Bain v. Fothergill (1874), L.R. 7 H.L. 158, is one which, having regard to the intricacies of title to lands in many cases, and to other exceptional circumstances attending the sale and conveyance of land, seems to me to have been not only a permissible one, but also, for practical purposes, a necessary one; the only doubt raised in my mind upon this subject is, whether the exceptions from the ception have gone far enough; whether, for instance, they ought not to include such a case as this. But they do not; it is within the exception to the rule, and is plainly covered by the decision by, and the opinions expressed in, the case of Bain v. Fothergill, which firmly established this rule, that, if a person enter into a contract for the sale of land, knowing that he has no title to it, or any means of acquiring title, the purchaser cannot recover damages for loss of his bargain, unless he can prove a right of action for deceit. To quite the same effect is the latest case upon the subject in this Court: Ontario Asphalt Block Co. v. Montreuil (1913), 29 O.L.R. 534.

There is no allegation or proof of deceit; the purchaser knew that the title was in a land company, not in the vendor, who was but a shareholder and a director of the company, entitled substantially to one-fifth only of the 300 feet of land out of which the 60 feet in question were to be sold; and who seems to have believed, when the agreement to sell was made, that his fellow-directors would be willing to join with him in giving a valid conveyance; which, according to his testimony, they afterwards refused to do.

Though one may be somewhat suspicious of a statement that the vendor did all that he could do to procure for his purchaser title to the land sold, there is not sufficient evidence upon which to base a finding that it was in his power to do so, but that he abstained for the purpose of making more out of the land, or for any other deceitful purpose.

The plaintiff's damages are, therefore, limited to the amount of the expenses incurred by him in the transaction; which I assess at $10.

There will be judgment for the plaintiff and $10 damages, with costs of action upon the Supreme Court scale, without any set-off of costs. I exercise my discretion, in that respect, not

because the plaintiff cannot have damages for loss of his bargain, though in some cases that circumstance does not seem to have been altogether without weight in dealing with the question of costs, but because I think the defendant might have found some means, not involved in a legal right, by which he might have kept his bargain unbroken, and that the additional price obtainable and afterwards obtained for the land by him, as well as by the other four persons interested in it, at least was not an inducement to him to apply as fully as he might such means. Out of the additional $300 received by him, and which was one of the consequences of his breach of contract, he can doubtless pay these costs, and yet have some of the money to the good.

LENNOX, J. JUNE 11TH, 1914.

WRIGHT v. TORONTO R.W. CO.

Costs—Motion to Set aside Award—Costs of Reference—Motion to Vary Judgment.

Motion by the defendants to vary the judgment of LENNOX, J., ante 119, upon a motion to set aside an award, by relieving the defendants from payment of the costs of the reference, or, alternately, for leave to appeal.

D. L. McCarthy, K.C., for the defendants.
W. H. Wallbridge, for the plaintiff.

LENNOX, J.:—Mr. McCarthy asks me to vary my judgment to the extent of relieving the defendants from payment of the costs of the reference, or, alternatively, to give the defendants leave to appeal. The parties having since proceeded to trial upon the basis of my judgment, without either of them questioning it in any way, I think it would be unfair to open the matter now. Aside from this, I think that a proper disposal of the costs was made. The award was set aside solely because of the failure of two of the arbitrators to appreciate the duties they were called upon to discharge. The action of Mr. McCarthy and Mr. Johnston in endeavouring to keep the costs as low as possible was eminently proper, and there was nothing at all in what they tentatively arranged to preclude either of them

from subsequently giving evidence; and nothing to give even a colour of justification to these arbitrators ultimately refusing to hear evidence; yet, as a matter of fact, they seem to have seized upon this as an excuse. This, however, was only another reason for setting aside the award—if this had stood alone I would have remitted the matter to them to take evidence. The award was set aside owing to actual misconduct of two of the arbitrators. Somebody had to bear the costs. The costs of the reference, had it been regularly conducted, were, by the terms of the submission, to be borne by the company, and, for experts and a protracted investigation, would have amounted to a very large sum; and, Mr. McCarthy, with the concurrence of Mr. Johnston in the first place, having relieved his clients from this pretty heavy burden—although it did not eventuate as the counsel had a right to expect—I thought it only fair, some one having to pay for the blunder of the two arbitrators, that the comparatively trifling costs of the brief investigation had should be borne by the defendants; and I still think so.

The application is dismissed without costs.

LENNOX, J. JUNE 12TH, 1914.

RE DOUGHERTY AND TOWNSHIP OF EAST FLAMBOROUGH.

Municipal Corporation—Debenture By-law—Township Council —Purchase of Site for School—High School District Composed of Township and Village—School-house Situate in Village—High Schools Act, R.S.O. 1914 *ch.* 268, *sec.* 38—*Jurisdiction to Pass By-law Vested in Village Council only.*

Application by George Dougherty to quash by-law 580 of the Township of East Flamborough.

J. G. Farmer, K.C., for the applicant.

C. W. Bell, for the township corporation.

LENNOX, J.:—The municipalities of the township of East Flamborough and the village of Waterdown constitute a high school district in the county of Wentworth. The high school

board having jurisdiction over this district determined to expend $25,000 in permanent improvements, including the acquisition of a school-site and the erection of a schoolhouse and necessary equipment and adjuncts; and, prior to the passing of the by-law in question, made a requisition upon the municipal council of the township of East Flamborough "to pass a by-law authorising the issuance and sale of debentures to the amount of $12,500 to be applied as one-half of the purchase-money of a site," etc. The municipal council thereupon, at a meeting called "for general business," holden in the village of Waterdown, passed by-law No. 580, providing for the issue of thirty-year debentures of the municipality to raise the sum required.

The last equalised assessment of East Flamborough is $2,-265,433 and of Waterdown $225,601.

Sub-section 10 of sec. 38 of the High Schools Act, R.S.O. 1914 ch. 268, provides that the municipality in which the high school is situate may assume the full cost of permanent improvements; and, as the school is at present in Waterdown, and there is no distinct provision for the new school-house being erected elsewhere, an equal division of the total cost between the two municipalities, if the proceedings in other respects are within the provisions of the statute, would not be illegal.

I am of opinion, however, that the municipal council of Flamborough had no authority to pass a by-law at all. The high school is established and is carrying on its work in Waterdown; and, although there is a half-hearted suggestion now that a site may be chosen in Flamborough, at the time the requisition was made and the by-law passed the board had not taken any definite action, and has not yet taken definite action, to have the high school established elsewhere. Until this is done the requisition for the whole of the money required must be to the council, and the by-law must be passed and the whole of the money raised by the council of Waterdown, being "the municipal council of the municipality within which the high school is situate:" sub-sec. (4) of sec. 38 of the High Schools Act. Section 60 of the Statute Law Amendment Act of 1914 is not retroactive; and sec. 38 referred to does not contemplate a by-law by any municipality except the one in which the school is situate: sub-sec. 8.

What the council of Flamborough was empowered to do, if a requisition for the full amount had been forwarded to them, was to "consider and approve or disapprove of the same," and only after the approval of the majority of the councils has been

obtained, and then only by the council of the municipality in which the high school is situate, could a debenture by-law be passed.

There will be an order quashing the by-law with costs.

MEREDITH, C.J.C.P. JUNE 10TH, 1914.

*GRAINGER v. ORDER OF CANADIAN HOME CIRCLES.

Life Insurance—Benevolent Society—Endowment Certificate—Payment to Member on Attaining Certain Age—Change in Constitution—Deprivation of Right—Ultra Vires—Contract to be Bound by Alterations—Death Benefit—Increase in Amounts of Premium Assessments—Intra Vires—Injunction—Damages—Costs.

Action by a member of the defendant society for an injunction restraining the defendants from acting upon or enforcing against him certain amended provisions of their laws and constitution, and for a declaration of the plaintiff's rights, and for payment of sums due to him under his benefit certificate.

I. F. Hellmuth, K.C., and J. R. Meredith, for the plaintiff.

J. E. Jones and N. Sommerville, for the defendants.

MEREDITH, C.J.C.P.:—Though incorporated under an Act of the Provincial Legislature bearing the title, "An Act respecting Benevolent Provident and other Societies," the defendants really are, and always have been, an insurance company, the most substantial purpose of which is, and always has been, mutual life and endowment insurance; issuing its policies, in all cases, under the . . . designation of "beneficiary certificates." . Though one of its declared purposes was, and is, fraternal union of all its members, it seems that not only were all of its members insured by the society, but that they were obliged to be (sec. 2, Laws).

The plaintiff became a member, and obtained his "beneficiary certificate" in the year 1888. Under it, he was to be entitled, at his death, to the sum of one assessement on each member, but not exceeding altogether $2,000, less all sums re-

*To be reported in the Ontario Law Reports.

ceived by him under the society's by-laws relating to total disability, or so received upon his attaining seventy years of age.

Under such by-laws, in force when the contract was made, he was to become entitled to one-half of the $2,000 on attaining the age of seventy years; and, under the certificate, all rights by virtue of it were, among other things, to be subject to his continuing a member of the society, in "good order," and faithfully complying with its laws, rules, and regulations; all of which has been done by him; and he attained the age of seventy years five years ago. Why then should he not be paid that $1,000, of which, so far, he has been paid only $500?

It is said, by the defendants, for two reasons: first, that, long after the making of the contract, the society made a new by-law depriving him of his right to payment of the $1,000 in one sum at seventy years of age, and making it payable in ten consecutive annual payments, of $100 each, commencing at that age; and that, subsequently, and after making the first five payments, they made another new by-law depriving him of all right to any further present payment of that kind; and that they had the right so to alter their laws; that, in his application for the beneficiary certificate, the plaintiff expressly contracted that they might so alter them; that is, that he expressly brought himself under all laws of the society then in force, or that might be enacted thereafter: see his application for the beneficiary certificate, dated the 24th April, 1888.

The plaintiff's reply is, that the earlier of the new by-laws, varying the time of payment of the endowment insurance amount of $1,000, is ultra vires, except in so far as it is confirmed by legislation; and the later one altogether ultra vires.

In the defendants' declaration of incorporation, made under the enactment I have mentioned, provision is made for endowment insurance, under the name of "expectancy" insurance, in these words: "5. Establishing a 'Life Expectancy Benefit Fund' from which all of its members who, having joined the Order at a certain age, as specified by classes in the Life Expectancy Law, and having attained the expectancy age, as specified in such class, and having complied with all the lawful requirements of the Order, such members shall be entitled to one-half the amount of their beneficiary certificate, the remaining half of their beneficiary certificate to be payable at death only."

There is no other provision on the subject contained in the declaration. So that, that which the defendants sought power

to do, in this respect, was to create a fund out of which those members coming under its benefit should be paid one-half of the amount of their insurance on reaching the specified in the by-laws age of their class of members. No power to postpone the time of payment, or to alter the amount, was sought or obtained; yet the defendants, as I have said, made a by-law purporting to do so. In the absence of legislation authorising such a change, and in the absence of a change in the declaration of the purposes of incorporation, authorising it, that could but be ultra vires. . . .

Many cases were referred to dealing with the question of the power of friendly clubs and societies to pass by-laws affecting their members' rights; some of them supporting the power of a club or society to take away rights which had already matured; but none of such cases is like this case; they were cases in which there was no "beneficiary certificate," no right acquired under a contract other than that involved in mere membership; they were cases relating more to the club feature of the institution than to any ordinary insurance transaction, or any ordinary contract. And in the case of most moment, perhaps—Smith v. Galloway, [1898] 1 Q.B. 71—the difference is very pointedly referred to by Wright, J. . . . And Smith's Case, 1 Ch. D. 481, as well as many other cases, shews how plain all ex post facto laws must be before they will be held to take away vested rights.

But it is said that the "beneficiary certificate" is not a contract. It is true that it does not contain the word "covenant" or the word "promise;" but no particular form of words is necessary to create a covenant, or a simple contract; it is enough if the words evidence any enforceable obligation. Here they plainly evidence an obligation to pay $2,000, if one assessment would exceed that sum; and, that admittedly being the case, the certificate, being under seal, contains a covenant to pay that sum.

This case, therefore, seems to me to be more in line with Smith's Case, and cases of that class, than it is with such cases as Smith v. Galloway, Baker v. Forest City Lodge, 24 A.R. 585, and cases of that class, even if, as to the English cases, friendly societies in England were quite like such societies as the defendants are—which they are not, but, instead, especially as to contracts of insurance, are far from it; and I may add that the inclination of my mind upon the subject of retro-

active legislation by such societies as the defendants are, is quite in accord with that of the learned Judge who delivered the judgment of the Ontario Court of Appeal in the case of Yelland v. Yelland, 25 A.R. 91, in so far as the inclination of his mind is revealed in these words: "I should, however, hesitate long before coming to the conclusion that by force of such rule a formal contract between the society and the deceased could be affected so as to change the person or class which had already been nominated as beneficiaries under rules then existing." The formal contract in that case was, as it is in this, a "beneficiary certificate" only.

But this interesting subject need not be pursued further, on this branch of the case, because, by the terms of their incorporation, the defendants are limited, in this respect, to the establishment of a fund out of which a member shall be entitled to one-half the amount of his beneficiary certificate upon attaining the "expectancy age" specified; which in this case is seventy years. There must be an "expectancy age," and there must be payment of one-half when it is reached.

In the year 1898, the defendants passed a by-law which had the effect of changing the one payment of $1,000 at seventy years of age, into ten annual payments, of $100 each, beginning at the age of seventy, as I have mentioned; and, as I have also mentioned, that law, in so far as it had that effect, was invalid; but, in the year 1903, by 3 Edw. VII. ch. 15, sec. 8, before the plaintiff had reached the age of seventy, the Legislature expressly made "valid and binding" such invalid domestic legislation, in so far as it was in conformity with such provincial legislation, notwithstanding anything to the contrary contained in the defendants' declaration of incorporation; and five of such payments have already been made, but the sixth the defendants refuse to pay, though the time for payment has elapsed.

The ground for refusal is another new domestic law on the subject, which deprives the plaintiff of his right to that payment and the following yearly payments; but that law, for the reasons I have already given, I consider ultra vires, being contrary to the declaration of incorporation, and unwarranted by any provincial legislation.

The plaintiff is therefore entitled to judgment for $100 damages, with interest from the day when that payment matured.

The other branch of this action stands upon quite a different footing; it is not to recover any part of the "expectancy" fund, but concerns the amount payable at the plaintiff's death; and the question is: "Had the society power to change its laws as they have done in regard to the plaintiff's rights in that respect, turning it, a good life insurance policy, into one not worth, to the plaintiff, the paper it is written on?"

The true rule in such case must be this: that whatever the parties really agreed to they are bound by; but that, if the contract between them is capable of any other reasonable construction, it will not be held to justify a one-sided destruction, or deprivation, of rights acquired under it, and that any act having such effect must be plainly shewn to come within the power so conferred. . . .

I must hold the plaintiff to be bound by any by-law subsequently passed, increasing his assessments. He must stand by his bargain, whether a wise or a foolish one. . . .

An injunction is sought; but obviously the case is not one for an injunction. If the plaintiff sought payment of the $500, his action should have been in the County Court to recover that sum. Being entitled to $100 only, now, his action should have been in the Division Court to recover that sum.

Upon the other branch of the case the plaintiff fails; and, anyway, he might have maintained any right he had by tendering the amount of the old assessments, if that were the measure of his obligation, or the defendants might have sued in the Division Court for the amount of any new assessment. But, as there seem to be many cases depending, more or less, upon a determination of the question in issue in this case, it is improbable that the defendants would have been content without a judgment of this Court, appealable to the Supreme Court of Canada, whether with or without leave. Therefore, although the plaintiff can now recover no more than $100, he should also, I think, have his general costs of the action upon the Supreme Court of Ontario scale, and there should be no order as to any other costs of it. . . .

As to the $1,000 to be paid at the age of seventy, the by-laws of 1898, in so far as they purport to postpone or otherwise hamper the payment of that sum at the specified age, were invalid, because not warranted by, but indeed in direct conflict with, the defendants' corporate powers; sec. 5 of the declaration of incorporation; and, although those by-laws were validated by the provincial legislation of 1903, they were vali-

dated only in so far as they converted the one payment of $1,000 at the age of seventy into ten equal annual payments beginning at that time. That legislation cannot be interpreted as a warrant for the direct wiping out of all that remains unpaid of that $1,000, as the defendants' by-law of 1914 purports to do; nor for indirectly effecting the same purpose in increased assessments greater than, or equalling, the annual payments not yet made. The legislation treats the $1,000 as an existing debt, as it in fact was, payable at the specified time, the payment of which, in case of the defendants, was postponed, but not otherwise hampered.

As to the $1,000 payable at death, the contract of insurance did not directly provide for the assessment-premiums; they were provided for in the by-laws of the society, subject to which the contract of insurance was made; and the plaintiff expressly and plainly agreed in effect that such by-laws might be changed. And it is admitted, or not otherwise contested, that these changes in the by-laws were regularly made, and made in good faith; and indeed it cannot be said that, under all the unfortunate circumstances of the society and its members, they are unreasonable.

This judgment will not, of course, affect any right the plaintiff's daughter, Clara R. Grainger, may have—if any—under the beneficiary certificate in question, as she is not a party to the action.

KELLY, J. JUNE 13TH, 1914.

CITY OF LONDON v. GRAND TRUNK R.W. CO.

SUMMERS v. GRAND TRUNK R.W. CO.

Railway—Level Highway Crossing—Destruction of Vehicle by Train—Injury to Person in Vehicle—Negligence—Contributory Negligence—Findings of Jury—Damages.

The first action was for damages for the destruction of a motor fire engine and truck struck by a train of the defendants at a level crossing; and the second action was for damages for personal injuries sustained by the plaintiff, a fireman, who was on the truck when it was struck by the train.

The actions were tried together before KELLY, J., and a jury, at London.

T. G. Meredith, K.C., for the plaintiffs in the first action.

Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiff in the second action.

D. L. McCarthy, K.C., and W. E. Foster, for the defendants.

KELLY, J. (dealing first with the action brought by the Corporation of the City of London):—On the 5th August, 1913, between 2 and 3 o'clock in the morning, the plaintiffs' motor fire engine and truck, which was being driven southerly on William street in the city of London, was struck by the defendants' freight train number 93, going westerly, and was so badly damaged as to be rendered practically worthless. William street at this point is crossed by several of the defendants' tracks. Train number 93 was running on the most northerly track.

The plaintiffs claim against the defendants on the ground of negligence in failing to take proper care in the running of the train, and by reason of the breach of statutory duties; and further allege that the defendants were running the train at an excessive and improper rate of speed; that the bell of the locomotive was not rung and the engine whistle was not sounded, as required by statute; and that there was no proper or sufficient light upon the locomotive. A great amount of evidence was given with a view to establishing these claims. The jury, in answer to questions submitted to them, found that the defendants were negligent in that "the switchman and employees at Maitland street, who saw the fire truck pass Maitland street, should have used what power they had at their disposal to have cleared William street, employees knowing that the fire was on the other side of the track, also knowing that number 93, a special, was coming from the east."

Maitland street runs northerly and southerly across the railway tracks, and is the next street to the west of William street. King street, which runs easterly and westerly, is the second street north of the tracks. The fire to which the fire engine was proceeding was to the south of the railway tracks. The fire engine proceeded easterly along King street; the switchman and other employees of the defendants who were at or near the intersection of Maitland street with the tracks, saw it going east on King street on its way to the fire, and also saw the freight train (number 93) east of William street and moving westerly.

These conditions throw light on the meaning of the above

answer of the jury. The jury also found that the plaintiffs were negligent in that "the fireman might have stopped the fire truck and made sure the railway crossing was clear, knowing same crossing was a dangerous crossing, also knowing the railway had the right of way."

Counsel for the defendants contends that, even assuming that the defendants were negligent, the jury's finding of negligence on the part of the plaintiffs disentitled them to succeed. Counsel for the plaintiffs, relying upon Hollinger v. Canadian Pacific R.W. Co., 21 O.R. 705, argues otherwise.

In cases such as this, each rests upon its own peculiar circumstances; the circumstances of the Hollinger case are quite distinguishable from those which the jury were called upon to deal with in the present case. Weir v. Canadian Pacific R.W. Co., 16 A.R. 100, more nearly approaches a resemblance to this case than does the Hollinger case. There is here some evidence from which the jury were entitled to draw the conclusion that the plaintiffs, through their workmen, servants, or agents, did not exercise that reasonable care when approaching this dangerous crossing which it was their duty to observe, especially having regard to the facilities they had, and which they did not use, of observing if a train was approaching them.

The driver of the fire engine says that he looked and listened for a train, but did not see or hear it; Eddyvane, a city fireman who occupied a seat beside the driver and had charge of the searchlight carried on the front of the fire engine, says that he did not observe the train, though he looked for it; but he says that he did not turn the searchlight on to the railway track, and that if he had done so he would have seen the train.

The duty of a traveller in approaching a railway crossing is stated in Weir v. Canadian Pacific R.W. Co., 16 A.R. at p. 104, to be: to use such faculties of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing and the line is in view, and there is nothing to prevent him from seeing and hearing the train if he looks for it, he ought not to attempt to cross the track in front of it merely because the warning required by law has not been given." There is no finding by the jury of want of warning in so far as the ringing of the bell, the blowing of the whistle, or the presence of the light on the locomotive is concerned, notwithstanding that the claim of want of such warnings was clearly before them on the pleadings and evidence given thereon.

The onus of making out contributory negligence is here upon

the defendants, and the matter is to be determined by the jury, if there is evidence that can properly be submitted to them on that question. In my opinion, there was such evidence, and upon it the jury have found against the plaintiffs. On that finding the plaintiffs must fail and the action must be dismissed with costs.

The plaintiff in the second case was a fireman in the employ of the Corporation of the City of London, and was injured when the defendants' train struck the motor fire truck referred to above. He was riding on the running board on the westerly or right side of the fire truck, and when the collision occurred between the defendants' locomotive and the fire truck he was thrown beneath the truck and sustained serious injuries.

The finding of the jury in respect of the negligence of the defendants was the same as in the other case; but they also found that Summers could not, by the exercise of reasonable care, have avoided the accident.

The claim set up in the statement of claim is, that the accident was caused by the neglect of the defendants in not giving warning of the approach of the train as required by law; adding that no whistle was sounded or bell run, as required, and that the train was running at an excessive and dangerous rate of speed.

The defendants' contention is, that the negligence found by the jury does not apply to and is not in respect of the acts or omissions particularly complained of as constituting negligence —that is, running at an excessive and dangerous rate of speed, and failure to ring the bell and sound the whistle, as to which there is no finding by the jury of negligence. If the lack of warning complained of by the plaintiff is not to be confined to the failure to whistle or sound the bell, or to the running at an excessive and dangerous rate of speed, but is, as I think it is, a general allegation of want of warning, not limited to these three particular matters, then the finding of the jury that the switchman and employees at Maitland street should have used what power they had to have cleared William street may properly be taken to extend to the giving of a warning in some other manner, such as by the swinging of a lantern; there being evidence that the defendants' employees who were at or near the Maitland street crossing and who saw the fire truck and the train had with them lanterns with which they could have signalled the train. If that be the correct view of the meaning of the general allegation of want of warning set up in the state-

ment of claim and the interpretation to be put upon the jury's finding—and I am of opinion that it is—and the jury having negatived contributory negligence, the plaintiff is entitled to succeed.

I direct judgment to be given in his favour for $600, the amount assessed by the jury, and costs.

MIDDLETON, J. JUNE 13TH, 1914.

ROUS v. ROYAL TEMPLAR BUILDING CO.

Building—Encroachment on Land of Another—Street-line—Boundaries—Surveys—Dedication—Presumption — Acquiescence in Public User—Conventional Boundary—Projecting Eaves—Discharge of Water—Obstruction to Light—Easement—Implied Grant—Presumption of Intention—Injunction—Damages—Costs.

Action for a mandatory injunction requiring the defendants to remove the northerly wall of their building and the footings from the land of the plaintiff, and for damages.

A. M. Lewis and F. W. Schwenger, for the plaintiff.
G. S. Kerr, K.C., and J. W. Jones, for the defendants.

MIDDLETON, J.:—This action concerns the title to a small strip of land at the rear of the Templar building, which is erected at the north-west corner of Walnut and Main streets, in the city of Hamilton. The building has recently been erected and is a very substantial structure, covering approximately the entire lot. The plaintiff's allegation is that the northern boundary of this lot encroaches upon his land, which lies to the north of the Templar parcel.

The controversy is based upon the exact location of the northern boundary of Main street. When the township was originally surveyed, the somewhat common custom was adopted of laying out the base line of the township and then the side lines between the lots right across the township, placing stakes where the concession roads would cross the side line; the concession lines not being themselves surveyed. This has resulted in great uncertainty and confusion, because it is not possible, in

the actual laying out of the survey, to have such accuracy as would insure concession roads determined in this way being in a continuous straight line. As the result of this, Main street, as actually laid out and travelled for very many years, is 66 feet in width, but at certain places there are jogs in the boundaries.

Comparatively recently an original monument was found which shewed that the south boundary of the street as travelled is 2 feet north of the true limit. There is no room for doubting the accuracy of the street line thus determined, for at the time of the discovery of this boundary post, at the north-west angle of lot 13, an old oak tree was found which in early conveyances was referred to as being at the north-east angle of the lot; and, besides this, a brick dwelling on Wellington street, which is erected on a parcel of land described as beginning a certain distance south of Wellington street, is found to conform to the measurement from the true boundary.

It may well be that those who have been encroaching on the south side of Main street have not acquired any title to the land of which they have been in possession; but it does not follow that the land on the north side of Main street, which has been in public use for all these years, has not become part of the highway. A dedication through acquiescence in public user is very easily inferred, and I think that there can be no doubt that the presumption exists in this case, and that the owners of the lands north of Main street cannot now claim the right to build down to the theoretical street line.

When the owner of the block lying between King street and Main street and abutting Walnut street came to subdivide this parcel, the subdivision was made, I think, with reference to Main street as it was actually travelled. It was quite competent for the owner of this parcel to lay out the subdivision with reference to the actual boundaries then existing, treating the travelled road as being the true road, and recognising the dedication of the two feet to the public. I think this is what was done, for the survey was evidently carefully made. The distance along Walnut street between King street and Main street corresponds precisely with the distance between the travelled roads upon the ground, 280 ft. 8 inches. If this is so, then the grant to the plaintiff had for its southern boundary a line parallel with Main street as travelled, and distant 73 feet north therefrom. If this is accepted as the true southern boundary of the plaintiff's land, then the Templar building has not encroached upon

him in any way, for it is one foot two inches south of the boundary, and the eaves project south of the boundary one foot two inches at the east end and one foot one inch at the west end. The eaves and footings project 13 inches north of the wall of the building, so that they fall exactly within the line. (Mr. Tyrrell's plan of the 5th January, 1914, which was put in, though not marked, shews the situation).

When Dr. O'Reilly, who then owned both parcels, sold the northern portion to the plaintiff's predecessor in title, a fence was erected upon the southern boundary. This fence was not upon the true boundary according to any survey. I suggested at the hearing, to the plaintiff, that this might be regarded as a conventional boundary; but the plaintiff's counsel strongly opposed this view, and insisted that the true boundary according to actual survey, following the description of the deed, must govern.

If the fence should be accepted as the true boundary, its location is well shewn upon plan exhibit 11. The fence was not run parallel with Main street. The footings encroach over the old fence line, and the north-west corner of the building is 6 inches over the fence boundary. At the request of the parties, I viewed the premises; and the indications upon the ground shew that this plan accurately described the situation.

If the plaintiff should be found to be entitled to recover, I think the case is one in which the defendants should be allowed to retain the land, making compensation. It would not be a seemly thing to direct the destruction of the building.

The plaintiff complains that it is an unfair thing to him and would seriously interfere with the selling value of his land to deprive him of 2 feet of the frontage of his property. There is some force in this, and the allowance to be made, if he is entitled to anything, should be correspondingly liberal. Yet I cannot think that the matter is nearly as serious as the plaintiff anticipates. No doubt, the projection of the eaves and the projection of the footings renders the 13 inches beyond the wall useless for building purposes. But the cutting down of the frontage from 47 feet to 45 feet is a matter of dollars and cents only. Immediately north of the plaintiff's property is an alleyway. North of that again, and fronting on King street, is a substantial building. Ultimately the old residence will be superseded by an office building or warehouse, as the location has long ceased to be suited for residential purposes.

If it should be held that there is the encroachment claimed

by the plaintiff and that he is entitled to recover, I should think an allowance at the rate of $200 per foot for the land actually taken would be ample.

Complaint is also made with reference to discharge of water in the winter time from the overhanging eave. I had this examined by a competent builder, approved by both parties, and he has suggested some changes. The defendants have agreed to make these changes; so that the complaint disappears.

At the trial complaint was made with reference to obstruction to light, and an amendment was allowed to permit this claim being set up. It appears that on the south side of the residence there are now some four or five windows, but at the time of the sale the only window to the south was a hall window. This window is just back of the steps marked on the plan; and, while there has been some interference with the light, I do not think that the window is rendered at all useless. No doubt, the tall wall of the building to the south interferes with the access of a a great deal of light, but light yet reaches this window in considerable quantity from the east.

The claim to light is based upon the implied grant arising from the existence of the window in the building at the time of the subdvision. This, I think, must be measured by the presumed intention of the parties at the time of the making of the grant. The wall of the house was some distance from the southerly boundary of the parcel conveyed, and I do not think it ought to be inferred that it was the intention of the grantor to sterilise the use of his own property for the purpose of permitting any greater access of light to the window than that which can be obtained over this strip.

The cases with reference to implied grant are, I think, gradually coming to indicate that this is the true way of looking at the matter, and the Courts are becoming less inclined to impute an intention to render useless the property retained by the grantor than in some of the earlier cases. Birmingham v. Ross, 38 Ch.D. 295, perhaps is the point of departure. The head-note states the principle accurately: "The maxim that a grantor shall not derogate does not entitle the grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee." See also Godwin v. Schweppes, [1902] 1 Ch. 926.

Even if I am wrong in this view, I think the plaintiff will not be entitled to an injunction, and that the case is one in which,

under Lord Cairns's Act, damages should be awarded in lieu of an injunction.

In view of the fact that the days in which the residence can be used as a residence are numbered, and that the building must ultimately, according to the plaintiff's own evidence, be superseded by an office or factory building covering the whole lot, which would mean the abandonment of the easement, the damages so awarded would be trifling.

For these reasons, I think the action fails; but, as there was some complaint justified from the overflowing of the water from the eaves, I think it is not a case for costs.

MICHENER V. SINCLAIR—LENNOX, J.—JUNE 11.

Settlement of Action—Agreement for—Enforcement—Judgment—Costs.]—After the action had been partly tried, an agreement for settlement was come to by counsel for the parties. This was stated by counsel, and, with suggestions by the presiding Judge, recorded by the stenographer. There was a subsequent agreement for an extension of time; but this did not vary the rights of the parties as arranged at the trial. The defendant now applies for judgment dismissing the action, and for possession, and for judgment for $250 against the plaintiff. The only question in dispute was as to whether there should be judgment for the $250. The learned Judge said that the true construction of the agreement was, that, in the events which had happened, the defendant was to have judgment for possession and for dismissal of the action with costs; and that this was to put an end to all matters in difference between the parties—was to be a complete settlement in fact. There should be judgment dismissing the defendant's counterclaim, except so much thereof as related to recovery of possession, without costs, dismissing the plaintiff's action and the claim set up in answer to the counterclaim; for recovery of possession of the lands in the pleadings mentioned by the defendant from the plaintiff, with costs; and for the costs of this application. John King, K.C., for the defendant. G. T. Denison jun., for the plaintiff.

HUDSON v. HUDSON—MIDDLETON, J.—JUNE 13.

Husband and Wife—Alimony—Quantum of Allowance.]—Action for alimony, tried at Brockville. The learned Judge said that there was no reason to suppose that the plaintiff was in any way to blame for the difficulties that had arisen, and she was entitled to alimony. The conduct of the defendant had been such as to indicate that it would not be altogether safe for the plaintiff to continue to reside with him at present. Alimony fixed at $35, on the understanding that the plaintiff has the youngest child to maintain. Judgment accordingly, with costs to be paid by the defendant. H. A. Stewart, K.C., for the plaintiff. J. A. Hutcheson, K.C., and J. A. Jackson, for the defendant.

WALLACE v. McKAY—BRITTON, J.—JUNE 13.

Master and Servant—Contract of Hiring—Salary and Expenses—Damages for Breach—Settlement of Claim—Finding of Fact of Trial Judge.]—This action was brought against A. McKay and C. W. Burns to recover $1,150.30 alleged to be the balance of six months' salary and expenses up to the 23rd October, 1913, owed by the defendants to the plaintiff, and $1,000 damages for breach of contract of hiring. The learned Judge finds that there was a complete settlement between the plaintiff and the defendant McKay as to any claim against McKay under the agreement, and that the plaintiff was paid $200. Action as against defendant McKay dismissed with costs. W. S. Brewster, K.C., for the plaintiff. E. F. B. Johnston, K.C., for the defendant McKay.

CORRECTION.

RE ROOKE AND SMITH, ante 382. On p. 384, lines 21 and 20 from the bottom, "(a) he is an express assignee of the land" should read, "(a) he is an express assignee of the covenant as distinct from assignee of the land."

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