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HON. MR. JUSTICE LENNOX. JUNE 30TH, 1914.

GRANT, CAMPBELL & CO. v. THE DEVON LUMBER CO., LTD.

6 O. W. N. 673.

Contract—Timber—Innocent Misrepresentation as to Quantity—Rectification of Contract—Payment for Value of Work Done—Evidence—Findings of Trial Judge.

A. was induced to enter into a contract with B. to cut timber upon the innocent and mistaken representation of the latter as to the quantity to be cut. Both parties intended as the basis of the contract that 2,500,000 feet was to be cut and got out, although the contract itself was to clear "the whole area." A. cut a much larger quantity than the 2,500,000 feet without being aware of it.

LENNOX, J., *held*, that A. was entitled to the balance of the amount due for the work done since B. got the benefit of a mutual mistake as to quantity which was the basis of the contract and for which he was responsible.

Action to recover the balance of an amount due to the plaintiffs for work done for the defendants in cutting and getting out logs in timber limits, and for rectification of the agreement between the parties.

R. A. Pringle, K.C., for plaintiff.

M. J. Gorman, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—The question to be determined in this action is the basis upon which the agreement in question was entered into; and, incidentally and necessarily, in this inquiry, to determine whether the defendants misrepresented the subject matter of the contract, that is, the quantity of timber to be cut and got out; and, if so, was the misrepresentation falsely and fraudulently, or only mistakenly and innocently, made?

It was material to the plaintiffs to know approximately the extent of the work they would be called upon to perform

within the limited logging season of 1913-14, if they contracted with the defendants—whether there was enough timber to make it worth while to establish a camp, and not more, on the other hand, than they could handle with their plant and equipment before the failure of the snow roads in the spring of 1914. The plaintiffs had to rely upon the defendants for information, as the defendants knew. Mr. Berham admits that it would take a cruiser with one or two assistants at least ten days to make a reasonably accurate estimate of the timber on this limit, thirteen square miles in extent. I am satisfied that it could not be done in this time, but his statement is sufficient for the purposes of this action. Mr. Fitzpatrick is not a cruiser or a man capable of performing this work, and the other plaintiffs know nothing about lumbering or bush work. Fitzpatrick did not go to the limits to estimate the quantity of timber. He was there for four or five days seeing the nature of the country as to road-making, and, of course, in a general way to see whether the lumber was scattered over the whole area and expensive and difficult to get at. This was all Fitzpatrick went out for and this is all he did; and this was all known to the defendants. The defendants had knowledge of investigations by their predecessors in title, had themselves investigated, and would be expected to know; and they pretended to know and inform the plaintiffs of the actual quantity of timber, available to be cut and got out, with approximate accuracy.

The actual quantity of timber at the time of the contract, as now ascertained, was about 4,289,846 feet, made up as follows: 3,429,846 feet delivered by the plaintiffs; 60,000 feet, said to be cut by plaintiffs and not taken out and 800,000 feet yet standing, as estimated by the defendants.

I find as a fact that the plaintiffs would not have entered into the contract had they known or had reason to believe that the quantity of timber upon the limit they contracted to clear substantially exceeded two and a half million feet, and this the defendants knew from the repeated enquiries as to quantity addressed to Mr. Brophy and Mr. Bartram, including Mr. Grant's questions immediately before the execution of the contract.

The evidence of Mr. Brophy, whose estimates of quantites were set out, and who says that he invariably answered

all questions as to quantities by the statement "There's the map," is not in effect different from the evidence of Fitzpatrick, and taken in conjunction with his admitted boasting of his marvellous skill and accuracy as a cruiser, and his statement that there were no figures upon certain lots, because there was no timber of value in these places, is emphatic confirmation of the plaintiff's whole case as to how they figured out the quantity they were to cut and what they relied upon on entering into the contract. Where the evidence of Fitzpatrick or Grant conflicts with the evidence of Mr. Bartram, I accept the statements of these plaintiffs.

The defendants were not guilty of wilfully false or fraudulent representations, although they have unfairly and dishonestly endeavoured to hold the plaintiffs to a bargain which they perfectly well know neither party contemplated at the time the agreement was signed. But the defendants by the verbal statements of Brophy and Bartram, by repeated assurance and by placing an inaccurate map in the hands of the plaintiffs, as the basis of computation, represented and stated to the plaintiffs that what they were contracting to get out was approximately two and a half million feet and the plaintiffs accepted and acted upon this representation. The defendants were honest, but mistaken. It was a mutual mistake. There was no manifest need to limit the undertaking of the plaintiffs in terms—the plaintiffs' were to strip the whole area, both parties intending to deal with the cutting and getting out of about 2,500,000 feet. The delay in scaling resulting in the plaintiffs getting out a much larger quantity without being aware of it. I am entirely satisfied as to the facts, the equities are with the plaintiffs, and I would have no hesitation in reforming the contract to the actual intention of the parties, as I find it, if that were necessary. The attempt of the defendants to deduct upwards of $8,000 from the plaintiffs' earnings when upon their own shewing their loss, if any, amounts to little over half this sum, is not commendable or to be encouraged. They gained, as it was, probably $3 a thousand on nearly a milion feet put out beyond what was actually bargained for. It was admitted that if I find for the plaintiffs, the undisputed balance owing them, including $289.94 paid into Court, is $21,726.48. There are other items, one of $454.75 and one of $398, in addition, claimed by the plaintiffs, which

defendants think they may be able to admit. This makes a total claimed by the plaintiff $22,578.23. There will be judgment for this amount, with costs, but if the defendants desire it, they may have a reference to the local Master at Ottawa to ascertain what sum, if any, is owing the plaintiffs in respect of these two items, and, in that event, the judgment will be for $21,726.48, including the money in Court, and a reference as to the disputed items amounting to $852.75, with costs of the reference reserved.

Stay of execution for 30 days.

HON. MR. JUSTICE MIDDLETON. JUNE 30TH, 1914.

HYATT v. ALLEN.

6 O. W. N. 660.

Costs—Appeal to Privy Council—Judgment—Interpretation of—Costs Incurred in Court of Appeal—Taxation.

MIDDLETON, J., *held*, that the words "the costs of the appeal to the Privy Council in the Court of Appeal" in a certificate of the Privy Council meant the costs of appeal incurred in Canada before the case was certified in England.

Motion by plaintiffs for a direction to the Taxing Officer to tax to the plaintiffs the costs incurred by them in Ontario in respect of an appeal to the Judicial Committee of the Privy Council.

Featherston Aylesworth, for plaintiffs.

M. L. Gordon, for defendants.

HON. MR. JUSTICE MIDDLETON:—By the certificate of the Privy Council, in addition to the sum taxed for the costs of the appeal incurred in England, the defendants are directed to pay the costs of the appeal to the Privy Council in the Court of Appeal.

The learned Taxing Master has refused to tax any of the costs of the appeal incurred in Canada, owing to the peculiar form of expression used in the certificate.

I think the words used in the certificate, "costs of this appeal incurred in the Court of Appeal," must be taken to mean the costs of the appeal incurred in Canada before the case was certified to England, and that the taxing officer should tax the costs incurred in Canada, taking care to see that there is no overlap and that nothing is allowed which is already covered by the costs taxed in England.

There will be no costs of this application.

HON. MR. JUSTICE MIDDLETON. JUNE 30TH, 1914.

RE McINNES.

6 O. W. N. 672.

Executors and Administrators — Sale of Land by, under Settled Estates Act — Proceeds Invested by Executors in Mortgage Taken in Name of Account of Supreme Court—Mortgage Moneys Paid to Executors—Special Order Authorizing Account to Execute Release.

Motion by the petitioners, the executors and trustees under a will, for an order directing the accountant of the Supreme Court of Ontario to execute a discharge of a mortgage.

J. Tytler, for the petitioners.

F. W. Harcourt, K.C., for the infants.

HON. MR. JUSTICE MIDDLETON:—On the 30th April, 1908, Mr. Justice Teetzel made an order under the Settled Estates Act, allowing a sale of the lands; but for some reason this order did not follow the well established practice and direct the moneys to be paid into Court, but directed that the moneys should be held by the executors and trustees and be by them invested and re-invested with the approval of the Official Guardian; the mortgages to be taken in the name of the accountant.

The mortgage was taken in the name of the accountant, and in due time it was paid off to the executors. The executors now tender a discharge of mortgage to the accountant, by which he is asked to certify to the untrue statement that he has received the mortgage money. In the meantime the executors have proceeded to re-invest the money in other securities received by them.

The accountant cannot be asked to discharge the mortgage under these circumstances, but an order may well be made by which, upon an affidavit being filed shewing that the money has been received by the executors—that being so far only a statement—the accountant should be authorised to execute a release, reciting the terms of Mr. Justice Teetzel's order and the payment of the money to the executors thereunder.

It is a pity that this small estate should be put to this expense, but there seems to be no other way out of the trouble which has been created by the course adopted.

HON. MR. JUSTICE LENNOX. JUNE 30TH, 1914.

COLE v. DESCHAMBAULT.

6 O. W. N. 673.

Trust—Purchase of Crown Lands—Declaration of Trust in Respect of Share of Plaintiff's Assignor—Form of Judgment.

LENNOX, J., settled a judgment pronounced by him (*ante* 348).

H. H. Dewart, K.C., and C. A. Sequin, for plaintiff.

W. C. McCarthy, for defendant.

HON. MR. JUSTICE LENNOX:—Let judgment be entered for the plaintiff in the terms of the prayer of the statement of claim, and for a reference to local Master at Ottawa to take an account and allow to the plaintiff one-fourth share of the net receipts and profits of the lumber and wood cut and converted by the defendant, and directing the defendant to convey to the plaintiff an undivided one-fourth share and interest in Petrie island upon payment of such sum, if any, as is found to be owing by the plaintiff to the defendant upon account of purchase-money after charging the defendant with one-fourth part of the receipts and profits aforesaid, and for payment of the balance, if any, owing by the defendant to the plaintiff upon the taking of the account, and for the costs of the action and reference.

HON. MR. JUSTICE MIDDLETON. JUNE 30TH, 1914.

REX v. HUCKLE.

6 O. W. N. 661.

Criminal Law—Habeas Corpus—Application by Person Imprisoned in Penitentiary Under Conviction of Court of Record—Penitentiaries Act, secs. 64, 65—Remission of Part of Sentence for Good Behaviour—Cancellation—Prison Regulations—Prison Offences.

MIDDLETON, J., *held*, that sec. 64 of the Penitentiaries Act, R. S. C. c. 147, does not entitle a convict, as of course, by a mere observance of the prison rules passed under the authority thereof, to remission of a portion of the time to which he is sentenced, but that such remission is dependent, in addition to observance of said rules, upon the determination of the prison officials, subject to review by the Minister of Justice, as to whether the conduct of the convict is exemplary.

Held, that an application to the Courts for remission was improper; that the Habeas Corpus Act had no application to a question of remission but that the Minister of Justice was the proper person to review the action of prison officials.

Motion, upon the return of a *habeas corpus*, to discharge a convict from custody.

G. Russell, for the applicant.

W. G. Thurston, K.C., for the Crown.

HON. MR. JUSTICE MIDDLETON:—Huckle was convicted before His Honour Judge Snider of extortion and sentenced to seven years' imprisonment, on 12th December, 1908. His sentence would not expire by effluxion of time until 12th December, 1915.

Under sec. 64 of the Penitentiaries Act, the inspectors of penitentiaries are empowered, subject to the approval of the Minister of Justice, to make regulations under which a record may be kept of the daily conduct of every convict, noting his industry and the strictness with which he observes the prison rules, with a view of permitting the convict to earn a remission of a portion of the time for which he is sentenced, not exceeding six days for every month during which he is exemplary in conduct and industry. When the convict is thus accorded seventy-two days of remission, he is allowed to earn ten days' remission for each subsequent month during which his conduct and industry continue satisfactory. Under the Statute, for certain offences, such as

attempting to escape, or assaulting officers, the whole remission earned may be forfeited.

Rules were prepared and approved by the Governor-General in Council, 26th November, 1898. These rules provide that the warden may deprive a convict of not more than thirty days of remission for any offence against prison rules, and that there may be forfeiture of more than thirty days, with the sanction of the Minister of Justice. Section 65 of the Statute provides for the drawing up of a list of prison offences, a copy of which is to be placed in each cell in the penitentiary.

This motion is based upon a fundamental misconception of the provisions of the statute. It is assumed that the convict is entitled as, of course, to a remission of his sentence, unless he is deprived of it for misconduct. A convict may so behave himself that he cannot be regarded as exemplary in conduct and industry, and yet not be guilty of any offence against the prison rules. In that case, he would serve the full term of his sentence, for he would have earned no remission. A convict, on the other hand, may by reason of exemplary conduct and industry earn a shortening of his sentence, but he may by specific offence forfeit that which he has earned; e.g., this convict apparently had earned some remission—I do not know how much—but on 18th October, 1910, the Minister of Justice approved of a report of the warden, dated 8th September, 1910, by which all remission then accorded was forfeited.

Another fundamental misconception underlying this application is the assertion that the applicant is not bound by the penitentiary regulations; it is said that he has not been furnished with a copy of them and that he ought not to be bound by any rules of which he has no knowledge. Apart from these rules, there is no right of remission, for the remission is by the statute to be under the regulations prescribed.

Then it is argued that the award of remission or the forfeiture of remission must be on some proceeding in the nature of a trial, so that the convict may be heard. This is clearly not what is contemplated by the Act. Some one must determine whether the conduct of the convict is exemplary. *Prima facie* the warden and officers of the prison must discharge this duty. Their conduct will be subject to

review by the Minister; but the statute surely does not contemplate a controversy in the Courts over a question of prison discipline.

The Habeas Corpus Act probably has no application to this case, and I am not sure that the writ was not granted *per incuriam*. It does not apply to any person imprisoned by the judgment, conviction or order of the Supreme Court or other Court of Record. Where, as here, the accused is imprisoned under a conviction, he must seek redress by application to the Minister of Justice, who alone appears to have authority to review the action of the prison officials.

The application is, therefore, dismissed, with costs, and the convict is remanded to custody.

Since the above was written, I have been handed a statement shewing that, apart from cancelled remission, the accused has 87½ days to serve, and, in addition, 117 days forfeited—204½ days in all.

HON. MR. JUSTICE KELLY. JULY 8TH, 1914.

BAND v. FRASER.

6 O. W. N. 709.

Account — Promissory Note — Payment into Court—Discharge of Mortgage—Reference.

Motion by plaintiff for judgment on the pleadings.

S. R. Broadfoot, for plaintiff.

W. C. Greig, for defendant.

HON. MR. JUSTICE KELLY:—My direction was, at the close of the argument, that on payment into Court by plaintiff of $1,000 as security for whatever amount is found to be overdue on the $1,272 note on the taking of an account between the parties, defendant should forthwith, at his own expense, procure and register a proper discharge of plaintiff's land from the Soper mortgage referred to in the material; and that, if the parties fail to agree upon the account between them, there would be a reference to the Master at Ottawa to take the account, and that, on such discharge being registered, there would be paid out to de-

fendant (out of $1,000) such sum as should be found due by plaintiff to him, and that the balance of the $1,000 should be paid out to plaintiff, and that further directions and costs should be reserved till after the Master's report or until after the parties had agreed on the account between them.

From what I have since learned, the parties have not agreed upon the account; if that be so, the matter should, therefore, proceed as above directed.

HON. MR. JUSTICE KELLY. JULY 8TH, 1914.

SWARTZ v. BLACK.

6 O. W. N. 710.

Title—Cloud on—Exchange of Land by Intending Purchasers whose Offers had not been Accepted — Removal of Instrument from Registrar.

A. made an offer to buy two, and B. to buy one, of C.'s houses. Before either of the offers had been accepted A. made an exchange with B. of these properties and registered an instrument to that effect.

KELLY, J., *held*, that the instrument was a cloud on C.'s title and ordered that it be cancelled and the registration thereof vacated.

H. H. Shaver and Gordon Shaver, for plaintiffs.

M. Wilkins, for defendants.

HON. MR. JUSTICE KELLY:—Plaintiffs seek to have it declared that an instrument entered into between the two defendants, by which defendant, Mrs. Black, purported to exchange with her co-defendant two houses on Claremont Street, in Toronto, for one house adjoining or near these two in the same street is a cloud on plaintiffs' title, and that it be ordered to be delivered up and cancelled, and that the registration thereof be vacated.

Defendants have set up that plaintiff Swartz accepted a written offer, signed by defendant Black, for these two houses at $3,000 each, and a further written offer, signed, by defendant Richards, for the other house, for $3,000. These are the houses dealt with in the alleged agreement of exchange.

I have no difficulty in finding on the evidence that Swartz did not sign an acceptance of either of these offers or do

any other act of acceptance, unless his having been in possession for some time of the two cheques which accompanied the offer can be said to have constituted an acceptance. The cheques are Mrs. Black's for $100, and Richards' for $50. Goldberg, the agent, obtained these offers and the cheques, both of which were payable to Swartz, and having had the cheques certified by the bank, he took them with the offers to Swartz. Swartz's co-plaintiff was interested with him in the three houses and in the two adjoining houses on Claremont Street, though it appears that the registration was in the name of Swartz only. Plaintiffs were desirous of selling the five houses together, and Swartz held the deposit cheques for some days while he had under consideration the acceptance of defendants' offers; having decided not to accept, he, on 9th February, cashed the cheques and on the same date gave his own cheques payable to the defendants, for the return of the amount of their respective deposits.

It is quite clear, taking into consideration all the evidence, that Swartz's holding of the cheque was not for any other purpose, or with any other intent or object, than to enable plaintiffs to consider and decide whether they would accept the offers. That act of his was not, under the circumstances, a part performance of the contract or such that the only reasonable inference to be drawn from it is that a contract was intended. There was, what is too frequently found in cases of this character, a conflict of evidence such as one finds difficulty in believing was based altogether on honest conviction.

Finding, as I do on the facts, and without detailing the evidence, none of which I have left out of consideration, the only conclusion I can reach is that plaintiffs are entitled to the relief they ask.

I cannot pass from consideration of this case without expressing disapproval in the strongest way of the action of defendants in entering into and registering the agreement for exchange when no *bona fide* exchange had been made, their only object being to tie up the property and thus prevent plaintiffs from dealing with it. Mrs. Black, on whose evidence I have been unable to rely, made a lame and ineffectual attempt to prove that the exchange was genuine. If any further evidence were necessary to shew that no real

exchange was intended, it is supplied by the statements of the clerk from the office of defendants' solicitor who prepared the agreement, and frankly admitted the real object of making and registering it.

Judgment will be in favour of the plaintiffs with costs.

HON. MR. JUSTICE HODGINS. JULY 10TH, 1914.

KIDD v. NATIONAL RW. ASSOC. & NATIONAL UNDERWRITERS.

6 O. W. N. 710.

Principal and Agent — Agent's Commission on Sale of Company-Shares — Action against two Companies—Contract—Terms of Employment — Evidence — Right to Commission—Liability of Companies Respectively—Costs.

HODGINS, J. gave judgment for plaintiff in an action for commission for the sale of stock.

Action tried at Toronto non-jury sittings 5th February, 1914, and 15th June, 1914.

I. F. Hellmuth, K.C., and J. H. Cooke, for plaintiff.

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

HON. MR. JUSTICE HODGINS:—The plaintiff sues both companies for commission on the sale of stock in the National Railway Association. Prior to June, 1912, he was acting for the Railway Association but no claim is made for that period of time. On 20th June, 1912, an agreement was made (exhibit 3) between the Railway Association and R. E. Menzies, which was practically an underwriting agreement. The plaintiff had, prior to this, been elected a director of the Railway Association and had accepted the office and while denying that he signed his name to exhibit 3, or on page 23 of the Railway Association minute book, does not dispute the agreement nor the correctness of the minutes. These latter recite his presence at the board meeting of 21st June, 1912. On or about the 6th July, 1912, the defendants, the National Underwriters Limited, bought out Menzies' interest under exhibit 3 and the Railway Association were notified of this and approved of it on the 9th July at a

meeting at which the plaintiff was present. The formal transfer is exhibit 12.

At this time the capital stock of the Railway Association was only $40,000. The scope of exhibit 3 appears to be that all the stock that was then unsold was bought by Menzies at 75c on the $1, and five per cent. of the purchase price was to be paid within three months and the balance in a year from the ratification of the agreement. The Railway Association was to transfer any portion of the stock on payment in full being made for it, and was to give certificates for that portion at the request of Menzies, applying all moneys upon the purchase price. Menzies agreed to bear the cost of selling. He was further entitled to require an increase in the capital stock up to $240,000, and had the right to the additional stock on the same basis, the time for payment being decreased or extended according to the amount of the increase. Clause 4 is as follows: "The second party (Menzies) also agrees with the company that Mr. E. W. Kidd and Mr. G. E. McGregor be allowed to continue selling stock and that the commission allowed them be twenty per cent. of par value of stock."

The situation after that agreement was made appears to be that Menzies controlled and directed the sale of stock, the Railway Association having none left for sale and that the plaintiff was by agreement to continue selling the stock for a commission of twenty per cent. but on Menzies account or on that of his assignees. This was, I find, known and assented to by the plaintiff on the 21st June, 1912.

Up to 11th September, 1912, no increase of stock was determined upon and until 20th September, 1912, Menzies in his correspondence with the plaintiff signs without any official addition to his name but after that date, he having been elected a director of the Railway Association, the letters are subscribed in the name of the association per Menzies. But I am unable to conclude from that circumstance that he was intending to bind the Railway Association. It was probably from inadvertence. This much is clear, that subscriptions taken in Allendale in September, 1912, by the plaintiff were for the stock owned by the Underwriters Company, see exhibit 6. The deposits to the credit of the Railway Association were not improper under exhibit 3 if Menzies and his assignee had not paid for the stock and

were no doubt a continuance of the practice before they intervened. The commission accounts statements, exhibit 17, dated September 20th, 1912, September 30th, 1912, October 30th, 1912, and October 31st, 1912, are all headed: "Re National Underwriters Stock," and the commission is calculated at twenty per cent. on first payments and ten per sent. on second payments, except in one case covering Chapleau and dated October 30th, 1912, where it is twelve per cent. The twenty per cent. tallies with the Menzies agreement and the dates, as far as they appear, cover August and September, 1912. The plaintiff does not quarrel with the statements except as to some debits. On October 30th, 1912, the plaintiff made the agreement (exhibit 16) with the Underwriters Company set out in his statement of claim.

It is to be observed that the commission to the plaintiff mentioned therein, namely, twelve per cent., is to apply to subscriptions "from such terminals as he has organized and worked" and is to be on all stock of the Railway Association offered by the Underwriters Company. This seems to me to indicate that he had worked for the Underwriters Company in these terminals and was to benefit thereby and was still to offer stock on their account out of what they controlled.

The applications (exhibit 24) dated on 10th and 11th December, 1912, are applications for transfer from the Underwriters Company of the Railway Association shares.

On the 2nd December, 1912, an agreement between the two defendant companies was come to terminating and dissolving the Menzies contract and after that the forms in exhibit 14 were used. These are direct applications to the Railway Association. Preceding this and on the 29th November, 1912, the Railway Association directors had passed a resolution in favour of terminating the Menzies agreement and also one appointing the Underwriters Company agents for the sale of stock as well as another effecting a purchase of oil lands in Alberta from the same company for 500,000 shares of the Railway Association stock, a cheque for $125,000 being apparently handed over and returned in this last transaction. On the same day the directors of the Underwriters Company passed similar resolutions, except that relating to the agency for the sale of stock. Following this and on the 24th December, 1912, the plaintiff resigned

as a director of the Railway Association and was appointed its organizer and since then has worked for it as such. On 27th December, 1912, a new prospectus was authorized which appears in these proceedings as exhibit 21 and contains his name as organizer. On 31st December, 1912, the directors of the Railway Association passed a resolution nullifying the Menzies agreement "and to be as having never existed" on the understanding that the Underwriters Company would assume and account to the Railway Association for the commission paid by the latter company on the first 208 shares of capital stock sold. During January and February, 1913, and apparently till April, 1913, things went on on this basis and some $700 was paid to the plaintiff by the Railway Association during his work in the west, and the correspondence in exhibit 15 shews that he was directed by those in authority in the Railway Association, i.e., McNaughton and Menzies, each as Chairman of the Executive Committee, a positon which the latter held until April 18th, 1913, when the committee was abolished. On the 25th April, 1913, the directors of the Railway Association passed a resolution reciting that as the Underwriters Company had not accepted the appointment as agents for the sale of stock (apparently referring to the minutes of 29th November, 1912), such appointment be rescinded, a position accepted next day by the Underwriting Company, whose directors declared by resolution that it had never accepted nor acted upon the appointment. The capital stock of the Railway Association had been increased to $5,000,000 on the 11th November, 1912, so that after that date that association had its own stock to sell. The Underwriters Company, under the Menzies contract, had an option only up to $240,000 and even with the $500,000 given for the transfer of the oil lands there was over $4,000,000 stock to be sold on account of the Railway Association. The cancellation of the agreement would probably vest the unsold portions of the original stock in the Railway Association.

I think the plaintiff must, under the circumstances, be taken to have worked for and on account of the Railway Association from the 24th December, 1912, when he was appointed its organizer and that the defendants the Railway Association are bound to account to him from that date. Prior to that he is entitled to an account against the Un-

derwriting Company on the basis of twenty per cent. on the whole amount subscribed and when paid or if not then twenty per cent. on the first payment and an interim commission of ten per cent. on the residue until payment in full under a verbal agreement with Menzies. After 24th December, 1912, the plaintiff is entitled to commission at twelve per cent. or such rate as has been paid since then by the defendants the Railway Association to other similar agents if any were employed.

I am unable to assent to the argument that the resolution of the respective companies to the effect that the agreement between them was to be as if it had never existed entitles the plaintiff to claim against the Railway Association from the 21st June, 1912, free and clear of any intervention by their co-defendants. What had actually occurred before those resolutions were adopted could not be effectually undone so far as the plaintiff was concerned and his rights and the corresponding liability of the Underwriters Company were unaffected by the rescission.

The dealings of the companies would estop them from an account from one to the other or from any liability except possibly for the commission paid on the first 208 shares, but are no bar to the plaintiff's claim, nor do they give him rights to which he was not then entitled.

As the defendants, the Railway Association, wholly denied the plaintiff's right they should pay the costs of action against them up to the trial. If a reference is taken as to them further directions and subsequent costs will be reserved. As to the defendants the Underwriters Company, the plaintiff suceeeds in shewing that they are not entitled to entangle him in an account with them after 24th December, 1912, nor to payment by him of any amount based upon an account after that date. The plaintiff's statement of claim correctly sets out the position, and I think these defendants should also pay the costs of action as against them, i.e., the excess caused by joining them. If a reference is had against the Underwriters Company further directions and subsequent costs will be reserved as also the costs of their counterclaim. If no reference there will be no costs of the counterclaim which will be dismissed.

HON. MR. JUSTICE LENNOX. JULY 3RD, 1914.

PARENT v. CHARLEBOIS.

6 O. W. N. 706.

Vendor and Purchaser—Agreement for Sale of Land—Written Memorandum—Omission of Material Terms—Consensus ad Idem not Arrived at—Duress — Claim for Reformation of Agreement—Conflict of Evidence—Findings of Fact of Trial Judge.

LENNOX, J., dismissed an action for specific performance of an agreement for the sale of lands on the grounds that there was no contract since the parties did not agree to the same thing and that the agreement did not satisfy the Statute of Frauds.

G. F. Henderson, K.C., for plaintiffs.

M. J. Gorman, K.C., for defendants.

HON. MR. JUSTICE LENNOX:—The examinations for discovery were put in upon the understanding that I would use any statements I consider relevant.

The plaintiffs have not shewn a right to either specific performance or damages. Counsel for the plaintiff concluded his argument with the statement: "I am satisfied that both parties took it for granted that the option was at an end." The evidence is quite the other way if the reference is to the understanding of the parties as to the rights of the tenants as a matter of law. There was no mistake as to legal position of the tenants. The tenants' right to have the property at $31,000 was not taken away by their refusal to purchase at $35,000 as both parties knew and recognised. And as referring to the understanding of the parties as to the conclusion of fact, namely, that the option would not be exercised upon a sale at $31,000—if true at all it is only true in this sense—it does not count for, but against the plaintiffs, for if the conclusion was well founded then the plaintiffs were bound to accept the property subject to the lease without modification or exception, and if ill-founded or mistaken then there was mutual error as to the essential basis of contract and the plaintiffs are without remedy.

Counsel for the defendant argues that the parties never agreed *ad idem,* and if the plaintiffs' evidence as to their understanding of the agreement come to no the 24th May is true, there is abundant evidence in support of this contention.

I am satisfied that the defendant never understood that she was making a contract of the character now alleged by the plaintiffs and the plaintiffs must have realised this at the time. The plaintiff Chevrier was already under contract to purchase the property at $35,000 and in specifically carrying out this agreement the defendant incurred no liability for damages or obligation of any kind under the lease. If the contract of this plaintiff was entered into in good faith on his part the tenants had no right of purchase as against it. It was suggested but not satisfactorily shewn, that there was some concealed understanding that this plaintiff's offer of $35,000 was partly with the view of misleading the tenants and defeating the option—if so the option would not be defeated in favour of Chevrier either alone or associated with his co-plaintiff upon a conveyance for a lower price. I can see no escape for the plaintiff Chevrier from the obligation of his first contract, on any such ground, and I would entertain no such plea, if it were set up in an action for specific performance of his agreement to purchase. Having this agreement, then, why would the defendant agree to sell for $4,000 less and at the same time subject herself to unlimited liability for damages at the suit of her tenants? It would require very clear evidence to induce me to believe this. I do not believe it. The contract set up by plaintiffs is an unconscionable one. The plaintiffs are shrewd, keen, educated men. The defendant is an aged hysterical woman living alone. The attempt to shew that she was a business woman at one time was not successful; but, on the other hand, it was shewn by the plaintiffs that she had imprudently endorsed for large sums and was financially embarrassed. The plaintiffs admit that she did not want to sell, that she cried when they asked her to do so, that she tried to get away; in fact, that "she rushed away," and that the plaintiff Parent followed her and persisted in obtaining an agreement. It is shewn that she did not understand the language of the agreement, that material provisions of the agreement were omitted from it, and that she was nervous and frightened and was intimidated and threatened. It is sworn, too, and not denied, that the plaintiffs insisted that if she did not conclude a bargain with them, she would be without bread and upon the road.

The defendant's nephew was present during a part of the time the plaintiffs plied their arguments and played

upon the baseless disasters they had conjured up. He contradicts the plaintiffs on several points, but I attach very little importance to his statements. He was no protection to his aunt. He is less intelligent than she is. The defendant swears that the agreement with Chevrier was *bona fide*, and I have no doubt that it was. It was, therefore, a valid and subsisting agreement on 24th May. This plaintiff may not, as he says, have been in a financial position to carry it out. There is nothing, however, to indicate that an action for damages would have been fruitless. This is manifestly not a case for specific performance. It is not shewn that the plaintiffs have sustained any damages, but this is not important, in view of the conclusions I have come to.

Pausing here, and upon the facts alone, without reference to the Statute of Frauds, I am clearly of opinion that the parties never agreed to the same thing, and that there was no contract. The evidence forces me to the conclusion, too, that this woman was not fairly dealt with; she never had a fair chance to understand, deliberate, or protect herself; the so-called agreement was practically wrung from her, and the plaintiffs, as medical men, were peculiarly fitted to appreciate the unfitness of this nervous, excitable, worried and hysterical woman.

Making all due allowance for the disturbing influences incident to an unusual situation, if the defendant's mental condition or fitness for business is to be in any way gauged by her condition while giving evidence at the trial, I would say that on the 24th May, 1913, she was probably quite incapable of appreciating or weighing any important business proposition, or resisting importunity, unless carefully advised and shielded by some competent, disinterested person. The lapse of time and the litigation itself may, of course, count for a great deal, even aside from the disturbing atmosphere of a Court room, but, with it all, I find it difficult to believe, and I am not sure that I do believe, that the plaintiffs at the time were able to persuade themselves that they were acting fairly or honestly by the defendant.

There has been no ratification or adoption of the agreement. Whether kept back intentionally or not this agreement was not in evidence at all until the 7th of July. In the condition in which she was while giving evidence I do

not feel that I should give any weight to what the defendant says she might or might not have done in events which have not happened.

I come to the question of the Statute of Frauds. As to being bound by it, it makes no difference whether Dr. Parent actually knew of the tenants' option or not, as he must be taken to have the knowledge of his partner, and besides knowing of the lease, and taking subject to some of its terms, knowledge of its contents is imputed to him. But the point is of importance in considering whether the writing produced embodies the actual agreement come to. The evidence at the trial convinces me that he did in fact know that the lease contained an option of purchase in favour of the tenants, and this is confirmed by his examination for discovery. Referring to his first interview with the defendant he says:

"Q. 14. Did she shew you the lease? A. No.

Q. 15. Did she tell you what claim Lamoreux had in the lease? A. Yes.

Q. 16. Did she tell you that Lamoreux had a lease and a right to renew and right to purchase? A. Yes, I think so."

The tenants had fifteen days after notice within which they could accept or reject the property at the price any other person was willing to give for it. The contract sued on was based upon an offer of $31,000, made for the first time on the 24th of May, and accepted within an hour without the parties separating or communicating with the tenants. It is idle to argue that the option upon this offer was disposed of, or that the refusal to buy at $35,000 implied even a probable refusal to buy at $31,000. Referring to the 24th of May, and to the actual agreement come to that day, this plaintiff says:

"Q. 22. But she says it was also subject to their option to purchase? A. Sure, and she said if you agree to purchase—I think that is what she said—I will accept this provided Provost and Lamoreux don't want it, but I have to submit it to them. I have to submit them your offer *and we waited and the time had expired,* and she said they won't take it, and you can take it."

I take the words italicised to be an argument of Dr. Parent, interjected, to shew that the defendant should have

given notice so as to complete the title, and not as a statement of anything the defendant said. As to the subsequent words it was probably the opinion of both parties that the tenants might not exercise their option even at $31,000. This was on the day alleged agreement was signed.

"Q. 23. It was after that she signed the paper? A. No, the day the paper was signed."

Q. 24. She signed that? A. Yes, she said, you will have to wait to see if Provost and Lamoreux take it. She said if they would not take it then the deal goes through."

It cannot be contended that this was not a substantial term of the agreement, if there was an agreement at all. It is not in the writing and without it the defendant is absolutely bound to convey, and subject herself to the payment of damages.

Further, it is admitted by the plaintiffs that the plaintiffs were to take the land subject to the lease—whatever that would mean—they say it only meant subject to the term and the right of renewal for a further term of years, the defendant says that they were to take subject to all the tenants' rights; and in view of the drop of $4,000 the probabilities are with the defendant, but whichever way it was, here again one of the most important terms of the alleged agreement is not in the writing.

The result, of course, is that the writing as it stands cannot be enforced because it does not contain the actual agreement between the parties. It cannot be amended and enforced because of the conflict of evidence; and I could not upon the view I entertain of the weight of evidence, amend to support the plaintiffs' claim.

The action will be dismissed with costs.

HON. MR. JUSTICE BRITTON. JULY 2ND, 1914.

JUNOR v. INTERNATIONAL HOTEL CO. LTD.

6 O. W. N. 690.

Master and Servant—Injury to and Death of Servant—Action under Fatal Accidents—Explosion of Hot Water Range in Hotel Kitchen—Common Law Liability — Employment of Competent Persons by Hotel Company — Independent Contractor—Findings of Jury—Negligence of Fellow-servants — Common Employment—Evidence.

A., a servant of a hotel company, was killed by an explosion of a range in the kitchen of the company's hotel caused by reason of the negligence of one B., who was employed by the manager of the hotel, in repairing the said range. The manager of the hotel was found to be competent.

BRITTON, J., *held*, that the hotel company was not liable, since A., B., and the manager, being fellow-servants, the doctrine of common employment applied.

Action under the Fatal Accidents Act to recover damages for the death of the plaintiff's daughter by reason of the negligence of the defendants, as the plaintiff alleged.

Tried with a jury at Sault Ste. Marie.

J. E. Irving, for plaintiffs.

Gideon Grant, for defendants.

HON. MR. JUSTICE BRITTON:—The plaintiffs are the parents of Jean Junor, who when living was the head waitress in defendant's hotel at Sault Ste. Marie, and who at that hotel was killed on the 18th May, 1913, by the explosion of the range, or hot water attachments thereto in the kitchen of the hotel where the said Jean, was in the performance of her ordinary work. This action is brought under the Fatal Accidents Act, the plaintiffs being father and mother respectively and being persons having a reasonable expectation of pecuniary interest or benefit in the life of their daughter.

The negligence charged is that the defendants so negligently and carelessly set up and installed the range and attachments as to cause the explosion. The plaintiffs further allege that it was the absolute duty of the defendants to provide a safe place for the daughter Jean to work and the defendants failed in their duty in that regard.

The defendants' manager of the hotel was one Pollock. He was not an expert—in fact he did not know anything

about putting up the range, so he employed Emanuel J. Gallagher to do the work.

After the close of the evidence and after some discussion, with counsel and the jury, the following questions were put to, and answered by the jury.

(1) Were the defendants guilty of any negligence which caused the death of Jean Junor? A. Yes.

(2) If so, what is the negligence you find? A. By not having the hot water system properly installed and inspected. The manager of the hotel neglected his duty inasmuch as he neglected to examine the work, or cause to have it examined, immediately when he found it was not satisfactory.

(3) Would danger to persons in the kitchen of the International Hotel, be reasonably expected to arise from an appliance formed by connecting the water front with the steam coils, unless measures were adopted to prevent such danger? A. Yes.

(4) Did the defendants take reasonable care to prevent such danger? A. No.

(5) Did the defendants exercise reasonable care in employing a manager? A. Yes.

(6) Was the manager in the employ of the defendants at the time of installation of plant which caused the damage and at time of accident, a competent manager? A. Yes.

(7) Did the defendants' manager exercise reasonable care in the employment of Mr. Gallagher to instal the work mentioned? A. No.

(8) Damages? Father $1,200, mother $1,200.

Additional:

(1a) Whose negligence was it that led to explosion? A. On the part of the manager, also of Gallagher.

(2a) Who in the construction of the appliance left anything undone, the leaving of which undone led to the explosion? A. Gallagher.

(3a) Who, if anyone, did anything in the construction of the appliance that led to the explosion? A. Gallagher.

Upon these answers each party claims to be entitled to judgment.

The case is by no means free from difficulty. I have looked at all of the many cases cited by counsel, and at

other cases. My conclusion is that the defendants can successfully invoke for their defence the doctrine of common employment.

This is a common law action. The plaintiffs have no claim under the Workmen's Compensation for Injuries Act, so, unless there is liability at common law, the plaintiffs cannot succeed.

The plaintiffs rely upon the *Ainslie Mining and Railway Co. and McDougall*, 42 S. C. R. 420, as correctly stating the law: "An employer is bound to provide a safe and proper place in which his employees can do their work, and an employer cannot relieve himself from this obligation by delegating the duty to another, and if the employee is injured by this failure of the employer to fulfil this obligation, the employer cannot in an action against him for damages, invoke the doctrine of common employment."

I do not understand that case to mean that whenever an accident happens to an employee in the course of his employment, in the room, or upon the premises provided by the employer, that the place is to be considered an unsafe and improper place in which to work. There is no warranty on the part of the employer, that the employee will not meet with an accident while at work. The right of action is founded upon negligence and if no negligence in providing and maintaining the place where work is being done, if safe and proper for the work to be done, and if no negligence in respect to the particular act or thing which caused the injury to the workman, there is no liability. The building must be structurally safe—it must be free from pitfalls, from dangerous openings insufficiently guarded, and from dangerous machinery, unprotected. The contention of counsel for plaintiffs, in his very able conduct of this case, is that, the kitchen of the hotel, from the time of the attachment of the steam heating to the range, was not a safe place for the hotel employees to work in. If it was not safe, it was for the time made unsafe, by the negligence of Gallagher. The contention is that if Gallagher was an ordinary servant of the employer, the employer is liable, and even if an independent contractor, the defendants are liable, and many cases were cited in supposed support of this contention. *Jones* v. *C. P. R.* 24 O. W. R. 917, has no bearing, as in that case there was breach by the de-

fendants of a statutory duty. The most recent case on the point of independent contractor is *Vancouver Power Co. and Hounsome,* 49 S. C. R. 430.

Upon what may be considered as undisputed evidence, the negligence which caused the accident was that of Gallagher. His work was repair work. He was called in as a known man, supposed to be competent, and as one engaged in and doing a large business. The defendants knew nothing about it, but their manager did. The manager was competent, as jury found, and the defendants exercised reasonable care in selecting and employing him. Both the manager, Pollock, and the workman, Gallagher, were with the deceased, fellow servants of the defendants. If there is anything left of the doctrine of common employment, as I think there is, it must be applied in this case.

In my opinion, if there is any liability, it is because of the answers of the jury to the third and fourth questions. These questions were put at request of counsel for the plaintiffs.

I am of opinion that there was no evidence that should be submitted to the jury, that danger to persons in the kitchen of the hotel would reasonably be expected to arise from an appliance formed by connecting the waterfront, with the steam coils. It was not shewn that any such accident had ever happened in that hotel, or anywhere, to the knowledge of the defendants. Steam heating and hot water heating are in general use. The hotel kitchen was free from all such sources of danger when the manager and deceased accepted employment. The manager as an employee sought to have changes made and repair work done and by the negligence of the person employed the accident happened. The defendants were not notified of the work, or of any danger as likely to arise in connection with the heating, as it had been or was to be.

I am also of opinion that there was no evidence to go to the jury, which would enable them to answer the fourth question as they did, by saying that the defendants did not take reasonable care to prevent such danger. My reasons are partly stated above, but I repeat: The company appointed a competent manager who in turn, knowing of no possible danger, selected a man in the business of steam and hot

water heating, to do, what seemed to the manager and reasonably so, an ordinary job. There was no evidence that want of inspection under the circumstances was negligence. The man employed to do the work was such a person as would be employed to inspect, if any inspection required, in the case of work done by another. The servant assumes all ordinary and usual risks in accepting employment. If the risk was an obvious one, it was so to the employee as well as to employer. The doctrine of assumption of risk applies as well to those arising during service as to those existing at time of hiring.

Upon the general question of limiting liability, where employer has secured competent workmen, see *Woods* v. *Toronto Bolt and Forging Co.*, 11 O. L. R. 216.

In dismissing the action I do so with some hesitation, because of what I regard as conflicting opinions upon the question and I shall not be sorry if this important case receives the attention of an Appellate Division.

The action will be dismissed without costs.

Thirty days' stay.

HON. MR. JUSTICE KELLY. JUNE 30TH, 1914.

PETCH v. NEWMAN.

6 O. W. N. 705.

Principal and Agent — Agent for Purchase of Goods — Claim for Moneys Advanced and Commission — Findings of Jury—Interest —Amendment—Counterclaim—Costs.

KELLY, J., *held*, that plaintiff was entitled to recover moneys advanced to purchase goods for defendant and commission for his services as agent for defendant.

Sir Geo. Gibbons, K.C., and J. B. Davidson, for plaintiff.

H. D. Smith, for defendants.

HON. MR. JUSTICE KELLY:—Plaintiff claims to have been the agent of the defendants in the season of 1912-1913 for the purchase of beans, and that while acting in that capacity defendants became liable to him for money ad-

vanced to make the purchases and for commission. Defendants deny the claim, and in their statement of defence set up that the only member of the firm of Newman and Company was the defendant, Marietta Newman. During the trial, however, counsel withdrew this latter objection and admitted that both defendants were involved in the transaction. Plaintiff had been employed by defendants as their agent for the purchase of beans on a commission basis in the years 1910-11 and 1911-12. Part of the contest set up in the pleadings is in respect of the dealings in these years. At the trial plaintiff contended that a balance due him at the end of the second season was settled in October, 1912, by defendants paying him $500. The position taken by defendants was that at the end of the operations of the second year, plaintiff was indebted to them in the sum of $78.26. An engagement was made by plaintiff with defendants for the year 1912-13 to carry on for them the same operations; but they are not agreed as to the terms of that engagement, the plaintiff contending that his position was that of agent, as in the preceding years, and the defendants disputing this, and setting up that they were simply purchasers from plaintiff.

The action was tried with a jury to whom questions, approved of by counsel, were submitted. The jury found that plaintiff was employed by the defendants to buy beans for the season of 1912-13; that in his employment he exercised reasonable or such skill as he actually possessed and that he was not guilty of disobedience to instructions or negligent in the discharge of his duties. They also found that the accounts between the parties for the second season, 1911-12, were settled by the payment of the $500 above referred to. A further finding was in reference to the price to be paid for beans bought from one McLarty. In his capacity as agent plaintiff agreed to purchase a quantity of beans from McLarty and when some of these were being delivered he made objection to McLarty on the ground of their inferior quality and refused to pay the price agreed upon. His evidence is that the matter was referred to his principal, William C. Newman, to fix the price, and that Newman did fix it at $1.50 per bushel. This Newman denied, but the jury found on the evidence that Newman did fix the price and communicated it to plaintiff.

The six carloads which the plaintiff purchased in the third season he purchased as agent for defendants; the purchases were made in the latter part of 1912 and shipments were made from time to time to defendants. Plaintiff's commission was two cents per bushel. Some of the shipments on their arrival were objected to by defendants on the ground of inferior quality, but with the exception of what was purchased from McLarty the purchases at the time they were made were not open to objection on the ground of quality. The evidence of most, if not all, of the vendors was put in, and taken with the jury's findings in favour of the plaintiff, it relieves him from any charge or imputation of neglect of his duty or failure to fulfil his obligations in so far as they related to the purchasing and shipping. No objection can be made to the McLarty purchase, the jury having found that defendants fixed the price.

Other reasons are found in the evidence for the attitude taken by defendants after the purchases were made. A rapid decline in the price of beans came about in the early part of December, 1912, and continued on into 1913, resulting in defendants being confronted with the certainty of a substantial loss in these very transactions. A means of escaping this loss would be to throw the purchased goods back upon the plaintiff on the ground that he was defendants' vendor and not their agent, a position, however, which on the evidence and the findings of the jury, defendants were not entitled to take.

The decline in the condition of the beans after the purchases were made and when or after they had reached defendant's possession is accounted for, to a great extent at least, by the evidence of several witnesses who say that the year 1912 was an exceptionally bad year, inasmuch as beans of apparently satisfactory quality in the early part of the season became affected and subject to decline later on.

Defendants also took the position that by his subsequent actions plaintiff treated some of these goods as his own and assumed responsibility for them. If the circumstances are fully looked into that claim cannot be substantiated insofar as five of the six carloads are concerned. The other car, referred to as the Blenheim car, I shall deal with later on. The most that can be said of plaintiff's action in regard to these five cars after he had shipped them to defendants is

that in the case of some of them he lent his services and assistance in the efforts made to dispose of the beans; and for this there is ample explanation. Defendants did not supply in advance the monies with which plaintiff made the purchases; and to put himself in funds or to recoup the outlay he made in purchasing, he had resort to the expedient of obtaining advances from the bank, turning over to it the bills of lading in order to enable it to obtain payment of the advances on the arrival of the goods at their destination. Defendants having declared their refusal to take delivery and difficulties having thereby arisen, the bank's representatives and the plaintiff were all interested in bringing about some satisfactory issue which would result in the realisation of the monies. Up to that time plaintiff had not assumed responsibility and I do not think that what he did in the way of disposing of the goods amounted to more than assisting the defendants to that end so that payment could be made to the bank. Defendants did not cease to be or to remain liable to him for such part of the purchase price of the five cars as they had not already paid to him.

The sixth car, the Blenheim car, is in a different position. Plaintiff in his capacity of agent purchased and shipped to defendants the contents of this car and on their refusal to accept delivery stating that they had no jurisdiction over the car and that plaintiff could do as he pleased with it, he (plaintiff) negotiated for the sale of these beans and did sell them to third parties. He did not further consult with defendants about the sale nor keep them advised of what he was doing nor report the result nor render to them a statement of the transaction. His conduct and mode of dealing after defendants had repudiated this car is consistent only with his assuming the ownership of and responsibility for this consignment. The beans contained in this car were of high quality whe purchased and shipped, but there was nevertheless a heavy loss on the resale, no doubt due to the rapid and serious decline in price in the interval. My view is that though plaintiff acted properly and within the terms of his agency in buying and shipping the contents of this car, he afterwards, by treating and dealing with them as his own, changed the relationship of the parties to each other and assumed the responsibility for the consignment.

The plaintiff is entitled to $4,297.26, made up as follows:

Amount of his claim as set forth in paragraph 5 of the statement of claim	$11,901 31	
Less price of 1,000 bushels in what is referred to as the Blenheim car	2,196 94	
		$9,704 37
Commission on his purchases		116 29
		$9,820 66
Less payments made by defendants as follows:—		
November 19th, 1912	$2,000 00	
December 26th, 1912	2,004 70	
January 2nd, 1913	1,124 95	
August, 1913	393 75	$5,523 40
Balance—		$4,297 26

Interest was not specifically claimed, but the evidence shews that payments for the purchases were to be made upon or soon after plaintiff made the shipments, and I think this would bring them all not later than January 1st, 1913. The claim may be amended to include a claim for interest. Plaintiff will be allowed interest from January 1st, 1913, on the sums from time to time remaining unpaid to him.

This disposes of all the items in controversy except a claim by defendants for $180 for 1,500 empty printed bags. Defendants ordered from the manufacturers in Toronto 1,500 bags, which were to be sent to plaintiff. Through no fault of the parties to the action there was considerable delay on the part of the manufacturers in forwarding them. Plaintiff admits that some bags did reach him but he did not use them. The evidence does not disclose what number so came into his possession. He will either return the number he received or pay defendants therefor at twelve cents each. If the parties cannot agree upon the number, either of them may submit the matter to me for determination. Otherwise the counterclaim is dismissed without costs.

Plaintiff is entitled to costs of the action.

HON. MR. JUSTICE MIDDLETON. JUNE 30TH, 1914.

RE MESSENGER ESTATE.

6 O. W. N. 667.

Will—Construction—Appointment of Trust Company as "Executor and Trustee"—Revocation by Codicil of Appointment of Executor and Appointment of Individuals as Executors—Effect as to Trusteeship.

A testator who had appointed a trust company "executor and trustee" revoked the appointment of the company as "executor" and substituted two persons in its stead as "executors."

MIDDLETON, J., *held*, that the word "executor" was effective to revoke the appointment of the company both as "executor and trustee" since the strict legal signification of technical words must give way to the intention of the testator.

Application by the National Trust Company, upon originating notice, for an order determining a question arising upon the construction of a will of David H. Messenger, deceased.

G. H. Watson, K.C., for the company, and for the daughter and granddaughter of the testator.

C. L. Dunbar (Guelph), for the executors named in the second codicil.

Argued 26th June, 1914.

HON. MR. JUSTICE MIDDLETON:—A somewhat troublesome question arises on the will of the late David H. Messenger, who died on the 3rd of August 1913. By his will he appointed the National Trust Company executor and trustee of his will. Throughout he speaks of the company as his "executor and trustee." He directs his "executor and trustee" to pay his debts. His property is then given to his executor and trustee, to be held and disposed of by such executor and trustee upon certain trusts. The executor and trustee shall, after realization, hold the property during the lifetime of the testator's daughter and shall pay her the income. Upon the death of the daughter, if the granddaughter survives it shall pay her the income, and after her death, leaving issue, her issue is to take. In default of issue the money goes to charities.

By codicil dated 14th December, Mrs. Cassidy, the testator's housekeeper, is given the testator's house for life. She

is also given the income upon the testator's estate within Ontario, for life. The testator then directs his "executors" to invest and keep invested the estate from which the income is to be derived during the lifetime of Mrs. Cassidy, and upon her death these assets are to be disposed of by his "executors and trustees in the manner provided for by the will."

By a subsequent codicil, dated 21st October, 1907, the appointment of the National Trust Company as "executor" is revoked, and instead two personal friends are named as executors. Save as to this, the will and former codicil are confirmed.

The trust company now contends that all the testator has done is to revoke its appointment as executors and that it still continues as trustee. This motion is to have it so declared, and for a declaration as to its rights and duties during the lifetime of Mrs. Cassidy.

Mr. Watson also appears for the daughter and granddaughter, and they desire that the trust company should be the custodian of the assets. No case is made or suggested for the removal of the executors from their office but the suggestion is that their duties as executors have now been fulfilled and that the functions of the trust company now arise.

There is no room for doubt that the offices of executor and trustee are in their nature easily distinguished; and there is equally no room for doubt that it is competent for a testator to appoint different persons to hold these different offices. In each case the true enquiry is whether the testator has used the words in their strict legal significance or whether he has indicated that the terms have been used in some secondary or colloquial sense, so that one office and not two is really indicated.

Turning to the will, I think it is plain that throughout the testator has not intended any distinction. The company is named as "executor and trustee." It is directed as executor and trustee to discharge the function of paying debts and testamentary expenses, which properly belongs to the office of executor. It is directed as executor and trustee to hold the fund during the lifetime of the daughter and granddaughter and, ultimately to divide the proceeds. This all properly belongs to the office of trustee. When the will

is varied by codicil his executors were directed to keep the fund invested during the lifetime of Mrs. Cassidy; but upon the death of Mrs. Cassidy it is the "executors and trustees" who are to divide. Then for some reason the testator changes his mind, revokes the appointment of the trust company as executor, and appoints instead the personal executors.

I cannot think that the testator intended to create the state of confusion contended for by Mr. Watson and to mean that as to his Ontario estate—which is practically all that he had—the executors should hold it during the lifetime of Mrs. Cassidy and that upon her death the National Trust Company should intervene as trustee. Nor do I think it likely that he could have intended that the trust company should have any functions to perform as trustee when he removed it from its position as executor.

Had the will drawn a clear line between the functions of the executors and the functions of the trustees there is no doubt that the testator could have well nominated his friends as his executors and the trust company as his trustee; but he would then have directed the executors on the realization of the estate to hand it to the custodial care of the trust company. Nothing of that kind is found. Everything points in the other direction; and I think it should be so declared.

Upon the argument of the motion I suggested to the parties the desirability of avoiding a somewhat unseemly contest as to the custody of this estate. It appeared to me that the trustees represented by Mr. Dunbar might well consent to have a third trustee appointed who would more particularly care for the interests of those entitled in remainder. This was not acceptable to Mr. Watson; but I again suggest the desirability of seriously considering the adoption of this course.

As I have no jurisdiction over the solicitor who prepared the codicil, his fault must be attributed to the testator, whose estate must bear the costs of this motion.

HON. MR. JUSTICE LENNOX. JUNE 30TH, 1914.

MITCHELL AND DRESCH v. SANDWICH, WINDSOR AND AMHERSTBURG RAILWAY.

6 O. W. N. 659.

Street Railway—Laying Rails on Streets under Authority of By-law not Submitted to Electors — Statutory Requirement—Action by Persons Affected to Restrain Laying of Rails and to Compel Removal—Locus Standi—Special and Particular Injury—Parties—Jurisdiction—Ontario Railway and Municipal Board.

A by-law of a municipality purported to empower a street railway company to construct a line of railway upon certain streets of said municipality.

LENNOX, J., *held*, that the by-law had no legal effect since it had not been submitted to the people as required by statute.

Held, that any person who has been specially injured by acts committed under the authority of an illegal by-law has a right to special damage.

Action for an injunction restraining the defendant company from constructing a street railway line upon certain portions of Ferry street, Chatham street and Victoria avenue, in the city of Windsor, and a mandamus compelling the company to restore the portions of these streets in so far as they have already interfered with them and for damages.

J. H. Rodd, for plaintiff.

A. R. Bartlett, for defendants.

HON. MR. JUSTICE LENNOX:—For some years the defendants have held franchises as to certain streets in Windsor, but it is not pretended that any of them cover the line in question. The by-laws conferring them were all passed prior to 16th April, 1912, and none of them were assented to by the electors.

On the 27th April, 1914, by by-law No. 1713, the municipality of the city of Windsor purports to authorise and empower the defendant company "to construct a line of railway from Sandwich street in the city of Windsor, south along Ferry street to Chatham street, thence along Chatham street to the intersection of Victoria avenue, thence along Victoria avenue to London street with suitable curves on Sandwich, Pitt, Chatham and London streets," being the line of railway the construction of which the plaintiffs seek to enjoin. This by-law was not submitted to the people as required by statute.

The by-law has no legal effect. It does not touch the question. It is argued that the city of Windsor is a neces-

sary party. I do not think so. No right or interest of the city is being questioned or attacked; not even by-law 1713, if the municipality can be said to be inserted in it. The situation is this: The plaintiffs complain and shew that they are being injured, and in a way special and particular to themselves, by the acts of the defendant company upon certain highways. *Prima facie* to break the roadbed of the highway and obstruct it is a wrong, and an actionable wrong at the suit of the persons injured where it causes them special damage; and it is none the less a wrong when done by a railway company. The defendant company must desist or establish a justification. They seek to do this by what they call the authority of the municipality.

The statute says authority cannot be so conferred. The document they set up does not prevent their being wrongdoers as against the plaintiffs—they are ordinary trespassers causing special and peculiar damages to the plaintiffs by reason of the situation of their properties. I find nothing to oust my jurisdiction by reason of the powers conferred upon the Railway and Municipal Board.

There will be judgment for an injunction and mandatory order in the terms prayed for and a reference to the Master at Sandwich to assess the damages sustained by each of the plaintiffs—judgment for these damages as found and for the costs of the action and reference.

HON. MR. JUSTICE LATCHFORD. JUNE 30TH, 1914.

KLENGON v. GOODALL.

6 O. W. N. 674.

Sale of Goods—Action for Price — Written Agreement—Statute of Frauds—Sale by Sample—Findings of Fact as to Quality—Condition as to Cleanness — Counterclaim — Goods Stored for Purchaser—Pledge by Vendor.

LATCHFORD, J., gave judgment for plaintiff in an action for the price of peas sold by sample, on the ground that the said peas were in accordance with the sample agreed upon.

Action brought to recover the price of 2,352 bushels of peas, sold by the plaintiff to defendant by a written contract dated 22nd November, 1913, and delivered to defendant at Wiarton, Ontario.

S. H. Bradford, K.C., and T. H. Wilson, for plaintiff.

H. Cassels, K.C., for defendant.

HON. MR. JUSTICE LATCHFORD:—The defendant admits the making of the contract. He asserts, however, that it is not sufficient under the Statute of Frauds, and alleges that the peas are not according to the sample mentioned in the agreement, and that accordingly he should not be obliged to accept or pay for them. He further counterclaims for damages on peas purchased from the plaintiff under an earlier agreement and not according to sample.

The initial difficulty in the case is to determine what is the "sample taken by Mr. S. J. Hogg" referred to in the agreement of the 22nd November. The peas to be supplied by the plaintiff were to be "fully up to" this sample.

At the trial the defendant and Mr. Hogg stated that the sample mentioned was one taken at Wiarton about the 24th October when peas purchased under the prior contract were being cleaned or bagged. Mr. Hogg was not very definite in his evidence on the point, but Mr. Goodall was quite positive. However, in Mr. Goodall's examination for discovery, which the plaintiff made part of his case, the defendant stated (Q. 13) that the sample mentioned in the contract was one taken by Mr. Hogg about October 1st "from various farmers that he was driven to by Mr. Klengon," and therefore identical with the sample referred to in the prior contract of October 4th.

That is what the plaintiff also swears to. In find as a fact that the sample mentioned in the contract of November 22nd is the sample taken by Hogg about the 1st of October and is the same sample mentioned in the first agreement. It was made up of a number of samples, all of uncleaned peas, the produce of several different farms. The peas were, however, to be cleaned. This term is not expressed in the contract; but it was understood by both the parties that cleaning was to be done.

I think the peas which the plaintiff procured from the farmers, placed in the defendant's bags and stored for him at his request at Wiarton under the second contract were fully equal to the sample originally taken by Mr. Hogg. That sample was not produced before me, nor was its non-production satisfactorily accounted for; but the evidence of many of the farmers from whom portions of the sample were taken satisfied me that the peas now stored at Wiarton are quite as good as the peas of which Mr. Hogg made up

his original sample. The sample which he did produce, as taken on October 24th, was of remarkably high grade—superior, indeed, to "No. 1 Peas," as defined by the Inspection and Sale Act. I cannot avoid the conclusion that this sample has been improved since it was taken.

I credit the evidence of the plaintiff that the sample which he took about the same time from the same peas, and produced in Court, fairly represents the peas which Hogg saw at Wiarton towards the end of October and passed as equal to the sample mentioned in the agreement sued on.

The price agreed to be paid by the defendant was much above the market value of the peas. He thought, however, the peas had the value he agreed to pay for them. He had, he says, tested some of the peas and found them to be "good boilers." Peas of that nature have, as the defendant knew, and as the plaintiff did not know at the time, a greatly enhanced value over peas of equal grade and external appearance which will not soften after being boiled for an hour and a half or two hours, and are therefore objected to in such markets as those of Montreal and Quebec, where, for domestic purposes, there is a great demand at high prices for peas that are "good boilers." However high the grade of such peas may be, their value in the markets where the defendant disposed of the peas purchased from the plaintiff depended to the extent of from 30c to 40c a bushel on whether they could be used as human food or were suited only for other purposes.

The buyers in the Montreal market who pay high prices for peas for household use are naturally particular, as the defendant admits, as to the quality of the peas which they purchase; and they are inclined to reject any that will not "boil soft." It was, I find, not the condition as to cleanness of the peas shipped to Montreal which led to their rejection by the buyers from the defendant's broker—though that reason was stated—but the fact that the peas were not "good boilers." There was no representation or undertaking made by the plaintiff that the peas which upon the defendant's order he shipped to Montreal should be suitable for domestic purposes. They were simply to be fully equal to the sample taken by Mr. Hogg. Five hundred and one out of the 1,050 bags now stored in Montreal are in statutory grade but No. 2½. This, I think, is wholly due to

the manner in which they were cleaned. Cleaning varies on every farm. Some farmers clean their grain well and others badly. But all the peas were "cleaned" within the meaning of the arrangement between Hogg and the plaintiff. The cost of thoroughly cleaning the peas at Montreal would be very small; but however thorough that cleaning might be, the peas would still be unfit for the use the defendant mistakenly thought they would serve. His counterclaim fails and should be dismissed with costs, while the plaintiff is entitled to recover the price of the peas at Wiarton $3,469.20, with cost of storage and interest and his costs of suit. If the parties cannot agree as to the cost of moving the peas from one storehouse to another at Wiarton and of the storage of them in the elevator there, a reference may be had at the defendant's expense to the Master at Walkerton.

The fact that the plaintiff has been obliged to borrow money from a bank on the security of the peas stored at Wiarton does not preclude him bringing this action. The defendant can obtain the peas at any time by paying for them. The Statute of Frauds has no application.

Stay of thirty days.

HON. SIR WM. MULOCK, C.J.EX. MAY 5TH, 1914.

RE TAYLOR—AN INSOLVENT.

6 O. W. N. 447.

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.

Held, that a creditor acting under the Act Respecting Assignments and Preferences by Insolvent Persons will not be allowed to contest a claim against an estate which has been assigned for the benefit of creditors and which the assignee refuses to contest unless the said creditor can shew that the estate will benefit thereby.

Held, that a mere successful resistance of a claim is not a benefit, since it adds nothing to the estate.

Appeal from the order of a Judge of the County Court allowing the creditor of an estate to contest a claim for his own benefit, but in assignee's name.

R. W. Hart, for Thomas Joseph Blain, assignee.

W. H. McFadden, K.C. (Brampton), for Lawson, a creditor.

HON. SIR WM. MULOCK, C.J.Ex. (v.v.) :—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 third clause of the Judge's order is as follows: "And it is further ordered that any benfit 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. ch. 134, confers such jurisdiction. Sub-sec. 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 the violation of this Act."

Then follows sub-sec. 2 of sec. 12, which declares that, "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 authorizing 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 indemnify 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 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.

HON. MR. JUSTICE MIDDLETON. JUNE 4TH, 1914.

RE BERLIN & BREITHAUPT, WATER COMMISSIONERS OF THE CITY OF BERLIN.

6 O. W. N. 423.

Municipal Corporation—Board of Water Commissioners—Rights and Duties—Alteration and Extension of Plant and Equipment—Surplus of Revenue over Cost of Operation—Payment by Commissioners to Municipal Treasurer — Power of Commissioners to Draw upon—Right of Commissioners to Determine what Extensions Necessary—Municipal Waterworks Act, R. S. O. 1897 ch 235, secs. 2, 38, 40, 47—Public Utilities Act, 3 & 4 Geo. V. ch 41, secs. 3, 26, 34, 35, 43.

By virtue of the Municipal Waterworks Act, R. S. O. (1897) ch. 235, secs. 2, 38, 40, 47 and the Public Utilities Act, 3 & 4 Geo. V. ch. 41, secs. 3, 26, 34, 35, 43, the Water Commissioners of the Corporation of Berlin were empowered by the said corporation to construct, operate and maintain waterworks.

MIDDLETON, J., *held*, that the commissioners had a right to deduct all expenditure before paying over the surplus to the corporation; that after payment over, such surplus was not to be used for general purposes until the commissioners should determine that it was not required for their work, when it might be used for municipal purposes.

Motion on behalf of the city for a mandatory order directing the Board of Commissioners to pay over to the City Treasurer the surplus of revenue over the cost of operation

Argued 8th May, 1914.

I. F. Hellmuth, K.C., for applicants.

E. F. B. Johnston, K.C., and E. P. Clement, K.C., for respondents.

HON. MR. JUSTICE MIDDLETON:—The question raised upon this motion is of importance, and the motion has been argued upon broad lines, for the purpose of obtaining a de-

cision as to the rights and duties of the Water Commissioners with reference to the alteration and extension of the plant and equipment.

The R. S. O. (1897), ch. 235, authorises the corporation to "construct, build, purchase, improve, extend, hold, maintain, manage and conduct water works." By sec. 40 the council may itself or by its officers exercise and enjoy the powers, rights and authorities conferred upon the corporation, or the Council may provide for the election of commissioners for such purpose. Upon the election of the commissioners all the powers, rights, authorities and immunities which under the Act might have been enjoyed and exercised by the Council shall and may be exercised by the commissioners.

By sec. 38, after the construction of the works, all the revenues arising from the supply of water shall, after providing for the expenses attendant upon the maintenance of the water works, subject to the obligation to pay off any money borrowed which is a charge thereon, form part of the general funds of the corporation.

By sec. 47, where the powers are exercised through a Board of Commissioners, the water rates, less disbursements by the Commissioners, shall be paid over by the Commissioners to the Municipal Treasurer, to be placed by him to the credit of the water works account.

In the revision of 1914, ch. 204, embodies an intervening revision, 3 and 4 Geo. V. ch. 41. The provisions of that statute differ somewhat from the earlier Act. By sec. 3 the corporation may "acquire, establish, maintain and operate water works."

By sec. 26 the Council may itself pass by-laws for the maintenance and management of the works, or, under sec. 34, the Council may, with the assent of the electors, provide for entrusting the construction of the works, and the control and management of the same, to a Commission. When this is done, under sec. 35 the powers, rights, authority and privileges conferred upon the corporation shall be exercised by the Commission and not by the Council of the corporation.

By sec. 43 the revenues, after deducting disbursements, shall be paid over to the Treasurer of the municipality, to be placed by him to the credit of the account of the public utility work, and if not required for the purpose of the

work the surplus shall form part of the general funds of the corporation.

If the municipal council itself is operating, then under sec. 43 the revenue arising from supplying any public utility is, after paying for the expenses of maintenance, to form part of the general funds of the corporation.

Although the phraseology adopted in these two Acts is different, I do not think there is any real difference, so far as the matters now arising are concerned. The scheme of both Acts is similar. The statute confers in general terms power upon the corporation to construct, operate and maintain the works. It then provides that the Council may be the executive body for the purpose of exercising the powers conferred, or, if it is seen fit to appoint a Commission, then the Commissioners shall be the executive body. Once the election in favour of a Commission is made, all the powers conferred upon the municipality must be exercised by the Commission and not by the Council; everything that the municipality is authorised to do must be done through the Commission; the Commission alone has authority to "construct, operate and maintain," and these words are to be interpreted in no narrow sense but as covering the entire municipal authority.

The provision for payment over of the surplus of income over expenditure is ancillary to this. Before paying over, the Commissioners have the right to deduct all outgoings. If there is then surplus, that surplus is to form part of the general funds of the corporation; but it is to be borne in mind that the surplus is not to be used for the general purposes unless it is "not required for the purpose of the work." In the meantime the money, even when paid over, is to be "placed to the credit of the account of the public utility work." While it is at the credit of the public utility work in question, the commissioners have, I think, power to draw upon it if required. The Commissioners are bound to pay over the surplus in their hands quarterly or oftener, but payment over must not hamper the commissioners in whatever they may think fit to do under the general wide powers. As in my view the whole municipal authority to construct, maintain and operate the waterworks system is vested in the Commissioners, it follows that they and they alone have the right to determine what extensions are necessary

and proper, and they may apply money in their hands to meet the cost of such works and may, if they see fit, draw upon any money which they have in the interim paid to the Council. Any money paid over from time to time must remain to the credit of the water works system until the commissioners determine it is not required for it; then and then only may it be used for municipal purposes.

The motion is refused. No order need be made as to costs, as the parties both represent the municipality.

HON. MR. JUSTICE MIDDLETON. JUNE 4TH, 1914.

WINNIFRITH v. FINKLEMAN.

6 O. W. N. 432.

Vendor and Purchaser — Agreement for Sale of Land—Time Fixed for Closing Sale—Extension of Time — Payment of Money by Purchaser to Vendor—Repudiation by Vendor—Time of Essence of Contract—Right of Vendor to Treat Agreement as Terminated and to Recover Money Paid—Equitable Relief.

Plaintiff made contract with defendant, W., for purchase of land, and defendant, F., in whom was the title, also made contract with W. to convey such land to plaintiff, and with plaintiff to same effect. A deposit was paid, and the matter was to be closed on a certain day, but plaintiff finding himself unable to complete by that day a new agreement was made in writing to have matter stand over for two days on condition that plaintiff paid F. a certain sum, which was done. On the day named F. deliberately repudiated the contract. By the next day F., having changed his mind, wished to renew the bargain, but plaintiff refused and brought action to recover the sum paid:—

MIDDLETON, J., *held*, defendant F. was guilty of breach of agreement since time was of the essence of the contract, and that there was, therefore, no ground for equitable relief by way of specific performance.

Action brought to recover $1,000 paid to defendant Smith on behalf of the defendant Finkleman.

Tried at Toronto 26th May, 1914.

D. L. McCarthy, K.C., and H. E. Wallace, for the plaintiff.

G. H. Watson, K.C., and A. L. Fleming, for the defendants.

HON. MR. JUSTICE MIDDLETON:—The plaintiff is a clerk in the employ of the National Trust Company, and entered into an agreement as trustee and agent for the com-

pany on the 31st day of October, 1913. He offered to purchase certain lands for the price of $20,850, payable $500 as a deposit with the offer, $10,000 on acceptance of the offer, and close of sale to be not later than November 15th, 1913, and the balance on or before May 15th, 1914, with interest on the unpaid purchase money up to the time of payment, from November 15th. This offer was accepted by Mr. Vanderwater, to whom it was addressed, on the 1st November, 1913.

The National Trust Company were purchasing as trustees for some one undisclosed, probably either the Toronto Street Railway or Mr. Fleming, its manager.

When the title came to be searched, the matter was placed in the hands of Messrs. McCarthy, Osler & Co. Mr. Case, who is connected with that firm, was instructed to look after the searching and generally the carrying out of the transaction. Some difficulty was found owing to the fact that Mr. Vanderwater was not the owner of the property but was entitled to call for a conveyance under an agreement between himself and Mr. Finkleman, the defendant in this action. That agreement was not produced, and I have no knowledge as to Finkleman's exact rights under it.

No difficulty arose upon this question, because it was arranged that Finkleman should convey direct to Winnifrith; and an order or direction to him to so convey was obtained from Vanderwater. The purchaser's solicitors were content to accept the direct conveyance.

There are, however, other difficulties arising in connection with the title, and some deficiency in the quantity of land supposed to exist arose when a survey was had.

On the 15th of November, the day named for closing, Mr. Smith, who represented Mr. Finkleman, and Mr. Bond, who represented Mr. Vanderwater, met Mr. Case at the office of McCarthy, Osler & Co. The adjustments were made, not only for the purpose of ascertaining the amount to be paid by Mr. Winnifrith, it being arranged that the whole price should be at once paid, but also an adjustment as between Vanderwater and Finkleman. There was an outstanding mortgage, and it was arranged that the amount due the mortgages should be deducted; and a comparatively small sum, $112.50, was to be held in abeyance for a few days until a further report from the surveyor could be obtained.

By the time all these adjustments were made and other matters had been arranged, one o'clock had arrived. Mr. Case then found that the senior members of the firm were away from the office and apparently the purchase money was not on hand. He was somewhat chagrined at the situation, and, I think imprudently, telephoned to the Street Railway Offices to see if he could get the money from Mr. Fleming, without first taking precautions that his conversation could not be overheard. Mr. Fleming was also out, and it became clear that it would be impracticable to close the trnasaction, owing to the early hour at which banks and registry offices close on Saturday. He asked the other solicitors to allow the matter to stand until Monday. To this they finally agreed, and left the office. They, however, shortly afterwards returned, and Mr. Smith took the position in which he was backed up by Mr. Bond, that Mr. Finkleman had been communicated with and would not allow the matter to stand until Monday unless $1,000 was paid on the Saturday.

There was no need for any anxiety as to the final closing of the transaction. Five hundred dollars had been paid as a deposit. But Mr. Case agreed to pay the $1,000 asked rather than permit any question to be raised. He, therefore, paid to Mr. Smith the $1,000. Mr. Smith was entitled to receive this, as Mr. Finkleman had signed an order directing the money to be paid to his solicitor. Then Mr. Case adopted the precaution of having the extension until Monday evidenced by writing, and a memorandum was signed by the three solicitors, by which they mutually consented to the extension of the closing until Monday the 17th.

On Monday the 17th apparently concerted action took place between Smith and his client to frustrate the closing on that day. The money was forthcoming; Mr. Bond was found and he was apparently willing; but Mr. Smith dodged all endeavours to obtain an appointment. When found he did not know when he could close; and finally he said that his client had taken away the deed which had been executed some days previously—the affidavit of execution is dated the 14th November—and upon tender of the money being made he declined to do anything. Tender was made also to Vanderwater, but he repudiated all knowledge of the matter.

The only inference I can draw from the facts proved is that Smith and his client, having learned enough to lead them to suspect that the street railway was the beneficial purchaser, determined to make use of that fact to secure some additional advantage.

I find as a fact that what took place on the 17th amounted to a deliberate repudiation on the part of Finkleman and his solicitor of all obligation to convey the lands in question and a refusal so to convey.

On the morning of the 18th there was an entirely unexpected change of heart on the part of Finkleman and Smith. They were then ready to convey. There was likewise a change of heart and desire on the part of the purchaser. The contract having been repudiated and performance of it refused on the 17th, the purchaser claimed to be entirely exonerated therefrom. The purchaser refused on the 18th to carry out the contract of which he sought performance on the 17th, and he also claimed that Finkleman, having refused to convey on the 17th when he ought to have conveyed, became liable to refund the $1,000. This action is brought to recover this sum. The $500 was paid to Vanderwater and I am not concerned with it.

First as to Smith. He acted as agent for Finkleman. He received the money as Finkleman's agent. When the money was paid to Smith it became and was Finkleman's. If there is a liability to refund, that liability is Finkleman's. I, therefore, think the action should be dismissed as to Smith, but I would not give him costs, as I cannot see that costs have been in any way increased by his presence.

Mr. Watson contends, first that there was no repudiation of the contract on the 17th; that there was no contract closed on the 17th; time not being of the essence of any arrangement that was made; and that even if there was a repudiation there is a right where no harm is shown to have been done, to reform the contract.

I think this argument is based upon a fundamental misconception. Originally there was no contractual relationship between the parties to this action. The plaintiff's contract was with Vanderwater; the defendant's contract was also with him; but there was a parol agreement by which the defendant should agree to convey to the plaintiff on receipt

from the plaintiff of the balance due under the defendants' contract with Vanderwater. It was known that this was under and in part performance of a contract between the plaintiff and Vanderwater. It was known that time was of the essence of this contract; and when the plaintiff found himself unable to complete the contract on the 15th as he had undertaken, the new contract then made to close on the 17th was a contract that I think embodied in it by implication all the appropriate terms of the original agreement between the plaintiff and Vanderwater, and thus time became and was of the essence of the contract. In consideration of the thousand dollars paid to Smith for the defendant, the defendant undertook to hand over the conveyance already executed so as to permit Vanderwater's agreement with the plaintiff being consummated in that way. As soon as the defendant refused to carry out this agreement he was guilty of a breach of agreement, and the right of action in the plaintiff to recover back the $1,000 paid as upon failure of consideration became vested in him.

The cases on which Mr. Watson relies are cases of a difference type. Where a contract is to be performed *in futuro*, one party may by announcing his intention not to carry out the contract when the time arrives, so repudiate the contract as to confer an immediate right of action upon the other. That other may treat the announcement of the intended breach as giving him a present cause of action, or he may if he choose, wait to ascertain if default is really made. If he elects to take the latter course, it is open to the repudiating party to change his mind and withdraw his announcement of repudiation, and he is then at liberty to carry out his original contract. But nowhere can be found a case which suggests that an offer to perform after the time fixed constitutes a defence. It may be relied upon in mitigation of damages. It may afford some ground for application to the Court for equitable relief, but a tender of a deed on the 18th, when the contract calls for the completion of the sale on the 17th, is not a compliance with the obligation assumed.

This I think is the result of all the cases.

If this is to be regarded as an action for specified performance and an application to the Court for equitable relief from the default, then nothing has been shewn to justify

interference. No explanation of the default is vouchsafed. A defence is filed in which charges of fraud are made and not a scintilla of evidence has been given to support them. Everything indicates that the position in which the defendant finds himself is the unexpected result of a piece of sharp practice on his part.

With the rights as between the plaintiff and Vanderwater I am not here concerned, for he is no party to this litigation. I can see nothing which justifies the retention by the defendant of this $1,000 for which he has given nothing.

HON. MR. JUSTICE BRITTON. JUNE 13TH, 1914.

WALLACE v. MCKAY, ET AL.

6 O. W. N. 503.

Master and Servant—Company—Incorporated, but not Organized or Operated—Contract of Hiring—Manager, Salary of—Settlement of Claim.

A company had been incorporated, but never organized or operated. The plaintiff, who was cognizant of this, had by an agreement in writing with the defendants, who signed personally, been engaged as general manager.

BRITTON, J., *held*, the defendants were not liable personally for salary and damages for breach of the agreement to pay the same on the ground that the condition precedent to payment, viz., the organization and operation of the company, had not taken place.

Action brought to recover $1,150.30 alleged to be the balance of six months' salary and expenses up to 23rd October, 1913, owed by defendants to plaintiff. The plaintiff further claimed $1,000 damages for breach of contract of hiring.

Tried at Brantford without a jury.

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

E. F. B. Johnston, K.C., for defendant McKay.

HON. MR. JUSTICE BRITTON:—The contract relied upon is dated 22nd April, 1913, and is as follows:

"We, the undersigned, agree to engage H. J. Wallace of Brantford to act as general manager for the Investment Company for a period of one year from date. The said H. J. Wallace to be guaranteed an annual salary of $3,000 per

annum, and legitimate travelling expenses, payable monthly. We also agree to pay office rents for offices now in operation, viz., Hamilton, St. Catharines and Woodstock, and to pay the rent on any new offices opened by Mr. Wallace, providing same meet with our approval. It is further understood that Mr. Wallace receive 15 per cent. commission on all lots sold in Prince Albert and Melfort, Sask., out of which commissions he is to provide payment for his agents.

It is also understood that the $3,000 is to apply against the commission on this basis.

On city property, he is to receive 50 per cent. of the commission received, and on farm lands 50 per cent., under the same conditions as above as to payments of agents. The commission of any sale of survey lots to be paid, 50 per cent. on payment of first instalment, and 50 per cent. on payment of second instalment, an adjustment of commission between ourselves and Mr. H. J. Wallace shall be made on the 31st December, 1913.

Signed this 22nd day of April, 1913.

(Sgd.) A. McKay.
C. W. Burns."

"I hereby accept the above contract.

(Sgd.) H. J. Wallace."

The defendants were members of a syndicate interested in western lands. It did not appear that the defendants or either of them had title or possession or control of any of these lands, but they were interested and expected to realize a profit from their sale. The syndicate intended to form a company—a holding and selling company—and a company was incorporated, but it was never organized. It was not shewn who were stockholders or provisional directors of this company. No lands were placed in the hands of this company. The defendants did not get possession nor control so that they could sell, either individually or through the agency of the proposed company, or through the agency or management or assistance of the plaintiff. It turned out, that for some reason beyond the power of the defendants to prevent, there was nothing requiring the assistance of any investment company, so the company did not go into operation. Its corporate powers were not exercised. The plaintiff knew that these defendants had no lands to sell—apart

from their comparatively small interest in the syndicate composed of many persons.

The agreement to engage the plaintiff to act as general manager for an investment company was not one binding upon the defendants personally. With the knowledge the plaintiff had, it appears to me that even if defendants in form made a personal agreement, that agreement was subject to the condition that such a company should be formed and organized—that there would be a company as a going concern, whose affairs were to be managed. The agreement provides that the plaintiff would be guaranteed an annual salary of $3,000, and expenses; that is to say, if such a company came into operation, the plaintiff would be appointed by that company manager, etc., and at the salary of $3,000 a year.

For the rent of offices already established, the defendants made themselves liable. This is a distinct part of the agreement—different from that referring to plaintiff's appointment as manager. Then there was to be an adjustment of commissions between the plaintiff and the defendants to be made on 31st December, 1913. That had nothing to do with the plaintiff's employment by the company. The plaintiff is not entitled to recover the salary from defendants personally. Any rents for offices up to the commencement of this action have been paid.

I find that there was a complete settlement between the plaintiff and defendant McKay as to any claim against McKay under the agreement in question. Prior to 23rd October, 1913, the plaintiff, seeing that no company had been, or was likely to be, organized, told the defendant McKay that he, the plaintiff, was losing. He stated that he thought he could recover from the defendants the year's salary under the agreement and also that he could recover damages, and he added in substance, that although he could do this, he did not intend to try. The plaintiff wanted a settlement. McKay wrote to the plaintiff on the 26th July, 1913, referring to a settlement. Following that letter, and because of it, plaintiff went to Ingersoll, and a settlement was then arrived at. Defendant was to pay $200, $100 by cheque and $100 by accepting and paying a draft upon him for that amount.

Plaintiff agreed to accept this in full, so far as defendant McKay was concerned. The $200 were paid.

The cheque for $100 given to plaintiff has upon it the words "to settle claim." The plaintiff stated that these words were not upon the cheque when he received it, or when the cheque was used by him. I have no doubt, and so find, that the words "to settle claim" were written by defendant McKay at the time the cheque was filled out and signed. The words were evidently written with same pen and ink as used in making defendant's signature. The defendant swears positively to the settlement and I accept his evidence as against that of the plaintiff upon the question of settlement and payment.

No useful purpose will be served by an attempted analysis of the evidence or further comment thereon.

The action will be dismissed as against McKay, and with costs.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON, IN CHRS. JUNE 6TH, 1914.

JARDINE v. McDONALD.

6 O. W. N. 444.

Summary Judgment—Rule 57—Defence—Extension of Time for Payment of Debt—Arbitration—Application of Commissions on Debt—Dispute as to Credit Item—Reference.

MIDDLETON, J., varied a judgment of Local Master, in an action for debt, by reducing it by $1,200, and ordered a reference, *inter alia*, to ascertain amount due.

Appeal from a judgment of Local Master at Guelph.

J. Shilton, for defendants.

G. H. Shepley, K.C., for plaintiff.

HON. MR. JUSTICE MIDDLETON:—The learned Master was, I think, right in granting judgment.

The agreement which authorizes all the commission or profit from the sales to be applied on the debt does not provide that the time for payment is to be extended till enough has been so earned as to pay off the claim. If this was to be the only way the claim was to be paid, what reason for asking a guarantee of the debt? The debtors and sureties appear to have been willing to trust to the leniency of the

creditors and to have stipulated for no extended time for payment.

The arbitration contemplated is an arbitration to determine whether the grantees have lived up to their obligation before the grantors forfeit the rights given. It is not an arbitration as to an admitted debt.

The last affidavit filed suggests a credit not given of less than $1,200. The judgment should be reduced by this amount and there should be a reference to the Master at Guelph to ascertain whether there is on the part of the defendants the right to credit upon the amount of the claim for any of the sums mentioned and to ascertain the true amount due. This judgment should provide for payment of the amount ascertained (over the amount for which the judgment now stands) forthwith after the making of the report. The Master will deal with the costs of the reference. The plaintiffs must have the costs of the appeals.

FIRST APPELLATE DIVISION. JUNE 8TH, 1914.

FIELDING v. HAMILTON & DUNDAS STREET RW. CO.

6 O. W. N. 474.

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.

SUP. CT. ONT. (1st App. Div.) *held*, that an Ontario street railway company can run cars from one point on its line to another without making any intermediate stops, in the absence of regulations to the contrary by the Ontario Railway and Municipal Board or by the Act of Incorporation or by any agreement between the railway company and the municipalities through which its line passes.

Appeal by the plaintiff from judgment of the Senior Judge of Wentworth County Court, dated 20th March, 1914, after the trial of the action before him sitting with a jury on the 6th of that month. The action was brought to recover damages for the breach of an alleged agreement between the appellant and the defendant company to carry her on the company's railway.

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

W. A. Logie, for appellant.

F. McCarthy, K.C., for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The appellant sues for damages for breach of an alleged agreement between her and the respondent to carry her on its railway.

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 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 that there would be no intermediate stops. The appellant testified that if this was done, she did not hear it, and that 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 (Ont.). 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, 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 betwen 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 objections 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.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS agreed.

FIRST APPELLATE DIVISION. JUNE 8TH, 1914.

ORTON v. HIGHLAND LUMBER CO.

6 O. W. N. 470.

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.

SUP. CT. ONT. (1st App. Div.) varied the trial judgment in an action on a lumber contract by reducing the amount.

Appeal by defendant from a judgment of HON. MR. JUSTICE LENNOX, 25 O. W. R. 378.

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 appellant.

M. B. Tudhope, for respondent.

HON. MR. JUSTICE HODGINS:—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 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 day of May, 1910. After that, on 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 May 11th, 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 1,000,000 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 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 & Scottish Life Assce. Co., [1909] 1Ch. 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 1,000,000 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 May 11th, 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 October 8th, 1910, and March 10th, 1911, and the shipments according to exhibit 9 filed by the respondent, began on June 28th, 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 March 29th, 1911, as per exhibit 33 (C. D. Tait's estimate) was $9,013.54 at the rate of $12.25. I do not think 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 May 29th, 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 recognized 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 him 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.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE agreed.