THE

ONTARIO WEEKLY REPORTER.

VOL. I. TORONTO, JANUARY 20, 1902. NO. 2.

MEREDITH, C.J. JANUARY 10TH, 1902.

TRIAL.

HUMPHRIES v. AGGETT.

Deed—Delivery—Retention by Grantor—Possession by Grantee with Rents and Profits—Evidence from Circumstances of, and Paying for Permanent Improvements—Executor and Trustee—Breach of Trust.

Action tried at Peterborough, brought to have it declared that an instrument dated 7th January, 1852, made by Henry Hurl Humphries sen. to Robert N. Humphries, purporting to convey certain land, was never delivered, and, therefore, did not operate, and consequently that such land formed part of the estate of Henry Hurl Humphries jun., to whom it was devised, subject to a life estate of Robert N. Humphries and his wife, by the grantor, who died in January, 1898, and also to set aside a conveyance of the land, dated 4th May, 1898, made by Robert N. to defendant; and also to have defendant removed from his office of co-executor and co-trustee with plaintiff of the will of Henry Hurl Humphries jun. The defendant, finding the conveyance of 1852 among his testator's papers, it is alleged, procured its registration, and then the conveyance of 1898 from Robert N. Humphries to himself.

E. B. Edwards, K.C., for plaintiff.

A. B. Aylesworth, K.C., for defendant.

MEREDITH, C.J., held that the conveyance made in 1852 was delivered and did pass the land to the grantee. All the words referring to assigns were struck out, and, having regard to the kind of man Robert was shown to have been, and to the fact that he purchased and paid for the land, the idea was that if Robert died without issue it would revert to the grantor. There is nothing inconsistent with the view that the deed of 1852 was delivered, in the fact that the grantor, after the death of Robert and his wife, assumed a

power to dispose of the land; and the non-registration is explained by considering the kind of man Robert was—shiftless and easily imposed upon. The conduct and acts of Henry Hurl Humphries jun., and statements made by him as to Robert's ownership, are inconsistent with the case plaintiff sets up. Robert had the use and enjoyment from 1852 until his death, and the account kept by Henry Hurl Humphries jun., after Henry Hurl Humphries sen. handed him the deed of 1852, as well as the fact that permanent improvements were made and their cost deducted from Robert's rents, are strong circumstances in the conclusion that Robert was the real owner. Henry Hurl Humphries jun. does not appear to have made any claim to the land. The handing of the deed of 1852 over to Robert, which does not, however, appear to have been proved, would not, even if proved, have constituted a breach of trust. Robert had frequently demanded it, but it is to be regretted that defendant did not frankly inform his co-executor what had been done. The testator, having no estate in the land, nor being in possession, nor claiming it, the defendant was entitled to a conveyance of it from Robert, and is not a trustee for anyone. Action dismissed, but without costs.

E. B. Edwards, Peterborough, solicitor for plaintiff.

A. L. Colville, Campbellford, solicitor for defendant.

JANUARY 13TH, 1902.

DIVISIONAL COURT.

BROTHERSON v. CORRY.

Master and Servant— Negligence of Master—Sufficient Evidence of, for Submission to Jury—Res Ipsa Loquitur.

Walsh v. Whitely, 21 Q. B. D. at p. 378; Moffatt v. Bateman, L. R. 3 P. C. 115, approved.

Per BRITTON, J., Cripps v. Judge, 13 Q. B. D. 583, should be followed.

Motion by plaintiff to set aside nonsuit entered by LOUNT, J., in an action for negligence, tried at Peterborough, and for a new trial. Action by Andrew Brotherson, a labourer of the township of Otonabee, against James A. Corry, and E. G. Laverdure, contractors for the construction of a section of the Trent Valley Canal, to recover damages for injuries received by plaintiff while engaged in working for defendants in such construction. A derrick used in the work fell upon plaintiff, owing to the alleged negligence of defendants in not sufficiently supporting the derrick, and by reason of a defect therein.

D. W. Dumble, Peterborough, for plaintiff.

A. B. Aylesworth, K.C., and D. O'Connell, Peterborough, for defendants.

Judgment was delivered on January 13th, 1902.

FALCONBRIDGE, C.J.—There was not sufficient evidence of defendants' negligence to justify a submission to the jury. The accident was due to a very common cause of injury to workmen,—the breaking or falling of something, which breaking is not necessarily attributable to negligence of defendants: Moffat v. Bateman, L. R. 3 P. C. 115, explaining or distinguishing Scott v. London Dock Co., 3 H. & C. 596.

STREET, J.—In my opinion the nonsuit was right and should not be disturbed, because no negligence on the part of defendants was shewn. It is not a case in which the doctrine of *res ipsa loquitur* should be applied, because evidence of proper and careful construction was given by defendants: Scott v. London Dock Co., 3 H. & C. 596; Moffatt v. Bateman, L. R. 3 P. C. 115; Black v. Ontario Wheel Co., 19 O. R. 578. . . . The case is one, therefore, in which the jury are asked to say that the derrick was negligently constructed, when no witness on either side has said so, and where the only opinion expressed by any witness is that it was properly and not negligently constructed. The case is within the doctrine laid down in Walsh v. Whitely, 21 Q. B. D. at p. 378.

BRITTON, J.—The case is not distinguishable in principle from Cripps v. Judge, 13 Q. B. D. 583, in which Heske v. Samuelson, 12 Q. B. D. 30, was affirmed. At the close of plaintiff's case, if the defendants had not put in any evidence, the jury should have been asked this question:—"Was the derrick fit to be used for the purpose it was being used at the time of the accident?" I do not think the evidence given by defendants warranted the withdrawing of the case from the jury. Even if the evidence on the part of the defence was not contradicted by witnesses called by plaintiff, still the jury, and not the Judge, should have pronounced upon it. Again, the iron strap, shewn in figure 2 and figure 3, slipped over the top of the bolt because it had no head. Omitting to put a head on the bolt may have been a specific act of negligence on defendants' part, and the jury should have been asked to say whether or not that omission was the cause of the accident, and, if so, was it negligence, and, if so, were defendants liable.

Motion dismissed with costs, BRITTON, J., dissenting.

D. W. Dumble, Peterborough, solicitor for plaintiffs.

Stratton & Hall, Peterborough, solicitors for defendants.

JANUARY 14TH, 1902.

COURT OF APPEAL.

WHIPPLE v. ONTARIO BOX CO.

Jurisdiction—Certificate of Judgment of Court of Appeal—Power to amend after issue—Mistake—Costs.

Where a certificate of the Court was issued setting aside the judgment dismissing the action, and directing judgment to be entered for plaintiff for $50 damages, and the costs of the action, the Court, upon application, amended the certificate to accord with its intention, to give costs on the High Court scale.

Motion by plaintiff to amend the certificate of this Court issued upon the allowance of the appeal of the plaintiff from the judgment at the trial. The written opinion on the appeal was delivered by LISTER, J.A., setting aside the judgment dismissing the action, and directing judgment to be entered for plaintiff, for $50 damages, and full costs of the action. The certificate as issued awarded the plaintiff $50 damages, and the costs of the action. Objection was taken on the taxation of the plaintiff's costs, that the costs should not be taxed on the High Court scale, but as if the action had been brought in a division Court, and this motion was therefore made in Chambers before LISTER, J.A., who referred it to the Court.

A. B. Aylesworth, K.C., for plaintiff.

G. F. Shepley, K.C., for defendants. "Full costs of action" means "costs of the action:" Irwine v. Reddish, 5 B. & Al. 786; Avery v. Wood, [1891] 3 Ch. 115. The certificate has issued. It is in accordance with the written opinion, and there has not been any mistake. There is, therefore, no jurisdiction to amend.

AYLESWORTH in reply.—The costs of the motion should be to plaintiff: Hardy v. Pickard, 12 P. R. 428.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, LISTER, JJ.A.) was delivered at the conclusion of the argument by ARMOUR, C.J.O., OSLER, J.A., dissenting as to the costs of the motion:—The intention of the Court was to give costs on the High Court scale, including the costs of the interim injunction, and the certificate must be amended to carry out that intention. Costs of the motion to plaintiff.

J. J. Scott, Hamilton, solicitor for plaintiff.

Washington & Beasley, Hamilton, solicitors for defendants.

LOUNT, J. JANUARY 13TH, 1902.

CHAMBERS.

RE GILLEM.

Infant—Custody of—Right of Father Paramount to that of Deceased Wife's Mother—Evidence of Reputable Witnesses—Credit to be Attached to.

Re Young, 29 O. R. at p. 668, referred to.

Application by James J. Gillem, father of Veronica Gillem, an infant, for the custody of his child.

J. N. Counsell, Hamilton, for J. J. Gillem.

Arthur O'Heir, Hamilton, for W. & M. Warnick.

LOUNT, J.—The dispute being between the deceased wife's mother, having no maternal right, and the father, he has as against her and all others, except his wife, if she were living, the paramount right, and unless such right has been forfeited by him by misconduct, or he is shewn to be otherwise unfit or incapable, he is not to be deprived of that right. On such an application as the present, a strong case of misconduct and unfitness must be made out on the part of the applicant to justify the Court in depriving the father of the custody, control, care and education of his child. No such case has been established. More weight and credit is to be attached to the statements made in the affidavits filed on behalf of the applicant than to those in reply, the deponents for the applicant being persons of good standing and repute, having had long and full opportunity of knowing the applicant; while the facts alleged in the affidavits in answer, are shaken by the cross-examination of their makers; and there is internal evidence that some of the persons did not fully understand and appreciate what they were swearing to. The arrangement spoken of by W. Warnick, as having been made with the applicant, is one that cannot be upheld even if it were fully established, and having regard to all the surrounding circumstances, M. Warnick's custody of the child is as consistent without such arrangement as with it. The applicant should have the custody of his child until and unless some further order shall be made. Costs to the applicant. Refer to *Re* Young, 29 O. R. at p. 668.

Mackelcan & Counsell, Hamilton, solicitors for Gillem.

Staunton & O'Heir, Hamilton, solicitors for W. & M. Warnick.

Moss, J.A.

JANUARY 13TH, 1902.

COURT OF APPEAL—CHAMBERS.

ROTHSCHILD v. SILVERMAN.

Appeal—Leave to Appeal to Court of Appeal—Finding of Trial Judge.

Motion by plaintiff for leave to appeal from order of a Divisional Court (*Globe*, 8th January, 1902), affirming judgment of STREET, J.

C. Millar, for plaintiff.

J. H. Clary, Sudbury, for defendant.

Moss, J.A.—There is no dispute as to the law; it is solely a question of fact. The trial Judge found against the plaintiff's testimony, and his conclusion should not be disturbed, and it involves a finding that the release of the judgment, to set aside which this action is brought, was a fair transaction. The Divisional Court agreed with the trial Judge, and under the circumstances a further appeal ought not to be sanctioned. Motion refused with costs.

Clary & Parker, Sudbury, solicitors for plaintiff.

McVeity & Culbert, Ottawa, solicitors for defendant.

FALCONBRIDGE, C.J.

JANUARY 13TH, 1902.

TRIAL.

ADAMS v. CULLIGAN; HOWE v. CULLIGAN.

Master and Servant—Negligence of Master—Mine—Defective Machinery—Improper Means of Ascent and Descent—By Ladders—By Common Ore Bucket—Contributory Negligence of Workman—Fatal Accident Act—Death of Widow of Deceased after Action Brought.

McHugh v. G. T. R. Co., 32 O. R. 234, 21 C. L. T. Occ. N. 581, followed.

Actions at common law and under Workmen's Compensation Act, against the defendants Culligan and Gilchrist, who are the owners of a mine in the Rainy River District, for damages for causing by their negligence the death of one Adams, the son of the plaintiff Adams, and one Howe, the brother-in-law of the present plaintiff Howe. The Howe action, as originally brought, was in the name of Aurora Matilda Howe, the widow of the deceased miner, and the only person entitled under R. S. O. c. 166, s. 3. Pending the trial the plaintiff, A. M. Howe, died, and the action was revived in the name of her brother-in-law, who is the administrator of her estate. By order of Court the actions were consolidated, but it was provided that the damages should

be assessed separately. The plaintiffs allege that on the night of the accident, when the engineer blew the whistle for the men to go to work, the bucket was hanging over the open shaft, having been left by the men when they came up at 6 o'clock. The men, believing that the engineer was at his post, and that the brakes and machinery were properly applied stepped into the bucket—four men in all— and it commenced to move, and in a moment fell away, and fell down the shaft. It was stopped by the engineer after it had descended about ninety feet, but the sudden drop, no doubt, threw three of the men out of the bucket, for they were found at the bottom of the shaft, one of them dead, and the other two dying shortly afterwards. The brake, which was supposed to be strong enough to hold any weight that the hoist was capable of lifting, had, possibly by means of wear, become loose, so that when locked in place it was not sufficient to hold the bucket with the men in it. There was some additional means used for holding the bucket in place, namely, a friction clutch, which threw the machinery into gear. If both brake and friction clutch were applied, they together would hold any weight. The engineer stated that the brake was properly locked, but he could not tell the position of the friction clutch. The cause of the accident, no doubt, was that the brake, while locked, was not sufficient to hold the bucket with the men in it, and that the friction clutch was not properly set, and therefore the bucket fell away when the men got in. The plaintiffs allege, (1) that the ladders provided for the men going into the mine were in a defective condition, (a) that they did not comply with the provisions of the Mines Act, (b) that they were insufficient to enable the men to enter the mine in safety. (2) That owing to the defective conditions of the ladders, they used the bucket to go down the shaft, and that the management authorized its use; that the bucket, being a common ore bucket, was unsuitable for the purpose, and the defendants were negligent in not providing a suitable means for the men getting to their work. (3) That the hoisting apparatus was defective in that the brakes were not in proper working order, and had not been in proper working order for some time prior to the accident, to the knowledge of the defendants, or their foreman. The defendants denied negligence, and alleged (1) That as the mine was in process of development, the ladders were as good as could reasonably be expected, and having regard to the mine, that they were suitable for the purpose, and that there was no occasion for the men to use the bucket. (2) That the men using the bucket did

so at their own risk. (3) That the men were guilty of contributory negligence in getting upon the bucket on the night of the accident, without first ringing the bell so as to make sure the engineer was in his place. The actions were tried at Rat Portage in July, 1901, and all the evidence taken, except that of Mr. Blue, Inspector of Mines, who had made a test of the machinery after the accident, and the Chief Justice desired to have Mr. Blue's evidence in order that he might ascertain exactly the result of the test. On the return of this evidence, argument was concluded.

N. W. Rowell and W. J. Moran, Rat Portage, for plaintiffs.

R. C. Clute, K.C., and A. C. Boyce, Rat Portage, for defendants.

FALCONBRIDGE, C.J., found the facts in favor of the plaintiffs, and that the accident occurred by reason of the defective machinery and plant in use in the mine, for which the defendants were responsible, and he found against the defendants on the issue of contributory negligence, and assessed the damages to the plaintiff Adams, the father of the deceased, who, at the time of his death, was between twenty and twenty-one years old, at $750. Having regard to the fact that Mrs. Howe lived for about a year and a half after her husband's death, he assessed the damages in the Howe action at $850, but held that he was bound by McHugh v. G. T. R., 32 O. R. 234, 21 C. L. T. Occ. N. 581, to dismiss the Howe action, but assessed the damages in case that decision should be reversed by the Supreme Court, or in case it was desired to appeal.

Moran & Mackenzie, Rat Portage, solicitors for plaintiff.

Boyce & Draper, Rat Portage, solicitors for defendants.

JANUARY 13TH, 1902.

COURT OF APPEAL.

LUTON v. TOWNSHIP OF YARMOUTH.

Highway—Want of Repair—Knowledge of, by Corporation—Accident—Causa Causans—Finding of Fact by Trial Judge—Interference with, when Evidence Conflicting—Damages not Excessive.

Atkinson v. Chatham, 31 S. C. R. 61, distinguished.

Sherwood v. Hamilton, 37 U. C. R. 410, and Toms v. Whitby, U. C. R. 195, followed.

Lucas v. Moore, 43 U. C. R. 334, 3 A. R. 602 specially referred to.

Appeal by defendants, from judgment for $1,750 of ROBERTSON, J., in action for damages for injuries sustained

owing to alleged non-repair of a highway. The plaintiff was driving a team of horses, attached to a waggon filled with wood, northward on the road leading north from the village of New Sarum, and when descending Luton hill, which is a short distance north from Edgeware road, his horses took fright at the noise made by some wood which fell off the waggon, and ran over the embankment close to the bridge which spans the west branch of Catfish Creek. The road becomes narrow as it approaches the bridge, and is rutty, and without railings. Plaintiff's ankles were both broken in the fall, and he will be permanently lame from the effects of the mishap. The trial Judge found that the roadbed at the top of the hill, near the bridge, was really 10 feet 5 inches wide, the east portion of the remaining 6½ feet of its width, consisting of a rut or washout, one foot deep and three feet wide, running 150 feet down the hill; that the road so sloped from the east that almost invariably a loaded waggon going down would slide into the washout; that there was, about six feet from the washout, a large stone embedded in the road, against which the right wheels of the waggon struck, causing the waggon to slide into the washout, and the sudden dropping into it of the left wheels made the wood fall out, and the noise frightened the horses, which ran away; and that the condition of the road was known by defendants. He held that this case was clearly distinguishable from Atkinson v. Chatham, 29 O. R. 518, *sub nom.* Bell Telephone Co. v. Chatham, 31 S. C. R. 61; that here the *causa causans* of the accident was not the running away of the horses, but the sliding into the washout of the waggon, owing to the bad and inefficient state of the road, Hill v. New River Co., 9 B. & S. 303, being in point; that the plaintiff's success did not depend on his shewing that his horses were not vicious; and that the judgment of the Supreme Court in Bell Telephone Co. v. Chatham, *supra*, in no way displaced the law declared in Sherwood v. Hamilton, 37 U. C. R. 410, and Toms v. Whitby, 35 U. C. R. 195.

C. Robinson, K.C., and W. L. Wickett, St. Thomas, for defendants.

T. W. Crothers, St. Thomas, for plaintiff.

The appeal was argued on December 10th, 1901, before the full Court, and judgment was delivered on January 13th, 1902, by ARMOUR, C.J.O., and LISTER, J.A. The questions presented in the case are purely questions of fact. The weight of evidence involves the degree of credibility to be attached to the statements of the different witnesses, and when such statements are conflicting, much reliance must be

placed upon the conclusion at which the trial Judge has arrived in respect to them, and as he has had an opportunity, which this Court cannot have, of hearing and seeing the witnesses, and being as it were in the atmosphere of the case at the trial, his conclusion should not be set aside unless it plainly appears to be wrong. There is nothing in the evidence which should justify any interference with the findings of the judge, and as he believed the evidence for the plaintiff, as to the nature and extent of his injury, that evidence amply warrants the damages awarded. Refer, in addition to the cases cited below, to Lucas v. Moore, 43 U. C. R. 534, 3 A. R. 602. Appeal dismissed with costs.

Crothers & Price, St. Thomas, solicitors for plaintiff.

W. L. Wickett, St. Thomas, solicitor for defendants.

BRITTON, J. JANUARY 16TH, 1902

TRIAL.

CITIZENS TELEPHONE AND ELECTRIC LIGHT CO. v. TOWN OF RAT PORTAGE.

Municipal Corporation—Contract for Light, etc., with—Reduction of Price by Corporation—By-law—Reasonableness of—Construction of—Validity of.

Action tried at Rat Portage, brought to restrain the defendants from amending by-law No. 105 as already amended, so as to reduce the rates which the plaintiff company is entitled to charge for light to consumers in the town of Rat Portage.

G. F. Shepley, K.C., and T. R. Ferguson, Rat Portage, for plaintiffs.

C. A. Masten, and A. McLennan, Rat Portage, for defendants.

BRITTON, J.—By-law 105 was passed on June 30th, 1892, and under it, a contract was entered into between the parties in relation to the placing of poles and wires for the supply of electric light to citizens. The by-law is part of the contract, and bears the same date. Section 10 of the by-law is as follows:—"The said corporation reserves the right to alter or amend this by-law in whole or in part, and to make such further conditions as the council of the town of Rat Portage may think proper." The contract and section 11 of the by-law provided, that the rates which were thereafter to be charged should be at least ten per cent. lower than the rates then being charged by another company, and it was provided by section 12 of the by-law, that in the event of amalgamation by the companies, the rights created under by-law 105

should become null and void, and absolutely forfeited. The companies subsequently amalgamated with the assent of the defendants, who passed a new by-law in November, 1892, confirming a new contract, and confirming by-law 105 as amended. The amendment provided that plaintiffs should not charge more than 15 per cent. above the then advertized rates, during the term of 10 years. The defendants now to propose, under the said clause 10, to pass a by-law providing that the plaintiffs shall not be at liberty to charge, as a maximum, more than 20 per cent. below the present schedule rates, and, as they can now charge up to 15 per cent. above advertized rates, the difference to them would be 35 per cent.

I think the only reasonable construction to be put in section 10 is, that the defendants can amend the by-law as to the poles, their location and erection, and the installing the telephone and electric light system, having all that done under municipal direction, and in a way to protect and benefit citizens in the use of streets, and respecting provisions in sections preceding section 10, but not in reducing the prices so as to compel plaintiffs to furnish light at a loss, or to go out of business. Such a result was never contemplated, and the exercise of such power by a municipality would be unreasonable: City of Toronto v. Toronto Street Railway Co., 15 A. R. 30, per BOYD, C., and per HAGARTY, C.J.O., at p. 36, and the case therein cited of Elwood v. Bullock, 6 Q. B. 401, in which Sir J. Coleridge says : "Whether a by-law is for the regulation of trade or for purposes of police, it must be reasonable and just." The object of defendants' by-law should be the good and welfare of citizens generally, and even if the attempted amendment to reduce rates were valid, the defendants, under the circumstances in evidence, should not be permitted to use that power in the supposed interest of one class of citizens against another. . . . To force plaintiffs to supply light at a loss is not in the public interest. . . . There is no evidence of actual malice on the part of individual members of the defendants' council, but it is a fair inference from what has taken place, that the council have in view the getting control of the electric light plant by pressure, rather than a desire to reduce rates for the public good. . . As a by-law to remedy a private grievance will not stand, so a by-law under the circumstances of this case ought not to be permitted. It is not necessary, in the view I take of the case, for me to decide whether or not it is within the powers of defendants' council, having once amended by-law 105, to again amend, . . . but it may well be doubted, in the face of the amendments already made, whether they can do

so without plaintiffs' consent. Judgment should be entered for plaintiffs, with a declaration that the defendants have not the right, during the existence of the present contract, to alter or change, without the consent of the plaintiffs, the rates charged in the conduct of its light and telephone business. The injunction already granted is continued. Costs to plaintiffs on High Court scale.

T. R. Ferguson, Rat Portage, solicitor for plaintiffs.

McLennan & Wallbridge, Rat Portage, solicitors for defendants.

BRITTON, J.

JANUARY 16TH, 1902.

TRIAL.

TOWN OF RAT PORTAGE v. CITIZENS ELECTRIC CO. OF RAT PORTAGE.

Municipal Corporation—Electric Lighting of Streets—Contract—Execution by Acting Mayor—Contract Partly Performed—By-law to Confirm—Necessity of—Tax By-law—Effect of—R. S. O. ch. 223, secs. 282, 404, 405, 568.

Action tried at Rat Portage, brought to have a contract between the parties declared void, (1) because no by-law was passed authorizing or sanctioning the contract; (2) the contract was not executed by a duly authorzied agent of plaintiffs, and (3) the agreement was not drawn, signed or sealed in a way to bind the plaintiffs.

C. A. Masten and A. McLennan, Rat Portage, for plaintiffs.

G. F. Shepley, K.C., and T. R. Ferguson, Rat Portage, for defendants.

The facts sufficiently appear in the judgment.

BRITTON, J.—The defendants purchased the assets of a company which had an agreement with plaintiffs for lighting the streets. The contract was duly completed, and in February, 1895, a new one was made for the electric lighting of the town for 5 years. In August, 1899, tenders were advertized for, and defendants tendered to supply street lighting, etc., for 5 years from February, 1900, and deposited with plaintiffs a marked cheque for $1,000. The tender was in terms of a draft contract alleged to have been agreed upon by a committee of the council. A meeting of the council was held on September 11th, 1899, and a resolution passed accepting the tender, and authorizing the Mayor and the Clerk to sign the contract as presented in draft. The Mayor

was absent, but the Acting Mayor, and the Clerk signed it at the meeting, and the plaintiffs' seal was affixed. The cheque was handed back the next day. On November 13th, 1899, a resolution, reciting the agreement and ratifying its execution by the Acting Mayor, was passed. The minutes of this meeting were read and confirmed at a subsequent meeting, and the corporate seal of plaintiffs attached. Thereafter the contract was acted on by both parties, and was being acted on when this action was brought.

The contract without express enactment would be good under sec. 568 of the Municipal Act. . . The necessity of a by-law to create liability on the part of a municipal corporation on an executory contract was discussed and decided in Waterous Engine Works Co. v. Palmerston, 21 S. C. R. 556, secs. 282, and 480, there in question being secs. 325, and 565, for comparison, of the present Municipal Act. . . . The town there was held not liable, in the absence of by-law, for the price of a fire engine which had not been accepted. The council acted here under sec. 568, and sec. 272 gives the Acting Mayor all the powers of the Mayor. . . .Bernardin v Dufferin, 19 S. C. R. 581, decides that a corporation is liable, on an executed contract, for the performance of work within its powers, and which it has adopted, and has had the benefit, though the contract is not under the corporate seal. The contract here is, to all intents and purposes, an executed one. A valid contract in full force was terminated before its expiry, and rights under it abandoned, and the new one has been acted on for 2 years, and defendants changed their position on the faith of its running for 5 years, renewable for 5 more years. The plaintiffs are, I think, bound, as an individual may be, by acquiescence, and are estopped in this action: Pembroke v. Canada Central R. W. Co. 3 O. R. 503. The corporation itself is plaintiff, not a ratepayer, and its not passing a by-law looks like bad faith. In 1900, and 1901, by-laws were passed for raising by taxation, in addition to other moneys, sums to pay defendants under the contract, and this could only be done by by-law: Secs. 404, 405 of the Act. These by-laws lawfully ratified the contract: Robins v. Brockton, 7 O. R. 48. The action is dismissed with costs. The defendants are entitled to a declaration that, as between them and the plaintiffs, the contract is a valid and binding one, and that plaintiffs must carry it out in all respects.

McLellan & Wallbridge, Rat Portage, solicitors for plaintiffs.

T. R. Ferguson, Rat Portage, solicitor for defendants.

JANUARY 17TH, 1902.

DIVISIONAL COURT.

DODGE v. SMITH.

Estoppel by Deed—Mines and Minerals—Possessory Title against Patentee — Subsequent Reservation of Minerals in Grant by Patentee—Effect of—Surface Possession—Notice—Evidence.

Appeal by defendants from judgment of LOUNT, J., in action to restrain defendants from trespassing upon lot 17, in the sixth concession of the township of Bedford, in the county of Frontenac, and digging for or removing any minerals therefrom. In 1864, the Crown granted the lot to Edwin Dodge, Dodge registered the deed in 1866, and in 1877, conveyed to his son Edwin G. Dodge. In 1884, Edwin G. Dodge conveyed to Patrick Murphy, by deed containing a clause, saving and excepting all mines, minerals, and ores. Murphy made a mortgage for the balance of the purchase money to Dodge, which contained a clause "saving and excepting the mines, which said mortgagor has no claim to." The plaintiffs claim the minerals under the will of Edwin G. Dodge. The defendants' title is derived through Murphy. The trial Judge found that P. Murphy had been in possession for two years prior to the deed to him from Dodge; that the lot had been fenced in for upwards of ten years either by P. Murphy, or his brother J. Murphy who had been in possession as a squatter for eight years, and who had then left it; that P. Murphy went into possession as a squatter, and remained there for ten years before the deed to him from Dodge; but that Murphy's conduct in dealing with the grantee of the Crown, Dodge, in receiving the deed from him, and giving him the mortgage with the reservations, and in not asserting at any time a title by possession, disentitled him now, through his representatives, to assert it; that the deed and mortgage read together operated to estop him and them from claiming title to the minerals; that when P. Murphy sold, his conveyance and the subsequent conveyances excepted the minerals, and if not estopped against the grantee of the Crown, he and they are estopped against those who had notice through the registry office, that P. Murphy made no claim to the minerals.

G. H. Watson, K.C., for appellants.

W. J. McWhinney and S. B. Woods, for plaintiffs.

Judgment of the Court, FALCONBRIDGE, C.J., and STREET, J., was delivered by STREET, J.—At the date of the conveyance of July 10th, 1884, from Dodge to Murphy, and

the mortgage back, the title to the mines and minerals had been extinguished by the possession of Murphy, who had acquired as against Dodge a good title to both land and minerals. If the mines had been revested in Dodge, subsequent possession by Murphy of the surface would not extinguish Dodge's title to the mines: Seaman v. Vawdrey, 16 Ves. 390; Smith v. Lloyd, 9 Ex. 562. But there is nothing in the conveyance or circumstances which had the effect of revesting the mines in Dodge, or which can estop defendants, claiming under Murphy, from asserting his title down to 1884. When Dodge reserved the mines, he reserved something he had not got, and the reservation did not operate as a grant from Murphy. The statement in the mortgage that Murphy makes no claim to the mines, whatever its effect between the parties in an action between them and their privies, and upon the mortgage, can have no effect in this action. It is evidence merely for plaintiff, but has been shewn to incorrect: Carpenter v. Buller, 8 M. & W. 209; Ex p. Morgan, 2 Ch. D. 89.

Appeal is allowed with costs and judgment below reversed with costs.

McWhinney, Ridley, & Co., Toronto, solicitors for plaintiffs.

Watson, Smoke, & Smith, Toronto, solicitors for defendants.

JANUARY 17TH, 1902.

DIVISIONAL COURT.

MATTHEWS v. MOODY.

Evidence—Trial—Jury—Refusal of Trial Judge sua sponte to Admit Evidence—New Trial—Costs—Contract—Rescission of—Evidence in Support of—Rule 785.

Motion by defendants to set aside verdict and judgment for plaintiff for $235 in an action for damages for breach of a warranty or return of money paid, tried by ROBERTSON, J., and a jury at Pembroke, and to dismiss the action or for a new trial. The warranty was upon the sale of a specific article, a hay press, by the defendants to the plaintiff for $300. By the contract the property in the article was not to pass until payment in full. The defendants took on account of the purchase price a pair of horses valued at $235 and gave credit for the $65 balance. At the trial the defendants asked for a nonsuit because the property did not pass.

A. B. Aylesworth, K.C., for defendants.

W. R. White, K.C., for plaintiff.

STREET, J.—In his statement of claim the plaintiff set out that the defendants had guaranteed the hay press to do good work, and the breach of the guaranty. The defendants denied the breach, and alleged that the breaking of the press was due to unskilful handling. The plaintiff said in one of his letters, which was in evidence, that for 25 days he had tried to make the press work, but that in that time it had only pressed 129 tons of hay, which was only equal to 13 small days' work at 10 tons a day. On cross-examination, it was shewn that plaintiff entered in a book, which he had with him in Court, the quantities of hay he had pressed at each farm he visited. The plaintiff cannot rely on breach of warranty, because the title to the press has never vested in him. He must rely upon the right to rescind the contract after certain trials of the press, and notices given to defendants. This right only arises "if the machine cannot be made to do good work," and the defendants were entitled to have the evidence upon that point submitted to the jury. An important element in determining whether the press could be made to do good work, was the amount of work that it was made to do in the six or seven weeks during which the plaintiff was working it. The plaintiff had written to defendants that the press had been doing good work. The defendants were therefore clearly entitled to the production, by the plaintiff on his cross-examination, of the book containing the entries of amount pressed daily. This, the trial Judge refused to allow. A substantial wrong has been occasioned to the defendants within the meaning of rule 785 by such refusal, the extent and effect of which is unknown, but which might have proved of the highest importance: Bray v. Ford, [1896] A. C. 44. There should be a new trial. Costs of former trial and of the motion must be in the action, because the objection to the evidence seems to have been wholly that of the Judge, and not of the counsel against whose client it was tendered.

FALCONBRIDGE, C.J., after setting out in detail what took place at the trial upon the rejection of the evidence:—I think substantial wrong has been occasioned, and there must be a new trial. Costs of former trial and motion to be in the action, the plaintiff's counsel not appearing to have raised or pressed the objection to the evidence.

BRITTON, J.—It seems to me substantial justice will be done by allowing this verdict to stand, notwithstanding the improper rejection of evidence. The evidence given well warrants the findings (1), that the press was not well made, (2) that it was not in good working order when the plaintiff had it, and (3) that plaintiff tried fairly, and in good faith,

to get it to work properly. The plaintiff was to have only one day to try the press. The defendants by their conduct in sending an agent to plaintiff, by suggestion and persuasion, threw him off his guard as to his strict legal position. I think defendants have waived their right to hold plaintiff to the strict letter of the contract, and that they should accept the press. Substantial justice will be done by allowing the verdict to stand.

Motion refused. Costs in the action.

White & Williams, Pembroke, solicitors for plaintiff.

J. G. Forgie, Pembroke, solicitor for defendants.

JANUARY 18TH, 1902.

DIVISIONAL COURT.

BOOTH v. BOOTH.

Mechanic's Lien—Work Done to Houses of Different Owners—Lien Attaches to Interest of Each Owner—Amount may be Proportioned—Recoverable if Proved—Discretion of Master—Interference with—R. S. O. ch. 153, secs. 7 (1), 2 (3).

Appeal by Mary E. Hess and others, served with notice of trial in a summary proceeding to enforce a mechanic's lien, from the judgment of the Master at Belleville, allowing plaintiff's lien. The lien is claimed by plaintiff against property on Ridgeway street, in the town of Trenton, belonging to his wife, and is for a balance due in respect of repairs to the value of $895.50 done by him to the property in question, and the property adjoining it, both of which are covered by the same roof, but the latter property is owned by the defendant's mother.

The Master found the plaintiff entitled to a lien for $295.50, and that that amount had been expended by him upon the property out of his own moneys.

T. A. O'Rourke, Trenton, for appellants.

H. L. Drayton, for plaintiff.

Judgment of the Court (MEREDITH, C.J., and BRITTON, J.) was delivered by MEREDITH, C.J.—I think a lien may attach on the land of each owner where the buildings are repaired under their joint contract, as in this case, for one entire price, provided a separate account has been kept. R. S. O. ch. 153, sec. 4, creates the lien, and by sec. 7 it attaches upon the estate of the owner as defined by sec. 2 (3). The Master has properly found that the plaintiff has brought himself within these provisions. The work, etc., was done at the request of the wife, and plaintiff is entitled to a lien on her estate, limited to the amount justly due. The price

may be apportioned. This has been done in the United States: Butler v. Rivers, 4 R. I. 38; Ballou v. Black, 17 Neb. 389. The Master found that the lien was registered and the action brought within the time limited by secs. 22 and 23, and as there is evidence to support his conclusion, it should not be disturbed. There was also evidence to establish the work done, and the materials furnished for the part of the building which belonged to the wife. The Master's finding should not be disturbed even though he had found the other way on the evidence. It cannot be said he was wrong, and unless it can, his findings should not be set aside.

BRITTON, J., I concur.

Appeal dismissed with costs.

A. Abbott, Trenton, solicitor for plaintiff.

T. A. O'Rourke, Trenton, solicitor for Mary E. Hess *et al.*

BRITTON, J. JANUARY 18TH, 1902.

CHAMBERS.

RE MOORE.

Will—Conversion—Residuary Legatee.

Application by an executor for advice of the Court, under R. S. O. ch. 129, sec. 39. The testatrix, Abigail Moore, by the first clause of her will, devised her homestead to Mrs. Robert Moore, her son's wife. Subsequent to the execution of the will, the executrix sold the house, receiving some cash, and a mortgage for the balance of the purchase money. By the seventh clause of the will it is provided that, "any money there may be over and above what I have herein mentioned, I give to my nephew, Joseph Mills of Ireland, County of Monaghan."

George Edmison, Peterborough, for executrix.

M. Dennistoun, Peterborough, for Joseph Mills.

BRITTON, J.—Held, that Mrs. R. Moore is not entitled to the mortgage or the money thereby secured upon the house. Held, also, that this mortgage is to go to Joseph Mills under the 7th clause in the will. Held, further, that there is no intestacy as to any part of the estate. Joseph Mills consenting in Court to the erection by executor of a suitable tombstone to the memory of Abigail Moore, order made for erection of same, at a cost not to exceed $50, and that the cost thereof be allowed to the executor in passing his accounts. Costs of all parties to this application to be paid out of the estate.

Edmison & Dixon, Peterborough, solicitors for executor.

Dennistoun, Peck, & Stevenson, Peterborough, solicitors for Joseph Mills.

FALCONBRIDGE, C.J. JANUARY 7TH, 1902.

TRIAL.

AITCHESON v. McKELVEY.

Specific Performance—Agent—Fraud—Amendment—Delay.

Action tried at Hamilton brought by administratrix of estate of Ellen Butler, deceased, for specific performance of agreement by defendant, made with one Bowerman, to purchase certain property in the city of Hamilton.

A. O'Heir, Hamilton, for plaintiff.

J. L. Counsell, Hamilton, for defendant.

FALCONBRIDGE, C.J.—The defendant, and his wife, and sister, all admit on cross-examination, that the agreement which he claims to have made with plaintiff's agent, Bowerman, that the necessary money should be raised on mortgage of the property in question, and a lot which defendant had placed in Bowerman's hands, was an agreement with Bowerman, personally, and not with the Butler estate, which they all knew had to get its money. And so they have easily persuaded themselves, that this understanding or arrangement was read out by Bowerman as part of the contract which defendant signed. Issue was joined on October 31st, 1901, and it was not until January 2nd, 1902, that defendant sought to amend charging fraud. It is too late to do so. The defence fails. Judgment for plaintiff with costs.

Staunton & O'Heir, Hamilton, solicitors for plaintiff.

MacKelcan & Counsell, Hamilton, solicitors for defendant.