The
Ontario Weekly Notes

VOL. VII. TORONTO, JANUARY 8, 1915. No. 18

APPELLATE DIVISION.

DECEMBER 29TH, 1914.

*STUART v. TAYLOR.

Will — Construction — Devises — Estates for Life and in Remainder — Contingent Remainder upon Contingent Remainder—Rule against "Double Possibilities"—Intestacy as to Second Remainder—Right of Heirs of Testator, Ascertained at his Death—Improvements under Mistake of Title —Lien for—Possession of Land—Title—Limitations Act—Partition—Estoppel—Costs.

Three appeals from the judgment of MIDDLETON, J., 6 O.W.N. 217.

The appeals were heard by MULOCK, C.J.Ex., HODGINS, J.A., CLUTE and RIDDELL, JJ.

F. D. Davis, for the defendants Duby and Chevalier.

M. Sheppard, for the defendant Strong.

J. H. Rodd, for the plaintiff.

A. B. Drake, for the defendant Sharon.

A. R. Bartlet, for the defendants Taylor.

RIDDELL, J.:—. . . The main ground of the appeals is as to the effect of the devise of the land in question. The will is printed in the report of Re Sharon and Stuart (1906), 12 O.L.R. 605, at pp. 606, 607, 608, the clause in controversy being as follows: "I give devise and bequeath to my son Narcisse Charron the east half of lot number 5 on Lake St. Clair, township of Rochester, containing 50 acres more or less, and to my son Pierre Charron the west half of lot number 5 aforesaid, containing also

*To be reported in the Ontario Law Reports.

50 acres, and to my son Joseph Charron the west half of lot number 8, also on Lake St. Clair in said township of Rochester, and to my son Olivier the east half of the said lot number 8 in said township, containing also 50 acres. To have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and such of their decease to have and to hold to their surviving wife respectively, and on the demise of their or each of their wives to have and to hold to their children respectively and their heirs forever. And I give devise and bequeath to my three sons Gilbert, Olivier, and Joseph, the south part of lot lettered A also on Lake St. Clair in said township of Rochester, containing 50 arpents, to have and to hold to them as is aforesaid mentioned, provided that they pay out of their share of money or otherwise to my executors hereinafter named the sum of $500 to be disposed of by my said executors in paying my debts and other bequests, and I give devise and bequeath to my son Gilbert Charron the north part of the aforesaid lot lettered A, containing also 50 acres, in said township of Rochester, to have and to hold to him etc. as aforesaid and not otherwise.''

The land in question is, in the devise to the three sons, ''the south part of lot lettered A . . . containing 50 arpents, to have and to hold to them as is aforesaid mentioned, provided . . . .'' The learned trial Judge seems to have interpreted the words ''as is aforesaid mentioned'' as importing into this devise a devise to the wives and children of the three named sons, and held that the limitation could not stand in law. I do not agree as to the effect of the words ''as is aforesaid mentioned;'' it is, ''to hold *to them* as is aforesaid mentioned,'' not to hold to their surviving wives respectively or to have and to hold to their children. These limitations are all mentioned in the preceding devise; but in this they are not. What is ''aforesaid mentioned'' as to having and holding *''to them''* is, ''to have and to hold to each of them for and during their natural life respectively;'' and the whole clause now under consideration, and every word of it, can be given full effect by holding that these are the limitations meant. After the life estates there is an intestacy, as the will makes no provision beyond these life estates. The interpretation contended for would compel us to leave out ''to them'' or to import other words, either of which courses is wholly inadmissible.

We were pressed with the judgment of the Chief Justice of the King's Bench in Re Sharon and Stuart, supra. That deci-

sion was on the last devise, and the limitation was "to have and to hold to him *etc.* as aforesaid and not otherwise." . . . But in our devise there is no "etc." . . . We in no way attack the credit of the decision of the learned Chief Justice, but the contrary, so far as it affects this case, when we say that the present devise goes no further than its express words carry it. There is, consequently, no necessity for a new trial on the ground that all parties relied upon that decision.

The declaration in the judgment appealed from, that there is an intestacy after the life estate of the wives, should be varied by declaring an intestacy after the life estate of the sons.

The plaintiff appeals, asking for an order that the lands in question should be divided among the heirs of Gilbert, Olivier, and Joseph, and not the heirs of Pierre . . . or for a new trial to bring in evidence of a family arrangement by the heirs of Pierre.

The defendant Emily V. Sharon makes the same appeal on much the same grounds.

The defendants Strong, Chevalier, and Duby appeal, and ask that the action be dismissed as against them. . . .

Pierre Charron (or Sharon) died shortly after making his said will, leaving seven heirs-at-law: Nelson (or Narcisse), Olivier (or Oliver), Gilbert, Joseph, Amelia, Peter, and Emery (or Henry). The date of the death . . . must . . . have been about 1860. . . .

The three sons, Gilbert, Olivier, and Joseph, took possession of parcel A, and a few years after the father's death, say eight or ten, they divided it into three substantially equal portions, fenced the lots and occupied the land, each occupying one portion. . . . Each of the three (or his successor in title) continued to occupy his piece till his death; and the parcels were fenced off as occupied.

Duby and his predecessors in title have been in possession of his strip for about 50 years, and it is not disputed that the occupation was such as would give a title by the statute. Olivier died between 35 and 40 years ago, leaving a widow, who is now believed to be dead. She married one Israel Markham, and with her son, Frederick Henry Charron, and her husband, in 1884 conveyed the south part of parcel A to Firman Lappan. Other heirs-at-law of Olivier conveyed their interests to Lappan in 1886 and 1887. Lappan conveyed to Legacé in 1889, and Legacé to the defendant Strong in 1898; the possession in each case following the title ostensibly conveyed by the deeds, so that Strong

has now any title which Olivier and his wife and heirs-at-law could convey in "the easterly third of the 50 arpents of said lot A," as the deed puts it.

Gilbert Charron died in 1911, his wife having predeceased him some five years. The plaintiff, Stuart, has a deed from the grantee of Gilbert's representatives of the east $16\frac{2}{3}$ arpents of the south part of parcel A; and he is in possession of this lot. . .

Joseph died on the 4th September, 1912 (his wife having died in 1905); he left only one child, a daughter, the defendant Emily V. Sharon. In 1866 he had (with his wife) conveyed all his right in lot A to G.C.G.; and G.C.G. in the same year conveyed to Rose Taylor, through whom the defendants Taylor claim.

The position of the defendant Chevalier is rather different. He has a deed, but it is not of this property or any part of it, and it does not assist in any way to determine rights here in question. His predecessor in title and himself have been in possession of the part claimed by him, adjoining Gilbert's lot, from before the time of the amicable division by the three sons of Pierre Charron.

As to the main ground of one appeal, the result will depend wholly on the language of the testator. . . .

We should . . . look to the formal judgment to see what we have to dispose of . . . Clause 1 deals with the declaration of title already spoken of; clauses 2, 3, and 4 direct a partition following on the declaration, and are unobjectionable; clause 5 is as to costs, and stands in the same category, with one exception to be mentioned later; clause 6 declares that the defendants Duby have not acquired title to any part of the lands, and the Duby appeal must now be dealt with.

The trial Judge proceeded on the ground that the Statute of Limitations did not begin to run against the heirs of Pierre Charron till the death of the last surviving life-tenant . . . Joseph . . . in 1912 . . . It is contended for the Dubys that they, who or whose predecessor had undoubtedly for many years before the death of the life-tenants had possession of the strip of land, can thereby hold it as against the heirs of Pierre Charron.

It is plain that, if he has any interest in the strip occupied by him, his appeal must succeed. To succeed so far as to obtain a dismissal of the action of partition, he must have exclusive ownership. The strip of land in his possession is said to be a part of Gilbert's third. If so, before the death of Olivier the life estate of Gilbert in the strip had become barred by the

statute; and as, during the period, Gilbert had been the owner of three remainders, viz., $\frac{1}{7}$ of $\frac{1}{3}$, that is, $\frac{1}{21}$, on the death of each of his two brothers and on his own, these also would be barred. . . .

[Reference to sec. 7(3) of the Limitations Act, R.S.O. 1914 ch. 75; Sladden v. Smith (1858), 7 U.C.C.P. 74; Doe d. Hall v. Moulsdale (1847), 16 M. & W. 689; Ludbrook v. Ludbrook, [1901] 2 K.B. 96; Clarke v. Clarke (1868), 2 Ir. Rep. C.L. 395; Sugden on Vendor and Purchaser, 14th ed., p. 480; Dart on Vendor and Purchaser, 7th ed., p. 452; Armour on Real Property, p. 458; Lightwood's Time Limit on Actions, pp. 59 sqq.; Lightwood's Possession of Land, p. 213.]

We should . . . hold that Sladden v. Smith is not well decided, and that sec. 7(3) applies to the present case.

Unless more appears, the death of Olivier saw the Dubys entitled to the life estate of Gilbert in possession, the $\frac{1}{21}$ of the fee to which on Olivier's death he (Gilbert) became entitled in possession and remainders amounting to $\frac{2}{21}$ of the fee in this strip. Of course, any division by the three sons of Pierre could not be assumed to last beyond their joint lives, since, on the death of any one, other persons became interested in possession as tenants in common of an undivided third interest in all the land, and no arrangement by these sons, inter se, could bind them.

Then Duby became a tenant in common of the fee: he held possession of the whole land without accounting to any one. . . .

[Reference to sec. 12 of the Act.]

The result would be that, on the death of Gilbert in 1911, since the outside limit of time given under secs. 40 and 41 of the Act had elapsed, Duby would have acquired the fee in one-third of the lot, directly under sec. 5, and indirectly under sec. 7(3). The death of Gilbert would not give a new term for the statute to begin. . . .

[Reference to Hill v. Ashbridge (1892), 20 A.R. 44, and In re Hobbs, Hobbs v. Wade (1887), 36 Ch. D. 553.]

If the strip be considered not a part of Gilbert's third, the same result will follow a fortiori. The three sons of Pierre were tenants in common, each for life or pur autre vie as might turn out. The trespasser acquired whatever estate they had in possession, and, by virtue of sec. 7(3), also their remainders in fee. Then, as all the other heirs-at-law of Pierre became entitled on the death of Olivier to a share in fee, the trespasser, as tenant in common remaining in possession of the whole, became entitled to their shares, both immediate through sec. 5, and through sec. 7(3) in remainder. . . .

On this evidence and on this record, Duby should have a judgment dismissing this action as against him; and that is all he asks now. The judgment should be varied accordingly, and Duby have his costs here and below.

This, however, should not be considered final in all respects. Some of the facts we have from statements of counsel, and some are not wholly clear except with the admissions of counsel. So, while all parties interested will probably be willing to leave Duby's strip out of the partition proceedings, any one not a party to this record should, if he alleges the facts as being different from what appears above, be allowed by the Master, at his own peril as to costs, to bring Duby into the partition proceedings.

Chevalier is in the same position as to title. . . . I think the same order should be made in his case as in Duby's.

These two argue that the partition made by the three sons of Pierre Charron should be declared binding on all parties. The argument that such act creates an estoppel as against these trespassers savours of absurdity. The essence of an estoppel in pais is an act or word done or said with the intent that it shall be acted upon by him claiming the benefit of an estoppel; and it will scarcely be contended that these three brothers divided up their lands so that some one should trespass on them.

I do not think it matters to these defendants whether the representatives of these three were bound by their partition; but in any event, as has been said, it could not last beyond the life-tenancies.

Strong stands in quite a different position. He has all that Gilbert and his children could give him. He is rightly a party to the partition; and whether there can be anything in the way of an estoppel will be threshed out in the Master's office when all the facts are known. The case cannot be dismissed as against him—the only declaration made being as to the effect of the will at the time of the death of Pierre. Evidence can be taken by the Master on anything shewing or tending to shew any transaction dehors the will, estoppel, descent, conveyance, and everything material to determine the present title to the land.

Taylor is the assignee of Joseph Sharon and is in the same position, and his appeal should be dismissed also. He, too, will have a chance to shew in the Master's office any right, claim, or title he may have.

Emily A. Sharon can have nothing to complain of, so far as the judgment is concerned. She claims a share in the estate

under the will; the claim that she is a devisee in remainder under the will cannot be given effect to; but she is an heir of Pierre Sharon, and will be heard in the Master's office. Her appeal should be dismissed.

For the plaintiff's appeal the reasons are adduced, viz., that all parties relied upon the interpretation of the will in Re Sharon and Stuart, 12 O.L.R. 605, and they now desire to give evidence that all the heirs of . . . Pierre Charron, deceased, consented to a division of the estate. This is quite unnecessary. It has already been pointed out that evidence of everything dehors the will can be effectively taken, and should be taken, in the Master's office in the partition proceedings. No evidence as to family settlement, etc., can affect the meaning of the will itself.

While Duby and Chevalier should have their costs here and below paid by the plaintiff, who brought them in, there should otherwise be no costs. . . .

The last clause in the judgment appealed from, directing the Master to determine what improvements have been made on the property by the plaintiff and defendants, and the value thereof, is of course conditional on any such having made improvements under mistake of title; and the inquiry will not be as to the value of the improvements, but as to "the amount by which the value of the land is enhanced by the improvements"—quite a different thing. See R.S.O. 1914 ch. 109, sec. 37. In settling judgments, "officers of the Court should endeavour to use the words of the statute and not employ terminology which may seem to them to be equivalent:" Re Coulter, Coulter v. Coulter (1907), 10 O.W.R. 342.

MULOCK, C.J.Ex., and HODGINS, J.A., concurred.

CLUTE, J., was of opinion, for reasons stated in writing, that the defendants Elizabeth Duby and Louis Duby and Albert Chevalier had, by their possession, as to their respective parcels of land, acquired title thereto as against the three brothers, Oliver, Joseph, and Gilbert and those claiming under them, and in the partition were entitled to $\frac{2}{7}$ of the same respectively, and the judgment below should be varied accordingly; and, with this variation, that all three appeals should be dismissed; the costs of all parties, including the costs here and below of the defendants the Dubys and Chevalier, to be paid out of the estate.

Judgment as stated by RIDDELL, J.

DECEMBER 29TH, 1914.

*RE LORNE PARK.

Deed—Construction—Building Scheme—Conveyances of Building Lots in Park—"Access to Streets, Avenues, Terraces, and Commons"—Meaning of "Commons"—Unenclosed Spaces on Plan—Absence of Designation—Recreation Grounds—Representations of Vendors—Quasi-dedication to Purchasers of Lots—Easement—Implied Covenant—Estoppel—Co-operative Undertaking—Limitation of Rights of Purchasers—Registry Act—Purchaser for Value without Notice—Evidence.

Appeal by Sidney Small, petitioner, from the judgment of MIDDLETON, J., 30 O.L.R. 289, 5 O.W.N. 626.

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

J. Bicknell, K.C., for the appellant.

M. H. Ludwig, K.C., for A. R. Clarke and others, claimants, respondents.

CLUTE, J. (after setting out the facts):—Upon the argument, the question whether or not the petitioner was a bonâ fide purchaser for value without notice arose, and, by consent of counsel, Sidney Small, the petitioner, was called as a witness and examined in Court. He stated that he was a purchaser at the sale by public auction, and signed the contract to purchase. He did not remember any discussion or anything being asked as to the quantity of property sold or in respect of the vacant spaces, but would not like to contradict the witness Jephcott; he did not remember. The whole thing was just at large.

Mr. Bicknell's argument in substance was that his client's rights were governed solely by the terms of the deed, and it was purely a question of construction; that the purchase of a lot only gave a right to the necessary street fronting the lot; that a grant of "commons" is unknown to the law and cannot be defined; it is not an easement or restrictive covenant and does not run with the land; rights of amusement are unknown to the law; and that his client, shewing a chain of title in fee simple to the blocks X, Y, and Z, was entitled to be declared to be the owner in fee simple of the same.

*To be reported in the Ontario Law Reports.

The question is largely one of fact, a short review of which is necessary before referring to the law bearing upon the case. . . .

I agree with the learned Referee of Titles that blocks X and Z were used as a common playground open to all the cottagers, and were two of the places intended by the word "commons," and that the lot-owners have a right to free access thereto which ought not to be interfered with by the petitioner; but I cannot agree with him that a different consideration should apply to block Y. As he very truly points out, it was equally open and accessible to all as the other two blocks; and, while it was not used as frequently as the other two, it was used at the will and pleasure of the cottagers as a common and place of resort, and the evidence shews that the owners of the cottages could and did resort thereto and make use of the seats and tables there provided; and I agree with my brother Middleton that no distinction ought to be made between the three blocks as to the rights of the cottagers in respect of the same.

I am also clearly of opinion that the petitioner cannot claim as a bonâ fide purchaser for value without notice. There is no doubt that sufficient was said at the time of his purchase to put him on inquiry as to the rights of the cottagers; but, whether he was put upon inquiry or not, I am of opinion that the word "commons" in the deeds to the various cottagers had reference to these three blocks, and that the plan annexed to and forming part of his chain of title through Roper was express notice that these blocks were reserved and used for the general benefit of the park-owners, including the cottagers.

Both the Referee and my brother Middleton find, properly as I think, that the word "commons" is not used in the deeds in its more strict and literal sense, and carries with it a meaning wide enough to cover the rights of the claimants to the use of the lands in question. As used here, it is an ambiguous term which requires explanation, and which may be explained by circumstances. As pointed out by Lord Hobhouse in Municipal Council of Sydney v. Attorney-General for New South Wales, [1894] A.C. 453, referred to by my brother Middleton: "It is very often used, though inexactly and in popular parlance, to denote land devoted to the enjoyment of the public or of large numbers of people."

I think in the present case the evidence is perfectly clear that it was so used. To exclude these three blocks as not covered by it in the deed would make the deed practically inoperative in that regard; and, from the evidence properly admissible, there

can be no doubt that it was intended as contended by the claimants to be so used.

In addition to the cases referred to by Middleton, J., see also 13 Cyc. 444 (IV. A.); . . . Bateman v. Bluck (1852), 18 Q.B. 870; . . . 13 Cyc. 448 (D.). . . .

Here, no doubt, the dedication was not to the public, but was of a quasi-public nature, limited to the general use of those who became owners of lots and residents within the park and their friends who might visit them, and others to whom the company gave, for the time being, the privilege of user.

The deed, which, it was admitted, is common to all the purchasers of lots within the park, contains a covenant in favour of the purchaser, that "his heirs, executors, administrators, and assigns, and his or their families, subject to the by-laws of the company, shall have free access to the streets, avenues, terraces, and *commons* of the said park," and free ingress and egress to and from the said park at any wharf or wharves thereof.

I agree with the learned Referee and my brother Middleton that the word "commons," as used in the deeds to the purchasers of lots, was not intended to have any strict or technical meaning, but to signify certain places in the park which were to be open and free to all for the purposes of general enjoyment and amusement, and I have nothing to add in that respect to the view so clearly expressed in the Court below. The covenant being thus in favour of the purchasers, and having relation to a building scheme of lots known as Lorne Park, it thereby became restrictive in its effect as against the vendor of those lots and those claiming under him. It could not operate in favour of the purchasers giving them the right to use the spaces referred to as commons without impliedly restricting the vendors from doing any act or thing, whether by sale or otherwise, which would preclude the purchasers from the enjoyment of the right which they had purchased and paid for.

The leading case is Renals v. Cowlishaw (1878), 9 Ch. D. 125, affirmed on appeal (1879), 11 Ch. D. 866; and in the House of Lords in Spicer v. Martin (1888), 14 App. Cas. 12, Lord Macnaghten, referring to this case (p. 23), said: "The law on the subject has never been stated more clearly than it was by Vice-Chancellor Hall in Renals v. Cowlishaw." . . .

In my opinion the principle enunciated in these cases applies to the present case, which should be governed by it. The incorporation of the original company shews clearly that its object and purpose was a building scheme, and that the duties of the

company and of the purchasers were correlative, and that there was what has conveniently been termed a "law" common to both for their mutual benefit. The subsequent patent of incorporation, changing the name, reaffirmed the purpose. The mutual duties, express and implied, in the various conveyances to purchasers set forth the mutual obligations to carry out the original purpose. The literature published and the representations made by the chief officers under which the purchasers were invited, and their conduct through a period of some 25 years, recognising the mutual relations between the vendors and the purchasers, all shew that the original scheme during this long period was not departed from; and the conveyances through which the petitioner claims his title, and particularly the pink plan referred to and forming a part of the Roper deed and having special reference to the three blocks in question, and the express notice given to the purchaser (the petitioner) at the time of the purchase, put it beyond doubt that he was not a bonâ fide purchaser for value without notice of the object and purpose of the building scheme and of the "law" governing the same.

The principle in Spicer v. Martin was applied in Mackenzie v. Childers (1889), 43 Ch. D. 265, referred to in the judgment appealed from. . . .

The views there expressed are, I think, applicable in principle to the present case. Having regard to the building scheme here inaugurated and put upon the market, the covenant giving to the purchasers the rights in respect of what is called the commons clearly created an obligation on the part of the vendors that this right should not be encroached upon by them or purchasers from them. . . .

[Reference to Davis v. Corporation of Leicester, [1894] 2 Ch. 208; Elliston v. Reacher, [1908] 2 Ch. 374.]

I would dismiss the appeal with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed.

RIDDELL, J., agreed in the result.

Appeal dismissed with costs.

DECEMBER 29TH, 1914.

STEERE v. HOWARD.

Fraud and Misrepresentation—Option for Purchase of Land—Acceptance — Resale at Increased Price — Purchaser for Value without Notice—Remedy of Vendor against Original Purchasers—Payment of Difference in Price — Charge on Mortgage for Amount Due for Principal, Interest, and Costs—Appeal—Costs.

Appeal by the defendants Howard, Bates, and Reid from the judgment of LENNOX, J., 6 O.W.N. 708.

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

M. Sheppard, for the appellants.

J. H. Rodd, for the plaintiff, respondent.

G. A. Urquhart, for the defendant the Detroit Land Company.

The judgment of the Court was delivered by CLUTE, J.:—The plaintiff's claim against Howard, Bates, and Reid charges them with fraud arising out of an option given by the plaintiff in May, 1913, for two months, to purchase for $20,000 the plaintiff's farm in the township of Sandwich West. In reducing the agreement to writing, the defendants Howard and Bates, it is charged, inserted a period of 90 days, instead of two months, which had been agreed upon, without the knowledge or consent of the plaintiff. The option not having been exercised within two months, as provided by the real agreement between the parties, the plaintiff proceeded to deal with the lands without reference to the option, when for the first time he discovered the error; but the defendants Howard and Bates, although they had paid only for the two months' option, insisted upon a further period as provided in the written agreement; and the plaintiff, to avoid further trouble and controversy, extended the option on the 8th July, 1913, for 60 days therefrom, but with the proviso that the plaintiff "reserves the right, during the life of this option, to sell the property before the option is expired, but the price at which he can sell is to be not less than $22,000; and, if he should sell at that price, the parties of the second part are to be refunded the sum of $750, which amount they have paid to the party of the first part."

During the currency of the extended option, and in virtue of the said provision, the plaintiff negotiated a sale of the property to other persons, before the option was accepted, for $28,000,

and gave notice thereof to the defendants Howard, Bates, and Reid, who intervened, and, by falsehood and misrepresentation, as alleged by the plaintiff, succeeded in inducing the proposed purchasers to enter into a binding contract with them; and afterwards, by representing that they had not intervened, fraudulently induced the plaintiff to acquiesce in the sale by the said defendants to the same persons.

The defendants deny all fraud, and claim under their option; and the defendant company claims to be a bonâ fide purchaser for value without notice. . . .

[The learned Judge then set out the findings of the trial Judge against the appellants and referred to the evidence.]

Upon the argument of the appeal it was directed that the defendant Reid should be examined and his evidence put in as part of the record. This has been done, and a perusal of the whole case satisfies me that the strictures pronounced by the learned trial Judge upon this transaction by the defendants Howard, Bates, and Reid, are deserved, and that they succeeded in form, by fraud, in having the proposed sale made by the plaintiff carried out in their names in order to appropriate and divide the proceeds among themselves.

It was a fraud of the grossest character, without one redeeming feature, and could have succeeded only by persistent falsehood and misrepresentation.

I do not find any legal difficulties in the plaintiff's way in his claim to recover the purchase-money. The sale was in fact made by him, by agreement with the defendants Howard and Bates. He was entitled to receive the purchase-money, returning to the defendants in that case the $750 previously paid to him on their option. This amount they are entitled to be paid and have been paid, under the terms of the judgment, by reducing the balance of the purchase-money by that amount.

The amount due upon the mortgage is ear-marked as part of the purchase-money due to the plaintiff under the sale made by him, and there can, in my opinion, be no doubt as to his right to recover the same.

Upon the facts in this case, the three defendants cannot be heard to deny the right of the plaintiff to make a sale, having authorised it by the terms of their option; nor can they be heard to say that what they did in fraud of the plaintiff's right should defeat his claim.

The appeal should be dismissed, with costs against the defendants Howard, Bates, and Reid—they also to pay the costs of the defendant company of this appeal.

HIGH COURT DIVISION.

MIDDLETON, J. DECEMBER 28TH, 1914.

GRANT v. LERNER.

Private Way—Grant of Right of Way by Deed—Proviso—Construction—Termini a quo and ad quem—User — Means of Access to Lot other than Lot to which Easement Appurtenant.

Action to restrain the defendant from using a lane or way and for damages for trespass and destruction of a fence.

The action was tried without a jury at Ottawa.

T. A. Beament, for the plaintiff.

J. A. Ritchie, for the defendant.

MIDDLETON, J.:—Mary A. Lyon originally owned all the property in question. It may roughly be described as consisting of lots 2 and 3 on the north side of York street and lot 3 on the south side of Clarence street—lot 3 on Clarence street being immediately north of lot 3 on York street.

On the 16th May, 1883, Mrs. Lyon conveyed to Robert Thompson a warehouse upon lot 2, which extended over a short distance upon lot 3 on the north side of York street, and also lot 3 on the south side of Clarence street, together with a right of way in common with the owners or occupants of the remaining part of lot No. 3, over a strip of land 10 feet wide, extending northerly from the north side of York street to the southern limit of lot 3 on Clarence street. This is followed by a proviso "that if the said Robert Thompson or his heirs should at any time hereafter sell or dispose of lot 3 on the south side of Clarence street aforesaid such right of way shall not pass to or be used by the person or persons to whom such lot 3 on the south side of Clarence street aforesaid shall be sold."

On the 29th July, 1901, Mrs. Lyon conveyed all of her lot 3 lying east of the right of way and the lane, subject to the right of way, to the plaintiff.

On the 27th April, 1908, the administrator of Thompson's estate conveyed both of the parcels conveyed to Thompson by the deed mentioned, namely, the warehouse on York street and lot 3 on Clarence street, to the firm of Lerner & Moyneur. Moyneur has conveyed his interest to Lerner, the defendant.

Upon the properties on York street two large warehouses have been erected, the main walls running to the rear of the lots, leaving the right of way between the warehouses. Until recently, this has been used not only as a means of access to the warehouses and for the purpose of receiving and shipping freight, but also as a means of access to premises upon lot 3 used by Lerner in connection with his business.

The plaintiff now contends that, upon the conveyance of the land by Thompson's administrator to Lerner, by virtue of the proviso above set out, the right to use the lane as a means of access to lot 3 on the south side of Clarence street came to an end. The defendant contends that, although this may be so, yet the defendant, by virtue of his ownership of lot 2, has the right to use the way for the purpose of obtaining access to lot 3 from his premises on lot 2. The right of way which he claims is a right not merely to obtain ingress and egress from York street, but it is a right which he can use to obtain access to his premises on lot 3. The proviso, he contends, was for the purpose of making it plain that the right of way was in no sense appurtenant to lot 3.

This argument appears to me to be unsound. In the first place, the great bulk of the user complained of is in no way connected with lot 2. The defendant's horses are kept in stables on lot 3, and the lane is used as a means of ingress and egress from these stables. A warehouse is also on lot 3, and goods are taken to and from this warehouse over the lane. None of this can be justified.

There is, however, a certain amount of coming and going over the lane between the buildings on lot 2 and the premises on lot 3. This is a matter of very minor importance, but of some concern. A team may leave the stable on lot 3 and draw up in the lane to be loaded at the warehouse on lot 2, and then proceed along the lane to the street. Is this a permissible user of the lane? I think not.

No doubt, the grant of the right of way over the lane permits the whole lane to be used for the purpose of obtaining access to any part of the dominant tenement. This is the effect of South Metropolitan Cemetery Co. v. Eden (1855), 16 C.B. 42. In Williams v. James (1867), L.R. 2 C.P. 577, 582, Mr. Justice Willes cites this case as establishing "that the grant was general, and that the right of way in that case might be used to any part of the land to which the way was granted."

That falls short of what is argued here, viz., that access may

be obtained to the servient tenement over any part of the boundary.

A right of way must have a terminus a quo as well as a terminus ad quem. The terminus ad quem, when the way is granted in general terms, may be each and every part of the dominant tenement; but the terminus a quo, there can be no doubt, was the highway in front of lot 2. This is plain from the terms of the grant.

In truth, what is now sought is to use the right of way granted as appurtenant to lot 2 as though it had been granted as appurtenant to lot 3. This is in conflict with a series of cases. Telfer v. Jacobs (1888), 16 O.R. 35, and Purdom v. Robinson (1899), 30 S.C.R. 64, may serve as examples.

The injunction sought must be granted, and costs follow.

MIDDLETON, J., IN CHAMBERS. DECEMBER 28TH, 1914.

RE LEGATE.

Land Titles Act—Application under sec. 99 for Order Modifying Building Restrictions — Opposition by Person Interested—Refusal of Order.

Application made on the 22nd December, 1914, under sec. 99 of the Land Titles Act, for an order modifying certain building restrictions in the conveyance under which the applicant claimed, so as to permit the erection of a building nearer to the street line than permitted by the restriction, and also permitting the erection of a church upon the land in question, where the restrictions prescribed that no building should be erected other than a dwelling-house.

Aitcheson (Beatty & Co.), for the applicant.

G. M. Willoughby, for the owner of the adjoining property, opposed the application.

F. J. Dunbar, for Nicholas Garland.

MIDDLETON, J.:—The extraordinary jurisdiction conferred by the Land Titles Act is one that must be exercised with the greatest care. Several cases have come before me in which I have felt warranted in granting what was sought; but in these

cases either every one concerned consented, or the opposition was plainly vexatious and came from some one having no real interest in enforcing the conditions, or when the whole condition of the neighbourhood had so changed that the restrictions could no longer apply.

Here the opponent is vitally concerned. His opposition cannot be regarded as vexatious, and I can find no principle upon which I should be justified in interfering with any rights that he may have under the restrictions in question.

It was argued that the respondent has no right to enforce the restriction. I do not think that that is a question which arises upon this motion. What is now sought is, that I should, under the statutory authority, take away the right which the respondent thinks that he has. If the restriction has no operation, and can be validly released by Mr. Garland (who was the original grantor), then the applicant does not need my assistance.

The motion fails, and, I think, should be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 28TH, 1914.

LOCHRIE v. KEARNEY.

Solicitor—Settlement of Litigation without Notice to Solicitor for one Party—Absence of Collusion—Absence of Notice of Lien—Application for Payment of Solicitor and Client Costs —Refusal of—Costs of Application — Provision for Payment of Party and Party Costs.

Motion by the solicitor for the defendant for an order directing the plaintiff to pay the applicant's costs (as between solicitor and client) incurred in this action and in an action of Kearney v. Lochrie, on the ground of a settlement behind the back of the applicant, without providing for his proper costs.

C. Kappele, for the applicant.

W. A. McMaster, for the plaintiff.

MIDDLETON, J.:—An agreement was come to behind the back of Kearney's solicitor, between Lochrie, represented by his solicitor, and Kearney, by which the litigation was settled. A certain amount was to be paid out of the moneys which were in

Court abiding the result of the litigation, and the party and party costs in the action of Lochrie v. Kearney, the latter to be paid to Kearney's solicitor. In consideration of these payments, Kearney released Lochrie from all claims. There is no evidence of any collusion nor of any intention to defeat the solicitor's rights; nor is there any evidence of notice to Lochrie of any lien the solicitor might have for costs. The money other than the costs has been paid over to Kearney, so that no lien can now be effectively asserted upon it.

I regret that the solicitor cannot bring himself within Sanridge v. Ireland (1890), 14 P.R. 29—an authority which by no means stands alone. Where there is no collusion, the solicitor cannot be given redress, unless the adverse party has notice of the existence of his lien.

While the motion fails, I give no costs, to express disapproval of the solicitor for one party intervening in a settlement and negotiating directly with the client of another solicitor.

It is admitted that the applicant has the right to receive the party and party costs agreed to be paid. If necessary, an order for payment of these may now be made, so that taxation may take place.

MIDDLETON, J., IN CHAMBERS. DECEMBER 28TH, 1914.

REX v. CANADIAN PACIFIC R.W. CO.

Railway — Dominion Railway Company — Conviction under Municipal By-law—Emission of Smoke—Nuisance—Operation of Railway—Regulations of Dominion Board of Railway Commissioners — Jurisdiction of Municipality—Constitutional Law.

Motion by the defendant company to quash two convictions under a municipal by-law of the City of Ottawa.

I. F. Hellmuth, K.C., for the defendant company.
J. T. White, for the prosecutor.

MIDDLETON, J.:— Under a municipal by-law of the City of Ottawa, No. 3393, sec. 12, certain provision is made for the prevention of a nuisance by smoke emission. The defendant company, in the operation of its railway, discharged smoke from its

locomotive in its roundhouse at the city of Ottawa; and, if the defendant company is subject to the operation of the by-law in question, the magistrate could convict upon the evidence before him.

But I am of opinion that the defendant company in its operation is not subject to the municipal by-law, but is subject to the regulations of the Dominion Railway Board. That Board, by its order number 5678, the validity of which is in no way attacked, regulates the discharge from locomotive engines with a view of preventing unnecessary and unreasonable emission therefrom, and the consequent fouling of the atmosphere. This regulation does not differ widely from the by-law in question.

The Dominion authorities having undertaken to pass regulations dealing with this question, the jurisdiction of the municipality, if it ever had any, is, I think, ousted. So long as the railway company complies with the direction of the Board, the municipality cannot interfere. For a violation of the Board's directions, the appropriate prosecution must follow.

This is, I think, something incident to the operation of the railway, and forms part of the railway legislation, over which the Dominion alone has control, and it cannot be regarded as mere municipal legislation, within the jurisdiction of the Province. That which was held to be within the Provincial jurisdiction in Canadian Pacific R.W. Co. v. Corporation of the Parish of Notre Dame de Bon Secours, [1899] A.C. 367, was something quite apart from the operation of the road over which the Dominion had jurisdiction. See Madden v. Nelson and Fort Sheppard R.W. Co., [1899] A.C. 626; Canadian Pacific R.W. Co. v. The King (1907), 39 S.C.R. 476.

The convictions will, therefore, be quashed; under the circumstances without costs and with protection to the magistrate.

MIDDLETON, J., IN CHAMBERS. DECEMBER 28TH, 1914.

*RE CITY OF OTTAWA AND PROVINCIAL BOARD OF HEALTH.

Provincial Board of Health—Approval of Plans for Water Supply System of City of Ottawa—Duty of Board — Public Health Act, 2 Geo. V. ch. 58—Special Act 4 Geo. V. ch. 84—Jurisdiction of Court—Mandamus.

Motion by the Corporation of the City of Ottawa for a peremptory order of mandamus directing the Provincial Board of

*To be reported in the Ontario Law Reports.

Health to consider certain plans and specifications prepared for the applicants under the authority of the statute 4 Geo. V. ch. 84 (O.), an Act respecting the City of Ottawa, and submitted for the approval of the Board.

Wallace Nesbitt, K.C., and T. A. Beament, for the applicants.

Edward Bayly, K.C., for the Provincial Board of Health, relied on sec. 9 of the Act as an answer to the application.

MIDDLETON, J.:— . . . The water supply for the City of Ottawa has been polluted and unsatisfactory, and for some years the question of securing a sufficient and satisfactory supply has been not only before the people, but before the Legislature and the Courts. . . .

[Reference to a letter from Dr. McCullough, secretary of the Provincial Board, to the waterworks committee of the Ottawa city council, dated the 23rd July, 1912, recommending the purification of water from the Ottawa river by a process of mechanical filtration and Lemieux Island as the site of the waterworks; the report of Allen Hazen, dated the 18th November, 1912, in favour of a scheme for taking water from a point north of Lemieux Island, and treating it with hypochlorite of lime; the certificate of the Board, dated the 23rd November, 1912, approving of the plans and specifications prepared by Hazen; the report of Sir Alexander Binnie and Dr. Houston, dated the 9th October, 1913, in favour of a scheme for bringing water from certain lakes in the Province of Quebec—the water being of such quality as not to require filtration or chemical treatment; the certificate of the Board, dated the 15th October, 1913, approving of this scheme; the statute 3 & 4 Geo. V. ch. 109 (O.), authorising the city corporation to borrow $5,000,000 to provide for the operation of the Binnie-Houston scheme, and authorising the corporation to go into the Province of Quebec, and an Act of the Quebec Legislature authorising the construction of works in that Province; a by-law passed by the city council authorising the borrowing of $5,000,000, which by-law was quashed by Lennox, J.—Re Clarey and City of Ottawa (1913), 5 O.W.N. 370; a notice, dated the 1st December, 1913, from the Board to the municipality, under the Public Health Act, requiring the municipality forthwith to pass by-laws necessary for the undertaking of the work, and a by-law passed in supposed compliance with this notice, which by-law was also quashed by Lennox, J.—Re Clarey and City of Ottawa (1914), 5 O.W.N. 673; a re-

port of Archibald Currie, engineer of the City of Ottawa, dated the 1st February, 1914, respecting the Ottawa river as a source of supply; the Act 4 Geo. V. ch. 82, assented to on the 20th March, 1914, and the Act 4 Geo. V. ch. 84, assented to on the 1st May, 1914, and a vote of the ratepayers of Ottawa, taken pursuant to the earlier Act, shewing a majority in favour of the scheme for taking water from the river with mechanical filtration—the second Act, passed after the vote, providing for the submission to the Board of plans and specifications to carry out the Currie scheme, and providing by sec. 5 that, if the Board should refuse to approve of the plans and specifications, the corporation should proceed to carry out the works recommended by the Binnie-Houston report; a report of Allen Hazen, dated the 19th August, 1914, submitting the necessary plans and specifications; the submission of these to the Board, and the report of the Board, dated the 18th September, 1914, refusing to approve of them.]

The Provincial Board has not followed the wording of sec. 5 of 4 Geo. V. ch. 84; its refusal is not merely to approve of the plans and specifications, but is also a refusal to approve of the report recommending the filtration of the river water.

The action of the Board is now attacked, upon the ground that it usurped a function not entrusted to it when it undertook to consider the report, and that its decision, which involves the rejection of the Ottawa river as the source of supply, is ultra vires, and upon the ground that the Board has refused to exercise the functions which it is called upon to discharge. . . .

It is said that . . . the . . . reasons for the Board's decision indicate that the refusal to approve is because of the preference of the Board for the Quebec lake scheme. The different members of the Board have been examined for the purpose of shewing that this charge was well-founded. . . .

[Extracts from the depositions.]

From all these extracts it is quite apparent that the Board has acted upon the assumption that it was justified in refusing to approve of the plans because the scheme propounded by Mr. Currie did not meet the approval of the Board. . . .

Whatever the functions of the Board may be, I have no right to consider, and do not consider, the merits or demerits of these schemes. . . .

[Reference to the Public Health Act, 2 Geo. V. ch. 58, sec. 89.]

The Board clearly went beyond what was referred to it by

the statute, when it assumed, as it undoubtedly did, to criticise and reject the engineer's report upon the source of supply. . . .

Have I jurisdiction to make the order sought? . . .

[Reference to Rex v. Board of Education, [1910] 2 K.B. 165.]

The Board, acting under the Public Health Act and under the special Act, are not to be regarded, as the defendants were in Graham v. Commissioners for Queen Victoria Niagara Falls Park (1896), 28 O.R. 1, as a mere emanation from the Crown. They are a body created for the discharge of very important administrative and quasi-judicial functions. As put in other cases, they constitute "a public authority performing a statutory duty:" Rex v. Lords Commissioners of His Majesty's Treasury, [1909] 2 K.B. 183; Commissioners for Special Purposes of Income Tax v. Pemsel,]1891[A.C. 531; Regina v. Commissioners for Special Purposes of Income Tax (1888), 21 Q.B.D. 313.

For these reasons, I think the Board have failed to discharge the precise duty imposed upon them by the statute, and that the mandamus sought should now be granted.

It was suggested that the mandamus ought not to be granted because the Court can in no way control the Board, and that the Board might refuse to approve of the plans, not because they are in themselves in any way defective, but because the Board disapproves of the source. I cannot suppose that professional men of the standing of the gentlemen constituting the Board could act otherwise than properly and in the honest discharge of the duty imposed upon them by the statute. If in the result the order I now make stands, the Board will, no doubt, yield obedience to the views expressed.

The case is not one for costs.

MIDDLETON, J. DECEMBER 29TH, 1914.

*RE BREAKWATER CO.

Company—Winding-up of Foreign Company Carrying on Business in Canada—Dominion Winding-up Act—Jurisdiction—Prior Liquidation Proceedings in Foreign Country—Distribution of Assets among Domestic and Foreign Creditors—Equality—Duty of Liquidator.

Appeal by the American liquidator and foreign creditors of the company from an order of the Master in Ordinary, in a re-

*To be reported in the Ontario Law Reports.

ference for the winding-up of the company, directing the liquidator to ascertain the amount of creditors' claims allowed in the American liquidation and to pay to the Canadian creditors, and to them only, such dividends as the united assets will pay, and then to remit to the American liquidator for distribution among the American creditors any balance that may remain.

The appeal was heard in the Weekly Court at Toronto.

A. J. Russell Snow, K.C., for the appellants.

R. C. H. Cassels, for the Ontario liquidator.

MIDDLETON, J.:—This company is an Ohio company, and is in liquidation in the Ohio Courts. Subsequent to the American liquidation, and at the instance of the American liquidator, ordinary winding-up orders were made in Ontario. Creditors have been advertised for in the ordinary way, and claims have been proved by creditors residing in Canada as well as by creditors residing in the United States.

The winding-up was made under the provisions of the Dominion statute, which applies to all companies carrying on business in Canada: Allen v. Hanson (1890), 18 S.C.R. 667. The jurisdiction of the Court to wind up a company under insolvency legislation is not taken away or defeated by the fact that a winding-up order has already been made in the foreign country, even though that country was the country of the company's origin: Ex p. McCulloch (1880), 14 Ch.D. 716; In re Artola Hermanos (1890), 24 Q.B.D. 640; Ex p. Robinson (1883), 22 Ch. D. 816.

When once a winding-up order is made, then, I think, the provisions of the Dominion statute apply and control the entire situation. The winding-up under our statute is in no sense ancillary to the proceedings in the American Court. It is an independent and self-contained proceeding. The statute provides that, regard being had to secured claims and to certain preferences to wage-earners and the like, the assets shall be distributed among all the creditors of the company pro rata. There is no warrant for giving preference to the claims of creditors residing in Canada.

If in the United States liquidation priority should be given to the American creditors, then the amounts that such creditors would receive under the American liquidation would be treated as payments made after the date of the Canadian winding-up, and regard would then be had to such payments in order to

secure the equality contemplated by the Dominion Act. There was no evidence before me as to what course will be followed in the American liquidation; I, therefore, directed information to be obtained from the American liquidator; and I am now told that under the American liquidation all creditors, foreign as well as domestic, will rank *pari passu* in the distribution of the assets of the estate, after payment of preferred claims.

The American liquidator seeks to have the funds transmitted to him to make this distribution; but I take it that it is the duty of the Canadian liquidator to distribute the Canadian funds, and that he cannot discharge himself by remitting them to the American liquidator. The result would probably be the same, but the remitting of the funds to the American liquidator might render them liable to preferential claims not recognised in our liquidation, and might render them liable for the expenses of an American liquidation if the liquidator is not in funds.

This is in accord with Banco de Portugal v. Waddell (1880), 5 App. Cas. 161. . . .

The rule there laid down ensures equality among all the creditors, and has no application where the foreign adjudication recognises the rights of all creditors, domestic and foreign, to share *pro rata*.

The judgment in In re Klœbe (1884), 28 Ch.D. 175, 177, where the right of English creditors to priority in the administration proceedings is denied and the cases are reviewed, is most instructive. . . .

The appeal will, therefore, be allowed, and the matter remitted to the Master with the directions above indicated.

Costs of all parties may come out of the fund.

KELLY, J., IN CHAMBERS. DECEMBER 29TH, 1914.

LAMPERT v. BARRETT.

Pleading—Statement of Defence—General Denial—Failure to Allege Facts—Rule 142.

Appeal by the plaintiff from an order of the Master in Chambers refusing to strike out paragraphs 2 and 3 of the statement of defence, the ground of appeal being mainly that paragraph 2 is a general denial of the allegations made in the statement of

claim, and that the statement of defence should have set forth the facts upon which the defendant relies.

Grayson Smith, for the plaintiff.
J. P. MacGregor, for the defendant.

KELLY, J.:—Rule 142, which extends the operation of the former Rule (269), requires the defendant not only to admit such material allegations of the plaintiff as are true, but also to set forth the facts upon which he relies, even though this may involve the assertion of a negative. The mere denial of the plaintiff's allegations, though made seriatim and not in general terms, is not of itself a compliance with the requirements of the Rule, the aim and object of which is to have set out on the record a clear statement of the issues to be tried. The form of defence to which objection is here taken is faulty in that respect. If effect were given to the argument of the defendant, the amendment to the former Rule would be meaningless, and it would fail in its purpose.

The appellant succeeds, and paragraphs 2 and 3 of the statement of defence will be struck out, unless on or before the 11th January, 1915, the defendant amends by stating the facts on which he rests his defence.

Costs, both of the motion and of the appeal, are payable by the defendant.

BRITTON, J. DECEMBER 30TH, 1914.

*DEVITT v. MUTUAL LIFE INSURANCE CO. OF CANADA.

Life Insurance—Policy—Non-forfeiture Clause—Construction—Surrender Value—Period of Ascertainment—Debt Due by Assured for Premium and Loan Covered by Surrender Value—Interest—Proofs of Death — Waiver by Denial of Liability.

Action to recover the amount of an insurance upon the life of Ernest F. Carlson, deceased.

The action was tried without a jury at Berlin.

*To be reported in the Ontario Law Reports.

R. S. Robertson, for the plaintiff.
W. H. Gregory, for the defendants.

BRITTON, J.:—Ernest F. Carlson, in his lifetime of Edmonton, Alberta, effected an insurance upon his life with the defendants for the sum of $2,000, and received a policy for that amount, dated the 28th March, 1910.

Carlson died on the 2nd February, 1914, at the city of Los Angeles, State of California.

The plaintiff obtained letters of administration of the estate of Carlson, and has brought this action to recover the amount of the said policy.

The defendants plead as a defence that the plaintiff did not, nor did any person on his behalf, furnish or deliver to the defendants proofs of the death of the assured. To this defence the plaintiff says that such proofs were in fact delivered, but they were unnecessary, as the defendants denied their liability and repudiated the plaintiff's claim. The plaintiff did put in formal proofs, upon blanks furnished by the defendants, of the death of Carlson, but not until after the commencement of this action. All the facts were well-known to the defendants before action and before the denial by the defendants of their liability. The denial of liability, in the circumstances disclosed, was a waiver of formal proofs of death.

Counsel for the defendants did not urge the objection that formal proofs were not put in before action, if I considered them sufficient. In my opinion, they are quite sufficient in form and substance.

The main defence is, that there was, at the time of the death of Carlson, an unpaid loan to the deceased upon the policy, and an unpaid part of the premium due on the 1st April, 1913, and, by reason of these debts, the policy became void. That may be so apart from the special provision in regard to non-forfeiture contained in this policy. None of the cases cited and none of the decisions, so far as I am aware, deal with the neat point in regard to forfeiture and non-forfeiture which arises in the present case. On the third page of the policy, clause 3, "termination and revival" are dealt with, and this clause has these words: "If any premium or written obligation given therefor be not paid when due, *except as provided* in the clause respecting *non-forfeiture* hereinafter contained," etc., etc.

The non-forfeiture clause is as follows: "If at time of default in payment of any premium on this policy, after it has

been in force for three years, the cash surrender value (less any indebtedness) shall exceed the amount of such premium, whether yearly, half-yearly, or quarterly, this policy shall not lapse, but shall be continued in force for the time covered by said premium. At the end of said term or succeeding terms, upon the maturity and default of subsequent premiums, if the cash surrender value (less any indebtedness) is sufficient to pay the premium then due—or a premium for a period of not less than three months—this policy shall be continued in force until the end of such period, when, however, it will lapse, and the company's liability cease, unless the succeeding premium be paid in cash within the thirty days' of grace. All premiums in default, with interest at 6 per cent. compounded yearly, shall be a first lien and charge against the policy."

There is no dispute about questions of fact. Both parties rely upon, and the issue depends upon, the proper interpretation of the above "non-forfeiture" clause.

This policy, at the time of default, had been in force for more than three years. The annual premium was $55.50, payable on the 1st April of each year. The premiums for 1910, 1911, and 1912 had been paid; that of 1912 had been paid by a loan from the defendants upon the policy; the premium due on the 1st April, 1913, had been paid in part. The defendants, by their letter of the 3rd March, 1914 (exhibit 17), say that this policy lapsed on the 30th September, 1913.

The letter states, and no doubt the policy account then stood:—

September 30th, 1912, loan to pay premium of April, 1912, $55.50 and interest thereon $1.40	$56.90
Promissory note given to pay balance on premium due 1st April, 1913	15.25
	$72.15

Although the defendants say the policy had lapsed on the 30th September, 1913, it is to be noticed that there had been no demand for payment of the principal of the loan of $56.90, and the defendants had accepted the interest upon it up to the 30th September, 1913, and the agreement provides for payment of interest and compounding the interest if a loan is treated as a continuing loan.

The $15.25 balance on the premium for 1913 is represented by a note dated the 7th July, 1913, at three months; that note

became due on the 10th October, 1913. There was in fact the $55.90 due to the defendants from Carlson on the date mentioned. The note for $15.25 carries interest at 6 per cent.—24 cents for 3 months; and, adding it to the $72.15, the total debt of the assured to the defendants was $72.39 on the 30th September, 1913. . . .

The contention of the defendants is, that the surrender value of the policy on the 30th September, 1913, was $68. If that be the true amount, and the indebtedness be taken at $72.39, there was a deficiency of $4.39.

The plaintiff contends that the surrender value is not limited to the amount mentioned in the table, but is the true surrender value at the time of default. The plaintiff cannot tell what the true surrender value was; but primâ facie the defendants have fixed it as a growing amount de die in diem. In the table it is: 1913, $68; 1914, $94 . . . and so on to the end of the 20th year, when the amount would be, if the policy continued, $958.

The difference between the 1st April, 1913, and the 1st April, 1914, is $26. If half that amount, say $13, is added to the $68, the surrender value would be $81—enough to pay all the debt and allow a surplus of $8.61. This pays all the indebtedness of Carlson, thus paying the balance of the premium due the 1st April, 1913; and so should continue the policy until the 1st April, 1914. . . .

This is not a case of voluntary surrender. Surrender values, as provided for in No. 10 of the "privileges and conditions," are cash surrender values as shewn in the table. That is an entirely different thing from the automatic working out of the non-forfeiture provision. If a policy-holder surrender, he gets cash—according to a table. If he does not surrender, but is unable to pay his premium, he gets what may be to the credit of his policy as a surrender value, not according to a table, but according to what the surrender value really is; and he does not get cash, but he gets extended insurance. . . .

[Reference to Bain v. Ætna Life Insurance Co. (1890-1), 20 O.R. 6, 21 O.R. 233, distinguishing it.]

The defendants issue this policy as an attractive and liberal one, and it certainly is. It works out to the advantage of a policy-holder unable to continue to pay his premiums. This benefit to the policy-holder should not be cut down unless the contract clearly warrants it. The contract must be construed strictly against the defendants on their contention that the policy lapsed or became forfeited on the 30th September, 1913.

The non-forfeiture clause was intended to override to a certain extent these clauses in the policy and in the application for insurance. Neither in the application for insurance nor in the application for the loan nor in the policy itself is there anything that limits the surrender value to the amount mentioned in the table. . . .

There was the default in payment of the premium due the 1st April, 1913. The surrender value must exceed the indebtedness—first, by way of loan, second, for premium. The premium was reduced to $15. If the surrender value was $81 and the debt $56.90, the balance was $25.10, and so exceeded the premium, which was $15, and which, when paid, would continue the policy to the 1st April, 1914.

Although the surrender value enures to the benefit of the policy-holder by continuing the policy in force, the defendants have not been paid the amount in cash; so the amount should be deducted from the amount of the policy:—

Policy		$2,000.00
Debt, loan, and interest	$60.39	
Balance of premium and interest	15.50	
		75.89
		$1,924.11

There will be judgment for this sum, with interest at 5 per cent. per annum from the date of the issue of the writ, and with costs.

LATCHFORD, J. DECEMBER 30TH, 1914.

JONES v. TOWNSHIP OF TUCKERSMITH.

RE JONES AND TOWNSHIP OF TUCKERSMITH.

Highway—Closing and Sale of Unopened Portion of Street as Shewn on Plan—Adoption by Municipality for Public Use not Shewn—By-law of Council—Municipal Act, 1903, *secs.* 629, 632, 637, 640—*Surveys Act*, 1 *Geo. V. ch.* 42, *sec.* 44—*Mala Fides — Evidence — By-law Quashed and Sale Set aside.*

Action to set aside certain conveyances and motion to quash a municipal by-law. See Re Jones and Township of Tuckersmith (1914), 5 O.W.N. 759, 6 O.W.N. 379.

The action was tried without a jury and the motion heard at Stratford.

William Proudfoot, K.C., for the plaintiffs.
R. S. Robertson and R. S. Hays, for the defendants.

LATCHFORD, J.:— . . . All the evidence was, by consent of the parties, regarded as applying to the motion as well as to the action. Little was added at the trial to the facts disclosed in the material before my brother Middleton when he quashed the by-law (5 O.W.N. 759). I accept unreservedly the findings of fact stated in his judgment.

It seems to me beyond doubt that the by-law of 1875 had reference to the plan of 1857, which was the original plan, and not to the plan of 1873. It is to Mill street and Water street "as shewn on the original plan" that the by-law refers. Mill street, according to that plan, did not extend north of Queen street, and the by-law of 1875 cannot be relied on as an acceptance of the extension of Mill street shewn on the plan of 1873 and now in question. There was no evidence before me establishing that the dedication of Mill street north of Queen was ever adopted by the municipality or that it was ever in actual use as a public street or highway.

It is urged, however, that Mill street north of Queen street became a public highway by sec. 44 of the Surveys Act, 1 Geo. V. ch. 42, R.S.O. 1914 ch. 166. . . . The application of this section to townships is first found in 60 Vict. ch. 27, sec. 20; but the enactment is plainly retroactive, and has been so held: McGregor v. Village of Watford (1906), 13 O.L.R. 10. Gooderham v. City of Toronto (1895), 25 S.C.R. 246, is not authority to the contrary. . . .

The allowance for Mill street north of Queen street was "surveyed" and "laid out" and "laid down" on the plan of 1873, and lots fronting on and adjoining that street were sold to purchasers.

The plan of 1873 was filed by L. O. Van Egmond. . . . Van Egmond had at various times sold and conveyed to purchasers, including John Sproat, from whom the plaintiff derives title, lots abutting and fronting on Mill street. . . . At the trial an effort was made to establish that Kruse and those—other than the defendant municipality—through whom he derived title, had, by their continuous occupation of the Van Egmond farm, acquired a possessory title to the unopened end of Mill street.

Van Egmond, subsequent to the filing of the plan of 1873, could not assert, as against any purchaser to whom he sold lots

on Mill street, that he had not dedicated Mill street to public use; and, therefore, so long as the plan remained unamended in accordance with the provisions of the Registry Act, Mill street, throughout the extent shewn on the plan, was, as against him, to be considered a public street which the municipality might at any time accept formally by by-law or quite as effectively by expending public moneys upon it: per Street, J., in Sklitzsky v. Cranston (1892), 22 O.R. 590, 594. . . .

I am of opinion that, under sec. 44 of the Surveys Act, the part of Mill street in question, as shewn on the plan of 1873, though not opened up or accepted by the municipality, became a public street.

The next question is: was the freehold in that part of the street vested in the municipality?

Mill street north of Queen street clearly does not fall within the definition of a public highway stated in sec. 599 of the Municipal Act of 1903. It is not a road allowance made by a Crown surveyor. It was not laid out by virtue of any statute. No public money had been expended for opening it. No statute labour had been performed upon it, and it had not been altered according to law. It is in the case of such highways only that the freehold is vested in the Crown by sec. 599. Section 601 is much wider in its scope, and vests in the municipality every public street and highway, including streets which have become public streets under sec. 44 of the Surveys Act—subject, however, to any rights reserved by the person who laid out such street or highway. . . .

[Reference to Roche v. Ryan (1891-2), 22 O.R. 107.]

There has been no alteration of the plan of 1873, and sub-sec. 6 of sec. 44 has no application. Upon the authority of Roche v. Ryan, I am bound to hold that by sec. 601 of the Municipal Act the property on Mill street north of Queen street was at the time of the impeached by-law vested in the defendant township, which, therefore, was possessed of a "qualified property, to be held and exercised for the whole body of the corporation:" Town of Sarnia v. Great Western R.W. Co. (1861), 21 U.C.R. 59, at p. 62.

By sec. 637 of the Municipal Act, 1903, the council of any township may pass by-laws for selling streets wholly within the jurisdiction of the council. . . .

It is argued that, under sec. 640, sub-sec. 11, the plaintiffs and other owners of lands on the west side of Mill street should have been given the option to purchase the street, and that only

upon their refusal to purchase could the street be sold. . . . The persons to whom the adjoining lands belong should have the first right to acquire and to add to such lands the accretion formed by the closing up of the highway: Broun v. Bushey (1894), 25 O.R. 612, at p. 616.

But sub-sec. 11 seems not to apply except in cases where a new road or street has been opened in lieu of the old: Cameron v. Wait (1878), 3 A.R. 175, at p. 180.

The next question is: did the municipality exercise conformably to sec. 632 the power to sell conferred by sec. 637?

On a motion to quash a by-law affecting a public road, the Court, until the contrary is shewn, will presume that the council acted regularly: per Robinson, C.J., in Fisher v. Municipal Council of Vaughan (1853), 10 U.C.R. 492. . . .

It is not, I think, too much to expect that the utmost fairness should characterise a proceeding depriving ratepayers of a right as important as their right of access to property from a street abutting on which they have bought lots. I find that such good faith was not manifested by the council. Their duty was to protect the interest of the ratepayers as a whole against the interest of particular individuals like Kruse and Berry. They should not have employed as their solicitor the solicitor whom they knew to be acting for the two persons who alone desired to purchase the street. . . .

The closing of the street is, I think, a violation of sec. 629 of the Act. Mill street provided the only means of access to such lots as that owned, at the time the by-law passed, by such persons as the plaintiff Jones. I do not understand the words "means of access" to express the idea that the means of access must actually exist at the time. It seems to me within the scope of the prohibition that the only means of access which may be afforded in the future by a statutory highway existing, though not opened up, shall not, without compensation, be taken from persons whose lots front on such highway. The only cases cited to the contrary have reference to farm lots which had more than one road affording access. . . .

A street laid down for forty years which many purchasers of lots fronting on it desired opened, but which only Kruse and Berry were interested in having closed, was closed at the instance of these two men and their solicitor, who was, as stated, at the same time acting as solicitor for the council.

No transaction carried out in this way should, in my opinion, be permitted to stand.

There will, therefore, be, upon the motion, judgment quashing the by-law with costs; and, in the action, judgment in favour of the plaintiffs, declaring the conveyances from the defendant corporation to the defendant James Berry and from the latter to his co-defendant Kruse null and void, and directing that the registration thereof be vacated. Any buildings or obstructions placed by any of the defendants upon Mill street north of Queen street are to be removed forthwith. The plaintiffs are to have their costs of action and trial.

KELLY, J. DECEMBER 30TH, 1914.

ROSSWROM v. ROSSWROM.

Husband and Wife — Alimony — Wife Leaving Husband, with Intention of not Returning, and Obtaining Divorce in Foreign Country—Bar to Action—Refusal of Husband to Receive Wife back after Divorce—Costs—Rule 388.

An action for alimony, tried without a jury.

W. D. Henry, for the plaintiff.

D. Robertson, K.C., for the defendant.

KELLY, J.:—At the close of the evidence, I stated my opinion that the plaintiff had entirely failed to establish any acts of violence or cruelty of the defendant, in the long term of their married life, which would entitle her to set up her present claim. Apart from any other evidence, her own testimony falls far short of establishing such acts, in any event for many years prior to her last leaving her husband's home; and the evidence of the defendant and other witnesses—women who many years ago were servants in the house of these parties, neighbours, and others who had occasion to visit their home or with opportunities of knowing what was taking place, and the plaintiff's son and two daughters, the younger a girl of 19 years of age—has established beyond any possibility of doubt that she has no just cause for complaint of her husband's conduct, except perhaps in respect of one act of his, to the extent to which he admitted it, but which she afterwards condoned.

She was the dominating influence in their home, exercising on occasions a control in his business matters to which he submitted.

Her health was not of the best at times, and in her evidence she persistently put this forward in an effort to prove that her physical condition was due to what she chose to characterise as her husband's "overlooking" her or neglect of her. There is nothing, however, in that position of hers.

The defendant's life was anything but smooth and happy as the result of her complaining. It was a case of a patient, considerate man suffering annoyances put upon him by a querulous, dissatisfied woman. It may be that her attitude in this respect was due in some degree to her physical weakness, but it did not result from any misconduct of the husband.

The evidence of Dr. Taylor, called on her behalf, indicates what was her state of health, when she consulted him about 10 years ago, but from what he added on cross-examination the condition he found may well affect the credibility of her testimony.

The defendant was not wanting in consideration of her. He was, and is, a farmer. Farm life was not congenial to her, and her objection to it was, partly at least, instrumental in inducing him to change his occupation several years ago and take up that of hotel-keeping. Later on, he returned to the farm. At three different times she went to the United States, presumably for the purpose of benefiting her health—first to Oklahoma, later on to Colorado, and again in 1905 to Oklahoma.

When the defendant disposed of his hotel business in 1903, he had in cash, after payment of his obligations, a little over $800. The plaintiff insisted on receiving and did receive $700 of this, and retained it, within a year afterwards going to Colorado, where she remained several months. On receiving this money, she intimated to the defendant that he could go his way and she would go hers. In May, 1907, she again went to Oklahoma; she says that the defendant did not wish her to go. She took with her their younger daughter, then about 9 or 10 years of age. It is quite clear from what then happened, taken with subsequent occurrences, that she left of her own accord and with little, if any, intention of returning. She carried on business in a small way in Oklahoma until 1912.

Early in 1907, she there applied for and obtained a divorce. During all the time of her absence she did not, directly or indirectly, communicate with the defendant, who continued to carry on his farm operations on the farm on which he and she had resided for many years of their married life.

She returned to Canada in July, 1912, taking up her resi-

dence in Hanover, a few miles distant from the defendant's place of residence, but she made no attempt to see him or communicate with him, or to return to his home. She did not dispose of her Oklahoma business on her returning to Canada, but leased it.

In these circumstances, she now claims alimony. There is nothing whatever on which she can base such claim, except his refusal, expressed in his evidence, to receive her again into his home; that refusal being by reason of the divorce proceedings and her other conduct towards him.

Not disregarding what the law lays down as the only bar to an action for alimony, I think, with the knowledge we have of the deliberate conduct of the plaintiff, her claim should not be allowed. She left the defendant of her own accord, and with the intention, now well established, of not returning to him. She set the law in motion in the country to which she went, with the object of freeing herself from him. Down to that time her husband's home was open to her, and there was no obstacle placed in the way of her return. Her daughter who lived with her in Oklahoma says in her evidence that, when they were about to return to Canada in 1912, the plaintiff stated that they would be only a short time in Canada, as she was coming here for the purpose of obtaining money from the defendant. That evidence is not contradicted in any way, though the plaintiff was again in the witness-box after the daughter had made that statement. Her retaining her Oklahoma business corroborates the daughter's statement, if any corroboration were necessary.

She made no statement or admission of willingness to return to her husband. The question was not, as I now recollect, put to her, and I should have been much surprised if she had declared her willingness, had she been asked the question.

Without being taken as passing on the validity of the divorce or holding the proceedings to be valid or binding even in the country in which it was obtained, otherwise than for the purpose I now state, I am of opinion that, having chosen the tribunal to which she made her appeal for relief, she is to be bound thereby, in so far as to disentitle her to make the present claim.

I am not at all disposed to mark the way for a wife's establishing such a claim as is now set up under the exceptional conditions which have been revealed in this action.

I, therefore, dismiss the action; the defendant to pay such costs as are payable under Rule 388.

KELLY, J. DECEMBER 30TH, 1914.

EAST v. CLARKE.

Limitation of Actions—Possession of Land—Statutory Title by Virtue of Limitations Act—Payment of Taxes—Acknowledgment —Lien for Taxes.

Action for recovery of land.

N. W. Rowell, K.C., and G. Kerr, for the plaintiff.
J. M. Ferguson and D. J. Coffey, for the defendant.

KELLY, J.:—The land which is the subject of this dispute adjoins to the east the defendant's lands on which he has resided since 1895.

The plaintiff's husband, William East, acquired this property by deed in 1889; he says he then owned the land immediately to the east of it, and that for five years after he so acquired it he used it as a garden and lawn and chicken-yard. In December, 1892, William East conveyed the lands now in question with other lands to his father-in-law William Dennis, the plaintiff being a party to the conveyance for the purpose of barring her dower. East says that the conveyance was made only by way of security for a sum of $1,000. So far as is disclosed by the evidence, the paper title so continued until October, 1913, when, by a conveyance of the 15th of that month, the surviving executors of John Dennis conveyed to the plaintiff.

According to the evidence of the plaintiff and her husband, in the spring of 1896 an interview took place between the defendant and the plaintiff's husband about this property—the plaintiff being present. William East says that the defendant wished to rent this property, and that he (East) wished to sell. Both the plaintiff and her husband say that it was then agreed with the defendant that he should have the use of the lands for payment of the taxes as rent, and that the plaintiff's husband would send the defendant the tax bills each year. The defendant denies that any such interview took place. As between him and William East, I should have difficulty in deciding; but the plaintiff's evidence impressed me on that point, and I accept it as correctly setting forth what took place.

In view of the defendant's evidence as to whence the tax bills came to him and the manner of his making the payments, as well

as from what can be deduced from the tax bills and receipts, I find it difficult to accept East's statement that for the several years mentioned by him he sent the tax bills to the defendant. Down to 1908, inclusive, the taxes did not belong to the Corporation of the City of Toronto, the property until that time not being within the city limits.

The defendant entered upon the lands early in 1896, and from that time until the commencement of this action, without interruption or interference, he used it as a part of his land and garden, changing some of the fences, and building a chicken-house thereon. From the time of his entry until about 1909 he paid the taxes charged upon it; from that time, the plaintiff's husband says, he paid them.

If there was any estate created by the arrangement made between these parties, it could not have been more or otherwise than a tenancy at will. This is borne out by the effect that may be given to East's statement of what took place when the arrangement was made, namely, that he (East) would send the defendant the tax bills each year, and if he got a purchaser he would sell.

The strength of the defendant's position lies in the fact that there was no other rent bargained for or agreed to be paid but the taxes, which were not, however, nor was their equivalent, to be paid to the owner, but only to the proper authority entitled to collect them as such.

A person in the position of the defendant, seeking to retain possession and establish ownership of lands on the sole ground of length of undisputed possession, has no cause for complaint if he be put to strict proof in support of his claim. Even on such a test, I find that the defendant was in adverse possession for more than the time required by the statute, and that he made no such acknowledgment as would take the case out of the statute or give a new starting-point from which possession would run. True, there is some evidence of a conversation or conversations between the plaintiff's husband and defendant—but denied by the defendant—with relation to the property, but not such as to constitute an acknowledgment of ownership.

The plaintiff, and those through whom she claims, outwardly displayed little, if any, interest in the property such as might have been expected from an owner. She personally knew nothing of its condition from the time the defendant took possession until a few months ago; her husband's activity in that direction went no further than seeing the property about once a year,

when it was patent to him that the defendant was in possession. They made no entry upon it and no claim to it. Apparently, at least, they slept on their rights. It may be that they relied upon their arrangement with the defendant as protecting these rights.

The agreement was to pay the taxes—not to pay to the landlord as rent an amount equal to the taxes, or any sum. This brings the case within the authority of Finch v. Gilray (1889), 16 A.R. 484, and Bowman v. Watts (1909), 13 O.W.R. 481, in the former of which, at p. 492, it is stated that the substantial characteristics of rent are wanting in the case of taxes paid as such by an occupant, and that even when so paid under an agreement with the landlord they cannot be regarded as rent. Putting it in the light most favourable to the plaintiff, the time began to run in favour of the defendant not later than 1897—if, indeed, it did not begin in 1896—and the full time required by the statute had run before there was any interruption or claim or entry by or on behalf of the plaintiff.

I have not disregarded the authorities cited for the plaintiff, which, I think, are quite distinguishable from the present case.

The result is, that the defendant has acquired title to the lands, and the action must be dismissed with costs; but with this modification, that the defendant pay to the plaintiff such taxes as the plaintiff or her husband has paid, beginning with the time (1909 or thereabouts) from which the husband says he paid them and the defendant admits he did not pay, with interest on the sums so paid from the respective times of payment, the lands to stand as security for such payment. If the parties cannot agree upon the amount, the matter may be referred to me.

MIDDLETON, J., IN CHAMBERS. DECEMBER 30TH, 1914.

*RE CITY OF BERLIN AND THE COUNTY JUDGE OF THE COUNTY OF WATERLOO.

Municipal Corporation—Resolution of Council Directing Inquiry by County Court Judge—Charges against Police Force—Authority of Board of Police Commissioners—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 248—*Construction and Scope—Refusal of Mandamus.*

Motion by the Corporation of the City of Berlin for a mandamus to the Senior Judge of the County Court of the County of

*To be reported in the Ontario Law Reports.

Waterloo directing him to proceed with an inquiry under a resolution of the city council into certain charges of misconduct and lack of harmony in the police force of the city.

H. J. Sims, for the applicant corporation.
Edward Bayly, K.C., for the Judge.

MIDDLETON, J.:—By the Municipal Act, R.S.O. 1914 ch. 192, sec. 248, where the council of a municipality passes a resolution requesting a Judge of the County to investigate any matter relating to supposed misfeasance or breach of trust, or other misconduct on the part of a member of the council, or an officer, or servant of the corporation, "or to inquire into or concerning any matter connected with the good government of the municipality, or the conduct of any part of its public business," it thereupon becomes the duty of the Judge to make the inquiry directed, and the Judge is given for the purpose of that inquiry all the powers which may be conferred upon Commissioners under the Public Inquiries Act.

The police of the City of Berlin are in charge of a Board of Commissioners constituted under secs. 354 et seq. of the Municipal Act. The Board in this case consists of the Mayor, the Police Magistrate, and the Junior Judge of the County, who has been designated by the Lieutenant-Governor in Council. The resolution in question requests the Senior Judge of the County to conduct this inquiry.

The learned Judge has declined to enter upon the inquiry, taking the view that what is now sought is not within the scope of sec. 248, and that he cannot be called upon to investigate matters which properly fall within the jurisdiction of the Board of Police Commissioners.

Upon this motion an affidavit is filed by the Police Magistrate stating that all complaints of every kind which have been made to the Board of Police Commissioners have been investigated and dealt with by the Board.

I think the learned Judge is right in the position which he takes. The words which I have quoted from sec. 248 are undoubtedly very wide. Practically everything in one way or another concerns the good government of the municipality, and some limitation must necessarily be found to the wide terms used. Similar wide expressions are found in sec. 250: "Every council may pass such by-laws and made such regulations for the health, safety, morality, and welfare of the inhabitants of the munici-

pality . . . as may be deemed expedient." No one supposes that this general provision confers unlimited jurisdiction upon the municipal council; yet it might well be argued that all laws dealing with every possible topic are presumed to be passed in the interest of the health, safety, morality, and welfare of the inhabitants.

A somewhat similar problem has recently been faced in Australia, in the case of Colonial Sugar Refining Co. Limited v. Attorney-General for the Commonwealth of Australia (1912), 15 Commonwealth L.R. 182, Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Limited (1913), 17 Commonwealth L.R. 644 and [1914] A.C. 237. . . .

In our scheme of municipal government, some matters concerning the welfare of the inhabitants are taken from the jurisdiction of the municipal council and vested in other legislative and administrative bodies. School affairs are entrusted to School Boards and Boards of Education; certain public utilities are placed in charge of Boards specially constituted; and the affairs relating to the police force are placed in the hands of Police Commissioners. I do not think it is competent for the municipal council to direct an inquiry before the County Judge into the matters entrusted to these independent bodies. Within the limits of the jurisdiction conferred upon these bodies, they are supreme, and in no sense subordinate to the municipal council. This has been demonstrated in a series of cases in which the municipal council has undertaken to review the action of school boards.

The unseemly results if this is not so are quite apparent upon most superficial consideration of the situation. The Board of Police Commissioners, consisting of the Mayor, the Police Magistrate, and one of the County Judges, has considered and dealt with the very matters now to be inquired into. The council now suggest that the whole matter be reviewed by the other County Judge. The Police Commissioners have the authority to act, and no doubt have acted, in accordance with their views. The County Judge who is asked to investigate has no power to take any action upon the evidence brought before him. His only function is to report to the municipal council. The municipal council then has no power to act, for the matters in question are not within its jurisdiction but under the charge of the Police Commission. If there is the right to have the inquiry, the inquiry might just as well be directed to take place before the County Judge who is himself a member of the Police Commis-

sion. In many counties this must be so, because there is only one Judge in the county; and, speaking generally, the Senior Judge is the member of the Board; and the council, if it has the power, may direct that the conduct of the Senior Judge and his colleagues be investigated by the Junior Judge sitting alone.

For these reasons, I think that I am bound to hold that the inquiry authorised by sec. 248 can only be directed concerning matters within the jurisdiction of the municipal council and with a view to obtaining a report for the guidance of the municipal council in dealing with matters over which it has authority.

The scope of the inquiry and its purpose is, I think, well indicated in Re Godson and City of Toronto (1888-9), 16 O.R. 275, 16 A.R. 452, Godson v. City of Toronto (1890), 18 S.C.R. 36. Paramount authority of the Board of Police Commissioners with respect to matters over which it has jurisdiction is established in Kelly v. Barton (1895), 26 O.R. 608, 22 A.R. 522; and Winterbottom v. London Police Commissioners (1901), 1 O.L.R. 549, 2 O.L.R. 105.

The decision of my learned brother Britton in Lane v. City of Toronto (1904), 7 O.L.R. 423, is in no way in conflict with this view. . . .

Motion dismissed with costs.

KELLY, J. DECEMBER 31ST, 1914.

GOWLAND v. HAMILTON GRIMSBY AND BEAMSVILLE ELECTRIC R.W. CO.

Railway—Injury to Person Crossing Track of Electric Railway on Company's Land—Private Driveway across Track Used with Knowledge of Company—Dangerous Crossing—Duty to Give Warning of Approach of Car—Negligence—Findings of Jury—Evidence—Dominion Railway Act, sec. 274.

Action for damages for personal injuries sustained by the plaintiff by reason of the defendants' negligence, as the plaintiff alleged.

The action was tried with a jury at Hamilton.

G. Lynch-Staunton, K.C., and M. Nesbitt, for the plaintiff.

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

KELLY, J.:—The lands over which the defendants' cars run, at the place where the plaintiff received his injuries, are owned by the defendants. At that point there is a driveway from the public road across the defendants' tracks and continuing into and through Carpenter's lands to his dwelling-house.

The plaintiff, who had, in the course of his employment, driven a delivery waggon of his employer over this driveway to Carpenter's house, there to deliver goods, was returning, when he was struck by the defendants' car.

The jury found negligence by the defendants, in that it was "an unusual dangerous crossing," adding: "We think they should use necessary caution in such places—we think they should sound an alarm in such places;" and they negatived negligence by the plaintiff. In answer to a question which I put to them when they had answered the other questions, they supplemented their answers by indicating that the defendants' lack of caution was in not sounding an alarm, and that the speed of the car might have been slower. There is evidence that Carpenter's property at this place is thickly grown with trees, through which the driveway passes, and which very much shut out the view of the public road from those passing along the driveway where the plaintiff passed just before the accident. The jury may have had this in mind when referring to the necessity of using caution.

This crossing is not a highway crossing, and this case is not brought within sec. 274 of the Dominion Railway Act, though it was vigorously contended for the plaintiff that the crossing, from its being the usual means of entry to the private property of Carpenter, over which persons have the right to pass in order to reach Carpenter's lands and house, is of the character of a highway crossing, if it is not a crossing on a highway.

There was considerable evidence on the question whether a bell was rung or a whistle blown as the car approached the place of the accident, some witnesses saying that no such warning was given, or none that they heard; some adding that if such warning had been given they would have heard it. The men in charge of the car were not called. This was evidence on which the jury could well have based their finding that an alarm was not sounded. The inference to be drawn from the jury's findings is, that an alarm was not sounded in this instance; that there was a failure to use necessary caution, both as to sounding an alarm or warning and in the rate of speed, at a place which, they say, was unusually dangerous.

I cannot see that there was any statutory obligation upon the defendants to give a warning such as sounding an alarm—a bell or whistle.

But, apart from any duty imposed upon them by statute, I am of opinion that they were under obligation to exercise care, which the jury, in the above view, find they did not exercise. The plaintiff was not outside of his rights in being upon the defendants' lands when the accident happened. The driveway across the defendants' tracks, built and used as it was, affording a means of entry to Carpenter's property from the public road, must be taken to have been there with the consent and approval of the defendants. Provision was made, by whom it is not clear, for the more easy crossing over the tracks by means of planks laid between the rails so as to bring the driveway to or near the rail level; and the existence and use of the driveway were such that the defendants could not but be aware that persons were in the habit of crossing their tracks as a means of ingress and egress to and from Carpenter's property for those whose business brought them there, and who had thus at least permission or license to pass over the defendants' lands.

Though I have reached my conclusion with some hesitation, I am of opinion that, in view of the circumstances, and apart from statutory obligation, there was a duty to give warning for the protection of those so crossing at this dangerous place, and which the jury in effect find was not given. If that view be correct, the judgment should be for the plaintiff for the amount assessed by the jury, and costs.

MIDDLETON, J. DECEMBER 31ST, 1914.

*McNIVEN v. PIGOTT.

Vendor and Purchaser—Agreement for Sale of Land—Inability of Vendor to Make Title—Rescission by Purchasers—Damages for Failure of Vendor to Make Title—Loss of Bargain—Profits — Vendor's Damages by Reason of Purchasers' Dealings with Land—Destruction of Buildings—Inability of Purchasers to Make Complete Restitution—Damages for Deficiency.

Appeal by the defendant and cross-appeal by the plaintiffs from the report of the Local Master at Hamilton, heard in the Weekly Court at Toronto.

*To be reported in the Ontario Law Reports.

G. Lynch-Staunton, K.C., and S. F. Washington, K.C., for the defendant.

W. S. MacBrayne, for the plaintiffs.

MIDDLETON, J.:—The facts giving rise to this appeal have already been before the Courts in more than one form. By an agreement bearing date the 18th March, 1913, Pigott, the owner of the lands in question, agreed to sell them to the plaintiffs for $32,000. A good title was to be made within 14 days, and in default the sum deposited was to be repaid, and the offer was to be void at the purchasers' option. Under the agreement, $2,000 was to be paid as a deposit, $4,000 on the 3rd April, 1913, and the balance remaining after the assumption of certain existing mortgages was to be paid on the 16th June, 1913, that being the date named for the closing of the sale. It is then provided that "we or any of us are to have possession at once of the said lands, to cut down trees, remove fences, clear off all obstacles necessary to put property in good saleable condition, survey and open up street through said property, sell or build on said property." It was also agreed that Pigott should have the free use of the house and 61 feet frontage on Wentworth street, as a dwelling, until the day fixed for closing.

An agreement had been made with Mr. Bell, the owner of the adjoining lands, looking to the opening up of a street across both parcels. It was assumed that this agreement was spent by the lapsing of the time mentioned in it. The solicitor acting for both parties did not regard it as any defect in the vendor's title, and he told the purchasers that the title was satisfactory. Thereupon they entered into possession of the land and took down fences, removed hedges, and laid out a road which, it was contemplated, should be made through the property for the purpose of profitable subdivision.

Acting in perfect good faith and with a view to a profitable subdivision and sale of the land, the purchasers pulled down and removed a stable and some outbuildings upon the property. These . . ., the Master has found, were worth $2,000.

Mr. Bell gave notice that he did not assent to the view above indicated as to the effect of his agreement, and he claimed to have the right to open up the street that that agreement contemplated across the Pigott land, notwithstanding the lapse of the time-limit contained in the agreement. This frightened the purchasers, and they declined to carry out the agreement, although they paid the second instalment on the purchase-price.

An application was made under the Vendors and Purchasers Act, which was heard by the Chief Justice of the King's Bench, and he refused to force the title upon the purchasers, thinking that the agreement constituted a cloud upon the title: Re Pigott and Kern (1913), 4 O.W.N. 1580.

This action was then brought to rescind the agreement and to recover back the purchase-price paid.

Thereafter, for the purpose of clearing up his title, Pigott brought an action against Bell. The result of this action was a declaration that the Bell agreement was spent, and formed no cloud upon Pigott's title. The judgment in that action, Pigott v. Bell, is reported in 5 O.W.N. 314.

The present action afterwards came on for trial before the Chief Justice of the King's Bench, who decided in Pigott's favour; but his decision was reversed upon appeal, the Appellate Division on the 12th May, 1914, McNiven v. Pigott, 31 O.L.R. 365, determining that the plaintiffs were entitled to rescind the agreement by reason of what had taken place, and a refund of the amount paid on account of the purchase-price was ordered. The Court also directed the defendant to pay the plaintiffs their costs of investigating the title to the land in question, and referred it to the Master to take an account of the damages, if any, over and above these costs, to which the plaintiffs are entitled by reason of the defendant's failure to make title under his contract, and also to determine the damages, if any, that the defendant is entitled to by reason of the plaintiffs' dealings with the lands and premises.

Upon the reference the plaintiffs claim to be entitled to recover as damages the profits or some sum to represent the profits which would have accrued to them if the defendant had had a good title. They also claim to recover an amount paid to a surveyor for work done in laying out a subdivision of the lands and the costs of litigation with this surveyor. The defendant claims to be entitled to recover as damages the value of the buildings etc. destroyed and removed by the plaintiffs.

The Master has disallowed the claims of both parties, save that he has allowed to the defendant the sum of $75 as representing the amount received by the plaintiff from the sale of the salvage from the buildings removed. The Master has assessed at $1,200 the damages that the plaintiffs are entitled to receive if in the result their claim should be upheld. He has in like manner assessed the defendant's damages, if he is entitled to succeed, at $2,000. This, I understand, includes the $75.

Both parties now appeal from the Master's report.

Dealing first with the defendant's appeal, the plaintiffs' action was in effect, and possibly in substance, for rescission of the contract, not upon any ground of fraud, but upon the ground of the inability of the defendant to make what is deemed a satisfactory title to the land to be conveyed. In this case, and possibly also in the case of fraud (see Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392), there can only be rescission and the restitution to the plaintiff of that which he has paid under the contract, upon the terms that the plaintiff himself make restitution of that which he has received, so that the parties may be restored to the positions in which they respectively were before the contract. If, either from the plaintiff's own act or from misfortune, he is unable to make restitution, he cannot rescind. This statement is, I think, justified by what is said in Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317, at p. 338; Hogan v. Healy (1877), Ir.R. 11 C.L. 119; Clarke v. Dickson (1858), E. B. & E. 148; Rees v. De Bernardy, [1896] 2 Ch. 437, at p. 446.

Manifestly in this case, owing to the destruction of the buildings, the plaintiffs cannot make complete restitution. This point does not seem to have been dealt with by the Appellate Division; but, if I understand the decision aright, the reference as to damages awarded to the defendant must be taken to be a reference to ascertain by how much that which the plaintiffs return falls short of complete restitution. Taking this view of the case, the defendant's right to receive the $2,000 . . . seems plain. . . .

Turning to the plaintiffs' appeal. In Flureau v. Thornhill (1776), 2 W. Bl. 1078, the principle is laid down that a contract for the sale of land is merely upon condition, frequently expressed, always implied, that the vendor has a good title. If the vendor has no title or a defective title, and is acting without collusion, the prospective purchaser is entitled to no satisfaction for the loss of his bargain. . . .

[Reference to Hopkins v. Grazebrook (1826), 6 B. & C. 31; Bain v. Fothergill (1874), L.R. 7 H.L. 158; Engel v. Fitch (1868-9), L.R. 3 Q.B. 314, L.R. 4 Q.B. 659; Day v. Singleton, [1899] 2 Ch. 320; Lehmann v. McArthur (1868), L.R. 3 Ch. 496; Clergue v. McKay (1903), 6 O.L.R. 51.]

Here it is plain, as the result of the litigation with Bell, that the defendant's title was at all times good. It is not suggested that there was any collusion or any deliberate failure on his part. Although he ultimately brought an action to get rid of

whatever cloud Bell's unwarranted claim cast upon his title, he was not bound to do this. It was beyond his obligation under his contract with the plaintiffs.

The result is, that the plaintiffs' appeal fails, while the defendant's appeal succeeds, and costs will follow the event.

A motion was made at the same time for judgment on further directions. If the plaintiffs desire to carry the matter further, this is premature; but, if there is no intention to litigate further, there should be judgment for the return of the balance of the purchase-money after deducting $2,000, and the defendant should have the costs of the reference and of the motion for judgment.

MIDDLETON, J. DECEMBER 31ST, 1914.

*RE HARRIS.

Distribution of Intestate's Estate—Shares in Commercial Company—Election of two Beneficiaries to Take in Specie—Refusal of third Beneficiary to Accept Shares—Position and Duty of Administrator—Advice and Direction of Court.

Motion by the administrator of the estate of Andrew D. Harris, deceased, for the advice and direction of the Court in regard to the administration of the estate.

D. Inglis Grant, for the administrator.
J. A. Macintosh, for the widow and adult son.
G. C. Campbell, for the adult daughter.
F. W. Harcourt, K.C., for the infants.

MIDDLETON, J.:—Andrew D. Harris died intestate on the 12th December, 1913, leaving him surviving his widow and four children, two of whom are infants. At the time of his death, Mr. Harris was substantially the owner of a valuable factory business, as he held 2,994 shares out of 3,000 of the capital stock of the Ontario Sewer Pipe Company. This stock is of very considerable value, but at the present time, owing to the financial conditions now prevailing, the stock cannot readily be marketed; and, although the business of the company is large and profitable, it is plain that any attempt to wind up the company would be

*To be reported in the Ontario Law Reports.

productive of great loss. There is a wide difference of opinion between those concerned as to the best course to pursue and as to the duty of the administrator.

The widow and the adult son desire the administrator to give them the shares that would be coming to them upon a distribution—that is, one-half of the 2,994 shares. The adult daughter, on the other hand, desires that there should be no partition of the stock, but that it should be held by the administrator until a realisation can take place at a fair price. The infant children, represented by the Official Guardian, submit their rights to the Court—and, of course, they cannot make any election.

The adult daughter has, since her infancy, resided with her grandfather and her uncle, one Thomas Kennedy, who is the manager of the Dominion Sewer Pipe Company. . . .

The motion must be dealt with upon the basis of the right or lack of right of those entitled to share in the estate to demand that the share be given to them in specie. There are no creditors, and no rights need be considered save the rights of the widow and the children. . . .

There is no question that, as soon as the debts have been paid, the administrator holds the estate in trust to convert and divide among those entitled under the statute to distribution, in precisely the same way that an executor holds an estate in trust under a will when he is directed to convert and distribute among several residuary legatees. . . .

[Reference to Cooper v. Cooper, [1874] L.R. 7 H.L. 53.]

But it must be borne in mind, as pointed out in Lord Sudeley v. Attorney-General, [1897] A.C. 11, that, until distributed, the assets which are the subject of the trust are not the property of the beneficiary.

This, however, makes it necessary to consider the exact nature of the right of election to take the estate in specie. The case is simple where there is only one cestui que trust, or where the cestuis que trust are all of one mind, and no complication arises from disability. There, as soon as all other interests have been provided for, the right to demand the delivery of the estate in specie is incontrovertible. But I think it is also well-established that where the parties beneficially concerned are not of one mind, the parties who so desire are entitled to insist upon the normal course of administration being pursued to the end. There can be no divergence from the donor's will, nor from the statutory testament, which would injuriously affect the right of

any one cestui que trust. That cestui que trust may compel a strict and literal adherence to the prescribed line of duty.

I think this correctly sums up the law to be derived from a large number of authorities. The general principle is clearly stated by Lord Cranworth in Harcourt v. Seymour (1851), 2 Sim. N.S. 12, 45. . . .

The necessity of united action among beneficiaries, where the rights of all are affected, is pointed out in Holloway v. Radcliffe (1856), 23 Beav. 163, and Chalmer v. Bradley (1819), 1 J. & W. 51; but, where the trust is to convert money into land, it has been held that any one entitled to the money may elect to take it, as this does not interfere with the other beneficiary: Seeley v. Jago (1717), 1 P. Wms. 389. . . .

[Reference to Lewin on Trusts, 11th ed., pp. 864, 1205 et seq.; In re Douglas and Powell's Contract, [1902] 2 Ch. 296; In re Marshall, [1914] 1 Ch. 192, 199, 200.]

In this case, applying the principle which, I think, runs through all these cases, I think it is the duty of the administrator to transfer any portion of the stock to the beneficiaries unless all agree. It is plain that if the widow and the son succeed in obtaining their one-half of the stock of the company now held by the administrator, this, together with the stock held or controlled by them, will give them the controlling vote in the company; and the fear of the daughter that she will be converted into a minority stockholder, instead of having a joint interest in the controlling stock, is well-founded. . . . Her position will be changed without her consent. She will be given something other than that which she now has; and, as I understand the law, where the objection is one of substance, and not put forward manifestly unreasonably and vexatiously, it is the duty of the trustee to protect the dissentients; and the Court cannot relieve the trustee from the duty which has been imposed upon him by the statute, which here constitutes his trust instrument. The statute directs a sale and conversion; and, in the absence of consent, this must govern.

The question here raised and determined is not far removed from that which has arisen, but has not yet been determined, in Rose v. Rose (1914), ante 416.

The administrator was well justified in asking the opinion of the Court; and costs of all parties may therefore be paid out of the estate.

MIDDLETON, J. JANUARY 2ND, 1915.

*ROGERS v. CITY OF TORONTO.

Municipal Corporation — Contract for Purchase of Crushed Stone—"Fair Wage Clause"—Labourers outside of Municipality — Exceeding Territorial Limits of Jurisdiction—Contract and Fair Wage Stipulation intra Vires—Power of Court to Exercise Supervisory Jurisdiction over Municipal Action.

Motion by the plaintiffs for an interim injunction, turned by consent of counsel into a motion for judgment, and heard in the Weekly Court on the 23rd December, 1914.

I. F. Hellmuth, K.C., and Eric N. Armour, for the plaintiffs.

G. R. Geary, K.C., for the Corporation of the City of Toronto, the defendants.

MIDDLETON, J.:—The plaintiff Alfred Rogers is a ratepayer of the City of Toronto, and sues, on behalf of himself and all other ratepayers, to restrain the defendants from entering into a contract with any person other than the plaintiff company for the purchase of crushed limestone and to restrain the defendants from inserting in any contract or tender for contract, a clause commonly designated "the fair wage clause."

By by-law of the City of Toronto, passed in December, 1893, it is provided that every contract thereafter made with the city corporation shall contain a clause providing that the contractor shall pay to all his mechanics, workmen, and labourers, to be employed by him in the execution of the contract, the union or prevailing rate of wages for such work at the date of the contract. Thereafter resolutions were passed fixing a minimum wage, originally 18 cents, now 25 cents, per hour, and settling a general form of clause to be inserted in the contract.

In pursuance of this settled policy on the part of the municipal council, the form of tender supplied to competing contractors contains the clause indicated. The plaintiff company in sending its tender deleted this clause. Other tenderers submitted tenders in accordance with the requirements of the municipal council; and it is proposed by the council to contract with some one of those whose tenders accord with the view of the council.

It is argued that because the stone which is to be contracted

*To be reported in the Ontario Law Reports.

for will be manufactured by labourers outside of the municipality—there being no limestone quarry within the city—this amounts to a diversion of municipal funds to non-municipal purposes, namely, the increasing of wages of non-resident workers, and that this is an attempt on the part of the municipality to transcend the territorial limits of its jurisdiction; for, if it is attempted to justify the municipal action upon the ground that the clause was inserted to secure the well-being of the workers, the workers to be benefited reside beyond the limits of the municipality, and the general authority conferred upon the municipality is only to pass by-laws for the well-being of its inhabitants.

I think the action is entirely misconceived. The by-law is not the subject of attack, and I know of no principle which enables the Court to prevent a municipality from making any contract with respect to a matter within its jurisdiction which it may see fit to make. Undoubtedly the purchase of stone for municipal purposes is intra vires; and, if the municipal council sees fit in its contract to stipulate that fair wages shall be paid to those who manufacture the stone, there is nothing in this that is ultra vires the corporation. The Courts have no right to interfere with municipal action unless the municipality proposes to transcend the limits of the jurisdiction conferred upon it by the Legislature.

At one time the Courts assumed jurisdiction to review municipal legislative action, upon the ground that the action was unreasonable. There never was in Ontario any real foundation for such jurisdiction. The supremacy of the municipal legislative authority, within the sphere of its delegated jurisdiction, was not at first recognised. It was assumed that the municipality occupied some subordinate position, and that the principles applicable to the determination of the validity of by-laws of companies, or the rules and regulations of Boards exercising a delegated authority, could be applied to municipal action. This assumed supervisory and paternal jurisdiction of the Courts, although founded in error, became well-established, and was only put an end to by the direct action of the Legislature, which enacted that no municipal by-law should be dealt with by the Courts on the ground of unreasonableness or assumed unreasonableness.

But this jurisdiction so usurped by the Courts over municipal legislative action was never extended to the supervision of contracts and the elimination of terms that might be regarded

as unreasonable. The only case that lends colour to the suggestion of such a jurisdiction as this is an unreported decision of my Lord the Chancellor in a judgment in an action of Crown Tailoring Co. v. City of Toronto (1903), in which an injunction was sought and granted restraining the letting of a contract for firemen's clothing in which it was stipulated that each article must bear the label of the Journeymen Tailors' Union. This decision proceeded upon grounds that possibly justify the plaintiffs' contention, but it is entirely out of accord with the great bulk of the law upon the subject—which, I think, must govern me.

With the wisdom or unwisdom of the council's action I have no concern. If the ratepayers agree with the policy of the municipal council, then all is well. If they disagree, the redress is at the polls and not through the Courts.

In Kelly v. City of Winnipeg (1898), 12 Man. L.R. 87, where a similar clause was attacked, it was held "that the matter in dispute was a question of policy in the government of the city, as to the expediency of which the ratepayers, and not the Court, should pronounce." It is true that in the course of the judgment Mr. Justice Bain pointed out that the Corporation of the City of Winnipeg could not be said to have no interest in the wages paid to the inhabitants of that city; but that is not the gist of the judgment. The real significance of the decision is the statement I have quoted, that this matter is one entirely outside the jurisdiction of the Courts.

American cases afford no guide. The municipal system there differs widely from our own, and in most of the cases it will be found on examination that the decision in reality turns upon constitutional limitations to which we have no parallel.

People ex rel. Rodgers v. Coler (1901), 166 N.Y. 1, cited by Mr. Hellmuth, is a good illustration of the difficulty that arises when any attempt is made to apply American cases to the situation in Ontario. . . .

The action fails, and must be dismissed with costs.

MIDDLETON, J. JANUARY 2ND, 1915.

LINDEN v. BASTEDO.

Solicitor—Lien for Costs—Property Recovered or Preserved by Solicitor's Efforts—Arbitration — Payment of Money into Court—Claimants—Priority.

Appeal by a solicitor from the report of the Master in Ordinary upon a reference to determine who was entitled to a sum paid into Court by the Corporation of the City of Toronto as representing lands taken upon expropriation proceedings.

The appeal was heard in the Weekly Court at Toronto on the 21st December, 1914.

Hamilton Cassels, K.C., for the solicitor.

Shirley Denison, K.C., for Bastedo.

J. R. Roaf, for Lenschner.

A. C. Heighington, for the Bank of Ottawa.

MIDDLETON, J.:—The lands taken formed part of a tract held and owned by one Logan, and by him agreed to be sold to John Linden. Under the agreement, a certain balance of purchase-money remained due to Logan, but he is not a claimant, as he evidently regards the lands not taken as being adequate security.

Linden transferred his interest to his wife. Under an agreement between the Lindens and Bastedo, Bastedo became entitled to a half interest in the lands, subject to the payment of the balance due to Logan. When the arbitration was undertaken, there appears to have been some difference of opinion between the Lindens and Bastedo as to the course to be adopted; and, as the result of negotiations, a letter was written by Bastedo to the Lindens in which he agreed to accept $2,000 as representing his interest in the land, leaving the Lindens, who desired to arbitrate, the chance of making more as the result of the arbitration, and the risk of receiving less.

The appellant was in the arbitration the solicitor for the Lindens. Without any authority, he assumed to represent Mr. Bastedo. It is admitted that the relationship of solicitor and client never existed between them.

The arbitration proceeded, with the result that the award was but $3,784, with interest from the date of the expropriating by-law; and, as this sum was less than the amount offered at the

beginning of the arbitration proceedings, the arbitrator left each party to pay his own costs.

Bastedo has been paid his $2,000 under an order made by the Chief Justice of the Common Pleas, and the balance of the money in Court, which is subject to this contest, represents the Linden interest in the property.

Under the Lindens' agreement, forfeiture followed default in payment. For the purpose of protecting the property against this forfeiture, Bastedo has paid not only his own share, but the Lindens' share, of the instalments falling due. The amount so paid on account of the Lindens exceeds the sum of money paid into Court. The result of these payments has been the preservation of the right of the Lindens, not only as to the money representing this portion of the land, but in the much more valuable portion yet remaining.

Bastedo claims to be entitled to a first lien with respect to the amount so paid, either on the principle of salvage or on the ground that he is subrogated to Logan's rights as unpaid vendor of the land.

The appellant, on the other hand, claims to be entitled to a lien, in priority to Bastedo, for the costs incurred by him in the arbitration, upon the ground that the fund in question was created by his efforts, and that, therefore, he is entitled to either a solicitor's lien or a charging order. The other two claimants have assignments of the Lindens' interests, and they desire to see Bastedo paid so that their position in regard to the remaining property may be improved.

The Master has refused to recognise the solicitor's claim. He holds that the money was in no sense recovered or preserved; it simply stands in lieu of the land. The result of the expropriation proceedings is simply to convert the land into money.

I think this is altogether too narrow a view to take of a solicitor's right. The money offered by the city corporation for the land was not, I think, recovered or preserved by the solicitor's efforts; but, if the solicitor had succeeded, as the result of his efforts, in creating an increased sum to be paid by the city corporation over and above that ordered, then this increase would, I think, have been created by the solicitor's efforts as the result of the arbitration. The weakness of the solicitor's position in this case is that his efforts were not successful in creating any increase over and above the amount offered by the city corporation before the arbitration. The fund, in truth, was imperilled as the result of the course taken.

In Westacott v. Bevan, [1891] 1 Q.B. 774, the defendants paid money into Court with their plea, at the same time denying liability. The plaintiff proceeded with the action, and in the result recovered less than had been offered. The solicitor then claimed a lien upon this lesser sum. It was held that this was not property "recovered or preserved" by the solicitor's efforts. It was jeopardised by the proceedings taken.

The amount to which I have referred as being offered by the city corporation was not the amount which was originally offered, but was a sum offered at the opening of the arbitration. The amount originally offered was $3,152.

The proceedings taken by the solicitor which led up to the making of the increased offer on the 7th May, 1913, the costs of which proceedings amount to some $50, may, I think, properly be looked upon as having brought about the increase, i.e., the increase was due to the solicitor's efforts, and this small sum stands in a different position; and for this I think he has successfully established a lien. Yemen v. Johnston (1884), 11 P.R. 231, I think, justifies me in going to this extent.

The extent to which the solicitor succeeds on this appeal may be measured when it is pointed out that his bill to that date is about $50 out of a total of $1,100.

I cannot regard this as any substantial victory, and I dismiss the appeal with costs, to be reduced by the amount which the appellant's bill would amount to up to the time indicated, to be taxed.

The other incumbrancers were within their right in attending upon the motion, but they should have only a nominal fee, as for a watching brief, which I fix at $10 in each case.

Bastedo's consent to refund the appellant $125, the half of the arbitrators' fees, seems to have been overlooked upon the preparation of the report; this should now be rectified.

RE O'DONNELL—MIDDLETON, J., IN CHAMBERS—DEC. 28.

Lunatic—Confinement in Public Asylum for Insane—Application for Habeas Corpus—Evidence—Report of Alienist.]—Motion for a habeas corpus with the object of obtaining the discharge of a person confined in the asylum for the insane at Hamilton. The only material filed was an affidavit made by the applicant. This being inadequate to establish his recovery, it was agreed that he should be examined by an eminent alienist, by whose conclusions counsel for the applicant was willing to abide. The applicant was examined accordingly, and the alienist re-

ported the symptoms as indicating dementia præcox, and stated that there was not the slightest doubt as to the applicant's insanity. Motion refused. J. J. Maclennan, for the applicant. J. R. Cartwright, K.C., for the asylum authorities.

PRICE v. PRICE—KELLY, J.—DEC. 29.

Husband and Wife—Alimony—Costs—Rule 388.]—An action for alimony. In 1910 the plaintiff failed in an action for the same cause, because she was not then living apart from the defendant, her husband. She left the defendant's house in the spring of 1913, and this action was begun in 1914. The learned Judge's conclusion upon the evidence is, that there was not just cause for the plaintiff leaving her husband's home; that the trouble between them is due primarily to her own conduct; and that any objectionable acts of his were in self-defence or under provocation. Action dismissed; the defendant to pay such costs as are provided by Rule 388. G. L. T. Bull, for the plaintiff. G. Mitchell, for the defendant.

KING CONSTRUCTION CO. v. CANADIAN FLAX MILLS LIMITED—FALCONBRIDGE, C.J.K.B.—DEC. 30.

Contract—Breach—Action for Damages — Counterclaim—Dismissal of both—Costs.]—Action to recover $2,500 damages for breach of a contract to furnish material for the superstructure of a factory. The defendants counterclaimed for damages. The learned Chief Justice said that, after a good deal of doubt and hesitation, he had come to the conclusion that the defendants were entitled to succeed. The officers of the two companies were all good witnesses, and the Chief Justice had no comparison to make on the ground of demeanour. The proceedings on both sides were unbusinesslike and such as to lead directly and inevitably to trouble and litigation; and so both action and counterclaim should be dismissed without costs. A. C. Kingstone, for the plaintiffs. Erichsen Brown and G. F. Peterson, for the defendants.

KEYSER v. PEARSON—LATCHFORD, J.—DEC. 31.

Fraud and Misrepresentation—Forfeiture of Share in Agreement for Purchase of Land—Rights of Assignee of Share—Purchaser for Value without Notice.]—Action for a declaration that

the defendant McCann had forfeited all his rights under a certain agreement made between him and the plaintiffs on the 6th January, 1914, and that his co-defendant Pearson, claiming under an assignment from McCann dated the 9th May, 1914, and duly registered, acquired no interest in the lands mentioned in the agreement. Under the agreement, the plaintiffs and McCann were each to have an equal one-fourth interest in certain lands. The representation made to the plaintiffs Mills and Thompson was, that the plaintiff Keyser was buying the lands for $20,000, when in fact the price was but $15,000. Each of the four was to pay $2,250, making in all $9,000, and join in a mortgage to the vendors, the Parents, for $11,000. Mills and Thompson paid their shares. Keyser and McCann paid nothing. McCann pretended to Mills and Thompson that he had paid $500 at the time, in December, when Mills and Thompson paid each $500; and McCann handed Keyser—as trustee for all four—a cheque for $1,750, when Mills and Thompson each paid Keyser $1,750. But McCann had his cheque returned to him as prearranged with Keyser; and both Mills and Thompson thought that Keyser, like McCann, had contributed the $2,250 which each had agreed to pay. In fact, there was no need at the time for any money beyond what was contributed by Mills and Thompson. When these plaintiffs discovered the fraud that had been practised upon them, they demanded that Keyser and McCann should each pay $2,250. Keyser complied with the demand; McCann did not. On the very day when the demand was most urgently pressed upon McCann, the defendant Pearson obtained from McCann an assignment of McCann's interest in the agreement. McCann made no defence to this action. Pearson set up that, as a purchaser for value without notice of any fraud, he was entitled to the one-quarter interest which McCann appeared to hold in the lands purchased from the Parents. LATCHFORD, J., who tried the action at Sandwich, without a jury, said that he doubted that Pearson was a purchaser for value in good faith. McCann had, Pearson said, defrauded him of $3,000 or $4,000. Pearson, discovering the fraud, insisted that McCann should convey to him all his interests in Ontario. Pearson said, in effect, that McCann had to abscond or go to gaol. It was, the learned Judge thought, under threat of prosecution that the conveyance was executed. No money was paid—no inquiry was made. Pearson knew that he was dealing with a dishonest man. The agreement of the 6th January was not at the time registered. It was never registered until registered by Pearson on the 18th May, after McCann had absconded from Canada. But

in any case the vitiating taint of fraud attached to McCann's interest. He could assert no right against the plaintiffs. He had no title to a share in the Parent farm, unless he, like Keyser, repented and made restitution. Quite clearly his assignee could stand in no higher position. Pearson had not offered to pay the $2,250 which McCann should have paid. Had he expressed any such intention, the learned Judge would have been willing to afford him, upon terms, the proper equitable relief. But, in the circumstances, the judgment must be that McCann had forfeited all rights under the agreement; that the assignment to Pearson, so far as it affected the pretended interest of McCann in the Parent lands, was null and void; and that the registration thereof should be vacated. The plaintiffs were entitled to their costs. J. H. Rodd, for the plaintiffs. J. H. Coburn, for the defendant Pearson.

FIRST DIVISION COURT IN THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

WARD, Co. C.J. DECEMBER 11TH, 1914.

WRIGHT v. JARVIS.

Municipal Corporation—Regulation of Hawkers and Peddlers—By-law—Municipal Act, 1903, *sec.* 583, *sub-sec.* 14—*Conviction for Peddling "Carpet Sweepers"* — *Construction of Statute.*

On the 16th September, 1914, at the town of Bowmanville, in the united counties of Northumberland and Durham, William A. Wright, of the said town of Bowmanville, upon the complaint of Richard Jarvis, Chief Constable, was charged before William M. Howsey, Police Magistrate in and for the said town of Bowmanville, and for the electoral district of West Durham, that he (Wright) did on or about the 5th September, 1914, at the said town of Bowmanville, unlawfully hawk and peddle and go from place to place and to other men's houses in the said town of Bowmanville, carrying goods, wares, and merchandise, without first having obtained a license therefor, as by law required, and was convicted by the Police Magistrate, and adjudged to pay a fine of $10 and costs. The evidence shewed that the goods offered for sale were "carpet sweepers."

Notice of appeal by Wright against the conviction was served upon the Police Magistrate and upon the complainant, on the 18th September, 1914, and the appeal was heard at the sittings of the First Division Court in the United Counties of Northumberland

and Durham, held at the town of Bowmanville on the 26th November, 1914.

Evan H. McLean, for the appellant.

No one appeared for Jarvis, the respondent.

WARD, Co. C.J.:—I find that the appellant was convicted under the provisions of a by-law of the town of Bowmanville, passed in pursuance of sec. 583, sub-sec. 14, of the Municipal Act, 1903.

In Regina v. Coutts (1884), 5 O.R. 644, under the law as it then existed, Mr. Justice Rose decided that the defendant did not come within the definition of a hawker, the circumstances being precisely the same as in the present case, and the learned Judge expressed the opinion that, under the statutes referred to, it was not within the power of a municipality to pass a by-law prohibiting unlicensed traders sending out agents to take order for goods, etc., from private persons and subsequently delivering the goods; and, if it was deemed desirable that such power should be given to municipalities, the Legislature could be applied to, etc.

This suggestion was evidently acted upon, as, by the Consolidated Municipal Act, 1892, 55 Vict. ch. 42, sec. 495, sub-sec. 3 (*a*), the word "hawkers" was defined to "include all persons who, being agents for persons not resident within the county, sell or offer for sale, tea, dry goods, watches, plated ware, silver ware, or jewellery, or carry and expose samples or patterns of any such goods to be afterwards delivered," etc.

This was found not to be wide enough; and, by the Municipal Amendment Act, 1896, 59 Vict., ch. 51, sec. 16, sec. 495 was amended by adding the words, "furniture, carpets, upholstery and millinery," after the words "silver ware" in the fourth line of paragraph (*a*) in sub-sec. 3 of sec. 495, and, by a subsequent Act, spectacles and eye-glasses have also been included.

This, to my mind, shews clearly that the intention of the Legislature has been to define and set out the different articles of merchandise coming within the terms of the Acts as passed; and, "carpet sweepers" not being mentioned, I find that the appellant should not have been convicted; and I direct and order that the conviction herein be and the same is hereby quashed, and that the respondent do pay to the appellant his necessary disbursements in this Court.

CORRECTION.

In WEIR v. HAMILTON STREET R.W. Co., ante 495, on p. 496, 15th line from the bottom, for $375 read $735.