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APPELLATE DIVISION.

MAY 11TH, 1914.

BRITISH COLUMBIA HOP CO. v. ST. LAWRENCE BREWERY CO.

Sale of Goods—Refusal to Accept—Breach of Contract—Damages.

Appeal by the defendants and cross-appeal by the plaintiffs from the judgment of LEITCH, J., ante 114.

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

G. A. Stiles, for the defendants.

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

THE COURT dismissed both the appeal and the cross-appeal with costs.

MAY 12TH, 1914.

BENNETT v. STODGELL.

Vendor and Purchaser—Agreement for Sale of Land—Option Contained in Informal Lease—Acceptance — Action by Lessee for Specific Performance—Sale by Lessor before Action to Third Person—Dismissal of Action—Appeal—Leave to Amend and Add Parties—New Trial—Indulgence —Costs.

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 163, dismissing the action.

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

M. K. Cowan, K.C., and J. W. Pickup, for the appellant
E. D. Armour, K.C., for the defendants, the respondents.

THE COURT granted a new trial, on terms, with leave to amend and add parties. The costs of the last trial and of this appeal to be costs to the respondents in any event, unless the trial Judge should otherwise order.

MAY 12TH, 1914.

HEIMBACH v. GRAUEL.

Fraud and Misrepresentation—Sale of Land—Action for Deceit—Evidence—Findings of Fact of Trial Judge—Damages—Appeal.

Appeal by the defendants from the judgment of KELLY, J., 5 O.W.N. 859.

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

E. E. A. DuVernet, K.C., for the appellants.

R. McKay, K.C., and A. B. McBride, for the plaintiff, the respondent.

THE COURT dismissed the appeal with costs.

MAY 12TH, 1914.

*VOLCANIC OIL AND GAS CO. v. CHAPLIN.

Water and Watercourses—Crown Grant of Land Bounded by Highway Running near Bank of Lake—Encroachment of Water upon Highway and Land Beyond—Right of Grantee to Land Covered by Water—Lease by Crown—Trespass—Evidence—Riparian Owners—Appeal—Questions of Fact—Reversal of Judgments of Trial Judge and Divisional Court.

Appeal by the defendants from the order of a Divisional Court of the High Court of Justice, 4 O.W.N. 517, 27 O.L.R. 484, affirming the judgment of FALCONBRIDGE, C.J.K.B., 3 O.W.N. 1597, 27 O.L.R. 34.

*To be reported in the Ontario Law Reports.

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

J. Bicknell, K.C., J. W. Bain, K.C., and Christopher C. Robinson, for the appellants.

G. F. Shepley, K.C., and J. G. Kerr, for the plaintiffs, respondents.

MAGEE, J.A.:—The defendants are appealing from the decision of a Divisional Court of the High Court of Justice, which affirmed the judgment of the Chief Justice of the King's Bench, who found that the oil or gas well which was being sunk by the defendants, although on land then covered by the waters of Lake Erie, was, with its derrick, engine-house, boiler-house, and machinery, situate on what originally was, and therefore still was, the west or south-west half of lot 178 north of the Talbot road west, in the township of Romney, belonging to the plaintiff John George Carr, subject to the right of his co-plaintiffs, and enjoined the defendants from further drilling or trespassing, and assessed at $10 the plaintiffs' damages.

The case for the plaintiffs is, that the waters of Lake Erie have gradually encroached so far to the north that they now cover, not only land which was originally south of the Talbot road, but also the site of the road itself and part of the plaintiffs' farm, which was bounded on the south by the road; but that such encroachment could not change the ownership of the soil, which, therefore, remained in the plaintiffs. In the alternative, they also claim that at least they now own the land as far as the water's edge, and that the defendants are, by the well and buildings, interfering with their rights as riparian proprietors.

The defendants deny that they have trespassed upon the land of the plaintiffs or that the water has reached the plaintiffs' land, or that, if it has, the plaintiffs' ownership would continue, or that the plaintiffs are riparian proprietors, or that they have interfered with riparian rights; and the defendants claim title in the defendant Chaplin under a lease to him from the Crown dated the 1st August, 1911, of the land under the water of Lake Erie in front of lot 178, Talbot road lot, and other Talbot road lots, for the purpose of sinking and operating petroleum and gas wells.

The plaintiffs claim title in fee simple in the plaintiff John George Carr to the west half of lot 178. The Volcanic Gas and Oil Company claim the right to gas and oil in the land, under

an agreement from him, and the Union National Gas Company, as their assigns, were added as co-plaintiffs. The action is really at the instance of the plaintiff companies, as the plaintiff Carr is to be indemnified against all costs.

As the defendants strongly challenge the correctness of the finding of fact that the water has encroached as far as the plaintiffs' land, it is necessary to examine the evidence closely and refer to it with some detail. . . .

[The learned Judge examined the evidence at great length.]

Quite apart from any evidence for the defence, a careful perusal and reperusal of the evidence has satisfied me that the plaintiffs have, upon their own case, failed to establish that the water has reached their original southern line, and, on the contrary, leads me to the conclusion that it has not done so. There is the outstanding fact that, wherever witnesses speak of the road at lots near to the plaintiffs' land, east or west of it, the southern edge of the clay bank is either not shewn to have been eroded as far as the north side of the road, or is shewn not to have been so; and there is no evidence that the line of the bank at the plaintiffs' land is farther north than at the neighbouring lots. I need hardly say that only the clearest conviction as to the effect of the evidence for the plaintiffs, assuming all that their witnesses said to be true, would warrant an interference with the finding of fact by the learned Chief Justice, confirmed as it was by the Divisional Court; and it is with the greatest respect that I feel bound to express a different opinion. In the examination of the witnesses at the trial, it would seem to have been largely assumed for the plaintiffs that it was sufficient to shew that the earth had broken away at the top of the bank, as if it followed that the land below had disappeared beneath the water. It is also, I think, quite probable that, if the additional extract from the field-notes had been before the Court at the trial, even less weight would have been attached to the evidenc of the witness Renwick than, considering his distance from the locality, would in any event seem to be warranted.

In my view, the plaintiffs have not proved either that the defendants' works are north of the site of the old Talbot road, or that the waters of the lake have reached so far, and hence they are not riparian proprietors.

They do not shew any inconvenience or injury from the

defendants' works beyond others of the public, and hence have established no right to relief.

As a consequence, it is unnecessary to express any opinion as to the very interesting questions of law so fully discussed here and in the Courts below.

The appeal should, in my opinion, be allowed, and the action dismissed, with costs of the action and of the appeal to the Divisional Court and of this appeal to the defendants.

HODGINS, J.A.:—Evidence of the disappearance of the old Talbot road, part of which formed the southern boundary of the respondents' lot, naturally predisposes the mind to accept as a result its submergence by the waters of Lake Erie. This, coupled with the view of the learned trial Judge, has compelled a careful scrutiny of the evidence, an analysis of which appears in the reasons given by my brother Magee.

It seems impossible to escape from the conclusion to which he has come, that the respondents have failed to prove what is essential to their case, namely, that the waters of the lake have so encroached upon this particular lot, that the appellants' works now stand upon it.

The utmost that can be said is, that the respondents have created an atmosphere of doubt, while, in an action such as this, certainty is absolutely necessary.

The appeal should, therefore, be allowed, and the action dismissed.

MEREDITH, C.J.O., and MACLAREN, J.A., concurred.

Appeal allowed.

MAY 12TH, 1914.

SNIDER v. CARLTON.

CENTRAL TRUST AND SAFE DEPOSIT CO. v. SNIDER.

Will—Construction—Legacy to Niece—General Devise of Lands in Ontario—Lands Standing in Name of Testator in which Niece Claims Half Interest—Niece not Put to Election—Declaration of Niece's Right to Half Interest — Trust — Promise to Devise Land to Trustees.

Appeal by the plaintiffs in the second action, the American executors of Thomas A. Snider, deceased, also defendants in

the first action, and by Harvey G. Snider, the Canadian executor, the plaintiff in the first action and a defendant in the second action, from the judgment of MIDDLETON, J., 5 O.W.N. 852.

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

W. J. Elliott, for the appellants the Central Trust and Safe Deposit Company.

F. C. Snider, for the appellant Harvey G. Snider.

E. D. Armour, K.C., and B. N. Davis, for the defendant Carlton, the respondent.

MEREDITH, C.J.O.:—The conclusion of my learned brother was, that the respondent was the owner of an undivided half interest in the Bay street property, and that there was nothing to put her to her election to claim for or against the will in respect of that interest.

If, as my learned brother determined, the respondent was the owner of an undivided half interest in the property, I agree with his conclusion that the respondent is not put to her election.

All that the testator purports to dispose of by the 7th paragraph of his will is "any real estate lands and premises that I may own at the time of my death in the city of Toronto, Canada."

There is nothing upon the face of the will to indicate that the testator intended to dispose of anything but his own property, and the settled rule now is, that evidence dehors the instrument is not admissible for the purpose of shewing that a testator considered that to be his own which did not actually belong to him or was not under his disposing power: Jarman on Wills, 6th ed., pp. 541, 542, 543.

The question whether the respondent was the owner of an undivided half interest in the Bay street property, or whether the testator was not the owner of the entirety, presents more difficulty.

The entirety had become vested in him by the conveyances from the respondent and her brother; the conveyance of the respondent's interest was made in pursuance of the arrangement evidenced by the letter of Mr. Irwin. That arrangement was, that her interest was to be conveyed to the testator, upon the agreement by him that one-half the rents of the property

should be paid to the respondent during her life; and this, as the letter states, "we have made secure to you by the execution of a will on the part of your uncle, who devises the property to trustees in trust to continue the payment of one-half of the rent to you for life and at your decease to convey a one-half interest in the property absolutely to your heirs."

This letter and the will referred to bear date the 9th May, 1900, and the conveyance from the respondent to the testator bears date the 15th of the same month.

The statement of the letter as to the provisions of the will is not accurate. The devise to the trustee is to hold the land during the natural lives of the respondent and her brother and the natural life of the survivor of them, and upon the death of the survivor to convey to the issue of the respondent an undivided half-interest in it and to the issue of her brother a like interest, but if at the death of the survivor there should be no issue of either of them to convey the undivided half or halves in respect of which there shall have been a failure of issue to the executors or administrators of the testator's estate in the United States of America; and the provision as to the rents is, that the trustee is to pay over to the respondent and her brother each one-half of the net proceeds of the rents and profits during their respective lives: "provided neither the said Mabel Carr Snider nor the said Thomas Edward Snider shall have alienated or otherwise disentitled herself or himself to personally receive her or his half-share of the said proceeds. If at any time it shall appear to my said trustees that either the said Mabel Carr Snider or Thomas Edward Snider has alienated or otherwise disentitled herself or himself to personally receive her or his half of the said proceeds or any part thereof, or that she or he has incurred debts or done anything whereby a judgment or order of any Court of competent jurisdiction shall have been made or obtained, or any writ of execution or attachment issued, then I direct that all right under this will of the one so alienated or becoming disentitled or against whom such judgment, order or writ of attachment or execution shall have been issued, shall absolutely cease and determine, and any sums in respect of such rents and profits accrued but not yet paid to such beneficiary shall be forfeited, and I direct my trustees thereafter to pay over the share of the said proceeds so forfeited to the executors or administrators of my estate situate in the United States."

Mr. Irwin's letter also states that "the will is so drawn that

nothing that can happen will during your lifetime interfere with the payment to you of one-half of the rents of the property." This also, in view of the provisions of the will which I have quoted, is also an inaccurate statement of the effect of the will.

I have no doubt that, having regard to the relations between the respondent and the testator, who stood in loco parentis to her, the age of the respondent, the want of any advice, independent or otherwise, to the respondent, and the other circumstances, especially the fact that no security was given to her for the performance by the testator of his part of the arrangement, the transaction would have been set aside if the respondent had been minded to repudiate it.

The subsequent events, and especially the fact that, when the change in the arrangement was proposed to her through Mr. Hillock, the respondent consulted a solicitor and elected to abide by the bargain which had been previously made, would probably have disentitled her to set aside the conveyance to the testator; and apparently the position taken by her throughout the present litigation has been that he stands by the original arrangement and insists upon her rights under it; and that she is bound by it is the position taken by the appellants.

What, then, is the position of the respondent under that arrangement? The effect of it was, I think, to constitute the testator a trustee for the respondent of the undivided one-half interest in the Bay street property which she conveyed to him.

In Freemoult v. Dedire (1718), 1 P. Wms. 429, the testator had covenanted before marriage to settle lands in Rumney Marsh on his wife for life, and it was held by Lord Chancellor Parker that the marriage articles, being a specific lien on the lands, made the covenantor as to them but a trustee, and that they were, therefore, during the life of the wife not affected by any of his bond debts.

Upon the authority of this case and other cases it is said in Lewin on Trusts, 12th ed., pp. 160-1: "Again, if a person agree for valuable consideration to settle a specific estate he thereby becomes a trustee of it for the intended objects, and all the consequences of a trust will follow."

It is, I think, immaterial for the purposes of the present inquiry whether the trust is for the respondent for her life and after her death for her heirs, or by force of the rule in Shelley's case a trust for the respondent of the fee simple in the lands, though I think that it is the latter. The promise is to devise the land to trustees in trust to pay the one-half of the rent to the

respondent for her life and at her decease to convey a one-half interest in the property to her heirs, so that both estates are equitable, and the rule applies.

See Van Grutten v. Foxwell, [1897] A.C. 658, in which the limitations were not unlike those which, according to the agreement in this case, were to apply to the undivided half-interest in the Bay street property.

Upon the whole, I am of opinion that the judgment of my brother Middleton is right and should be affirmed, and that the appeals should be dismissed with costs.

MAGEE, J.A.:—Under the circumstances under which the deed was made by Mabel Snider, now Mrs. Carlton, to her uncle, of her undivided half interest in the Toronto property, I have no doubt that she could have had it set aside. But for some years before his death she chose to act upon the terms of Mr. Irwin's letter, upon the faith of which it was executed, and she now stands upon that letter—under which her uncle was not the absolute owner of the property, but held it for a definite purpose, which must be taken to have been well known to himself. I agree with my Lord the Chief Justice that the devise in the will should not be read as applying to that half of the property; and, therefore, that she is not put to elect between her interest and the bequest. I express no opinion as to whether she would in any case be entitled to more than a life interest, which alone she would have to sacrifice to obtain the legacy.

MACLAREN and HODGINS, JJ.A., agreed that the appeal should be dismissed.

Appeal dismissed.

MAY 12TH, 1914.

*McNIVEN v. PIGOTT.

Vendor and Purchaser—Agreement for Sale of Land—Action by Purchasers for Rescission—Possession—Alteration in Property—Title to Land—Objection—Validity—Order under Vendors and Purchasers Act—Order not Issued, but Acted upon—Taking Possession—Acceptance of Title—Abandonment—Doubtful Title—Cloud on Title.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE,

*To be reported in the Ontario Law Reports.

C.J.K.B., 5 O.W.N. 921, dismissing an action for rescission of an agreeement for the sale of lands in Hamilton.

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

I. F. Hellmuth, K.C., and W. S. McBrayne, for the appellants.

E. D. Armour, K.C., for the defendant, the respondent.

HODGINS, J.A.:—The crucial point in this case, as it seems to me, is the view to be taken of the action of the respondent in presenting his petition under the Vendors and Purchasers Act (Re Pigott and Kern (1913), 4 O.W.N. 1580), and the result of the judgment thereon. . . .

The objection that the appellants had accepted the title would be formidable if it had been insisted upon, instead of being abandoned by submitting to the Court the question of whether the vendor had made out a good title. Taking possession was no waiver, as the contract provided for its being given "at once," which might well be before the fourteen days (for completion) expired: Stevens v. Guppy (1826), 3 Russ. 171; Upperton v. Nickolson (1871), L.R. 6 Ch. 436; Aldwell v. Aldwell (1874), 6 P.R. 183; Rankin v. Sterling (1902), 3 O.L.R. 646; In re Gloag & Miller's Contract (1883), 23 Ch.D. 320. . . .

[Further discussion and reference to Hetherington v. McCabe (1910), 1 O.W.N. 802; McMurray v. Spicer (1868), L.R. 5 Eq. 527, at p. 543; Crawford v. Toogood (1879), 13 Ch.D. 153; Green v. Sevin (1879), 13 Ch.D. 589; Stickney v. Keeble (1913), 57 Sol J. 389; Harris v. Robinson (1892), 21 S.C.R. 390, at p. 398; Nott v. Riccard (1856), 22 Beav. 307, 311; Armstrong v. Nason (1895), 25 S.C.R. 263; Pigott v. Bell (1913), 5 O.W.N. 314; In re Prickett & Smith's Contract, [1902] 2 Ch. 258; Cato v. Thompson (1882), 9 Q.B.D. 616; In re Cox & Neve's Contract, [1891] 2 Ch. 109; Gamble v. Gummerson (1862), 9 Gr. 193; In re Bayley Worthington & Cohen's Contract, [1909] 1 Ch. 648; Thompson v. Wringer (1881), 44 L.T.R. 507; In re Wallis & Bernard's Contract, [1899] 2 Ch. 515; Re Bingham and Wrigglesworth (1882), 5 O.R. 611; Halkett v. Earl Dudley, [1907] 1 Ch. 590, 593; Turner v. Marriott (1867), L.R. 3 Eq. 744; In re Yielding and Westbrook's Contract (1886), 31 Ch.D. 344; In re Nisbet and Potts' Contract, [1905] 1 Ch. 391, [1906] 1 Ch. 386; In re Burroughs Lynn and Sexton (1877), 5 Ch.D. 601; In

re Higgins & Hitchman's Contract (1882), 21 Ch.D. 95; In re Arbib and Class's Contract, [1891] 1 Ch. 601; In re Hargreaves & Thompson's Contract, (1886), 32 Ch.D. 454; In re Hughes & Ashley's Contract, [1900] 2 Ch. 595; In re Young & Harston's Contract (1895), 29 Ch.D. 691; In re Scott & Alvarez's Contract, [1895] 1 Ch. 596, 627, 628, [1895] 2 Ch. 603; In re Wilson & Steven's Contract, [1894] 3 Ch. 546; In re National Provincial Bank of England and Marsh, [1895] 1 Ch. 190.]

I have found no case which establishes the proposition that where a purchaser brings his action at law for a deposit he may be met by saying that the title is now a good one, though bad before. Upon principle, I do not see how matters subsequent to the breach of contract can cure the breach existing when the action is brought. They merely go to damages: Callender v. Hawkins (1877), 2 C.P.D. 592. It might be different if the respondent in this case, instead of merely defending the action, had by counterclaim asked for specific performance. . . .

[Reference to Halkett v. Earl Dudley, supra; Rules 511, 523; In re Nichols' & Von Joel's Contract, [1910] 1 Ch. 43; In re Scott & Alvarez's Contract, supra; Vendors and Purchasers Act, R.S.O. 1914 ch. 122, sec. 4.]

But, granting that the judicial decision against the title is not appealed against, and no further time is given, then, it seems to me, it makes an important and radical change in the position of the parties, and, especially if taken advantage of, as here, by the prompt commencement of an action for rescission, should entitle the one so acting to the full benefit of the decision.

Independently of authority, I should have thought it would be a reproach to our system of jurisprudence if, in a case where the difficulty between vendor and purchaser had narrowed down to one point, on which hung the final outcome of the contract, the Court could not, under the Vendors and Purchasers Act, dispose of it both on the facts and law, and give the relief flowing from the decision, especially so as an appeal is allowed and a reference may be had if the circumstances warrant it. This is all that is covered by the present case, and my examination of the authorities leads me to think that it is fully warranted by them.

It is argued, however, that the appellants cannot have the benefit of the decision under the Vendors and Purchasers Act because the order has never issued and because there is involved in the learned trial Judge's judgment in this case a withdrawal of the permission given during the course of the trial

to take out that order. Under our Consolidated Rule 512 a decision is operative for the purposes of appeal and otherwise from the date of its pronouncement. See Davidson v. Taylor (1891), 14 P.R. 78; Moody v. Canadian Bank of Commerce (1891), 14 P.R. 258. And if it had appeared to the learned trial Judge that it had been acted upon or had effected an important change in the rights of the parties, he would have been the last one to throw any doubt upon the right to issue it now. It was clearly correct in law when pronounced. See Price v. Strange (1820), 6 Madd. 159, and Mullings v. Trinder (1870), L.R. 10 Eq. 449, and the reason given by Romilly, M.R.

The event has proved it to be correct in fact; and, while I do not doubt the power of a Judge to recall or modify his judgment until it is passed and entered (Preston Banking Co. v. Allsopp, [1895] 1 Ch. at p. 145), I think there is a restriction on this right where it has been acted upon, or where, due to it, the parties have changed their position: Hatton v. Harris, [1892] A.C. 547, 558, 560; Stewart v. Rose, [1900] 1 Ch. 386; Port Elgin Public School Board v. Eby (1895), 17 P.R. 58. . . .

The respondent further argued that, even if the order in question were issued, yet in the present action the appellants must prove their allegation that the title was bad before they could recover at law as for a breach of the agreement. Boyman v. Gutch (1831), 7 Bing. 379, was relied on for this. But in that case the question was, whether, when the property was offered for sale, the defendant had a good title, i.e., at the date of the contract.

I do not think that the appellants are bound to prove that the title was bad at the date of the trial or that the respondent could shew, in order to defeat the action, that the defect had been cured since the issue of the writ. . . . The title comes within the class of doubtful titles, and there is nothing in this contract that binds the appellants to take the title such as it is, nor does the Bell agreement establish by its own force the invalidity of their objection. If the proper order had been made on the vendor and purchaser application, then the only relief left unadministered would be the giving of any damages not covered by the usual rule in vendor and purchaser cases. Unless this Court is prepared to ignore the decision on the application altogether, it cannot refuse to give the ordinary relief, i.e., the return of the money paid, with interest and the costs of investigating the title; while any extraordinary damages may well be referred to the Master as indicated at the trial.

But the onus on the appellants in this case is surely no

greater than this. They must satisfy the Court that, at the date of the issue of the writ, the respondent had broken the contract in an essential point. The respondent did so when he failed to shew a good title on the 16th June; and the view that, if he establishes a good title at the trial, it would be sufficient, is borrowed from the practice in equity and not at law. . . .

Now a doubtful title is not a good title: per Lindley, L.J., in In re Scott & Alvarez's Contract, [1895] 1 Ch. 596, at p. 613. "If the vendor cannot clear the estate, the necessary consequence is, that the purchaser cannot be compelled to complete the contract:" per Blake, C., in Spohn v. Ryckman (1859), 7 Gr. 388, at p. 392. It may be that that defence must be decided in point of law by the trial Judge, or it may be that the acceptance by both parties of the opinion of a Judge or of an eminent counsel that it was such a title, might be proved. If the former is the correct rule, then the judgment of the trial Judge is appealable upon that point; and, speaking for myself, I would hold the title doubtful, i.e., not a good title, until the cloud created by the Bell agreement was entirely removed or the rights yet undetermined were settled in such a way as to bind all parties. See Re Nichols' and Von Joel's Contract, [1910] 1 Ch. 43. . . .

Upon the whole case, I think that the judgment should be reversed, and judgment should be entered for the $7,000 with interest and costs of investigating the title. I do not think that under the facts of this case any further damages would be recoverable, as the case seems to fall within the rule in Bain v. Fothergill (1874), L.R. 7 H.L. 158.

But, as the question of damages was expressly left over on both sides, there should be a reference as to any other than those now allowed, claimed by the appellants; and, as to those claimed by the respondent, reserving further directions and costs of reference. But I think that the appellants should be allowed to enforce their judgment for $4,000 in the meantime, as they paid $7,000, and the respondent claims only $3,000.

If the respondent had submitted to the order in the application under the Vendors and Purchasers Act, and had pleaded that this action was unnecessary, then he could not in fairness be asked to pay the costs of the action. But he did not do so, and should, I think, pay the costs, both of it and of the appeal.

MEREDITH, C.J.O., and MAGEE, J.A., concurred.

RIDDELL, J., dissented, for reasons stated in writing.

Appeal allowed; RIDDELL, J., *dissenting.*

MAY 13TH, 1914.

BALDWIN v. CANADA FOUNDRY CO.

Warranty—Contract—Sale and Installation of Machinery—Guarantee as to Fuel Consumption and Loss—Breach—Delay—Limitation of Liability—Damages.

Appeal by the defendants from the judgment of LENNOX, J., ante 152, declaring the plaintiff entitled to damages and directing a reference.

J. A. Paterson, K.C., for the appellants.
McGregor Young, K.C., for the plaintiff, the respondent.

THE COURT dismissed the appeal with costs thereof to the plaintiff upon the final taxation.

HIGH COURT DIVISION.

KELLY, J. MAY 13TH, 1914.

RE KIRK.

Appeal—Allowance by Surrogate Court Judge of Contested Claim against Estate of Deceased Person—Surrogate Courts Act, R.S.O. 1914 *ch.* 62, *sec.* 69, *sub-sec.* 6—*Right of Appeal by Administrators—Amount Involved.*

Appeal by the administrators of the estate of Charles Thomas Kirk, deceased, from an order of the acting Judge of the Surrogate Court of the United Counties of Northumberland and Durham allowing against the estate the claim of Charles J. Goodfellow and Martha M. Goodfellow at $194, the amount claimed being $247.50.

The appeal came before KELLY, J., in the Weekly Court at Toronto.

W. F. Kerr, for the claimants, objected that no appeal lay.
F. M. Field, K.C., for the appellants.

KELLY, J.:—The administrators, in pursuance of 1 Geo. V. ch. 18, sec. 3 (Surrogate Courts Act, R.S.O. 1914 ch. 62, sec.

69), served notice disputing the claim except in respect of the sum of $2, and the proceedings to determine the validity of the claim taken under that section.

On the argument, counsel for the claimants took the preliminary objection that no appeal lies, contending that under sub-sec. 6 of sec. 69 (above), what is here to be considered is the amount in dispute upon the appeal, and, that amount not exceeding $200, there is not the right to appeal.

The position taken by the appellants is, that sub-sec. 6 gives a right to appeal even in cases where the amount involved in the appeal does not exceed $200, if the amount of the original claim exceeded that sum.

The question involved in this appeal is, whether the appellants are liable for payment of $194. Should they succeed, they would be relieved from payment of that sum; should they fail they would remain liable for it; so that what is in dispute, or, as the statute puts it, what is contested (in the appeal), is their liability to pay $194.

In Lambert v. Clarke, 7 O.L.R. 130, the right to appeal under sec. 154 of the Division Courts Act, R.S.O. 1897 ch. 60, where the sum in dispute in appeal did not exceed $100, was discussed and dealt with; the line of reasoning there adopted can be applied here. But, apart altogether from that authority and that reasoning, I am of opinion that, upon the true construction of sub-sec. 6, an appeal does not lie in this case; and the appeal should be dismissed with costs.

MIDDLETON, J. MAY 14TH, 1914.

FESSERTON v. WILKINSON.

Vendor and Purchaser—Agreement for Sale of Land—Material Difference in Subject-matter of Sale—Land Subject to Right of Way—Parties not ad Idem—Executory Agreement—Rescission—Lien for Money Paid and for Improvements—Use and Occupation—Costs.

Action for a declaration that the defendant had no further interest in or right to certain lands the subject of an agreement for sale by the plaintiff to the defendant.

H. F. Upper, for the plaintiff.

A. C. Kingstone, for the defendant.

MIDDLETON, J.:—Northrup and Beaumont owned the lands in question, subject to a right of way reserved to one Skinner over the western eight feet. This right of way was reserved to afford access to the rear of a large block fronting on the next street, upon which Skinner proposes erecting an apartment house.

When the house in question was sold to Wilkinson by Misener, agent for the owners, he had no knowledge of the right of way, and the agreement makes no mention of it. This was an honest mistake; but the parties never were ad idem, for the vendors never intended to sell save subject to the right.

The right of way makes the subject-matter materially different, and the purchaser has the right to refuse to accept something other than what he thought he was purchasing and which the contract calls for: Paget v. Marshall, 28 Ch.D. 255; Wilding v. Sanderson, [1897] 2 Ch. 534.

The contract, being executory, should be rescinded, and the purchaser should be declared to have a lien on the lands for the sum paid, with interest, and for $25, which I allow for improvements, less an allowance for use and occupation, which I fix at $25 per month, and upon which interest should be allowed as it accrued from month to month.

The defendant should have his costs of the action added to the balance due him.

If the parties cannot agree on the amount, the Registrar may compute it on entering judgment. There was no dispute as to the figures.

MIDDLETON, J. MAY 14TH, 1914.

*TORONTO ELECTRIC LIGHT CO. LIMITED v. CITY OF TORONTO.

Contract—Municipal Corporation—Electric Light Company—Distribution of Electricity—Overhead System—Erection of Poles in City Streets—45 Vict. ch. 19—R.S.O. 1877 ch. 157, sec. 54—Absence of Formal Agreement Evidencing Consent of Municipal Corporation to Use of Streets—Absence of Provision for Determination of Occupation — Implied Agreement and Consent—Extension of System not Limited to Underground Conduits—Implied Term of Supervision and Direction of Municipal Authorities—Covenant to Remove Specific Poles—Knowledge of Municipality of Operations of Company—Estoppel—Application of Right to Erect Poles to Extended Area of City—Injunction—Damages.

Action to restrain the defendant corporation from removing certain poles from Playter boulevard, Playter crescent, Ellerbeck avenue, and Hurndale avenue, in the city of Toronto.

The action was tried without a jury at Toronto.

I. F. Hellmuth, K.C., and A. W. Anglin, K.C., for the plaintiff company.

G. R. Geary, K.C., and C. M. Colquhoun, for the defendant corporation.

MIDDLETON, J.:— . . . The question to be determined involves the right of the plaintiff company to maintain and operate an overhead system for the distribution of electricity for light and power purposes in the city of Toronto. . . .

[The learned Judge then gave a detailed history of the company and its operations, referring to its incorporation by letters patent under the great seal of the Province of Ontario on the 20th September, 1883, under the Act 45 Vict. ch. 19; the provisions of that Act; the provisions of the charter; the letter of Mr. Wright, afterwards manager of the company, to the Mayor of Toronto, dated the 9th July, 1883; the agreement of the 30th August, 1883, permitting the proposed incorporators of the company to erect poles for demonstration purposes; the agreements

*To be reported in the Ontario Law Reports.

between the company and corporation of the 6th September, 1884, the 4th January, 1886, the 13th November, 1889, the 28th October, 1890, and subsequent lighting agreements; the resolution of the city council of the 6th February, 1912; the agreement between the company and the Council of the Township of York of the 15th June, 1908; and also referred to the facts bearing upon the controversy.]

Following the resolution of the 6th February, 1912, the defendant corporation sought to resist by force the erection of further poles upon the streets, and sought to remove by force poles already erected. This undignified course was probably taken for the purpose of provoking the plaintiff company to become the attacking party in the litigation which was inevitable.

The opposition system, which is owned by the defendant corporation and operated by a Board of Commissioners, has covered the city with a duplicate network of wires erected upon poles; and the fact that, at the very time the plaintiff company's wires were being removed from the houses of its customers by the defendant corporation, a canvasser representing the other branch of the defendant corporation's service was present to solicit business, is, perhaps not unjustifiably, regarded by the plaintiff company as an indication of motive for the hostility existing.

This action is brought for the purpose of obtaining an injunction restraining the defendant corporation from interfering with the poles and wires of the plaintiff company. The defendant corporation sets up in answer that the plaintiff company has no right whatever to erect or maintain poles or wires upon the city streets, and that the agreement of 1889 only authorises the construction of an underground system for the distribution of electricity. It is then claimed that the recital in the agreement of 1889 was unnecessary and mere surplusage, and does not constitute an estoppel so far as the defendant corporation is concerned, nor is the defendant corporation in any way prevented by acquiescence or otherwise from objecting to the overhead system established by the company.

By a paragraph added at the trial, the defendant corporation further claims that, at the time of the making of the agreement in 1889, it had no power or authority to permit the erection of poles upon the streets, and, if the agreement in question grants or admits such right, it is ultra vires. The allegation is also made that the defendant corporation has not "acquiesced in any

way or even been aware of the existence of an overhead business of the plaintiff company or any extensions thereof." The series of lighting contracts above referred to are then set out, and the exercise of the option to require the removal of poles erected under these contracts.

The special agreements with regard to the erection of poles and their removal are then referred to, and it is said that if any other poles have been erected save under the lighting agreements and these special agreements, such poles have been erected without the knowledge of the defendant corporation and without any right.

The fundamental difficulty in the case is the absence of any formal agreement on the part of the municipality evidencing its consent under the Act of 1882. The Act R.S.O. 1877 ch. 157, sec. 54, gives to the company the right to construct works for the transmission of electricity along the streets of the municipality, but, by sec. 2 of the Act of 1882, this right may be exercised "only upon and subject to such agreement in respect thereof as shall be made" between the company and the municipality and subject to any by-law passed in pursuance of such agreement.

Apparently no agreement was made at the time save the agreements with relation to the establishment of poles and wires for the purpose of street lighting. Yet from the beginning commercial lighting was an important factor in the company's operations; for, according to the statement filed as exhibit 28, the company in the year 1884 supplied light for commercial purposes from February, and did not commence street lighting until June. The amount earned for street lighting in that year was $4,805, as against $7,323 for commercial lighting. In the month of December, the amount earned for commercial lighting was almost identical with that earned for street lighting. The truth probably is that the improved method of lighting was so enthusiastically welcomed that no attention was paid to the necessity of a formal agreement.

When the agreement of 1889 was made, the recitals correctly state the situation. The company had in operation an overhead system by which it was supplying a light not only to the city but to individual citizens. It had applied for permission to lay down underground conduits and wires. I think it was recognised then that the company was rightfully in occupation of the city streets by its overhead system. It was also recognised that under the statute there was no provision for the determin-

ation of that occupation. The permission to construct the underground conduits was granted in consideration of the company agreeing to give to the municipality the right to purchase at the expiration of thirty years all the plant, buildings and material used in the carrying on of its business. This agreement, I think, contemplates the sale by the company to the municipality of its entire undertaking, overhead and underground; and, in view of this, it appears to me that the assent of the city to the user by the company of the municipal highways for transmission purposes must be implied; indeed, I think it must be taken to be absolutely expressed.

There is more difficulty in construing this agreement in another respect. Does it confer upon the company any right in the future save to extend its system by means of underground conduits? I think it does, and that it is to be construed as conferring upon the company the right to construct underground conduits in addition to using the overhead system for supplying electric light to its customers.

This seems to have been the view taken by the defendant corporation itself; for during the twelve years following this agreement, and until dissension arose over an entirely different matter, no word of objection was made to the enormous expansion of the overhead system which took place.

Looked at from the commercial standpoint, the construction now suggested by the defendant corporation could never have been present to the minds of the contracting parties. While the underground conduit system is undoubtedly the better system for central and densely populated sections, its enormous cost would preclude its use for the purpose of supplying customers in nine-tenths of the city's area. No doubt, what was wanted was the supplying of light, both for street lighting and for private purposes, throughout the municipal area, at a reasonable cost. If no method of distribution was contemplated save through underground conduits, the distribution to any beyond a very limited central area would have been an impossibility.

With regard to the ninety-nine poles erected under the series of agreements between 1901 and 1904, the absolute covenant for removal may occasion some difficulty. If I am right in thinking that the company has the right to erect poles on any street of the city, no good purpose would be served by directing the removal of those poles, when the company might immediately re-erect others. From 1904 down, the agreements are all with-

out prejudice to the right the company claimed, and which I think they have, to erect without specific permission.

Lest I should be misunderstood, the company has never claimed the right to place its poles save in accordance with the general supervision and direction of the municipal authorities. From the beginning, the location of the poles upon the streets and the use of one street in preference to another street has been the subject of mutual arrangement between the company and the city engineer; and I think that this must be taken to be a term upon which the consent of the municipality to the erection of poles must have been granted.

As I read the section of the statute, the consent of the municipality to the erection of any particular pole or to the erection of poles upon any particular street is not required. What the statute requires is, that, before any company which has obtained its charter under the general Act enters upon its operations in the municipality, the municipality must assent, and, if it desires to assent conditionally, it may embody in the agreement such terms as may be deemed proper. The agreement already referred to with the Corporation of the Township of York is such an agreement.

The circumstances in this case make applicable the same reasoning as that underlying the doctrine of lost grant in the case of easements.

That the municipality had knowledge of the operations of the company and its use of the streets is, I think, abundantly plain, not only from the recital of the agreement, but from all the surrounding circumstances. The civic authorities have stood by and allowed the expenditure of the large sums necessary to establish the existing plant, with an earning capacity of about a million and a half per annum; they have obtained from this company an agreement to sell to the city this plant at a valuation which may be had in the year 1919; and now they seek to destroy the whole undertaking and all the value of the assets which the city has the option to buy. I think, on the plainest principles of the law of estoppel, the defendant corporation cannot now allege that the consent necessary to be given was not given in 1883.

Assuming then that the municipality in 1883 gave the necessary consent, is this consent operative beyond the then limits of the city so as to render lawful the erection of poles in territory which has been added to the city between 1883 and the present time? In Toronto Corporation v. Toronto R.W. Co.,

[1907] A.C. 315, it was held that the railway company, when it contracted to construct tracks and operate lines of street railway, and carry passengers for a fixed fare from any point in the city to any other point in the city, contracted with relation to the city as it then was. It was not thought possible that the company could have intended to contract to carry passengers for a fixed fare over an area which might be indefinitely extended, without its consent.

That reasoning, it appears to me, does not control the present case. Here, what was required was the assent of the municipality to the operation by the company within the civic area. That consent, once given, applies, I think, not only to the area of the city as it then was, but to all territory which might be added and which would come within the civic jurisdiction. There was nothing in the circumstances to indicate that the municipal consent was not a consent operative co-extensively with its legislative jurisdiction. It could never have been contemplated that, when a consent was given in general terms, as the statute requires, upon each accession of new territory a further agreement or consent should be had. Rather, the intention was that the company should have the right to supply electricity, if it chose, anywhere within the city limits as they might from time to time be. Again, if the term is ambiguous, the parties have shewn their intention by their conduct; for, since the new territory has been added under the long series of agreements referred to, the company has supplied light throughout the entire territory, not only to individual citizens, but for street lighting.

I think the injunction sought must be awarded, and that, if the claim for damages is insisted upon, there should be a reference to the Master to ascertain the amount, unless some agreement can be made.

Costs should follow the event.

LENNOX, J. MAY 15TH, 1914.

HALLETT v. ABRAHAM AND FISHER.

Master and Servant—Injury to Servant—Absence of Negligence on Part of Master—Findings of Jury—Negligence of Contractor for Building on which Servant Employed when Injured — Evidence — Workmen's Compensation for Injuries Act, R.S.O. 1914 *ch.* 146, *sec.* 4—*Person Owning and Supplying Ways, Works, etc — "Workman" — "Contractor"—"Negligence of Person for whom Work Done."*

Action for damages for injury sustained by the plaintiff, a carpenter, by falling from the roof of a house upon which he was working. The plaintiff was in the employment of the defendant Fisher; but the negligence alleged was that of the defendant Abraham, who was said to be the contractor for the work which the plaintiff was engaged upon.

The action was tried before LENNOX, J., and a jury, at Toronto.

Harcourt Ferguson, for the plaintiff.

R. J. Gibson, for the defendant Abraham.

G. W. Holmes, for the defendant Fisher.

LENNOX, J.:—There is no ground upon which I can direct judgment against Fisher. The jury acquitted him of negligence, and I do not see that they could have done anything else. Their findings, at all events, are conclusive.

The defendant Abraham is not liable at common law. It is true that the negligence, if any, from which the plaintiff suffered, was not negligence of a fellow-servant, but of this defendant himself; the plaintiff was, however, in no sense Abraham's servant, but the servant of Fisher.

The doubts I expressed, in charging the jury, as to the want of a ladder being the cause of the injury, have not been entirely removed from my mind; but, in the face of a charge emphatically favourable to the defendants, upon this point, the jury have come to the conclusion that it was the cause of the accident, and I cannot say that there was not any evidence to support their finding.

Even with this question settled, I have had a good deal of difficulty in coming to the conclusion that the defendant

Abraham is liable, that is, that he owed any duty to the plaintiff. Outside of the statute he certainly did not. The main contest in the case was as to whether this defendant acted solely in the capacity of an architect, as he contended, or as a contractor, upon an accepted tender, doing the work and supplying the material for a specified sum. It ultimately turned upon whether McWilliams, the building owner, accepted Abraham's tender. The jury found that he did, and in this finding I entirely concur. This defendant then occupied the unique position of being at once contractor and architect—the builder and supervisor and judge. The sharp contrast between his evidence as first given, and his evidence in reply, when unexpectedly confronted by McWilliams, was not creditable to him, or calculated to win the sympathy or confidence of the jury. The plaintiff has to recover under sec. 4 of R.S.O. 1914 ch. 146, the Workmen's Compensation for Injuries Act, if at all. I think he can. It might be argued, perhaps, that this section is confined to the case only of the owner of the property who supplies "ways, works," etc., but I think it is not necessarily so confined. A statute of this character is to receive a liberal interpretation. This defendant it was who contracted with Fisher, the plaintiff's employer. He was in sole charge and possession, and, as contractor and architect, was in exclusive control until the work was completed and passed. "The execution of the work was being carried out under a contract." He was the person owning and supplying the "ways, works, machinery, plant, . . . used for the purpose of executing the work;" the plaintiff was "a workman" of Fisher, "a contractor or . . . sub-contractor," and "the defect," as found by the jury, "arose from the negligence of the person for whom the work . . . is done."

There will be judgment for the plaintiff against the defendant Abraham for $2,500 with costs. I think it is the duty of a jobbing contractor, such as Fisher is, to know something of the conditions under which his men are working. The action as against Fisher will be dismissed without costs.

LOVELL v. PEARSON.

Covenant—Restraint of Trade—Agreement between Master and Servant—Sale of Goods—Prohibition Extending to whole Dominion of Canada—Interim Injunction.

Motion by the plaintiffs for an order restraining the defendant until the trial of the action from soliciting orders for or engaging in or being interested in any business within the Dominion of Canada similar to that carried on by the plaintiffs, contrary to the defendant's covenant with the plaintiffs, as alleged.

The motion was heard by KELLY, J., in the Weekly Court at Toronto.

R. G. Agnew, for the plaintiffs.

J. E. Jones, for the defendant.

KELLY, J.:—The defendant, who, prior to the 3rd January, 1914, had been in the plaintiffs' employ as a travelling salesman, on that day entered into a written agreement with the plaintiffs to serve for one year from that date in the capacity of a salesman of stationery merchandise. The agreement, which is in the terms of a printed form in use by the plaintiffs, contains provisions of a somewhat exacting character, including one that the defendant "shall not during the continuation of his employment with the employer or within the space of 12 months after its termination, however determined, solicit orders within the Dominion of Canada for any other person or persons, firm, company or corporation carrying on or engaged in dealing in any business within the Dominion of Canada similar in whole or in part to that of the employer, or engage in or directly or indirectly become interested in any such business."

This application is to restrain him until the trial from so soliciting orders or so engaging or becoming interested in business.

Each party to the agreement had the right to determine the employment on thirty days' notice. Because of receiving notice from the plaintiffs, about a month after the commencement of the term of the employment, changing the scale of prices at which he was required to sell the plaintiffs' goods, and which change, he contends, affected to his prejudice the amount of commission he would be able to earn, the defendant gave one

month's notice of his intention to quit the employment, and he did accordingly sever his connection with the plaintiffs.

Granting the injunction asked for would have the effect of depriving the defendant of his earning power in selling goods of the class referred to, not in a limited territory, but any place in the Dominion of Canada. This occupation is the one with which he is best acquainted, and upon which he chiefly, if not wholly, relies as a means of earning a livelihood for himself and those dependent upon him. I fail to see that the protection to the plaintiffs' business requires that the defendant should, pending the action, be deprived of this means of employment. Nor do I understand the law to go so far. The right to put restraint upon an employee after the termination of the term of the employment, and where he contracted not to continue in the class of business in which he served the employer, was considered in Allen Manufacturing Co. v. Murphy, 23 O.L.R. 467, where the Court of Appeal dealt with facts much similar to those here present, and where a distinction was drawn between restraint in such cases and that which may be imposed in connection with the sale of a business or goodwill, or the dissolution of a partnership. Much of what was there said is applicable here. Quite sufficient reasons were put forward in the argument in opposition to the motion to convince me that this application should not be granted; and I, therefore, dismiss it; the costs to be disposed of at the trial.

The defendant, through his counsel, was willing, on the argument, to be restrained from operating in certain territory in which he had sold for the plaintiffs, but the plaintiffs were not satisfied with that limited restraint, and refused the offer.

McDONALD v. MILLER—MIDDLETON, J., IN CHAMBERS—MAY 11.

Summary Judgment—Rule 577.]—Appeal by the plaintiff from an order of the Master in Chambers refusing a motion for summary judgment under Rule 57. MIDDLETON, J., said that no defence was shewn, and the appeal should be allowed and judgment granted as asked, with costs. A. C. McMaster, for the plaintiff. A. Singer, for the defendant.

RE ROBINS—MIDDLETON, J., IN CHAMBERS—MAY 11.

Lunatic—Petition for Order Declaring Person of Unsound Mind—Trial of Issue—Dismissal of Petition.]—Petition by McAllister and Smith for an order declaring Henry Edward Robins to be of unsound mind and incapable of managing his affairs. When the petition was presented, MIDDLETON, J., directed an issue to be tried; and the petition now came on to be disposed of after trial of the issue. MIDDLETON, J., said that the order was not issued in the form intended; his intention was to have the issue as to this man's mental condition tried by KELLY, J., on oral evidence at a sittings for the trial of actions. At the hearing it was plain to KELLY, J., that the petitioners' case entirely failed; and MIDDLETON, J., agreed in the result. Petition dismissed with costs. R. N. Ball, for the petitioners. S. G. McKay, K.C., for the respondent.

COLE v. DESCHAMBAULT—LENNOX, J.—MAY 12.

Trust—Purchase of Crown Lands—Payment of Share of Deposit—Agreement—Patent Taken in Name of Defendant—Declaration of Trust in Respect of Share of Plaintiff's Assignor—Amendment—Fraud—Right of Assignee for Benefit of Creditors to Sue—Reference—Costs.]—The action was brought for the benefit of the creditors of Cleophas Bordeleau, an insolvent. Objection was taken that the plaintiff was not authorised to take proceedings. The learned Judge said that this was not a defence to be encouraged, particularly where, as here, there would be substantial gain to creditors of the estate; and he was of opinion that, upon the facts disclosed at the trial, the action was clearly maintainable. At the trial the plaintiff was allowed to amend his statement of claim by alleging fraud in obtaining the patent of Petrie islands from the Government; and the learned Judge now said that the allegations of fraud were fully borne out by the evidence. The insolvent, before assignment, had paid his one-fourth share of the deposit made to the Government, and an agreement between him and the defendant and others provided for an adjustment or equalization of accounts in case any of the partners or associates paid more than his one-fourth share. This agreement enured to the benefit of the insolvent's estate, and was binding upon the defendant, when, ignoring and concealing the rights of the

plaintiff as assignee of Bordeleau, he induced the Government to issue the patent to him alone. Even if there were no writing at all, the Statute of Frauds was not an obstacle in such a case. The doctrine that a trust results in favour of the person who advances the purchase-money, or pro tanto in favour of the person advancing a share of it, is not interfered with by the statute. The defendant and those who assisted him obtained the patent by flagrant dishonesty—by deliberate concealment and misrepresentation—and the learned Judge was satisfied that the Government would not have issued the patent to the defendant alone if the facts had been honestly disclosed. The result was that the defendant, upon obtaining the patent to himself alone, ipso facto became an unwilling trustee for the plaintiff, as assignee as aforesaid, of a one-fourth share in the islands in question. Before and since the issue of the patent, the defendant cut and converted to his own use quantities of timber and wood upon Petrie islands. The plaintiff should be allowed further to amend the statement of claim so as to include this ground of complaint; and, subject to the payment or allowance of $425—the balance of the plaintiff's share of the purchase-money—upon the adjustment of the accounts, there should be judgment for the plaintiff in the terms of the prayer of the statement of claim, and for a reference to the Local Master at Ottawa to ascertain the plaintiff's one-fourth share of the defendant's net receipts and profits from the cutting and sale or disposal of timber and wood upon the islands. There should be judgment, too, for the plaintiff for the costs of this action, and —the defendant's conduct having created the necessity for it—the costs of the reference in any event, except such costs, if any, as the plaintiff might improperly cause or incur; and as to these the question might be spoken to, should a necessity for doing so arise. H. H. Dewart, K.C., and C. A. Seguin, for the plaintiff. W. C. McCarthy, for the defendant.

CAMPBELL v. BARRETT AND MCCORMACK—LENNOX, J.—MAY 13.

Vendor and Purchaser—Agreement for Sale of Land outside of Province—Specific Performance—Title—Failure of Vendors to Acquire—Judgment for Return of Purchase-money —Stay of Execution to Enable Vendors to Make Title.]—Action for specific performance of an agreement for the sale by the defendants to the plaintiff of certain land in Saskatchewan, and,

in default, for repayment of $1,500 paid by the plaintiff, and for a declaration of the plaintiff's lien therefor upon the land. The learned Judge said that it was admitted on all hands that the plaintiff had paid his purchase-money in full, and, as against the defendant McCormack at all events, had done everything to entitle him to a conveyance. And, upon the facts, dealing with conflicting evidence as to the transactions between the defendants, the plaintiff was entitled to a conveyance as against both defendants. The defendants not having got in the title, a judgment for specific performance would be useless. Judgment against both defendants for $1,500 with costs; execution to be stayed for sixty days; and, if the land is conveyed or transferred according to the law of Saskatchewan, within that time, that is to be a satisfaction of the judgment for $1,500, and the plaintiff is to have execution for the costs only. No order as to costs between the defendants. W. B. Lawson, K.C., for the plaintiff. W. N. Tilley, for the defendant Barrett. R. A. Pringle, K.C., for the defendant McCormack.

MEAGHER v. MEAGHER—LENNOX, J.—MAY 14.

Will—Validity—Construction—Devise and Bequest—Absolute Ownership of Subject of Gift—Costs.]—Action by George Meagher against Mary Ann Meagher and others for a declaration that a certain document purporting to be the last will and testament of Thomas Meagher, deceased, admitted to probate by a Surrogate Court, was not his last will, but that he died intestate, and to set aside the probate, or, if the will should stand, for a declaration as to the true construction of paragraph 5. Upon the facts and evidence given at the trial, the learned Judge found in favour of the will, and adjudged that the grant of probate should be confirmed and the action dismissed. He was also of opinion that paragraph 5 conferred upon the testator's daughters Mary Ann Meagher and Margaret Ellen Meagher the absolute ownership of the personal estate and effects and the ownership in fee of the lands in that paragraph described for their own exclusive use and benefit. There was justification for inquiry both as to fact and law; and it was, therefore, a case in which the costs of all parties should come out of the estate, were it not that all available assets had been distributed. In the circumstances, the action should be dismissed without costs except the costs of the Official Guardian, which should be paid by the

beneficiaries in the 5th paragraph mentioned. A. R. Hassard, for the plaintiff. E. F. B. Johnston, K.C., for the defendants the executrices. I. F. Hellmuth, K.C., for the defendants James and Michael Meagher. E. D. Armour, K.C., and A. F. Lobb, for the defendants Thomas and John Meagher. E. C. Cattanach, for the Official Guardian.

MILES v. CONSTABLE—KELLY, J.—MAY 15.

Landlord and Tenant—Flooding of Demised Premises—Knowledge of Landlord—Concealment of Defect—Knowledge of Purpose for which Premises Leased—Liability in Damages—Assessment of Damages—Counterclaim.]—Action for damages for flooding of premises in the city of Toronto leased by the defendants to the plaintiff for the purpose of a bake-shop. The plaintiff was prevented by the flooding from carrying on his business. KELLY, J., found that the premises had turned out to be totally unfit for the purpose for which they were built and for which the plaintiff required them. The defendants contended that the source of the trouble was a defect in the city sewer, and that the plaintiff's remedy was against the city corporation. The learned Judge said that, assuming that a defective sewer was the cause of the trouble, the defendants were not entitled to be relieved on that ground, because they knew of the condition at the time they made the lease and withheld that knowledge from the plaintiff, knowing the purpose for which he leased the premises. Upon all the evidence, the learned Judge found for the plaintiff, and assessed his damages for injury to and loss of goods at $200, and for loss of and disturbance to business and for being deprived of the use of the premises down to the commencement of the action at $920: in all $1,120. The defendants were allowed $213.33 on their counterclaim for rent, etc., to be deducted from the $1,120; and judgment to be entered for the plaintiff for $906.67 with costs. T. F. Slattery, for the plaintiff. H. A. Reesor, for the defendants.