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WINCHESTER, MASTER. APRIL 14TH, 1903.

CHAMBERS.

EMPIRE LOAN CO. v. McRAE.

Specific Performance—Contract for Purchase of Land—Judgment for Payment of Price—Extension of Time—Payment on Account—Forfeiture—Relief against—Final Order of Sale.

Motion by plaintiffs for a final order of sale in an action by vendors for specific performance of a contract for purchase of land. On the 13th November, 1902, a judgment was pronounced directing specific performance, declaring that defendant had accepted the title to the land, and appointing a day for payment of the money, $4,578.45. It was agreed by the parties that upon defendant paying $500 the time for paying the whole sum should be extended until 26th March, 1903, and the judgment was issued in these terms. The $500 was paid. The agreement provided that in case the balance of the $4,578.45 was paid on or before the 26th March, it would be accepted in full, but in default of payment of such balance on that date, defendant should forfeit the $500. Defendant not having paid the balance, this application was made.

W. E. Middleton, for defendant, asked liberty to pay only $4,078, with subsequent interest and costs, in full.

C. D. Scott, for plaintiffs, contra.

THE MASTER.—The plaintiffs, coming to this Court for assistance, must deal equitably with defendant, and I hold that accepting $500 from him in good faith on his purchase, and refusing to give him credit for it because he happened to be a week or two behind in paying up the balance, would not be equitable, notwithstanding that his agreement was to allow it to be forfeited. This Court has always relieved against

forfeiture, and will do so where the parties can be placed in the same position they would have occupied had the agreement been carried out within the time limited.

I will permit defendant to pay the $4,078.45 within one week from this date, together with interest on that sum from the 26th March, 1903, until paid, and the costs of this application, and extend the time under the judgment until that time. In default of such payment, the final order of sale to issue.

WINCHESTER, MASTER. APRIL 14TH, 1903.

CHAMBERS.

QUANTZ v. QUANTZ.

Solicitor—Authority to Bring Action—Retainer—Instructions to "Collect"—Subsequent Instructions—Assignment of Annuity and Judgment—Setting aside Proceedings—Costs.

Motion by plaintiff to set aside the writ of summons and all subsequent proceedings with costs to be paid by the solicitor instituting such proceedings, on the ground that the same were taken without instructions from plaintiff.

The plaintiff, a woman of 87 years, being entitled under her husband's will to an annuity of $100 a year payable by her son, the defendant, and not having been paid it, sent for the solicitor, who went to see her at her daughter's house, when the plaintiff explained to him the position of affairs, and requested him to arrange them for her. She then signed a written memorandum authorizing the solicitor to collect all arrears of dower and annuity, etc., and promising to pay the solicitor his lawful costs, charges, and expenses.

The solicitor at once began this action, and served the defendant with the writ of summons. Shortly afterwards he was told by plaintiff's son-in-law that the whole matter had been settled between plaintiff and defendant. The solicitor then called upon plaintiff and obtained from her written instructions to proceed with the action, and a power of attorney to act for her. He then again wrote to defendant, and proceeded to file a statement of claim, which he served by posting in the office of the clerk of records and writs, there being no appearance, and, no defence being delivered, he signed judgment against defendant for $1,464.77 and interest and $36.82 costs, and issued writs of fi. fa. and placed them in the sheriff's hands. The solicitor afterwards made plaintiff an

advance of $50 and took from her an assignment of the annuity and of the judgment and a promisory note as security for the loan and for his costs.

T. M. Higgins, for plaintiff.

J. E. Jones, for defendant.

W. E. Middleton, for the solicitor.

THE MASTER.—The solicitor by his own admissions brings himself within the cases as to obtaining security for costs in advance, for there was not due to him when he took the security $100 for costs—scarcely half that sum. No bill of costs was made up or explained to the client. She was entirely ignorant of such things. Had the solicitor been dealing with a man of business, he scarcely would have ventured to have acted as he did with this woman of 87 years, not accustomed to such business. The note, under the cases referred to in Re Solicitor, ante 268, is only security at the most for the $50 and whatever costs were due by her to him up to that date. See also Hope v. Caldwell, 21 C. P. 241; Robertson v. Caldwell, 31 U. C. R. 143; Atkinson v. Gallagher, 23 Gr. 201; Galbraith v. Irving, 8 O. R. 751; and Uppington v. Bullen, 2 Dr. & War. 184.

The solicitor obtained from defendant $100 cash on 18th October, 1901, which he sent to plaintiff the same day. He also obtained from defendant a note for $159.59, being the amount of plaintiff's note and interest for one month, payable in one month from 14th October, 1901, with which to take up plaintiff's note for $157.69 dated 11th April, 1901, and due 14th October, 1901. This note given by defendant is, under the circumstances, of no higher value or greater validity than the one executed by plaintiff. The assignment of the annuity by plaintiff to the solicitor is also affected by the decisions above mentioned. . . .

The plaintiff, while most emphatic in her belief that she gave the solicitor no authority to issue a writ against her son, did undoubtedly sign two authorities. It may be she did not understand their full meaning. Certainly as to the first it did not authorize the solicitor to issue the writ herein: Atkinson v. Abbott, 3 Drew 251; Wray v. Kemp, 26 Ch. D. 169. The first retainer signed by plaintiff and produced by the solicitor comes within these decisions, but the second retainer, in my opinion, is binding on plaintiff. I cannot, therefore, compel the solicitor to pay the costs of this suit.

The plaintiff desires to dismiss her action against defendant. . . . An order will be made setting aside the writ, judgment, and executions; no costs to any of the parties.

MEREDITH, J. APRIL 14TH, 1903.

TRIAL.

ST. MARY'S CREAMERY CO. v. GRAND TRUNK R. W. CO.

Railway—Carriage of Goods—Injury to Goods by Negligence—Shipping Bill—Bill of Lading—Conditions Limiting Liability—Insurance on Goods.

Action for damages for loss of butter shipped by plaintiffs from St. Mary's, Ontario, to Manchester, England, under a "through" contract made with defendants.

J. Idington, K.C., and L. Harstone, St. Mary's, for plaintiffs.

W. Cassels, K.C., and Forster, for defendants.

MEREDITH, J.—Plaintiffs' cheese and butter are sent in large quantities to Manchester, upon through contracts made with defendants. The dealings between the parties in regard to such carriage have been large and have extended over some length of time. Such dealings have been and are conducted in this manner. Plaintiffs apply to defendants' agent at St. Mary's for a through rate, and for space upon a steamship for their goods, and, upon being satisfied as to these things send them, with a shipping bill, signed in their behalf to their authorized officer or servant, to defendants' receiving sheds or cars at St. Mary's. Upon receipt of the goods, the defendants' agent at St. Mary's delivers to plaintiffs a formal bill of lading, and thereafter the goods are despatched.

The plaintiffs' course of business has been, and is, to indorse the bill in favour of their agent at Manchester, and forward it by mail to him, and also to send a telegraphic despatch to him, apprising him of the shipment, so as to give him timely notice, in order that he shall arrange for the receiving and sale of the goods, and that he shall effect insurance upon them. The insurance is of a somewhat different character from that with which most of us are familiar. It was, and is, effected in Manchester, through the plaintiffs' agent there. A policy of a very general character was obtained from the Baden Marine Insurance Company, Limited, of Mannheim, Germany, dated at Manchester on the 13th day of December, 1900, under which that company took upon itself insurance of the plaintiffs to the amount of £10,281 ; and agreed and declared that the insurance should be (lost or not lost) at and from "by rail to Portland and for Halifax and for St. John thence to U. K. ports," and that the subject matter should be and is, upon "butter and for cheese, as in-

terest may appear, to be declared on receipt of invoice, and for bill of lading, at market value with 10 per cent. added, limit per any one steamer £3,000." There are then printed provisions in which the company promises and agrees that the insurance shall commence when the goods are laden on board the said ship, or vessel, craft or boat, as above, and continue until discharged and safely landed at as above, and that the adventures and perils which (among others specified) the insurers are to bear and take, are "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject matter of this insurance or any part thereof." And in the margin is attached a slip, partly printed and partly written, in these words: "In the event of loss or damage prior to declaration held covered at market value 10 per cent. added." And in the margin are written these words: "This policy does not cover any loss or damage caused by an interruption in the working of the refrigerator machines."

Upon the receipt of the telegram announcing the shipment, the plaintiff's agent at Manchester made "declaration" to the insurers of the goods, and thereupon they seem to have become covered by the policy. Under the written words of the policy, and notwithstanding the printed ones quoted, the insurance, after declaration, seems to have been, lost or not lost, by rail from St. Mary's to Portland, and thence to any port in the United Kingdom of Great Britian and Ireland to which the particular goods were shipped.

The goods in question were delivered to the defendants on the 16th day of April, 1901, to be carried by them, by rail, from St. Mary's to Portland in the State of Maine, and thence by way of Liverpool, to Manchester. On the 18th day of that month they were injured, to the extent of about $488, through the negligence of the defendants' servants while in transit over the defendants' railway, in the Province of Quebec, on the way to Portland.

On the 19th day of the same month the plaintiffs sent to their agent this message: "We have shipped eighty boxes of butter by the steamship Numidian; declare insurance;" and the insurance seems to have been effected accordingly; neither principal nor agent having any notice of the injury to the goods.

On the 23rd day of the same month the plaintiffs wrote to their agent to return the bill of lading, and "cancel the declaration you may have made for marine insurance," as they had been advised that the goods had been destroyed in an accident on the way to Portland.

On the 26th of the same month the plaintiffs wrote again to the agent, countermanding the instructions to cancel the insurance, as, "since writing to you on the 23rd we find on reference to our marine insurance policy, that it covers the goods in transit to Portland as well as from that point."

The agent on receipt of the letter of the 23rd, and before receiving that of the 26th, cancelled the declaration, so that, as he says, the plaintiffs are precluded from making a claim upon the insurers. . . .

It is very clear that plaintiffs were bound by the terms of their shipping bill, signed by them and handed to defendants' agent before he would receive the goods for defendants as carriers, if accepted by defendants and not superseded by the bill of lading. This bill requested defendants, over plaintiffs' signature, to receive the goods in question, "subject to the terms and conditions stated above and to those on the other side of this shipping note." One of the conditions on the other side was: "13. In case of any loss or damage to goods for which this company or connecting lines or other carriers may be liable, it is agreed that the company or line or carriers so liable shall be given the benefit of any insurance effected by or for account of the owner of said goods and shall be subrogated in such rights before any demand shall be made on them in respect of such loss or damage, and in case of any liability whatsoever, the company shall only be liable for the invoice value of the property at the point of shipment. . . .

As to the bill of lading there seems to be no doubt, upon the authorities, that its terms are binding; that it contains the contract, or at least the written evidence of the contract: see Lerdue v. Ward; 20 Q. B. D. 475; Parker v. South Eastern R. W. Co., 2 C. P. D. 416; Watkins v. Rymill, 10 Q. B. D. 178; North-West Transportation Co. v. McKenzie, 25 S. C. R. 38. . . . Even if it could be found as a fact—a finding I should be unable to make—that none of the plaintiffs' officers had read, or was aware of, the terms of the bill, yet I cannot doubt that plaintiffs would be bound by its conditions.

. . . .

One of the conditions, plainly printed upon the face of the bill of lading, applicable to the service until delivery at the port of Portland, is in these words: "The shipper must insure all insurable property; and in case of any loss for which the Grand Trunk Railway Company or its connections are liable, the company or carrier so liable shall be entitled to the benefit of such insurance in estimating the damages to be paid by such carrier, and the insurer shall not be subrogated to any rights against such carrier."

Prima facie, it appears that plaintiffs were fully insured against the loss that has happened, and it is difficult to see, upon the evidence which has been adduced, how the insurers were relieved by them from liability; or, if so, that such release would relieve them from the whole effect of condition 13, if they are bound by it. And little, if anything, could be said against the fairness of a conclusion that plaintiffs' action failed by reason of this condition, that is, assuming the insurance to have been validly effected and either to be still subsisting or to have been released by plaintiffs. . . .

But the case must be dealt with according to law, not according to any one's notions of fairness; and the first question is, what was the contract for the carriage of the goods? That is a question of fact, and, upon the whole evidence, I find that the whole contract is contained in the bill of lading, that the terms and conditions of the shipping bill do not form part of it. . . .

Condition viii. of the bill of lading has not been complied with by plaintiffs. Is it binding upon them, and, if so, does its breach relieve defendants from liability, or give them a right of action against plaintiffs? . . . Does it apply to a case of loss through negligence attributable to defendants, and, if so, is it made of no effect by sec. 246 of the Railway Act?

The cases have gone to an extraordinary length in excluding from a condition limiting liability loss occasioned by negligence of defendants or their servants.

[Reference to Mitchell v. London, etc., R. W. Co., L. R. 10 Q. B. 256; Puce v. Union, etc., Co., 19 Times L. R. 378; Harrison v. Anchor Line, [1891] 1 Q. B. 619; Sutton v. Cicers, 15 App. Cas. 144; Phillips v. Clark, 2 C. B. N. S. 156; Fitzgerald v. Grand Trunk R. W. Co., 4 A. R. 601.]

The cases constrain me to hold that condition viii. applies to defendants' liability as insurers, and not their liability for any negligence attributable to them. Otherwise, I would have considered that "any loss" for which defendants were liable included a loss caused by negligence attributable to them: see Dixon v. Richelieu Navigation Co., 15 A. R. 647, 18 S. C. R. 704; Robertson v. Grand Trunk R. W. Co., 24 S. C. R. 611, 615.

But, assuming that the condition covers loss through negligence, does the Railway Act preclude defendants from taking advantage of it?

Section 146 is clumsily framed and worded, but, upon all hands, it seems to be now considered that (so far as the question here involved goes) it precludes defendants from

contracting themselves out of liability for negligence in the cases therein provided for, that is, by "any notice, condition, or declaration;" the only question in this case being whether the words "notice, condition, or declaration" cover condition viii.

[Reference to Grand Trunk R. W. Co. v. Vogel, 11 S. C. R. 612; Robertson v. Grand Trunk R. W. Co., 24 S. C. R. 612; The Queen v. Grenier, 30 S. C. R. 42.]

The Vogel case is not overruled, but is yet an authority binding upon this Court. If, however, I am at liberty to give effect to my opinion upon the question, it is that the Vogel case was rightly decided. . . .

It comes to this: either condition viii. does not apply to loss through defendants' negligence, and so is no defence to the action or ground of counterclaim; or it does so apply, and, if so, is made of no effect by the enactment.

[Reference to Willcocks v. Pennsylvania R. R. Co., 166 Pa. St. 81, 184; Rintoul v. New York R. R. Co., 17 Fed. R. 905; Providence v. Moore, 150 U. S. 99; Shouler on Carriers, secs. 450, 464, 465; Elliott on Railroads, vol. 4, sec. 1509.]

Judgment for plaintiffs for $488 damages and costs of action.

MACMAHON, J. APRIL 14TH, 1903.

TRIAL.

BANK OF MONTREAL v. LINGHAM.

Limitation of Actions—Promissory Notes—Indebtedness to Bank—Acknowledgement by Deed—Conversion of Simple Contract Debt into Specialty—Revival of Debt—Release—Accord and Satisfaction.

Action to recover a money demand based upon two promissory notes dated respectively 6th and 27th March, 1884, both at 3 months, for $35,000 and $25,000 respectively, and upon a deed executed by defendant dated 7th June, 1884, whereby defendant acknowledged that he owed plaintiffs $58,875.52.

Defendant pleaded the Statute of Limitations and accord and satisfaction.

W. Cassels, K.C., and A. W. Anglin, for plaintiffs.

C. H. Ritchie, K.C., and W. B. Northrup, K.C., for defendant.

MACMAHON, J.—The overdue indebtedness of defendant to the plaintiffs was on the 7th June, 1884, about $88,875.52

as security for which they held the guarantee of defendant's father for $30,000. The $88,875.52 included the two promissory notes for $35,000 and $25,000.

In a trust deed dated 7th June, 1884, to which defendant's father, defendant himself, an agent of the plaintiffs as trustee, and the plaintiffs, were parties, it was recited that defendant was indebted to his father in $10,000 and to plaintiffs in $58,875.52, or thereabouts, and that the father owned and held certain lands as security for the $10,000 ; and the father conveyed such lands (in the State of Minnesota) to the trustee to secure first to the father his $10,000, and next to plaintiffs their $58,875.54 ; and in trust to sell, etc.

On 24th July, 1893, defendant, by deed reciting the trust deed of 7th June, 1884, released to plaintiffs all his interest in the lands aforesaid. . . .

Job Lingham, defendant's father, held the Minnesota lands as security for the $10,000 owing him by his son, the defendant, which remained a first charge under the trusts in the deed. Defendant alleged that the $10,000 note which his father had indorsed, and for which the latter held security on the Minnesota lands, had been paid by him. And (Job Lingham having died) this statement seems to have been accepted as true by all the other heirs of Job Lingham, for they released all their interest in the lands to the plaintiffs.

The general manager of plaintiffs stated most positively that there never was any agreement between himself and defendant in the nature of an accord and satisfaction as sworn to by the latter. The defendant's acts in 1893 shew, I think, that he did not at that time consider that there was any agreement between plaintiffs and himself which would form an accord and satisfaction.

Job Lingham was not the actual owner of the lands when he conveyed them in trust to secure the debt due by defendant to plaintiffs. The recital in the deed states that he owns and holds the lands for the debt due to him by defendant. And there is then an acknowledgment by defendant of the amount of his indebtedness to plaintiffs, and the giving of security on the lands for the indebtedness so acknowledged to be due. There is no covenant to pay.

[Reference to Marryat v. Marryat, 18 Beav. 227 ; Isaacson v. Horwood, L. R. 3 Ch. 225 ; Jackson v. North Eastern R. W. Co., 7 Ch. D. 573, 585.]

The case in hand comes within the principle laid down in the above decisions, and it must be held that the acknowledgment by the defendant by the recital in the trust deed of the debt due to the plaintiffs did not convert it into a special debt.

Then the debt being barred by the statute on the 8th June, 1880, did the release by defendant to plaintiffs in July, 1893, revive the debt? If the $10,000 note was paid by defendant, then Job Lingham at the time of his death had no interest in the Minnesota lands. That would be the proper finding. . . . If Job Lingham had no interest in the lands, plaintiffs could sell free from his claim.

But even assuming the defendant had not paid the $10,000 note, the release to plaintiffs in 1893 of his interest in the lands—which would necessarily include his interest as one of the heirs of Job Lingham in the $10,000—and the subsequent sale in August, 1896, of timber valued at $5,500 from the lands, his share of which the plaintiffs credited on their claim against him, was merely permitting the plaintiffs to realize an additional sum from the same security, which they held for defendant's debt.

The only object plaintiffs had in procuring the release from defendant, and his only intention in granting a release was "in order to avoid the expense of a sale." There was nothing in defendant's act in executing the release from which an intention could be implied to pay the debt and so waive the statutory bar.

Action dismissed with costs.

APRIL 14TH, 1903.

DIVISIONAL COURT.

HOLNESS v. RUSSELL.

Deed—Conveyance of Land—Cutting down to Mortgage—Improvidence—Fraud.

Appeal by plaintiff from judgment of BRITTON, J., 1 O. W. R. 655, dismissing action to set aside a conveyance of land and a bill of sale for improvidence, or for leave to redeem.

E. Coatsworth, for plaintiff.

G. F. Shepley, K.C., for defendant.

THE COURT (BOYD, C., FERGUSON, J.) dismissed the appeal with costs, not being able to find any ground upon which to interfere with the findings of the trial Judge.

APRIL 14TH, 1903.

C.A.

REX v. KARN.

Criminal Law—Offering or Advertising for Sale Medicine for Improper Purposes—Evidence—Inference from Wording of Advertisements—Functions of Judge and Jury—Case Reserved after Acquittal—Misdirection—New Trial.

Crown case stated by the Chairman of the General Sessions of the Peace for the County of York.

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

J. R. Cartwright, K.C., for the Crown.

E. E. A. DuVernet, for the defendant.

OSLER, J.A.—The accused was indicted at the General Sessions of the Peace for the county of York, for that he did in the month of November, 1901, unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise, and have for sale, a certain medicine, drug, or article, described, intended, or represented as a means of preventing conception, or causing abortion or miscarriage, and did thereby commit an indictable offence contrary to the Criminal Code, sec. 179 (c).

The trial took place on the 9th December, 1901, before the Chairman of the General Sessions of the Peace and a jury.

The evidence of the Crown shewed that the accused conducted a large business in various proprietory medicines, including a certain emmenagogue or medicine for stimulating or renewing the menstrual flow. This medicine was put up in the form of tablets, and sold under the terms of an agreement, duly proved, between the accused and the manufacturer. A box was produced as made up for the purpose of sale, with a brief printed description of the contents on the outside, across which a warning in red ink and large type was printed, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets, and a separate advertising circular referring to the tablets and describing their purposes and operation was also proved.

On behalf of the Crown it was contended that the statement on the box and in both the circulars referred to, or some part of the same, or some expressions therein, shewed that the drug or article was thereby intended or represented as a means of preventing conception or causing abortion; and,

therefore, that the accused having offered to sell or having the article for sale or disposal, had committed an offence within the meaning of sec. 179 (c) of the Criminal Code, which enacts so, and it was urged that the case should be left to the jury to draw their own conclusions from the language of the printed notices, directions, and circulars proved.

The learned Chairman of the Sessions (Macdougall, C.O.J.) was of opinion, though with some doubt, that looking at the whole advertisement, it was not one advertising a medicine for preventing conception or causing abortion, and he directed an acquittal, reserving a case for the Crown, if desired, upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned.

There was no evidence for the prosecution, except that which I have mentioned; and the question simply was, whether the advertisement was one of a medicine *intended* or *represented* as a means of preventing conception, etc. If that meaning could not be drawn from the circular, the notice, and printed directions, the case for the prosecution necessarily failed, as there was no extraneous evidence to give point to the language of the printed papers, and to shew that the medicine had been sold for the purpose said to be intended or represented. The section is new, and there is no corresponding section that I am aware of in any Imperial Act.

The defendant contends that the construction of the printed documents was wholly for the Judge. For the prosecution it is urged that it was wholly for the jury. I do not agree with either contention.

There is some analogy between a case of this kind, and an indictment for sending a threatening letter, or for a libel. In Taylor on Evidence, 9th ed., sec. 43, it is said: "The respective duties of the Judge and jury in indictments for writing threatening letters, are not very clearly defined. In some cases the jury have been permitted, upon examination of the paper, to decide for themselves whether or not it contained a menace. In other cases it appears to have been determined by the Court; while on a few occasions the opinion of the jury and the Judge have been both alternately taken." Many authorities are cited. The result of the most recent and consistent is, that the jurisdiction of the Judge is to determine whether the document is capable of bearing the meaning assigned to it, and it is then for the jury to say whether under the circumstances it has that meaning or not: per Lord Morris, C.J., in Regina v. Coady, 15 Cox C. C. 89; Regina v. Carruthers, 1 Cox C. C. 138.

It is not contrary to law to sell or advertise for sale the drug or medicine in question. The Act strikes at the abuse, not the use of it, which may be perfectly legitimate. From the nature of its action, however, it is a drug extremely susceptible of being used for an improper purpose, or at a period when it might produce a result which ought not to be sought for, and it cannot, therefore, be wrong to warn against its use for such purposes, or at such a period. In the absence of evidence that the warning on the outside of the box was intended to be read as an invitation to do the very thing warned against, in other words, that it was not an honest warning, I should have thought the learned Chairman of the Sessions was right in saying that the jury would not be justified in inferring from the warning alone that the drug was intended or represented as a means of preventing conception or causing abortion. There is, however, a paragraph in the "directions" which is of a more doubtful character, viz. : "Thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets." I think the learned Chairman should have held that this language, read of course with the rest of the printed matter, was capable of the obnoxious meaning, and that the jury could have legitimately inferred from it that the tablets were thereby represented at least as a means of preventing conception. Their object and operation in promoting and ensuring the regularity of the menstrual flow, which is, popularly at all events, supposed to be interrupted by conception, is so clearly and explicitly stated, that it might well be asked for what other purpose married ladies, or others who might desire to prevent pregnancy, would be likely to be using them monthly. I think, therefore, it would have been right to have left the case to the jury ; and that, if they had taken an unfavourable view of the meaning of the paragraph referred to, a conviction might have been supported.

This expression of opinion will probably be sufficient as a guide in future cases of a similar kind, as we are not obliged, nor do I think it would be right, even if we have the power to do so, to direct a new trial, the defendant having been tried and actually acquitted ; though it may be, in consequence of an erroneous direction. The cases ought to be extremely rare in which the Court would think it right to place the accused a second time in jeopardy for the same offence, contrary to what has hitherto been one of the fundamental principles of English law. I express no opinion on this point at present ; but it is not to be overlooked, that what the section

of the Code speaks of in reference to a new trial on an appeal by the prosecutor, is where there has been a *mistrial* in consequence of an erroneous ruling of the Judge. I must say, speaking for myself, that where there has been an acquittal it would be more desirable for the trial Judge to leave the prosecutor to apply for leave to appeal, than to reserve a case. Very different considerations, of course, prevail where there has been a conviction after an erroneous ruling on some important point adverse to the accused.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLENNAN and GARROW, JJ.A., also concurred.

APRIL 14TH, 1903.

C.A.

REX v. WOODS.

Criminal Law—Bigamy—Defence—Dissolution of Former Marriage —Decree of Foreign Court—Validity—Domicil.

Case reserved by MCDOUGALL, Judge of the County Court of York, before whom and a jury the defendant, Minnie G. Woods, was tried on the 2nd October, 1901, at the General Sessions of the Peace, upon an indictment for bigamy, and convicted. The questions reserved were as follows: 1. "Is a decree of divorce granted to either party from a marriage contracted in Canada, pronounced by a competent Court of the State of Michigan, for "extreme cruelty," a cause recognized as sufficient by the law of the said State, but a cause not recognized as a sufficient ground of divorce by the law of Canada, to be considered a valid decree of divorce in Canada? 2. In case the Court is of opinion that such a decree of divorce granted by a competent Court in the State of Michigan for the said cause is to be considered as binding and valid in Canada, was the decree of divorce granted by the Surrogate Court of Wayne County, Michigan, under the circumstances in evidence—both as to the facts and law—a valid and effectual divorce between the parties, so as to constitute in law a good defence under the Criminal Code to the indictment?"

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

T. C. Robinette, K.C., for the prisoner.

J. R. Cartwright, K.C., for the Crown.

MOSS, C.J.O.—The facts stated in the reserved case shew that, at the time of the marriage between William N. Barn-

hardt and the defendant, both had their domicil in Canada, and the marriage was celebrated in this Province.

Barnhardt had been a resident of the city of Toronto for a number of years before 1897. In the early part of that year he went to Detroit, for what purpose is not stated. He remained there apparently until the 5th July, 1897, the date of the marriage, when he came to Windsor and was married to the defendant, and remained in the Province until the following October. Up to this time there was nothing to evidence an intention to become domiciled in Michigan.

It is clear that there was no charge of domicil in the interval between the marriage and the decree of divorce pronounced by the Surrogate Court of Wayne County in the State of Michigan. There was nothing more than a temporary change of residence. The marriage with Barnhardt took place on the 5th July, 1897. They continued to reside together in Canada until some time in the following September, when he went to Detroit. The defendant remained in Toronto until some time in October, when she too went to Detroit, but they did not live together. Each seems to have been advised to take proceedings for divorce as soon as the residence in Michigan was sufficient to enable them to be taken under the laws of the State. Each did take proceedings, and, after pleadings filed, the defendant's attorney withdrew her proceedings and allowed a decree of divorce to be pronounced on proof of the charges in Barnhardt's bill. Both then seem to have returned to reside in Toronto, as it appears from the case that the defendant in November, 1900, went through the ceremony of marriage with one John Pendril at Toronto, Barnhardt being at that time alive and a resident of Toronto.

The inference from these facts is that Barnhardt's permanent home was Toronto, and that he never changed or intended to change his domicil. The nature of his residence in Detroit and his conduct generally, so far as shewn, are inconsistent with the existence of an intention to reside there permanently.

The Courts in England have surrendered the theory once held that no English marriage could be dissolved by a foreign divorce. (See Lolley's case and McCarthy v. DeCaix, in note to Warrender v. Warrender, 2 Cl. & F. 567). It is now admitted that where the parties to such a marriage are bona fide domiciled in a foreign country, the tribunals of that country have jurisdiction to pronounce a divorce which will be held valid: Dicey, Conflict of Laws, 757.

But they are not bound by any principle of international

law to recognize as effectual the decree of a foreign Court divorcing spouses who at its date had the domicil in England.

In Lemesurier v. Lemesurier, [1895] A. C. 517, the Judicial Committee, after a full examination of the authorities, came to the conclusion that according to international law the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concurred without reservation in the views expressed by Lord Penzance in Wilson v. Wilson, L. R. 2 P. & D. 442, including the following, viz.: "It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

The rule thus laid down by the Judicial Committee had been recognized and acted upon by the learned Chancellor in Magurn v. Magurn, 3 O. R. 570, and his opinion was affirmed by this Court, 11 A. R. 178.

The foreign decree set up in this case is, therefore, not one to which credit can be given in this country as having the effect of dissolving the marriage between the defendant and William A. Barnhardt, and the defendant was rightly convicted.

That being so, and having regard to the manner and form in which the findings upon the evidence are stated and the questions are framed, we do not deem it necessary to answer the questions otherwise than as above.

Maclaren, J.A., gave reasons in writing for the same conclusion.

Osler, Maclennan, and Garrow, JJ.A., also concurred.

April 14th, 1903.

C.A.

Re Cartwright School Trustees and Township of Cartwright.

Public School—School Site—Change of—Meeting of Ratepayers—Invalid Arbitration and Award—Mandamus.

Appeal by the township corporation from order of a Divisional Court (1 O. W. R. 387, 4 O. L. R. 272), allowing an

appeal from an order in Chambers and granting a mandamus to the township corporation requiring them to pass a by-law for the issue of debentures for $1,000 for the purchase of a school site and the erection of a school house thereon.

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

W. R. Riddell, K.C., and Harold Fisher, for the trustees.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

GARROW, J.A.—By sec. 62 of the Public Schools Act, R. S. O. 1897 ch. 292, it is the duty of the school trustees to provide adequate school accommodation, and for such purpose to purchase or rent school sites or premises, and to build, repair, furnish, and keep in order the school-houses, etc.

By sec. 31, sub-sec. 1, the trustees have power to select a site for a new school house or to agree upon a change of site for an existing school house, but they must forthwith call a special meeting of the ratepayers to consider the site so selected by them and no site is to be adopted or change of site made . . . without the consent of the majority of such official meeting. By sub-sec. 2 it is provided that in case a majority of the ratepayers present at such meeting differ as to the suitability of the site selected by the trustees this difference shall be determined by arbitration. From this language it is perfectly clear that the foundation of such an arbitration is a difference between the trustees, on the one hand, and a majority of the ratepayers at this special meeting, on the other, as to a school site selected by the trustees, whether such selection consists in choosing a site for a school house where there had been no school house before—or in choosing a new and different site for an existing school house. It is, I think, also reasonably clear that a site once chosen in the manner provided by the statute remains the school site of the section, and can only be changed or abandoned in the manner pointed out by the statute. Upon this site the trustees could repair, and, if necessary, under sec. 62, rebuild, the school house without calling a special meeting of the ratepayers, although under sec. 70 the ratepayers' consent is necessary if it is proposed to incur a debt for the purpose of building or rebuilding. No change of site was proposed in the case before us by the trustees prior to the so-called arbitration proceedings. What they then proposed to do was to rebuild on the old site. No special meeting of ratepayers was convened or could have lawfully been convened to consider a school site chosen by the trustees, for they had chosen none. There was, therefore, a total absence of the necessary foundation for an arbitration

between the ratepayers and the trustees, namely, a difference concerning a school site chosen by the trustees, and the whole proceedings were therefore void.

There could be no estoppel or waiver of the public right.

Sir John Robinson, C.J., in Counties of Peterborough and Victoria v. Grand Trunk R. W. Co., 18 U. C. R. at p. 224, says that "the doctrine of estoppel can never interfere with the proper carrying out of the provisions of Acts of Parliament." As applied to public rights and public duties, this statement of the law could, if necessary, be fortified by numerous more modern decisions which it is not necessary to cite.

Nor is it a matter of any consequence, in my opinion, that the award is on its face valid, as stated by the learned Chief Justice of the King's Bench in refusing the order. I even doubt if the award is on its face a valid award. True, it states that it is an award under sec. 31 of the Public Schools Act, but it omits to set forth that which made it legally possible to have an arbitration under that section, namely, a difference between the trustees and the ratepayers at a public meeting called for the purpose concerning a site selected by the trustees. I am inclined to think that the award, instead of being good on its face, is at least of doubtful validity for omitting to shew such a difference.

But the matter is not, I think, of the least consequence. Whether good or bad or doubtful on its face, it was an absolutely void proceeding, unless such a difference existed, and its invalidity could have been set up by any one affected by it at any time. The facts were all easily within reach, and it was, I think, the clear duty of the township council, acting judicially and without bias on either side, to have investigated the facts, when they must have found, or been advised, that the award was a mere nullity and in no sense an answer to the application of the trustees.

The appeal fails and should be dismissed with costs.

APRIL 14TH, 1903.

C.A.

REX v. JAMES.

Criminal Law—Keeping Common Gaming House—"Gain"—Payment for Refreshments—Profit—Misdirection—Acquittal of Defendant—Reserved Case—New Trial.

Crown case reserved, heard before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

J. R. Cartwright, K.C., for the Crown.

T. C. Robinette, K.C., for defendant.

OSLER, J.A.—The defendant was indicted for keeping a common gaming house contrary to secs. 196 (a) and 198 of the Code. The former defines a common gaming house as a house, room, or place kept by any person for gain to which persons resort for the purpose of playing at any game of chance.

The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing poker. Out of the stakes which were bet on most, though not all, of the different hands, a sum of 5 cents was withdrawn and put to one side as a "rake-off" to cover the expenses of the cigars and refreshments consumed by the players. The frequenters left as late as 3, 4, or 5 o'clock in the morning.

The manager and proprietor only charged and received the fair price of the refreshments furnished to the frequenters such as would be charged in an ordinary restaurant, and the cost of the cigars sold to them ; 50 to 100 of these would be consumed in the course of an evening, the profit of which would be from 2 cents to 4 cents a piece. No charge was made for the use of the room.

One Repath, an informer who had given evidence in the Police Court before the police magistrate, when defendant was committed, was not present at the trial, being abroad in the United States, and his evidence was read to the jury. It was in effect that he had repeatedly been at defendant's place playing poker, 5 cents ante and 25 cents limit, with a rake-off of 5 cents on each hand, collected by or for the defendant; that this rake-off did not include refreshments, but that refreshments were served, and the amount received by defendant would more than cover the cost of the refreshments ; that he knew defendant and that he had taken about $50 as a rake-off at one sitting of the game. This was denied by the defendant.

The Crown contended that the use of the room in question as an adjunct to the cigar shop was a colourable transaction and that the profit made out of the sale of the cigars alone was sufficient to constitute a keeping "for gain."

The defendant on the other hand urged that the indirect advavtage derived from the sale of cigars was the only benefit derived from playing of the game, and that this was in the ordinary course of his business and was no infraction of the Act.

The learned junior Judge of the County Court, before whom the case was tried with a jury, told them that if the

rake-off was not more than reasonably sufficient to pay the proprietor for what he furnished in the way of cigars and refreshments, then, leaving to one side the evidence of Repath, defendant would not be liable. But, if the amount of the rake-off was so disproportionate to the value of what was actually furnished in the way of cigars and whatever was given in the way of refreshment as to be an actual substantial profit to himself, he thought defendant had broken the law, and that the refreshment business was only a device to evade the statute; and that, apart from the testimony of Repath, the evidence would not sustain a conviction.

The jury found the defendant not guilty, and at the request of the Crown the Judge reserved the following question for the Court of Appeal: "Was I right in my direction as a matter of law, or did the profit made by the defendant out of the sale of the cigars to the persons who frequented his place for the purpose of playing at games of chance, under the circumstances set forth, render him liable as keeping the place for gain?"

The place in question was a room or place kept by the defendant, and it was a place to which persons resorted for the purpose of playing games, or a game, of chance. Was it kept by him for "gain"? The act does not define the word or limit its meaning to gain derived from the rental of the room or a share of or interest in the stakes played for.

"Gain" is "that which is acquired or comes as a benefit, profit, or advantage," and it may be derived indirectly as well as directly.

The defendant was not keeping the room or place heated and lighted until all hours of the night and morning for nothing, or for some benevolent or charitable purpose. It was, or so the jury might have found, an adjunct to his usual business of a cigar dealer. By what he allowed to be done there the profits of that business were increased more or less by the sale of the goods in which he dealt, and so he might be found to have kept it for gain, though the gain was confined to the profits on the cigars which he sold to the players. Such a place as the defendant kept is, in my opinion, one of the places the Act strikes at, and perhaps one of the most dangerous. The question of what is a keeping it for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments which he furnishes to the players. The question for the jury is whether he keeps the place for gain, and they may be properly told that the in-

creased profits of the business derived from the sale of the defendant's goods to the persons who resort to his room for the purpose of play, is some evidence of a keeping it for gain.

For these reasons, I am of opinion that the direction of the Judge was wrong, and that the proper direction to have given is that which I mentioned. As the matter is always one for the jury, the question set out in the reserved case cannot be answered in the precise terms in which it is framed.

I repeat my dissatisfaction with the practice of reserving cases at the instance of the prosecutor after an acquittal, and this case seems to me equally to illustrate its impropriety, as the defendant has been fully tried, and the jury might have convicted him upon Repath's testimony alone. It is a plain case for declining to direct a new trial, even if we have the power to do so.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLENNAN, and GARROW, JJ.A., concurred.

APRIL 14TH, 1903.

C.A.

RAY v. PORT ARTHUR, DULUTH, AND WESTERN R. W. CO.

RAY v. MIDDLETON.

Damages—Breach of Contract—Delivery of Railway Bonds—Evidence —Depositions of Party in Former Action—Admissibility—Necessity for Proof by Witness or Admission of Party.

Appeals by defendants Conmee and Middleton from order of a Divisional Court dismissing their appeals from the report of the Master in Ordinary fixing the value of certain bonds. There were two actions, which, so far as they were in appeal, were brought by plaintiff for himself in the one case, and in the other as executor of E. A. Wild, to recover from Middleton and Conmee, the contractors for the building of the defendant's railway, damages for breach of contract to deliver to the plaintiff $17,500 worth, and to E. A. Wild, $3,000 worth, of bonds of the company, when and so soon as such bonds were handed over to the contractors for their work upon the road. The action was tried before ROBERTSON, J., who gave judgment for the plaintiff against the appealing defendants, and directed a reference to ascertain what was the market value of the bonds on the day upon

which they should have been handed over. The reference was had to the Master in Ordinary, who made his report in which he found the value of the bonds to have been 27 cents on the dollar, and the amount therefore due to Ray in person to be $4,725, and to him as executor of Wild, $2,160. An appeal was taken by defendants Middleton and Conmee to a Divisional Court, which appeal was, together with the plaintiff's cross appeal, dismissed. The appeal to this Court was taken upon the same grounds as that to the Divisional Court, namely, that the Master in making his computation had proceeded upon an incorrect principle by averaging the prices obtained at different sales of bonds, and this without taking into consideration the number sold at each sale, and that the answers of Conmee on his examination for discovery in an action between other parties, and on a different subject matter, had been improperly admitted to shew the value of the bonds.

The plaintiff had a cross-appeal on the ground that sufficient weight had not been given to evidence shewing that the bonds were more valuable than the Master had found.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

Wellington Francis and J. H. Moss, for the appellants.

J. R. Roaf, for plaintiff.

OSLER, J.A.—I am of opinion that the Master's finding or assessment of the value of the bonds which the principal defendants should have delivered to the plaintiff at the date mentioned in the judgment at the trial ought not to be disturbed. I see no safe ground on which we can certainly hold that their value was not, at those dates, at least that which the Master has found it to be, or that it ought to be measured or ascertained then in the light of sales made years afterwards, when, in consequence of unexpected conditions coming into existence, the property of the company whose bonds were the subject of the contract between the parties became depreciated in value and the railway a non-paying concern. I think it is not unreasonable to look at the defendant Conmee's contemporary opinion of the value of the bonds, making every allowance for too sanguine an outlook, and it is perfectly manifest that he would not have parted with them at the times I have mentioned at the rate the Master has fixed.

I have read the cases of Peek v. Derry, 37 Ch. D. 541, 14 App. Cas. 337, Twycross v. Grant, 2 C. P. D. 489, and other cases of a cognate character, but I do not understand

them to lay down any rule controlling the measure of damages as appropriate to the facts of the case at bar.

A question arose in the Court below which was again debated before us as to the admissibility and proof of the deposition of the defendant Conmee taken for discovery in a former action, to which he and his partner, the defendant Middleton, were parties, relating to these bonds. It is elementary that if properly proved such a deposition was admissible as an admission against the deponent and his partner in the subsequent action, but I should have thought it equally elementary that, being only the shorthand writer's copy or report of what the defendant is supposed to have said on his examination in another action, it could only be introduced by viva voce proof by a witness, or defendant's own admission, that it was a true statement of what he had formerly sworn to.

The rules of Court which provide for taking the examination in shorthand and proving it by a copy certified by the examiner and shorthand writer, relate, as it appears to me, only to the procedure in the particular action in which the examination is taken and the manner in which the examination of the party or witness may be taken, used, and proved at the trial of or in the course or for the purposes of that action.

I refer to Rules 456, 457, 458, 459, 461, 483, 485, 486. I find nothing in these rules which can be drawn into support of the contention that an examination of a party or witness taken in shorthand in one action may be proved in another action by a copy certified by the examiner or shorthand writer.

The point, however, is not of much importance here, as the defendant Conmee was examined upon what was said to be a copy of his depositions in the former suit, and it is properly to be inferred from what he said then that he was not denying it to be a statement of what he had formerly said, though he explained or minimized the effect of it. Apart from this, however, his statements of value in former years were deposed to by the plaintiff himself, and it was for the Master to attach such importance to these statements as, in his opinion, they deserved.

I would dismiss the appeal and cross-appeal with costs.

GARROW, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLENNAN and MACLAREN, JJ.A., also concurred.

APRIL 14TH, 1903.

C.A.

RE EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Arbitration and Award—Submission—Appointment of Sole Arbitrator—Arbitration Act.

Appeal by the corporation from order of a Divisional Court, 1 O. W. R. 87, 3 O. L. R. 93, reversing order of STREET, J., 2 O. L. R. 301.

J. H. Moss, for appellants.

G. H. Watson, K.C., and N. Sinclair, for the Excelsior Life Insurance Company.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—A policy of insurance issued by the Employers' Liability Assurance Corporation (hereafter called the corporation) in favour of the Excelsior Life Insurance Company (hereafter called the company), guaranteeing the company against loss which might be sustained by them through the fraud or dishonesty of one of their servants, contained, among other provisions, the following: "This agreement is entered into on the condition that, if any difference shall arise in the adjustment of a loss, the amount to be paid by the corporation shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be final."

The company, alleging that a loss had been sustained by them in consequence of the dishonesty of their servant, appointed an arbitrator on their behalf under this clause, and gave notice thereof to the corporation. Being advised that the submission was one which provided for a reference to two arbitrators, within the meaning of sec. 8 of the Arbitration Act, they further required the corporation to appoint an arbitrator on their own behalf within seven clear days following the service of such notice, failing which the company might appoint the arbitrator already named by them, to act as sole arbitrator. The corporation, contending that no difference had arisen which entitled the company to proceed to arbitration, and that, in any event, they had no power to appoint a sole arbitrator, made no appointment. The company then appointed, and gave notice to the corporation that they had appointed, the arbitrator already appointed by

them, as sole arbitrator. The corporation thereupon applied to Street, J., in Chambers, under sec. 8, proviso, of the Arbitration Act, to set aside the appointment. The learned Judge refused to do so, and his order was affirmed on appeal by a Divisional Court. The corporation now, by leave, appeal to this Court against these orders.

It was contended by the respondent company that the order of Street, J., was made by him as persona designata, and was not subject to be reviewed by the Divisional Court, or by the Court. The short answer to this objection, however, is, that, by sec. 3 of the Arbitration Act, a submission, i.e., a written agreement to submit present or future differences to arbitration, has the same effect in all respects as if it had been made a rule of Court; s.c., the High Court of Justice. When, therefore, a Judge in Chambers entertains an application to set aside an appointment of a sole arbitrator under such a submission, he is not exercising a personal and independent jurisdiction, but is acting as, or for, the Court, exercising the powers of the Court, and dealing with a matter of which the Court is, by statute, already seised, just as he does in exercising many of the other powers which the Act confers upon the Court or a Judge in reference to a voluntary submission, e.g., enlarging the time for making the award (sec. 10), remitting the matters back for the reconsideration of the arbitrators (sec. 11). Under the corresponding provisions of the earlier Act, R. S. O. 1877 ch. 50, sec. 216, before making an application to revoke the appointment of a sole arbitrator, it was necessary in order to confer jurisdiction, to make the submission a rule of Court, which was done as a matter of course, unless it appeared therefrom that the parties had agreed to the contrary. The present Act dispenses with this formal proceeding, and regards the submission as in Court ab initio for the purpose of any motion respecting it: Re Allen, 31 U. C. R. 458, 488; and Re Waldie and Burlington, 13 A. R. 104, 112, may also be referred to.

What we have to deal with, therefore, is a judicial order, which is appealable under the proper conditions.

The question is, whether the submission is one providing for a reference to two arbitrators, within the meaning of sec. 8 of the Arbitration Act, which enacts that, "Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then unless the submission expresses a contrary intention" the arbitrator appointed by one party, may, on the default of the other party to appoint one, be appointed to act as sole arbitrator

in the reference. In such a submission, a provision is implied, unless a contrary intention is expressed therein, that the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award: sched. A (b).

Those, therefore, who become parties to it, do so with the knowledge that if the arbitrators are appointed, the award will not necessarily be made by them, but may, if they do not agree, be made by an umpire; and also that if either fails to appoint his arbitrator, the award may be made by a single arbitrator.

The Legislature is dealing with the contract of the parties, and attaches to it the terms and consequences I have mentioned, unless a contrary intention is expressed. If the contract they have made is not that which the section deals with, but a different one, it cannot apply. The submission before us is, no doubt, a submission to two arbitrators. But it is something more. Clearly, the two arbitrators could not have appointed an umpire. That power, which would otherwise have been implied, is excluded by the language of the submission, which expresses a contrary intention, viz., the intention of the parties not to submit to the award of an umpire.

Equally clear, as I venture to think, is the expression of their intention that the only award by which they are to be bound is one made by two arbitrators, either the two to be appointed by them, or, if they are unable to agree, not by an umpire, but by one of the appointed arbitrators, and a third arbitrator to be chosen by the two. By the very terms of their agreement, they have excluded the operation of sec. 8 (b) of the Act, inasmuch as the appointment of a sole arbitrator is not consistent with an agreement which contemplates and provides for an award by two, or by two out of three.

It was argued very forcibly by Mr. McKay that if you stopped at the end of the first clause, there was a reference to two arbitrators simpliciter, and that one of the parties had the right to apply the statute if his opponent attempted to defeat the submission by making no appointment. But I know of no authority for thus severing what is one entire agreement. It is the right of the parties to enter into such an agreement as will exclude the statute, and when the whole of their agreement in this case is read, the "contrary intention" the Act refers to is seen, namely, that sec. 8 (b) is not to apply, and that the award is to be made, if made at all, by two arbitrators, and not by a sole arbitrator, or an umpire.

Whether the third arbitrator was to be appointed after the other two had failed to agree, or, as I shouid suppose the proper course, before they entered upon the reference, seems to me a matter of little moment. The submission may not be couched in the usual terms of a submission to three arbitrators, but neither is it what may be called the statutory submission to two arbitrators; and, unless it is, I do not see that either party has the right to appoint his arbitrator the sole arbitrator.

It is asked in the judgment entered, why such a submission as we have before us is not quite as much within sec. 8 as is a submission to two arbitrators with power to appoint an umpire; or to two arbitrators simply, saying nothing about an umpire. To which, with deference, I can only answer that the two agreements are entirely different, or seem to me to be so. In one case the parties know that they are entering into a submission under which an award may be made by an umpire; or by what may be described as a statutory tribunal consisting of a sole arbitrator—the arbitrator appointed by one of the parties. In the other, they provide, as they are at liberty to do, for an award by two arbitrators, and exclude the contingencies which may arise and are provided for by the simpler form of submission. The statute, perhaps unfortunately, does not provide for an attempt by one of the parties to such a reference to defeat it by refusing to appoint an arbitrator; but, whatever remedy the disappointed party may have for breach of contract, I think he had no right to appoint a sole arbitrator, as if the Act applied to such a reference.

I agree with the opinion of my brother MacMahon in the Court below; and with the judgment of the Chancellor in Re Sturgeon Falls Electric Light and Power Co., 2 O. L. R. 585, rather than with that of the Divisional Court; and would, therefore, allow the appeal.

APRIL 14TH, 1903.

C.A.

DAVIEAUX v. ALGOMA CENTRAL R. W. CO.

Master and Servant—Action for Wages—Amount to be Recovered—Variation on Appeal.

Plaintiff sued for wages earned as a car-repairer and carpenter in the service of defendants during 1901, and for special services rendered in 1900 in connection with the prosecution of deserters from defendants' employment, and others.

The action was tried before FERGUSON, J., at Sault Ste. Marie, and judgment was given for plaintiff for $227.

The defendants appealed.

W. Nesbitt, K.C., for appellants.

J. P. Mabee, K.C., for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.) was delivered by

OSLER, J.A., who reviewed the evidence and held that the amount of the judgment should be reduced to $208.48, and, with this variation, that the appeal should be dismissed with costs.

APRIL 14TH, 1903.

C.A.

McCULLOUGH v. ALEXANDER.

Negligence—Chattel Mortgage—Race-horse—Loss of—Agency of Trainer—Unsatisfactory Verdict—New Trial.

Appeal by defendant from judgment of STREET, J., in favour of plaintiff upon the findings of the jury for the recovery of $1,100. The action was brought for damages for the loss of a racing filly called "Montreal" of which plaintiff was the owner, and defendant the chattel mortgagee. The loss occurred, as the jury found, by reason of the negligence of one Nixon, a trainer in whose charge the filly was. The plaintiff's claim was based on Nixon's agency for defendant. The jury found the agency proved, and gave plaintiff $1,100 damages.

A. B. Aylesworth, K.C., and R. G. Code, Ottawa, for defendant, contended that Dixon had the filly as agent for plaintiff; that under the admitted facts there was no liability upon defendant; or, at all events, that the findings were against the evidence and the Judge's charge, and the damages excessive.

G. F. Henderson, Ottawa, for plaintiff, contra.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—We have fully considered the arguments of counsel on both sides, and after a careful examination of the evidence are of opinion that the verdict of the jury is so unsatisfactory that it ought not to be allowed to stand. It is right to add that the learned trial Judge is also dissatisfied with the verdict.

In the exercise of our discretion, therefore, we direct that a new trial shall be had between the parties, the costs of the last trial and of this appeal to abide the result. It is not necessary to make any observation upon the evidence further than to say that too much stress appears to have been laid upon the precise time at which the conversation between the parties on the 30th September took place, if even it was on that particular day. That such a conversation did take place seems clear, and it is difficult to imagine any other reason for the defendant's telegram of that day to Nixon, countermanding the order which he had given by the telegram of the 28th to send the horse to Ottawa. We do not mean by anything now said to embarrass the conduct of the next trial, whether it takes place before a jury or before a Judge alone, if he should think fit to dispense with a jury.

APRIL 14TH, 1903.

C.A.

HOLDEN v. TOWNSHIP OF YARMOUTH.

Way—Non-repair—Injury to Person—Approach to Railway—Neglect of Railway Company to Fence—Municipal Corporation—Relieving Enactment.

The action was brought against the township corporation, the Michigan Central Railway Company, and the Canadian Pacific Railway Company, but was dismissed at the trial, by consent, as against the Canadian Pacific Railway Company.

On the 1st November, 1901, plaintiffs, husband and wife, were travelling from the city of St. Thomas towards their home at Yarmouth Centre, along the Talbot road in a buggy; to which was attached a young and spirited horse. The line of railway built and owned by the Canadian Pacific Railway Company, but at the time in question leased or used by the Michigan Central Railway Company, crossed the Talbot road just outside the limits of St. Thomas. The crossing was a level one, but the approach to the track was graded up to reach the necessary level of the track about four feet above the natural level or surface in that vicinity, leaving as a consequence a declivity at each side of that depth. No railing was placed along this declivity, and the absence of such railing was the negligence complained of as against the defendant township corporation. When plaintiffs approached the

crossing in question, a freight train, with a Michigan Central engine, stood on the track. It pulled out of the way, and plaintiffs proceeded to cross, when, just as the rails had been passed, the horse reared and turned sharply to the right, ran down the declivity, and into a private lane, and finally into an orchard, before it was stopped. The plaintiffs were thrown out and injured. The via trita at the place was 21 feet wide. The highway was otherwise in good repair.

The trial Judge gave judgment (1 O. W. R. 557) in favour of plaintiffs as against the township corporation and the Michigan Central Railway Company. Both defendants appealed.

The appeal of the railway company was allowed at the hearing (ante 130).

A. B. Aylesworth, K.C., for appellant township corporation.

W. R. Riddell, K.C., for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A., was delivered by

GARROW, J.A. (after setting out the facts).—I am of the opinion that the finding, so far as the railway is concerned, can only be justified on the ground that the locus in quo is an approach to a railway crossing. . . .

The facts, historically, are rather meagre in the printed case, local knowledge on both sides having been apparently imported as matter for judicial notice rather than proved. One of the witnesses, however, speaks of the highway having been in its present condition since 1893, which was probably the date of the construction of the railway. There is no evidence that sec. 186 of the Railway Act, 51 Vict. ch. 29 (D.), was never complied with. That section requires that any approach by which any roadway is carried over or under any railway or across it at rail level shall not be greater than one foot of rise or fall for every twenty feet of the horizontal length of such approach, unless the Railway Committee direct otherwise, and a good and sufficient fence shall be made on each side of such approach . . . which fence shall be at least four feet in height from the surface of the approach. This imposes a plain statutory duty not involving any nice questions of reasonable repair, etc., such as would undoubtedly lie against the railway company at the instance of any one who had suffered injury owing to a neglect of such duty. The railway company in default in the present instance were the defendants the Canadian Pacific Railway

Company; and, if any of the defendants should pay, that company is the one apparently primarily liable. That liability, however, cannot now be made effectual, because . . . the action as to that company was dismissed at the trial with the plaintiffs' consent.

Under these circumstances, it appears to me that sec. 611 of the Municipal Act, which was not brought to the notice of the learned Chief Justice, affords a complete defence to the defendants the corporation of the township of Yarmouth. By that section it is provided that nothing contained in secs. 606 to 610 (which impose the statutory duty upon municipal corporations to keep their highways in repair) shall cast upon the municipal corporations any obligation or liability in respect of acts done or omitted to be done by other persons, companies, or corporations, acting in the exercise of powers or authorities conferred upon them by law, and over which such municipal corporations have not control.

Section 611 was first introduced in the Municipal Amendment Act, 1896, 59 Vict. ch. 51, sec. 22 (O.) Before the last mentioned statute it had been held, under states of facts not unlike those in question here, that a prior neglect by a railway company of its statutory duty with respect to approaches to crossings did not excuse the municipal corporations from their statutory obligation to keep such approaches as part of the highway in repair: Mead v. Township of Etobicoke, 18 O. R. 438; Fairbanks v. Township of Yarmouth, 24 A. R. 273.

The injury in the latter case took place on 23rd February, 1895. The judgment of the learned Chancellor, who tried the case, was given on 13th February, 1896, or about two months before the final passing of the statute before referred to, which was assented to on 7th April, 1896—probably passed in consequence of these decisions.

It is not, I think, necessary to say more than that, in my opinion, the facts in this case very clearly fall within the exception created by sec. 611, rather than within the rule as stated in sec. 606, and that, for this reason, the defendants the corporation of the township of Yarmouth are not liable to the plaintiffs' claim, and the appeal by these defendants should, therefore, be allowed, but, under the circumstances, without costs, and the action dismissed with costs.

APRIL 14TH, 1903.

C.A.

THOMPSON v. COULTER.

Evidence—Corroboration—Action by Executors for Money Demand—Defence of Payment in Cash to Testator—Testimony of Defendant—Corroborating Circumstances.

Appeal by defendant from judgment of a Divisional Court, 1 O. W. R. 205, reversing judgment of BOYD, C., who dismissed the action.

The plaintiffs were the executors of John David Thewes, and the action was brought to recover from defendant $1,000, in connection with the purchase of certain land by defendant from deceased. The question in dispute was whether the $1,000 had actually been paid to Thewes by defendant, as asserted by the latter. The $1,000 had been deposited in a bank by defendant to deceased's credit, and defendant said that deceased gave him the pass-book relating to the deposit, and a cheque for the amount, and he (defendant) drew out the money and gave it to deceased.

The Divisional Court held that the onus of shewing payment was on defendant, and that he had not satisfied it by his own uncorroborated statement that he had paid it to Thewes in cash, when the latter was in a hospital.

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

F. E. Hodgins, K.C., for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

GARROW, J.A. (after setting out the facts).—The issue is purely one of fact, and must depend for its solution upon the credit to be attached to the defendant's testimony as given in the witness box. The learned Chancellor, who saw the witness and heard his evidence, considered him a credible witness, and dismissed the action. The Divisional Court do not treat him as worthy of credit . . .

Assuming then . . . that defendant's account of the matter is credible and ought to be believed, the test from the standpoint of the Divisional Court is, has it been corroborated? I do not quarrel with that test, although, with deference, I think there is sufficient corroboration: Radford v. Macdonald, 18 A. R. at p. 171; Green v. McLeod, 23 A. R. 676. . . . What are the corroborating circumstances here? Thewes was a smart, shrewd old man, keeping a sharp

look-out upon his money. There is not a particle of evidence that he in any way trusted defendant. On the 12th May he would not even put his name to the deed till the whole purchase money was either in his own hands or under his control in the bank. This is proved by Mr. Smith, as well as by defendant. Is it probable or reasonable to presume that on the 29th of the same month he permitted the defendant to obtain his bank book and a signed cheque for $1,000, and to keep the proceeds without any written evidence in the way of a receipt, note, or otherwise? If defendant acted, as he says, as a mere messenger, and handed over the money at once, the absence of such written evidence would be probable. If he did act as such messenger merely, and failed to hand over the proceeds, there would have been an immediate outcry, one would think, and the criminal law would have been invoked. If, on the other hand, the transaction . . . . amounted to a loan or a trust, and involved defendant's keeping the money for a time, the absence of any writing is quite extraordinary, under the circumstances.

It appears that in July Thewes gave an order to Father Langlois to get this money. The order is ambiguous, but, let us assume that it is, as plaintiffs contend, an order to pay over the money to Father Langlois. Father Langlois wrote to defendant to send him the money—so he says. Defendant's account of the letter, which was not produced, was that it simply said Thewes wanted to see defendant. And accordingly defendant visited Thewes in the hospital, and was there told by Thewes to pay no attention to Father Langlois. . . . No further demand was made . . . in Thewes' lifetime. . . . The state of Thewes's mind towards Father Langlois, as described by defendant, is corroborated by the witness Gabau, who says that when Thewes was ill and alone in his house. . . . witness advised Thewes to send for Father Langlois, but Thewes refused, saying that if Father Langlois came, he would only come on speculation and would want his (deceased's) property. This appears to me to be a material corroboration, and to explain the order of July, which was intended to put Father Langlois off the track. This is strengthened materially by the fact that if the order was really intended to be acted upon, nothing was ever done under it, but to write the one letter, to which no reply was made except the visit.

Appeal allowed with costs and judgment of the Chancellor restored.

APRIL 14TH, 1903.

C.A.

FIRST NATCHEZ BANK v. COLEMAN.

Company—Indorsement of Promissory Note—Transfer to Bank—Action by Bank against Maker—Defence that Bank not Lawful Holders—By-laws of Company—Provision as to Indorsing Notes—Non-compliance with—Transfer of Debt Represented by Note—Powers of Directors—Authority of Solicitor.

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., dismissing an action on a promissory note for $2,000 made by defendant to the order of the Vidalia Lumber and Manufacturing Company (of Vidalia, Louisiana), and endorsed to plaintiffs.

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

E. L. Dickinson, Wingham, and J. L. Killoran, Seaforth, for defendant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, JJ.A.) was delivered by

MOSS, C.J.O.—Defendant set up that plaintiffs were not the lawful holders of the note, and a special defence to the effect that the note was to be paid out of the defendant's share of the profits derived from the business of the Vidalia Lumber and Manufacturing Company, and not otherwise. The trial Judge admitted, against objection, parol evidence in support of the last defence, and held it to be established. . . . The burden of sustaining the defence that he was not to pay the note unless out of profits, lay upon the defendant. The evidence in support of it appears far from satisfactory, and there are many circumstances tending to cast doubt upon defendant's contention.

But we are constrained to give effect to the defence of the bank not being the lawful holders of the the note, or of the debt which it represents.

If the bank are to be held to their pleading, and the action is to be dealt with as on the promissory note merely, we think the bank failed to prove that the indorsement was signed by a person duly authorized to indorse on behalf of the lumber company, and therefore the note was not duly indorsed to the bank.

On the other hand, if we consider that we ought to treat the action as one founded on an assignment to the bank of the debt, there are insuperable difficulties in the bank's way.

. . . The company were authorized to issue notes. . . . The business and affairs were to be under the management of a board of three directors, and all the corporate powers were vested in the board . . . Coleman (the defendant), Dickson, and Sloan were constituted the board, with the defendant as president, Dickson as vice-president, and Sloan as secretary and treasurer. The board were empowered to make rules and by laws. . . . One of the by-laws provided that all cheques, drafts, promissory notes . . . should be signed by the secretary-treasurer and the president. Another provided that all other contracts intended to bind the company should be executed by affixing the corporate seal, evidenced by the signature of the secretary-treasurer and that of the president. . . .

Fifty shares were allotted to defendant at first. . . . The promissory note in question was given in connection with the allotment of twenty additional shares to defendant. It bears date the 20th February, 1900, and is payable to the Vidalia Lumber and Manufacturing Company, Limited, or order. It is indorsed: "Vidalia Lumber and Manfg. Co., Limited, per Arch. S. Dickson, Vice-President and Acting President."

The defendant was absent from the place of business of the company, and had been for some months, but he had not resigned his position, nor had his place on the board been declared vacant or filled by the appointment of another shareholder. He was not asked to indorse or put his signature to an indorsement, and there was no resolution of the board appointing the vice-president to indorse in his stead, or rescinding or varying the two by-laws regulating such an act.

The only warrant for Dickson's action . . . is an entry in the book of minutes of directors and shareholders' meetings, purporting to be the proceedings at a meeting of directors held on the 1st February, 1901. . . . Sloan and Dickson assumed to adopt a resolution which . . . authorized Dixon, the vice-president, the president being absent, to sell and deliver to the bank all the property, debts due the company, and its effects, in full settlement of the bank's claim. . . .

The resolution, even if a valid act of the board, falls short of an authority to Dickson to make the indorsement. It does not assume to dispense with all the requirements of the by-laws in question as to making a transfer of a note. If it can be said to substitute the vice-president for the president, it does not do away with the other provisions of the by-laws as to the signature of the secretary-treasurer or the seal.

But it was not a valid act of the board, and constituted no authority to Dickson to do any act of sale or delivery of property belonging to the company. . . . Assuming that the board of directors had power to sell and transfer to the bank all the company's property in settlement of the bank's claim, there is no authority for the proposition that two out of the three could do so without calling a meeting for that purpose and notifying the third. The English authorities are directly to the contrary, and so are many American decisions: Portuguese Copper Mines Co., Steele's Case, 42 Ch. D. 160; In re Homer Mines, Ex. p. Smith, 39 Ch. D. 546; Deambrocker v. Columbia City Lumber Co., 28 Pac. R. 899; People v. Catchellor, 22 N. Y. 134; Harding v. Vandewater, 40 Cal. 77.

No case from Louisiana has been cited in support of the action of the two directors, and the two instances cited seem to turn upon their own circumstances: Chase v. Tuttle, 55 Conn. 455; Edgely v. Emerson, 3 Foster (N. H.) 555. . . .

The same objections apply if it is sought to recover upon the debt. It is true that a notarial instrument is produced by which Dickson purports, as vice-president, and under the authority of the resolution of the 1st February, to sell and transfer to the bank all the assets of the company, including the promissory note in question. This instrument is not executed as required by the by-law which calls for the affixing of the seal, attested by the signatures of the secretary-treasurer and the president. And there is no valid action of the board dispensing with these requisites.

We cannot accede to the argument that Mr. Boetner (the attorney for the company upon an application by the bank for a receiver) was duly authorized to enter into such a bargain or contract on behalf of the company by virtue of his engagement or retainer to represent it in the application for a receiver. His action in this respect was not submitted to three of the five shareholders of the company, and they were afforded no opportunity of expressing an opinion on the subject. Whatever powers the directors, or the whole body of shareholders, may have to dispose of the whole assets and terminate the business of the company, they were not exercised by them. We think the instrument in question did not transfer the debt to the bank.

We do not think these conclusions are open to the objection that this is a collateral attack on the assignment or the proceedings on which it is founded.

The bank is obliged to rely upon the instrument as establishing its right to maintain the action as assignee of

the debt. The defendant, therefore, has a right to insist upon the bank shewing an assignment validly executed so as to legally transfer the property, and in this the bank has failed. . . .

But we think the dismissal of this action should not prejudice any other proceeding in case the bank is able hereafter to procure a valid assignment or indorsement to be made, or in case an action is brought by the company. . . .

Appeal dismissed with costs.

APRIL 14TH, 1903.

C.A.

MANN v. GRAND TRUNK R. W. CO.

Deed—Construction—Gravel—Taking and Removal—Ownership of Land—Evidence—Damages.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., 1 O. W. R. 230, in favour of plaintiffs in an action for damages for conversion by defendants of a quantity of gravel taken by defendants from certain lands of plaintiffs, granting an injunction restraining defendants from further interfering with the deposit of gravel and awarding plaintiffs $350 damages with costs.

The facts appear in the reports of the decision upon a previous trial, 32 O. R. 240, and in appeal, 1 O. L. R. 487.

This appeal was heard by MOSS, C.J.O., OSLER, GARROW, JJ.A.

H. S. Osler, K.C., for appellants.

J. H. Moss, for plaintiffs.

MOSS, C.J.O.— . . . The first contention is, that it is not proved that the parcel or strip of land from which it is alleged the defendants removed gravel is the plaintiffs' property. . . .

Both parties claim through the same grantor, William C. Benson. The deed from him to the Buffalo and Lake Huron Railway Company, through which the defendants claim, in the words of their defence, "that they acquired and became possessed of the right to take for their own purposes and the purposes of their railway the said gravel and rights of way to and from the beach or margin of Lake Erie for their purposes as aforesaid," has upon it a map or plan shewing Lake Erie as the southern boundary of the parcel of lot 4 in question. This instrument is in itself evidence of dealing with

any acts of ownership in connection with the property, even without the proof of the defendants having acted under it: Doe v. Pulman, 3 Q. B. 622.

There is a roadway north of the beach or edge of Lake Erie, running through the range of lots and following the lake shore, but the evidence is that it is a "forced" or trespass road, and not an original reservation or allowance. The plaintiffs and those through whom they claim appear to have exercised acts of ownership on the strip south of the roadway by erecting and using buildings spoken of as a blacksmith's shop and an ice house. Certain maps or plans which are deposited in the registry office of the County of Haldimand were produced, which indicate that the range of lots in question go to the water's edge of Lake Erie, and there is some, though not very satisfactory, evidence as to the field notes of the original surveyors shewing that they ran the lines of the lots through to the water's edge. In 1860 one of the maps or plans above spoken of was prepared by one Henry Lowe, P.L.S., under the instructions of and for the township of Moulton. He says he prepared it from surveys made by himself and others and from other material and information, including the field notes of the original surveyors, from all which he concluded that the lots ran through to the water's edge, and so indicated them in his map or plan. While this evidence may not be conclusive as against the Crown, I think it is sufficient, in the absence of anything to the contrary, to shew title in the plaintiffs as against the defendants.

The defendants' next contention is, that the deed from Benson to the Buffalo and Lake Huron Railway Company is either a grant of the strip in question in fee or a grant to take and remove gravel in perpetuity—a license of profit or profit a prendre.

But I think it is nothing more than a sale and transfer of the gravel upon the lands at the time of the deed, with a right of way or access to and from the place where the gravel was situate. It does not purport to grant or convey any estate in the land or any interest save such as was necessary to enable the railway company to remove what it had purchased.

The statement in the deed that "the extent and description of the said land covered by and containing the gravel hereby conveyed" shews plainly what is conveyed, viz., the gravel as distinguished from the land, and emphasizes the previous grant of "all and singular the gravel situate and being and comprised within" the parcel of land. I read

this as a present grant of the gravel in the land at the date of the deed, and of nothing more. I entirely agree with the view of the deed and of the defendants' rights under it taken by Meredith, C.J., in 32 O. R. at p. 241.

Such being the effect of the deed, I think the evidence shews that the defendants have taken large quantities of gravel which did not belong to them from the plaintiffs' premises. . . .

The last objection to the judgment is, that there was no evidence on which to base a finding of $350 or any other sum as damages. The evidence is, that during 1897 the defendants were engaged in removing gravel from the plaintiffs' and two adjoining premises at the rate of 90 to 100 carloads per day for three weeks, and that during 1898 they removed at the same rate for nine weeks or longer. Each car held on an average 8 cubic yards, valued at 10 cents per yard. The exact quantities taken from each place could not be ascertained, but it is plain that a large number of car loads were taken from the plaintiffs' premises.

Upon the evidence a jury might, and I think probably would, have awarded a greater sum for the trespasses and damages done, and I think the amount fixed by the learned Chief Justice is reasonable and well supported by the evidence.

The appeal should be dismissed with costs.

OSLER, J.A., dubitante, concurred.

GARROW, J.A., concurred.

APRIL 14TH, 1903.

C.A.

SPOONER v. MUTUAL RESERVE FUND LIFE ASSN.

Life Insurance — Validity of Policy — Transfer of Insurance from one Company to Another—Novation—Payment of Premiums—Estoppel.

Appeal by defendants from judgment of ROBERTSON, J., 1 O. W. R. 566, 583, in favour of plaintiff in an action upon a policy of life insurance.

The appeal was heard by MOSS, C.J.O., MACMAHON, J., STREET, J.

C. Robinson, K.C., and R. B. Henderson, for appellants.

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

Moss, C.J.O.— . . . George Spooner was a member in good standing in the Covenant Mutual Association at the date of the agreement between that company and the North-West Life Association, and as such his policy was accepted by the latter company. He assented to the arrangement and paid premiums, and so became a member of that company. Then he did not assent to Hoover's proposal to become a member of the Home Life Association, but decided, notwithstanding the arrangement said to have been effected between it and the North-West Life Association, to remain in the latter company, and he did so remain and pay premiums until the arrangement of the 1st September, 1900, between the North-West Life Association and the defendants, was consummated. That he was considered and treated as still a member and liable for premiums to the North West Life Association is shewn by its secretary's letter to him of the 24th August, 1900, enclosing notice of premium due on the 24th September, "on your policy or certificate of membership issued by the Covenant Mutual Life Association of Illinois, and assumed by the North-West Life Association of Chicago." Not only was he retained as a member, but, as appears from the letter, the amount of premium rates on his policy or certificate was considerably increased by a resolution of the 15th May, 1900, some months after the date of the Home Life agreement. Before the premium fell due, the North-West Life Association consummated the arrangement with the defendants, and the latter company thereupon accepted Spooner as one of the members of the company, who was (in the words of the agreement) "in good standing at the date and time this contract is ratified and approved of by the members of the said company," and the defendant dealt with him as such, and he was notified by the defendants by circular letter of the 1st September, 1900, that he had been transferred to and reinsured in the defendants, and that there would be sent him in a few days official evidence of the assumption of his insurance, and that, in the meantime, his insurance was protected. He was further notified by circular letter issued by defendants, and dated the 10th September, that they had assumed every policy or certificate in good standing on the 1st September, and he was required to pay the premium to them. And on the 14th September, 1900, they accepted from him the amount of the premium payable on the 24th September, and gave him a formal receipt therefor. The receipt is expressed to be on account of premium on policy No. 108273, i.e , the number of Spooner's policy or certificate from the Covenant

Mutual Life Association. From that time until the date of his death, Spooner was a member insured in the defendants' association, upon the terms of the agreement between it and the North-West Life Association. It was not necessary to the further assurance of his or the plaintiff's rights, that he should take any further steps except continue to pay premiums as they fall due. So far as he was concerned, no new or substituted policy was needed, but the defendants were entitled, if they wished, to replace the Covenant Mutual Life Association assessment policy or certificate, by a standard policy with a fixed premium.

The defendants, however, contend that, before the agreement between them and the North-West Life Association, there was an agreement between the latter and the Home Life Association, which the learned trial Judge refused to receive in evidence, and which shewed conclusively that Spooner's policy or certificate was never transferred by the North-West Life Association to the defendants.

It is doubtful if the defendants are entitled to take this position. They dealt with Spooner as one who, with his policy or certificate, had been transferred to and accepted by them, and they received and accepted his premium on that footing. To this they were not moved by any act or representation of Spooner or the plaintiff. They had not shewn that they acted under any mistake or misapprehension, and they should not, now, be permitted to take a contrary position.

Although not prepared to say that the learned Judge erred in rejecting the agreement with the Home Life Association, we have examined it and do not think there is anything in it to shew that Spooner was not a member transferred to and accepted by the defendants.

He was not bound to agree to or accept the arrangement with the Home Life, and he refused to do so. Between the date of that arrangement and the agreement with the defendants, he had had no dealings with the Home Life. And at the latter date he was still a member of the North-West Life Association, and was wholly unaffected by its agreement with the Home Life. This being the case, the agreement with the defendants expressly applied to him, and he accepted it and was accepted by the defendants. Under these circumstances, the plaintiff is not driven to rely upon the standard policy issued by the defendants. But it is important to observe that, on the face of that policy, the defendants recognize Spooner as a member entitled under policy No. 108273, and that they propose to continue him as a member upon the terms stated. One of the terms is that it is not to take effect

until the payment of the first premium in Spooner's lifetime, and he died before the premium became payable. In every other respect, however, Spooner literally complied with the terms and conditions upon which it issued. The contention or suggestion that he made use of his membership in the Covenant Mutual Life Association to obtain another policy for the same amount from the Home Life Association, and that he agreed to deliver up the policy or certificate for cancellation, does not assist the defence. In strictness, the application to the Home Life Association does not contain an undertaking to deliver up the policy or certificate in question, or any policy, though that may be implied. But, assuming that it does so, such an undertaking was no prejudice to the defendants, and in fact the policy or certificate was never delivered up or cancelled. Even if the intention in sending it to Hoover was that he might send it to be cancelled, which the evidence shews it was not, the intention was not carried out. It was recalled, and was sent to the defendants, and they now produce it.

And even if the Home Life Association has been improperly induced to issue their policy without a re-examination of Spooner, the defendants have not been prejudiced, nor has their position been altered or affected thereby.

Their liability rests upon the contract effected on the 14th September, 1900, when they accepted Spooner's premium in pursuance of their agreement with the North-West Life Association, and the circular letters sent to Spooner before that date. And that liability has not been in any way displaced by any act of Spooner or the plaintiff.

The appeal ought to be dismissed.

STREET, J., gave written reasons for the same conclusion.

MACMAHON, J., concurred.

APRIL 14TH, 1903.

C.A.

RE EQUITABLE SAVINGS, LOAN, AND BUILDING ASSOCIATION.

Company—Order for Dissolution of—Ontario Winding-up Act—Application by Shareholders to Rescind—Power of Judge to Rescind—Final Order—Appeal—Ex Parte Order.

Appeal by the liquidators of the company from an order of the junior Judge of the County Court of York rescinding two orders previously made by him, under the circumstances stated below.

The appeal was heard by OSLER, MACLENNAN, and GARROW, JJ.A.

A. B. Aylesworth, K.C., and A. McLean Macdonnell, for appellants.

G. F. Shepley, K.C., and C. D. Scott, for respondents.

OSLER, J.A.—Proceedings were taken by the directors and shareholders of this company under the Winding-up Act of Ontario, R. S. O. 1897 ch. 222, by which it was placed in voluntary liquidation with a view to its amalgamation with or the transfer of its assets to another company, called the Colonial Investment and Loan Company. An agreement, authorized by special resolution passed at a special general meeting of the company, was duly executed, and the terms of this agreement had been so far carried out by the transfer of the assets of the company, and arrangement for allotment to their shareholders of shares in the Colonial company, as, in the opinion of the liquidators, to warrant an application to the Court, i.e., the County Court, for an order for the dissolution of the company, under sec. 41 of the Act. Such an application was accordingly made to the junior Judge of the County Court of York, on the 24th March, 1902, supported by the affidavit of one of the liquidators, in which all the proceedings which had been theretofore taken, including the agreement between the two companies, were set forth, and the learned Judge thereupon made an order "that the Equitable Savings, Loan, and Building Association be, and the same is, dissolved."

It is stated in the reasons of appeal, and was assumed or not denied on the argument, that this order had been reported by the liquidators to the Provincial Secretary, as required by sec. 41, though I do not find this fact stated in any of the affidavits filed before the Judge in the subsequent proceedings now in question.

On the 7th April an order was made by the Judge, on the application of the liquidators, that no action or other proceeding should be proceeded with or commenced against the Equitable Loan Association, except with leave of the Court and subject to such terms as the Court might impose.

It appeared that on the 24th March, 1902, an action had been commenced and a writ served upon the liquidators of the company by one Riviere, for the purpose of setting aside all the proceedings leading to a transfer of the assets of the Equitable and to restrain the liquidators from carrying out the agreement and completing the transfer.

Whether this writ had been served before the application for the order of the 24th March, does not appear. The action seems to have been afterwards settled.

On the 17th April notice of motion was given on behalf of certain other dissatisfied shareholders, of an application to be made to the Judge to set aside and vacate his orders of the 24th March and 7th April.

The application was made accordingly, and judgment reserved thereon until the 21st June, 1902, when an order was made vacating and discharging the two orders in question. In his written judgment the learned Judge says that, from the representations made to him, and the materials presented to him, on the application for the order to dissolve the company, he was satisfied that there had been a full and complete winding-up of the affairs of the company, so as to warrant the issue of the orders, but that he is now satisfied that the orders were made prematurely, and ought to be set aside.

It does not appear that any statements or representations were made by the learned Judge other than those set forth in the affidavit of the liquidators.

The liquidators now appeal from the order of the 21st June, contending that the Judge of the County Court had no jurisdiction to make it. Counsel for the dissatisfied shareholders support its validity, and attack the regularity and sufficiency of the order of the 24th March and of the earlier proceedings. They also contend that the order of the 21st June is not a final order, so as to be the subject of an appeal within the meaning of sec. 27 of the Winding-up Act.

I am of opinion that the order of the 21st June is an appealable order. Section 27, sub-sec. 1, enacts that "any party who is dissatisfied with *any* order or decision of the Court in any proceeding under the Act, may appeal therefrom," and by sub-sec. (2) no such appeal shall be entertained unless the appellant has "within 8 days from the rendering of such final order or judgment" taken proceedings on the appeal, and given security that he will duly prosecute it. If an appeal is confined by this language to final orders, restricting the wide language of sub-sec. 1, we have no definition of what is essential to that quality. The final order is not contrasted, as in sec. 52 of the County Courts Act, with orders "merely interlocutory:" McPherson v. Wilson, 13 P. R. 339; Baby v. Ross, 14 P. R. 440.

In this case the learned Judge had made what appears to me to be a discretionary order under sec. 41, dissolving the company. I am inclined to think that in a case of voluntary liquidation he is not bound to make an order under that sec-

tion, but may leave the liquidators to proceed under sec. 40.

It may be that no appeal would lie from his refusal to make such an order, though it is unnecessary to decide and I do not decide this. He did, however, make it, and the result was, if he had authority to do so, that the company was dissolved. Thereafter he assumed to make the order now in question, rescinding and vacating his former order. If he had authority to make that order, the status of the company was restored, and it appears to me that such an order is properly described as a final order, since it undid and put an end to the order of dissolution which upon the facts the learned Judge seems to have thought he had no authority to make. Upon the same state of facts, or in the exercise of his discretion, he would not or might not make a similar order in the future, and on these grounds the order of the 21st June may properly, I think, be regarded as a final order and therefore appealable: Re D. A. Jones Co., 19 A. R. 63; Re Essex Centre Mfg. Co., 19 A. R. 125; Re Haggart Mfg. Co., 20 A. R. 597.

The next question, and, in my opinion, the only other question on the appeal, is whether the learned Judge had authority to make the order of the 21st June, rescinding that of the 24th March. It appears to me, upon full consideration, that he had not. The order of the 24th March was an appealable order, and any one of the shareholders might have appealed to this Court against it, on any of the grounds on which it is now suggested that it is wrong. It is true that it was an ex parte order, and under certain circumstances a Judge who has made such an order may rescind it before it has been acted upon, as for example where it was obtained by fraud or misrepresentation, or by suppression of material facts. Many of the authorities are collected in the case of McNab v. Oppenheimer, 11 P. R. 214, before the late Mr. Justice Rose. But in the case at bar, the facts and circumstances on which the learned County Court Judge acted as furnishing reasons for rescinding his order, were all set forth in the affidavit of the liquidator in support of the application for it, and the papers and documents referred to herein as exhibits. There is no reason for saying that the learned Judge was misled, or that any fact was suppressed. He merely took a different view of the facts from that which he now thinks he ought to have taken. He thinks the order of the 24th March was premature, and his reasons for so thinking are the facts disclosed in the affidavit which was then before him. That only shews that the proper way to have attacked that order was by appeal, not by an application

to the Judge who made it to rescind it after it had been acted upon and become effective. I am, therfore, of opinion that the order of the 21st June, in so far as it attempts to vacate and discharge the order of the 24th March, is one which the Judge had no authority to make, and that the appeal therefrom should be allowed. As regards the order of the 7th April, if there were any authority to make it at that time, it was in its nature one which remained subject to be controlled or avoided by the Court—an order staying proceedings until further order—and therefore, valeat quantum, I see no objection to an order discharging or setting it aside. Whether an action will lie at the suit of the respondent shareholders, notwithstanding the order of the 24th March, it is not for us now to decide, though I may say that I am not strongly impressed with the merits of their contention. It may be that the existence of the condition on which the Judge is authorized to make it will be found of more importance than it has been said to be in the case of a dissolution under the section of the Imperial Act (1862) which corresponds with sec. 40 of our Act: Buckley on Joint Stock Companies, 7th ed., pp. 359, 360.

I think the appeal should be allowed with costs.

GARROW, J.A., concurred.

MACLENNAN, J.A., dissented, giving reasons in writing.

APRIL 14TH, 1903.

C.A.

LEE v. CANADIAN MUTUAL LOAN AND INVESTMENT CO.

Mortgage—Building Society—Monthly Payments—Maturity of Shares—Depreciation of Assets—Deduction from Amount Credited to Shareholders—Right to Discharge—Novation—Interest—Premium—Bonus.

Appeal by plaintiff from judgment of MACMAHON, J., at trial (3 O. L. R. 191) dismissing action with costs, but allowing plaintiff to redeem on the usual terms. The action was brought to have it declared that a certain mortgage for $1,200 made by plaintiff to the Standard Loan and Savings Co., and subsequently transferred to the defendants, was fully paid and satisfied, and for the return of the excess of payments over and above the principal and interest reserved in the mortgage. The mortgage provided for the payment monthly for 96 months of $18.49, made up as follows: $6.49 interest at six per cent: $7.20 monthly subscription on shares in the company, subscribed for shortly before the execution

of the mortgage, and $4.80 premium to the company for making a loan upon unrealized stock. Promissory notes for $18.49 each had been signed by plaintiff payable at intervals of one month for 96 months, and these had been met as they fell due. He then tendered a discharge to the defendants, the assignees, who refused to execute it on the ground that the stock, to the loan upon which the mortgage was collateral, had not been fully paid. At the time of the transfer from the Standard Loan Company to the defendants, the plaintiff had withdrawn his stock from the former and transferred it to the latter. The by-laws of the latter at the time of the transfer provided that the premium for a loan on unrealized stock should be 40 cents per share per month for seven years or until the stock matured, whichever happened first. By a subsequent by-law the premium was required to be paid until the stock matured, no matter how long this might be. As there was a depreciation in the assets of the Standard Loan Company amounting to 38 per cent. thereof, there was, instead of profits to add to the shares, a proportionate share of the depreciation to be deducted therefrom, and the plaintiff found that, when he had paid his 96 promissory notes, there was still between $500 and $600 to pay upon the stock.

The appeal was heard by MOSS, C.J.O., OSLER and GARROW, JJ.A.

W. J. Clark, for appellants.

G. F. Shepley, K.C., and A. McLean Macdonnell, for defendants.

GARROW, J. A. (after setting out the facts).—The defendants' real contention is, that the shares for which the plaintiff subscribed have not yet matured; that the profits expected have not been realized; that, indeed, instead of profits, the Standard Loan and Savings Company made a large loss; and that, although the plaintiff has already paid the sum of $1,775.04, he must continue to pay until he pays $631.94 more to enable the shares to mature; and they rely on their by-laws, which undoubtedly, as do those of the Standard Loan and Savings Company, provide that shares such as those in question shall mature when they reach $100 by the aid of payments and profits. To this contention MacMahon, J., who tried the case without a jury, acceded. In his judgment the learned Judge apparently relies upon the case of Williams v. Dominion Permanent Loan Co., 1 O. L. R. 532. But that case is, I think, unlike this in at least one material feature, viz., that there the agreement set forth in the mortgage was to repay in monthly payments according

to the by-laws and rules of the association; the provision for payment was in monthly payments according to the tenor of the rules and by-laws, until the shares shall have matured; and the proviso for reconveyance is on repayment according to the rules and the provisions of the mortgage being complied with. In the present case the payments to be made are exactly specified. There are to be ninety-six monthly payments of $18.49 each, and the proviso for reconveyance is, "provided this mortgage is to be void upon the performance by said member of his hereinbefore recited agreement, and upon payment of taxes and performance of statute labour, and of the covenants and provisoes hereinafter contained." The "hereinbefore recited agreement" has been before set forth, and need not be repeated. The covenant for payment is that he will duly and punctually from time to time make the several payments as aforesaid, according to the above proviso; and also that he will observe and perform the laws and rules for the time being of the said association with respect to "the said shares and of the repayment of the said advance, and will pay all fines and forfeitures imposed on him under said rules and by-laws." It must not be forgotten that there is here no question between the members and creditors. The questions are wholly as between investing and borrowing members inter se. Nor must it be forgotten that this application which the Standard Loan and Savings Company accepted was for a loan to be repaid in eight years. The rules of that company then in force provided that loans should be made at six per cent., and should be repayable in monthly payments extending over eight years, with the option of repayment in two years, in which latter event interest only for the time the money was kept would be charged. These rules are to be treated as if incorporated in the mortgage, and read as part of it. And they must be so read and construed as to give the proper effect, not only to them, but to the other rules before quoted, which require payments upon ordinary stock to be made until with profits such stock matures. The plaintiff is a borrower, not an investor. He was to pay, not to receive, and he was to pay until he had repaid the loan and interest. It is true he is called, and for many purposes is, a member, and, as such, is subject to the rules from time to time applicable to his case. But it is clear that both these classes of rules are not applicable to him. He must, as a borrower, under an explicit rule, repay the loan and interest in eight years. The mortgage explicitly calls for ninety-six monthly payments, which he has duly made. Prima facie one would

think that should be an end of the matter; that, having made the stipulated payments, he is entitled to his discharge, and a reconveyance of his land, which he only agreed to place in pledge for the eight years, and not for sixteen, or, it may be, sixty years, if losses instead of profits are continuously made.

In my opinion, the proper way to apply both classes of rules is to read those which provide for payment until maturity as applicable to the investing member only, unless the borrowing member by his mortgage expressly agrees, as in the Williams case, to repay until the shares mature. To impute such an agreement here, however, is, I think, to contradict the express terms of the contract, which was, in effect, an agreement for a loan for eight years only, with the option to pay off at any time after two years, by paying the principal and interest at the stipulated rate, for the time the money had been kept.

The distinction between a borrowing member and an investing member, where there was, as here, no question of the rights of creditors, was pointed out very clearly in Brownlie v. Russell, 8 App. Cas. 235, and in Tosh v. North British Building Society, 11 App. Cas. 439. . . .

Each payment a borrower makes is pro tanto a discharge of his liability, and cannot be recalled, nor losses charged up against him, unless under proper by-laws duly passed and applicable equally to all members. He is so far a member that, during the period he has agreed to occupy the position of mortgagor or mortgagor-member, he is bound by the rules of the association in force when he joined or became a member; and is even subject to new rules properly and validly passed, so long as they are intra vires and do not alter his contract: Bradbury v. Wild, [1893] 1 Ch. 377 at p. 385. In that case it was held that a new rule to levy an assessment to cover losses was not an alteration of the advanced member's contract. Each case must, of course, depend upon its own particular facts. The contract there was in terms much more like the contract in Williams v. Dominion Permanent Loan Co., before cited, than the one in question in this case. But, even if the contract here would justify the application of the same principle, the circumstances are entirely different. It would, to begin with, be a very distinct alteration of the contract to tie up the plaintiff's lands for a longer period than eight years. What he must pay, he is to pay with the eight years, and then be free. It may be that during that period, that is, during the currency of the mortgage, he is, in his character of member, liable, under a properly passed

rule, to have his burden as mortgagor increased by increased assessments, but no such rule is in evidence. . . .

The plaintiff, undoubtedly, as the learned Judge finds, thought he was getting a loan for eight years at six per cent. As a matter of fact he was, on the terms of the mortgage as it stands, paying, and has paid, between ten and eleven per cent., and if he had paid, or was to be made to pay, what the defendants demanded in addition, the rate would have been increased to something like eighteen per cent. There is in such facts a suggestion of extortion, which one would think ought to be made impossible by the Legislature, because this is, I am afraid, by no means an isolated case. The two classes, the borrowers and the investors, should, I think, be classified; their respective rights and obligations more clearly declared; and in the case of borrowers on mortgage, the maximum obligation should be declared in plain language in the mortgage itself, instead of having to be spelled out of a series of complicated and repeatedly amended rules, as in the present instance.

Fortunately for the present plaintiff, he is entitled to be relieved from further payments by the construction, and for the reasons which I have pointed out, which, in my opinion, distinguish this case from the case of Williams v. Dominion Permanent Loan Co.

The appeal should be allowed with costs, and the defendants ordered to execute to the plaintiff a proper reconveyance of his land in the mortgage mentioned, and a release of the mortgage; and they must pay the costs of the action.

The defendants should also refund to the plaintiff the admitted over-payment of forty-nine cents on each of the ninety-six payments, or in all $47.04, for which amount the plaintiff is entitled to judgment, and for which he has already, in effect, a judgment not appealed against, inasmuch as MacMahon, J., in the notes of his judgment, directed that this sum should be allowed to the plaintiff on taking the accounts; although the formal judgment, as drawn up, does not, as I think it should, refer to or contain this declaration.

Osler, J.A., gave reasons in writing for the same conclusion.

Moss, C.J.O., concurred.

APRIL 14TH, 1903.

C.A.

RE CANADIAN PACIFIC R. W. CO. AND CITY OF TORONTO.

Landlord and Tenant—Agreement for Lease—Covenants—Taxes—Local Improvement Rates—Re-entry—Rent—Interest—Exemption.

Appeal by the railway company from order of BOYD, C., 1 O. W. R. 385, 4 O. L. R. 134, made on appeal from report of Mr. J. S. Cartwright, an official referee, upon a reference to him to settle the terms of a lease of lands by the city corporation to the company.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.

E. D. Armour, K.C., and Angus MacMurchy, for the appellants.

C. Robinson, K.C., and J. S. Fullerton, K.C., for the city corporation.

MOSS, C.J.O.—The company complain of the learned Chancellor's holding in affirmance of the referee's report, that a covenant on the part of the lessees to pay taxes and a power of re-entry by the lessors in default of payment of rent were properly inserted in the lease, and that rent should be payable from the 1st January, 1895.

The city complain that the learned Chancellor erroneously decided that interest was not payable on the overdue gales of the rent reserved by the lease.

Dealing with these in their order, the chief and most important question is that raised by the objection that the lease should not contain a covenant to pay taxes. There are two instruments of agreement between the parties, the first dated the 26th July, 1892, and the other dated 4th February, 1895, and it is under them that the questions arise.

In brief, their effect is stated by my brother Maclennan in 27 A. R. at p. 59, as follows: "There is a contract for a lease, renewable in perpetuity in successive terms of fifty years, at an agreed rent, payable on named days; and the agreement is silent as to what, if any, covenants on the part of either lessors or lessees are to be inserted therein."

It was argued for the company that the agreement was self-contained, and that there was no occasion or necessity for a further instrument or lease, in order to give effect to the contract between the parties.

It seems manifest, however, not only from the terms of the agreement itself, but from the conduct of the parties, that a formal instrument of lease was contemplated. In para-

graph 19 of the first agreement, provision is made for apportionment of the first quarter's rent, "having regard to the time of possession under said lease:" and in par. 20, "the execution of such lease" is spoken of. In par. 3 of the second agreement, it is provided that the alternative site is to include "and in the lease thereof shall be described," etc. The proceedings now under review were taken under an order of the High Court, obtained at the instance of the company, whereby it was referred to the referee to determine, amongst other things, "all matters as to the time of delivery of the abstract, the sufficiency thereof, and all subsequent questions arising out of, or connected with, the title to the said site, and the carrying out of the said agreements respecting the making of title to, and the conveying of, the said alternative site." And in proceeding under this order of reference, both parties brought in and submitted to the referee draft leases of the premises.

One can hardly suppose that in dealing with such a large and valuable tract of land in the city of Toronto, and proposing to lease it practically for all time in successive terms of fifty years each at an increasing rental, the parties intended that all questions respecting their rights and obligations should rest solely upon the bald provisions of the agreement. There is nothing in the agreement from which it can fairly be inferred that the parties when they negotiated the lease did not contemplate anything, or agree to anything, that was not written in the agreement. It was eminently proper that a more formal instrument setting forth particularly and precisely the terms of the letting and holding, and the rights and obligations of the parties in respect thereof, should be prepared and executed. And in many respects the parties are now at one as to what that instrument should contain; and, except in respect of the matters now in question in this appeal, they accept the lease settled by the referee as a proper instrument.

There was much discussion of whether, in settling the terms of the lease, and especially in regard to the covenant as to payment of taxes, the referee should have received, or, at all events, acted upon, the parol evidence adduced. The referee was obliged to determine what the lease should contain, and the agreement being silent except as to the term and the amount of rent to be paid, it was necessary for him to ascertain in some way what other provisions, terms, and conditions should be inserted in it. In Woodfall's Landlord and Tenant, 17th ed., p. 135, it is said that the question what are usual covenants, appears to be one of fact in a case where

the parties stipulate for usual covenants; but to be a question of law, where the contract for the lease is silent as to covenants. But it would appear that, whether the contract is silent or not as to covenants, there are certain covenants which, prima facie, go into the lease as usual covenants. But even these may be subject to variation, having regard to special circumstances. In Hampshire v. Wickens, 7 Ch. D. 555, Jessel, M.R., refers with approval to the statement in Davidson's Precedents in Conveyancing, that "the result of the authorities appears to be that in a case where the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely for the lease containing 'usual covenants,' or, which is the same thing, in an open agreement without any reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon." The learned author then specifies certain covenants, and amongst those by the lessee to pay rent, and to pay taxes, except such as are expressly payable by the landlord.

It is insisted that in this Province taxes are, by virtue of sec. 26 of the Assessment Act, payable by the landlord, in the absence of agreement to the contrary; and that the agreement here being silent, the covenant to pay taxes is improper. But the covenants which are usual and proper depend very much on the nature of the property. Here the parties do not occupy the position of ordinary landlord and tenant. The city is not an owner within sec. 26, from whom taxes could also be recovered. The lands leased, being the lands of a municipality, do not come within the general rule of liability to taxation against the owner to which sec. 26 makes reference. They are governed by the exemption clause, subsec. (7) of sec. 7. Therefore, while occupied for the purposes of the city, or unoccupied, they are not liable for taxes under the Assessment Act; nor can taxes be recovered from the city in respect thereof. But, upon their becoming occupied by a tenant or lessee, they cease to be exempt. They then became property liable to the taxes imposed by the city, and to be paid to the city as part of the income which it is entitled to provide by taxation of property within its limits. The reason why the law declares that in the case of lands—the property of a municipality—the owners are not liable for taxes upon them while occupied or used by such owners, but that when used or occupied by a tenant or lessee they fall back into the category of property liable to taxation, is very apparent. It would be useless for the municipality to tax itself for revenue purposes. But when the lands become oc-

cupied by a tenant or lessee, the municipality becomes entitled to treat it as his property for revenue purposes, and to tax it in his hands. For the purpose of taxation, it is his property, and if it is not to be classed as land, real property, or real estate, under sec. 1 (9) of the Assessment Act, why may it not be classed as personal estate, or personal property, under sec. 1 (10)? That sub-section is made to include "all other property except land and real estate and real property" as defined in sec. 1 (9). The definition in sec. 1 (9) does not include leasehold interests, and so they fall within the term "all other property" in sec. 1 (10). Applying, then, the rule approved of by Jessel, M.R., the agreement carries in itself the prima facie right to the covenant in the form settled by the referee.

The parties must be taken to have dealt with knowledge of the position of the property in this respect, and, in the absence of anything to the contrary, must be deemed to have contracted with reference to that condition of affairs. Unless displaced by evidence, the presumption would be that the company understood, as any person dealing with the city for a lease of lands would understand, that to become a tenant or lessee of the city involved liability to pay city taxes in respect of the leasehold premises. As the learned Chancellor points out, the incidence of such taxation plainly falls upon the tenant or lessee, and not upon the city. And, in order to bring about this result and to entitle the city to a covenant by the tenant or lessee to that effect, it is not necessary that it should have been expressly so agreed. Unless by the terms of the agreement or the special circumstances of the case it is made to appear that the tenant or lessee was not to pay taxes, the liability of the tenant or lessee arises from the assumption of that relation in respect of lands, the property of the city. Whether the question is to be determined as one of law or as depending upon evidence, there is no difficulty in reaching the conclusion that a covenant to pay taxes is a usual covenant in a lease of lands forming part of the municipal property. Therefore, in settling the lease in question, the city is entitled to have a covenant to that effect inserted, unless it is made to appear that, by reason of the circumstances or of the terms of the agreement, the company are relieved from the ordinary obligation of a tenant or lessee of city property to pay the taxes imposed upon it.

From the nature of this case, it is obvious that cases where taxes are chargeable against, and recoverable from, the owner, furnish no analogy. The question of whether the covenant to pay taxes is a usual one for insertion in a lease of the kind in question here, must be determined by other

considerations. It is shewn that, by the invariable practice of the city, all leases of its lands for long or renewal terms, contain a covenant on the part of the lessee to pay taxes. The greater portion of the lands forming what is termed the original site, were lands belonging to the city, held under leases for long renewable terms. The company had acquired or were endeavouring to acquire, the lessees' interests, when the agreement was made by which the alternative site was substituted. These leases were produced, and they shew that under them the lessees paid rent and taxes. The company, in acquiring the terms, became liable to the same extent. It cannot be assumed that in the exchange effected, whereby other city lands were substituted, the latter were to be freed in the lessees' hands from a burden which the former were subject to in their hands. There is nothing in the evidence to lead to the conclusion that any such agreement was come to. . . .

I think, therefore, that a covenant to pay taxes was properly inserted in the lease, and that it should stand as indicated in the judgment of the learned Chancellor.

The proviso for re-entry on non-payment of rent is so common and usual in leases, that it ought not to be excluded in this instance upon the mere suggestion that difficulty may arise in enforcing it. At present I am not convinced that sec. 143 of the Railway Act applies to the circumstances of this case; and it is not unimportant to note that, up to a late stage of the proceedings, counsel for the company entertained the view that the covenant for re-entry was proper, so far as non-payment of rent is concerned.

Upon the argument, much was made of the fact that the agreement had been confirmed by statutes. But the rules of construction were not thereby affected. No doubt, after the legislation the Court would not interfere to set aside or rectify the instruments on grounds of fraud, surprise, or mistake, but they remain to be construed according to their language, and the rules applicable thereto, as if there was no legislation.

As to the date from which rent should be payable, I see no reason for disturbing the conclusion arrived at by the learned Chancellor. In 1893 the company went into possession, and from a period anterior to January, 1895, have been continuously in possession of the alternative site, with tracks and freight sheds, and have been using it for all purposes without let or hindrance from the city. And it has not been shewn for the company that the occupation was not as beneficial as that for which they were to pay rent. The

original agreement provided for apportionment of the first quarter's rent, having regard to the time of possession under the lease, and properly so, for at the date of that instrument the company were not in possession. But at the date of the second instrument (4th February, 1895) the company were in possession, and the agreement fixed the date of the commencement of the first term as of January, 1895. Thus all uncertainty as to the time from which rent should be payable was removed.

I think, therefore, that the appeal of the company fails, and that it should be dismissed.

But I am unable to agree with the learned Chancellor that interest was not payable in respect of the arrears of rent. The gales of rent were payable by virtue of a written instrument, at a certain time, and so fall within secs. 113 and 114 of the Judicature Act. The reasons urged against the application of these provisions, i.e., delay in perfecting the title and completion of the transaction, however forcible in the absence of possession and beneficial enjoyment by the company, ought not to prevail in the face of that fact. In Marsh v. Jones, 40 Ch. D. 563, the Court of appeal held the plaintiff entitled by way of damages to interest on purchase money from the day on which the purchaser had taken possession, although the amount of purchase money was not finally ascertained for more than two years after possession taken.

I am of opinion that the referee's finding in respect of interest should not have been disturbed.

The result is that the appeal of the company is dismissed, and the appeal of the city allowed. Costs will follow the event.

MACLENNAN and GARROW, JJ.A., gave written reasons for the same conclusions.

OSLER and MACLAREN, JJ.A., also concurred.

MACMAHON, J. —— APRIL 16TH, 1903.

TRIAL.

TRAPLIN v. CANADIAN WOOLLEN MILLS (LIMITED).

Master and Servant—Injury to Servant—Dilapidated Condition of Elevator—Common Law Liability—Finding of Jury.

Action for damages for injuries sustained by plaintiff while working in defendants' factory.

H. Guthrie, K.C., for plaintiff.

G. F. Shepley, K.C., for defendants.

MACMAHON, J.—One Baker, a machinist who for more than a year had been intrusted with the repair of a portion of the mill machinery, found the machinery which ran the elevator "chattering," which, he said, indicated that the ma-

chinery was wearing out. About a year prior to plaintiff being injured, he informed Morrison, the then manager, that a new elevator was required because of the worn out condition of the machinery. Baker afterwards told Berry, who succeeded Morrison in the management, that because of the worn out condition of the pinion gear and driving gear connected with the elevator machinery, they should be renewed. The elevator was 21 years old, and the life of such an elevator is about 10 or 12 years. Baker said he considered the "chattering" caused the key to come out, and the key coming out caused the fall of the elevator.

The 6th question submitted to the jury was: "What, in your opinion, caused the falling of the key?" Answer: "Vibration and general dilapidation of the running gear."

On this answer I think plaintiff is entitled to recover at common law.

Judgment for plaintiff for $3,150 and costs.

April 17th, 1903.

DIVISIONAL COURT.

SUMMERS v. COUNTY OF YORK.

Way—Non-repair—Injury to Person—Liability of County Corporation—Claim over against Railway Company—Proximate Cause of Injury—Moving Car—Agreement between Corporation and Company.

Appeal by defendants from judgment of County Court of York in favour of the Metropolitan Railway Company, third parties, upon an issue between defendants and third parties.

Plaintiff recovered judgment against defendants for $160 for damages sustained by reason of his horses falling over an embankment upon a road of defendants, and the judgment was affirmed by a Divisional Court (1 O. W. R. 137).

The issue between defendants and third parties was afterwards tried in the County Court and decided in favour of the latter.

The appeal was heard by Falconbridge, C.J., Street, J., Britton, J.

C. C. Robinson, for appellants.

J. H. Moss, for third parties.

Street, J.—The facts as found in the Court below are these. The plaintiff was driving along the road in question, and at a point where there is a steep embankment, eight feet high, his horses became restive by reason of the approach of an electric car of third parties, whose tracks are beside the travelled parts of the highway. Plaintiff got off his waggon and stood at his horses' heads and had them under

control until after the car had passed, but they became again frightened at the noise made by the car as it passed over a wooden bridge behind where they were, and they drew plaintiff over to the edge of the embankment, and fell over it. The car was going at a reasonable speed. The railway company were not negligent in not stopping the car when plaintiff's horses were seen to be restive, because plaintiff had them under control at the time the car passed. The cause of the accident was the negligence of defendants in not having a guard rail at the top of the embankment at this point.

These findings of fact are fully justified by the evidence. . . . Apart from an agreement between the third parties and the county, the former cannot be held liable; they were lawfully using the highway for the purposes for which they are incorporated under 60 Vict. ch. 92, and they have been found not to have been guilty of any negligence in so using it. . . .

The 3rd clause of the agreement between the parties is to be found in the schedule to that Act, as follows: "The company shall be liable to the county for, and shall indemnify the county against, all damages arising out of the construction or operation of the company's railway . . . whether such damages are occasioned while running at a speed authorized by this agreement or otherwise, and for and against the county's cost and expenses of and incident to claims for such damages."

The clause must receive a reasonable construction, and should not be so read as to make the company responsible to the county for damage occasioned not by any fault or act of theirs, but by the negligence of the county itself . . . The language must be taken to have relation to the immediate cause of the accident, which was here the absence of the guard rail, and not to its remote cause, which was the moving car.

BRITTON, J., gave written reasons for the same conclusion.

FALCONBRIDGE, C.J., concurred.

Appeal dismissed with costs.

APRIL 17TH, 1903.

DIVISIONAL COURT.

McINNES v. TOWNSHIP OF EGREMONT.

Way—Non-repair—Injury to Person—Liability of Municipal Corporation—Bridge without Railing—Notice of Accident—Requirements of—Mistake in Date—Quantum of Damages.

Appeal by defendants from judgment of County Court of Grey in favour of plaintiff in action to recover damages for

injuries sustained by plaintiff owing to negligence of defendants in not keeping in proper repair and in not protecting by a railing a bridge upon a road under their jurisdiction, by reason whereof plaintiff with his horse and carriage drove over the edge into the water below.

On 26th May, 1902, plaintiff gave notice to defendants that he had met with an accident on 7th May (instead of 6th May, which was the true date) at the bridge in question, which he described, stating that it was during a thunderstorm, and that a flash of lightning had caused his horse to swerve, and that "owing to the defective state of the bridge" he was thrown into the water; he further stated that he had rescued his horse, with the aid of Mr. Andrew Peckover, and that the accident could not have happened had the bridge not been defective by being void of a proper railing.

The action was tried without a jury, and judgment given for plaintiff for $200.

The appeal was heard by STREET and BRITTON, JJ.

W. H. Kingston, K.C., for defendants.

A. G. MacKay, K.C., for plaintiff.

STREET, J.—The cause of the accident, as a matter of law and fact, was the negligence of defendants in not providing the bridge with a railing to prevent accidents of this kind. It is true that this particular accident would probably not have happened had not the night been dark and the lightning vivid at the moment the plaintiff's horse was on the bridge; but these are ordinary dangers to be provided for; and if defendants had done their duty in protecting the sides of the bridge, the accident would have been avoided; and therefore, they are liable.

The notice of accident given by plaintiff is sufficient to comply with the requirements of sub-sec. 3 of sec. 606 of the Municipal Act, when the object of requiring that notice is taken into consideration. . . . The notice should state the time and place of the accident with reasonable particularity, so as to identify the occasion, and so long as no mistake is made in either of these matters of a nature calculated to deceive or mislead the corporation to its prejudice, the notice will not be vitiated: see Green v. Hutt, 51 L. J. Q. B. 640; Langford v. Kirkpatrick, 2 A. R. 513.

In the present case the place was clearly described, and the date was identified by the circumstance of a thunderstorm having taken place and of plaintiff having obtained the assistance of Mr. Peckover. Moreover, there is no suggestion that the mistake in date misled defendants.

. . . Plaintiff was an elderly man, and was suddenly

thrown into cold water, and was obliged to remain for some hours in his wet clothes. He says he has suffered from the shock and from rheumatism. I do not think we can interfere as to the amount of damages ($200).

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

APRIL 18TH, 1903.

DIVISIONAL COURT.

BERRY v. DAYS.

Covenant—Restraint of Trade—Breach — Injunction—Damages — Waiver—Assignment of Covenant.

Appeal by defendant from judgment of MACMAHON, J. (1 O.W.R. 909), in favor of plaintiffs in action to recover damages for breach of a covenant by defendant not to enter into business as a druggist, and not to open a third or further drug-store in the village of Lucknow, and for an injunction. The trial Judge granted an injunction and directed a reference to assess damages. Defendant was selling out to plaintiff Berry one of the only two drug-stores in Lucknow; it was considered necessary that he should not for five years either open a new drug-store, or go into business with the other existing one. After five years he might go into business with the other existing one, or buy it out, but he must not for a further period of five years open a new one, so as to increase the competition in Lucknow. There were, therefore, for the first five years two concurrent covenants, one of which continued beyond the five years for a further period of five years.

J. A. Paterson, K.C., for defendant.

W. Proudfoot, K.C., for plaintiffs.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that the assent of plaintiff Berry to defendant's carrying on the original business with Berry's son during the first five years did not affect the covenant not to open a third business in Lucknow. The covenant is separable into two parts, and one part may survive the other. A covenant such as this is assignable, and the right to enforce it does not terminate by reason of plaintiff having gone out of business himself: Hitchcock v. Coker, 6 C.B. 438; Elves v. Crofts, 10 C. B. 241; Jacoby v. Whitmore, 49 L. T 335. Judgment to stand, and defendant to be restrained from opening, carrying on, or having part in a further business in Lucknow during the period of ten years from 21st September, 1900. No reference as to damages. Defendant to pay costs of action and appeal.