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COURT OF APPEAL.

DECEMBER 30TH, 1910.

BEARDMORE v. CITY OF TORONTO.

Appeal—Privy Council—Application to Allow Security—Jurisdiction—Matter in Controversy—10 *Edw. VII. ch.* 24.

Application on behalf of the plaintiff for the allowance by the Court of the security required to be given in the case of an appeal from a judgment of the Court of Appeal to His Majesty in his Privy Council, as provided by the Act 10 Edw. VII. ch. 24.

The application was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

E. F. B. Johnston, K.C., and J. S. Lundy, for the plaintiff.

H. L. Drayton, K.C., and H. Howitt, for the defendants.

The judgment of the Court was delivered by MOSS, C.J.O.:—The decision from which the appeal is proposed to be taken is reported 21 O.L.R. 505. It is there pointed out that the case had narrowed down to the discussion of the question of the legislative competency of the legislature of the province to enact in whole or in part certain specified Acts.

The nature of the case, and the questions raised undoubtedly bring it within the class of cases in which, not infrequently, the Judicial Committee of the Privy Council have considered it just and proper to advise His Majesty to grant leave to appeal.

But the granting or refusing of leave to appeal rests entirely with the Judicial Committee.

The Act under which this application is made does not confer on this Court the power to deal with an application for leave to appeal. The power is to allow the security required to be given by the appellant where the case is one which comes within the classes specified in sec. 2 of the Act. And the sole question here is whether this is such a case.

It does not seem possible fairly to distinguish it from cases already decided by this Court; City of Toronto v. Toronto Electric Co., 11 O.L.R. 310; Canadian Pacific R.W. Co. v. City of Toronto, 19 O.L.R. 661. These decisions were under the R.S.O. 1897 ch. 48, of which the present Act is a re-enactment, and are really decisive of the question now before us.

The application must be refused.

DECEMBER 30TH, 1910.

RE CITY OF OTTAWA AND TOWNSHIP OF NEPEAN.

Municipal Corporations—Annexation of Part of Township to City—Valuation of Assets and Liabilities—Bridges—"Property and Assets"—Municipal Act, 1903, *sec.* 58 (1)—*Arbitration and Award.*

Appeal by the Corporation of the Township of Nepean from the order of LATCHFORD, J., ante 49.

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

W. Greene, for the appellants.

W. N. Ferguson, K.C., for the city corporation, the respondents.

MACLAREN, J.A.:—Certain portions of the township of Nepean adjoining the city of Ottawa were annexed to that city, and arbitrators were appointed under sec. 50 of the Municipal Act, 1903, to determine what portion of the debts of the township the city should pay, and what was the value of the interest which the added territory had in the "property and assets" of the township, and which should be paid by the township to the city.

Neither party appealed from that part of the award which determined the amount of the township debts to be paid by the city. As to that part of the award which determined "the value of the interest which the added territory had in the property and assets of the township" the township appealed against an item of $1,642.91 allowed as the interest of the added territory in certain bridges situated in the remaining part of the township. The assessed value of the added terri-

tory was approximately one-seventh of the whole township, and the arbitrators based their award as to the debts and as to the assets upon this ratio.

The appeal was heard by Latchford, J., and dismissed, and leave was given to appeal to this Court.

The question to be decided is, are these bridges "property and assets of the township," within the meaning of sec. 58 of the Municipal Act, for which the township should pay to the city approximately one-seventh of their value as the interest of the added territory in them?

I find myself, with great respect, unable to agree with the conclusion of the arbitrators on this point, or the reasoning or conclusion of the Judge who heard the appeal.

It is quite true that these bridges were erected and paid for by the township, and may be said to be township property, but I do not think they are properly described as assets of the township. The word "assets" is suggestive of a liquidation, and is usually opposed to liabilities, and ordinarily refers to such as may be available for meeting the liabilities, although not always restricted to these. These bridges are presumably erected upon and form a part of highways of which the soil and freehold are vested in His Majesty under sec. 599 of the Municipal Act, the municipal council of the township having jurisdiction over them under sec. 600. They are precisely on the same footing as the culverts, roadbed, etc., of the highway. The moneys laid out for these purposes are devoted and dedicated to the public, and after the annexation in question, the inhabitants of the added territory are as fully entitled to the use and advantage of these bridges as they were before, and all the inhabitants of the city of Ottawa and the general public may use them just as freely as those who belong to the remaining portion of the township of Nepean. The only difference is, that upon the ratepayers in the remaining portion of the township alone will fall for the future the burden of the repair, maintenance, etc., of these bridges. So far as the township as a corporation is concerned these bridges may be considered as a liability rather than an asset.

If the legislature had intended that in a case like the present the city should be paid a pro rata share of the value of such peculiar property as this, which I think cannot properly be described as assets of the township, it should have said so in language that would be more fairly susceptible of such a meaning.

The allowance of $75 to the city on account of its costs before the arbitrators should, as a consequence, be set aside.

The appeal should be allowed with costs both here and below.

MEREDITH, J.A.:—In ceasing to be a part of the one municipality and becoming a part of the other, that portion of the township acquired by the city took with it its rights and its obligations as they existed at the time of the change; and, in regard to the bridge in question, its obligation was to pay its share of the cost of it, as the arbitrators found and awarded; but its right respecting it was merely the right of its inhabitants, in common with all His Majesty's liege subjects, to use it as a public highway, a right which still continues. In putting a money value upon it, in addition to that, as if it were a piece of property at the disposal of the township, for its own uses, they plainly erred.

In parting from the township, all that the severed portion of it left with it, in this respect, was the obligation to keep the bridge, as part of the highway, in repair; it left no property rights of any money value. By the change, it became liable to contribute to cost of the repairs of the city highways, and was relieved from that obligation in regard to the township highways. If there had been no change, it could never have taken any benefit from the bridge in question, except the common right of its inhabitants to travel over it; but would have remained liable to pay its portion of the township debt in respect of it, and its share of the cost of keeping it in repair.

To compel the township to pay $1,642.91 to the city in respect of the bridge, plainly, would be to compel the payment of that sum for nothing, as a simple test will prove: let the township convey absolutely to the city, not only one-seventh of its interest in the bridge, but its whole interest, and substitute the one for the other in respect of it, and what will the city get, substantially? Nothing but the obligation to keep it in repair for the use of the public, whose, substantially, it is.

If it were right to award to the city any sum in respect of this part of the highway, it was equally right to award something in respect of every other part of that highway and all other highways in the remaining portion of the township, as well as to award to the township a sum in respect of all parts of highways passing under the control of the city with this portion of the township.

The highways are vested in the Crown for the use of the public; they are vested in the municipalities for the purpose, and to the extent, of enabling them to perform more effectually their duties to keep them in repair for the benefit of the public.

The bridge was not the property or an asset of the township; on the contrary it constituted, and still continues to constitute, an obligation; there was and is nothing like money, or money's worth, in it for them.

I would allow the appeal.

Moss, C.J.O. Garrow and Magee, JJ.A., concurred.

December 30th, 1910.

ONTARIO SEWER PIPE CO. v. MACDONALD.

Sale of Goods—Contract—Manufacture and Sale of Specific Articles—Sale by Description—Implied Warranty—Fitness for Purpose—Defects—Damages—Evidence.

Appeal by the plaintiffs from the judgment of Falconbridge C.J.K.B., 1 O.W.N. 699, dismissing the action with costs and allowing the defendants' counterclaim for $1,141.14 with costs.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

I. F. Hellmuth, K.C., and J. A. Macintosh, for the plaintiffs.

G. H. Kilmer, K.C., and J. A. McAndrew, for the defendants.

Garrow, J.A.:—The defendants were contractors for the construction of the Walkerton and Lucknow Railway, and, requiring for that purpose a quantity of tile suitable for culverts in the railway, applied to the plaintiffs, who are manufacturers, to supply the same. . . .

[The learned Judge set out part of the correspondence between the parties.]

Under the arrangement, whatever it was, a considerable quantity of pipes was delivered in 1906 and paid for by the defendants in full. The action was brought simply to recover for the pipes delivered in the month of April, 1907, to the

value of $774.26, an amount which the defendants do not dispute. But they say they should not be called on to pay, and, on the contrary, are entitled, in addition to a set-off equal to the amount of the plaintiffs' claim, to recover damages from the plaintiffs because the pipes were, as the plaintiffs knew, intended to be used and were used in the construction of the railway, and, after being so used, proved defective and had to be removed and replaced with other pipes, because the pipes supplied by the plaintiffs were not properly vitrified and salt glazed, which were defects not known to the defendants when they accepted and used them and of a nature which could not have been discovered by ordinary inspection.

The defendants succeeded before Falconbridge, C.J., who held that, the plaintiffs being manufacturers and not mere sellers, and knowing that the pipes were required for culverts, the law will imply a warranty that they were fit for the purpose; and that the pipes which broke and had to be replaced did so because of some latent and intrinsic defect, not discoverable by mere inspection.

It is clear, I think, that the sale was one by description. The term that the pipes to be supplied were to be vitrified and salt glazed applied both to the double strength and to the standard pipe. And if, in the case of either, the article tendered did not conform to the description, the purchasers were not bound to accept delivery. But, the goods having been received and used without objection, the defendants must now rely upon their other rights, if any, in the nature of warranties, express or implied.

Meller, J., in the well-known case of Jones v. Just, L.R. 3 Q.B. 197, formulated certain classifications of the numerous cases upon the subject of implied warranties which have ever since met with general approval. Those relating to the case of goods supplied by a manufacturer or dealer, such as the plaintiffs in this action, are the third, fourth, and fifth, and are as follows:—

"Thirdly, where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

"Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that

the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied.

"Fifthly, where a manufacturer undertakes to supply goods manufactured by himself or in which he deals, but which the vendee has had no opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article."

The Imperial Sale of Goods Act, 1893, subsequently passed, apparently made some slight changes in the effect of these classifications or of some of them; but, as we have no similar legislation in this province, they (the rules formulated by Meller, J.) may still be safely relied on as correctly expressing the law here, as they were similarly relied on in the highest Courts in England before the statute: see Drummond v. VanIngen, 12 App. Cas. 284, 291; Jones v. Padgett, 24 Q.B.D. 651.

And, upon the facts in evidence, it seems to me, this case falls within the fourth, and perhaps to some extent the fifth, of these classifications: see Randall v. Newson, 2 Q.B.D. 102.

It appears that there are a number of makers of similar pipes, Canadian, American, and British; that, in a word, such pipes are, like the goods in question in the two first-mentioned cases, simply ordinary articles of commerce, and not "known, described, and defined articles," within the third classification, such as, for instance, the articles in question in Chanter v. Hopkins, 4 M. & W. 399.

In addition, to the warranties which, under these authorities, may be implied, there is the further warranty, contained in the description itself, that the pipes were to be vitrified and salt glazed (which must mean properly and sufficiently salt glazed and vitrified); and this, upon the delivery and acceptance, ceased to be any longer a condition and assumed the character of a warranty, at least as to latent defects.

Under some or all of these warranties the defendants are, I think, entitled to complain if the facts establish that the pipes delivered were not in fact salt glazed or vitrified to such an extent as they should have been to make them reasonably fit to be used in the work for which the defendants, as the plaintiffs knew, intended to use them.

But none of the warranties would, upon the evidence, in my opinion, extend to fitness in point of thickness or strength, proof of that, it is clear, the defendants alone were to judge, since they had the choice of selecting either the double strength

or the "standard" . . . and deliberately, and in no way in reliance upon any representation made by the plaintiffs or by any one on their behalf, selected the "standard" strength and quality, in which class all the defective pipes appear to have been.

There seems to be no dispute about the fact that, for some cause or other, a number of the pipes broke down in place and had to be removed and replaced. And there is no sufficient reason for disagreeing with the finding of the learned Chief Justice that this was not because they had not been properly laid. It is not specifically found by the learned Chief Justice what the latent defect upon which his judgment in favour of the defendants proceeded, was; but, as all the evidence appears to have been directed to the establishment of insufficient glazing and vitrification as the real defect, it is not going too far to assume that he referred to that. And, in my opinion, the evidence sufficiently supports such a finding. . . . And there is evidence, although this seems to be the least satisfactory portion of the defendants' case as established by the evidence, that the insufficiency of the pipes should be attributed to the defect in their manufacture, rather than to the use which was made of them. . . .

Upon the whole, I think the appeal fails, and should be dismissed with costs.

Meredith, J.A., reached the same conclusion, for reasons stated in writing.

Moss, C.J.O., Maclaren and Magee, JJ.A., concurred.

December 30th, 1910.

*REX v. FREJD.

Criminal Law—Conviction by Justices not Having Jurisdiction —Imprisonment under—Habeas Corpus—Certiorari in Aid —Order Quashing Warrant of Commitment and Directing Bringing of Prisoner before Justices for Preliminary Hearing—Criminal Code, sec. 1120—Construction and Application of.

Appeal by the defendant from an order of Clute, J.

The defendant was apprehended on a charge of issuing a

*This case will be reported in the Ontario Law Reports.

false cheque and brought before two Justices of the Peace at Cochrane. He pleaded guilty before them, and they imposed a sentence of imprisonment in the Central Prison at Toronto. The offence was an indictable one, and was not one of those which two Justices are, under Part XVI. of the Criminal Code, authorised to try. They should have held only a preliminary inquiry, and sent the accused to the gaol of the district to await trial until bailed. Being taken to the Central Prison, he applied for and obtained a writ of habeas corpus and certiorari in aid, and, on the papers being returned thereunder, moved for his discharge. CLUTE, J., made an order quashing the warrant of commitment to the Central Prison, but, instead of discharging the defendant from custody, ordered that he be removed back to Cochrane and brought before the two Justices for a preliminary hearing upon the charge. CLUTE, J., considered that the case came within sec. 1120 of the Criminal Code, 1906 (formerly sec. 752 of the Criminal Code, 1892), now amended by 7 & 8 Edw. VII. ch. 18, sec. 14, and, as amended, providing that, whenever any prisoner in custody charged with an indictable offence has taken proceedings before a Court or Judge by way of certiorari, habeas corpus, or otherwise, to have the legality of his imprisonment inquired into, such Judge or Court may, with or without determining the question, make an order for the further detention of the person accused, and direct the Judge or Justice under whose warrant he is in custody, or any other Judge or Justice, to take any proceedings, hear such evidence, or do such further act as, in the opinion of the Court or Judge, may best further the ends of justice.

The defendant appealed from the order.

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

A R. Hassard, for the defendant, contended that he was not in custody charged with the offence, within the meaning of sec. 1120, but in custody under conviction for the offence.

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

MAGEE, J.A., after setting out the facts as above, and referring to Regina v. Randolph, 32 O.R. 212; Rex v. Morgan, 2 O.L.R. 413, 3 O.L.R. 356; Rex v. Graf, 19 O.L.R. 238; Rex v. Blucher (B.C.), 7 Can. Crim. Cas. 278; Rex v. Goldsberry (Que.), 11 Can. Crim. Cas. 159—proceeded:—

The tendency of legislation is to prevent the ends of justice being interfered with by reason of mistakes, and to ensure the substantial carrying out of the law; and, indeed, the further-

ance of these ends is the express object of sec. 1120. There is no reason why a mistake in or after conviction for a crime should not be remedied as well as one before—indeed, rather the contrary. One would think that such a case as Rex v. Morgan or Rex v. Graf would be just such as the legislature would endeavour to cover. If there is nothing in principle against it, are the words of this section wide enough to cover cases of conviction, or is there anything to indicate that they were not so intended? We gain little or no assistance from any of the words in the section other than the words "charged" and "accused," which are here challenged, although one's attention is drawn by the words "legality of his imprisonment" and "further detention of the person accused." But is a person any the less "charged with" an offence or "accused" of it because the charge or accusation has been established? . . .

[Reference to In re Hope, 7 N.Y. Crim. R. 406; People v. Warden of the City Prison, 3 N.Y. 370; Dinkall v. Spiegel, 68 Conn. 441, 447; People v. Bauman, 3 N.Y. Crim. R. 454.]

I have referred to these cases as shewing that there is nothing inherently excluding the idea of a proven charge from a charge or an accusation. There is no reason in this particular section why the narrow meaning should be taken rather than the "fuller and more accurate sense" referred to by the Supreme Court of Connecticut. The furtherance of the ends of justice, implied as well as expressed to be the object of the provision, call for its application as much after as before conviction. The proceedings of certiorari and habeas corpus, in which the power is given, may arise at either stage, and the legislature has given no indication of an intention to limit the words of a beneficial provision. I see no reason so to limit it. If, then, the section applies after a valid conviction, is it, as here argued, less applicable after a wholly void conviction, made without jurisdiction, and when the prisoner is not absolved from being tried for his offence, and there is nothing in which the charge could be said to merge? The argument appears to be stronger against such a conclusion. The section uses the words "further detention," but that does not necessarily mean detention in the same place, but detention in the custody of the law. . . .

I would dismiss the appeal.

Moss, C.J.O., Garrow and Maclaren, JJ.A., concurred.

Meredith, J.A., in a written opinion, discussed the meaning of sec. 1120, and expressed the view that the order in appeal

could not be supported under it; but said that, quite apart from that section, there was power to remand the prisoner so that he might be dealt with according to law upon the charge originally made against him; that the order should have been one discharging him out of his present custody and providing for his proper return to his former custody, so that the proceedings which were properly begun against him might be properly continued; but, having regard to the nature of the charge against him, as stated upon the argument, and to the very considerable punishment he had already undergone, he might well have been discharged simply, leaving it to the prosecutor, or the Crown, if not yet satisfied, to take the usual steps for the apprehension and prosecution of the prisoner anew. The learned Judge did not, however, dissent from the order dismissing the appeal, though less satisfied with it than if it were such as he had indicated.

DECEMBER 31ST, 1910.

VANCE v. GRAND TRUNK PACIFIC R.W. CO.

Railway—Collision Caused by Misconduct of Crew of Train—Injury to and Death of Brakesman—Action by Widow—Failure to Shew Negligence of Railway Company.

Appeal by the defendants from the judgment of LATCHFORD, J., at the trial, upon the findings of a jury, in favour of the plaintiff, the widow of David Vance, deceased, in an action brought on behalf of herself and children to recover damages for his death in a collision of trains upon the defendants' line of railway, by reason of the negligence of the defendants, as the plaintiff alleged.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.
D. L. McCarthy, K.C., for the defendants.
I. F. Hellmuth, K.C., for the plaintiff.

MEREDITH, J.A.:—The collision in which the plaintiff's husband was killed was caused by the concerted neglect of duty and disobedience of orders of the whole crew of the train except the fireman, McMaster. Vance was one of the crew, and the one to whose neglect of duty, and disobedience of the working rules of

the defendants, whose servant he was, the disaster is most directly attributable; on duty he could and should have avoided the collision; and, in any case, could easily have saved himself.

After spending a half hour or so of their masters' time in amusing themselves at rifle shooting, these men—the conductor, the engineer, the head brakesman, and Vance, who was the rear brakesman—went into the caboose of the train and began cleaning their rifles. The conductor, after some slight demur on the part of the engineer and to the knowledge of all the others, went to the engine, and, taking the engineer's place, ran the train backwards to a place called Crest and into some cars which this same crew had a short time before moved out of a siding and placed upon the main line and left there. Both brakesmen and the engineer, disregarding their duties and the rules of the company, remained in the caboose, Vance still cleaning his rifle, instead of being stationed, and on the look-out, at the rear of the train, as his duty was, and this too though the train was being backed down at an excessive rate of speed, controlled by one who had no sort of right, nor the proper knowledge and skill, to assume the engineer's place and work. In this reckless and inexcusable state of affairs the collision took place, and Vance was killed before he could escape from the train. The other brakesman having happened to go to the door of the caboose, almost immediately before the collision, saw the imminent danger, and, having shouted his warning, escaped by jumping off the train; but the warning was too late for Vance, who was inside the caboose when it was given.

How it could have been thought possible that the plaintiff could recover, in this action, in these circumstances, seems to me extraordinary; on the contrary, I cannot but think that, if justice were done, these servants of the defendants should make good all the loss which the defendants have sustained by reason of such flagrant concerted misconduct.

I would allow the appeal and dismiss the action.

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

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

MAGEE, J.A., dissented, being in favour of granting a new trial.

DECEMBER 31ST, 1910.

*REX v. WISHART.

Criminal Law—Fugitive Offenders Act—Arrest of Person Charged with Offence in another Part of His Majesty's Dominions—Warrant not Indorsed as Provided by sec. 8—Committal of Accused to Await Return—Jurisdiction of Police Magistrate—Secs. 9, 10, 11, 12, 29*—Habeas Corpus—Lawful Detention.*

Appeal by the defendant from the order of MEREDITH, C.J.C.P., in Chambers, ante 271, refusing, upon habeas corpus, to discharge the defendant from custody upon a warrant issued in Ireland, and not indorsed as required by sec. 8 of the Fugitive Offenders Act, R.S.C. 1906 ch. 154.

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

W. T. J. O'Conner, for the defendant.

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

MOSS, C.J.O.:—This case is brought before us under the provisions of R.S.O. 1897 ch. 83, sec. 6, by way of appeal from an order pronounced by the Chief Justice of the Common Pleas, upon the return to a writ of habeas corpus, whereby the prisoner was remanded to the custody of the gaoler of the City of Toronto.

The prisoner had been apprehended and brought before George T. Denison, Esquire, Police Magistrate for the city, under a provisional warrant issued under R.S.C. 1906 ch. 154, known as the Fugitive Offenders Act, and was by him committed to the common gaol to await his return to Ireland.

A warrant issued in Ireland for the apprehension of the prisoner was produced before the Police Magistrate, but when produced it was not indorsed by the Governor-General or a Judge of the High Court in the manner provided by sec. 8 of the Act.

Upon the argument of the motion for the prisoner's discharge under the writ of habeas corpus, the learned Chief Justice indorsed the warrant and ordered that the warrant of commitment granted by the Police Magistrate be confirmed.

The main question raised upon the appeal is, whether the Police Magistrate could proceed finally to deal with the case and

*This case will be reported in the Ontario Law Reports.

commit the prisoner under sec. 12 of the Act, notwithstanding that the warrant issued in Ireland was not indorsed in the manner directed by sec. 8.

I confess to having been strongly impressed with the argument that the words "indorsed warrant," which occur in sec. 12, were used only for the purpose of distinguishing between a warrant issued outside of Canada and a provisional warrant issued within Canada, and that, provided the person was duly apprehended under the latter, and that the warrant issued outside of Canada was duly authenticated in the manner prescribed by sec. 29, the Magistrate was authorised to proceed, and, if satisfied with the other proofs, commit the prisoner.

But, upon further consideration, I have reached the conclusion that the requisition for the indorsement of the warrant was enacted with an object beyond that of merely rendering it available for the apprehension of the accused person without any other warrant.

Under sec. 8, the Governor-General or a Judge is only to indorse the warrant when he is satisfied that it was issued to some person having lawful authority to issue it. This requirement furnishes a protection to an accused person against frivolous or vexatious proceedings. A somewhat similar protection is afforded to the accused when apprehended under a provisional warrant. By sec. 10, a magistrate issuing such a warrant is required to send a report of the issue, together with the information or a certified copy, to the Governor-General, who may, if he thinks fit, discharge the person apprehended under such warrant.

Apparently a provisional warrant may be issued either before or after the indorsement of the warrant issued outside of Canada; but sec. 14 makes it plain that a magistrate before whom a person apprehended under a provisional warrant is brought cannot immediately proceed with an investigation. He can only remand from time to time pending the production of an indorsed warrant. The production of a warrant indorsed by the Governor-General or a Judge is prima facie what is meant by this section. It seems plainly to be intended as the authority to the magistrate to enter upon the investigation. He is then in a position to enter upon the inquiry, under sec. 12, whether the indorsed warrant is duly authenticated, and whether the evidence is such as to satisfy him that a case is shewn for committing the fugitive to prison to await his return to that part of His Majesty's dominions from which the warrant issued. I can come to no other conclusion than that the expression "indorsed warrant," occurring, as it does, so frequently in the Act, has

some greater significance than as a mere term of distinction between it and another warrant. If it is so called merely for the purpose of distinguishing it from a provisional warrant, then, unless it is desired to apprehend by virtue of it under sec. 8 or to obtain a search warrant by virtue of it under sec. 19, no indorsement by the Governor-General or a Judge is needed. If so, there seems to be no occasion for speaking of it as an indorsed warrant when directing what the magistrate shall do under secs. 12 and 14.

It can scarcely be that, if it was intended to constitute a warrant without indorsement a sufficient authority to the magistrate to proceed, some other expression more directly suggestive of that intention would not have been used.

At all events it appears to me that it is safer, in dealing with a matter involving restraint of liberty, to adhere to the primary meaning of the language used, in the absence of context manifestly controlling it and pointing clearly to a different meaning.

I think, therefore, that the prisoner was entitled to be discharged under the writ of habeas corpus.

Having regard to the nature of the case and the circumstances under which it comes before us, I do not think we should impose any restraint upon the prisoner's right to the order to which it is now held he was entitled.

We need not concern ourselves with the question of the extent to which it may prove to be of advantage to him.

Maclaren and Magee, JJ.A., agreed in the result, for reasons stated by each in writing.

Garrow, J.A., also concurred.

Meredith, J.A., dissented, for reasons stated in writing.

December 31st, 1910.

*REX v. SAM SING.

Criminal Law—Carnal Knowledge of Young Girl by Prisoner on his own Premises—Act of Commission—Application of sec. 217 of the Criminal Code.

Case stated by the Judge of the County Court of Carleton, by whom the defendant was convicted under sec. 217 of the Criminal Code for having a girl on his premises for immoral purposes.

*This case will be reported in the Ontario Law Reports.

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

G. F. Henderson, K.C., for the prisoner.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

MEREDITH, J.A.:—The case was not one of permitting, but was one of committing, the defilement of a girl on the premises of the prisoner.

Section 217 of the Criminal Code, under which the accusation was made and the conviction was had, relates only to persons who induce or knowingly suffer girls under 18 years to resort to or be upon their premises for the purpose of being unlawfully and carnally know by any man, whether such carnal knowledge is intended to be with any particular man or generally: all of which seems to me to be inapplicable to fornication with the householder on his own premises; to be applicable to cases of permission, not commission; a view which accords with the marginal note of the enactment in question, and also with that of the Imperial enactment from which it is taken, 48 & 49 Vict. ch. 69, sec. 6—"Householder, etc., permitting defilement of young girl on his premises;" see also sec. 220 of the Criminal Code.

If this be not so, the enactment is very far-reaching in its effect; it covers cases in which, hitherto, it has been generally thought that a civil action only would lie, as well as cases to which, it has also hitherto been generally thought, neither the civil nor the criminal law is applicable; but, if it be so, as, in my opinion, it must, then the prisoner should be discharged; and it is unnecessary to consider the other question.

MOSS, C.J.O., and GARROW, J.A., agreed with MEREDITH, J.A.; GARROW, J.A., to give reasons later.

MACLAREN and MAGEE, JJ.A., dissented, for reasons stated in writing by MAGEE, J.A.

HIGH COURT OF JUSTICE.

MEREDITH, C.J.C.P. DECEMBER 30TH, 1910.

RE PAINE.

Will—Construction—Gift to Bible and Tract Society—Charitable Bequest—Division between two Societies which might have been Intended.

Originating motion for the determination of questions arising on the will of Joseph Paine, dated the 15th July, 1903.

A. H. Clarke, K.C., for the executors and residuary devisee.

J. A. Paterson, K.C., for the Upper Canada Religious Book and Tract Society.

A. M. Denovan, for the Upper Canada Bible Society.

MEREDITH, C.J.:—The testator was evidently an illiterate man, and his will was penned by himself. The clause of the will upon which the questions arise is a very curious one. It reads as follows: "The remainder I want it sent to the Bibble and Track Society to be given to the poor and to the heathings of the Calvanistic and Lutherian doctrine."

Two questions have been raised: (1) whether this bequest is a good and effective charitable bequest; (2) who is entitled to take under it?

I am relieved from considering the first question by the concession of the residuary devisee that the bequest is a good and effective charitable bequest, and her expressed willingness to pay over the fund to the body which it shall be held is entitled to take under it.

The fund is claimed by the Upper Canada Religious Book and Tract Society, which was incorporated by 18 Vict. ch. 230, and whose objects are expressed in the incorporating Act to be the disseminating throughout Upper Canada religious tracts and books at the lowest possible prices and gratuitously to such as have not the means of paying therefor; and the fund is also claimed by another society called the Upper Canada Bible Society, which was incorporated in the same year (18 Vict. ch. 229), whose objects are expressed in the incorporating Act to be the "circulating the Bible throughout Upper Canada at the lowest possible prices and gratuitously to such as have not the means of paying therefor."

I am of opinion that the case is one in which there are two institutions either of which might have been intended by the testator; and that, following Williams v. Roy, 9 O.R. 534, the proper conclusion is, that the legacy should be equally divided between the two claimants; and there will be a declaration accordingly.

I say nothing as to the application of the fund when it reaches the hands of the societies.

The costs will be paid out of the fund.

MEREDITH, C.J.C.P. DECEMBER 30TH, 1910.

*RE ONTARIO SUGAR CO.

McKINNON'S CASE.

Estoppel—Res Judicata—Company—Winding-up—Contributory—Action for Calls—Dismissal—Grounds of—Judgment—Pleadings—Admissions.

Appeal by the liquidator of the company from the report of an Official Referee, dated the 8th June, 1910, upon a reference for the winding-up of the company, striking the name of one McKinnon from the list of contributories.

W. N. Tilley, for the liquidator.
J. Shilton, for McKinnon.

MEREDITH, C.J.:—The question for decision is, whether or not the liquidator is estopped from alleging that the respondent is a shareholder in the company, by a judgment dated the 5th October, 1904, dismissing an action brought by the company against the respondent as the holder of the fifty shares of $100 each of the capital stock of the company in respect of which it is sought to place him on the list of contributories to recover $5,000 alleged to be due by him in respect of five calls of 20 per cent. which had been made.

By his statement of defence the respondent pleaded that he was not a holder of shares in the capital stock of the company; that at the request of one Richard Harcourt (made a third party to the action) he became a nominal applicant only for the purpose of the issue of the letters patent; and that it was "agreed by and between the other petitioners for the issue of the letters patent and the defendant and the said Richard Harcourt and with the provisional directors of the company that the defendant should not become a holder of the said shares by reason of his joining in the application for the issue of the letters patent;" and that, by reason of certain matters alleged, to which it is unnecessary to refer, the petition, memorandum of agreement, stock-book, and letters patent became "vitiated;" and he also pleaded that the company was not a duly incorporated company under the Ontario Companies Act, and that the calls for which he was sued had not been duly made.

*This case will be reported in the Ontario Law Reports.

Issue having been joined, the action came on for trial on the 5th October, 1904, when the judgment I have mentioned was pronounced upon consent, and the judgment was signed and entered on the 30th March, 1910.

The provision of the Indian Code of Civil Procedure as to bar by judgment is: "No Court shall try any suit or issue in which the matter directly and substantially in issue was in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court;" and that is substantially the rule of the common law.

The difficulty of applying the rule is greater under the existing system of pleading than it was under the system which prevailed before the Judicature Act. . . .

[Reference to Ripley v. Arthur, 88 L.T.N.S. 735, 736; Alison's Case, L.R. 15 Eq., 394, L.R. 9 Ch. 1; Maharaja Jagatjit Singh v. Rajah Sarabjit Singh, L.R. 18 Ind. App. 165, 176; Amriteswari Debi v. Secretary of State for India, L.R. 24 Ind. App. 33, 47; Russell v. Place, 94 U.S. 706; Caspersz on Modern Estoppel and Res Judicata, 3rd ed., part 2, pp. 48 to 51, 77 et seq.; Black on Judgments, 2nd ed., secs. 500, 624, 673, and 731; Houston v. Marquis of Sligo, 29 Ch.D. 448.]

That a judgment by consent is in the same position as a judgment pronounced after the trial of the action is well settled: In re South American Co., Ex p. Bank of England, [1895] 1 Ch. 37; The Bellcairn, 10 P.D. 161.

Applying the principles enunciated in the cases to which I have referred, to the case at bar, it follows that the judgment in the action by the company against the respondent is not a bar to the appellant's proceedings to place the respondent on the list of contributories unless it was determined in the action that the respondent was not liable for the calls for which he was sued because he was not a shareholder. It is impossible from the pleadings and the judgment to ascertain upon which of the grounds of the defence the respondent succeeded, and it is manifest that, if it was on the ground that the calls were not duly made, as the respondent alleged in his statement of defence, the judgment is not a bar to the appellant's proceedings.

As has been seen, the Court, for the purpose of ascertaining what was actually determined in the former action, may look outside the judgment and the pleadings; and, looking at the admissions which were made before the referee, I find there an

admission that all the calls for the recovery of which the action was brought were made as alleged in the statement of claim (admission 4), and an admission (5) that the respondent denied that he was a shareholder and refused to pay calls that were made upon him by the company as such shareholder, and that the calls were not paid.

These admissions, coupled with the judgment and record, I think warrant the conclusion that the ground upon which the respondent succeeded in the action was that he was not a shareholder in the company, and it follows from that conclusion that the former recovery is a bar to the claim of the appellant to place him in the list of contributories, which is based, and necessarily so, upon its being established that the respondent was a shareholder at the commencement of the winding-up.

Appeal dismissed with costs.

DIVISIONAL COURT. DECEMBER 30TH, 1910.

RE J. A. FRENCH & CO. LIMITED.

Company—Ontario Companies Act, sec. 116—Rectification of Register of Shareholders—Power of Court—Reduction of Number of Shares—Consent.

Appeal by Charles Augustus Herman from the order of MIDDLETON, J., 1 O.W.N. 864, dimissing the appellant's application to rectify the register of members and the memorandum of agreement and stock-book of the company by removing therefrom the name of the appellant as the holder of 100 shares of the par value of $10 each of the capital stock.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and LATCHFORD, JJ.

W. A. Proudfoot, for the appellant.

McGregor Young, K.C., for the company.

FALCONBRIDGE, C.J.:—In my opinion, my brother Middleton had, in any view of the case, a discretion to refuse the motion, without prejudice to an action being brought: Buckley's Companies Acts, 9th ed., p. 85, and cases on sec. 32 of the Imperial Companies (Consolidation) Act, 1908, which is sufficiently like sec. 116 of the Ontario Companies Act, 7 Edw. VII. ch. 34.

But counsel for the company stated that he was more concerned about the retention of the applicant as a holder of even one share than with the amount of his holding. And counsel for the applicant expressed his willingness that his client should remain on the register, etc., as the holder of one share.

The register will, therefore, be rectified and amended by reducing the holding of the applicant and recording him as the holder of one share of the capital stock of the company.

No costs of this appeal.

BRITTON, J., agreed, for reasons stated in writing.

LATCHFORD, J. (dissenting):—I am of opinion that my brother Middleton was right in dismissing Herman's application. Upon the argument of the appeal, it was admitted by counsel for the company and for Herman that there in fact exists no register of stockholders which could be rectified by the removal therefrom of the applicant's name. The Court has, I think, no power except what the statute confers, and cannot, even upon the consent of counsel for Herman and the company, interfere in any way with the memorandum of agreement and stock-book, which are filed with the Provincial Secretary. It may be that in a proper proceeding Herman would be found to have subscribed for one share, and not for one hundred; but, upon a summary proceeding under sec. 116 of the Ontario Companies Act, no such end can, I think, be attained.

I would dismiss the appeal with costs.

DIVISIONAL COURT. DECEMBER 31ST, 1910.

STRATFORD PUBLIC SCHOOL BOARD v. CITY OF STRATFORD.

Assessment and Taxes—Part Exemption—Agreement Fixing Taxes of Railway Company at Named Sum—Validation by Statute—Construction of Agreement—Inclusion of School Taxes—Application of Sum Paid.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., at the trial, dismissing an action brought by the school board and by a ratepayer against the city corporation to compel the defendants to apply certain moneys in payment of public school expenditure.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

R. T. Harding, for the plaintiffs.

R. S. Robertson, for the defendants.

The judgment of the Court was delivered by MEREDITH, C.J.:—The plaintiff school board on the 12th May, 1910, made a requisition on the defendants to provide $31,000 for public school expenditure for the year 1910. The council of the defendants on the 2nd May, 1910, passed its by-law "to raise a sufficient sum of money to defray the liabilities, expenses, and current expenditure of the municipality for the year 1910." The by-law recites that the assessed value of the real and personal property of the municipality, as appears by the last revised assessment roll, other than the property of the Grand Trunk Railway Company of Canada and other property exempt by law from rates and levies for and towards public school purposes, amounts to $5,409,072, and imposes a rate of $6\frac{1}{10}$ mills on the dollar in order to raise $32,995.34, which is stated to be the sum required to be raised for public school purposes.

By an agreement bearing date the 28th July, 1904, and made between the Grand Trunk Railway Company of Canada and the defendants, it was, amongst other things, provided that all the provisions of an agreement between the parties bearing date the 27th February, 1910, respecting the yearly rates and taxes to be paid on the company's property in the city of Stratford, should be extended for a further period of ten years from the 31st December, 1909. This agreement was confirmed by . . . 10 Edw. VII. ch. 131 (O.)

The agreement of the 27th February, 1900, provided that the defendants would commute and fix for the next ten years, including the year 1900, "the rates and taxes to be paid by the company, save for local improvements or frontage rates, taxes, or assessments where the company's property is benefited thereby in its use for the business and purposes of the railway (but this does not include street watering), for and in respect of all assessable property now owned and occupied by the said company or which may be acquired and occupied by the said company for railway purposes during the next ten years, within the limits of the said city, at the sum of $8,000 . . ." And by the agreement the corporation agreed that the assessors appointed in any of these years should be relieved from the necessity of making the declaration or oath with regard to the assessable value of the company's property on the assessment roll for any of these years,

as required by the Assessment Act or by any similar provision in any amending Act. This agreement was confirmed by . . . 63 Vict. ch. 97 (O.)

The property of the railway company in the year 1910 was entered upon the assessment roll as being of the value of $865, 700.

In making provision for the public schools, in addition to imposing the rate of $6\frac{1}{10}$ mills, the council appropriated, of the $8,000 payable by the railway company, a sum which bears the same proportion to the $8,000 as the $6\frac{1}{10}$ mills bears to the aggregate rate of taxation, which was 27 mills.

The fact that a larger sum was provided than the school board made requisition for was due to a payment on a debenture in respect of public school expenditure having to be provided for.

The plaintiffs at the trial conceded that the effect of the agreement of the 28th July, 1904, and the Act confirming it, was to relieve the railway company, on payment of the $8,000, from all taxes, including those imposed for public school purposes; but contended that the council should have applied the $8,000 first in payment of the public school taxes for which the railway company would have been liable had there been no commutation, and that only the residue was applicable to the general purposes of the municipality; and the same ground was taken and the same contention made before us.

We agree with the view expressed by the trial Judge that the plaintiff school board has no ground of complaint, as the council has made ample provision for raising the whole amount for which the board made its requisition; but the plaintiff ratepayer stands on a different footing, for, undoubtedly, if his contention is well founded, a higher rate has been imposed upon the public school supporters than would have been necessary if the $8,000 had been applied as he contends it should have been applied.

If, however, as was, as I have said, conceded, the effect of the agreement and the Act confirming it is to relieve the railway company, upon payment of the $8,000, from all liability for the taxes, including school rates, for which it would otherwise have been liable, the application which has been made of the $8,000 appears to us to have been a fair and reasonable one. These taxes are commuted at $8,000. Had they not been commuted, the railway company would have had to pay probably about $20,000, and I do not see why, if the $8,000 is applied to general and public school purposes respectively in the same proportions as

the $20,000 would have been applicable to those purposes, proper effect is not given to the agreement.

If there had ben no agreement, and a rate had been imposed on the property of the company for public school, as well as for general, purposes, which it was unable to pay in full, and the defendants had accepted in satisfaction of it a composition of fifty cents in the dollar, I have no doubt that the sum paid by the company would have been applicable in the way the defendants have applied the $8,000, and there is, in my opinion, no difference, so far as the question under consideration is concerned, between such a transaction and an agreement fixing a sum to be paid in lieu of the taxes which would otherwise be payable.

Way v. City of St. Thomas, 7 O.W.R. 731, relied on by the plaintiffs, does not help them. . . .

I am also of opinion that the concession as to the railway company being relieved for school rates was rightly made.

The language of the agreement is general—"the rates and taxes to be paid" are to be commuted and fixed at $8,000, and the exception of local improvements and frontage rates other than those for street watering makes applicable the maxim expressio unius est exclusio alterius; and, in my opinion, the school rates come within this general language, for, although the proceeds of them are to be handed over to the public school board, they are municipal rates imposed by the council under the authority of the Public Schools Act, sec. 47.

The case at bar comes within the principle of the decision of the Supreme Court of Canada in Canadian Pacific R.W. Co. v. City of Winnipeg, 30 S.C.R. 558, rather than within that of Pringle v. City of Stratford, 20 O.L.R. 246. . . .

The council had no power to grant exemption from school rates and perhaps no power to exempt from taxation the property of the railway company, and it, therefore, entered into an agreement with the company, which was not intended to be and could not be operative until confirmed by the legislature. The company was willing to agree to enlarge its locomotive shops and plant by the erection of additional buildings and the installing of new tools and machinery, at an expenditure of not less than $120,000 if until the end of the year 1919, the taxes on its property, save those excepted by the agreement, were fixed at $8,000 per annum.

The earlier agreement had been in force for four years, and during all that time the $8,000 had been treated as covering the taxes, including school rates; and I see no reason why effect should not be given to the agreement according to what was

manifestly the intention of the parties to it, and to what appears to me to be the plain meaning of the language which they have used to express that intention.

Appeal dismissed with costs.

DIVISIONAL COURT. DECEMBER 31ST, 1910.

*STECHER LITHOGRAPHIC CO. v. ONTARIO SEED CO.

Assignments and Preferences—Insolvent Company—Chattel Mortgage—Assignment of Book Debts—Preference—R.S.O. 1897 ch. 147, sec. 2—Intent—Actual Advance by Officer of Company—Knowledge of Insolvency—Payment of Debt to Bank—Relief of Officer as Surety—Invalid Transaction—Payment of Secured Creditor—Subrogation.

Appeal by the plaintiffs, and cross-appeal by the defendant Uffelman from the judgment of TEETZEL J., 1 O.W.N. 1113.

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

M. A. Secord, for the plaintiffs.

G. C. Gibbons, K.C., for the defendant Uffelman.

The judgment of the Court was delivered by CLUTE, J.:—This is an action to set aside a chattel mortgage, dated the 12th August, 1909, from the defendants the Ontario Seed Company Limited to the defendant Adam Uffelman, for $8,300.

Prior to the incorporation of the defendant company in 1909, Herold and Kusterman carried on business as co-partners under the name of the Ontario Seed Company, and in December, 1909, presented a statement of their affairs to Jacob Uffelman, a merchant of Waterloo, shewing a surplus of $14,000, upon which he indorsed notes for them, and finally gave his bond for $5,000 as security for their debt to the Merchants Bank.

In the spring of 1909, the firm being then indebted and pressed by their creditors, the defendant company was incorporated to take over the business. Jacob Uffelman became a director and secretary-treasurer of the new company, taking $1,000 of stock. The new company was not floated successfully, only about

*This case will be reported in the Ontario Law Reports.

$5,000 of the stock being taken up. The Merchants Bank and other creditors were pressing for payment. The bank held as security an assignment of the book debts, in addition to the bond of Jacob Uffelman.

At a meeting of the directors of the company it was decided to raise money by chattel mortgage. The defendant Adam Uffelman is a brother of Jacob Uffelman, and a clerk in his employ, worth about $11,000. He received a cheque for $7,000 from Struthers, of London, handed to him by his brother Jacob, which he indorsed and handed back to Jacob, who deposited it to Adam's credit in the Merchants Bank, on the 3rd August, 1909. He had not asked a loan from Struthers. The money was obtained by Jacob on his own note without the knowledge of Adam. On the 13th August, Adam gave a cheque to the defendant company for $8,300, which was deposited to their credit in the Merchants Bank, and on the same day the defendant company gave a cheque to the Merchants Bank for $8,254.50, being the full amount of their account. On the 14th August there was a further deposit to the credit of Adam's account in the Merchants Bank of $1,000, of which a part was obtained from Jacob and the balance borrowed from another source. These are the only entries in his bank book.

On the 7th September, 1909, the bank assigned to Adam all their interest in the book debts held by them as security for their indebtedness, the assignment purporting to be in consideration of $8,254.52 "paid by Adam Uffelman. . . ."

[The findings of the trial Judge were then set out: see 1 O.W.N. 1113.]

The plaintiffs appeal and contend that the judgment should be varied by declaring the chattel mortgage void in toto, and the defendant Adam Uffelman by his cross-appeal asks that the action be dismissed. It will be convenient to deal with the cross-appeal first.

Mr. Gibbons urged that the chattel mortgage was not invalid; that the question of preference was eliminated, because the Merchants Bank and Jacob Uffelman—those who it is alleged were benefited—are not parties to this action; and that it was not void as against creditors upon the ground that it was made with intent to defeat, hinder, and delay creditors, because there was an actual bona fide advance in money, and the fact that one creditor was preferred is no offence either against the statute of Elizabeth or our Act, R.S.O. 1897 ch. 147, sec. 2, sub-sec. 1, which corresponds to it.

It was clearly established that at the time the chattel mortgage was given the company was insolvent, and that the effect of the transaction was to give the bank a preference and indirectly to benefit Jacob Uffelman, who was security to the bank, and that it was done with this object in view. . . .

[Reference to Mulcahy v. Archibald, 28 S.C.R. 523; Middleton v. Pollock, Ex p. Elliott, 2 Ch. D. 104; New Prance and Garrard's Trustee v. Hunting, [1897] 2 Q.B. 19; Harman v. Richards, 10 Hare 81; Thompson v. Webster, 4 Drew. 628, 632; In re Johnson, 20 Ch. D. 389, 392; Holmes v. Penney, 3 K. & J. 90; Freeman v. Pope, L.R. 5 Ch. 538; Ex p. James, 12 Ch. D. 314, 324, 325; Alton v. Harrison, L.R. 4 Ch. 622, 626.]

The statute has no application to the case of a preference of one creditor over another . . . but the statute has express reference to the case where the conveyance is made with the intent to delay, hinder, or defeat creditors.

A careful perusal of the evidence satisfies me that there is ample evidence to support the finding of the trial Judge that there was intent to delay and hinder creditors, quite apart from the question of preference. The case was, in my opinion, brought within the Statute of Elizabeth.

I think the case is also clearly within sub-sec. 1 of sec. 2 of the Assignments and Preferences Act. The directors and Jacob Uffelman knew that, unless the creditors were held off in some way, the company must assign. It could not meet its obligations. Jacob knew this, and desired to have the bank paid off and to be discharged as surety. He planned and carried out the scheme, using Adam as his instrument. Adam must have known or should have known the condition of affairs. The money advanced, while in the bank in his name, was obtained and placed there for the purpose by Jacob Uffelman. . . .

[Reference to Campbell v. Patterson, Mader v. McKinnon, 21 S.C.R. 645, 653.]

Adam Uffelman had not obtained the $7,300 on his own credit or with any intention, at the time the mortgage was given, of becoming liable to Struthers for the loan; nor did he in fact become liable until some time afterwards.

I think this case is within the language of sub-sec. 1 of sec. 2 of the Act, and that Burns v. Wilson, 28 S.C.R. 207; Campbell v. Patterson, Mader v. McKinnon, 21 S.C.R. 645, and Allan v. McLean, 8 O.W.R. 223, 761, govern the present case. The defendant's appeal fails.

As to the plaintiffs' appeal. The trial Judge held that "the transaction could be impeached only to the extent of the difference

between the actual value of the book debts held by the bank on the 13th August, 1909, and $8,300, because it was in fact only to the extent of that difference that either the bank or Jacob Uffelman as surety could be said to be unjustly preferred, and to that extent only could the advance be said to have been mala fide for the purpose of avoiding the statute." . . .

[Reference to Commercial Bank v. Wilson 3 E. & A. 257; Campbell v. Roche, McKinnon v. Roche, 18 A.R. 646; Campbell v. Patterson, Mader v. McKinnon, 21 S.C.R. 645, 653.]

The bank did not assign its debt to Adam; it was paid off. No doubt, it was part of the arrangement that Adam should have the book debts, and they were included in the chattel mortgage. There was no advance specially in respect of the book debts. It is true that the company got the benefit of them as far as collected, and, if a bona fide advance had been made in respect of them, no doubt the mortgage, to that extent, would have been valid. But the whole advance was one transaction, made, in my opinion, to hinder and delay creditors, contrary to the statute. There being no bona fide advance by Adam, he has no equitable claim of any kind. He is not entitled to stand in the shoes of the bank and be subrogated to their position in respect of the book debts. But, if he was, that would not entitle him to his present claim. He has allowed the company to exhaust this part of his security, and now seeks to have his loss made good out of the proceeds of the chattels, to which he has no legal right as against the other creditors. By his own laches he has lost his security, and cannot be heard to say, "True, I have neglected to enforce my claim in respect of that to which I had a title, and now I ask the Court to make good my loss from the proceeds of that to which I have no title."

The judgment of the Court below should be varied by eliminating the clauses bearing reference to book debts and deductions on account thereof.

The plaintiffs are entitled to the costs of this appeal and of the cross-appeal.

MIDDLETON, J. DECEMBER 31ST, 1910.

*NEAL v. ROGERS.

Injunction—Landlord and Tenant—Distress—Judicature Act, sec. 58 (9)—"Just and Convenient"—Disputed Question of Fact—Rent, when Due—Notice—Rent not Payable at a Time Certain.

Motion by the plaintiff for an order continuing an injunction granted by a local Judge restraining the defendant (landlord) from proceeding with a distress for rent and sale of the plaintiff's (tenant's) goods.

J. J. Coughlin, for the plaintiff.
C. A. Moss, for the defendant.

MIDDLETON, J.:—Three grounds are urged: (1) that the rent does not fall due till the end of the year, in April next; (2) that no notice has been given of the cause of the taking; (3) that, upon the landlord's own shewing, the rent was not payable "at a time certain," and so there can be no distress.

Before the Judicature Act, when a tenant desired to dispute the landlord's right to distrain, his only remedy, if he desired to prevent a sale, was to replevy the goods. He could not resort to equity for an injunction. Since the Judicature Act there are two reported cases in which an injunction has been granted. For some time after the Act was passed there was much uncertainty as to the effect of sec. 58 (9), giving to the Court the right to grant an injunction when "just and convenient." The view that has ultimately prevailed is, that the Court should grant an injunction now only where formerly the Court of Chancery would have done so.

In Manufacturers Lumber Co. v. Pigeon, 22 O.L.R. 36, ante 79, I collected some of the cases in which the phrase "just and convenient" was discussed; and, as bearing on injunctions particularly, would now refer to North London R.W. Co. v. Great Northern R.W. Co., 11 Q.B.D. 80, and Kitts v. Moore, [1895] 1 Q.B. 253.

Neither of the cases in which an injunction was granted can now be regarded as authoritative: . . . Shaw v. Earl of Jersey, 4 C.P.D. 120 . . . Walsh v. Lonsdale, 21 Ch. D. 9. . . .

*This case will be reported in the Ontario Law Reports.

In this case the first ground depends upon a disputed question of fact; this cannot now be determined. The second ground is one the landlord can remedy. And the third ground is one resting upon a legal proposition by no means clear or indisputable.

In these circumstances, it would clearly not be "just and convenient" to grant an injunction and deprive the landlord of his security, if in the end he turns out to be right—unless some other equally good security is substituted. Replevin is a cheaper, more just, and more convenient remedy.

The motion must, therefore, be dismissed; costs to the defendant in any event.

Had it been certain that the plaintiff was right in his contention that, upon the landlord's own statement, there was no right to distrain, I should have given him the option of turning this motion into a motion for judgment and resting his case upon this ground alone. . . .

[Reference to Foa on Landlord and Tenant, 4th ed., p. 483; Encyc. of the Laws of England, vol. 4, p. 291; Co. Litt. 42a. and 147a.]

I do not now determine this question, but draw attention to the matter.

DIVISIONAL COURT. DECEMBER 31ST, 1910.

*BELCOURT v. CRAIN.

Solicitor—Professional Services—Contract with Client Fixing Amount of Remuneration—Payment on Account—Action for Balance—No Bill Rendered before Action—Solicitors Act, sec. 34.

Appeal by the defendant from the judgment of the County Court of Carleton, in favour of the plaintiffs in an action to recover $400, the balance alleged to be due of a sum which the defendant (as alleged) agreed to pay to the plaintiffs, who were solicitors, for professional services.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

W. E. Raney, K.C., for the defendant.

H. S. White, for the plaintiffs.

*This case will be reported in the Ontario Law Reports.

The judgment of the Court was delivered by MIDDLETON, J.:—
The only defence suggested in this action which requires any consideration is, that no bill was rendered before suit. Section 34 of the Solicitors Act requires the delivery of a bill of "fees, charges, and disbursements for business done by a solicitor as such," as a condition precedent to an action therefor.

In this case, after the solicitors had rendered the services in question to the client, and while they had in their possession a cheque from the defendant for a portion of the amount recovered, an agreement was made by which the solicitors' charges were fixed at $1,200. A portion of this was then paid, and, on the faith of the defendant's promise to pay the balance, the cheque was handed over to him. The action is for $400, the balance now remaining due after certain payments made.

The learned Judge has found the agreement, and that, in the circumstances of the case, the agreement was fair. This finding cannot, upon the evidence, be successfully attacked. . .

[Reference to Jeffreys v. Evans, 14 M. & W. 210.]

In Thomas v. Cross, 13 W.R. 166, Lord Chancellor Westbury had before him an action to enforce a mortgage taken by a solicitor from his client in payment of costs, no bill having been rendered. At p. 167 it is said: "His Lordship then proceeded to consider the statute with respect to which the question arose, whether there was any prohibition by reason of no bill of costs being delivered. He had a strong impression that these words had been construed judicially to prohibit suits and actions upon that particular contract or assumpsit that arose between attorney and client. But, when a suit had been commenced upon another contract into which the client had entered, there was nothing to which the statute applied. It contained no prohibition against enforcing collateral arrangements. His Lordship, therefore, wholly recognised the decision of the Court of Exchequer in Jeffreys v. Evans as applicable to the present case. . . .

[Reference to Brooks v. Bockett, 9 Q.B. 847; Scadding v. Eyler, ib. 858.]

That services rendered afford a basis for such a new promise is clear from . . . Halsbury's Laws of England, vol. 7, p. 388, based, inter alia, upon a statement of Bowen, L.J., in Stewart v. Carey, [1892] 1 Ch. 104, 115. . . .

We are not considering here the question of what constitutes payment to preclude taxation under sec. 49, but merely the question arising under sec. 34.

The appeal fails and should be dismissed with costs.

FALCONBRIDGE, C.J.K.B. JANUARY 3RD, 1911.

SHAW v. ST. THOMAS BOARD OF EDUCATION.

Negligence—Unguarded Hole in Floor of Furnace-room in School Building—Injury to Person Having Business in Building—Contributory Negligence—Damages.

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

C. St. Clair Leitch, for the plaintiff.

T. W. Crothers, K.C., for the defendants.

FALCONBRIDGE, C.J.:—The plaintiff is Sanitary Inspector and Truant Officer in and for the city of St. Thomas, having been appointed by by-law No. 720, passed on the 4th July, 1893. The by-law provides that, besides performing the several duties imposed upon the Sanitary Inspector by the Public-Health Act, he shall at all times assist the Medical Health Officer, and perform such other duties as may from time to time be assigned to him by the Board of Health or its Chairman; or by any resolution or by-law of the council.

In the city of St. Thomas, and under the jurisdiction and control of the defendants, there is a building used and occupied for public school purposes, known as the Myrtle Street School. In the early part of 1910 there had been an epidemic of diphtheria in the city, and the plaintiff was instructed by the Chairman of the Board of Health to make an inspection of the schools. The plaintiff had arranged with the Medical Health Officer to meet him at the said school. The plaintiff went there about 10.40 a.m. on the 22nd February last; and arrived before the Medical Health Officer. The plaintiff entered on the ground floor, then went to the west, down into the basement, to find the janitor to get him to shew the different parts of the building. The plaintiff understood that it was a rule of the Board that the janitor should be in or about the building. As a matter of fact, the janitor was then outside, shovelling snow, but the plaintiff did not know this. The plaintiff looked into the elevator to see if the janitor was there, and then passed on to what proved to be the door of the furnace-room, where he thought he heard a noise. He assumed, reasonably, I think, that the janitor was there. He hesitated at or inside the door and saw a little light inside. He went in about two steps and some

one spoke to him. The plaintiff said "good morning" in reply, and turned to the west to walk across to the person, and fell into the unguarded furnace-pit or ash-pit, sustaining the personal injuries complained of. It was a dark, snowy day. The door where the coal was kept was closed, and there was no artificial light in the room. The floor was all in shadow. He did not see the pit, and supposed it was all one plane surface. He had never inspected this school before, nor been in the basement before.

The plaintiff was in the building in the exercise of his official duties, which entirely distinguishes the case from Rogers v. Toronto Public School Board, 23 A.R. 597, affirmed 27 S.C.R. 448. In that case the plaintiff visited the premises for his own purposes, and without the knowledge of the occupant, and merely to see for his own convenience how he could best deliver coal ordered by the defendants. Not only was the present plaintiff properly in the building in pursuit of his duty, but it was his business, and it was right for him to enter the furnace-room in search of the janitor.

The Principal of the school has an office just at the door, and teaches in the room on the ground floor. The plaintiff had known the Principal personally for years. There was no one in sight when the plaintiff passed through the yard, and he did not consider it proper to see the Principal, or ask for him (thereby disturbing him in his classes), knowing that the janitor could shew him around quite as well, or better.

The Chairman of the Board of Health testified that, in his opinion, there should have been a light and a chain across to protect the pit. The janitor who preceded the present one told the Chairman of the Board of Education about seven years ago that there ought to be a light, and the Chairman said they were going to put one in. The present janitor, who was called for the defence, says he asked for a light over the pit, and that members of the Board told him they would put it in. It is true that both the janitors wanted the light, to some extent, for their own purposes in doing their work, seeing the steam-gauge, etc.; but the present janitor also said that it was needed for protection against the pit.

The man who was in the furnace-room was a friend of the janitor. He happened to have nothing to do; it was a stormy day, and he was there because it was warm.

Dr. Lipsey, called as a medical witness, and who was also a member of the Board of Education, had the misfortune to fall into the pit once.

I have gone through all the English and Canadian cases from Indermaur v. Dames, L.R. 1 C.P. 274, down, and I think the plaintiff is entitled to recover.

The only remaining question is the issue presented on the defence of contributory negligence. As to this the onus is, of course, on the defendants, and I am of opinion that they have not succeeded in establishing it.

I have always a great deal of difficulty in settling the quantum of damages where results are of the neurasthenic character, because there is too much danger of an innocent and unconscious exaggeration of symptoms on the part of the claimant. Perhaps in this case I am not giving the plaintiff all that he is entitled to when I award him $1,200 and costs.

DIVISIONAL COURT. JANUARY 3RD, 1911.

*RE STINSON AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Physicians and Surgeons—College Council—Inquiry into Alleged Misconduct of Member—Ontario Medical Act, R.S.O. 1897 *ch.* 176, *sec.* 59—*Notice of Inquiry—Time-limit—Procuring Abortion—Crime—Sec.* 33(1)—*"Infamous or Disgraceful Conduct in a Professional Respect"—Acquittal by Criminal Court—Prohibition.*

Appeal by Albert W. Stinson from the order of RIDDELL, J., ante 298, dismissing a motion by the appellant for an order prohibiting the College Council from proceeding with an inquiry into and investigation of a charge made against the appellant, that he had, in the months of August and September, 1909, performed a criminal operation on a woman named Emma Dale.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

E. G. Porter, K.C., for the appellant.

J. W. Curry, K.C., for the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.:—On the argument we disposed of two of the grounds of

*This case will be reported in the Ontario Law Reports.

the appeal, viz.: (1) that proper notice had not been given to the appellant of the intended inquiry; and (2) that the right of the respondents to enter upon it was barred by sec. 59 of the Ontario Medical Act; and expressed our agreement with the view of my learned brother as to them.

The third and main ground of appeal remains to be dealt with. . . .

[Reference to the Ontario Medical Act, R.S.O. 1897 ch. 176, secs. 33, 35, and the amending Act 10 Edw. VII. ch. 77.]

It is contended on behalf of the appellant that under this legislation there is no jurisdiction in the Council to erase from the register the name of a medical practitioner: (1) for conduct amounting to an indictable offence unless he has been convicted of the offence; or (2) for infamous or disgraceful conduct in a professional respect, unless the act charged does not amount to an indictable offence; and (3) that, even though this be not the effect of the legislation, there is no jurisdiction where the person charged has been tried for the act for which it is sought to discipline him, as a criminal offence, and has been acquitted.

The first two of these contentions are not, in my opinion, entitled to prevail. To construe the section as we are asked to do would be to read into it words which the legislature has not used, and something which would seriously impair the effectiveness of the legislation to accomplish the purpose it was designed to serve—the removal from the register of the name of a medical practitioner who has been guilty of conduct which unfits him to remain a member of an honourable profession. . . .

[Reference to Cordery on Solicitors, 3rd ed., p. 176, and cases there cited; ib., pp. 176-7, and cases there cited; Stephens v. Hill, 10 M. & W. 28, 1 Dowl. P.C.N.S. 673; In re An Attorney, 12 W.R. 311; Anon., London Times, 15th Dec., 1904.]

I have found more difficulty in reaching a conclusion as to the third contention. On the first blush it strikes one that it would be unfair and contrary to the principles of British law that, where the act which is charged involves guilt of infamous or disgraceful conduct in a professional respect, and also amounts to a crime, and the person charged has been acquitted of the crime, he should be liable to have his name erased from the register, because he may on an inquiry by the Council be found guilty of the act.

My brother Riddell has presented very strong arguments in favour of the view that there is nothing to prevent such an inquiry being made and action being taken upon it, and

I am not prepared to say that his conclusion is wrong. It may be that the appellant was acquitted, not on the merits, but on some technical ground; and, in one case at least, a solicitor has been struck off the rolls after his acquittal by the jury on a criminal charge based on the same matters on which the charge of misconduct was based: Re W.H. Brown, 17 L.J. 165.

I am inclined to think also that the appellant's application, so far as this last point is concerned, was premature. The fact of his acquittal, if an answer at all, is a defence to the charge that has been made against him, and should be presented to the tribunal whose duty it is to make the inquiry. It would, I think, be improper to stop the inquiry at the threshold, and the Court ought not to assume that, if the acquittal were an answer to the charge, the Council would not give effect to the answer when it was made to appear that the acquittal had taken place.

I have the less hesitation in affirming the order of my brother Riddell because the appellant is entitled to appeal from the decision of the Council. As my learned brother points out, the appellate Court may be depended on to see that no injustice is done to the appellant.

I would dismiss the appeal with costs.

DIVISIONAL COURT. JANUARY 3RD, 1911.

SCOTT v. MERCHANTS BANK OF CANADA.

Banks and Banking—Custom or Practice between Banks—Unaccepted Cheque Initialled by Local Manager—Credit Given by another Bank on Strength of—Authority of Manager—Evidence—Undertaking—Representation—Promise to Accept—New Trial—Terms.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 1 O.W.N. 1110, dismissing the action. The action was originally brought by T. M. Scott. The Dominion Bank were added as party plaintiffs under order of the trial Judge.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

G. T. Blackstock, K.C., and T. P. Galt, K.C., for the plaintiffs.

G. C. Gibbons, K.C., and G. S. Gibbons, for the defendants.

The judgment of the Court was delivered by MIDDLETON, J.:—
C. N. Huether was a customer of the Merchants Bank at Berlin; Deavitt was the manager of the branch there. The Dominion Bank also had a branch at Berlin; Scott was the manager. Huether was not a regular customer, but had occasional transactions.

On the 20th February, 1909, Huether drew a cheque upon the Merchants Bank in favour of "cash or bearer" for $10,000. This was not accepted and was not "marked" by the ledger-keeper. Deavitt placed in one corner in pencil his initial "D."

No evidence whatever is given by either party of the circumstances under which, or of the purpose for which, this was done.

Huether, armed with this cheque so initialled, presented it for deposit at the Dominion Bank, and contemporaneously drew against this deposit two cheques for $7,950 and $2,050 respectively in favour of cash or bearer, and deposited these in the Merchants Bank. On the same day these were paid to the Merchants Bank, and the proceeds placed to the credit of Huether's overdrawn account.

When the $10,000 cheque on the Merchants Bank was in ordinary course presented to that bank for payment, it was refused. Scott demanded explanation from Deavitt, and Deavitt asked that the cheque be returned, and said that he was expecting $15,000 discounts from Huether, and he would mark the cheque. No discounts were put in. An inspector arrived, and he declined to permit the cheques to be paid.

The action was originally brought by Scott as the holder of the cheques and as assignee of the claim of the Dominion Bank. Some question having been raised as to his status, the Dominion Bank were added as plaintiffs; and the controversy may be regarded as really between the two banks.

Upon the argument the plaintiffs contended that the initialling of the cheque by Deavitt was an acceptance by the defendant bank, or, as it is put in the notice of appeal, "a certification thereof," upon which the bank are liable.

A cheque is, by sec. 165 of the Bills of Exchange Act, a bill of exchange, and, under sec. 36, an acceptance is invalid unless it is written upon the face of the bill and is signed by the drawee.

At one time a practice of "marking" cheques prevailed. The ledger-keeper charged the cheque to the customer's account and wrote upon the face of the cheque the reference to the account, and signed this with his initials. This practice

produced much laxity, and the provision making the law as to acceptance of bills applicable to cheques was adopted in 1890, and now banks generally accept cheques formally when presented to the ledger-keeper. This is recognised by both the banks to be the practice.

The initialling of cheques by the manager of the bank is a piece of domestic machinery adopted by the bank. It is an authority by the manager to the ledger-keeper, who has the custody of the acceptance stamp of the bank, to accept the cheque when there is not a balance to the credit of the customer against which it can be charged. When there is money to the customer's credit, the ledger-keeper accepts the cheques of the customer without question. The ledger-keeper has no discretion to grant credit—that power rests with the manager.

The plaintiffs' contention upon this head fails.

The plaintiffs then contend that the Dominion Bank paid the sum of $6,518 due from them to the Merchants Bank, on the 22nd February, as a clearing-house balance, upon the strength of a promise by the Merchants Bank to accept this cheque.

It may not be material, but the $6,518 did not include the two cheques on the Dominion, nor could they have been factors in arriving at this sum, as these cheques were paid on the 20th. The obligation to pay the $6,518 was clear, and the payment of it formed no consideration for the alleged promise. Probably no more took place than a protest on the part of Deavitt against any attempt upon Scott's part to force the situation by withholding an indisputable claim due as the clearing-house balance.

The course adopted by the plaintiff Scott at the trial of refraining from producing any evidence as to the circumstances under which the cheque was initialled, prevents our now giving effect to the argument presented to us, that the initialling was with the object of enabling Huether to present the cheque to the Dominion Bank as one which would be accepted by the Merchants Bank, and so obtaining money which was to be deposited to his credit in that bank. The circumstances surrounding the whole transaction are most suspicious. Huether, though called, was asked nothing save the one question—"Did you take this cheque to the Dominion Bank?" Deavitt was not called. The state of the account in the Merchants Bank is not clearly shewn. All is left to the imagination, aided by the declamation of counsel. Neither formally in the notice of appeal, nor informally upon the argument, do the plaintiffs ask any indulgence, and it is not without much misgiving that I think it proper now to give them a right to elect to accept a new

trial if they see fit, such new trial to be based upon an appropriate amendment of the pleadings to present this aspect of the case and to be confined to it—our adverse judgment upon the other branches of the case to be regarded as final.

If the plaintiffs elect to avail themselves of this option, the costs of the last trial, the appeal, and the amendment, must be paid by them in any event. If they do not, the appeal will be dismissed with costs.

The election should be made in two weeks.

MEREDITH, C.J.:—I agree.

TEETZEL, J.:—I agree.

MIDDLETON, J. JANUARY 3RD, 1911.

TOWN OF DUNDAS v. HAMILTON CATARACT POWER CO.

Desjardins Canal—7 Geo. IV. ch. 18—39 *Vict. ch.* 17—*Public Work of Canada*—31 *Vict. ch.* 12—*Conveyance to Municipality — Legislative Jurisdiction of Province — Ontario Railway Act,* 1906, *sec.* 51, *sub-sec.* 4—*Authority to Electric Company to Lay Wires across Canal—Navigation not Interfered with.*

Motion by the plaintiffs for an injunction to restrain the defendants from erecting an electric wire across the Desjardins Canal, by consent of counsel turned into a motion for judgment.

H. C. Gwyn, K.C., for the plaintiffs.
G. H. Levy, for the defendants.

MIDDLETON, J.:—In 1826 the Provincial Parliament of Upper Canada, by the Act of 7 Geo. IV. ch. 18, after reciting the public benefits expected to be derived from connecting Burlington Bay with Lake Ontario, and, "in order that those benefits may be more generally extended to the surrounding country, it is of manifest importance to form a water communication or canal sufficient for the passage of sloop and other vessels of burden from the said bay to the village of Coote's Paradise through the intervening marsh," incorporated Peter Desjardins and his associates

as a canal company, with power to construct and operate the canal in question. This statute further provided that at the end of fifty years the canal should vest in the Crown for the use of the province.

In 1876, by 39 Vict. ch. 17, it is enacted that at the expiration of the charter of this company the canal shall "be deemed a public work of Canada," and that secs. 52-57 of the Public Works Act shall apply to it.

By the statute 31 Vict. ch. 12, the Minister is empowered to make arrangements for the granting of certain public works either forever or for a term of years to any provincial government, municipal council, or other local authority or company, and power is conferred upon any such government, council, or local authority to take and hold the work so transferred.

Pursuant to this statute, by order in council of the 26th October, 1877 (Gazette, p. 512), the canal was conveyed to the town of Dundas in fee simple, subject to the provisions of the Act of 1876. This grant is subject to be defeated by breach of certain conditions as to repair, etc.

The declaration in the Act of 1876 that this canal was to be "deemed to be a public work of Canada" was not intended to be a declaration under sec. 92, sub-sec. 10 (c), that this canal was "for the general advantage of Canada," as the Dominion had assumed control of the canal under its general jurisdiction over navigation and shipping.

Upon the transfer of the canal in 1877, it became (subject to the right of the Dominion to forfeit) an asset of the municipality and subject to the legislative jurisdiction of Ontario.

The defendant company was originally incorporated by letters patent (on the 9th July, 1896, Ontario Gazette, p. 629) as "The Cataract Power Company of Hamilton Limited," under the Act respecting companies for steam and heating or for supplying electricity for light, heat, and power, with, inter alia, power to manufacture and sell electric power.

By 61 Vict. ch. 68, these letters patent were confirmed, and power is given to construct a canal for power purposes, and secs. 13 to 20 of the Railway Act of Ontario are made to apply to the company and its undertaking, both with regard to the works authorised by the original charter and those authorised by this Act, "railway" being read as meaning any work so authorised, and "land" meaning any privilege or easement required for operating the works authorised.

Without detailed reference, it is clear that the Electric

Light Act gives ample power to construct lines for the transmission of electricity.

Section 51, sub-sec. 4, of the Ontario Railway Act of 1906 (identical with sec. 8, sub-sec. 5 of R.S.O. 1897 ch. 207, made applicable to this company by the Act of 1903), interpreted by the meanings given to "railway" and "land" above quoted, authorises this company to construct its lines across any canal, so long as the usefulness of the canal for the purposes of navigation is not impaired.

Upon the evidence it is clear that the lines in question cannot be said to interfere in any way with the navigation of this canal.

Any wire carrying high tension electricity is a source of danger in one sense, as, if it breaks and falls, it may, in the absence of effective safety devices, permit the escape of dangerous electricity, but, so long as it remains in the position in which it is placed, it does not interfere with navigation, which is all that the statute requires.

The Ontario Railway and Municipal Board is not given any power over the crossing of canals, etc., and the Dominion Board has no jurisdiction over this company.

Several of the power companies that operate under Dominion Acts are made subject to the Dominion Railway Board, as the appropriate sections of the Dominion Railway Act are by their special Acts made to apply to them.

The canal company is placed in the same position as the municipality in Wandsworth v. United Telephone Co., 13 Q.B.D. 904. See also Finchley v. Finchley, [1902] 1 Ch. 866, [1903] 1 Ch. 437; National Co. v. St. Peter Port, [1900] A.C. 317.

The action should be dismissed with costs.

MEREDITH, C.J.C.P. JANUARY 4TH, 1911.

*LAMONT v. WENGER.

Damages—Fraud and Misrepresentation—Sale of Creameries—Measure of Damages—Difference between Purchase-price and Actual Value—Finding as to Actual Value—Destruction of Books—Omnia Præsumuntur contra Spoliatorem—Appeal from Report—Costs.

Appeal by the defendant from a report of the Local Master at Woodstock, upon a reference "to ascertain and state what

*This case will be reported in the Ontario Law Reports, with a previous judgment noted 1 O.W.N. 177.

damages, if any, the plaintiffs have sustained by reason of the fraud referred to in the pleadings."

The action was for the rescission of a contract made in August, 1905, for the purchase by the plaintiffs from the defendant of two creameries, and to recover back the purchase-money, on the ground that the contract was entered into by the plaintiffs relying on certain false and fraudulent representations made by the defendant as to the output, expenses, and profits of the creameries for 1904 and 1905; and the plaintiffs also claimed damages for the loss sustained by them in operating the creameries in 1906, and further and other relief.

The purchase-price was $4,830, and the Master found the fair value at the time of the purchase of the Kenilworth creamery to have been $367.50 and of the Springbank creamery, $532.50, and assessed the damages at the difference between the aggregate of these two sums and the purchase-price—$3,930—with interest at 5 per cent. per annum from the 12th January, 1906, to the date of report, amounting to $715.65; and he also allowed as damages $3,440.14 which he ascertained to be the loss sustained by the plaintiffs in operating the creameries after the purchase.

As to this latter head of damage, the defendant's appeal was allowed (1 O.W.N. 177) and the $3,440 disallowed.

The appeal as to the items of $3,930 and $715.65 was heard after the other branch of the appeal had been disposed of.

G. H. Watson, K.C., and W. A. F. Campbell, for the defendant.

J. G. Wallace, K.C., for the plaintiffs.

Meredith, C.J.:— . . . The proper measure of damages has been determined to be the difference between the price paid for the creameries and their fair value at the time of the purchase. . . . I see no reason for differing from the view of the Master as to the fair value of the land, buildings, and machinery, assuming that the creameries were valueless as creameries. It is undoubted, I think—to whatever cause it may properly be attributed— that the result of the plaintiffs' operation of the creameries shewed that they were valueless as creameries. After a careful perusal and consideration of the testimony, I have come to the conclusion that, apart altogether from any evidence as to the actual results of the operation of them in 1904 or 1905, sufficient appears to warrant the conclusion of the Master that the creameries had no value as creameries at the

time they were sold to the plaintiffs, and that the conduct of the defendant and his associates in the transaction which led to their purchase, as disclosed in the evidence, is cogent evidence of the fact. . . .

It was sufficiently established that there was, instead of a profit as was represented, a very considerable loss in operating the Springbank creamery, both in 1904 and 1905, and a large loss in operating the Kenilworth creamery in 1905, if not also in 1904.

It would be a mockery of justice if, in such a case as this, the plaintiffs must fail in obtaining redress for the wrong that had been done to them, unless they are able to trace to the last pound the quantity of butter that went out from the two creameries. That was a matter within the knowledge of the defendant or his associates. There would have been no doubt as to it had the books which shewed the result of the operation of the creameries not been destroyed; and the plaintiffs are well warranted in invoking in aid of their case the maxim omnia præsumuntur contra spoliatorem, a maxim which has been rigorously applied in cases such as this; Broom's Legal Maxims, 6th ed., p. 892 et seq., and cases there cited.

The appeal, in my opinion, fails, and should be dismissed.

As the defendant succeeded as to the claim for damages for the loss in operating the factories, the plaintiff should have only three-fourths of their costs of the appeal, and should pay one-fourth of the defendant's costs of it.

MIDDLETON, J. JANUARY 4TH, 1911.

KERR v. COLQUHOUN.

Mortgage—Interest post Diem—Accounts Rendered including Interest at Mortgage Rate without Provision therefor—Mistake in Law of both Parties—Payment of Lump Sums—Application by Mortgagee—Interest Act—"Liability"—Judgment on Further Directions—Costs.

Appeal by the plaintiffs from the report of the Local Master at Cornwall upon a reference to take the account in a mortgage action; and motion by the plaintiffs (by consent) for judgment on further directions.

I. Hilliard, for the plaintiffs.
R. A. Pringle, K.C., for the defendants.

MIDDLETON, J.:—I very much regret that I am unable to interfere with the Master's report upon the main question.

The defendants' testator, William Colquhoun, rendered accounts from time to time to the plaintiffs' testator, Joseph Kerr, and his brothers. All the securities were long past due. There is no evidence of an agreement for the extension of time or for payment of interest at any other than the rate allowed by law in the case of past due securities. In his statement Colquhoun assumed that the rate originally stipulated and the provisions as to compounding applied as well before as after maturity; and Kerr, in ignorance of the law, accepted these statements without protest. No payments were made specifically on account of interest—almost all the payments being lump sums generally "on account." The payments of "broken sums" appear to have been made to suit the debtor's convenience, and without any relation to the accounts.

In these circumstances, I am unable to apply the principle of Stewart v. Ferguson, 31 O.R. 112, in the defendants' case. That case is more in the defendants' favour than Daniel v. Sinclair, 6 App. Cas. 181 (not cited in it); and it may be found to be in conflict with the higher authority.

Plenderleith v. Parsons, 14 O.L.R. 619, binds me as to the construction of the Dominion statute: but for that case, I should have understood "liability" as referring to the debt, and not to the liability as to interest.

The rules as to application of payments do not aid the defendants. The creditor has the right, when the debtor has not made any application, to apply the payments as he pleases. The payment can be applied only in satisfaction of a claim having some legal foundation. Daniel v. Sinclair, supra, shews that the application by the creditor, with the debtor's knowledge and acquiescence, in discharge of a claim for interest having no foundation in law, but which both parties thought was well grounded, is not final and must be disregarded in taking the accounts. I do not think the plaintiffs are entitled to recover any sum paid in excess of the amount due. This is a payment made by reason of mistake in law, and there is no remedy—both parties were under the same error, and there was neither fraud nor any fiduciary relationship.

Counsel consent that I shall now dispose of the action on further directions and costs. My doing so must not prevent a

further appeal from the Master's report if the parties so desire.

The judgment will direct the mortgage to be discharged and the lands to be conveyed, and there will be no costs either of the action, reference, or appeal.

MIDDLETON, J., IN CHAMBERS. JANUARY 5TH, 1911.

MACDONELL v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION.

Pleading—Statement of Defence—Railway Construction Contract—Dispute as to Payment for "Overhaul"—Reference to Earlier Contract—Interpretation of Contract—Discovery—Production of Documents—Relevancy—Amendment.

Motion by the plaintiff to strike out so much of paragraphs 15 to 21 of the statement of defence as related to a certain contract of October, 1902; and appeal by the plaintiffs from an order of the Master in Chambers directing better production of documents by the plaintiff, in so far as by that order production was required of documents relating to the contract referred to.

A. M. Stewart, for the plaintiff.
W. N. Tilley, for the defendants.

MIDDLETON, J.:—The action is based upon a construction contract dated the 7th June, 1904. The plaintiff contends that, according to the true construction of this contract, he is entitled to be paid a very large sum of money for "overhaul" of material used in the formation of the road-bed. The contract provides for an allowance for overhaul in connection with excavation, but not for "ballasting" or "trestle filling by train"—matters which are specifically dealt with by the contract. An enormous amount of material was used in the construction of the line; and the contest is as to which head this falls under—the difference being upwards of $1,000,000.

In answer to the plaintiff's claim, the defendants set up several provisions of the contract and divers matters not now the subject of controversy, and then in paragraph 15 allege an earlier contract, in similar terms, for the construction of another

portion of the line, and, that, after the making of the second contract, the work proceeded contemporaneously under both, and that, though each contract contemplated the grading (other than trestle filling) being complete before track-laying, the plaintiff was permitted to lay the tracks before the grading was completed, so as to facilitate the bringing of ballasting material from pits over the permanent way—and that the hauling over the permanent way is not "overhaul" within the meaning of the contract. Prior to the second contract the engineer had classified this as "ballasting" (for which no "overhauls" were payable), but, after the making of the second contract, the engineer proposed to change the classification to "trestle filling by train," except as to 3,000 yards per mile, to be allowed as "ballasting." This filling was to be done at a cheaper rate than ballasting, and there was no "overhaul" allowance. This was objected to, and on the 14th November, 1904, a letter was written by the plaintiff, protesting and suggesting as fair that all material other than that actually used to fill trestle should be allowed as ballast, and this was finally agreed to by the defendants; and the work done under both contracts was thereafter paid for upon that basis. Such payments were accepted by the plaintiff and receipted for in full.

Paragraph 21 then sets out that the only record kept by the plaintiff under either of the contracts was in accordance with this classification, but that the plaintiff's records have been falsified so as to give colour to his present claim, which is manifestly unjust, as the "overhaul" as claimed is $58\frac{8}{10}$ cents per yard per mile, while the actual cost is only $\frac{6}{10}$ of one cent per yard per mile.

These are the paragraphs objected to.

The plaintiff has pleaded over, in his reply submitting that the statement of defence discloses no answer to his claim.

The motion for better production was based upon some question as to the sufficiency of the identification of documents not now in issue, and upon a claim to have the following produced: (*a*) the contract of October, 1902; (*b*) the correspondence relating to the laying of the rails before the grading was completed; (*c*) all correspondence relating to classification under the first contract; (*d*) progress certificates, cheques, and receipts under the first contract; (*e*) the plaintiff's books and records shewing how the material was classified under the first contract, and all changes made in the original record.

There is much difficulty in ascertaining the exact way in which the matters relied on in the paragraphs in question are regarded as a defence; and it may well be that, in view of the argument, the defendants may be driven to amend so as to make their position clear. If they do, an order may now issue without the necessity of a further motion. . . .

[Reference to Bank of New Zealand v. Simpson, [1900] A.C. 182, and North Eastern R.W. Co. v. Hastings, [1899] 1 Ch. 663, [1900] A.C. 260, as to the interpretation of the documents; also Forbes v. Watt, L.R. 2 Sc. App. 214; McEntire v. Crossley, [1895] A.C. 467; Moens v. Taylor, 8 Hare 51, 56.]

Upon this record there is no plea for rectification.

The rights of the parties under the agreement must, therefore, be determined upon the agreement itself, unless there can be found in it some ambiguity or obscurity which brings the case within Forbes v. Watts, supra.

I must assume in favour of the pleader that he can do so, and the subsequent action of the parties upon the contract can, therefore, be pleaded. Indeed, this is not objected to. But I can find no warrant for saying that the action of the parties upon another and contemporaneous contract can be so used.

Had the pleading said that upon the earlier contract a course of dealing and mode of classification had been adopted before the making of the new contract, and that the new contract was made upon the faith of this, the situation would have been different. The pleading says that the controversy as to the meaning of the provisions of the earlier contract arose after the making of the later.

There is, however, an aspect of the case which prevents my striking out paragraphs 15 to 20. They may be regarded as a statement of the fact that there was the earlier contract, that there was a dispute as to the proper classification, and that an arrangement was made by which the material in question should be classified as ballast, and that this arrangement was made to apply to the new contract, as well as to the old, and the dispute as to the meaning of a contract, vague, uncertain, and obscure, was in effect determined by a new and substantive agreement, to be inferred from the conduct of the parties. In this view, these clauses must stand.

Clause 21, so far as it relates to work done under the earlier contract, is not well pleaded, and must be amended so as to confine it to the second contract.

The result is, that the documents mentioned above—save the

first contract, and the documents (if any) going to shew an agreement based upon the proposition contained in the letter of the 14th November, 1904, and going to shew an acceptance of that proposition by both parties as a solution of the controversy—are not relevant.

The plaintiff may have joined issue upon paragraph 19 rashly, and he may amend by admitting its truth, in whole or in part, as advised, and so still further narrow the scope of discovery.

Order accordingly, after the parties have elected as to amendment.

Costs in the cause here and below.

DIVISIONAL COURT. JANUARY 5TH, 1911.

*DAWSON v. DAWSON.

Covenant—Conveyance of Farm by Father to Son—Covenant by Son to Pay Annuity to Sister—Right of Sister to Enforce after Death of Father—Trust for Benefit of Third Persons—Parties—Dispensing with Representation of Father's Estate—Charge on Farm.

Appeal by the plaintiff from the judgment of MAGEE, J., of the 4th November, 1910, dismissing the action without costs and without prejudice to any other action which the plaintiff might bring against the defendant or the executors of Thomas Dawson.

The action was brought to recover a sum alleged to be due in respect of an annual payment which, by an agreement dated the 12th November, 1897, the defendant covenanted with his father, Thomas Dawson, who died on the 7th April, 1898, that he would pay to the plaintiff during her life.

The defendant, besides putting in issue the allegations of the statement of claim, set up in his statement of defence that the agreement was made without consideration, and that it was subsequently destroyed by his father, with the intention of putting an end to the defendant's liability under it, and that, therefore, at the time of the father's death, no liability attached to the defendant by reason of the agreement.

*This case will be reported in the Ontario Law Reports.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

W. J. L. McKay, for the plaintiff.

C. R. McKeown, K.C., for the defendant.

MEREDITH, C.J.:— . . . The plaintiff is not a party to the agreement, and is only named in it as the person to whom this annuity is to be paid, and the fact that the agreement had been entered into was not communicated to her.

The learned trial Judge . . . found against the defendant as to the alleged cancellation of the agreement, and held that it was a subsisting liability at the time of the father's death; and the ground upon which he dismissed the action was that, in his opinion, the plaintiff, not being a party to the agreement, was not entitled to maintain an action upon it for the purpose for which her action is brought. . . .

[Reference to the unreported case of Birch v. Birch, referred to in Edminson v. Couch, 26 A.R. 537, and to Mulholland v. Merriam, 19 Gr. 288, 20 Gr. 152.]

The decision in Birch v. Birch, unless the fact that the father had released the son from the obligation of the bond was sufficient to distinguish it from Mulholland v. Merriam, is, I think, directly in conflict with that case, and it is also opposed to the decision of the Irish Court of Appeal in Drimmie v. Davies, [1899] 1 I.R. 176. . . .

[Reference also to In re Flavell, Murray v. Flavell, 25 Ch. D. 89, 32 W.R. 102; Page v. Cox, 10 Hare 163; Ehrmann v. Ehrmann, 43 W.R. 125; Kelly v. Larkin, [1910] 2 I.R. 550; McConbray v. Thomson, 2 Ir. C.L.R. 226; Clitheroe v. Simpson, 4 L.R. Ir. 59; Tweddle v. Atkinson, 1 B. & S. 393.]

After the best consideration I have been able to give to the matter, I have come to the conclusion that Birch v. Birch does not stand in the way of the plaintiff's success, and that it may properly be treated as having been decided, as the present Chief Justice of Ontario appears to have thought (see Edmison v. Couch), upon its own circumstances, and I have come to that conclusion the more readily because, if it was not, the decision is in direct conflict with Mulholland v. Merriam and Drimmie v. Davies.

I am also warranted, I think, by what was decided in In re Flavell, Murray v. Flavell, and in Drimmie v. Davies, and by what was said by Vice-Chancellor Strong in Mulholland v. Merriam, in holding that, though the annuity which the defendant

covenanted to pay to the plaintiff was not in terms agreed to be paid out of the farm conveyed to him, any money received by the executors of his father in respect of the annuity would, in their hands, be impressed with a trust for the plaintiff. . . .

Beyond the payment of three sums, amounting in all to $20, to a son and two other daughters, the only matter for which the covenant . . . provided was the payment of the annuity to the plaintiff; and it cannot be doubted, I think, that substantially, the sole purpose of the covenant was to secure a benefit for her.

If in Lloyds v. Harper, 16 Ch. D. 290, it was proper to hold that the guarantee which the father had entered into with Lloyds was one for the benefit of the persons with whom his son might enter into contracts of insurance so as to constitute Lloyds trustees of the guarantee for them, I do not see why it is not proper to hold that the covenant of the defendant was one for the benefit of the plaintiff, and that the personal representatives of the father are trustees of any money received in respect of the annuity for the plaintiff.

For a similar reason to that for which Vice-Chancellor Strong, in Mulholland v. Merriam, directed that the action might proceed in the absence of a person representing Mulholland, it would be proper that we should direct that the plaintiff's action should proceed in the absence of any person representing her father; but, as the defendant is an executor of the father's will, the father's estate is represented, and that by the only person beneficially interested under his will, which makes, I think, an a fortiori case for dispensing with any further representation of the father.

If there ever was a case in which a Court would be justified in struggling to find a ground for sustaining an action, it is this.

The plaintiff's father owned a valuable farm, which the will he made shewed he intended to leave to his son subject to the payment of an annuity to the plaintiff; instead of leaving the land to pass in that way to the son, and solely for the purpose of avoiding a supposed difficulty on account of the son having been appointed an executor, the form of carrying out this intention was changed, and the farm was conveyed to the son, and the covenant upon which the action was brought was entered into by the son as part of the arrangement under which he obtained the farm; and, the father being now dead, the son repudiates his obligation under the convenant and refuses to pay the annuity to the plaintiff.

There can be no shadow of doubt as to the defendant's moral obligation to pay the annuity, and it would be a misfortune, I think, if the obligation were not as binding in law as it is in conscience.

For the reasons I have given, the obligation is, in my opinion, as binding in law as it is in morals; and the result is that the appeal should be allowed with costs, and that the judgment of my brother Magee should be reversed, and, in lieu of it, judgment should be entered directing payment of the arrears of the annuity, with interest, to be made by the defendant to the plaintiff, and also of the costs of the action, and declaring that the defendant is bound to pay to the plaintiff the accruing gales as they become due, and that the plaintiff is entitled to a charge upon the farm for the annuity, and directing a sale of the farm in default of payment.

The defendant should pay the costs of the action and of the appeal.

CLUTE, J., agreed, for reasons stated in writing.

TEETZEL, J., also agreed.

DIVISIONAL COURT. JANUARY 5TH, 1911.

*RE HENDERSON AND TOWNSHIP OF WEST NISSOURI.

Schools — Continuation School—Erection of School-house—Township By-law—9 Edw. VII. ch. 90; sec. 9; ch. 91, sec. 4.

Appeal by James Henderson from the order of MIDDLETON, J., ante 152, dismissing an application to quash a by-law of the township providing for the levying of a rate for the erection of a school-house for a continuation school.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

J. M. McEvoy, for the appellant.

T. G. Meredith, K.C., for the respondents.

*This case will be reported in the Ontario Law Reports.

FALCONBRIDGE, C.J.:—I put the same interpretation on the statute as did my brother Middleton, in the judgment appealed from.

The appeal will, therefore, be dismissed with costs.

BRITTON, J., reached the same conclusion, for reasons stated in writing.

RIDDELL, J., dissented, for reasons stated in writing. He was of opinion that the by-law of the county, establishing a continuation school in the township, was bad, being contrary to 9 Edw. VII. ch. 90, sec. 9; and, the by-law of the county being bad, it followed that the by-law of the township was also invalid, and should be quashed.

SWEARNGEN V. HYNDMAN—SUTHERLAND, J.—FEB. 5.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Possession—Statute of Limitations—Reservations and Exceptions—Damages—Costs.]—Action for specific performance of an agreement made by the defendants the Kaministiquia Power Company with the plaintiff for the sale of land to the plaintiff, reserving minerals, etc., and for possession of the lands, damages for interference with possession, mesne profits, etc. The defendant Hyndman claimed the lands by virtue of the Statute of Limitations. The issue thus raised is found against the defendant Hyndman. Judgment for the plaintiff for possession of the lands in question, subject to the payment of the balance due under the agreement of sale between the plaintiff and the defendant company, and subject to the rights of the defendant Hyndman under the reservations and exceptions in his original deed. The plaintiff to have $10 damages and costs of action against the defendant Hyndman. The plaintiff to pay the costs of the defendant company, fixed at $50. F. H. Keefer, K.C., for the plaintiff. A. E. Cole and J. Reeve, for the defendant Hyndman. W. McBrady, for the defendant company.