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LATCHFORD, J. DECEMBER 13TH, 1912.

RE MITCHELL.

Will—Construction—Gift to Daughter—General Words—Connected with Subsequent Directions—Whole Clause to be Considered—Assignment of Fund—Duty of Executors.

Motion by the executors under the will of Louisa C. Mitchell to determine questions arising between them and C. W. Mitchell, the husband of the testatrix, claiming as assignee of his daughter, Mrs. Hawkens, to be entitled to five thousand dollars bequeathed to Mrs. Hawkens under the will.

A. E. Lussier, for the executors.
W. C. McCarthy, for C. W. Mitchell.
A. C. T. Lewis, for the Official Guardian.

LATCHFORD, J.:—The application I considered too wide to be disposed of summarily, and it was accordingly restricted to the construction of the will of the deceased, so far as the will affects the rights of Mrs. Hawkens and her children.

Mrs. Mitchell, who died on the 17th January, 1912, left an estate of $112,000. After leaving to her children certain specific bequests and legacies—only one of which it is necessary to consider—she bequeathed the residue of her property to her husband. He after her death procured an assignment from the legatees of all their interest under the will, and claims that under this assignment he is entitled to $5,000 bequeathed to Mrs. Hawkens in the terms following:—

"I give and bequeath to my daughter Louisa Caroline Mitchell Hawkens, wife of George J. Hawkens, of Ottawa, insurance agent, the sum of five thousand dollars for her own separate use, but free from the control of her husband, and without right to her to anticipate the same in his favour, such sum to be invested by my executor and trustee and the interest thereon

only paid to my said daughter each six months, but with power to my said executor and trustee in case my said daughter shall need and be in want, or in case of sickness and distress, to pay her out of the capital sum, such sum or sums from time to time as my said executor in the discretion of their manager at Ottawa for the time being shall consider right for her under the circumstances to satisfy her said need or want or expenses in case of sickness and distress, for herself and children and family. The said principal sum, or such part as shall not have been paid to my said daughter as above provided, shall upon her death be paid to her children then living, share and share alike, and in case she should die without children living at her death, the said sum or such part thereof as shall be left as above provided, I bequeath to her sisters Estelle and Bonnie or the survivor of them, share and share alike."

Mrs. Hawkens had two children living at her mother's death; and these children are still living. Both are infants, and are represented by the Official Guardian, who also represents under an order of the Court any now unborn children of Mrs. Hawkens who may be living at the time of her death.

Effect cannot be given to the claim of Mr. Mitchell if any interest in the five thousand dollars is given by the will to the children of Mrs. Hawkens who may survive her. Quite clearly, such an interest is, I think, conferred. Upon principles not open to question, the whole clause must be considered—not the words which standing alone would constitute an absolute gift—and effect must be given, if possible, to all its provisions. The general words bequeathing to Mrs. Hawkens the five thousand dollars cannot alone be regarded. They are expressly connected with the subsequent directions as to investment and the payment of interest *only* to the legatee during her life-time, except in circumstances of need, illness, or distress.

The further direction as to what is to become of the residue of the fund upon the death of Mrs. Hawkens, again establishes that the intention of the testatrix was that her daughter should have only the interest of the fund, in all but exceptional circumstances, and that what remained should inure upon her daughter's death to the children of her daughter then living.

There is in addition the further gift over in case Mrs. Hawkens should leave no children surviving her at her death.

It is impossible to disregard, as I am asked to do, all the limitations which are placed upon the gift, in clear and unambiguous words, and to hold that Mrs. Hawkens took the five thousand dollars absolutely. This is not a case of inconsistent words en-

grafted upon a clear and express bequest. There is no inconsistency or repugnancy between the general words bequeathing the five thousand dollars, and the specific directions which are given for the investment of it, and for the disposal of the remainder of the fund after the death of Mrs. Hawkens. Nor is it a case where mere directions as to enjoyment are attached to an absolute gift. It is simply a case where general words are clearly governed by restrictions unequivocally expressing the intention of the testatrix to limit the bequests in a particular and proper manner.

Mrs. Mitchell in the clause under construction plainly stated her intention that Mrs. Hawkens should enjoy for life the interest only of the five thousand dollars, with a right to part of the fund itself in certain circumstances, and then only to the extent the manager of the Royal Trust Company might in his discretion deem proper. Upon the death of Mrs. Hawkens her children, if any survive her, take the fund or so much of it as may remain in the hands of the executor. Should Mrs. Hawkens leave no issue, the fund will pass to her sisters Estelle and Bonnie. There will be judgment accordingly.

It may be added—though the point may not properly be one for determination here—that as a consequence of the interpretation I have given, the assignment from Mrs. Hawkens to her father cannot affect the rights of her children, and the executors cannot safely transfer to him the fund which he has claimed.

Costs of all parties out of the estate of the deceased.

LATCHFORD, J. DECEMBER 13TH, 1912.

GOWER v. GLEN WOOLLEN MILLS, LTD.

Master and Servant — Negligence — Liability Covered by Insurance—Election to Proceed without Jury—Workmen's Compensation for Injuries Act—Notice not Given in Time—Factories Act—Necessity to Guard Shaft of Elevator—Proximate Cause—Common Law—Defective System—Conflict of Evidence—Volunteer.

Action by Arthur Edward Gower, an infant, aged 19, against the defendants for injuries sustained by him while in the defendants' employment, on the 15th December, 1911.

T. J. Blain, for the plaintiff.

E. E. A. DuVernet, K.C., and B. H. Ardagh, for the defendants.

LATCHFORD, J.:—This is an action brought by the next friend of the plaintiff, an infant, against the defendants, an incorporated company, carrying on business as woollen manufacturers in their factory at Glen William, in the county of Halton. Damages are claimed at common law, and under the Workmen's Compensation for Injuries Act and the Ontario Factories Act, for injuries sustained by the plaintiff on the 15th of December, 1911, when he was in the defendants' employ.

In opening the case to the jury, counsel for the plaintiff mentioned that the defendants' liability was covered by insurance; and I thereupon—following Loughead v. Collingwood Ship Building Company, 16 Q.L.R. 64—required him to elect between a postponement of the trial or the dismissal of the jury. He chose the latter. I then dismissed the jury and proceeded with the trial.

The plaintiff, who was nineteen years of age at the time of the accident, had had five years' experience in England in the same kind of work that he was doing for the defendants in their spinning room on the third story of their factory.

An elevator ran between the weaving room on the ground floor of the factory and the room in which the plaintiff was employed. Until a few weeks before the accident the elevator was operated by a belt which ran from the main shaft, suspended from the ceiling of the centre of the weaving room, to a pulley connected with the elevator. Some inconvenience resulted from this, and a jack shaft was installed between the main shaft and the pulley which actuated the elevator. The main shaft was connected to this sub-shaft by a belt. From the sub-shaft to the elevator pulley was a five-inch belt, with a twist in it, so as to give the elevator pulley a reverse motion. The pulley actuating the belt to the elevator pulley was a fixed pulley; and the belt, either because of the twist or—mainly as I find—because the shaft was not properly hung, frequently came off.

The employees with few exceptions were women and children. The evidence of one of the women in the weaving room is that this belt often came off, and that then "anybody put it on again." When the belt was off, the elevator would not run, and the skips containing the yarn from the spinning room could not be brought down to the weaving floor, nor could the skips containing the emptied spools or carded wool be taken up from the ground floor or the second story to the third.

Small boys were employed, one of them under fourteen, to take the spools, rolls and yarn from one story to another by means of the elevator.

The plaintiff had no experience in putting on belts; but on one occasion had been told by the foreman, Schofield, to take a pole and move the belt off the elevator pulley. Gower reported to Schofield what he had done, and Schofield then sent him back to put the belt on. Schofield denies this; but, having regard to the manner in which he gave his evidence, I think his denial and his testimony generally, entitled to no consideration, save when he admits that the belt came off the pulley frequently.

The only method of placing the belt on the elevator pulley was to rest a twelve-foot ladder on the greasy floor of the weaving room, and ascending the ladder until a suitable position was obtained, pull the belt over the pulley.

On the fifteenth of December the plaintiff was engaged as usual in the spinning room. He required empty spools for his mules. The spools were in the weaving room, and could be got up only by means of the elevator. At the moment a boy named Bearman came up the stairs for yarn. The elevator—the only means of taking the yarn down and the spools up—was not running. Bearman asked the plaintiff to put the belt on the elevator pulley. Bearman says that he had previously asked Preston, the only man on the weaving floor, to put on the belt, and that Preston told him he had no time and to ask another man, Eddie Hill. Bearman then asked Hill—who was cleaning cards on the second floor—and Hill also said he had no time. Neither Preston nor Hill was called to deny these statements. It was after Preston and Hill had refused to put on the belt that the request of Bearman to the plaintiff was made.

Gower and Bearman both needed, in the defendants' interest, to use the elevator; Gower to get his spools up and Bearman to bring the yarn down. Without the yarn the weaving could not proceed; nor could the spinning proceed without the spools. While the primary duty of the plaintiff was to attend to his spinning, he could at times leave his machine to do other work in his employers' interest. The foreman having once ordered him to put on the elevator belt, the urgency of this particular occasion led him to think it was also his duty to connect up the elevator in the only way practised in the factory. With that intention he went with Bearman down the stairs to the weaving room floor.

There is a conflict of evidence as to whether the ladder should have been rested against the wall or against the projecting end of the shaft in replacing the belt. The shaft, which was ten feet from the floor, was nineteen inches from the wall; and the face of the thirteen-inch pulley would be about a foot from the wall.

I find that it would have been so difficult as to be almost impossible for a person using the ladder—the only ladder available—with one end upon the floor and the other end against the wall—to place the belt upon the pulley. With the ladder against the wall in a position of stability to sustain the plaintiff—that is, with its base three or four feet from the wall—there would remain, as a simple calculation will shew, a distance of not more than six inches between the face of the pulley and the upper part of the ladder; a space into which neither man nor boy could squeeze himself for the purpose of putting on the belt.

The proper and safe position would be breast-high to the pulley. If the distance between the ladder in a stable position and the shaft itself is considered, the available space is not more than a foot—a space also inconsistent with safety.

The system adopted in putting on the belt was to rest the ladder against the end of the shaft, which projected eighteen inches beyond the pulley. This position was also dangerous, but was the least dangerous of the only positions available. The ladder was without spikes at its foot to prevent it from slipping on the greasy floor; and Bearman attempted to hold it while Gower ascended.

While standing upon the ladder Gower succeeded in placing the belt upon the pulley. The belt, however, ran off between the pulley and the hanger on the other side. Gower then reached over for the belt, and while he was doing so the ladder slipped upon the floor. Gower fell against the projecting end of the shaft, which, engaging in his clothing, whirled him around between the shaft and the wall, tore off his left arm at the shoulder, and inflicted other serious injuries.

The foreman, the manager, and one of the directors of the defendant company gave Gower immediate attention, and had him conveyed to a hospital. There the torn shoulder was dressed, and all possible care given to the boy, who made a fairly rapid recovery.

The defendants had full knowledge of the accident as soon as it occurred; but no formal notice as required by the Workmen's Compensation for Injuries Act was given to them. Negotiations regarding a settlement were entered into, and protracted—deliberately, I think—until six months had expired, and an action under the Workmen's Compensation for Injuries Act was barred.

In ordinary circumstances it would not be necessary to guard the projecting end of the shaft, far above the heads of the operators in the spinning room; but where, as in this case, it was

necessary constantly to replace the belt, the projecting end of the shaft was a source of great danger. Mr. Mackell, a tool-maker and machinist of great experience and high intelligence, testified that it was practicable to guard the pulley and shaft; and I accept his evidence. If the shaft had been so guarded, the accident would not have happened. Want of a guard was the direct and proximate cause of the accident; and the plaintiff is accordingly, in my judgment, entitled to recover under the Factories Act.

I think the plaintiff is also entitled to recover at common law. The system was defective. The shaft undoubtedly was not properly hung. The pulley was set eighteen inches out from a hanger, and no hanger was placed at the other end of the shaft, which was but two and three-eighths inches in diameter. There was consequently nothing to resist the pull which the belt exerted upon the shaft, except the hanger already mentioned. The shaft was, therefore, constantly sprung towards the driving pulley, and the belt necessarily ran off and had to be frequently replaced.

Then, the ladder used for replacing the belt was wholly unfit for the purpose. The ladder, as well as the floor, was greasy. There were no spikes in the bottom of the ladder to prevent it from slipping. Some employee had from time to time to mount the ladder for the purpose of replacing the belt. Mr. Schofield, the overseer, says that he was there to do that work. But I do not credit his evidence. He himself had lost an arm, and could put on a five-inch belt, only with considerable difficulty.

The practice in the factory was for "anyone" to put the belt on; not the little boys or the women, who formed the majority of the employees, but any of the few men who were capable, like the plaintiff, of doing so. The plaintiff had been once ordered to put on the belt, and had not been forbidden at any time to do so.

The plaintiff was not a mere volunteer. His very work in the weaving room itself made spools necessary, and the elevator was the only means of bringing them up. In putting on the belt he was doing work identical with that which the foreman had, at least upon one occasion, ordered him to do, and was doing it in the only way the system of the defendants rendered possible, and without knowledge of the risk he was running.

The system of the defendants was defective in the respect I have mentioned. The plaintiff was not himself negligent, and, apart from his rights under any statute, is entitled to damages:

Smith v. Baker & Sons, [1891] A.C. 348; Webster v. Foley (1892), 21 S.C.R. 580.

I assess the damages at two thousand dollars, and direct that judgment be entered against the defendants for that amount with costs.

DIVISIONAL COURT. DECEMBER 13TH, 1912.

FROST & WOOD CO., LTD. v. LESLIE.

Costs—Settlement of Agent's Account by Promissory Notes—Refusal of Plaintiff to Accept—County Court Action—Alternative Claims—Payment of $184.39 into Court—Acceptance by Plaintiffs—Taxation of Costs—County Court Scale—Con. Rule 425—"All the Causes of Action"—Former Rule—Res Adjudicata—Election of Plaintiffs.

Appeal by the defendant from the order of the Judge of the County Court of the County of Bruce, dismissing the defendant's appeal on the taxation of the plaintiffs' costs.

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

T. H. Peine, for the defendant.

G. H. Kilmer, K.C., for the plaintiffs.

RIDDELL, J.:—This action was brought in the County Court of the County of Bruce. The statement of claim sets out that the defendant was the agent of the plaintiffs at Hanover on commission, but he was to obtain such security for the payment of any implements sold by him as such agent as would be satisfactory to the plaintiffs, etc.—that the plaintiffs shipped him a large quantity of implements accordingly—that a statement was made of accounts on November 9th, 1911, shewing the defendant owed the plaintiffs $504.29—that at the defendant's instance, as he could not pay at once, the plaintiffs' traveller took promissory notes for $480.29 as follows:—

Due January 1st, 1912	$ 80.29
Due June 1st, 1912	100.00
Due October 1st, 1912.....	300.00
	$480.29

to submit to the plaintiffs—that the plaintiffs refused to accept them and returned them to the defendant forthwith—that noth-

ing has been paid—that the defendant sometimes asserts that the plaintiffs took the notes in settlement, but this the plaintiffs deny—a statement of the items amounting to the $504.29 is annexed to the statement of claim and the plaintiffs claim "to recover from the defendant the said sum of $504.29 and interest from the 9th November, 1911, or in the alternative to recover from the defendant the sum of $180.29, the amount of two of the three promissory notes and interest thereon." It does not exactly appear whether the plaintiffs are claiming as on account stated or on the open account—from the items being attached to the record, I presume the latter.

The statement of defence sets up that it was the recognized custom to accept the personal notes of the defendant for any balance due: that the plaintiffs' agent Appleby "settled the balance at $480.24 and insisted and demanded that the defendant should furnish his promissory notes . . ." as mentioned, which he did: that he on June 13th, 1912, paid the plaintiffs the sum of $184.39, being the amount of the first two promissory notes with interest, but the plaintiffs refused to accept it and repudiated the settlement and he brought into Court that sum and said it was sufficient to satisfy the plaintiffs' claim.

The plaintiffs thereupon served a notice in the following terms. "Take notice that the plaintiffs accept the sum of $184.39 paid by you into Court in satisfaction of its alternative claim herein"—and taking the money out of Court proceeded to tax costs. These were allowed by the clerk on the County Court scale, and on appeal to the County Judge the clerk's ruling was upheld.

The defendant now appeals.

Since the judgment already spoken of, the plaintiffs have issued another writ for the note for $300 or in the alternative for damages for conversion thereof.

The state of affairs, then, is that the plaintiffs contended that, while there may have been a settlement of the amount due them from the defendant, there was no settlement of the account by notes, but that he owed them $504.29, i.e., $24 more than the amount of the notes: but if it turned out that the notes were accepted in settlement, then they wanted the amount of the notes. The defendant said that the notes were given in settlement: he did not deny that the notes should be paid, but he said that within a week of the writ he "paid" the amount of the notes which were due, but the plaintiffs refused to accept the payment and repudiated the settlement. It is perfectly manifest that had the case gone on, the only issue to be tried would be

whether the notes were accepted as the defendant says they were —with what we know now, that would have been determined in favour of the defendant—and the defendant would have been entitled to all the costs subsequent to payment in, and to so much as his County Court costs before that time would exceed his Division Court costs. As it is, by paying money into Court, the plaintiffs contend that he has enabled them to compel him to pay more costs than he would have paid had the action gone to trial. In other words, the plaintiffs by suing for a claim they cannot support, and adding their real and supportable claim as an alternative, contend that they may tax costs payable attributable only to the unsupportable claim. This would be a monstrous result, and we must examine the rules with care to see if they make such a result necessary.

The rule is Con. Rule 425: "When the plaintiff takes out money in satisfaction of all the causes of action he may tax his costs of the action and sign judgment therefor, unless the defendant pays them within 48 hours after taxation."

The former rule read, "the entire cause of action": Con. Rule 637—the change being made in order that there could be no doubt that the action was at an end: Moore v. Dickinson, 63 L.T. 371. Here there are two causes of action, alternate, indeed, but still two. How can it be said that satisfaction of one cause of action, and that the minor one, is a satisfaction of all the causes of action?

It is argued that the plaintiffs would be estopped as by matter of record if they were to set up again the original cause of action, and consequently that cause of action is at an end (I do not discuss the effect of the new action with which, as I think, we have nothing to do).

Stirling, J., in Coote v. Ford, [1899] 2 Ch. 93, at p. 99, says: "I do not see how any such proceedings could ever be available as a ground for a plea of res adjudicata. If either party were to attempt to open the matter, the appropriate defence of the other would seem to be, not a plea of res judicata, but an application to the Court, to stay proceedings"—and the learned Judge was there speaking of the cause of action on which specifically money had been paid in. It is a fortiori in the case of a cause of action upon which money has not been paid in.

The plaintiffs must, in my opinion, elect either to take the money paid in, in full satisfaction of their claims against the defendant, in which case they may retain their taxation of costs in the County Court: Babcock v. Standish, 19 P.R. 195; McKelvey v. Chilman, 5 O.L.R. 263; Stephens v. Toronto R.W. Co.,

13 O.L.R. 363; but must dismiss their other action with costs—or they must be held not to have brought themselves within Con. Rule 425. In this case they must repay the money into Court with interest and pay the defendant his costs of taxation, of the appeal to the County Court Judge and of this appeal.

If they elect the former alternative they will hold their judgment with County Court costs up to the judgment: but pay to the defendant his costs of the appeal from the taxing officer and of this appeal.

FALCONBRIDGE, C.J.K.B., and LENNOX, J., agreed in the result.

MIDDLETON, J. DECEMBER 14TH, 1912.

McBRIDE v. McNEIL.

Action to Recover Land—Lien for Improvements—Mistake of Title under Statute—At Common Law—Increased Selling Value—Exception to General Rule as to Lien—Estoppel—Statement of Intention to Give Land—Evidence.

Action to recover possession of the east half of lot three in the second concession of Wallace.

G. Bray, for the plaintiff.
J. C. Makins, K.C., for the defendant.

MIDDLETON, J.:—Catherine McBride was in her lifetime the owner of the lands in question, by virtue of a Crown patent dated the 12th August, 1848. She died on the 26th June, 1912. The right of the plaintiff as her administrator to possession of the land was admitted at the trial, although denied in the pleadings.

The defendant claims to be entitled to a lien upon the land for improvements said to have been made under mistake of title, by virtue of the statute, and also claims a lien apart from the statute.

The facts giving rise to the present situation are as follows: The deceased and William McNeil lived together as man and wife for many years, but they never intermarried, as they had both been theretofore married, and were living separate from their respective spouses. The plaintiff David McBride was the

lawful issue of Catherine McBride and her wedded husband. The defendant is one of several children, issue of the unlawful union. As Catherine died intestate, the plaintiff will take her entire estate beneficially.

The late William McNeil, and Catherine, settled upon the lot in question many years ago. The patent for the west half was taken in the name of one of the sons of William. The patent for the east half was taken in the name of Catherine.

In the first place the defendant bases his claim upon the fact, as he says, that he thought the patent to the east half had been taken in his name. He says he inferred this from the fact that the patent for the other half had been taken in his brother's name; but he admits that upon his father's death some 24 years ago his mother claimed to be entitled to the land in question; and although he says he did not believe that she was entitled, he then made an agreement—or, rather, a series of agreements—with his mother by which he occupied the property with her and maintained her upon the property, paying the taxes. He says he made this arrangement because he thought that his mother had a life interest: a statement which is quite inconsistent with the idea that he was the patentee. He also admits that he was the custodian of his mother's papers, and that he had the patent in his possession for all these years. He said that he did not read the patent until recently.

The defendant had acquired title to the west half by purchase from his brother; and during the 24 years the whole lot was worked, as it always had been, as one farm. The house was upon the east half, and the barn was upon the west half. A well was constructed upon the west half, close to the boundary. Over the well a windmill was erected; two of the legs of this windmill being planted upon the east side of the boundary. A road was laid out upon the centre line, half upon each side of it; and considerable money and labour was expended upon making this road of value to both halves of the farm. Some clearing was done upon the east half, also some fencing.

I am unable to find that any of the improvements made were made under a mistake of title. I think it is obvious that for many years, probably ever since the father's death, the defendant has known the real position of the title. I am confirmed in this view by the defendant's own statement that he had arranged with his mother to make a will by which she would leave him this property, but that it had been put off from time to time and had been finally neglected.

I think that some of the improvements made upon the pro-

perty have increased its selling value, and that as a matter of fairness the defendant ought to be allowed a lien for this increased selling value.

I do not think that an allowance should be made for the road, as the proper inference from the evidence is that this road was constructed upon an agreement between the defendant and his deceased mother which amounted to a dedication of the land used for the road, the purpose being to have a common way, serving both the east and the west half. This may be so declared.

The fencing is an improvement of a permanent nature; so also is the draining.

The repairs to the house I do not think are in the nature of permanent improvements, but were mere repairs.

The replanting of the fruit trees, etc., is a trivial matter, and was in the nature of ordinary husbandry.

No claim can be sustained for the pump, well, or windmill, these being on the west half. It was arranged at the trial that the legs of the windmill which rest upon the east half of the land should be allowed to continue as they are.

As to the increased value, the evidence was unsatisfactory. The witnesses entirely failed to apprehend the real question: that is, the increase of the value of the land by reason of the improvements. The defendant goes so far as to claim a sum greatly in excess of the cost. Giving the matter the best consideration I can, I think $600 would be a fair sum to allow to cover all improvements made by the defendant.

There is no dispute concerning the defendant's right as to the $143.05, being amounts paid since the death of Catherine McBride, for which a claim ought to have been sent in to the administrator.

The general rule is well stated in Halsbury, vol. 19, p. 19: "A person who has expended money for the benefit of another, or on property in which he has no interest, has as a rule no lien in respect of such expenditure against such other person or against the owner of the property"—a rule which is quite in accord with the recent decision of the Privy Council in the Indian Treaty case, [1910] A.C. 637, at p. 646: where it is stated that there is no right to recover "expenditure independently incurred by one party for good and sufficient reasons of his own, but which has resulted in direct advantage to another." See also Macclesfield v. Great Central Railway, [1911] 2 K.B. 528.

To this general rule there is, I think, an exception, based upon the principle of estoppel. As stated by Halsbury (p. 21)

"Where the owner of property stands by and allows a person to spend money thereon in the expectation that he will receive the benefit of it, such person is entitled to a lien for the increased value resulting from the expenditure." [Reference to Unity Joint Stock Bank v. King, 25 Beav. 72, per Romilly, M.R., 3 Plimmer v. Wellington, 9 App. Cas. 699; Ramsden v. Dyson, L. R. 1 E. & I., 129.]

I think that Sir John Romilly's decision justifies me in holding that the same principle applies where the expenditure is made upon the faith of a statement by the owner of his intention to give the land to the person making the improvement.

In the case in hand, the defendant says that his mother encouraged him to improve the place by telling him that he would ultimately have the benefit of his labour and expenditure; and, although I might not have disposed to accept the defendant's own statements, because he was manifestly ready to shift his ground as he thought would best serve his purpose, yet the corroboration of his statements by disinterested witnesses leads me to accept them.

I do not think that the defendant is entitled to enforce his lien by retaining possession of the land. Judgment will therefore be for possession, and declaring that the defendant is entitled to a lien upon the land for the sum of six hundred dollars. A time—say three months from the date of the judgment—should be fixed for payment, in default of which payment the defendant ought to be at liberty to proceed to enforce his lien by sale.

The judgment will further declare that the road between the east and west halves has been dedicated as a way between both half lots. It may also be declared that the defendant is entitled to the $143.05 as a creditor.

I think each party may well be left to pay his own costs.

MASTER IN CHAMBERS. DECEMBER 16TH, 1912.

SALTER v. McCAFFREY.

Lis Pendens—Certificate of —Motion to Vacate Registration—Abuse of Process of Court—Endorsement on Writ—Cause of Action—No Right to Appeal.

Motion by the defendant for an order vacating certificate of lis pendens on the ground that the filing of same is an abuse of

the process of the Court, and embarrasses the winding up of the estate, as its chief asset is the house in question, which must be sold in order to pay off liabilities as well as for distribution. The action is an outcome of the death on 28th September last of William McCaffrey with his wife and children, unseen by any human eye. The plaintiff is the administratrix of Mrs. McCaffrey, and as such has brought an action against the administrator of Mr. McCaffrey. Her claim as endorsed on the writ is "for a declaration that the plaintiff is entitled to share as an heir at law of the late Wm. McCaffrey, deceased, and for a declaration that the said plaintiff is joint owner of the land hereinafter described" (setting it out by metes and bounds), "and for a lis pendens."

N. F. Davidson, K.C., for the defendant.
G. B. Balfour, for the plaintiff.

THE MASTER (after setting out the facts as above):—The whole doctrine of lis pendens was examined and explained in Brock v. Crawford, 11 O.W.R. 143. There at p. 147 it is said: "To remove (the certificate) the defendant must, I think, shew clearly that there is and can be no valid claim in respect of the land, and that the proceedings—not alone the registration of the certificate—are an abuse of the process of the Court. That can only be done by proving that under no possible circumstances can the facts as set out in the pleading give any right to the plaintiff in respect of the land in question." No statement of claim has as yet been delivered, though an appearance to the writ was entered on the same day it was served—25th November. There can, therefore, be nothing to consider here except the endorsement on the writ. In a similar case it was said in Sheppard v. Kennedy, 10 P.R., at p. 245, "that where a plaintiff seeks to register a lis pendens he should be more precise than in ordinary cases, and by his endorsement he should define generally the grounds of his claiming an interest in the lands." Here it is not made clear whether the first clause of the endorsement is a personal claim by Mrs. Salter or whether it is made by her as administratrix. Probably the latter is intended, and the plaintiff is only to be taken as speaking in behalf of the deceased whom she represents. There were affidavits filed in support of the motion, and these were answered by two affidavits of the plaintiff herself and a lady friend of Mrs. McCaffrey. On cross-examination they receded very materially from the statements in their affidavits—so much so that, if no stronger evidence could

be had, the plaintiff could not hope to succeed.—But, of course, the action cannot be tried in that way or at this stage. Counsel on the argument stated that he was prepared to rely on the endorsement of the writ as being sufficient within the decision above cited in Sheppard v. Kennedy.—He relies especially on what was said in that case at p. 244: "It may well be that nothing more happened than is detailed in their affidavits, but no suitor is obliged to submit to a preliminary trial of his case on affidavit."

While I feel very strongly the unfortunate and perhaps disastrous consequences to the estate that may ensue if this certificate is allowed to stand, yet I cannot say that I am warranted by the two authorities above cited in ordering it to be discharged, unless on such terms, if any, as plaintiff is willing to accept.

Failing this, however, the trial should be expedited in every way. For that purpose the statement of claim should be delivered this week, and reply, if any, should be delivered in two days after statement of defence is delivered.—The case should be set done forthwith as soon as it is at issue—so as to be heard, if possible, in the first or second week of the January sittings.—This is to be done, notwithstanding Con. Rule 552.

The costs of this motion will be in the cause.

I regret that my decision is not subject to appeal. See Hodge v. Hallamore, 18 P.R. 447. While this consideration has made me consider the application very carefully, yet I am not thereby absolved from doing what seems to be a duty, by refusing to decide the question raised, to adopt the language of the judgment in Brock v. Crawford, supra, at p. 148.

RIDDELL, J. DECEMBER 17TH, 1912.

UNITED NICKEL CO. v. DOMINION NICKEL CO.

Contract—Non-compliance with Terms — Interim Injunction—Motion to Continue—Exclusive License—Balance of Convenience.

Motion by the plaintiffs for an order continuing injunction granted by the local Judge at Sudbury.

J. T. White, for the plaintiffs.
R. McKay, K.C., for the defendants.

RIDDELL, J.:—On January 28th, 1911, B. H. Coffin and his associates entered into an agreement with S. G. Wightman whereby they granted him "the right of entry upon the property . . . owned by them and known as the Mount Nickel Mine . . for the purpose of operating the same in such manner and by such methods, together with the right to mine and use ore therefrom and in such quantities as the party of the second part may elect." The final clause reads thus: "The party of the second part as a part of his duties herein, in order to hold the parties of the first part, agrees to have the . . . Nickel Alloys Company legally bind itself to the parties of the first part to have all the duties of the second part herein fully performed."

The party of the second part sold all his interest in this agreement to the plaintiffs, February 14th, 1912; about the same time it is sworn "the Nickel Alloys Company, by resolution of its executive committee, fully and duly authorized and empowered thereto by its by-laws, ratified and approved the aforesaid agreement."

Before this and January 27th, 1912, the parties of the first part wrote Wightman notifying him that the requirements of the agreement to have the Nickel Alloys Company bind itself had not been complied with, and declaring the agreement null and void. A conference took place which does not seem to have resulted in anything; and again in May, 1912, Coffin and his associates repudiate the agreement.

The Nickel Alloys Company has not bound itself to the syndicate or even communicated with it. Coffin and his associates entered into a contract with the defendants under which they are entitled to enter upon the property, etc. The defendants have sent men with a diamond drill upon the claim: and these have made all arrangements to drill and intend to do so.

The District Court Judge at Sudbury granted an interim injunction, November 22nd; and this is a motion to continue it.

The points relied upon in answer to the motion are three in number: (1) The agreement is not an exclusive license; (2) it is not assignable, but personal; (3) the grantee Wightman has not performed the contract in its last clause.

(1) In view of the long line of cases beginning with Lord Mountjoy's case, Anderson 307, through Duke of Sutherland v. Heathcote, [1891] 3 Ch. 504, [1892] 1 Ch. 475, and culminating in McLeod v. Lawson, C.A., June 29th, 1906, Cases in Supreme Court of Canada, vol. 294, it is in my view impossible to say that the right of the plaintiffs is so clear that the Court should interfere before trial.

Passing over the second, it is clear that a resolution of the Nickel Alloys Co. is not a binding of that company to the grantors. At all events if it be so, the plaintiffs must establish their right at a trial—and shew they do not come within the rule laid down in Re Northumberland Avenue Hotel Co., 33 Ch. D. 16, and other cases in Lindley on Companies, 6th ed., p. 232. I think it more for the advantage of the plaintiffs that I do not absolutely decide against them here and now.

But in any event, I do not think on a balance of convenience the order should stand. The only damage which it is claimed might ensue to the plaintiffs is the value or want of value of the claim. To one who is desirous of selling a pig in a poke, it may no doubt be a damage for anyone to cut a slit in the bag and shew that the supposed pig is really a dog—but it is common knowledge that a diamond drill does not establish the fact that a claim is worthless—while it may establish that a claim is valuable. I pointed this out, and the reasons, in Sharpe v. White, vol. 189, Court of Appeal cases pp. 269, 270 (the word "leaked" in line 41 should be "leached"). An angler may fail to catch trout at one place in a pond without proving that there are none in the pond—while, of course, if he can catch fish anywhere it is certain that fish there are or have been to be caught. It would be, in my view, unjust to prevent the plaintiffs finding out if they have anything—or even realizing on their venture on the facts of this case.

The injunction will be dissolved, costs here and below to the defendants only in the cause.

CLUTE, J. DECEMBER 17TH, 1912.

McINTYRE v. STOCKDALE.

Sale of Land—Specific Performance—No Written Agreement—Part Performance — Damages — Effect of Judicature Act, secs. 41, 58(10).

Action for specific performance of an agreement for the sale of a house and lot in North Bay by the defendant to the plaintiff.

J. C. W. Bell, for the plaintiff.
R. McKay, K.C., and G. A. McGaughey, for the defendant.

CLUTE, J.:—This action was brought for specific performance for the sale of a house and lot in North Bay by the defen-

dant to the plaintiff. There was no memorandum in writing, but I found as a fact that plaintiff went in possession under the agreement, and is still in occupation of the house and premises.

The purchase price was $2,800, $500 was paid down and monthly payments were made for sixteen months at the rate of $20 a month.

The deed and mortgage were prepared, but the plaintiff having attended several times and the solicitors not being in, he neglected afterwards to attend and sign the papers. They never were in fact executed. There was some question raised as to whether the title was in the defendant or not, but the evidence clearly disposed of this point, and I found as a fact at the close of the evidence, that the defendant before he re-sold the property was in a position to convey to the plaintiff, and that he was the real owner at the time of the agreement for sale, although he had agreed to give a portion of the purchase money to his son as a gift, and the property stood in the son's name for a time.

The defence relied upon the case of Lavery v. Pursell, 39 Ch. D. 508, where it was held that the jurisdiction to give damages in substitution for, or in addition to specific performance, has not been extended to cases where specific performance could not possibly have been directed, and accordingly the contract having from lapse of time become at the hearing incapable of specific performance, the equitable doctrine of part performance did not enable the plaintiff to obtain relief and damages. The only point reserved at the trial was whether this case applied, and would preclude the plaintiff from recovering damages from the defendant for re-sale of the property at an advanced price, subsequent to the sale to the plaintiff. [Reference to the judgment of Chitty, J., in the Lavery case, in which he also refers to his judgment in Re Northumberland Avenue Hotel Company, which went to the Court of Appeal, 33 Ch. D. 16, 18, 2 Times L.R. 210.]

A reference to the facts in the Lavery case shews that at the time the action was tried the time for specific performance had passed, and it was there held that as it would have been impossible to grant specific performance the plaintiff could not recover damages in lieu thereof.

In Re Northumberland Avenue Hotel Company, . . . the case was affirmed by the Court of Appeal, but not upon the ground that damages could not be given in lieu of specific performance. That question does not seem to have been referred to, either in the argument, or in any of the judgments in the Court of Appeal. It is true that Chitty, J., as a second ground in his

judgment states, that if there had been an agreement on which specific performance could have been originally decreed on the ground of part performance, there would not be any jurisdiction to give damages after specific performance had become impossible, but this was not necessary for the decision of the case and is in no way confirmed by the Court of Appeal.

The argument upon which this view proceeds is, to my mind, wholly unsatisfactory, and at all events does not, I think, apply to the facts in the present case.

Here was a binding contract, made so by admitting the purchaser into possession of the property, where he resided for some sixteen months and made payments upon the principal of the purchase money and was so credited by the defendant in a book kept by himself. The transaction was repeatedly confirmed by these payments, and the defendant did not deny in the box that it was an absolute sale by him, and it was merely an accident that the plaintiff did not sign the documents which were prepared. He subsequently found an opportunity to re-sell the property at an advance and actually offered to the plaintiff $100 for his loss. I cannot understand upon what principle the man should be relieved from the effect of his contract, which is binding upon him, simply because by his own wrong he places himself in a position where he cannot carry it out. Since the Judicature Act there was a binding contract in law as well as in equity. There is a breach of that contract by refusal to complete, and I am of opinion that the plaintiff is entitled to recover damages for the breach, as well as a return of the purchase money paid by him, with interest from the dates of payment.

The Lavery case was decided apparently having exclusive reference to Lord Cairns' Act, which corresponds to our Judicature Act, sec. 58, sub-sec. 10, but the Judicature Act vested in the High Court all the jurisdiction which prior to the 22nd of August, 1881, was vested in the Common Law Courts and the Court of Chancery. While Chitty, J., in the Lavery case incidentally refers to the Judicature Act, he does not point out the effect of the added jurisdiction to the High Court to that possessed formerly by the Court of Chancery. The effect of this enlarged jurisdiction is clearly set forth in the case of Elmore v. Pirrie, 57 L.T.R. 333. It was there held that under the Judicature Act of 1873, the Court had complete jurisdiction both in law and in equity, so that whether the Court could in a particular case, grant specific performance or not, it could give damages for breach of the agreement. This case does not appear to have been referred to in the Lavery case, although decided the year before.

Kay, J., in the Elmore case points out that Lord Cairns's Act somewhat enlarged the jurisdiction of the Chancery Court to grant specific performance or to give damages in lieu thereof to the extent pointed out by Lord Cairns himself in Ferguson v. Wilson, 15 L.T.R. (N.S.) 230, 2 Ch. App. 77.

[Reference to the judgment of Lord Cairns at pp. 88, 91, and to Soames v. Edge, John. 669.]

Kay, J., after referring to the cases, points out that the Judicature Act of 1873 gave the Court a power which it did not possess before, "that is to say, it gave the Court complete jurisdiction both in law and equity; so that, whether the Court could in a particular case grant specific performance or not, it could give damages for breach of the agreement; a fortiori, if the contract was one as to which the Court had the right to exercise its jurisdiction to grant specific performance of it, the Court could grant damages for breach of it; so that the Court had now a much larger power than it had under Lord Cairns's Act, for under that Act the plaintiff had first to make out that he was entitled to an equitable remedy before he could get damages at all. Now, however, the plaintiff might come to the Court and say: 'If you think I am not entitled to specific performance of the whole or any part of the agreement, then give me damages,' That was the jurisdiction of the Court when the Judicature Act was passed."

This is, in my opinion, the true effect of the changes in the law. It is not by virtue of sec. 58, sub-sec. 10, of the Judicature Act, that the jurisdiction covering the present case was determined, but sec. 41, which gives to the High Court the jurisdiction possessed by the former Courts both of law and of equity. This is the view I expressed at the close of the plaintiff's case, and it is confirmed by a further consideration of the effect of the changes of the law bearing upon the question. See also Fry on Specific Performance, 5th ed., Canadian Notes.

I think there is a distinction where the plaintiff by his own act disentitles himself to specific performance, as in Hargreaves v. Case, 26 Ch. D. 356, and where, as here, the defendant commits the wrongful act which deprives the plaintiff of the rights arising under his contract.

The plaintiff is, therefore, entitled to a return of his purchase money and interest thereon from the date of payment, and also damages for the breach of contract.

As to the amount of damages, the evidence was not very clear or satisfactory; the plaintiff claiming too much, and the defendant, I think, conceding too little. I assess the damages at $200,

with a right to either party to take a reference, at his peril as to costs, to either increase or reduce this amount before the Master at North Bay. The plaintiff is entitled to full costs of action.

CLUTE, J. DECEMBER 17TH, 1912.

ALABASTINE COMPANY, PARIS, LTD. v. CANADA PRODUCER AND GAS ENGINE CO., LTD.

Sale of Goods — Contract — Implied Warranty — Intention of Parties—Reliance on Skill and Judgment of Defendants—Inherent Defects—Scienter—Fraudulent Representation—Loss of Business—Damages.

Action to recover $5,500 paid by the plaintiffs on account of purchase money for an engine bought from the defendants and alleged to be useless for the purpose intended, for $20,000 damages for loss of business, and for rescission of the agreement for sale and purchase of the engine, etc.

G. H. Watson, K.C., and F. Smoke, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., and W. A. Boys, K.C., for the defendants.

CLUTE, J.:—The plaintiffs manufacture gypsum products—plaster of paris, hard wall plaster, etc., at Paris and Caledonia, Ont. The defendants manufacture gasoline engines at Barrie.

The plaintiffs desired to increase their power, and Mr. Haire, their manager, got into communication with one, Cooper, who was acting as sales agent (though in the employ of another company), for the defendants. The result of this was that the defendants' manager, Greaves, Haire and Cooper, negotiated for the sale of the engine and other appliances in question. It was fully made known to the defendants, through their manager, what was required. He visited the plaintiffs' works, and it was pointed out to him that it was necessary to have an engine that could be well-governed, inasmuch as at one time there was a heavy load and then the engine would run light. This and other special requirements were pointed out to him.

According to Cooper's evidence, Greaves impressed upon Haire that their engine was the one they ought to purchase. Greaves further stated that their engine would easily develop 250 H.P., and that they were prepared to guarantee the proper operation of the machine.

I do not mention this part of the evidence, which was objected to, as in any way varying the contract, but with a view of shewing, what was made manifest throughout the evidence, that the plaintiffs required and the defendants agreed to furnish a particular engine suitable for a particular purpose.

After a good deal of negotiation and after all parties understood what was required, an agreement was entered into on the 5th of May, of which the attached specifications, together with a guarantee and special agreement mentioned in the specifications, were made a part. It provides that the purchaser is to place the engine on the foundation and to furnish help to erect it, the vendors to furnish engineer to superintend the erecting and starting of the machinery, and to give instructions for ten days after the plant is started.

I will refer later to some of its provisions.

The engine was delivered early in August and set up by defendants' engineer about the 8th of September and started to run on the 10th. It was stopped owing to the pistons being too tight; they had to be filed down. This took some time, two or three weeks. After it was started again one of the bearings gave trouble and the engine would not govern properly. It would race without a load, and with a heavy load would stop. The balance wheel also gave trouble, causing vibration. This was attributable, I think, to the weakness of the crank case, of which I will speak later.

I may mention here that a crack had been discovered by Parkhurst, superintendent of plaintiffs' mill, before the engine was removed from Barrie, but he was assured by the defendants' manager, Greaves, that it was a trivial matter and could be made perfectly secure; and castings were prepared and bolted on to that end. A second crack, however, appeared in October about a foot long, opening and closing as the engine moved, with oil oozing out. The weakness of the crank case, according to the evidence, which I accept, caused the crank shaft to vibrate dangerously. This occurred early in October. The effect of this was to make the bearings run hot and melted out the babbitt; that is, the metal in which the shaft turns. The effect of this was to break the gear, which was found to be cast iron instead of steel, as it should have been. This occurred about the middle of October. The engine had only run a few days during this period. About the 22nd of October the air cylinder cracked, owing to an original flaw in the cylinder, which had been known to the defendants, and had been drilled out and plugged before the engine was shipped. It was from this point of weakness that

the cracks which caused the break started. I regard this as impugning the defendants' integrity in sending out the engine. The defect was in a vital part where the greatest pressure was applied, and where the cylinder should have been perfect; yet, knowingly, a very defective cylinder was put in by the defendants. The effect of this break of the cylinder and the gear caused a delay of some weeks.

The plaintiffs' manager says that the engine was practically out of business for two months, the new bearings and the cylinder not being obtained from the defendants until December.

After these parts were finally replaced and the engine started up again, it ran for a few days and another bearing gave out. The babbit melted out. This is attributed by the plaintiffs' manager to the balance wheel not running true and the weakness of the crank case, causing the bearings to run hot. One Berg was sent down. He rebabbitted the bearing and put it in some kind of running order, and it was again started some time early in January. The babbitt broke again and the engine worked very little until February. It would run part of the time and then stop. It operated at times fairly well during the early part of March, but on the 25th of that month it "went to smash," as the witnesses express it.

The crank case forming the body of the engine, was broken beyond repair, and other parts of the engine were so broken and destroyed as to make the engine, in the opinion of a number of witnesses whose evidence I accept, not worth repairing.

The evidence shews that an engine of this kind ought to be set up and running properly in about two weeks, possibly three. This engine, after seven months from the time it was taken in hand by the defendants to install, never was made to run properly, although the defendants had charge of the installation and repairs during the whole period.

The correspondence during all this period between the parties, upon which I lay great weight, shews clearly, I think, that from first to last the engine was never in proper running order. It never would properly govern, which was a very essential prerequisite for doing the plaintiffs' work. The castings were unfit for use, and this fact was either known or should have been known to the defendants before the engine was sent out. The crank case upon which the whole strain of the engine would come was so defective that the witnesses for both plaintiffs and defendants concurred in the view that it was not fit for the purposes for which it was intended. I find that the frequent breaks and final wreck of the engine were due to its inherent de-

fects, and not owing to any want of care on the part of the plaintiffs or their servants in charge of the engine. I find the crank case was not oil tight and was not so arranged as to lubricate all moving parts within it on the oil-splash principle. I find that it was defective in form and material, that there were cold shots through it; it was spongy, thicker upon one side than upon the other and was unfit to be sent out and used for the purposes intended. I find that the governor did not comply with the guarantee and did not control the admission of gas and air proportionate to the load, and did not maintain a constant speed of the engine. I find that one of the pistons was defective to the knowledge of the defendants before it was sent out, and was plugged, which had a tendency to weaken it and make it unfit for the use intended. I find that the engine was never capable of continuously carrying 250 H.P., or so adjusted as to start properly without the assistance of the smaller engine. I find that the material and workmanship were not of the very best class of their respective kinds, but on the contrary were such, having regard to the parts defective, as to render the engine wholly unfit for the work required of it as intended by both parties.

As to the defendants' witness Hindle, the erecting engineer, he was acting as selling agent for the defendants during the time of his erecting the engine in question and was interested in speaking well of the engine. His evidence was unsatisfactory and I do not give full credit to it.

Stanley Moore, who ran the engine for a time and then went to the defendants, was wholly discredited, so much so that Mr. Hellmuth very frankly stated that he would not rely upon his evidence.

I think it clearly made out in this case that this contract was entered upon by both parties with a distinct and clear understanding as to the purpose for which the engine was to be used, that it was to be applied to a particular purpose which required particular qualities, and the defendants represented to the plaintiffs that they could supply the engine required, and the plaintiffs trusted to their judgment and skill in doing so, and I think this is a case where there is an implied term or warranty that the article shall be reasonably fit and proper for the purpose for which it was designed. It was not, I think, within the contemplation of either party that where there was a wreck, such as occurred in this case, and the principal parts of the engine destroyed and smashed, that that came within that part of the guarantee which limited the remedy to a replacement of the injured parts. Many injured parts during the six months were

over and over again replaced, and every endeavour was made both by the plaintiffs and defendants to get the engine in running order. The result of six months' experiment was that the whole thing practically collapsed, and I am satisfied that this breakdown was from its inherent defects and weakness. I cannot but feel that the defendants were guilty of fraud in putting this engine off as they did, and so find. I think it was clear that defendants had knowledge of the defect in the crank case and did not bring it to the attention of the plaintiffs. The plaintiffs' manager having discovered it, he was assured that it was of no moment.

The defence did not see fit to call the defendants' manager, Greaves, although he was in Court, and no contradiction was offered as to what was said by the plaintiffs' witnesses in regard to the defect of the crank case.

There was certainly wilful concealment in regard to the plugged cylinder, the most important part of the engine. The defendants also withheld from the plaintiffs that they had never built an engine of this size before, but rather represented themselves as having full knowledge of what was required and of their capability to produce the article. I think the defendants knew, or should have known, that the engine was unfit for the purpose for which it was intended.

The defendants' counsel strongly relied upon the case of Sawyer & Massey Co. v. Ritchie, 43 S.C.R. 614, and that there could be no implied warranty that the engine should be fit for the purpose for which it was used, because there were certain provisions in the contract for replacing defective parts. In my opinion the two things are quite distinct, and I think this case falls within the principle laid down in Canadian Gas Power and Launches, Limited v. Orr Brothers, Limited, 23 O.L.R. 616. In that case there was a guarantee that the engine should be in perfect running order when shipped, and also that in the event of any part breaking within twelve months by reason of material therein having been defective, the purchaser might return the same and be furnished free of charge with a duplicate part. It further provided that no agent was authorized to make any contract or promise differing in any way from that written and contracted in the order. In that case, as here, the vendors had knowledge of that which the defendants desired and required of the engine. The question as to when an implied condition or warranty may arise is carefully considered in the Orr case, and the cases referred to.

The rule is thus laid down by the late lamented Chief Justice Sir Charles Moss, page 621, where he is reported as saying:—

"But, in order to get at what was present to the minds of the parties, the circumstances connected with and surrounding the transaction may be looked at. If, for instance, a purchaser specifically describes the article he requires, or selects what he wants, relying on his own judgment as to its fitness for the purpose to which he intends to apply it, the mere fact that the vendor is aware of the use for which it is designed will not raise an implied condition or stipulation or warranty on his part that it is fit for that purpose. An example of this class is Charter v. Hopkins, 4 M. & W. 399. But many cases decided in the English Courts, both before and since the passing of sec. 14(1) of the Sale of Goods Act, 1893 (of which it has been said that it only formulates the already existing law on the subject—per Collins, M.R., in Clarke v. Army and Navy Co-Operative Society, [1903] 1 K.B. 155 at p. 163, and in Preist v. Last, [1903] 2 K.B. 148), and in our own Courts, have clearly affirmed the rule that where a manufacturer or 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 trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit and proper for the purpose for which it was designed."

In my opinion, this rule is applicable to the present case upon the facts and evidence disclosed, and there can be no doubt in my mind whatever, that the engine was wholly unfit for the purpose for which it was designed and intended to be used by both parties.

The plaintiffs are entitled to recover back the $5,500 purchase money paid, with interest upon $1,000 from the 8th of August, 1911, and upon $4,500 from the 17th of January, 1912. They are also entitled to recover the expenses to which they were put in the installation, which amounts to $500, the expense in disbursements, repairs and changes, $272, and also the expense incident to installing a temporary engine to keep the works running, less the present cost of such engine (the total cost of which amounts to $2,300), from which must be deducted the present value of the temporary engine, which was placed by the plaintiffs at $1,500, leaving $800 to be allowed on that item. This would make a total of $7,072.

There is also a claim for loss of business. There is no doubt that the plaintiffs suffered considerable loss directly traceable to the defective operation of the engine installed, but the greater part of this claim I do not think can be sustained. There was

evidence that there was a loss of $75 a day for 200 days, making a claim of $15,000. The greater part of this, I think, cannot be sustained. It appeared from the evidence that the supposed profits which were said to have been lost would have accrued from the fact that two competing firms had gone out of business during the fall and winter of 1911 and 1912. This, of course, was not in the contemplation of either party when the engine was ordered, and cannot, therefore, be considered as forming any part of the damages to which plaintiffs would be entitled. As a matter of fact the plaintiffs' business and profits largely increased during this very period, owing to increased demands; I think, however, a certain amount of loss is properly traceable to the defective running of the engine. In addition to the allowances above made, I think $300 would be a fair allowance, making a total of $7,372, for which the plaintiffs are entitled to judgment.

As in Canadian Gas Power v. Orr Brothers, 22 O.W.R. 351, I think the order may provide that the defendants shall be entitled to a re-delivery of the engine, conditional on the repayment of the balance of the price.

Plaintiffs are entitled to costs.

DIVISIONAL COURT. DECEMBER 20TH, 1912.

CURRIE v. HOSKIN.

Principal and Agent—Real Estate Broker—Sale of Land—Commission—Time Limit to Agency—Lapse of Authority—Evidence—Production of Plaintiffs' Diary—Alteration in—Findings of Fact by Trial Judge—Duty of Appellate Court.

Appeal by the defendant from the judgment of the Senior Judge of the County of York, in an action by real estate agents for $525, commission for lands alleged to have been sold by them for the defendant.

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

J. E. Jones, for the defendant.

R. L. Honeyford, for the plaintiffs.

RIDDELL, J.:—The plaintiffs are real estate agents who sue for a commission: the trial Judge, the Senior Judge of the County

Court of the County of York, has awarded them $525, and the defendant appeals.

That the plaintiffs were authorised to sell is admitted; that they obtained a purchaser seems not to be disputed—and the only question is whether their authority had lapsed before they proffered the purchaser to the defendant.

The plaintiffs say that their employment began on the 27th April; the defendant, the 20th April—that it was to last for 10 days is agreed upon.

When we find that the plaintiffs advertised in the Toronto Star this property for sale on the 26th April, representing that they had exclusive sale of it—we require some very clear explanation before coming to the conclusion that they had no authority to deal with the property till the next day. To my mind the attempted explanations do not explain—and they are not consistent. Currie says—"We had a right to because we had a similar property running at the same time: that did not have any reference to Mr. Hoskin's property . . . particularly." Then on being pressed and shewn that this property must be referred to, he says "Supposing I did: probably my partner did on his own accord: we almost thought we had it." His partner says that this property was what was meant, that it was advertised "just to draw the people's attention" before the defendant had authorized the plaintiffs to sell or offer the property for sale—that when they advertised they did not know what the plaintiff was asking for it, "nothing definite about prices," they did not know what the defendant was going to ask for the property.

The office diary is produced by the plaintiffs to support their story—and, of course, wrongly permitted to be so used. Evidence of a more self-serving character cannot be thought of: and there was no pretence that the book was needed to refresh the memory of the witnesses. But even with the book we have the evidence of the plaintiff Sterry that entries were made by him therein when he knew that he meant to go to law—that he took the book to his solicitor for that purpose and he adds, "When we were going over it, he (i.e. the solicitor) said 'You have got it (i.e. a particular entry) on the Wednesday' and I said, "That is easy enough; I can strike it out?' And he did strike it out on the Wednesday," the day which would not suit his case, and entered it on the preceding day, which would.

Books kept by a person having such a conception of their value, I can place no dependence upon, even if they were evidence. Moreover there are throughout circumstances of a most suspicious character which have not been explained.

We are always very loath to interfere with the finding of fact by a trial Judge: Lodge Holes Colliery v. Mayor, etc. of Wednesbury, [1908] A.C. 323 at p. 326; Bishop v. Bishop (1907) 10 O.W.R. 177. But we must reaffirm the principle laid down in Beal v. Michigan Central Railway (1909), 19 O.L.R. 502: "Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not, and cannot, abdicate its right and its duty to consider the evidence."

Where there is "some unmistakeable document or something of that kind" which shews that the Judge has made a mistake, or which he has failed to take into consideration, or to which he has not given such effect as it deserves, an appellate Court should scrutinize the whole evidence with great care: Nassau v. Equity (1912), 4 O.W.N. 340. Where the Judge has misapprehended the effect of the evidence or failed to consider a material part of it, the case falls within the Beal case: Re Graham (1911), 25 O.L.R. 5 at p. 9; Leslie v. Hill (1911), 25 O.L.R. 144; Kinsman v. Kinsman (1912), and Bateman v. Middlesex (1912), C.A., are recent cases in which the findings of a trial Judge have been reversed.

The County Court Judge in this case has paid no attention whatever to the advertisement of the 26th April—to me a most cogent piece of evidence—and I think we cannot support his finding in this respect.

Nor does the defendant "claim that his memory is not very good"—the only time he is asked about his memory he denies that it is defective. He does not pretend to have an independent recollection of dates without tracing them back and comparing them with other dates which he can verify—probably the same thing would be said of (and by) ninety-nine per cent. of reliable witnesses. And such a witness is in most instances to be preferred to one who boasts that he has the dates "by heart."

The period given to the plaintiffs was admittedly 10 days—that would expire 30th April—the time was extended "a few days," "a few more days," "no particular time mentioned, just a few more days," "You will have to hustle . . . you have got a few more days to work in, "three or four days were the words he used," "the words he used 'a few more days,'" "Mr. Currie says, 'we will get it through in three or four days,'" and he said, "it was all right."

No offer was obtained by the plaintiffs and tendered to the defendant till, at the earliest, the 7th May—I think the 8th May. In the diary of the 8th May is an entry, "Hoskin Sr. refuses to sell estate to client: says he sold property yesterday to his son."

This is in ink and it is the entry "on the Wednesday" which would not suit the plaintiffs' case—it is scored through, and under Tuesday, May 7th, is inserted an entry in pencil "presented offer to Hoskin."

In any case, 7th or 8th, that was beyond the time for which the plaintiffs were authorised to sell—and their agency had come to an end.

I think the appeal should be allowed with costs and the action dismissed with costs.

FALCONBRIDGE, C.J.K.B.:—I agree.

BRITTON, J.:—I agree in the result.

MUSSELLWHITE v. LUCAS—MIDDLETON, J.—DEC. 14.

Sale of Land—Specific Performance—Conveyance to Wife.]—Action by the purchaser for specific performance and to set aside the conveyance made by the defendant Frederick E. Lucas to his wife Esther Lucas. MIDDLETON, J., said that after considering the matter carefully, he remained of the opinion formed at the trial, that there is no defence whatever to this action. The defence pleaded was based upon suspicion, which turns out to be totally unfounded. He thought that there was no ground for supposing that the agent, Rowell, was in any way concerned in the purchase of the property; nor was any fraud or deception practised upon the defendants. Lucas purchased the land some time ago, and the title was conveyed to him; and the proper inference from the evidence is that whatever earnings the wife had were put into the common fund and were her contribution to the home intended for both. After discussing the evidence, the learned Judge said that he could see no ground for refusing the relief sought. The plaintiff to be allowed to deduct his costs from the purchase money. R. B. Henderson, for the plaintiff. A. K. Goodman, for the defendant.

THE COMMISSIONERS OF THE TRANSCONTINENTAL RAILWAY v. GRAND TRUNK PACIFIC RAILWAY COMPANY AND THE COMMISSIONERS OF THE TEMISKAMING AND NORTHERN ONTARIO RAILWAY—SUTHERLAND, J.—DEC. 14.

Contract—Removal of Machinery—Interim Injunction—Motion to Continue —Unnecessary Party.]—Motion for an order

that an injunction granted by a local Judge of the High Court of Justice at Ottawa, dated 5th November, 1912, and restraining the defendants, their servants, workmen or agents from removing the machinery and other plant, material and things used by the defendants, the Railway Company, in the construction of a section of the Transcontinental Railway, be continued until the trial of the action. Judgment: "Under clause 19 of the written contract between the defendant Railway Company and the plaintiffs, it is provided that 'all machinery and other plant, material and things whatsoever provided by the contractor' (the defendant railway company) 'for the works hereby contracted for, not rejected under the provisions of the last preceding clause, shall from the time of their being so provided become, and until the final completion of the said work shall be, the property of the commissioners for the purpose of the said works and the same shall on no account be taken away," etc. The engines and other plant and material in question are, I think, material, under that clause, and any attempt on the part of the defendant railway company to remove them is a breach of that clause of the contract. The railway company says that in previous years it has been permitted, without objection by the plaintiffs, to remove engines during the winter as it is proposing to do now. In the present instance the plaintiffs are objecting and standing upon the contract.

The local Judge, who made the order, was, I think, quite right in not permitting one of two contracting parties to depart from a definite clause of an agreement at its own pleasure, and force the other contracting party to obtain his relief, if any, by way of damages. I think the injunction should be continued to the trial.

There does not appear to have been any good reason for making the Commissioners of the Temiskaming and Northern Ontario Railway Company defendants, so far as the material discloses. As against them the motion will be dismissed with costs. As against the defendant railway company the order will go continuing the injunction to the trial, and reserving costs of the application to be disposed of by the trial Judge. A. E. Knox, for the plaintiffs. F. McCarthy, for the defendants.

FORAN v. MARTEL—DIVISIONAL COURT—DEC. 14.

Sale of Land—Specific Performance—Principal and Agent.] —Appeal by the plaintiff from the judgment of SUTHERLAND, J., at the trial, of October 5th, 1912, in an action for specific per-

formance of an agreement to purchase certain lands. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ. The judgment of the Court was delivered by RIDDELL, J., who said that a careful perusal of the evidence failed entirely to shew any ratification by the defendant of the action of the solicitor; that he had any antecedent or implied authority is not apparent. . . . It is simply a case of solicitor and plaintiff taking a chance, and the chance turning out against them—the plaintiff is helpless. "The law of agency is very strict and often creates much hardship, but it is well settled and well understood." Appeal dismissed with costs. FALCONBRIDGE, C.J.K.B., and BRITTON, J., concurred. G. F. Henderson, K.C., for the plaintiff. W. L. Scott, for the defendant.

RE WEST NISSOURI CONTINUATION SCHOOL—DIVISIONAL COURT—DEC. 14.

Schools—Township Continuation School—Establishment of—Duty of School Board—Mandamus.]—Appeal by three trustees of the Continuation School from the judgment of MIDDLETON, J., 3 O.W.N. 1623. The appeal was heard by RIDDELL, LATCHFORD, and SUTHERLAND, JJ. The judgment of the Court was delivered by RIDDELL, J., who said that upon consideration of the whole case and after a most careful and exhaustive argument, the members of the Court were all of opinion that the appeal cannot succeed. Appeal dismissed with costs. G. S. Gibbons, for the trustees. E. C. Cattanach, and W. R. Meredith, for three applicants.

RE STRATFORD FUEL, ETC., CO. LTD.—RIDDELL, J., IN CHAMBERS. DEC. 14.

Principal and Surety—Compromise of Action—Double Ranking—Appeal under R.S.C. ch. 144, *sec.* 101 (*c*).]—Motion by the claimants Coughlin and Irwin, for leave to appeal to the Court of Appeal, from the judgment of MIDDLETON, J., ante 414. RIDDELL, J.:—"I am asked to allow an appeal to the Court of Appeal under R.S.C. ch. 144, sec. 101 (c), from a judgment of Mr. Justice MIDDLETON, of December 4th, 1912. There is no such stringent rule laid down for such a motion as this, as in the new Con. Rule 770 (1278); and I think the creditor should be allowed to substantiate his claim in the Court of Appeal if he can. The

case is of importance and not wholly clear. Costs in the appeal." R. S. Robertson, for the claimants. R. T. Harding, for the liquidator.

RE BUTLER AND HENDERSON—SUTHERLAND, J.,—DEC. 14.

Vendor and Purchaser—Description of Land—Encroachment—Possession.]—Motion by vendor for an order declaring that he can make a good title to certain lands. SUTHERLAND, J.:—By written contract . . . William Butler, the owner thereof, agreed to sell to George Henderson "the premises on the west side of Hamilton street, in the city of Toronto, known as No. 108." The vendor's paper title appears to comprise the northerly 20 feet 4 inches of lot 28 on the west side of Hamilton street, plan 188. No. 108 is the house number. It appears that the house itself encroaches slightly on the land to the south and the sheds and fences on the land to the north of the above described lands. The extent of these encroachments is shewn on a sketch filed on this motion and admitted to be accurate. The vendor submitted proofs to the vendee by declarations that the lands included in the encroachments have been held in quiet, peaceable and undisturbed possession by him and his predecessors in title for such a period as to establish his title thereto. The vendor tendered, before the motion, a deed of the land hereinbefore described but not including the land covered by the encroachments. Since the motion a new deed was prepared covering the encroachments also. I am of opinion that a satisfactory title by possession has been shewn by the declarations furnished by the vendor and that the vendee must now accept the title. There will be no costs of the motion. A. Cochrane, for the vendor. T. H. Barton, for the purchaser.

SMYTH V. BANDEL—MASTER IN CHAMBERS—DEC. 14.

Motion for Judgment—Con. Rule 603—Contract Containing Proviso as to Local Option.]—Motion by the plaintiff for judgment under Con. Rule 603. See ante, 425. The Master said that after judgment was pronounced in this case on 3rd December, counsel for the plaintiff found the agreement not produced on the former argument, and obtained leave to have the matter further discussed, and the motion was accordingly reargued by the same counsel as appeared on the first argument. After discussing the new material in the light of the cases cited on the

previous argument, the Master said that he saw no reason to vary his former disposition of this motion, which was dismissed with costs in the cause of this argument to defendant only. H. S. Murton, for the plaintiff. J. T. Loftus, for the defendant.

POWELL-REES, LIMITED v. ANGLO-CANADIAN MORTGAGE CORPORATION—DIVISIONAL COURT—DEC. 16.

Contempt—Motion to Commit—Refusal to Answer Questions on Examination—Company—Director—Con. Rules 902, 910.]—Appeal by E. R. Reynolds from order of SUTHERLAND, J., ante 352. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The judgment of the Court was delivered by BOYD, C., at the close of the argument, as follows: We think a declaration should be made that the order of the Divisional Court of September 23rd, 1912, should have been framed to provide that E. R. Reynolds was an officer of the defendant company and as such can be examined, and that on such examination he make full discovery and production of documents, said order to be amended nunc pro tunc. There shall be no costs of the motion before SUTHERLAND, J., or of this appeal. E. R. Reynolds, in person. M. C. Cameron, for the plaintiffs.

RICKERT v. BRITTON—DIVISIONAL COURT—DEC. 17.

Practice—Staying Proceedings — Unpaid Costs — Vexatious Action—Discretion of Court.]—Appeal by the plaintiffs from the order of RIDDELL, J., ante 258. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. Judgment was given by BOYD, C., at the close of the argument, as follows: We cannot disturb the order appealed from. I would put this decision on the ground that there is jurisdiction in the Court to stay proceedings in default of payment of interlocutory costs, especially if the action is vexatious, or if the plaintiff in the course of it acts vexatiously towards the defendant. The learned Judge appealed from has exercised this discretion, holding that the plaintiffs in the course of the action acted vexatiously towards the defendant, and thus imposed the payment of the prior costs as a test of the bona fides of the litigation. The judgment will be affirmed with costs. J. G. O'Donoghue, for the plaintiffs. C. G. Jarvis, for the defendants.

CURRY v. WETTLAUFER MINING CO.—MASTER IN CHAMBERS—DEC. 17.

Mining Case—Discovery—Further Examination of Engineer—Production of Time Sheets.]—Motion by plaintiff for further examination of engineer of defendant company, and for further affidavit on production. The plaintiff owned nine-tenths of mining claim H.R. 105, and the defendant company owned the other undivided tenth, which it acquired on or about 1st January, 1912. It also owned claim H.R. 85, which diagonally adjoins claim H.R. 105. It was alleged in the statement of claim that by reason of a right of entry on the Silver Eagle Mining Co., lying between the southerly boundary of H.R. 85 and the easterly boundary of H.R. 105, the defendant company wrongfully entered on and worked claim H.R. 105 before it had acquired the undivided one-tenth therein. The 4th paragraph of the statement of defence said that, prior to the acquisition of that tenth, the defendant company did not enter upon the plaintiffs' property, and did not work the same or remove any ore therefrom. The engineer was examined twice, and the depositions were very bulky, which was largely due to the lengthy and frequent discussions between counsel on the question of the relevancy of the questions asked, and as to the right to have certain documentary evidence produced. The chief point for consideration was as to certain time sheets or reports which, the plaintiff's counsel said, would shew if the allegation referred to in the statement of defence is correct or not. Counsel for the defendant company did not either refuse to produce, or agree to do so, without qualification. He was willing to let them be seen, but not to produce them as being relevant. He was willing to produce the engineer for further examination if such is ordered, without further payment. THE MASTER: "As at present advised, I think the engineer should attend again and produce the time sheets or daily reports of work done. The matter can rest there for the present, and the question of a further affidavit on production can be left for further consideration in the light of what may then be disclosed, if plaintiff is still dissatisfied." The costs of the motion to be in the cause. Britton Osler, for the plaintiff. W. M. Douglas, K.C., for the defendants.