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HON. MR. JUSTICE KELLY. OCTOBER 25TH, 1913.

SASKATCHEWAN LAND & HOMESTEAD CO. v. MOORE.

5 O. W. N. 183.

Company—Managing Director of—Claims against — Counterclaim—Indebtedness to Company—Alleged Assumption of Mortgage — Account—Commission—Salary — By-laws of Company—Retention by Defendant of Surplus Assets of Company to Satisfy Alleged Debt—Directors—Right to Delegate Powers to Committee —Interest—Statute of Limitations — Trustee—Commission — Salary—Endorsement of Commercial Paper—Compensation for —Reference—Further Directions Reserved.

KELLY, J., gave judgment for the plaintiffs with a reference in an action by an incorporated company against its managing director for the return of certain of its moneys retained by him on various pretexts, and refused to permit the defence of the Statute of Limitations to be raised on account of the fiduciary relationship existing between the parties.

Action by plaintiffs, an incorporated company, against defendant, their former managing director, for various sums alleged to have been wrongfully retained by defendant upon various pretexts while such managing director. Defendant counterclaimed for commissions on the sale of lands for plaintiffs, past due salary as managing director, disbursements, compensation for discounting commercial paper of plaintiffs and for special services.

J. L. Whiting, K.C., and A. B. Cunningham, for plaintiffs.

A. J. R. Snow, K.C., for defendant.

HON. MR. JUSTICE KELLY:—Plaintiffs' several claims against defendant arise out of transactions of defendant while he held the office of plaintiffs' managing-director. These claims are itemised in the statement of claim.

Defendant, as well as disputing these claims, by way of counterclaim claims $25,000 for moneys due him for commission on sales of plaintiffs' lands, expenses, disbursements, compensation for endorsing notes and other negotiable paper for plaintiffs and procuring the same to be discounted, fees as director, salary as managing-director, and for special services.

At the trial plaintiffs abandoned the following items:

(a) $3,631.88 set forth in paragraph 20 of the statement of claim.

(b) $85.90, an item forming part of a claim of $2,187.77 in paragraph 33.

(c) $9.31 in paragraph 6, and

(d) $25 in paragraph 27.

The chief part of the evidence submitted consists of the evidence taken and the exhibits put in at the trial of the action of the present plaintiffs against Leadley and others, including defendant, (the judgment of the Court of Appeal in which action is reported in 10 O. W. R. 501), and the exhibits and evidence submitted before the Master-in-Ordinary on the reference made to him in that action, and which latter evidence was reviewed in an appeal from the Master's report heard by Hon. Mr. Justice Teetzel (14 O. W. R. 1096) and in the further appeal from him to the Court of Appeal (16 O. W. R. 890). The parties to the present action were parties to all the proceedings in the former action, and the defendant, whose evidence in this action was taken *de bene esse*, was examined at great length both at the trial of the former action and on the reference. The books of the plaintiffs—the minute-books, by-laws and books of account—which there formed part of the evidence, are also in evidence here.

The only other evidence submitted is that of Mr. Cunningham, called for the plaintiffs, and Mr. Leadley called for the defence, so that there is but little evidence now before me beyond what was before the Court in one or other of the appeals mentioned above.

Defendant resists the claim for payment of the $4,600 referred to in paragraph 14 and the preceding paragraphs of the statement of claim, on the ground that an arrangement existed between him and Edward Leadley,—one of the mortgagees in a mortgage from plaintiffs—by which the latter was to assume this indebtedness personally and credit the amount on the mortgage and so reduce the plaintiffs' mort-

gage indebtedness. Defendant admits owing this sum to plaintiffs at the time of the alleged arrangement. The final result of the taking of the mortgage accounts in the former action was that plaintiffs were not allowed this credit and so have not been paid its amount. The matter of the right of the parties was there fully gone into, and I am not disposed to disagree with the conclusion then arrived at. The evidence, to my mind, justified the position of the plaintiffs that the defendant is liable to account to them for this item of the claim. It would serve no useful purpose to review again the evidence, but apart from whatever may have been the defendant's rights as between him and Leadley, I fail to see that the arrangement between them, and to which the plaintiffs were not parties, had the effect of binding plaintiffs to relieve defendant from that indebtedness and particularly as plaintiffs have not been allowed it as a credit on the mortgage.

Much the same may be said of the item of $3,279.22, (paragraphs 17 and 18 of statement of claim) which the defendant contends was to have been credited upon the Leadley mortgage at a time when the mortgagees released certain lands from the mortgage, and when defendant made a promissory note in respect of this sum to Mr. Leadley. The evidence and the records do not substantiate that defence, and moreover, plaintiffs were found not to be entitled to get credit therefor on the mortgage and so were held liable for payment thereof. Defendant is not entitled to the credit which he claims against the company, and consequently, as shewn by his own evidence, not having paid his note given for this sum, he is liable therefor to the plaintiffs.

The next item is a claim for $8,166.66, (paragraph 15 of statement of claim) credited in plaintiffs' books to defendant for special services and paid to him by plaintiffs. Defendant's contention is that prior to 1887 and while he was managing-director of the plaintiffs, and as such was in receipt of a salary fixed by by-law, he had negotiations with representatives of the Government of the Dominion of Canada in respect of plaintiffs' lands in what was then the North-West Territories of Canada, and that for certain services which were performed for the benefit of the Government allowances were made to plaintiffs, that a portion of these allowances was intended for and belonged to defendant personally, and that later on credit was taken by him in plaintiffs' books for the amount now claimed against him.

This credit did not appear in plaintiffs' books until 1893, several years after the occurrences in respect of which the allowances were made. There is no resolution or by-law specifically dealing with this allowance, except in so far as references in the plaintiffs' annual statements to moneys due the managing-director might be said to apply thereto. It does not seem reasonable that a matter of such importance and of so unusual a character should not have been specially dealt with and recorded in the books in all these years. Moreover, it may be noted that in the interval between the negotiations with the Government and the credit first appearing in the company's books in 1893, by-laws of the company were passed from time to time altering and fixing defendant's salary as managing-director, one of which (by-law No. 26 passed on May 4th, 1887), states that it is "hereby fixed at the sum of five thousand dollars per annum, commencing from the beginning of his service, viz., from the 1st day of March, A.D. 1882." Prior to the passing of this by-law his compensation had been $2,000 and certain commission, which, at the time by-law 25 was passed, he is shewn to have expressed his willingness to waive. Other by-laws both before and after 1893 were passed relating to defendant's compensation as manager, but no specific reference is made to the item in question either by the directors or the shareholders, though, in such matters as directors' fees and compensation to the directors for obligations assumed in endorsing negotiable paper for the benefit of the plaintiffs, by-laws in clear and distinct terms were in every instance passed.

During all this time defendant held the position of managing-director, and the books and records of the company were in his charge and were written up by himself personally or by clerks under his supervision. This transaction was of such an unusual character as to have required the special attention of the plaintiffs, if it was their intention to give or sanction the credit to which defendant now claims to be entitled, and it is but reasonable to expect that if the company had taken any action thereon it would have been evidenced by some by-law or resolution or other express act, clearly shewing its nature and effect.

The entry of this credit to the defendant in 1893, was made by Owens, a clerk under the defendant and at the defendant's dictation. The reason assigned by the defendant for the long delay in carrying the credit into the books,

is that plaintiffs were unable to pay the amount at the time he says he became entitled to it. But they were not in any better position in 1893; on the contrary, their liabilities were steadily growing if I read the records rightly. It was argued that defendant's statements and his belief in this claim as expressed in his evidence are corroborated by the evidence of the person who was vice-president of the company during several years. To my mind the credibility of the latter is seriously affected by his lack of candour and what I believe was untruthfulness in his answers to enquiring shareholders, when, in reply to enquiries about the affairs of the company after the turning over of the mortgaged assets to the mortgagees, he declared he had years before severed his connection with the company, whereas the records shew that he attended meetings of the directors and of the so-called finance committee down to March, 1900, and as vice-president signed the minutes of the meetings, and further that some time after the company's assets had disappeared he was one of the signers of a circular letter setting forth that the company's assets had been wiped out by its liabilities. This circular is said to have been sent to the shareholders in 1902.

In view of all the circumstances, I do not think this credit taken by the defendant can be upheld as against the plaintiff company; the latter having paid the amount are entitled to recover it.

The next item of claim is based on the allegation that defendant unlawfully credited his account with items of commission and interest to the extent of about $3,000 and that such credits were paid him by plaintiffs. By by-law No. 7, passed on July 26th, 1882, defendant's compensation as manager was fixed at $2,000 per annum commencing on April 1st, 1882, and 5 per cent. upon the net profits of the company from year to year during the term of service.

By-law 22, passed on March 9th, 1886, which repealed by-law No. 7, fixed his salary at $2,000 per year, and in consideration of his special services performed and to be performed and in lieu of the commission provided by by-law 7, there was to be paid to him a commission, at rates therein set forth, on the gross sales of the company's property and transfers of property to shareholders, the minimum amount of such commission annually (over and above the salary of $2,000) to be $3,000. Then came by-law 26 (May 4th, 1887), which after reciting that defendant had expressed his willingness to waive any right to commission under by-law

22, and that he had surrendered the agreement pursuant to that by-law, placed the salary at $5,000 as mentioned above, and repealed the parts of by-law 22 which named the salary.

Plaintiffs allege that while the earlier by-laws were in force certain commissions thereunder were credited to and received by defendant, and that there was also paid to him $5,000 per year from March, 1882, without having taken into account his receipt of these commissions.

It is quite clear that under the terms of by-law 26, what defendant was there entitled to was $5,000 per annum from the beginning of his services, and that he was not entitled to any other commissions or allowances in addition to this $5,000 annual salary. If, therefore, on a proper taking of his salary account, it be shewn he has received for the term commencing with the beginning of his services and down to the end of the time covered by by-law 22 any sum or sums as salary or compensation as managing-director or for said commission, in excess of $5,000 per year, he should account therefor to the plaintiffs; and if the parties cannot agree upon whether any such payments were so made and their amount, there will be a reference to the Master-in-Ordinary to take an account thereof.

The remaining items of the claim arise from defendant having received and applied to his own use certain assets of the company at or after the time of the release of the equity of redemption in the mortgaged lands to the Leadley estate. Defendant does not deny the receipt of these sums, but contends that plaintiffs authorised the transfer thereof to him in full satisfaction of all his claims and demands as managing-director or otherwise. His warrant for this contention is based on the action of the board of directors at their meeting on March 2nd, 1900, where on the report of what was known as the finance committee it was recommended that it (the committee) be authorised to deal with the situation (that is the demand made by the Leadley estate, the mortgagees, in respect of its overdue mortgage) to the best advantage in the interest of the company and the shareholders, with a view to avoiding unnecessary expense and loss all round, etc., and which recommendation was adopted in its entirety at that meeting. In pursuance of this, the committee on the same day purported to empower and direct the defendant (amongst other things) to release to the mortgagees the company's equity of redemption or otherwise vest the property in the mortgagees, and

also "to arrange as he (John T. Moore) may be able with the mortgagees for reserving sundry debtors, etc., including balances on allotments, as a provision to be accepted by him in full satisfaction of all his claims and demands as managing-director, or otherwise, including services and clerical expenses incidental to the adjustment of all matters with the mortgagees and the writing up and closing of the accounts."

There is no record of any other authority for defendant's receiving these assets—nor does he contend that there was any such—and there is nothing to shew that after that date any meeting of directors or shareholders was held. The last recorded meeting of the shareholders was on March 30th, 1898.

The first question which presents itself is, was there authority in the directors to delegate to a committee the performance of the important duties which it (this committee) assumed to turn over to the defendant? I have not been able to discover from the records of the company any authority given to the directors to so delegate, and I am of opinion that the decision in *Re Leeds Banking Co., Howard's Case* (1886), L. R. 1 Ch. App. 561, is applicable under such circumstances as exist here, and that the directors had no right or authority to delegate their powers and duties. But apart altogether from such want of authority, the procedure adopted in the disposal of these assets was not such as should have been followed in order to give binding effect to the transaction. The committee having assumed to turn over to the defendant the carrying out of these transactions, what followed was carried on without any notice to or knowledge of the shareholders. It was due to them that they should have had an opportunity of knowing what were the remaining assets of the company, and what were the debts or obligations which were to be paid out of these assets. Not only were they, in so far as any notice from the directors or defendant was concerned, in ignorance of the wiping out of the assets which thus left nothing to repay them the moneys they had put into the enterprise, (and not even did the directors themselves take the trouble to ascertain the value of the remaining assets or the amount of the liabilities which these assets went to pay), but the evidence does not disclose that any report of these transactions was sent to the shareholders, in any event until 1902, when it is said the circular letter above mentioned was sent out, signed

by the vice-president, the defendant as managing-director, and another director, announcing that the company's career had been brought to a close and that the balance of liabilities had wiped out the assets. This circular contained this reference to the balance of assets:—

"In closing the business, there were some current liabilities requiring attention, as well as the charges and expenses connected with properly completing any final duties. Towards these we applied our limited remaining resources of old balances on allotments, etc., and any deficit must be accepted as a personal loss."

This circular, which was evidently intended as the company's obituary, contained no particulars of what these "limited remaining resources" were, no detailed statement of the "current liabilities" or the "charges and expenses," and no information except what appears above. It is not a question of whether or not there existed valid claims of defendant against the company, but of the means resorted to of satisfying such claims. Whatever remained of the company's "limited remaining resources" after satisfaction of "the current liabilities" and the "charges and expenses" belonged to the shareholders, and to properly arrive at that balance the shareholders were entitled to know what these remaining resources were, and the particulars of the liabilities, charges and expenses claimed to be payable thereout. In other words, before finally disposing of the balance of assets *en bloc*, there should have been what is equivalent to an accounting, both as to the assets and the liabilities.

That not having been done, my opinion is that plaintiffs are now entitled to payment by defendant of the following amounts included in plaintiff's claim and admitted by him to have been received—$646.87, $365, $365 and $730, referred to in paragraph 23 of the statement of claim, and $364.05 received from George W. Greene, and interest on these sums from the respective dates they were so received; also an account in respect of the interest which plaintiffs had in the lands as "Blackfalds," and which arose in this way: Defendant and one Nanton, to whom these lands were conveyed in trust, on May 9th, 1893, executed a declaration by which they bound themselves to transfer and convey, out of these lands, to the Calgary & Edmonton Rw. Co., the land required for a right-of-way and station grounds, and to hold the remainder of the lands as to one-half in-

terest therein for the plaintiffs and as to the other one-half interest for the parties represented by Nanton. By transfer dated June 11th, 1903, Nanton and defendant transferred to defendant the portion of these lands the interest in which they held for plaintiff. Nanton's authority for making this transfer was a memorandum of the same date, which purported to be a consent by plaintiffs to the division of the lands between him and defendant. This consent was executed by the defendant in the name of the plaintiffs and by his own name as manager, the plaintiffs' corporate seal being affixed thereto. There was no other authority from the plaintiff, and there is no allegation of any such other authority to make this division and transfer except such as it is claimed is derivable from the resolution of the Finance Committee on March 2nd, 1900. I am unable to find that there existed any authority in defendant to give consent to the division of these lands, or that he can take or retain the benefit of the lands so acquired without accounting therefor to the plaintiffs.

The position of the claim put forward in paragraphs 21 and 22 of the statement of claim is this:—Prior to March, 1900, certain shareholders of the plaintiffs applied for allotments of land in exchange for their holdings of stock in the company (this mode of settlement having been sanctioned by the Government), and allotments of land were made to them and their stock surrendered; but on the adjustment, certain balances of cash were due by the allottees to the plaintiffs and in consequence plaintiffs held undelivered, until payment should be made, the transfers of the lands which had been executed to the allottees.

In March, 1900, when defendant alleges plaintiffs authorized him to receive and retain the balance of plaintiffs' assets in settlement of his claims, balances were still due to plaintiffs by certain of those allottees, and the transfers, to the delivery of which they would have been entitled on final payment, remained in the plaintiffs' hands. These balances not having been paid, defendant, according to his own evidence, later on issued notices to the delinquents that unless payment was made within three months the transfers would be cancelled. Some of the delinquents not having paid within the time specified, defendant, of his own accord and without the knowledge or authorization of the plaintiffs, cancelled the transfers, and in the plaintiffs' name made

new transfers of the lands represented by the cancelled transfers to his wife Annie A. Moore.

What defendant sets up is that he (or Mrs. Moore) took those lands instead of the balances due by the allottees to the company, and that he was entitled thereto as having been given to him by the company. Plaintiffs claim the value of these lands.

The form of agreement with and transfer to the allottees is not produced; but the evidence of the defendant is that plaintiffs did not therein reserve any right to cancel the transfers on non-payment of the balances due by the allottees. That being so, the remedy would not have been to retake the lands, but to recover from the allottees the balances so due. It would, therefore, have been wrongful on the part of the plaintiffs to re-possess the land in the summary manner employed by the defendant.

In referring to the transaction, defendant in his evidence says that if anybody other than the allottees had paid the balances due and taken a receipt therefor, he would have accepted the payment and handed over the transfers. To my mind the position of the matter is much as if he himself had paid over the balances and taken the tranfers, and that being done he would have received these monies for the plaintiffs. In that view my opinion is that what the plaintiffs are entitled to is not the lands or their value but the balances which were due by the allottees whose transfers defendant assumed to cancel, with interest; and there will be a reference to the Master in Ordinary to ascertain these amounts. I am assuming, in the absence of the documents, that the defendant's statement is correct, that there was no agreement with the allottees entitling plaintiff to cancel the transfers on default in payment. Had there existed such a remedy, my view as to the liability of the defendant to account for the value of the lands instead of for the balances due by the allottees, might be different.

As to the interest chargeable against the defendant, I think it is clear that under the circumstances plaintiffs are entitled to interest on sums payable to them from the time the same, or the benefit thereof were received by the defendant. The rule as to the charging of interest, as laid down in such cases as *Small* v. *Eccles*, 12 Gr. 37, is, I think, applicable here.

A defence set up by the defendant is that plaintiffs' claims are barred by statute. I cannot accept this view. The liability of a director, who is a trustee of a company and has its property in his hands and under his control, to account to the company for all such property, is undoubted. His right to plead the Statute of Limitations does not exist "where the claim is founded upon any fraud or fraudulent breach of trust to which he was party or privy, or is to recover trust property or the proceeds thereof still retained by him or previously received by him and converted to his own use." Halsbury's Laws of England, vol. 5, p. 235, sec. 377.

Where any person as agent, guardian, or in any other fiduciary capacity, is in receipt of money for which it is his duty to account, no lapse of time, so long as the relation of confidence exists between the parties, can bar the right to an account from the beginning of the transactions; nor will the statute begin to run when the relation is put an end to. (See Halsbury, vol. 19, pp. 165-166.)

The defendant has counterclaimed in respect of several matters with which I shall deal separately. The first is for commission on sales of plaintiffs' lands. By-laws 30 and 32 deal with this commission. By-law 30, passed on 10th December, 1891, provides for payment to defendant from November 30th, 1891, or 2½ per cent. on gross sales, in addition to $2,500 per year. This by-law was repealed, on April 10th, 1893, by by-law 32, which enacted that from and after April 30, 1893, defendant's compensation should be at the rate of $1,200 per annum and five per cent. upon the gross sales of the company's property from month to month. No particulars of defendant's claim for commission are furnished, but if any sales of lands were made from the time by-law 30 came into effect until March 30th, 1900, on which defendant has not been paid the commission provided by by-laws 30 and 32, he is entitled to the commission thereon, and the reference to the Master in Ordinary will include an enquiry into this. In arriving at this commission he is not, however, entitled to have taken into account the value of the company's lands for the taking over of which he says he had negotiations with the Government. He claims to be so entitled on the ground, as he puts it, that "the company declined to carry the arrangement out that I had made; they wanted a little better terms." The company's minutes

record the action of the directors that in event of the disposal of the property to the Government the manager's compensation should be the same as if sold to private parties section by section. No such sale or disposal was carried out, and I cannot find from the records that any arrangement was arrived at with the Government, though it is apparent that lengthy negotiations took place with that object in view. The company's minutes set forth that the company would grant to the Government for $2 per acre and interest. Later on it appears the Government proposed $2 per acre, but this proposal involved the Government dealing with three other companies at the same time and on the same terms.

Defendant contends too, that he is entitled to commission on sales of lands which he made for the Leadleys. That claim is not sustainable even on the ground that the lands afterwards were dealt with as the company's lands. Moreover, in the taking of the accounts in the former action substantial allowances were made to the defendant in connection with making sales after March 30th, 1900, and these allowances were included in the redemption moneys payable by plaintiffs. As I understand it, the amount so allowed was in excess of the commissions provided by the above referred to by-laws. I cannot adopt the position taken by the defendant, that the sales made under such circumstances were made for the plaintiffs, or in such a way as to entitle him to the commission provided by the by-laws.

By-law 31 made provision for the compensation to the directors for endorsing commercial paper for plaintiffs, and defendant is entitled to compensation in the terms of the by-law. The reference to the Master-in-Ordinary will include also an enquiry, if, in addition to what defendant has already received for making such endorsements, there be anything further due on this claim. The reference will include also an enquiry to ascertain if anything is due the defendant for directors' fees as allowed by the company's by-laws.

The claim for unpaid salary as managing director can only apply to the time subsequent to March 1900, as his salary, exclusive of any commissions under by-laws 30 and 32, was on his own admission paid down to that date. From that time he did not, as managing director, assume to perform any services for plaintiffs, except it can be contended

that the getting into his possession the company's remaining balance of assets in settlement of what he alleges were his claims against the company were services within the purview of the managing director's duties. According to his own printed statement, the company's career had come to an end, and if that was his belief at the time I cannot sanction a claim for salary. Under these circumstances that claim is dismissed.

No satisfactory evidence has been adduced of special services rendered by defendant to the company in respect of which he sets up a claim; and that claim also fails.

Although no particulars are produced of the claim for expenses and disbursements made by the defendant for and on behalf of the plaintiffs, outside of the matters I have already disposed of, defendant may have an opportunity of producing such statement before the Master-in-Ordinary to be enquired into on the reference to him.

There will be judgment in accordance with the above findings. Further directions and costs are reserved until the Master makes his report.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. OCTOBER 27TH, 1913.

VOGLER v. CAMPBELL.

5 O. W. N. 169.

Conveyance—Action to Set Aside — Accounting—Bank Account—Moneys in Joint Names—Testamentary Intention—Appeal.

LENNOX, J., *held* (24 O. W. R. 680), that upon the facts of the case certain moneys standing in the joint names of one John L. Campbell, deceased, and the defendant were moneys of the former intended by him only as a testamentary gift to defendant and defendant was liable to account for the same.

Hill v. *Hill*, 8 O. L. R. 710, followed.

SUP. CT. ONT. (2nd App. Div.) *held*, that as the moneys in question were irrevocably transferred by the deceased in his lifetime to the joint account of himself and the defendant, there could be no suggestion of a testamentary intention and no parol evidence intended to support such intention was admissible.

Hill v. *Hill*, 8 O. L. R. 710, distinguished.

Appeal allowed and action dismissed with costs.

Appeal from so much of the judgment of HON. MR. JUSTICE LENNOX, 24 O. W. R. 680, as found that the money in question belonged to the estate of John L. Campbell, deceased.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

Matthew Wilson, K.C., for defendant, appellant.

O. L. Lewis, K.C., contra.

HON. SIR WM. MULOCK, C.J.Ex.:—John L. Campbell, an old man, resided with his daughter Margaret A. Campbell, the defendant, and on the 11th of July, 1908, he and the defendant signed and delivered to the Traders Bank at Ridgetown a document in the following words and figures:—

"To the Traders Bank of Canada:—

"We, the undersigned, John L. Campbell and Margaret Ann Campbell, hereby agree, jointly and severally, and each with the other, to deposit certain monies with the Traders Bank of Canada to the credit of our joint names; any monies so deposited to be our joint property, and the whole amount of the same, and of the interest thereon, to be subject to withdrawal by either of us, and in the case of the death of one, by the survivor. And each of the undersigned hereby authorizes the said bank to pay any monies which may be at any time so deposited, and any interest there may be thereon, to either of the undersigned, and in the case of the death of one, to the survivor.

Dated at Ridgetown this eleventh day of July, 1908.

"John L. Campbell

"Margaret Campbell."

"Witness: Hugh Ferguson."

John L. Campbell then deposited in the Traders Bank to the credit of the joint account of himself and his daughter Margaret Campbell a sum of $2,000, which theretofore he held on deposit to his own credit. During his lifetime Margaret Campbell drew $500 out of this joint fund, the balance remaining there until the death of the settlor, John L. Campbell, who died intestate, when the defendant was appointed administratrix of his estate.

This action is brought by the plaintiff, a daughter of the deceased, who among other things asks that the $2,000 be declared to be part of the estate, and that she be declared entitled to share therein as one of the next of kin of the deceased.

The question, I think, turns wholly on the construction to be placed upon the document above set forth. The intestate deposited the money, subject to the terms of that document, to the credit of himself and the defendant, and when so deposited it became the joint property of the two, and on the death of one became the property of the survivor. Nothing remained in order to perfect the gift to the defendant of a joint interest in the fund during their joint lives; and the exclusive ownership of so much as remained on deposit at the time of his death, in the event of her surviving him. John L. Campbell predeceasing her, the fund formed no part of his estate at the time of his death.

The learned trial Judge considered himself bound by *Hill* v. *Hill*, 8 O. L. R. 710. The facts, however, in that case were different. There a person having money on deposit in a bank, procured from the bank a deposit receipt therefor "payable to William Hill, senior" (the depositor) "and John R. Hill" (his son) "or either of the survivor."

This instrument did not transfer the ownership of, or any interest in, the fund to the son, during the lifetime of the father, and on his death the legal estate in the fund devolved on the father's legal representative.

As regards the son the deposit receipt at most was but an incomplete gift or settlement and being voluntary was not enforceable against the estate.

In the present case the gift being complete in John L. Campbell's lifetime, I am of opinion that the defendant is entitled to restrain the fund. I therefore, with respect, find myself obliged to differ from the learned trial Judge and think this appeal should be allowed with costs.

Having regard to the state of the pleadings I think we should not deal with the item of $500 referred to in the case, but reserve to the plaintiff any rights thereto to which she may consider herself entitled.

HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH, agreed.

RIDDELL, J.:—James L. Campbell was an old man, rather given to drink, but not to transacting business when he was "in liquor." His daughter the defendant, was married and living about two miles distant from her father.

Early in March, 1908, he came to live with her and continued so to live until the time of his death in 1912. February 4th, 1907, he made a conveyance to the defendant of his farm; July 11th, 1908, he and the defendant signed a document in the following form:

"To the Traders Bank of Canada:

We, the undersigned, John L. Campbell and Margaret Ann Campbell hereby agree, jointly and severally, and each with the other, to deposit certain monies with the Traders Bank of Canada to the credit of our joint names; any monies so deposited to be our joint property, and the whole amount of the same, and of the interest thereon, to be subject to withdrawal by either of us; and in the case of the death of one, by the survivor. And each of the undersigned hereby authorizes the said bank to pay any monies which may be at any time so deposited, and any interest there may be thereon, to either of the undersigned, and in the case of the death of one, to the survivor.

Dated at Ridgetown this eleventh day of July, 1908.

Witness: John L. Campbell.

Hugh Ferguson. Margaret A. Campbell."

Campbell had, at the time $2,000 in the Traders Bank at Ridgetown, and he transferred that amount to the new joint account. From this a sum of $500 was afterwards withdrawn by a cheque of Campbell; Campbell dying intestate, the defendant became his administratrix.

The plaintiff is another daughter. She brought her action May, 1912, claiming that the deed was obtained by undue influence and that Campbell was at the time totally incompetent; she asked that the deed should be set aside. She also alleged that the $2,000 had been obtained by the defendant "fraudulently, improperly and dishonestly by improper and undue influence," and asked that that sum should be adjudged to belong to the estate.

At the trial before Mr. Justice Lennox, May, 1913, at Chatham, that learned Judge dismissed the claim as to the deed, and most justly, for there was no kind of evidence to charge the defendant with wrongdoing, and it was proved that Campbell was (as his doctor puts it) "a pretty shrewd canny Scotchman."

The view of the learned trial Judge in respect of the bank account was different; his considered judgment is to be found in 24 O. W. R. 680.

The defendant appeals against so much of the judgment as is adverse to her. There is no cross-appeal.

I am unable to agree with my learned brother in his view of the agreement of July 11th, 1908. The document was read over to Campbell; he quite understood it, and when it was signed by both parties, it became a valid instrument under which the defendant became joint owner with her father of the money in the account then or thereafter. The instrument required no oral evidence to explain it, its meaning is plain and unambiguous.

The case of *Hill* v. *Hill* (1904), 8 O. L. R. 710, was quite a different case; there was no contract entered into by and between the parties; the document was a deposit receipt signed not by the parties but by the bank. Mr. Justice Anglin held that under the circumstances of that case the real transaction was a retention by the one party of his control over the money during his lifetime with the document to operate as a testamentary disposition at his death.

But here there is a contract reduced to writing which neither requires, nor, as I think, will permit of explanation or modification by parol evidence; and it must be given full effect.

Even if parol evidence were admissible, I do not think the plaintiff's case is advanced. The banker says, QQ. 35, 36, "they just opened a joint account so that they could both draw out money . . . he had spoken and asked me if he could have an account that way so he or his daughter could draw the money out." Q. 96. "He asked me if one of his daughters could draw that money while he was living and I told him she could, and he seemed particularly anxious that the money was to go for her . . . he said he did not want her to use all that money while he was living . . . He asked me once or twice if she had drawn any of that money."

As against this evidence of her own witness, the plaintiff sets up the evidence of the defendant. After describing Campbell's desire to avoid making a will, she goes on to say that the two of them went up and Mr. Ferguson drew up the paper, read and explained it to Campbell and after it was read and explained and executed, Campbell told the banker that he did not want her to use the money during his lifetime, that he was an old man and wanted

the money for his own purposes; but after that he often told her if she wanted it to go and get it. No doubt the desire to get out of making a will was one of the motives, if not *the* motive, but that is the case in many cases of gifts *inter vivos*. And there can be no possible doubt that Campbell thoroughly understood that his daughter had just as much control during his lifetime as he had himself.

This alone would be sufficient to distinguish *Hill* v. *Hill* (1904), 8 O. L. R. 710, and even were the document in question less clear and unambiguous would entitle the defendant to succeed. *Schwent* v. *Roetter* (1910), 21 O. L. R. 112, is well decided (although it is my own decision). But the present case is much stronger in that there is an express contract making this money joint property. No parol evidence can modify the effect of this document.

The appeal should be allowed generally and the action dismissed.

The sum of $500 was withdrawn by the deceased a short time before his death, and was delivered to the defendant. Some evidence was given at the trial, but the matter was not fully investigated; there was nothing in the pleadings about it; and while we dismiss the action, we reserve to the plaintiff the right to bring any action she may be advised in respect of the five hundred dollars.

As to costs, I can see no good reason for taking this case out of the general rule; and I think the plaintiff must pay costs of action and appeal.

I have assumed that the plaintiff has the right to sue, since the defendant is herself administratrix. *Hilliard* v. *Biffe* (1874), L. R. 7 H. L. 39, at p. 44, and other cases considered in *Empey* v. *Fick* (1907), 15 O. L. R. 19, at p. 24.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. OCTOBER 27TH, 1913.

KOVINSKI v. CHERRY.

5 O. W. N. 167.

Prescription—Possession of Lands—Boundaries—Buildings—Surveys—Encroachment—33 Vict. c. 66—Statute Legalizing Survey—Tax Sale—Irregularity—Taxes not in Arrear.

SUP. CT. ONT. (2nd App. Div.) dismissed an appeal and cross-appeal from the judgment of the County Court of the County of Kent declaring plaintiff entitled to possession of certain lands and that a tax title he possessed thereto was invalid.

Appeal by the defendant, and cross-appeal by the plaintiff from a judgment of HIS HONOUR JUDGE BELL, Judge of the County Court of the county of Kent, sitting without a jury, dated the 19th May, 1913, in an action to recover possession of land and for other relief.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

M. Houston, for defendant, appellant.

O. L. Lewis, K.C., and S. B. Arnold, for plaintiff, respondent.

HON. MR. JUSTICE LEITCH: — The plaintiff appeals against the second and third clauses of the judgment, which are as follows:—

"2. This Court doth further order and adjudge that the plaintiff, as the owner of an undivided eight-ninths of lot number 6, plan 9, Beatty's survey, on the east side of William street in the city of Chatham, in the county of Kent, recover possession of the said land to the line between lots 6 and 7 in the said survey, as shewn on the plans of W. G. McGeorge, Esq., P.L.S., filed at the trial as exhibits 29 and 30, except that portion thereof upon which now stands the old brick-veneered portion of the present building claimed to be owned by the defendant.

"3. And this Court doth further order and adjudge that the defendant do pay to the plaintiff the general costs of the action except the costs incurred by the plaintiff in attempting to prove a tax title to said lands."

The plaintiff cross-appealed against that portion of the judgment which declared the tax deeds invalid, and asked to have them declared valid and binding, and for an order allowing the plaintiff damages for preventing him from occupying the land in question.

The action was brought by the plaintiff as purchaser and grantee of all the right, title and interest of the heirs and heiresses at law of James Carleton, late of the city of Chatham, deceased, in lot 6 and the southerly half of lot 5 and on the east side of William street in the city of Chatham, according to plan number 9 in the pleadings mentioned, and to recover possession of the land, and for the removal of buildings, and for $300 damages for refusal to give up possession and for an injunction. The plaintiff also claimed title to the said land under a tax sale held by the corporation of the city of Chatham on the 6th day of December, 1911, and a tax deed from the said corporation dated 28th January, 1913. It was conceded that the defendant was entitled to possession of the land occupied by the brick building shewn on the plan.

The chief controversy was as to the frame structure, commonly called a "lean to," which extended beyond the line of lot number 6 as surveyed by W. G. McGeorge and shewn on his plan. The defendant claimed up to the fence built five or six years ago and marked on the plan "by possession."

I do not think that the defendant has shewn that quiet, peaceable, exclusive and continuous user and occupation which would entitle him to hold any of lot number 6 beyond McGeorge's line. There was no permanent fence between the lots; there was no regular cultivation or cropping of the land; the garden which Mrs. Charlton is said to have had was open to the neighbours' cattle and subject to their depredations.

I think that W. G. McGeorge's line, which forms the boundary between lots 6 and 7, shewn on the plans exhibits 29 and 30, is the true line. By reason of a complication of surveys and in order to define the limits of the town and the proper boundaries of the streets and lots, the corporation of Chatham caused a re-survey to be made and stone

monuments to be planted indicating the boundaries, and the streets and lots.

An Act was passed by the Legislature of Ontario in 1869 —33 Vict. ch. 66—confirming the survey and declaring it to be the true and unalterable survey of the town of Chatham. McGeorge in his evidence states that he procured from the registry office a copy of the plan and field notes of the survey legalised by the Act of 33 Vict. and uncovered several of the monuments, and, with those that appeared through the pavement, was able to prepare the plans, exhibits 29 and 30. These plans are from actual survey and work on the ground, and there can be no doubt of their accuracy.

As to the plaintiff's cross-appeal, to have it declared that the tax deed set up by him was valid; at p. 152 the learned trial Judge says: "I think the tax sale was a very lax one. I am of opinion that the tax sale was not properly conducted."

On the argument Mr. Houston urged several objections to the tax title set up by the plaintiff; and a perusal of the cases cited shews these objections to be well taken.

It is not necessary for me to go over the cases, as it was proven that the defendant had paid his taxes. The defendant proved the payment of the taxes for every year from 1905 to 1912 inclusive, and the trial Judge so found. If any authority was necessary for the proposition that this objection was fatal, *Street* v. *Fogel*, 32 U. C. Q. B. 119, may be referred to.

I think the appeal and cross-appeal should be dismissed; and without costs, both parties having failed.

HON. SIR WM. MULOCK, C.J.Ex., HON MR. JUSTICE RIDDELL and HON. MR. JUSTICE SUTHERLAND, agreed.

HON. MR. JUSTICE HODGINS. OCTOBER 27TH, 1913.

RE MCKEON.

5 O. W. N. 190.

Will—Construction—Gift to Trustee—Fund "to be Expended for the Education and Support of Testator's Niece"—Right of Beneficiary to Unexpended Balance.

HODGINS, J.A., *held*, that where there is a gift to a trustee for the education and support of a named beneficiary, the latter is entitled to the fund absolutely upon coming of age.

Hanson v. *Graham*, 6 Ves. 249, referred to.

Motion by the trustee under the will of Albert McKeon deceased, for the construction thereof.

T. J. Murphy, for trustee, Mary A. Crotty.

J. B. McKillop, for next of kin.

J. F. Faulds and P. H. Bartlett, for Angela Crotty.

HON MR. JUSTICE HODGINS:—The words of the will in question were as follows:—

"The balance of my estate . . . he" (the executor) "shall sell and hand over the proceeds to Mary A. Crotty, of St. Columban, to be held by her in trust, and to be expended by her for the education and support of my niece Angela Crotty now attending the Ursuline Academy in Chatham."

Angela Crotty at the death of the testator was a minor. She is now of age, and contends that she is entitled to have the balance of the estate which the will deals with, handed over to her. It is said that the trustee received about $5,000 and has expended about eight or nine hundred dollars for Angela's education and support; that part is in the bank, and that the balance is invested on the security of a promissory note.

I think this case falls within the line of decisions which hold that where an entire fund is given, and a purpose, such as education and support, is assigned as the motive of the gift, the beneficiary takes the whole fund absolutely. See *Hanson* v. *Graham*, 6 Ves. 249; *Re Sanderson's Trusts* (1857), 3 K. & J. 497; *Younghusband* v. *Gisborne* (1844), 1 Coll. 400; *Re Stanger* (1891), 60 L. J. Ch. 326.

In the latter case Chitty, J., observes, on the terms of the gift, (p. 327): "It is material to observe that it is not framed as to make it the duty of the trustees to apply the

whole of the income or corpus for R. Tate's benefit. Had this been so, I should have been prepared to hold that he took a vested interest in the whole fund."

I think the principle to be applied in dealing with this will is at one with that stated by the learned Chancellor in *Re Hamilton*, 27 O. L. R. at p. 447, and that the right of the beneficiary can only be defeated by "making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary." In this he follows *Re Johnston* (1894), 3 Ch. 204.

Where it has been held that the fund does not go to the beneficiary, it is because the destination of the fund is controlled in one or other of those ways. See *Re Nelson*, 12 O. W. R. 760; *Re Rispin*, 25 O. L. R. 633; 46 S. C. R. 649; *Re Hamilton*, 27 O. L. R. 445, 28 O. L. R. 534; *Re Collins*, (1912), 23 O. W. R. 225.

In no case that I have been able to find has the mere interposition of a trustee to hold and to expend the moneys been held to defeat the vesting of the gift where otherwise no controlling discretion is vested in him.

There should be a direction that the trustee should pay over the balance of the fund to Angela Crotty after payment of any moneys properly expended by her thereout, and of her commission, and the costs of this motion; the account to be taken by the Master at London.

Costs of all parties out of the fund; those of the trustee as between solicitor and client. This motion was properly made in Court.

HON. MR. JUSTICE LATCHFORD. OCTOBER 27TH, 1913.

RE DONALD McDONALD ESTATE.

5 O. W. N. 188.

Will—Construction — Gift to Executors in Trust—Life Estate—Remainder—Condition—Birth of Issue—Time of Vesting.

LATCHFORD, J., *held*, that where certain lands were given to A for life and after A's death to B if she should have lawful issue, but if she should die without lawful heirs to C, and where at A's death, B was living having lawful issue, she became entitled in fee simple to such lands.

London Weekly Court.

Application by the executors of Donald McDonald, late of the township of Enniskillen in the county of Lambton,

for the advice of the Court as to whether upon the true construction of the will of the deceased it was the duty of the executors after the death of the testator's sister Christiann Bolls, to convey certain lands in fee to her daughter Mary Bell Bolls (now Mary Bell Beaton), or, to hold such lands until the death of Mrs. Beaton in order to ascertain to whom such lands should then be conveyed.

G. N. Weekes, for the motion.

J. M. McEvoy, for county of Middlesex.

John C. Elliott, for township of Lobo.

HON. MR. JUSTICE LATCHFORD:—The will of the testator, a retired farmer, was made July 2nd, 1881. He signed it by his mark in the presence of two witnesses, one described as a farmer, the other as a gentleman. There is no direct evidence of the circumstances attending the making of the will. McDonald died November 24th, 1881, and probate was duly granted to the executors named in the will, on December 3rd, 1881.

The will devised the lands in question to the executors "in trust to be managed or rented by them as best they may," and the net proceeds were to be paid yearly and every year to the testator's sister Christiann Bolls during her natural life. The will then proceeds: "After the death of my sister the surplus . . . from said farm to be paid yearly by my executors to my sister's daughter Mary Bell Bolls, if alive, during the term of her natural life, or if she has family legally begotten then the said farm to be given by my executors to the said Mary Bell, but provided she, the said Mary Bell, dies without having any lawful heirs, then my executors to give up the management of said farm to the township council of the township of Lobo and their successors in office to be managed or sold, and if sold the proceeds to be invested and the interest or rent to be applied for the benefit of the poor in the county of Middlesex's house of refuge or house of industry near the town of Strathroy."

At the date of the testator's death, as at the date of the will, Mary Bell Bolls was unmarried. It was obviously present to the mind of the testator that upon the death of the life tenant, her daughter might be: 1st. Living and unmarried; 2nd, dead without lawful issue; 3rd, living and having lawful issue. Only in the second event could the

township of Lobo claim. The third contingency provided for actually occurred. At the death of Mrs. Bolls in 1908, her daughter Mrs. Beaton, was alive and had lawful issue living. The executors are, in my opinion, bound to convey the farm to her in fee.

Costs of all parties out of estate—those of the executors as between solicitor and client.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. OCTOBER 27TH, 1913.

ROSCOE v. McCONNELL.

5 O. W. N. 172.

Mortgage—Deed Absolute in Form — Claim that Same by Way of Mortgage — Subsequent Option to Grantor to Repurchase—Circumstances Surrounding — Terms of — Default in Exercising—Acquiescence in Determination of Option — Transaction not a Mortgage—Evidence.

MIDDLETON, J., dismissed an action brought to have it declared that a conveyance of certain property absolute in form was by way of mortgage only, holding that the terms of and circumstances surrounding a subsequent option given by the grantee to the grantor for three months to purchase the property shewed that it was only intended that the grantor should have an option of repurchase for that period of time and that the original conveyance was not by way of mortgage only.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment with costs.

Samuel v. *Jarrah Timber and Wood Paving Corp.*, [1904] A. C. 323, distinguished.

Appeal from a judgment of HON. MR. JUSTICE MIDDLETON, dismissing the action.

The action was brought by Maglen Roscoe, daughter and administratrix of the estate of Thomas McConnell, deceased, to have it declared that a certain transaction carried out by deed from one James H. Simmons, bearing date the 20th of December, 1906, to the defendant of certain lands on Yonge street in the city of Toronto, and by a contemporaneous agreement between the defendant and the plaintiff's father, was in fact a mortgage transaction and not a *bona fide* sale to the defendant with a right of re-purchase by the father.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

J. P. MacGregor, for plaintiff, appellant.

G. H. Watson, K.C., contra.

HON. SIR WM. MULOCK, C.J.EX.:—The facts established by the evidence are as follows:—

The lands in question had been vested in fee simple in Simmons, but on a secret trust for Thomas McConnell, the beneficial owner, and at McConnell's request and for his benefit were mortgaged to certain parties, one of them being Samuel C. Smoke, who on the 15th of August, 1905, became mortgagee thereof for $500 subject to the prior mortgages.

At this time, Thomas McConnell was erecting buildings on the land, intending in the near future to effect a larger loan wherewith to pay for the buildings.

In October, 1905, he applied to Mr. Smoke for a further advance which was refused unless McConnell gave further security, McConnell then applied to his son, the defendant, for assistance, and the latter, for his father's accommodation, on numerous occasions, gave to him his promissory notes for sums amounting to between $3,000 and $4,000, and these notes Thomas McConnell discounted with Mr. Smoke.

Thomas McConnell having made default in payment for the buildings, mechanics' liens were registered against the land and proceedings were taken to realise on these liens, Mr. Smoke being a party defendant in those proceedings. On their culminating in a judgment he, with the consent of Simmons and Thomas McConnell, paid the amounts owing and obtained a further mortgage to secure the amount then due to him, being something over $8,000, John E. McConnell still remaining liable to Mr. Smoke in respect to the notes above mentioned. Subsequently interest on this mortgage falling into arrear, Mr. Smoke, in October, 1906, began power of sale proceedings when Thomas McConnell applied to the defendant for his assistance towards obtaining their discontinuance.

It was then agreed, between Thomas McConnell and the defendant, that if the defendant would secure a discontinuance of the proceedings by becoming liable to Mr. Smoke for the amount of his mortgage claim, Thomas McConnell

would cause the property to be conveyed to him for his own use on the condition that he should be given the option of re-purchasing it within three months.

In pursuance of this agreement the defendant gave to Mr. Smoke his written undertaking (to which his father was a party) whereby the defendant undertook with Mr. Smoke that "unless your (Smoke's) claim is otherwise paid by 31st November, 1906, I will then pay your claim including principal, interest, and costs, you at the same time assigning to me your securities."

In consideration of this undertaking Mr. Smoke discontinued the sale proceedings, whereupon, Thomas McConnell refused to carry out his promise to have the property conveyed to the defendant. In consequence the defendant, by letter of the 3rd December, 1906, requested Mr. Smoke to bring the property to a sale and accordingly Mr. Smoke again instituted sale proceedings.

Then again Thomas McConnell agreed with the defendant to have the property conveyed to him he, Thomas McConnell, "to have three months within which to take the property off the owner's hands at what it had cost the son to buy the property back" according to the evidence of Mr. Smoke.

Thomas McConnell and the defendant then instructed Mr. Smoke to prepare the necessary papers for carrying out the agreement and the latter then caused to be prepared the deed in question in this action, bearing date the 20th December, 1906, from Simmons to the defendant and the contemporaneous agreement between Thomas McConnell and the defendant, securing to the former the right of re-purchase within three months. The deed vested the property in the defendant in fee simple subject to the existing encumbrances and the contemporaneous instrument is worded as follows:—

"Agreement made this Twentieth day of December, 1906. Between John E. McConnell of the First Part and Thomas McConnell of the Second Part. Witnesseth that in consideration of the sum of One Dollar now paid by the party of the second part to the party of the first part, the party of the first part hereby gives and grants to the party of the second part or his nominees the right at any time within three months from the date hereof of purchasing from the party of the first part the property now belonging to the party of the first part and known as (describing the land

in question) at a price equal to the now existing mortgages and other encumbrances, charges and liens upon said lands and interest thereon according to the terms of the said mortgages together with all costs which have been incurred or may hereafter be incurred by the party of the first part in respect of the said property and all moneys which may be hereafter paid by the party of the first part in respect of the said properties whether upon or in reduction of the said mortgages, etc., or for repairs to the buildings on the said lands or for insurance or taxes or for any cause whatsoever. The party of the second part in the event of his exercising the said option or right must accept the title of the party of the first part as it stands and must bear all expense to which the party of the first part may be put in carrying out the said sale.

Time is strictly of the essence of this agreement and unless the said option or right shall be exercised and the transaction wholly carried out within the said period of three months the party of the second part and his nominees shall have no right whatever in or to the said property under or by virtue of this agreement or otherwise howsoever.

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of "S. C. Smoke." (Sgd.) "T. McConnell" (seal) " "J. E. McConnell." (seal)

Whether this transaction was a mortgage transaction to secure the defendant in respect of his suretyship for his father or an actual sale with a right of re-purchase is the real issue here. If the latter then the condition that on failure to exercise the option within the stipulated time Thomas McConnell should lose his right to re-purchase is not a penalty or forfeiture but a privilege and its terms must be strictly complied with.

Barrell v. *Sabine*, 1 Ver. 268; *Perry* v. *Meadowcroft*, 4 Beav. 202; *Gossip* v. *Wright*, 9 Jur. Part 1, 592; *Shaw* v. *Jeffrey*, C. R. [3] A. C. 483.

Mr. MacGregor seemed to attach much weight to *Samuel* v. *Jarrah Timber and Wood Paving Corporation*, [1904] A. C. 323, and other cases of that nature, but they can have no application to this case. Those are all cases in which as part of the original transaction the borrower conveyed to the lender the estate as security by instrument absolute in form

and where at the same time and as part of the original transaction it was agreed between the parties that the grantor might re-purchase within a named period, failing which the right should cease. In those cases in each of which the grant was in fact a security, it was not competent for the parties by any contemporaneous contract to override the equitable doctrine "once a mortgage always a mortgage," and those cases simply affirm that well-established equitable doctrine.

But a mortgagor may by subsequent independent transaction extinguish in favour of his mortgagee his equity of redemption at the same time acquiring the option to re-purchase and if such be the real agreement the equity of redemption ceases to exist and the former mortgagor has only an option or privilege.

In the present case the mortgage to Mr. Smoke for some $8,000 had been made some months previously and it was competent for Thomas McConnell on the 20th of December, 1906, to extinguish his equity of redemption in favour if his mortgagee or the defendant, his surety, acquiring as part of that arrangement an option to re-purchase. If such was the real agreement between the parties Thomas McConnell thereafter had no rights incident to the right to redeem but only such as the option gave him; thus, the question resolves itself into one of fact, what was the real nature of the agreement between the parties?

The written agreement of the 29th December, 1906, purports to set forth the terms in plain, unmistakable language and I see no reason for thinking that it does not contain the real agreement.

An examination of the conduct of Thomas McConnell shortly before, and also subsequent to, the transaction of the 20th of December, 1906, is helpful as indicating his view of the transaction.

On the 10th of December, 1906, he wrote the defendant with reference to the then pending sale proceedings, saying, "I offered to give you the property without putting costs on it, reserving the right to redeem within three months to redeem," etc.

On the 20th of December, 1906, he became a party to the instrument of that date whereby he purports to acquire a mere option, and which in very plain language makes it clear that if the option is not exercised within three months he shall have no right whatever in the property, "either by

virtue of that agreement or otherwise." The instrument also in plain language declares that at its date John E. McConnell is the beneficial owner. No fraud in procuring his signature to this instrument is suggested, and in the absence of fraud it must, I think, be taken as shewing the real agreement between the parties. Even if up to the time of executing it Thomas McConnell desired to reserve to himself the equity of redemption, he must be held to have abandoned that wish when he executed the agreement. Shortly thereafter Thomas McConnell endeavoured to negotiate a sale of the property, and employed Mr. W. Middleton Hall, barrister, Toronto, to act for him. Thereupon that gentleman put himself in correspondence with Mr. Smoke informing him that Mr. McConnell was endeavouring to arrange to acquire the property by paying the defendant's claim, and asking for a statement. This was furnished him, and a somewhat lengthy correspondence took place between Mr. Hall and Mr. Smoke as to the correct amount. During the course of this correspondence, Mr. Smoke several times reminded Mr. Hall of the date when the option would expire, giving him to understand that there would be no extension, and that if the money was not paid within the time Thomas McConnell would cease to have any interest.

At no time during this correspondence did Mr. Hall or Mr. Thomas McConnell take exception to Mr. Smoke's construction placed upon the transaction.

On the 14th of March, 1907, Mr. Thomas McConnell wrote to the defendant in these words: "John E. McConnell, Esq., Dear Sir:—Re Yonge street property: Be good enough to, under the option held by me from you in regard to the purchase of" (referring to the land in question) "convey the same to Thomas H. Simmons of the city of Toronto, Esq., and this shall be sufficient authority, and upon the execution and delivery of said conveyance, as aforesaid, the said option shall be exercised to the same extent as if the said conveyance were to myself."

On the 16th of March, 1907, four days before the expiry of the option, Mr. Smoke's firm wrote to Mr. Hall as follows:—

"Mr. John E. McConnell has been enquiring of us to-day about the progress made by Mr. Thomas McConnell in connection with his expressed intention to exercise the option of purchase of the Yonge street property under his agreement with Mr. John E. McConnell. We write to you of

course because you are acting for Mr. Thomas McConnell. Our client, Mr. John E. McConnell, instructs us to draw your attention to the fact that the option will expire if not completely exercised by payment of the purchase money not later than Wednesday next, 20th inst."

Thomas McConnell, not being able to complete his arrangements by the 20th of March, the parties by mutual consent in writing extended the time for exercising the option until the 25th of March, 1907, when it expired.

On the 2nd of April, 1907, Thomas McConnell wrote Mr. Smoke saying: "I have found the time you gave me too short to get the business through . . . now Mr. Smoke you have dealt very lenient with me, and have carried me a long time, please don't crush me at this present time . . . All I need is a few days to close it up . . . If you will be kind enough to give the short time required . . . etc."

On the 3rd of April Mr. Smoke replied as follows:—"Thomas McConnell, Toronto. Dear Sir:—I received your letter of yesterday. You write as if I had some control over the matter referred to, but you surely must understand that it is entirely out of my hands, and that only the present owner of the property can deal with it."

Here again Thomas McConnell is reminded of the nature of the transaction of the 20th of December, 1906, but he never challenges the correctness of the defendant's or Mr. Smoke's interpretation of it, nor does he institute legal proceedings to enforce any rights he may have.

In the spring of 1911, Mr. Charles Millar, barrister, on behalf of Thomas McConnell, communicated with Mr. Smoke regarding the position of matters, and a correspondence passed between those two gentlemen.

On the 27th of April, 1911, Mr. Smoke wrote to Mr. Millar a letter of which the following is an extract:—"Re McConnell. Mr. J. E. McConnell has seen me since I sent him a copy of your letter, and his position is that of denying all liability; and on the contrary saying that he has been the injured one. I am instructed to accept service of any legal process which may be issued on his behalf . . . . etc."

No proceedings were instituted, and Thomas McConnell died on the 23rd day of July, 1912. His conduct in acquiescing in the oft repeated notice of the defendant's interpretation of the true nature of the transaction, must be construed as an admission that the transaction of the 20th

of December, 1906, in substance was an extinguishment of Thomas McConnell's equity of redemption, and secured to him merely an option to re-purchase on the terms set forth in the agreement, and I do not think the plaintiff, a mere volunteer, can be heard to make a claim inconsistent with the attitude of Thomas McConnell through whom she claims.

The plaintiff also charges undue influence but wholly fails to establish the charge, which is unsupported by any evidence.

I therefore think this appeal should be dismissed with costs.

HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH agreed.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. OCTOBER 27TH, 1913.

BATES v. LITTLE.

5 O. W. N. 180.

Contract—Sale of Goods—Chattels in Moving Picture Theatre—Refusal of Lessor to Consent to Assignment of Lease to Purchaser—Condition—Evidence — Refusal of Lessor brought about by Defendant—Waiver—Estoppel—Cheque—Action on—Appeal.

Action upon a cheque for $450 given as part payment upon the purchase of certain chattels appurtenant to a moving picture theatre by the defendant from the plaintiff. Defendant alleged the transaction had fallen through by reason of the refusal of the lessor of the theatre premises to consent to an assignment of the lease thereof to the defendant.

BELL Co.C.J., dismissed the action with costs.

SUP. CT. ONT. (2nd App. Div.) *held*, that the defendant by his acts was estopped from denying the validity of the purchase.

Appeal allowed and judgment entered for plaintiff for $450 and costs.

Appeal by plaintiff from judgment of the Judge of the County Court of the county of Kent dismissing action brought to recover $450, the amount of a cheque given as part payment for certain chattels purchased by defendant from plaintiff.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

J. G. Kerr, for the plaintiff, appellant.

O. L. Lewis, K.C., and S. B. Arnold, for the defendant, respondent.

HON. MR. JUSTICE SUTHERLAND:—This action arises out of a sale by the plaintiff to the defendant of certain chattel property in the "Temple Theatre" in the city of Chatham, used in connection with a moving picture "show." The owner of the building was one Eva. M. Brisco whose husband, Fred H. Brisco, acted as her agent in connection with the leasing of the building. Originally one White had been the tenant and later, one Geo. O. Phillip. Frank E. Baxter associated with Phillip, and on the 15th May, 1912, a lease was made to them by Eva M. Brisco for a term of two years and five months at a weekly rental of $21.05. A sum of $500 had been deposited by Phillip with Mrs. Brisco to guarantee the payment of the rent. Soon after the said lease was made, Baxter bought Phillip out and no assignment of the lease was made as the landlord apparently desired to hold Phillip and his $500 to secure the rent. On the 1st November, 1912, Baxter sold to the plaintiff under the following document—

"Chatham, 1st November, 1912.—I hereby assign over to Fred Baxter all my interests in the Temple Theatre for valuable consideration, including the articles mentioned in bill of sale, Phillip to Baxter, the lease to remain in my name, but he to have full and complete possession of the premises after the Saturday night (2nd November), performance."

The consideration is said to have been $900.

Little, the defendant, had apparently been a patron of the theatre and knew something about it. On the night of the 2nd November Baxter, acting for Bates, made a sale to the defendant, and it is said a brief memorandum was made and executed that night, but it was not produced at the trial. The defendant testified that he thought he was dealing only with Baxter, the owner, but admits Bates' name was mentioned. Baxter says he explained to him that he had sold to Bates, who was selling to the defendant, and the solicitor Mr. Gundy, who prepared the papers on the following Monday, says that Little, Baxter and Bates all came to his office for that purpose, and it was explained

to him before he drew them that a sale had been made by Baxter to Bates and that Bates had resold to Little.

No formal bill of sale had been made by Baxter to Bates, and on Monday, November 4th, the bill of sale then drawn was from Baxter directly to Little and covered the chattel property in question, together with the good will of the business in the theatre and the price which had been agreed upon, namely, $1,500, was inserted therein. It was duly executed by Baxter and delivered to Little. An assignment of an insurance policy covering the chattel property was also, on the same date, made by Baxter to Little and given to the latter. At the same time the defendant executed the following papers: a cheque in favour of Baxter for $50, the bill of exchange or cheque for $450 in favour of the plaintiff and in question to this action, and two lien notes, each for $500, in which he promised to pay Frank E. Baxter or the order of the Bank of Montreal at Chatham, the sum of $500, without interest. These notes also stated that the title of the property was not to pass but to remain in the payee of the notes until they were paid, and that in case of default he should be at liberty to take possession. It is suggested by the defendant that the Bank of Montreal or its manager at Chatham, was in some way assisting Baxter or interested in the matter. The defendant also made out and gave to Baxter a cheque for a week's rent. On Baxter taking this cheque to Brisco he declined to accept it and raised objections to a transfer of the lease from Baxter to Little. No assignment of the lease had been drawn in the solicitor's office, although he states that the defendant said something in his office about an assignment of the lease and Baxter told him that the business could be run under his name without an assignment and that nothing further was said about the matter.

It is quite clear, I think, that the defendant promptly rued his bargain, thinking probably he had paid too much for the property. This may well be. When matters were in this position Baxter sent for Phillip who did not live in Chatham, and he came to that city. On the following Wednesday, namely, 6th November, Brisco, Phillip, and Baxter went to defendant's house and Brisco, at p. 78 of the evidence, tells what happened there:

(P. 78) "Q. Who formed the idea first as between you and Little of you making a deal with Little direct, did

Little suggest it or did you suggest it? A. I think I suggested it.

"Q. Before you went to the house or at his house? A. At his house.

"Q. You suggested to Little to deal with him direct? A. It was not that.

"Q. What was it? A. Well the bargain was this: We went up to Little's place as he was unable to come down. As Phillip and I talked to Little on the verandah, Mr. Baxter was talking to Mrs. Little. Mr. Little called me into his room and he said: "Get me out of this scrape. I do not want to deal with these fellows." I said: "Do you really want the theatre?" He said, "not at the price I am paying." I said, "What will you give for it; will you give $1,000? He said yes, he thought he would." The matter dropped there regarding the purchase of the theatre. I said, "These fellows want me to assign this lease," and he said "Don't you do it;" and I said, "I have already told them I will not do it," and he gave me a cheque for $100, and written on the bottom of the cheque was—to be payable on a certain date two weeks hence, if the lease was not transferred to him.

The lease was not immediately assigned to the defendant, but there followed a curious dealing with the property.

On the 7th November a document was executed by Baxter, Phillip and Mrs. Brisco, under which, Baxter, who had previously taken over as between themselves the rights of Phillip in the lease, re-assigned his rights thereunder to Phillip; and Mrs. Brisco consented to the assignment. On the next day, 8th November, Phillip assigned and surrendered his interest in the lease, by written document, to Mrs. Brisco. On the same day a new lease was made by Eva M. Brisco to S. B. Arnold, a solicitor in Chatham, for a term of twenty-three months from the 7th November, and at the same rental as in the old lease. Arnold says that he was acting for a man, Fallahay, and Brisco says in one place, when asked if he knew Fallahay, that Arnold had told him of him; and in another place that Fallahay first went himself to see him about the question of leasing.

Brisco's alleged objection to transferring the lease to defendant was, that he was not an experienced theatre man. He admits that he knew that Arnold was not an experienced theatre man, nor Fallahay whom he represented. He also

was aware that the defendant was a man of financial strength, who could pay the rent if the lease were assigned to him. The lease to Arnold has a provision to the effect that the lessor did not in any way claim to be interested in nor to transfer title to the lessee of the chattel property mentioned; and it sets out in detail said property by a description practically identical with that contained in the bill of sale from Baxter to Little, and then goes on to say "and further that should possession of said chattel property or any portion thereof be recovered from the lessee by any person or persons having the right thereto during the term of this lease, the lessor shall, at her option, either pay to the lessee such sum as will represent the fair value of the article or articles so recovered from him or allow him to retain such amount out of the rents to accrue hereunder if the lessee shall be obliged to give up possession of said chattel property, subject to this, however, that the lessor shall not be called upon to pay or allow in respect of the matter above referred to any sum in excess of $300."

On the 9th November, a cheque for $900 was made by Little, payable to himself or order and was endorsed by him to Fallahay, and on the 12th November Arnold made a cheque to Lewis & Richards, the solicitors for the landlord, for $900, and he says he received the $900 from Fallahay. It is said that Arnold then operated the theatre for a month or so, keeping the receipts in a trust account; and it is pretended that about the 11th December he sold it to the defendant.

In the meantime it is clear from the evidence that Little was from time to time at the theatre and apparently receiving patrons as though he had some interest. I think there is no doubt he had the entire interest in the theatre, during the intervening period.

An agreement was made on the 11th December, 1912, under which Arnold purported to assign to the defendant the lease already referred to for a consideration of $1,050. He explains that this was made up of the sum of $150, which represented the loss incidental to running the theatre in the meantime, and for which he received a cheque from Little on the 11th December, 1912, and $900 paid to Fallahay.

It is alleged or pretended that Fallahay had given Little an option on a certain property and the written option is put in, signed by Fallahay and under seal. It is a curious

feature of it that although the price and terms are set out in it, no property is mentioned at all. On the back of the paper, under date November 12th, 1912, there is this endorsement: "Little P'd. Fallahay on within $900." Matters apparently ran along thus until the 24th February, 1913, when another agreement was made between the defendant and Mrs. Brisco in which it recited that the former had agreed to cancel the Arnold lease that had been assigned to him, upon being relieved of further responsibility for rent, and also agreed to transfer to her the chattel property mentioned in the lease, for the consideration of $300 payable on or before the 1st January, 1914. It further recites "that in case Fred Bates, the Bank of Montreal, or Frank E. Baxter, make and establish a legal right to the possession of the said chattel property before the said 1st day of January, 1914, so as to deprive the party of the second part, (Mrs. Brisco) of the right to the possession of the same, the said $300 shall not be payable, but the payment shall be cancelled, and the party of the second part has agreed to release the said party of the first part from the said liability under the assigned lease, and also to pay for the said property the sum of $300 as above provided;" and the agreement further provides that the defendant "doth hereby transfer, assign, and set over to the party of the second part all right, title, interest and claim of the party of the second part to the said chattel property in the said theatre," etc.

The landlord, through her husband, at the time that Phillip assigned the lease to her, after Baxter had assigned his interest to Phillip, gave him back his $500 that had been on deposit, with the exception of $100 which she retained. In the result, therefore, the landlord obtained possession of, and also a fictitious title to, the chattels in question, and at the same time made a profit of $1,000 out of Little and Phillip in connection therewith.

There is much of the evidence that I am utterly unable to credit. I think that Fallahay merely permitted his name to be used by Little, and that both he and Arnold were mere representatives of Little in a scheme to which Mrs. Brisco, through her husband, was a party, by which (it was admitted) to get rid of the sale from Bates to Little, and in preventing an assignment of the lease to Little under that sale. The only title to the goods in question which the defendant obtained at all, so far as the evidence discloses, is that under the bill of sale from the plaintiff through

Baxter. He retained this bill of sale; he retained the assignment of the insurance policy covering the goods, and at a date long subsequent to his alleged repudiation of the contract with the plaintiff on the ground that the latter could not procure an assignment of the lease to him, he purported to deal with the goods as though they were his own and to transfer them to Mrs. Brisco and to assign the policy to her.

If the assignment of the lease were in fact a term of the contract of sale from the plaintiff to the defendant—and the evidence does not in a satisfactory way make this out—he clearly waived this, retained the documents evidencing his title to the chattels, and dealt with them as their owner. I think he must be held to have ratified the agreement after the alleged breach, and to have converted the goods to his own use. But it is clear that having repented of his bargain with the plaintiff, and concluded he could deal more advantageously with the landlord, he did not want to have the contract with the plaintiff, as entered into, carried out, and did not want to obtain through it, an assignment of the lease, but on the contrary, while pretending this and putting it forward as an objection, secretly induced the landlord to withhold her consent.

The failure of the plaintiff to secure an assignment of the lease to the defendant and to carry out his contract is what is pleaded by the latter in his statement of defence as the ground on which he is relieved from liability in respect of the cheque in question. But the judgment does not, apparently, deal with this aspect of the case. This judgment is very short as follows:—

"I am of opinion that the transaction by which defendant Little was induced to become the owner of the picture show was brought about by fraudulent representations of Baxter and others acting for Bates, and that he was justified in repudiating his liability on the negotiable documents signed by him. I dismiss the action with costs; I direct the $450 cheque and two notes referred to in the counterclaim returned by the clerk to plaintiff."

It was not set up in the statement of defence that the contract was brought about by fraudulent representations. When at the trial evidence of this character was offered on behalf of the defendant objection was taken on behalf of the plaintiff.

(P. 2) "It is not alleged that there is any misrepresentation." Mr. Kerr.

(P. 3) "I can't now say what he proposes to ask"—Judge Bell.

Some evidence was thereupon admitted as to Baxter's representations as to the weekly profits, etc.

I am of opinion that the sale by the plaintiff to the defendant of the chattels in question must be held to be binding upon the latter, the appeal allowed and judgment in the action entered for the plaintiff for the amount of the cheque, namely, $450, with appropriate interest and costs, together with the costs of this appeal.

HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE LEITCH, agreed.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. OCTOBER 29TH, 1913.

PRIOR v. CANADIAN PACIFIC RW. CO.

Railway—Protection of Highway Crossing — Horse Running into Engine on Highway—Defendants not Liable.

SUP. CT. ONT. (2nd App. Div.) held, that defendants were not liable for damages where a horse ran into an engine of defendants upon the public highway where the same crossed the right-of-way. Judgment of O'LEARY, Dist. Ct. J., confirmed.

Appeal by the plaintiff from a judgment of HIS HONOUR JUDGE O'LEARY of Thunder Bay District Court, pronounced June 11th, 1913.

Action to recover $500 damages for loss of horse and cutter that escaped from plaintiff's yard in Port Arthur on February 2nd, 1913, went on defendants' right-of-way, were run over by engine of defendants. The horse killed and cutter destroyed, which was alleged to be caused by defendants' failure to provide cattle-guards or gates and fences.

His Honour Judge O'Leary at trial gave judgment for defendants with costs.

The appeal to the Supreme Court of Ontario (Second Appellate Division), was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

H. E. Rose, for plaintiff, appellant.

J. D. Spence, for defendant railway company, respondents.

Their Lordships' judgment was delivered by

HON. SIR WM. MULOCK, C.J.EX. (v.v.):—The evidence is very slight as to John street crossing the tracks, but nevertheless there appears to be some evidence, and if not controverted it is sufficient.

John street clearly comes down to the tracks, and to all appearance crosses over there. The street crossing at the tracks appears not to have been boarded there as the law requires; but that does not make it not a highway across the right-of-way.

The learned trial Judge's finding is that the horse was injured at John street on the public highway; the horse running into the engine.

We agree, and therefore think that this appeal must be dismissed with costs.

Appeal dismissed.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. OCTOBER 28TH, 1913.

PALO v. CANADIAN NORTHERN RW. CO.

5 O. W. N. 176; O. L. R.

Railway—Horse Killed on Track—No Witness of Accident—Finding of Fact by Trial Judge—Evidence — Reversal on Appeal—Ry. Act R. S. C. 1906 c. 37, ss. 254, 294 (4), 295—9 & 10 Edw. VII. c. 50, s. 8—Absence of Fencing—Liability for—"At Large"—Meaning of—Onus —Satisfaction of.

Action against a railway company for damages on account of the alleged killing of plaintiff's horse by a train of defendants. Plaintiff had let out the horse into his pasture which ran down to the railway track, the right of way being unfenced. The accident was not witnessed by anyone.

O'LEARY, DIST.CT.J., *held*, that there was no evidence to establish the fact that the horse was killed by the train and dismissed the action with costs.

SUP. CT. ONT. (2nd App. Div.) *held*, that the evidence clearly shewed that the death of the horse must have been caused by a passenger train of defendants.

That Statute 9 & 10 Edw. VII. c. 50 s. 8, amending the Railway Act shifts the onus and in effect provides that the railway company to escape liability must prove that the animal was "at large" and "at large" through the owner's negligence or wilful act or omission.

That "at large" in the above section means elsewhere than on the land of its owner.

McLeod v. Can North. Rw. Co., 12 O. W. R. 1279, followed.

Appeal allowed with costs and judgment entered for plaintiff for $275 and costs.

Appeal by the plaintiff from the judgment of HIS HONOUR JUDGE O'LEARY of the District Court of Thunder Bay, who dismissed the plaintiff's action with costs.

The plaintiff's claim was for damages because of injury to his horse by a train of the defendant company on the 27th of September, 1912, which strayed upon the defendant company's track because of their omission to fence.

The learned trial Judge held that there was no evidence that the injury was caused by the defendant company's train, and therefore dismissed the action. From that finding the plaintiff appealed.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

H. E. Rose, K.C., for the plaintiff, appellant.

A. J. Reid, K.C., for the defendant, contra.

HON. SIR WM MULOCK, C.J.EX.:—The plaintiff is a farmer, residing on his farm, and the company's line of railway runs westerly along its south side. His house is in a clearing which is fenced on all sides. At the west side of this clearing is his stable, the west door of which opens into another portion of the plaintiff's land, which portion is unfenced and extends down to the defendants' line of railway. The plaintiff permitted the horse to pasture on this unfenced portion of this land.

At about five o'clock in the afternoon of the day when it was killed, the horse was pasturing near this stable on the plaintiff's land. A passenger train went westerly past the farm at about 7.30 p.m. It was then quite dark. Shortly thereafter the horse was found at the south side of the track with one front leg broken and with serious injuries to his right jaw and right hind leg, and had to be destroyed. There was hair and blood on and along the south rail near which the horse was found.

Shortly before the arrival of the train, Isaac Karila, one of the plaintiff's witnesses, saw the horse uninjured on the north side of the track, grazing almost up to the rails. About an hour after the train had passed, going westerly, he again saw the horse, but at this time it was injured and was at the south side of the track within about twenty feet of where he had previously seen it. The plaintiff swears that the horse could not have been injured except by the train, as the ground was all even and level where it was.

The evidence shews that there were two other horses grazing along the track in addition to the plaintiff's horse. The defendants' engineer in charge of the train swore that he was on the right side of the cab, and, when approaching the siding where the horse was injured was looking out, and that the fireman called to him to look out for a horse, and that at that moment the horse crossed the track from the south or left side to the north, passing about twenty feet in front of the engine, when it disappeared. He said he saw but one horse. From his position in the cab, his view of the south side of the track was obscured by the engine. He said that there might have been other horses on the left side of the track, but "hardly thought" he could have struck a horse on the left side of the track without seeing it. He admits, however, that he did not see the horse that crossed the track until it was actually upon the track, and if, there-

fore, he did not actually see it before it got upon the track, he may also have failed to see other horses close enough to the south rail to be injured.

John Barden, the fireman, was on the left side of the cab, and "thinks if he had struck a horse he would have seen it;" but on being further questioned by the defendants' counsel he said that if the engine had struck a horse he would have seen it.

The facts established on behalf of the plaintiff are not controverted, and an Appellate Court is in as good a position as the trial Judge to draw the correct inferences from admitted or proved set of facts, and is free to do so.

From the plaintiff's evidence the inference is, I think, irresistible that the horse was struck by the passenger train in question, and this inference has not been rebutted by the evidence for the defence. The learned trial Judge, however, seems to have misapprehended the evidence of the engineer and fireman, for he says "no one saw the train strike the horse, and the engineer and fireman both testify that this did not happen."

A careful perusal of the evidence of these two witnesses fails to satisfy me that they so testified. It is clear from a perusal of the engineer's evidence that he saw nothing of any occurrences at the left side of the track; and as the plaintiff's evidence leads to the conclusion that the horse was struck by the left side of the train, the engineer's evidence is irrelevant and valueless; nor can any weight be attached to the fireman's evidence. He was, it is true, on the left side of the cab; but when asked by the defendant's counsel if he could have seen a horse if he had struck it he said he "thought so," and explained, evidently in justification of his doubt, that it was quite dark but he could see the front of the engine. When further pressed by the defendants' counsel he said he would certainly have seen it if the engine had struck a horse; and finally he said he was positive, but both of these witnesses, however, only testify to the engine not having struck the horse; but the accident might have been occasioned by another part of the train; as at times happens where an animal standing alongside of a passing train turns away, and in turning comes in contact with the train. Such an occurrence here is reconcilable with the whole evidence; and, with all respect to the finding of the trial Judge, I think the proper infer-

ence to draw from the evidence is that the horse was injured by some part of the defendants' train, not necessarily the engine; and this seems to have been the view of the trial Judge, who says in his judgment "it might be possible to have the train hit a horse without their (the engineer and fireman) knowing it." But it is argued that the plaintiff was guilty of negligence and therefore is not entitled to recover.

9 and 10 Edward VII. ch. 50, sec. 8, being an Act to amend the "Railway Act," is as follows:—"When any horses . . . . at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such damage against the company in any action . . . unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent," etc.

This section, like section 237 of the "Railway Act" and the repealed section 294, shifts the onus and renders the company liable unless it establishes that the animal got at large through the negligence or wilful act or omission, etc., of the owner, etc. Thus the company, in order to succeed, must establish two things; (a) that the animal got at large, (b) that it got at large through the owner's negligence or wilful act or omission, etc. Failing to establish both of these conditions, the company's defence fails.

Of what negligence or wilful act or omission has the plaintiff been guilty? This is a question of fact. The horse is not shewn to have been elsewhere than on the plaintiff's land, and on the defendant company's right of way. It was the duty of the defendant company, not of the plaintiff, to maintain a fence between the plaintiff's land and the company's right of way. This the defendant omitted to do; but such omission could not deprive the plaintiff of the right to use his land; and, as such owner, he was within his legal rights in allowing the horse to pasture there, and therefore was guilty of no negligence. The company having thus failed to establish any defence to the *prima facie* cause of action conferred upon the plaintiff by the statute, he is en-

titled to maintain this action, and this appeal should be allowed.

The plaintiff in his statement of claim stated the value of the horse to be $275. At the trial he said he would not have sold it for less than $300. This is not saying it was worth $300. Another witness for the plaintiff spoke of the horse as worth about $300. In the face of this rather indefinite evidence I think the amount of the judgment should be limited to that claimed in the statement of claim, viz., $275; and judgment should be entered for that amount, and costs below and here.

HON. MR. JUSTICE RIDDELL:—The plaintiff is a settler along the line of the P. A. D. & W. owned and operated by the defendant railway company, and this railway runs through his property. The railway company did not fence their right of way but left it wholly open. The plaintiff had a fence surrounding his land, but about two years ago it was destroyed by fire and he has been too poor to rebuild it. About 600 yards from the west side of his lot runs through his land a forced winter road used for drawing out wood, ties, etc. In September, 1912, the plaintiff had some horses outside of his stable not far from this road; they apparently went upon the road down to the railway and wandered along the railway property grazing as they went. One of them was injured so seriously that it had to be killed. The plaintiff sued the railway company and at the trial in the District Court of Thunder Bay, before His Honour Judge O'Leary without a jury, that learned Judge dismissed the action. The plaintiff now appeals.

The learned Judge finds it not proved that the horse was struck by a train of the defendants.

There is no more salutary rule than that laid down by Lord Loreburn, L.C., in *Lodge Hales Colliery Co.* v. *Mayor, etc.*, [1908] A. C. 323 at page 328; "when a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury except that a jury gives no reasons." But an appellate Court "does not and cannot" abdicate its right and its duty to consider the evidence" "and if it appears from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider the material part of the evidence and the evidence which has been believed by him when

fairly read, and considered as a whole, leads the Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse these findings." *Beal* v. *Michigan Central Rw. Co.* (1909), 19 O. L. R. at p. 506.

In this case shortly before the passing of a train the horse had been seen "all right" on the plaintiff's side of the track. Shortly thereafter it was seen with its leg broken, but on the other side; there was blood and hair on the rail on this side and near where the horse was found, and the horse had other injuries, some on the head, some on the neck, etc. The learned Judge found against the plaintiff because of the evidence of engineer and fireman.

"The engineer and fireman on defendant's train had done everything required of them. They were not in any way at fault. The train was running slowly, the whistle had been blown. The head-light was on and that they were on the look-out so that they are not excusing themselves from a negligence, and I believe they are telling the truth as far as they know. It might be possible to have the train hit the horse without their knowing it. From the fact that their attention was called to the horse crossing the track immediately in front of their train they would naturally be on the lookout, I think if the train had struck the horse they would know it."

As the trial Judge points out, it is possible that their train struck the horse without either fireman or driver knowing it, although the fireman, at least, says it is not possible. But the error of the Judge is in the assumption that the railwaymen were speaking of this particular horse which is not the fact: it was "a horse."

I think that we are entitled to hold, and should hold, that the plaintiff has proved that his horse was injured by the defendants' train.

The defendants, however, raise before us that the claim of the plaintiff cannot succeed by reason of the provisions of sec. 294 (4) of the "Railway Act.' If effect were to be given to this contention the result would be startling. It is argued that the act of the plaintiff in putting his horse out of the stable, although on his own land, was a putting at large by his wilful act within the meaning of sec. 294 (4) of ch. 37, R. S. C. (1906). The result would be that all a railroad company need do would be to neglect their

statutory duty to fence: sec. 254: and the unfortunate farmer along the line must not allow his animals out in the farm but must keep them in stable or closed field. This would no doubt be a happy result for the law-breaking railway company: but before such an extraordinary effect be given to the section, it must be clear that such is its necessary meaning.

I do not think that the section applies at all to the present case. It is sec. 295 which refers to the duties of adjoining owners *quod* their own land, and sec. 254 to their rights. "At large," in sec. 294, refers to animals elsewhere than upon the land of their owner. This I think is apparent from a reading of the statute and authority is not wanting. In the very full and exhaustive judgment in *McLeod* v. *Canadian Northern Rw. Co.* (1908), 9 Can. R. Cas. 39, 12 O. W. R. 1279, on p. 1283 of the report in O. W. R., it is said: "The negligence of the owner referred to in the 4th clause of sec. 294, is really applicable to cases where the animal is 'at large and not at home.'"

Page 1285, "Cattle on the lands of the owner are not 'at large,' but 'at home.'"

A few weeks before this decision the case of *Higgins* v. *Canadian Pacific Rw. Co.* (1908), 9 Can. R. Cas., at p. 34, 18 O. L. R. 12, was decided in the King's Bench Divisional Court. And while there was no express decision that "at large" meant "not at home," this was taken for granted throughout.

The cases previous to these are cited by the Chancellor in the *McLeod Case*, and it is unnecessary to refer further to them. The learned district Court Judge has found against negligence on the part of the plaintiff, and rightly so on the facts—even if negligence by the plaintiff could avail in an action based upon neglect by the railway company of a statutory duty; as to which see *Davies* v. *Canadian Pacific Rw. Co.*, 12 A. R. 724.

The appeal should be allowed. The trial Judge did not find the value, as he might have done, and no doubt would have done had the evidence been conflicting. The only evidence of value is that of the plaintiff, and his witness Isaac Karila. Both placed the value at $300.

Judgment should, in my view, be entered for the plaintiff for $300, with costs here and below; but as my learned brethren think the amount should be $275, I do not dissent.

Appeal allowed.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 5TH, 1913.

RE IRWIN AND CAMPBELL.

5 O. W. N. 229.

Arbitration and Award—Provision in Lease—Award or Valuation—Right to Appeal.

MIDDLETON, J., 24 O. W. R. 896; 4 O. W. N. 1562, *held*, that there was no appeal from a decision of three valuators under a clause in a lease, it being a valuation not an award.

Re Irwin, Hawken & Ramsay, 24 O. W. R. 878; 4 O. W. N. 1562, followed.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

Appeal by the trustees of the Irwin estate form an order of HON. MR. JUSTICE MIDDLETON, 24 O. W. R. 896; 4 O. W. N. 1562.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

W. N. Ferguson, K.C., for the appellants.

N. W. Rowell, K.C., and George Kerr, for Campbell.

THEIR LORDSHIPS' judgment was delivered v. v. dismissing the appeal without prejudice to the rights of the appellants in pending litigation. Their Lordships agreed with the decision of Hon. Mr. Justice Middleton, which followed that of Hon. Sir Glenholme Falconbridge, C.J.K.B. in *Re Irwin, Hawken*, and *Ramsay*, 24 O. W. R. 878; 4 O. W. N. 1562.