THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING MARCH 25TH, 1905.)

VOL. V. TORONTO, MARCH 30, 1905. NO. 12

MARCH 17TH, 1905.

C. A.

O'DONNELL v. CANADA FOUNDRY CO.

Appeal—Court of Appeal—Leave—Order of Divisional Court —Malicious Arrest.

Motion by plaintiff for leave to appeal from order of a Divisional Court (5 O. W. R. 215), affirming judgment of ANGLIN, J. (4 O. W. R. 402), dismissing action for malicious arrest.

J. G. O'Donoghue, for plaintiff.

G. H. Watson, K.C., for defendants.

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

MOSS, C.J.O.—We are of opinion that leave to appeal ought not to be granted.

The only plausible ground presented in support of the application was that there was evidence in the case on which a jury might properly find that in making the arrest defendant Wilson was acting under instructions from his co-defendants. But a perusal of the evidence satisfies us that this is not the case. There is no evidence which could have justified the jury in finding that it was within the scope of Wilson's duty, under any instructions he had from his co-defendants, to make the arrest.

We see no reason for permitting the case to be carried further.

The application is refused with costs.

MARCH 17TH, 1905.

C. A.

RE NORTH YORK PROVINCIAL ELECTION.

KENNEDY v. DAVIS.

Parliamentary Elections—Judgment Voiding Election—Dissolution of Legislature—Effect of on Pending Appeal—Costs.

After an appeal by Davis, the member elect, from the judgment of the rota Judges at the trial voiding his election had been argued and was standing for judgment, the Legislative Assembly was dissolved.

S. B. Woods, for the petitioner, the respondent upon the appeal, contended that the effect of the dissolution was that the appeal could not be proceeded with, and the judgment of the trial Judges stood unaffected.

A. B. Aylesworth, K.C., for the appellant, contended that the appeal was but a step in the cause, and the whole proceeding dropped by force of the dissolution.

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

OSLER, J.A.—Upon the authorities it seems clear that no effective judgment could now be given upon the petition either by dismissing it or by unseating the respondent. The dissolution brought the whole of the proceedings to an end before any final judgment had been pronounced therein. Were we to allow the appeal, there is nothing which we could certify to the House to which the respondent had been elected, and the case is the same were we to dismiss it. I have considered whether the case is one in which we could or ought to give judgment nunc pro tunc, as of the day on which we reserved judgment, and thus pronounce a judgment in which we might dispose of the costs of the appeal; but, on reflection, this course is not open to us. To justify us in doing that, our judgment should be one in its nature effective for some purpose in relation to the relief sought by the petition. On the whole, therefore, I think we should simply make no order.

OSLER, J. A. MARCH 18TH, 1905.

C.A.—CHAMBERS.

MOLSONS BANK v. STEARNS.

Appeal—Court of Appeal—Leave to Appeal from Judgment at Trial.

Motion by defendant for leave to appeal direct to the Court of Appeal from the judgment at the trial, passing over a Divisional Court.

W. E. Middleton, for defendant.

C. S. MacInnes, for plaintiffs.

OSLER, J.A.—The amount involved is $5,000. Defendant asserts an intention to appeal to the Court of Appeal if he is obliged to go to a Divisional Court and fails there. The question involved may be said to be a mixed question of law and fact, and the case is one in which an appeal to the Supreme Court of Canada would lie.

I have read the notes of the decided cases on this point. Each seems to stand on it own circumstances.

My own view is, that it is to the interest of all parties that the series of possible appeals should be reduced by one in cases of substantial importance ; and that leave ought to be granted here.

Costs in the appeal to both parties.

STREET, J. MARCH 20TH, 1905.

WEEKLY COURT.

RE MCVICAR.

Will—Distribution of Estates—Money Paid to Compromise Action for Reconveyance of Land—Realty or Personalty—Construction of Will—Gift—Income or Corpus.

Motion by the administrators of the estate of J. F. Ruttan, deceased, for an order under Rule 938 determining certain questions arising in the winding-up of the estates of Christina McVicar and Victoria McVicar.

A. B. Aylesworth, K.C., for the administrators of the estate of J. F. Ruttan.

C. A. Moss, for R. A. Ruttan, trustee of the wills of Christina McVicar and Victoria McVicar, appointed after the death of J. F. Ruttan, the executor.

A. R. Clute, for Calla Goldsmith.

J. W. McCullough, for Janet Maud Strathy and Christina Cains.

W. N. Ferguson, for George A. McVicar.

STREET, J.—The first question arises upon the following facts:—

In August, 1883, Christina McVicar was entitled to certain lands and water lots in the town of Port Arthur, and she and Victoria McVicar and George McVicar were entitled to lands in Fort William. They joined in a conveyance, dated 9th August, 1883, to the Canadian Pacific Railway Company, in fee, the consideration being the agreement of the company to erect their passenger and freight stations near the lands. It was part of the terms of the agrement that, in case the company failed to do so within two years, they should reconvey to Christina McVicar the lands and water lots owned by her in Port Arthur so conveyed by her.

On 15th May, 1893, Christina McVicar conveyed to Victoria McVicar in fee an undivided half of the land previously conveyed to the company.

Christina McVicar died 24th July, 1895, leaving a will whereby she devised to Victoria McVicar the remaining undivided half of the land, upon certain trusts as to one half of it for other persons. She appointed J. F. Ruttan to be her executor.

Victoria McVicar died 29th September, 1899, leaving a will and appointing J. F. Ruttan her executor. By her will she devised her real estate in Port Arthur to the executor in trust to divide it in equal shares between Christina Cains, Janet Maud Strathy, George A. McVicar, and J. F. Ruttan; and she bequeathed her personal property and household effects in Port Arthur to her executor J. F. Ruttan, "knowing that he will make such disposition of same as he shall have been advised by me."

The Canadian Pacific Railway Company failed to carry out the terms of the agreement upon which the property had been conveyed to them, and an action was brought on 7th May, 1900, by George A. McVicar and J. F. Ruttan, as executors of Victoria and Christina McVicar, against the company, to compel specific performance of the agreement of August, 1883, or for a reconveyance of the property, and for damages for the breach of the agreement. On 7th April, 1902, this action was compromised, the company reconveying a portion of the land and paying to the executor of Victoria and Christina McVicar $7,500, which he treated as realty and divided amongst the devisees of the real estate under the will of Victoria McVicar. . . . .

J. F. Ruttan died after the distribution of this sum, and R. A. Ruttan was by an order of the High Court appointed trustee under the wills of Victoria and Christina McVicar in his place.

In my opinion, this sum of $7,500 was properly treated by the executor J. F. Ruttan as realty. The agreement of the Canadian Pacific Railway Company, entered into at the time of the conveyance to the company, was to reconvey the land if they should fail in performing their part of it; they did fail, and the successors in title to Christina McVicar brought their action to compel a reconveyance. By the terms of the settlement part of the property was reconveyed, and this sum of money was paid, and the company retained the remainder of the land. In the absence of any evidence explaining what it was intended to represent, I think it is proper to assume it to have been compensation for the land retained by the company, especially as it seems to have been unhesitatingly so dealt with by the executor who received it.

The next question is whether Calla Goldsmith, formerly Calla McVicar, is entitled to the principal, or only to the income of the proceeds of the sale of certain land in Fort William, devised to the executor of Victoria McVicar's will upon trust for sale, and to divide the proceeds into three parts. As to one of such parts the trust declared is as follows:—"To be paid to my adopted daughter Calla McVicar (without the power of anticipation) during her natural life only, and upon her decease her interest to revert to my general estate, and then to be divided equally between my brother George and my executor hereinafter named."

The clear intention of the testatrix under this clause is that Calla McVicar shall enjoy this money for her life only, and that, subject to her life interest, it shall belong to George McVicar and the executor. The gift to her is expressly limited to her life, and the gift over at her death is clearly expressed. I see no difficulty in carrying out the intention of the will, and no reason why it should not be carried out; and my conclusion therefore is, that she is entitled to the income only and not to the principal: see Thorpe v. Shillington, 15 Gr. 85. It will be the proper course for the trustee to invest the fund and pay the interest to the legatee during her life: Howe v. Lord Dartmouth, 7 Ves. 137a; Williams on Executors, 9th ed., pp. 1037, 1246, et seq. . . .

The costs of the parties should come out of the estate, those of the trustee as between solicitor and client.

MARCH 20TH, 1905.

DIVISIONAL COURT.

SHEPPARD PUBLISHING CO. v. HARKINS.

Master and Servant—Contract—Servant to Devote Entire Time to Master's Business and to Engage in no other—Breach—Account of Profits Made in other Businesses—Damages—Costs—Reference—Statute of Limitations—Competitive Business.

Appeal by plaintiffs and cross-appeal by defendant from judgment of IDINGTON, J., 4 O. W. R. 477.

Action for an account of profits alleged to have been made by defendant while employed by plaintiffs as their advertising manager, by devoting to other enterprises time and labour which he had agreed to give to them, and by engaging as principal in competitive business. In the alternative plaintiffs claimed damages for breach by defendant of his contract for exclusive service.

IDINGTON, J., held plaintiffs not entitled to an account of profits, but only to damages, which he assessed at $5, with costs upon the County Court scale, subject to set-off of the difference between High Court and County Court costs of defence.

The appeal was in regard to the dismissal of the claim for an account, and the cross-appeal against the finding of liability for damages for breach of contract.

A. B. Aylesworth, K.C., and W. J. Elliott, for plaintiffs.

W. R. Riddell, K.C., and W. T. J. Lee, for defendant.

The judgment of the Court (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.), was delivered by

ANGLIN, J.:— . . . The trial Judge found as facts that defendant in 1889 engaged to devote his entire time and attention to the advertising interests of plaintiffs, and to engage in no other business during the period covered by the agreement then made; that this provision of the original agreement was extended to the continued services of defendant with plaintiffs; and that the businesses undertaken by defendant, of which plaintiffs complain, were carried on by him while he was in their employment upon these terms.

There is ample evidence to support these findings, and I am unable to say that there was any error either in making them, or in holding that defendant was guilty of a breach of his engagement with plaintiffs. It follows that the cross-appeal of defendant fails and must be dismissed with costs.

Such being the nature and the terms of their servant's employment, plaintiffs claim . . . an account of profits made by him by engaging in work in breach of his agreement with them for exclusive service, on the grounds, first, that the time which he so spent was their time, and that they are, therefore, entitled to his earnings or profits made by using it for his own purposes, and, second, that as their servant he was bound to refrain from engaging in any competitive business, and that to that extent his relation to them was fiduciary, and such as would entitle them to an account of profits made by him in breach of such duty. . . .

Defendant . . . occupies the position of a servant or employe rather than that of an "agent," in the sense in which that word is generally used.

Counsel for plaintiffs strongly urged upon us that the profits of which his clients seek an account were made by defendant out of transactions within the terms of or in the course of or in connection with his employment, within the purview of the line of cases which requires agents to account for secret commissions and other profits or advantages derived by them from the transaction of the business of their principals, beyond the renumeration for which they have agreed to render their services. I am unable to agree with this contention. On the contrary, I think it is absolutely clear that the profits claimed by these plaintiffs were made, if at all, in independent transactions, undertaken by defendant as principal, and in no wise connected with or arising out of his employment by the plaintiffs—transactions to which this line of authority has no application.

Speaking with very great respect for the distinguished Court by which Morrison v. Thompson, 9 Q. B. 480, was decided, it is not at all clear that the distinction between cases in which the agent or servant has been compelled to disgorge profits made out of his employment, and those in which the servant's earnings from entirely independent employment have been held to belong to the master, was given the consideration to which it is entitled. In the judgment of the Lord Chief Justice both classes of cases are discussed. The essential difference in the principles upon which the decisions rest is not adverted to. It should be noted that in the former class of cases the liability of the agent to account to his principal is for money had and received—a contractual obligation to account for and pay over to the principal everything received beyond the stipulated remuneration, the relation between them being that of debtor and creditor, and not that of trustee and cestui que trust: Lister v. Stubbs, 45 Ch. D. 1; Powell v. Evans, [1905] 1 K. B. 11. In this aspect there is more resemblance between them. But other-

wise the difference between the two classes of cases is very marked.

In support of the contention that the employer is entitled to the earnings of his servant acquired from other sources in breach of a contract for exclusive service, reliance is placed upon such cases as Thompson v. Havelock, 1 Camp. 527, where an employer was held entitled to retain as against his servant the earnings of the latter paid to him by one who had employed the servant. No doubt, the rights of the master over the person as well as the time and labour of his servant were much more extensive formerly than they are to-day. Many of these rights which arose out of the feudal system of villenage are inconsistent with modern ideas of human liberty and the inalienable freedom of citizenship. To apply in its pristine force, even to the menial servant of the present day, the maxim quicquid acquiritur servo acquiritur domino, would shock the twientieth century mind. This rule of law, though extended to the earnings of apprentices in many old cases (and upon principle it is in this connection imposible to draw any sound distinction between apprentices and servants), can have but a limited application to the present day relations between master and servant: Jones v. Linde British Refrigeration Co., 2 O. L. R. at p. 432, per Moss, J.A. There is no question here of the master's right to an injunction restraining breach by his servant of a negative covenant against engaging in any business except that of such master, nor of his right to damages for breach of such covenant. . . .

There are two distinct covenants made by this defendant: (a) that he will devote his entire time to the advertising interests of the plaintiff company; (b) that he will engage in no other line of business during the term of his employment by the plaintiff. The latter negative covenant cannot be construed as expressing or implying a contract by defendant that if he does engage in any other business than that of the plaintiffs he will do so in their interest and for their benefit. . . .

[Dean v. McDowell, 8 Ch. D. at p. 353, referred to.]

The implication, in the case of a partner, of a covenant to do for the partnership all business within its scope in which he may engage, is not, in my opinion, to be extended to the case of a servant or agent, though he has promised to give to a particular undertaking of his employer exclusive service. . . . The contract of the agent or servant is merely to do his employer's business for his employer's benefit. He may violate his contract, express or implied, not to engage in any other business, or to devote his whole time and attention to his master's work, by undertaking other employment, but it is quite another thing to say that he must be deemed to have

agreed that, if he does other business than that of his employer, it shall be on his employer's account or for his benefit. The right of the employer to the earnings or profits derived from such extraneous employment of his servant must, if it exists, rest upon something other than such an implied agreement on the part of the servant.

The covenant of an employee to devote his entire time to the undertaking of his employer must, moreover, receive a reasonable construction. It cannot, for instance, be deemed to require that the employee should give to the service hours of the day or night usually devoted to rest and recreation. It does impose upon him an obligation to employ diligently, in advancing that undertaking or business of his principal to which he has agreed to devote himself, during such hours as it is customary for men in positions such as his to work, all the time and ability he can bestow advantageously to his principal. Even during these hours of the day usually devoted to work of the kind for which he is engaged, the servant is not obliged by such a covenant to sit in idleness. . .

[Reference to Williamson v. Hine, [1890] 1 Ch. 393.]

If the agent or servant undertakes, in that capacity, work outside the scope of his employment, his principal or master is, if he wishes to take them, entitled to earnings or profits so made. The only right which the servant or agent can have against his master is a possible claim for extra remuneration. But, if he neither uses time which belongs to his employer nor engages in competitive undertakings, an agent or servant doing work in some other capacity is not accountable to his employer for his earnings from such work: Jones v. Linde British Refrigeration Co., 2 O. L. R. 428. . . . The servant's spare time is his own: Wallace v. De Young, 98 Ill. 638. But, if he employs for his own purposes portions of the day usually devoted to such business as that for which he has been engaged, the onus is certainly upon him to furnish convincing proof that the time so spent was not required for and could not have been profitably used in the business of his master which has been intrusted to him.

Putting aside, therefore, the expenditure of spare time in non-competitive business, two questions remain for solution. If the servant, without his employer's consent, devotes to his own purposes time which he should, under his agreement fairly construed, have given to the service of his employer, is the latter entitled to earnings or profits so acquired? If the servant devote only his spare time to a rival or competitive business, is the master entitled to an account of the earnings or profits which he so makes?

If the master is so entitled, in the former case, it must be because the time and labour expended by the servant is to

be regarded as the master's property, and the earnings and profits as the value or proceeds of that property, converted by the servant to his own use and sold for money which in his hands is to be deemed money had and received to the use of his master. Such is the doctrine of the old decisions: Lightley v. Clouston, 1 Taunt. 112; Foster v. Stewart, 3M. & S. 191; Barber v. Dennis, 6 Mod. 69; Meriton v. Harnsby, 1 Ves. Sen. 48; Hill v. Allan, ib. 93. But, in a learned note to their edition of Coke upon Litt., at p. 117a, Messrs. Hargrave and Butler, discussing these cases, question the soundness of the principle upon which they proceed, and suggest a distinction between apprentices and other servants. They point out that in Treswell v. Middleton, Cro. Jac. 653, the master, suing for work and labour done for another by his servant, failed, because he did not allege that the service was rendered by himself or on his account. . . . [Reference to Morrison v. Thompson, L. R. 9 Q. B. at p. 482, and Reynolds v. Roosevelt, 30 N. Y. St. Repr. 369.]

I am unable to distinguish profits made by the servant by working on his own account from wages earned by him in the service of another. Neither one nor the other may represent any real damage sustained by the master. As such neither one nor the other can be recoverable by him. As money obtained by the servant by the sale of time and labour which belonged to his master, and, therefore, in contemplation of law, the proceeds of the master's property, his right to follow and demand them may be upheld: Taylor v. Plumer, 3 M. & S. 562. I am bound, I think, to hold profits so made by a servant to be in his hands the property of his master, for which the servant must account to him. . . .

Plaintiffs have not shewn that in any of the several outside enterprises in which he was engaged did defendant expend any portion of the usual business day which he could have used to the advantage of plaintiffs in the branch or department of their business in which he was employed. On the contrary, defendant has discharged the burden, which I hold to have been upon him in regard to the ordinary business hours, of proving that he did not utilize for his own purposes any time which fairly belonged to his employers.

Moreover there is, with regard to the posters and the album "Ocean to Ocean," a very considerable body of evidence to support the finding of the trial Judge that the plaintiffs knew of and acquiesced in defendant's participation in these enterprises. The Judge has found otherwise with regard to the publication of the "Elite Directory" and the business of the Press Publishing Co. While a finding in regard to both these ventures similar to that made in respect to the posters and album would not, upon the evidence, seem

to me at all improper, I am unable to say that the contrary conclusion, supported as it is by some evidence, is erroneous. . . .

If the servant is to be held accountable to his master for profits which he makes, during the term of his employment, by using his spare time in business similar to, and, because of its competitive character, likely to be injurious to, that of his employer, it must be, as Lord Ellenborough indicated in Thompson v. Havelock, 1 Camp. 527, because it is contrary to sound ethics to permit a man to retain profits made out of an undertaking which gives him an interest conflicting with his duty. . . .

It would be most dangerous if immunity to the servant were assured by confining the redress of the employer to the recovery by way of damages of compensation for such special loss, or even actual general loss, as he could with any reasonable degree of certainty trace to this cause: Ratcliffe v. Evans, [1892] 2 Q. B. at p. 528. The contrary view seems to be so opposed to sound principles, that, although we do not find the proposition explicitly formulated in any judicial opinion, I think that we should not hesitate to declare it to be law that no servant can be permitted to retain as against his employer profits acquired by engaging, during his term of employment, without his master's consent, in any business which gives him an interest conflicting with his duty to that employer.

But does the evidence sustain the claim that the defendant has engaged in competitive business? In my opinion, plaintiffs cannot bring the business of defendant within the rule merely because it may be of a character such as their charter permits them to undertake. Whatever rights they have must be restricted to business similar to and competitive with that in which they are engaged. The only publication or enterprise of plaintiffs with which it is suggested the ventures of defendant might conflict or compete is the society newspaper, "Saturday Night."

"The Newspaper Reference Book," the sole publication of the Press Publishing Co. during the period in question . . . contained no advertising. How such a publication could compete with or injuriously affect the business of "Saturday Night," as described by plaintiffs' witnesses, even the ingenuity of counsel for appellants did not enable him to suggest.

The "Elite Directory" comprised an alphabetical list of the "society" ladies and gentlemen of the city of Toronto. . . . A quantity of advertising matter of a class similar to that which is to be found in the columns of "Saturday Night" is a prominent feature of this publication. One or

two of these advertisements defendant canvassed for and obtained. . . . The Court, when satisfied that the servant has assumed a position in which his interest may conflict with his duty, will not enter upon an inquiry to determine whether in fact there has been any departure from the strict line of duty, or to what extent the fidelity of the servant has been affected. . . .

[Reference to Shipway p. Broadwood, [1899] 1 Q. B. at p. 373.]

It is impossible to say that as one of the proprietors of the "Elite Directory," sharing in the profits to be made from the advertising which it contained . . . defendant had not an interest which conflicted with his duty. . . . For the profits which he made out of this enterprise, of a character such that it might compete with plaintiffs' undertaking, such that it might give him an interest against his duty, he must be held accountable to his employer.

But of what nature is this liability? If it be at common law, defendant is accountable as for money had and received. The Statute of Limitations would thus be a bar to plaintiffs' claim, "Elite" having been published 10 years ago. If accountable in equity, it can only be on a fiduciary basis. If defendant be in any sense a trustee for plaintiffs of such profits as he made from the publication of "Elite," the trust is . . . a constructive trust, to the enforcement of which the lapse of time (by analogy to the statute) is a bar.

At the trial defendant applied for leave to set up a plea of the statute. The trial Judge assented to his doing so, upon the terms that he should pay costs. . . . The statute would, therefore, prevent plaintiffs recovering profits from this source for which defendant may be accountable. If there be no such profits, plaintiffs should not be awarded any costs, and probably should be ordered to pay the costs of defendant. If upon a reference they should establish that there were profits made by defendant, it would entitle them, not to such profits—because of the bar of the statute—but perhaps to costs of the reference and of the action from the time the defence was delivered until defendant sought leave to plead the Statute of Limitations.

The proper conclusion seems to be to allow defendant to elect within a fortnight whether he will take a reference to ascertain what profits, if any, he made out of the publication of the "Elite Directory." If he declines such reference, the judgment below will be varied by awarding to plaintiffs, in addition to the costs which that judgment gives them, the difference between costs on the County Court scale and costs on the High Court scale from the time of delivery of defence down to the time at which defendant applied for leave to plead

the Statute of Limitations. If defendant takes such reference, this action will be referred to the Master in Ordinary to inquire and report what profits, if any, were made by defendant out of the publication of "Elite," and costs of the action and reference will be reserved to this Court until the Master shall have made his report.

In any event there will be no costs of plaintiffs' appeal to either party.

MARCH 20TH, 1905.

DIVISIONAL COURT.

RE INGLIS AND CITY OF TORONTO.

Municipal Corporations—By-law—Closing Part of Highway—Private Interests—Bonus Clauses of Municipal Act—Reducing Width of Street—Rights of Owners Purchasing according to Plan.

Appeal by the John Inglis Company, Limited, from order of MEREDITH, J., dismissing appellants' motion to quash by-law No. 4462 of the city of Toronto, a by-law "to provide for the closing of part of Strachan avenue and conveying the same to the Massey-Harris Company."

See the report of a former motion, 4 O. W. R. 253.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., ANGLIN, J.

H. S. Osler, K.C., and Britton Osler, for the appellants.

G. H. Watson, K.C., and F. R. MacKelcan, for the respondents.

STREET, J.:—By-law No. 4462 . . . recites that the Massey-Harris Co., Limited, have applied to have the portion of Strachan avenue described in the by-law closed and conveyed to them, and that the committee on works have reported in favour of the application, and that their report has been adopted by the council; and proceeds to enact that the easterly 14 feet of Strachan avenue lying between King street and Wellington street shall be stopped up and closed, and that it be conveyed to the Massey-Harris Co.

The evidence . . . shews that the portion of the street to be closed is to be conveyed to the Massey-Harris Co. by way of bonus for the promotion of the manufacturing industry carried on by them in Toronto, and to promote an intended enlargement of their works in Toronto. No contract by the company to add to their works or to increase the manufacture of their implements or to employ any additional number of

men, appears to have been entered into; and it is strenuously urged by the appellants that this circumstance is fatal to the by-law.

The sections of the Municipal Act bearing upon the question are: the general clause 632, for closing and altering highways; sec. 591, sub-sec. 12, for granting aid by way of bonus; sec. 591a., as amended by 4 Edw. VII. ch. 22, sec. 26, defining what is meant by a bonus, and declaring that it may be given by closing up any portion of a street and conveying it for the use of a manufacturing industry.

Strachan avenue, before the passing of the by-law in question, was 80 feet wide between King street and Wellington street, so that the effect of the by-law will be to leave it still 66 feet in width.

The objections of the appellants are:

1st. That the by-law is not passed in the public interest, but in the private interest of the Massey-Harris Co.

2nd. That the appellants, having bought a parcel of land upon Strachan avenue, about 600 feet to the south of the part in question, upon a plan shewing the street to be 80 feet in width between King street and Wellington street, are entitled to have it maintained at that width, and that their property will be lessened in value by the narrowing of the street.

In support of the first of these objections . . . we were referred to . . . Re Waterous and City of Brantford, 2 O. W. R. 897 and 4 O. W. R. 355. . . . An examination of that case, however, shews that the by-law in question was not passed by way of granting a bonus to the Waterous Engine Works Co., but solely as a matter governed by the general section 632 of the Act. It has been repeatedly held by our Courts that the powers granted by that section must be exercised for the public interest, and not for the private interest of any corporation or individual. In the Waterous case the corporation, acting under sec. 632, closed a street . . . at the request of the Waterous Engine Works Co., who wished to use it, and who agreed to convey to the corporation in its place a parcel of land to be used as a highway in lieu of that closed up. It was the simple case of a highway being closed for the benefit of a private corporation, and the substitution of a new highway in its place, more convenient to the private corporation, but less so to the public. The case was thus brought within the principle of In re Morton and City of St. Thomas, 6 A. R. 323.

I think it is plain that that decision is not an authority which at all governs the present case. Where a municipal corporation grants a bonus of any kind to a manufacturing company, it is quite true that the council must act in doing

so in the public interest, which they represent, but, at the same time, the private interest of the recipient of the bonus is necessarily present, and is a feature which cannot be excluded. The council are bound not to grant a bonus unless they consider that the interest of the public requires them to do so, but the fact that in serving the interest of the public they are at the same time serving the interest of the grantee of the bonus, is not an objection to the by-law.

The Court found in the Waterous case that the interests of the public would not be furthered by the closing of the street, and the substitution of a longer and less convenient one; and that no one would be benefited but the applicants. If we could find here that the council were wrong in the conclusion to which we must assume they came, viz., that the public interest would be served by closing this 14 feet and conveying it to the Massey-Harris Company, then the by-law should not stand. But it appears that the council did not take action in passing the by-law without much consideration; two-thirds of the land owners upon the street supported the application, and it was further supported by a petition signed by some 1,100 residents of Toronto, all or most of whom are workmen at the works of the Massey-Harris Company.

If the council had acted hastily and without taking any measures to determine whether the public interest would be served by passing the by-law, and there was a strong preponderance of evidence the other way, it might have been possible for us to say that it should not stand.

The municipal council is the body to whose discretion has been committed the duty of deciding whether the granting of a bonus is or is not in the public interest; and if a bona fide decision is arrived at by the council, it should not, in my opinion, be disturbed by the Courts except under very special circumstances.

It is urged that the omission of any obligation on the part of the Massey-Harris Company to increase their works or employ additional men, or to give any other consideration for the grant of the piece of street, stamps the transaction as one which is in their interest and not in that of the public.

I do not so read the sections in question, for the council may under sub-sec. (a) grant money unconditionally by way of bonus; if they can grant money unconditionally for the promotion of manufactures, the absence of a condition in a grant of land can hardly be treated as a fatal objection. The evidence upon the present application shews distinctly that the land granted was intended to be immediately used by them in connection with additional works. The respondents have, therefore, in my opinion, failed to make out that the by-law was not passed in the public interest.

The other ground is that the council had no right as against a purchaser under the registered plan, which shewed this street to have a width of 80 feet, to pass a by-law reducing its width to 66 feet.

This proposition, if sound, would prevent a municipal council from closing or altering any street upon which lots have been sold, except with the assent of the owners, and it cannot, in my opinion, be supported.

The decision in In re Peck and Town of Galt, 46 U. C. R. 211, was based upon the acceptance by the municipal corporation of a dedication of land by an individual as a public square, which it was held made them trustees to preserve it for that purpose, and a by-law for closing and selling it was quashed upon the ground that it was a breach of their trust. That decision, in my opinion, has no application here.

In my opinion, the appeal should be dismissed with costs.

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

FALCONBRIDGE, C.J., concurred.

MAGEE, J. MARCH 22ND, 1905.

WEEKLY COURT.

ROGERS v. LAVIN.

Injunction — Interim Order — Chattel Mortgage — Sale of Goods—Misrepresentations—Breach of Warranty.

Motion by plaintiff for an interim injunction restraining defendants from proceeding under a chattel mortgage and from depriving plaintiff of the possession of a Clydesdale stallion purchased by plaintiff from defendants.

G. H. Kilmer, for plaintiff.

H. E. Rose, for defendants.

MAGEE, J.:—Plaintiff makes out a strong case of misrepresentation and breach of warranty as to the stallion upon which the mortgage in question was given. Defendants do not attempt to meet his statements. Plaintiff does not repudiate the purchase, and in fact now seeks to prevent his being deprived of the animal as to which he claims to have been deceived. His claim, whether to have the price reduced or to have damages awarded to him, is yet an unliquidated one. Defendants are not plaintiffs coming to the Court for relief, but are about to realize upon their security without the aid of the Court, and their right to do so should not be

interfered with unless upon good grounds. Plaintiff, having given a covenant for the payment of the money, and not seeking to avoid the transaction, would be driven to a counterclaim if he were sued upon the covenant.

I have not been referred to any authority that the mere existence of a counterclaim for damages is a ground for an injunction. Even if granted, it would only be upon terms of paying the amount of the chattel mortgage into Court, and so would not be of any present relief to plaintiff, who is said upon both sides to be in not the best financial circumstances (perhaps the worse in consequence of this very transaction), and to whom the raising of the money may be a hardship. But I do not, upon the authorities, see my way to tying up the money from defendants for the several months which would elapse before the trial. It is not alleged that they are not in good circumstances. I have reluctantly come to the conclusion that the motion should be dismissed; but, as defendants make no attempt to deny the alleged misrepresentations or breach of warranty, the costs will be costs in the cause, unless the trial Judge otherwise orders.

See Re Kennedy, 26 Gr. 33; Hamilton v. Banting, 13 Gr. 484; Heap v. Crawford, 10 Gr. 442; Henderson v. Brown, 18 Gr. 79; Egleson v. Howe, 3 A. R. 366; Mondel v. Steele, 8 M. & W. 856; Georgian Bay Lumber Co. v. Thompson, 35 U. C. R. 64; Christie v. Taunton, [1893] 2 Ch. 178, 184; Ex p. Brayly, 15 Ch. D. 223, 227; Warner v. Jacob, 20 Ch. D. 220, 222, 223; Rawle on Covenants, 5th ed., secs. 324-6; Harrison v. Bray, 92 N. Car. 488.

CARTWRIGHT, MASTER. MARCH 24TH, 1905.

CHAMBERS.

TORONTO INDUSTRIAL EXHIBITION ASSOCIATION v. HOUSTON.

Evidence—Foreign Commission—Proposed Interrogatories—Motion to Strike out—Jurisdiction.

Motion by defendant to strike out interrogatories served by plaintiffs upon defendant as proposed to be used upon a commission to take evidence in Scotland, as ordered by STREET, J., ante 349.

Grayson Smith, for defendant.

F. R. MacKelcan, for plaintiffs, objected that the Master had no power to deal with interrogatories.

THE MASTER:—The only Rule dealing with the subject is 503. On this only two cases are to be found in our reports. Neither of these deals directly with the question of jurisdiction. The head-note in Lockwood v. Bew, 10 P. R. 655, is likely to mislead unless the report is read.

No authority was cited in support of the motion; against it is the authority of Hume-Williams and Macklin on Evidence on Commission (1903), p. 101, where it is said that great care should be taken in framing interrogatories, for, "if the interrogatories contain leading questions, or are immaterial, irrelevant, or otherwise objectionable, the opposite party may object to the answers being received at the trial. It is not the present practice for the Master to consider interrogatories proposed to be administered to witnesses on commission, because the rules which so provide apply only to interrogatories inter partes; but the practice seems at one time to have been different."

For these reasons it is said to be usual to have interrogatories settled by counsel.

To the same effect is the judgment of Lord Denman, C.J., in Small v. Nairn, 13 Q. B. at p. 843. . . .

These authorities make it plain that, in the absence of express authority, there is no power to deal with these interrogatories. This conclusion is strengthened by the absence of any cases from our own reports. . . .

It seems clear that a party examining on interrogatories cannot be interfered with as is sought to be done in this case.

If the other side objects to his interrogatories, it may be wise to alter them. But a party is not obliged to do so. If he chooses he is free to take his risk of the commission evidence being rejected either in whole or in part by the Judge at the trial.

Motion dismissed with costs to plaintiffs in the cause.

MEREDITH, C.J. MARCH 24TH, 1905.

CHAMBERS.

MACLEAN v. JAMES BAY R. W. CO.

Discovery—Examination of Plaintiff—Absence from Province—Right to Have Examination at Plaintiff's Place of Residence—Stay of Action—Concurrent Proceedings under Railway Act.

Appeal by plaintiff and cross-appeal by defendants from order of Master in Chambers, ante 440, staying proceedings in the action for a reasonable time to enable defendants to examine plaintiff after her return from abroad, but refusing to stay the action until the determination of concurrent proceedings for compensation under the Railway Act.

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

R. B. Henderson, for defendants.

MEREDITH, C.J., allowed the plaintiff's appeal and directed that the plaintiff should be examined for discovery in London, England, and that the trial of the action should be stayed for one month to allow of the examination taking place; and dismissed defendants' appeal.

MEREDITH, C.J. MARCH 24TH, 1905.

CHAMBERS.

SANGSTER v. AIKENHEAD.

Defamation — Discovery — Examination of Defendant—Admission of Publication—Refusal to give Name of Informant.

Appeal by plaintiff from order of Master in Chambers, ante 438, dismissing plaintiff's motion, in an action for libel, for an order requiring defendant, upon examination for discovery, to give the name of the person who informed him of

the alleged misconduct with which he charged plaintiff in the writing complained of.

W. E. Middleton, for plaintiff.

J. W. McCullough, for defendant.

MEREDITH, C.J., dismissed the appeal. Costs in the cause.

CLUTE, J. MARCH 24TH, 1905.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. OTTAWA FIRE INS. CO.

Fire Insurance—Property along Line of Railway Damaged by Fire from Engines—Property in Foreign Country—Standing Timber—Powers of Ontario Insurance Company to Insure—Application of Policy to other Property—Validity of Policy—Statute of Foreign Country—Mistake.

Action to recover certain sums paid by plaintiffs to defendants as premiums for an insurance against loss or damage by fire to the amount of $75,000, under a policy of insurance dated 9th January, 1901, a renewal thereof, dated 11th May, 1902, and a further policy for three years, dated 11th May, 1903, or, in the alternative, to recover under the last mentioned policy for a loss of $4,698.94, and interest.

W. R. Riddell, K.C., and Angus MacMurchy, for plaintiffs.

G. F. Shepley, K. C., and F. A. Magee, Ottawa, for defendants.

CLUTE, J.:—The special terms of the policy of 1901 are as follows: "Ottawa Fire Insurance Company, head office, Ottawa, Canada, in consideration of $5,000 and of the agreements and conditions herein contained, does insure the Canadian Pacific Railway Company against loss or damage by fire to the amount of $75,000 on property as follows . . . on all claims for loss or damage caused by locomotives to property located in the State of Maine, not including that of the assured, or upon land owned, leased, or operated by the assured; the loss paid by the assured upon all verdicts, judg-

ments, and settlements for said claims against the assured, or railroad company owning the line of road, shall be considered full proof of all claims under this policy. . . . It is understood and agreed that this company shall not in any event be liable under this policy for a greater sum than $20,000 for loss or damage caused by any one fire . . . that this insurance company shall not be liable under this policy except upon claims upon which the insured's payment is $5,000 or more, on account of loss by any one fire, and then this company shall be liable only for the amount of loss sustained in excess of $5,000. . . ." Defendants were paid $5,000 as the consideration for this policy.

On 11th May, 1902, plaintiffs paid to defendants a further sum of $5,000 for a renewal of the policy for one year. No claim was made . . . under the above policy or the renewal for loss or damage sustained during the two years. On 11th May, 1903, in consideration of $11,000 paid by plaintiffs, defendants issued a further policy to plaintiffs in terms similar to those contained in the first policy, except the difference in consideration, and that the period of liability was 3 years, and a further clause that " this is a binding insurance for full term of policy, neither party having the privilege of cancelling during currency of same."

On 11th May, 1903, and while the last mentioned policy was in full force and effect (if it be a good and valid contract of insurance), fire was communicated from one of plaintiffs' locomotives to certain property in the State of Maine whereby it was damaged, as was alleged by the owners thereof, to the extent of $10,000 and upwards. The owners thereupon made claims upon plaintiffs for the amount of their loss, and after investigation and proof had been given to the satisfaction of plaintiffs that such loss and damage had been sustained, the claims were settled by the payment by plaintiffs to the claimants of $9,698.94. Full particulars of the claim were delivered by plaintiffs to defendants, and payment demanded from defendants of $4,698.94, being the amount in excess of $5,000, as mentioned in the policy.

Defendants denied all liability, and alleged that they had no power under their charter to insure the property so destroyed or damaged or to indemnify plaintiffs in respect thereof.

Defendants were by letters patent, issued pursuant to the Ontario Insurance Act, R. S. O. 1897 ch. 203, and dated 30th September, 1899, created a body corporate and politic " for the transaction of such kind or kinds of insurance as may be authorized by the provincial license to be from time to time issued. . . ."

Section 166 of the said Act is as follows: "Every company licensed and registered for the transaction of fire insurance may, within the limits prescribed by the license and registry, insure or reinsure dwelling-houses, stores, shops, and other buildings, household furniture, merchandise, machinery, live stock, farm products, and other commodities, against damage or loss by fire or lightning. . . ."

It was in the exercise of the powers conferred by this section that defendants issued the policies of insurance, and defendants contend that they do not cover or extend to standing timber and land, the destruction of which, or damage to which, forms the subject of plaintiffs' claim.

Defendants contend that the policy is still in full force and effect and binding on them, and that . . . plaintiffs have been fully insured and indemnified against claims for loss or damage to such property as defendants had power to insure; nor do defendants deny their liability to plaintiffs in respect of loss or damage that may occur to the property insured by them during the currency of the policy dated 11th May, 1903.

Defendants further contend that as a matter of law the word "property" in the policies should be construed with reference to the statutory powers of defendants, and so as to exclude any species of property to the insurance of which the statutory powers do not extend, and submit that standing timber and land are beyond the powers of defendants to insure.

Plaintiffs, upon the other hand, submit that, if this be so, then there is a failure of consideration, and plaintiffs are entitled to recover $21,000 paid as premiums, with interest from the date of payment, and in the alternative, if it be held that the policies of insurance are valid and binding upon defendants, plaintiffs claim payment of $4,698.94 together with interest.

On the argument . . . plaintiffs' counsel strongly urged that the agreement set forth in the policies between plaintiffs and defendants was really not a contract of fire insurance at all, but was rather in the nature of a guarantee insurance, and was not within the scope of defendants' powers; that there was, therefore, a complete failure of consideration, and upon that ground plaintiffs were entitled to recover the premiums paid.

Some evidence was offered tending to shew that it was not the intention of defendants to insure standing timber and land against loss or damage by fire, and plaintiffs' coun-

sel insisted that, if this be so, as it was the intention of plaintiffs to obtain such insurance, the parties were never ad idem.

I do not think the evidence offered at the trial outside of the written documents can vary the contract between the parties, and I am of opinion that their rights must be decided upon the written documents as they stand. . . .

The word "property" occurs in R. S. O. 1897 ch. 203, sec. 2, sub-sec. 41 (c), where it is declared that "insurance" shall include "insurance of property against any loss or injury from any cause whatsoever, where the obligation of the insurer is to be indemnified by a money payment or by restoring or reinstating the property insured."

Then, in the margin of sec. 166 are the words, "'property' which may be insured." Here we find the meaning of the word "property," so far as it relates to fire insurance, limited to the classes of property therein defined.

I think that standing timber and land do not fall within any of the classes of property therein specified. . . .

[Reference to Broom's Legal Maxims, 5th ed., p. 540; Brown v. Bachelor, 1 H. & N. at p. 255; Mare v. Charles, 5 E. & B. 981; Langston v. Langston, 2 Cl. & F. 194, 243; Baker v. Tucker, 3 H. L. C. at p. 116.]

Here we have the statute using the word "property" in a limited sense and clearly defining its scope and meaning. We have a contract purporting to be made in pursuance of the powers given under the same Act where the word "property" is used. By giving it the meaning defined by the Act, the contract, if not void upon other grounds, is valid. By giving the meaning contended for by plaintiffs, the contract is invalid.

Defendants never insured or assumed to insure standing timber on any other occasion; and I do not find anything in the evidence to suggest, nor is it contended, that defendants intended to insure standing timber in this case. In my opinion, looking at the contract as it stands, and having regard to the statute in pursuance of which it purports to be made, the meaning of "property," as therein used, is limited to the classes of property defined in sec. 166 of the Insurance Act. And so finding, I am of opinion that plaintiffs are not entitled to recover $4,698.94, being the amount of the loss claimed. It may be mentioned here that, while property other than standing timber was included in the claim, it was stated that this property would not exceed $5,000, and therefore, if the standing timber were not included, no claim could be made for the other property.

The question remains: was this a fire insurance at all, within the scope of the provincial Act above referred to, or is it ultra vires? . . . The argument was . . . to this effect:—The property burned was not insured nor intended to be insured. The scope of the contract was, in short, a guarantee to indemnify defendants against a possible loss which they might be called upon to pay by reason of fire originating from defendants' locomotives, if claim should be made and successfully made, and the loss amount to more than $5,000 from any one fire. That it was in the nature of a guarantee similar to the risks covered by employers in case of injury to their workmen, and that it was not a fire insurance, in any proper sense of the term or within the scope of defendants' charter.

I have reached the conclusion that this point is not well taken. The contract is expressed to be "an insurance against loss or damage by fire . . . of property, as per wording hereto attached: $75,000 on all claims for loss or damage caused by locomotives to property located in the State of Maine, not including that of the insured. . . ." It is the property for the destruction of which plaintiffs may be liable, and not that liability itself, which is insured against loss or damage: see Eastern R. R. Co. v. Relief Fire Ins. Co., 98 Mass. 420, 424.

The contract being within the powers of defendants to make, was there such an insurable interest in plaintiffs in any property along the line of their railway through the State of Maine as would enable them to effect an insurance upon it against loss or damage which they might be called upon to pay by reason of fire originating from their locomotives? It is laid down in Mr. Porter's work on Insurance, 4th ed., p. 57, that, "although risk and property generally go together, they are not necessarily associated, and the risk alone will suffice to sustain the insurance: Anderson v. Morice, L. R. 10 C. P. at p. 619; Colonial Ins. Co. v. Adelaide Ins. Co., 12 App. Cas. 128. The peril must be such that its happening might bring on the insured a pecuniary loss, but it is sufficient that it might bring a loss, and by no means necessary that it should certainly have that consequence were it to happen: Anderson v. Morice, 1 App. Cas. 742, per Lord O'Hagen." A common carrier has an insurable interest in the goods carried by him, which he may insure to their full value without regard to his liability to the owner of the goods: Crowley v. Cohen, 3 B. & A. 478; London and North Western R. W. Co. v. Glyn, 1 E. & E. 652; so also has a warehouseman: Waters v. Monarch Ins. Co., 5 E. & B. 870.

In many of the States of America there are statutes which expressly declare that a railroad company is liable for a loss occasioned by fire escaping from its engines, and that it has an insurable interest in the property for which it may be held liable for such loss. There is no case in England or Canada, so far as I am aware, where it has been held that a railway company has an insurable interest in the property for which it may be held liable for loss by fire escaping from its engines. In the State of Maine and other States of the Union such a statute has existed for many years. For decisions under state law see Pratt v. Atlantic and St. Lawrence R. W. Co., 49 Me. 579; Perley v. Eastern R. R. Co., 98 Mass. 414; Andrews v. Union M. F. Ins. Co., 37 Me. 256; Lukehart v. Western R. R. Corporation, 13 Met. 99. Counsel agreed that the law in the State of Maine at the time the fire in question occurred, was contained in the Maine statute, a copy of which has been handed in since the trial, and is as follows:—

"When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon. But such corporations shall be entitled to the benefit of any insurance upon such property effected by the owner thereof, less the premium and expense of recovery. The insurance shall be deducted from the damages, if recovered before the damages are assessed, or, if not, the policy shall be assigned to such corporation, which may maintain an action thereon, or prosecute, at its own expense, any action already commenced by the insured, in either case with all the rights which the insured originally had:" R. S. Maine, 1903, ch. 51, sec. 87.

It is clear, I think, that plaintiffs had not an interest in property other than their own along their line in Canada upon which they could effect an insurance, and it is very doubtful, I think, if defendants can issue a valid policy to cover a case of that kind. Plaintiffs are incorporated in Ontario. Assuming that they could not take such a risk in Canada, does that preclude them from issuing a policy and taking a risk in the State of Maine, where the law declares that a railway company has an insurable interest in such property? Would this be an attempt to enlarge the powers of defendants, by virtue of a foreign statute? That depends, it seems to me, upon whether or not the statute declaring the insurable interest has relation to the railway company or to the insurance company. Manifestly to the railway company. It simply brings within the scope of the powers of the insurance company property

which was not before within their power to insure, because it declares that the railway corporation who are made liable for loss have an insurable interest, and the insurance company, by virtue of their charter, may insure where an insurable interest exists. . . . Suppose the law were changed in Ontario, and it was declared that all railways having a charter from the province had an insurable interest in property along their lines, could it be said that in such a case an insurance company, who could not before the Act take such a risk, would not, on the amendment of the law, be entitled to take it; and does it make any difference that the law passed declaring the interest insurable is that of a foreign state where the property is situated? I think not. See Lindley's Law of Companies, 6th ed., p. 1226.

Defendants issue a policy upon such property as they may insure, in which plaintiffs have an insurable interest, and although that property happens to be in the State of Maine, and the interest is made insurable by the statute of that State, I am of opinion that the policy is a valid policy, and covers the risk intended to be covered, as evidenced by the policy of insurance in question.

Plaintiffs called one witness who is described as "insurance commissioner" in the employment of plaintiffs, who stated that plaintiffs desired to insure themselves against claims made by the owners of standing timber caused by sparks from plaintiffs' locomotives, and that their liability for said standing timber along their line through the State of Maine is a paramount liability, and that he thought in the present case they were insuring against that liability. On cross-examination, however, it appeared that the witness did not see any person connected with defendants in regard to the policy. He simply employed a broker, who transacted the business with defendants' agents at Montreal. I do not think evidence of this kind can in any way affect the rights of the parties as evidenced by the written instrument. The mistake, if there were one, was not mutual, and what the agent who effected the insurance may have thought cannot be material: Pollock's Law of Contracts, 7th ed., p. 485; Smith v. Hughes, L. R. 6 Q. B. 597, 603-7, 610.

It was further urged that the railway passes through a wooded country where the loss must chiefly be that of standing timber, but upon the trial it was shewn that there was more than $500,000 worth of property along the line that would fall within the class of property which defendants might insure under their statutory powers.

I think that the policy in question is a valid policy, in full force and effect, and binding on defendants, and that by the policy plaintiffs have been fully insured and indemnified against claims for loss or damage to such property as defendants have power to insure.

Action dismissed with costs.

ANGLIN, J. MARCH 24TH, 1905.

TRIAL.

WALL v. WALL.

Distribution of Estate—Intestacy—Next of Kin—Action for Administration—Issue as to Legitimacy—Administratrix—Costs.

Action for administration of estate of Catherine Wall, and for an injunction restraining defendant from dealing with or disposing of such estate.

R. S. Robertson, Stratford, and J. J. Coughlin, Stratford, for plaintiff.

S. C. Smoke and W. M. Charlton, Brantford, for defendant.

ANGLIN, J.:—Plaintiff is a nephew of Catherine Wall, who died intestate at Brantford on 19th March, 1903. Defendant, who asserts that she is the daughter of the intestate, was granted letters of administration to her estate in April, 1903. Plaintiff asserts the illegitimacy of defendant, and that he is sole next of kin of the intestate, and seeks a judgment for the administration of her estate and an injunction restraining defendant from dealing with or disposing of such estate. There is no claim made that the letters of administration should be set aside.

The admissibility of much of the evidence adduced by plaintiffs was questioned. Upon evidence which is, I think, clearly unexceptionable, I am compelled to find that it has been established that Catherine Wall, the intestate, was never married, and that defendant is her illegitimate child. The relationship of plaintiff to the intestate, as alleged by him, I find to be sufficiently proven; but the evidence does not satisfy me that he is the sole next of kin of the intestate.

Judgment will, therefore, be entered for administration and for an injunction as prayed by plaintiff. The reference will be to the Master at Brantford. There will also be an order that defendant shall forthwith pay into Court the moneys of the estate which she admits holding.

In view of the fact that defendant is administratrix of the estate of the intestate, and that it was quite reasonable that she should require plaintiff to prove in a court of law that she has no beneficial interest in that estate, costs of all parties of this action should, I think, be paid out of the estate of Catherine Wall.

Further directions and subsequent costs will be reserved.

ANGLIN, J. MARCH 25TH, 1905.

TRIAL.

UNIVERSITY OF TORONTO v. CITY OF TORONTO.

Way—Dedication—Lease to Municipality—Contract — Construction—Express Restrictions—Exclusion of Others—Forfeiture—Injunction.

Action for a declaration of forfeiture of a lease, or, in the alternative, for a mandatory injunction, in the circumstances mentioned in the judgment.

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

J. S. Fullerton, K.C., for defendants.

ANGLIN, J.:—The Bursar of the University and Colleges of Toronto, in the year 1859, leased to the corporation of the City of Toronto, for a term of 999 years, the property known as the Queen's park and the two avenues known as the Queen street avenue and the Yonge street avenue, subject to certain reservations and restrictions. At this time the Queen street avenue was fenced in on both sides, and, except through the gateways at the north and south ends, and at the intersection of Caer Howell street, there were no public approaches to it. These fences the lessees covenanted to maintain and repair. In 1886 plaintiffs, conceiving that defendants had broken their covenants in the lease of 1859, brought action to have such lease forfeited and avoided. In that action judgment was, on 31st January, 1888, entered for plaintiffs as prayed.

As a result of negotiations, pending an application by defendants to vacate this judgment, a new agreement between the city and the University was concluded in 1889, which was ratified by an Act of the legislature, 52 Vict. ch. 53 (O.)

One of the principal complaints made by the University authorities had been that, instead of maintaining the fences upon the park and avenues, as agreed, the municipal corporation had caused or permitted various public entrances to be made into these avenues and into the park itself, and had caused or permitted portions of the fences which they were so bound to maintain, to be removed for that purpose. Opposite to the eastern end of Anderson street 6 feet of fencing had been removed to admit of the construction of a footpath, 6 feet wide, which extended the sidewalk on the north side of Anderson street through the western fence of the Queen street avenue to the western footpath or sidewalk running up the avenue.

By the agreement of 1889 the judgment of forfeiture obtained by the University was vacated, and the University . . . consented to and confirmed all existing street openings into the Queen's park and avenues, and, amongst them, "Anderson street, footpath 6 feet wide," as if agreed upon in pursuance of the lease of 1859.

By the same agreement the Yonge street avenue and the Queen street avenue were dedicated by Her Majesty to the public, all restrictions as to traffic being removed, "subject to conditions hereinafter set forth," which do not affect the matters now under consideration. The lease of 1859, as modified, should, the parties further agreed, remain in full force and effect.

Anderson street has a width of about 40 feet. Until recently defendants have maintained a fence across the southerly 34 feet of its eastern end, to the satisfaction of plaintiffs. In the summer of 1904 defendants' engineer caused this fence to be removed, and proceeded to grade and construct, as a roadway for vehicular traffic, an extension of Anderson street across the Queen street avenue, cutting through a concrete sidewalk constructed on the west side of such avenue, and also removing some trees which stood in the line of the new highway. The lease of 1859 required the lessees to preserve and keep in good order the trees planted in the park and avenues.

Plaintiffs allege that these acts worked a forfeiture of the lease held by defendants, and they ask a judgment so declaring, and ordering the delivery up and cancellation of the lease. In the alternative they claim a mandatory injunction

requiring defendants to restore the Queen street avenue to its former condition, to replace the fence across the southerly 34 feet of Anderson street, and to refrain "from using Anderson street as an access to that avenue to any larger extent than the footpath 6 feet wide."

Defendants assert a right under the agreement of 1889 to do what has been done; and, in any event, they aver that the acts complained of were done by their engineer without authority, and should not be held to work a forfeiture of their lease.

Under the original lease of 1859 it is conceded that defendants had no rights such as they assert in this action. Mr. Fullerton contends that by the dedication of the Queen street avenue to the public, under the agreement of 1889, and the removal of all restrictions as to traffic thereon, the right to open streets into that avenue was conferred upon the municipality as one of the incidents of its dedication as a highway; . . . that, because this dedication is made in express terms "subject to conditions hereinafter set forth," it is necessarily freed from all other restrictions to be inferred either from circumstances surrounding the dedication, or from earlier provisions of the instrument by which it is made. It is conceded that a party taking by dedication can only claim secundum formam doni, but counsel for defendants stoutly maintains that the expression of certain restrictions or limitations excludes any inference of others.

The rule or canon of construction upon which this argument rests, though of undoubted force, "is not of universal application. It depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction:" Saunders v. Evans, 8 H. L. C. at p. 729. A guide to enable the Court to ascertain that intention, which when clearly discerned must govern, it necessarily yields to clearer and more conclusive indications afforded by the language of the instrument.

In the present instance the clause of the agreement of 1859 containing the words of dedication of the Queen street avenue is immediately preceded by the clause confirming, amongst others, as an existing street opening into that avenue, shewn on the plan to the agreement annexed, "Anderson street, footpath 6 feet wide." . . . The presence of this provision in the agreement is, in my opinion, entirely inconsistent with the existence of an intention that the dedication which follows it should be unqualified and absolute. . . . I cannot read these words of limitation or restriction as tantamount to "subject to the conditions hereinafter set forth and no others."

Secundum formam doni the municipal corporation are, in my opinion, restricted in their use of the Queen street avenue as a highway, as to street openings into it, by the provisions of the clause which specifies the openings existing in 1889, and in terms as such confirms them.

It follows that the acts of the city engineer in removing the fence in question and extending Anderson street were in violation of the rights of plaintiffs. But, upon the evidence, I am not satisfied that these acts were so clearly authorized by defendants that they should be held to have forfeited their rights as lessees or donees of plaintiffs.

There will, therefore, be judgment for plaintiffs for the injunction which they claim. Inasmuch as defendants have unsuccessfully sought to maintain a right to do that which they will now be enjoined from continuing, they must pay the costs of plaintiffs of this action. On the motion for interim injunction there will be no costs to either party.

MARCH 25TH, 1905.

DIVISIONAL COURT.

COOKE v. McMILLAN.

Vendor and Purchaser—Contract for Sale and Purchase of Land—Specific Performance—Objection of Purchaser—Jurisdiction of Court over Foreign Defendant—Title—Will—Conveyance by Executors—Period of Distribution—Further Evidence on Appeal.

Appeal by defendant from judgment of IDINGTON, J., 4 O. W. R. 523, in favour of plaintiff in action by vendor for specific performance of a contract for the sale and purchase of land.

A. R. Clute, for defendant.

M. H. Ludwig, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., ANGLIN, J.), was delivered by

FALCONBRIDGE, C.J.:—Instead of making the usual decree for specific performance with a reference as to title, the trial Judge, at the request of the parties, disposed of the objection to the title in the manner set forth in the report of his judgment (4 O. W. R. 523.)

There did not appear to be evidence before us as to whether plaintiff's brother John Henry Cooke died in the lifetime of the mother Phœbe Cooke. No doubt the fact was in the minds of the counsel who appeared at the trial, and was made known to the Judge.

At the close of the argument we intimated that if the fact was that John Henry Cooke did die before his mother, the judgment was right and would be upheld.

It is now stated on affidavit that John Henry Cooke died on 20th February, 1882, and his mother, Phœbe Cooke, on 22nd August, 1887.

We agree that the trustees had the right to make the conveyance on which plaintiff's title rests.

Appeal dismissed with costs.