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APPELLATE DIVISION.

FEBRUARY 13TH, 1914.

STOCKS v. BOULTER.

Damages—Fraud and Misrepresentation—Rescission of Sale of Farm—Damages Suffered by Purchaser—Loss of Income from Investment—Quantum—Loss in Operating—Allowance to Vendor—Occupation Rent—Other Items.

Appeal by the plaintiff from the order of MIDDLETON, J., upon appeal by the defendant and cross-appeal by the plaintiff from the report of the Local Master at Picton upon a reference to assess damages: ante 129.

The appeal was heard by BOYD, C., MACLAREN, MAGEE, and HODGINS, JJ.A.

R. McKay, K.C., and D. Inglis Grant, for the plaintiff.

A. W. Anglin, K.C., and C. A. Moss, for the defendant.

The judgment of the Court was delivered by BOYD, C.:—In a difficult and unusual case, the Master has fairly considered and applied the law as to the items allowed by him, with one exception, i.e., the item of $7,500. This should be reduced to $2,000, representing the value of interest at five per cent. lost on the moneys paid by the plaintiff to Boulter, i.e., as found by the Master, $16,109, which was withdrawn from British Columbia, where it produced ten per cent. The repayment of the part of the price paid, with statutory interest at five per cent., does not satisfy the claim for damages which the plaintiff has for the fraudulent misrepresentations which induced him to withdraw the money from British Columbia. He was assured by the defendant that the investment in the farm would yield at least ten per cent., and that is to be made good, on the rescission of the contract.

As to the allowance for occupation rent at $1,425 no appeal has been taken from it by the plaintiff, and it has to stand,

though it errs on the liberal side, for Stocks gets no allowance for his personal toil, and the farm from its run-down condition was worked at a loss.

The net result as to damages and occupation rent stands thus by this appeal:—

Allow as damages:—

Travelling expenses		$ 458.05
Outlay on factory		410.49
Outlay on house		272.84
Injury by change of circumstances.		2,000.00
Losses in operating property....		400.00
		$3,541.38
Deduct chattels	$ 323.25	
Occupation rent	1,425.00	$1,748.25
Balance		$1,793.13

payable by the defendant.

To this extent the Master's report is to be modified.

We do not regard the occupation of the plaintiff as a voluntary act; he was induced to go on the place by the misrepresentations of the defendant, and when he found out the full extent of the fraud he was in a quandary what to do—whether to stay on or to leave; arrangements for farm work had been entered upon, and he could not expect to get another farm at that time of the year; he had a right to hold the place as a lien for his money. The defendant could have solved the difficulty by agreeing to take back the farm and repay the money; but this he refused till ultimately compelled to do so by the highest Court in the Dominion. The occupation of the plaintiff was also precarious all the while, because at any time the defendant might have ended the strife and acknowledged that he was wrong. Failing that, the plaintiff was driven to do the best he could. The defendant has no reason to complain, nor is he to be put in a better position than if he himself had occupied the land for the two seasons the plaintiff had it; in which case he would have suffered approximately the same loss.

We have endeavoured to reach a fair conclusion as far as possible, and the case is not one in which "golden scales" should be used in estimating what the defendant should pay for his tortious conduct.

As to the appeal and cross-appeal to Middleton, J., there should be no costs to either party; as to this appeal, the defendant should pay the costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 9TH, 1911.

RE TUDHOPE MOTOR CO.

Company — Winding-up — Petition under Dominion Act, by Creditor Unwilling to Accept Compromise of Claim—Right of Petitioning Creditor—Discretion of Court.

Petition by Parish & Bingham, creditors, for an order for the winding-up of the company, under the Dominion Winding-up Act.

J. A. Macintosh, for the petitioners.
M. B. Tudhope, for the company.
D. Inglis Grant, for creditors opposed to the motion.

MIDDLETON, J.:—I am inclined to think that it may in the end turn out that the arrangement made and accepted by the majority of the creditors may be found to be from a business standpoint the best possible; but, in my view, this affords no answer to a winding-up application by a dissenting creditor. The creditor cannot in this way be compelled to accept the obligation of another company for his claim. He has the right to invoke the aid of the Winding-up Act, and so to obtain what he can. It is not the case of a choice between a liquidation under the Dominion Act and a distribution of the debtor's estate under an assignment. There the Courts have found a discretion to exist; but this is an attempt to coerce an unwilling creditor by refusing to exercise the jurisdiction of the Court in his favour because of his unwillingness to accept a compromise which he deems unreasonable. No case can be found to justify this course. When the winding-up order is made, the creditor may find that the arrangements made bind him, or that under the Act the majority may control his action, but this cannot be anticipated, and he must be left to see how these matters work out.

The usual order must go. Costs of all parties out of the estate (if any).

FALCONBRIDGE, C.J.K.B. FEBRUARY 10TH, 1914.

SMITH v. HAINES.

Fraud and Misrepresentation—Inducement to Buy Company-shares—Proof of Fraud—Onus—Evidence.

Action for a declaration that the plaintiff was not a shareholder in the defendant company; for the removal of his name from the list of shareholders; for repayment of $3,000 by the defendant Haines; for payment by the defendant Haines and the defendant company of all moneys paid by the plaintiff as surety for the defendant company; for delivery up by the defendant Haines of the plaintiff's promissory note for cancellation; and for damages.

The action was tried without a jury at Toronto.

I. F. Hellmuth, K.C., and W. J. Elliott, for the plaintiff.

E. F. B. Johnston, K.C., for the defendant Haines.

R. McKay, K.C., for the defendant company.

FALCONBRIDGE, C.J.K.B.:—In an ordinary civil case, if the scales inclines one way or the other "but in the estimation of a hair," that way the verdict may go. But when a man's life or liberty is at stake, a higher degree of proof, and a correspondingly high degree of certainty in the conclusion, is required. And so it is, even in a civil action, when fraud is charged. The man who alleges fraud must clearly and distinctly prove the fraud which he alleges. If the fraud is not strictly and clearly proved, as it is alleged, relief cannot be had, although the party against whom relief is sought may not have been "perfectly clear in his dealings with the plaintiff:" Mowatt v. Blake (1858), 31 L.T.R. O.S. 387. This is a decision of the House of Lords; and the phrase which I have quoted is that of the Lord Chancellor (Chelmsford).

Applying this standard, the plaintiff fails to satisfy the burthen imposed upon him. On cross-examination the plaintiff gives the following account of the representations which he says the defendant made to induce him (the plaintiff) to go into the company:—

"Q. I am speaking about the representation you say he made to you to go in, what was the first one? A. That there was going to be a lot of money in it.

"Q. That was a mere opinion? A. Yes.

"Q. That was your opinion, too, when it was explained? A. I was not after any money in it. I did not care that much for $400 or $500; I went in more than anything else—I said, 'That will be a good opportunity for Brodie to make good.'

"Q. Was that the inducement that got you into it, to allow Brodie to make good, was that one of them? A. Yes.

"Q. What was the other? A. That Haines was so anxious for me to come in.

"Q. What else? A. That is all I can think of.

"Q. I may take it that the two grounds of representation or misrepresentation were: first, you were willing to go in to help Brodie to make good, because he was a friend of yours, and you were interested in him in some way? A. Yes.

"Q. Secondly, that this man Haines thought there was a good thing in the company? A. Yes.

"Q. Are these the only two grounds upon which you went in? A. No; he said our own auditor was going to be auditor; he was going to give us a report every month as to how they were doing.

"Q. That was true—their auditor was Mr. Vigeon? A. Yes.

"Q. And he was your auditor? A. He was our auditor.

"Q. There was no complaint about that? A. In a little while he was telling me that Vigeon was no good.

"Q. I asked you what else there was that induced you to go into this company except what you have told me? A. And that it took very little money.

"Q. You knew how much it was going to make? A. He told me $2,000, of which he sold $1,000; then it was a matter of another $1,000.

"Q. What else? A. That is all I can tell you of.

"Q. Was there anything else that induced you to go into the company except what you have told? A. Not that I can think of. . . ."

This evidence does not support a charge of fraud, secudum allegata, nor generally.

The plaintiff is a man of affairs and by no means unsophisticated as to the organisation and conduct of joint-stock companies. He is president and general-manager of the J. B. Smith Company Limited, a company doing a very large business in lumber, and is or has been president or vice-president of several other corporations.

As to what took place about and after the organisation of the

company, and particularly as to alleged manufacture or falsification of minutes, etc., I acquit the Vigeons, father and son, and Mrs. McMullen (née Lampman), of any fraudulent complicity in anything that may have been wrongly or irregularly done.

As far as their personal actions are concerned, things may have been loosely done as a mere matter of routine, but with no wrong intent, and certainly not in pursuance of any conspiracy with the defendant.

I am by no means satisfied either with the defendant's conduct or his evidence. It is reasonably plain that he has not been "perfectly clear in his dealings with the plaintiff," to adopt the phrase of the Lord Chancellor; and, while I dismiss the action, I do so without costs.

HODGINS, J.A. FEBRUARY 11TH, 1914.

*HAIR v. TOWN OF MEAFORD.

Municipal Corporations—Local Option By-law—Action to Restrain Town Council from Submitting to Electors—Liquor License Act, sec. 141, *sub-secs.* 1, 5, *sec.* 143*a—By-law Submitted in Previous Year and Defeated—Judgment Declaring Submission Illegal—Consent Judgment—Compromise — Inconclusive Judgment — Ineffectiveness — Validity of Previous Submission—Absence of Evidence—Necessity for Proof—Rights of Electors—Refusal of Injunction—Constitution of Action—Status of Plaintiff—Costs.*

Action for an injunction to restrain the defendants from submitting a local option by-law to the electors and from passing a by-law. See ante 783.

The action was tried before HODGINS, J.A., without a jury, at Toronto.

A. E. H. Creswicke, K.C., and W. A. J. Bell, K.C., for the plaintiff.

H. E. Irwin, K.C., and W. E. Raney, K.C., for the defendants.

*To be reported in the Ontario Law Reports.

HODGINS, J.A.:—The proposed local option by-law, number 73, voted on in January, 1913, did not receive the approval of three-fifths of the electors voting thereon, and, if validly submitted, the provision contained in sub-sec. 5 of sec. 141 of the Liquor License Act of Ontario (added by 6 Edw. VII. ch. 47, sec. 4) thereafter applied. It is as follows: "In case such by-law does not receive the approval of at least three-fifths of the electors voting thereon the council shall not pass the same, and no by-law for the same purpose shall be submitted to the municipal electors before the date of polling for the annual election of members of the council to be held after that at which the voting on the first mentioned by-law took place."

It is contended on behalf of the defendants that the latter provision does not apply, because, by a judgment pronounced on the 15th September, 1913, in an action of George Overholt against the Municipal Corporation of the Town of Meaford, it was declared that the proposed by-law "was not legally submitted to the electors of the Town of Meaford, and that the proceedings had and taken for its submission to the electors were and are null and void, and do not operate to prevent the submission to the electors of Meaford of another by-law of a like nature on the date of the municipal election for the said Town of Meaford for the year 1914 or at any municipal election for the said town thereafter."

By sec. 141, sub-sec. 1, the power of the council to pass a by-law under that section is contingent upon the due approval of the electors "in the manner provided by the sections in that behalf of the Municipal Act."

If such a by-law was not legally submitted to the electors, their assent could not be legally gained or withheld, nor could there be any effectual ascertainment of the majority for or against. The method of submitting the by-law and of ascertaining the result of the poll is set forth in the Municipal Act; and the Courts have frequently quashed by-laws upon the ground that these provisions have not been properly adhered to; e.g., Re Hickey and Town of Orillia (1908), 17 O.L.R. 317.

The first question is, therefore, whether the declaratory judgment in the Overholt action is binding and conclusive as to the matters with which it professes to deal. . . .

The defendants did not appear. Judgment was pronounced without the Court having, in the words of Lord Romilly, "exercised its judicial mind," and without having come to the

conclusion that one side was right, and pronounced a decision accordingly. What was done took the case practically out of the hands of the Court.

The notice of motion given by Overholt asks for judgment upon the admissions and consent contained in the statement of defence. But if those admissions and that consent were made and given by arrangement and by way of compromise, I think that the judgment must be treated as one in which the parties to it, and not the Court, arrived at the result, and that it falls within the principle enunciated in Jenkins v. Robinson (1867), L.R. 1 Sc. App. 117: "A decree obtained by arrangement between the contending parties, the Court bestowing no judicial examination on the merits of the question, can never be res judicata."

If it is not res judicata, it cannot bind any one but the immediate parties, and certainly not the public or others not directly implicated. It would not be conclusive in any subsequent trial; and its effect as to others would be merely evidence, the efficacy of which depends upon how it was obtained and on the proof of the allegations upon which it rested, all of which would clearly be open. See Allan v. McTavish (1883), 8 A.R. 440.

But, apart from authority, there is a strong reason why such a judgment should not be effective. The sections of the Liquor License Act regarding local option deal with a matter of great public concern. The right of the electors in a municipality to settle, by their votes, the question of the local sale of liquor and to compel the submission of that question by a properly signed petition, is provided for. Upon the result of their vote, and upon that alone, depends the action of the municipal council; and there is a special statutory prohibition against that body attempting to raise again for three years the question either of adopting local option or of repealing a by-law under which it has come into force.

The council cannot make a bargain with any elector or body of electors to abrogate the statutory protection given to those interested one way or the other. Its functions, after a vote, while optional in some cases and compulsory in others, are, when exercised, confined to registering and giving legal effect to the will of those who have the necessary majority of votes.

I do not see any way in which a council can interfere with the right to have a vote or the right not to have the question again agitated for three years.

If they can intervene, then the statutory right dwindles

down to a question of votes in council. If the municipal authority cannot itself consent to and adopt a course which will have the effect of nullifying the statute, it follows that its admissions to the same end cannot found jurisdiction in the Court to bind others not before it, and enable a ratepayer to walk out with something that, while in form a judgment of the Court, is really only the record of a private bargain with the municipality that the statutory provisions shall not be effective against him or others who think as he does.

On this ground, therefore, which is far more important than the dry legal point dealing with the binding effect of a judgment founded on compromise, I prefer to rest my opinion on this branch of the case.

It is then argued that, if the judgment is not effective to the extent of clearing the ground of what was done, there remains the situation that a by-law was in fact submitted and rejected. It is said that, under those circumstances, sub-sec. 5 applies to disable the council from putting the question before the electors, and that they should be restrained by injunction from giving the by-law its third reading.

This part of the case has given me much difficulty. The first part of this argument assumes the validity of the submission of the by-law in 1913. The fact that the Overholt judgment is not conclusive does not settle that question. The matter is left standing upon the statute alone. If the proceedings in 1913 were so far a departure from the mode provided by the Municipal Act, and fall outside the protection of sec. 204 (as was the case in Re Hickey and Town of Orillia, supra), and in consequence to be of no validity in law, then the council may act, unaffected by what they had purported to do; whereas, if they were properly conducted, the council, in again putting matters to a vote, are doing so in the face of the statute.

The record in the case asserts on the one hand the submission of a by-law and its failure to receive, when voted on, the requisite three-fifths majority; on the other, the defendants, by a plea added at the trial, assert that the proceedings for the submission of that by-law and the vote thereon were not in accordance with the requirements of the law, and were illegal and void.

The submission, the vote, and its result were admitted, but no evidence was given by the defendants in support of their plea save the Overholt judgment and the proceedings leading up to it. Prima facie, therefore, the plaintiff would be entitled

to succeed upon that issue. But, in view of what I have previously said upon the effect of the Overholt judgment, it seems to me, after the best consideration I can give to the matter, that the issue involved should not be disposed of upon the dry legal question of onus of proof or on the result of mere absence of proof upon one side. It is something upon which very important consequences follow; and upon its proper determination may depend the right to sell liquor by retail for three years or the reverse. It is to be remembered that the statute in question has been construed on three different occasions as if it were provided that no by-law should be again submitted if a previous one has been *validly* submitted and defeated by the electors at a legal poll. . . .

[Reference to Re Vandyke and Village of Grimsby (1909), 19 O.L.R. 402, at p. 405; Stoddart v. Town of Owen Sound (1912), 27 O.L.R. 221; Carr v. Town of North Bay (1913), 28 O.L.R. 623.]

It may be said that there is no jurisdiction to pronounce a declaratory judgment under our statute in a case where no private right is to be established, or where in a case of a public right the municipal council and the actions of its officials are in question, and the public is only represented by a fiction. This receives some support from the fact that in the two first cases mentioned the Court allowed argument to be made by counsel representing one side of the dispute, but not representing either of the parties to the action.

To give a declaratory judgment that a municipality can or cannot act as provided by statute, because of something it has done properly or improperly, involves, I think, the proposition that it can be restrained by injunction from acting contrary to the statute if the circumstances warrant it. In either case it would be litigation not over or because of any effective act of the corporation, but over former attempts to do that act.

But in dealing with this record I should defer to and act on the opinions expressed by the three learned Judges whose decisions I have mentioned, upon both points. And the fact that in these instances the question was decided upon evidence properly given would lead me to the conclusion that I should not decide what is, in principle, the same point, without similar evidence to guide me.

I am quite unable to say, judicially, upon the evidence given in this case, that the former submission and vote were legal and valid, or were saved by virtue of sec. 204, or were incurably bad, as were those in the two cases mentioned. If the

submission, to be a bar, must be a valid submission, then the legality or illegality should be proved and not assumed. It is to be observed that the very important power vested in the Court by sec. 204 may save a by-law which appears to have been vitiated by the non-observance of the statutory requirements. It is of the greatest moment that a judicial test should always be applied where there are two parties contending for and against the validity of official acts upon a question of public interest.

If I were to continue the injunction, I should necessarily be assuming the validity of these preliminaries; a question which has never been effectively debated or investigated, and which has not been brought before me in such a way in this case that I can decide it on its merits.

If the proposed by-law is not carried or if it goes to a vote in council and is defeated—this not being a case in which it is compulsory on the council to give a third reading—there is an end of the matter. If it carries, its opponents have the right to apply to quash it upon the ground that it was passed in contravention of the statute, because of the former vote, as well as upon any grounds arising in connection with its submission; and they can then obtain a proper investigation into both questions.

There is this further consideration. The Liquor License Act has put a definite statutory power into the hands of the Provincial Secretary when by-laws, apparently carried, are "quashed or set aside or held to be invalid or illegal." This power is intended to be used so as to prevent the real will of the people being thwarted through the mistake or ignorance of the council or its officers. It is found in the part of the Liquor License Act which deals with local option; and I should incline to the opinion that the Court should do nothing which would prevent the powers given in sec. 143*a* (as enacted by 8 Edw. VII. ch. 54, sec. 11) from becoming effective. In other words, that these questions should arise and be dealt with only when a by-law has in fact been passed and upon a motion to quash it.

My conclusions, shortly stated, are these:—

The mere admission that the by-law was submitted and voted on is not enough. The cases referred to have determined that it must be a valid submission. Neither party attempted to satisfy this construction. I am unable to determine the validity of what was done in the absence of evidence. In a case in which a public right is concerned, I do not think I should act on less proof on an application for an injunction against the exercise

of a right than was required to justify declaratory judgments establishing a similar right.

If I grant the injunction, I act without evidence, and I prevent altogether the question from being properly tried and decided; whereas, if I refuse it, any party can raise it if the circumstances require it.

It may be said that by adopting this course the defendants are allowed to take advantage of their own default. Were the plaintiff and the defendants the only parties concerned or affected, this criticism would be justified; but, I think, the answer is, that I should not deprive the electors of Meaford of any rights which they may have, because their municipal council may have erred, or neglected, through their officers, to observe the statutory requirements or failed properly to defend the action.

Upon the whole, I think the interests of justice and the more effective preservation of the rights of all parties will be better served by refusing, at this stage and under the present circumstances, the injunction asked for. See the view expressed in City of London v. Town of Newmarket (1912), 3 O.W.N. 565, and the cases cited therein.

I think that the action was properly constituted. The plaintiff is a municipal elector (see Carr v. Town of North Bay, supra), one of a class recognised as entitled to sign a petition to compel the council to submit a by-law (sec. 141, sub-sec. 3); properly upon the voters' list; and his residence is not challenged (see secs. 141(*a*), 141(*b*)); Re McGrath and Town of Durham (1908), 17 O.L.R. 514; Re Ryan and Town of Alliston (1910), 21 O.L.R. 582, 22 O.L.R. 200.

Some objections were raised as to the non-compliance with sec. 263, 266, and 267 in the proceedings already taken preliminary to submitting the by-law which the defendants are now intending to proceed with. My view is, that these objections are not valid; but, I think, the better course is not to pronounce finally upon them, but to leave them to be dealt with if raised hereafter upon any motion to quash the by-law, if it passes.

The result is, that I must dissolve the injunction already granted, and leave the question of the preliminary proceedings in 1913 to be fought out in whatever way may be open. Success is in fact divided, the plaintiff failing to secure the only remedy his statement of claim asks for, and the defendants failing to establish their main ground of defence and being unsuccessful in their attack on the status of the plaintiff. Under these circumstances, there should be no costs to either party. If a stay is desired, I may be spoken to.

KELLY, J. FEBRUARY 11TH, 1914.

EPSTEIN v. LYONS.

Title to Land—Ascertainment of Boundary-line between Tiers of Lots—Evidence—Ownership of Legal Estate—Mortgage—Foreclosure—Possession—Non-user—Right of Way—Easement—Injunction—Conveyance to Assignee for Benefit of Creditors—Title outstanding in Assignee.

Action to restrain the defendants from erecting any fence, wall, or other obstruction upon the rear of the plaintiffs' lands, to compel the removal of a wall already built, and to restrain the defendants from using any part of lot 3 on James street, Hamilton, for the purpose of access to the defendants' lands, being part of lot 2 on James street, and for damages.

The action was tried without a jury at Hamilton.

G. Lynch-Staunton, K.C., and W. A. Logie, for the plaintiffs.

E. D. Armour, K.C., for the defendants.

KELLY, J.:—On the 14th February, 1887, Mark Hill, who was the owner of lot 3 on the east side of James street, in Hamilton, mortgaged it to Edward Martin. Lot 3 is in a block bounded on the north by Cannon street (formerly Henry), on the east by Hughson street, on the south by Gore street, and on the west by James street. This block comprises 6 lots fronting on James street and 6 lots fronting on Hughson street, the lots on each street numbering consecutively from south to north.

It is admitted by counsel that lot 3 on James street and lot 3 on Hughson street abut each other.

On the 30th September, 1888, Hill obtained a conveyance of lot 3 on the west side of Hughson street. On the 10th December, 1888, he made a general assignment of his assets to F. H. Lamb for the benefit of his creditors, the assignment being executed, not only by him, but also by other persons said to be his creditors. On the 9th May, 1898, he made another assignment for the benefit of his creditors to one Blackley.

On the 26th April, 1890, Blackley and Hill conveyed to Adolphus Farewell lot 3 on James street and a right of way over the southerly 11 feet 4 inches of lot 3 on Hughson street, reserving to Hill, for the use of himself and Farewell and their heirs, etc., a right of way over the easterly 12 feet of lot 3 on James street.

On the 11th May, 1899, Farewell granted to Edward Martin a right of way over the southerly 11 feet and 4 inches of lot 3 on Hughson street; and on the 16th June, 1899, Martin obtained a final order of foreclosure in respect of lot 3 on James street as against Farewell, the original defendant in the foreclosure proceedings, and F. H. Lamb and others, who had been made parties defendant in the Master's office.

On the 22nd October, 1904, the executors of Edward Martin conveyed to the plaintiffs the southerly 34 feet and 8 inches of lot 3 on James street and a right of way over the southerly 11 feet 4 inches of lot 3 on Hughson street, reserving to themselves for the benefit of the remainder of lot 3 on James street a right of way 11 feet 4 inches in width, extending along the northerly boundary of the easterly 68 feet of the land then conveyed, thence southerly along the rear of the lot to its southerly boundary, and thence easterly along the southerly boundary of lot 3 on Hughson street to the west side of Hughson street.

On the 17th February, 1905, the executors of Martin conveyed to Jane Burgess the remaining part of lot 3 on James street and the right of way over the southerly 11 feet 4 inches of lot 3 on Hughson street and the right of way (reserved by the above-mentioned conveyance from the Martin executors to the plaintiffs) over the above-mentioned 68 feet and the rear 11 feet 4 inches of the southerly part of the James street lot.

In January, 1912, the plaintiffs acquired title to the part of lot 3 on James street so conveyed to Jane Burgess, following which the executors of Martin released to them the right of way over the 68 feet and over the easterly 11 feet 4 inches of that lot.

On the 24th December, 1903, the North American Life Assurance Company granted to the defendants the northerly 22 feet 7½ inches of lot 2 on James street (being immediately south of lot 3 on James street); and on the 29th October, 1910, Mark Hill conveyed to the defendants the rear part of lot 3 on Hughson street. . . .

On the 30th May, 1913, Hill made a further conveyance to the defendants of part of lot 3 on Hughson street. . . .

[This was for the purpose of a better description of the lands conveyed.]

The dispute which resulted in the present action is largely traceable to two sources; first, the uncertainty that seems to prevail as to the true location of the boundary line between the lots fronting on James street and those fronting on Hughson street; and, secondly, from the contention set up by the defend-

ants that, even if the location of that line is such that the lands in dispute are really a part of lot 3 on James street, the plaintiffs and their predecessors in title have been out of possession for such time as defeats their title.

The only record from the registry office put in at the trial of any plan of the lots in this block was two maps, or copies of maps, which are and have been for a long time in use in that office. These are not original plans. . . .

These maps or plans seem to have been, to some extent at least, recognised by conveyancers and surveyors. The evidence of the Deputy Registrar, who has held his present position since 1890, is that there is no registered plan shewing lot 3 on James street or lot 3 on Hughson street. It is contended for the defendants that these . . . maps do not properly establish the location of the lot-lines or the size of the lots, and that they are not proper sources of information. It is quite apparent from surveys and measurements recently made that the distance from the easterly line of James street to the westerly line of Hughson street, as these lines now appear on the ground, is several feet in excess of the distance indicated by the earlier conveyance of these lots. . . .

The first matter to be determined is the location of the dividing line between the lots on James street and those on Hughson street. . . .

The defendants' contention is, that the dividing line between these lots is nearer to James street than is claimed by the plaintiffs. The dividing line, on the ground, between the properties immediately to the south of these two lots and also between some of the properties to the north, particularly on the south side of Cannon street, is and always has been, so far as any witness has been able to speak, practically in a direct line with what is contended by the plaintiffs is the true dividing line between lot 3 on James street and lot 3 on Hughson street.

On the south side of Cannon street this dividing line is a line running southerly between two old and substantial buildings, and it continues southerly across lots 6 and 5 to the southerly limit of lot 5, its existence between the two properties being of long standing. Surveys made in recent years shew this line as being at Cannon street, 153 feet 6 inches east of the east limit of James street as laid out on the ground, and 150 feet 6 inches west of the west limit of Hughson street as laid out on the ground. The easterly boundary, long existing, of the property to the south of lot 3 on James street is 153 feet and 6 inches from the east limit of that street as laid out on the ground. The

conveyance of this property to the defendants describes it as running from James street 153 feet and 6 inches more or less to the rear of lot 2. The easterly limit of the defendants' building on lot 2, erected by them, is that distance from James street. . . .

Mr. Armour, for the defendants, urged that, the earlier conveyances of lot 3 on James street having described the lines running east and west as being 2 chains and 24 links, the dividing line between the two tiers of lots should be placed arbitrarily at that distance from James street; and that, the measurements, from east to west, of lot 3 on Hughson street not being given in the old conveyances, the latter lot should be taken to comprise and include all the land east of a line 2 chains and 24 links from James street. The force of that argument is affected by other considerations arising from the form of the description. . . .

I think the evident intention was that lot 3 on James street should run back, not an arbitrary distance of 2 chains and 24 links, but 2 chains and 24 links more or less to its south-easterly angle and north-easterly angle, wherever those points really were. Dividing the distance from James street to Hughson street on the ground, as ascertained by recent measurements, in the same proportion as the earlier conveyances state the area of lot 3 on James street bore to that of lot 3 on Hughson street, would result in locating the line of division at or very near what is now contended by the plaintiffs to be the true easterly limit of the James street lot.

In the absence of more positive evidence, and taking the evidence before me of long-established physical boundaries of many of the lots, some to the north and some to the south, the long recognition of the dividing lines between these lots by successive owners, the difference between the superficial area of lot 3 on James street and lot 3 on Hughson street, coupled with the evidence of the conditions which existed in these latter lots, I think a reasonable view is, that the true line of division between these lots is to be found by continuing the existing boundary-line between the old buildings fronting on Cannon street southerly to what was and now is the easterly limit of the property adjoining to the south lot 3 on James street, that is, at the north-easterly angle of the defendants' present building, or 153 feet and 6 inches east of the present easterly limit of James street. . . .

The question of the rights of the parties in respect of the easterly portion of lot 3 on James street, as I have so defined it, is one involving equal difficulty. The defendants erected

on the northerly part of their James street property a building running to the easterly limit of lot 2 as defined upon the ground, and at the east end of the northerly side of this building placed a door leading to the north. In 1913 they erected a wall running from this building northerly to the south-easterly corner of the building now upon the northerly part of the plaintiffs' lands. This building of the plaintiffs, according to Blondie's evidence, extends 143 feet and 5½ inches easterly from the present east side of James street. The wall erected by the defendants has had the effect, not only of severing the rear portion of the southerly part of lot 3 from the land to the west of it, but also of depriving the plaintiffs of the means of access to the westerly part from the southerly 11 feet 4 inches of lot 3 on Hughson street, over which they claim to have a right of way, and it is to restrain the defendants from so building and maintaining this wall and to assert the rights of the plaintiffs that the action is brought.

The defendants rely to some extent upon the conveyance of the 30th May, 1913, from Hill to them. This conveyance does not, however, purport to grant any part of lot 3 on James street, but is taken on the assumption that the true boundary-line between that lot and lot 3 on Hughson street lies to the west of what I find to be its real location; so that the most the defendants can claim under that conveyance is the title of Hill, whatever it was, to the westerly portion of lot 3 on Hughson street, and his right, title, and interest, if any, over the rear 12 feet of lot 3 on James street. Hill had, however, long prior to making this conveyance, parted with all of lot 3 on James street except any right that might have remained in him to pass over the rear 12 feet thereof. . . .

A further position taken by the defendants is, that Martin's title was not perfected by the foreclosure, inasmuch as Lamb's interest in the mortgaged property was not properly gotten in by these proceedings. This is based on the contention that Lamb, being a grantee of the equity of redemption, was not the holder of a lien, charge, or incumbrance, and was not properly made a party defendant in the proceedings. Whatever may be said in favour of this contention under other conditions, I think the legal estate of which Martin was possessed having become vested in the plaintiffs is sufficient to overcome the objection, so far at least as concerns the plaintiffs' right to maintain this action in respect of the easterly part of the James street lot. Lamb made no further conveyance of the mortgaged property, nor does it appear that he was at any time in possession. . . .

There remains to be considered the further contention of the defendants that the plaintiffs and their predecessors in title have lost through non-user their title to and rights over the part of lot 3 on James street which lies east of the east wall of their present building on the northerly part of that lot and its production southerly. . . .

I think the reasonable view is, that, from the time the James street driveway was closed at least, there was no such cessation of use or occupation of the rear portion of lot 3 as to debar the plaintiffs and their predecessors in title from their interest therein and their right to pass over the Hughson street alleyway. I have reached the same conclusion with regard to the time prior to the closing of the James street driveway. . . .

I must accept the evidence offered for the plaintiffs. . . . Many of their witnesses are in a position to speak of the conditions, and what they say is consistent with other circumstances which one cannot overlook. I have to conclude that the defendants have failed to prove that the plaintiffs, who have the paper title, have forfeited through want of use or failure to occupy it.

The plaintiffs also ask an injunction restraining the defendants from using any part of lot 3 on James street for the purpose of affording access to lot 2 on James street, part of which is owned by the defendants. No such right is expressly given to the defendants by the conveyance to them of that lot or as appurtenant thereto. Any right they possess to pass over the rear part of lot 3 on James street was acquired in the conveyance from Hill to them of the rear portion of lot 3 on Hughson street by which they also acquired "the right, title, and interest of the grantor" (Hill), "if any, over the rear 12 feet of lot number 3, fronting on the east side of James street in the same block, as reserved in instrument number 46171, duly registered in the registry office for the county of Wentworth, in common with the owners, tenants, and occupants of the remainder of said lot number 3."

What was reserved by instrument number 46171 was "a right of way 12 feet wide along the easterly boundary" of lot 3 on James street, "such right of way to be used as right of way for" Hill, who then purported to be the owner of lot 3 on Hughson street, and Farewell, to whom Hill was then conveying lot 3 on James street, subject to the right so reserved. It is evident that whatever easement was created over the rear 12 feet of the James street lot was intended for the use and benefit of the owners of that lot and of the westerly portion of lot 3 on Hughson street, and was so confined.

That it cannot be used by the defendants as incident to their ownership of lot 2 is, I think, established by authority: Purdom v. Robinson, 30 S.C.R. 64, and cases there cited.

Entertaining this view, I have not thought it necessary to consider the proposition put forward, that Lamb, the assignee of Hill, was a necessary party to any conveyance by Hill made after the time of his assignment.

Judgment will be in favour of the plaintiffs in accordance with the above findings, and for $5 damages and costs.

KELLY, J. FEBRUARY 12TH, 1914.

TOWNSHIP OF NIAGARA v. FISHER.

Highway—Municipal By-law Opening up Road Allowance—12 *Vict. ch.* 81, *sec.* 31—18 *Vict. ch.* 156—*New or Existing Highway—Intention to Continue—Rights of Persons in Possession—Railway—Injunction.*

Action for an injunction restraining the defendants from obstructing what the plaintiffs asserted was a road allowance running between lots 8 and 9 in the township of Niagara, extending from the Queenston and Niagara road to the west limit of the road allowance between the 1st and 2nd concessions; for delivery of possession of the locus by the defendants the Fishers; for an injunction restraining the defendants the Michigan Central Railroad Company from continuing to maintain their fences across the alleged road allowance; for a mandatory order requiring them to remove their fences; and for a declaration that the road allowance was a public highway.

A. C. Kingstone, for the plaintiffs.

E. D. Armour, K.C., and F. C. McBurney, for the defendants the Fishers.

D. W. Saunders, K.C., for the defendant company.

KELLY, J. (after stating the facts and the history of the locus):—On the 10th March, 1913, the plaintiffs passed a by-law declaring that certain lands in the township of Niagara, "being composed of the road allowance between lots numbers 8 and 9 in the 1st concession of the said township," describing the

lands by metes and bounds, are a public highway, and that the same be opened up forthwith for the use of the public, and that any person or persons, corporation or corporations, occupying or in possession of these lands, should give up possession immediately on the passing of the by-law. The lands, as particularly described, are the southerly 66 feet of lot number 9, running from the west limit of the River road to the east limit of the next concession road (being the west limit of the lands occupied by the defendant company).

Some negotiations then took place between the owners of lot 9 and the plaintiffs with a view to an amicable arrangement for the opening up of this road, but unfortunately that result was not accomplished.

The defendants Fisher set up that they and their predecessors in title have been in uninterrupted possession of the lands in question from the grant from the Crown, and that no highway has in fact existed upon these lands, and they claim the benefit of the Statute Law Revision Act, 1902, 2 Edw. VII. ch. 1, secs. 17, 18, 19, and 20.

The defendant company take the position that there is no allowance for road reserved between lots 8 and 9; that the survey made in 1855, in pursuance of 18 Vict. ch. 156, and the by-law of the 19th December, 1855, were subsequent to the conveyance to their predecessors; that they are under statutory obligation to maintain fences dividing their railway lands from the adjoining lands of their co-defendants; and also set up that no leave has been obtained from the Board of Railway Commissioners for Canada authorising the opening of the claimed highway across their lands, and that such highway cannot be opened by by-law without an order of that Board.

It is clear that the true location and size of lot 9 are as shewn by the report, field-notes, and plan of DeCew (a surveyor who made a survey and report in 1855), who appears to have gone very thoroughly into the whole matter. Though his view was, that in the original survey an allowance was made of the land necessary for a roadway through this lot, he was unable to fix its location, and the expedient which he recommended or suggested was resorted to, of establishing the road along the south limit of the lot, which was done by by-law of the plaintiffs, on the petition of the owner of the part of the lot now owned by the defendants Fisher.

Under the authority of 12 Vict. ch. 81, sec. 31, then in force, the plaintiffs had power to pass by-laws for the opening, con-

structing, maintaining, etc., of any new or existing highway, road, street, sidewalk, crossing, alley, lane, bridge, or other communication within the township, etc.

It cannot be said, however, that the 50-foot road established by the plaintiffs is an original road allowance, or that it was an "existing highway" prior to the passing of the by-law. What the Act of 1855 (18 Vict. ch. 156) declared was, that the allowances for roads as laid out and established by the original survey (that made by Jones) should be and were thereby declared to be the true and unalterable allowances for roads. It did not give authority to establish roads not laid out or established by the original survey. DeCew was unable to say where the road allowance through lot 9 was to be found (if, indeed, such allowance was really made by the original survey), and the uncertainty which existed in that respect prior to the passing of the Act was not removed by his exhaustive and careful survey and report. The location of this roadway along the south side of the lot rests, therefore, not on the original survey, but on the action of the plaintiffs under their general statutory powers to pass by-laws to open any new or existing road. The evident intention of the council was, that, such a roadway being necessary, and provision having been made for it in some part of the lot, and Durham, the owner of part of the lot, having petitioned to that effect, the southerly 50 feet of the lot should, so far as they were concerned, be established as a public highway and thereafter be recognised as such. Subsequent action of the plaintiffs in requiring persons occupying the land comprised in this roadway to vacate, and in refusing Durham's request in 1860 to have the road placed at the north side instead of the south side of the lot, and the recognition of the roadway by Durham, implied from his making that request, are all consistent with an intention to continue this as a roadway. The time that the brush fence was built a short distance to the north of the south limit of the lot (4 or 5 years after the survey) coincides generally with the time of the plaintiff's refusal to allow the location of the road to be changed from the south to the north.

The plaintiffs' by-law of the 10th March, 1913, in express terms declared the lands therein described (that is, the southerly 66 feet in width for the whole length of the lot) to be a public highway, and that it should be opened for the use of the public. It was not a case of establishing a new road—the by-law does not mean that—but of declaring that a public highway did already exist, and that it should then be opened. It operated only as

what was already a highway, namely, the southerly 50 feet of the lot extending as far west as the lands of the defendant company, and it did not affect the remaining 16 feet in width, which had not previously been established as a public road.

I am of opinion that the plaintiffs are entitled to succeed as to this southerly 50 feet, but not otherwise; as against the defendant company, the plaintiffs altogether fail; the southerly 66 feet of the company's lands not having at any time been a part of a public highway.

The declaration, therefore, will be that the southerly 50 feet, extending as far west as the defendant company's lands, is a public highway to possession of which the plaintiffs are entitled as against the defendants Carl E. Fisher and Howard Fisher, who are restrained from obstructing it; the operation of the order for possession and against obstruction being suspended for three months from this date to enable these defendants to comply with the terms now imposed.

The defendant company are entitled to their costs against the plaintiffs; success as between the plaintiffs and the other defendants being divided, there will be no costs as between them.

BRITTON, J., IN CHAMBERS. FEBRUARY 14TH, 1914.

RE BARNETT v. MONTGOMERY.

Division Court—Jurisdiction—Title to Land—Motion for Prohibition—Costs.

Motion by the defendant for prohibition to the First Division Court in the County of York.

M. L. Gordon, for the defendant.
R. G. Hunter, for the plaintiff.

BRITTON, J.:—The plaintiff agreed with the defendant to purchase property, and paid as a deposit $100. The sale was not carried out, but no question of title arose in the negotiations for purchase. There was delay, and the plaintiff assumed to cancel the agreement, or withdraw his offer, and he demanded a return of the sum of $100 which he had paid when he made the offer to purchase. As the defendant refused to return the deposit, the

plaintiff sues for it in the Division Court, and the defendant disputes jurisdiction, alleging that the title to land will come in question. Upon the facts disclosed upon this application, the title to land does not, nor is there any reason why it should, come in question.

The plaintiff did not refuse to accept the property by reason of any defect in title.

Re Crawford v. Seney, 17 O.R. 74, seems in point. In an application for prohibition it is not what the ingenuity of counsel can suggest as a defence in order to succeed at the trial, but, as was said by Armour, C.J., in the case cited, "In prohibition we have to be satisfied that the title really comes in question, before we can prohibit." See also Re Waring v. Town of Picton, 2 O.W.R. 92, and Re Moberly v. Town of Collingwood, 25 O.R. 625.

As counsel for the defendant produced a decision of the learned County Court Judge at variance with his decision in the present case, there should be no costs of the present application. Motion dismissed without costs.

BRITTON, J. FEBRUARY 14TH, 1914

RE GOLDBERG AND GROSSBERG.

Mortgage—Foreclosure—Parties to Action—Executors of Deceased Mortgagor—Will—Power to Sell Land—Beneficiaries not Joined—Rule 74—Title to Land—Application under Vendors and Purchasers Act—Validity of Title Derived through Foreclosure.

Application by the vendor, under the Vendors and Purchasers Act, for an order declaring that the objection of the purchaser to the title of the vendor to the land forming the subject of an agreement for sale and purchase—viz., that the children of one Julius Breterwitz were not joined as defendants in foreclosure proceedings taken by the Hamilton Mutual Building Society, after the death of Julius Breterwitz, upon a mortgage made by him in his lifetime—had been satisfactorily answered by the vendor, and was not a valid objection to the title, and that a good title had been shewn in accordance with the conditions of sale.

F. F. Treleaven, for the vendor.
C. E. Burkholder, for the purchaser.

BRITTON, J.:—I am of opinion that the vendor is entitled to the declaration.

Under Rule 74, the executor might properly be sued on behalf of or as representing the property or estate. This Rule is clear that in the case of executors or trustees the persons ultimately entitled need not be joined in foreclosure proceedings.

In Re Roberts and Brooks, 10 O.L.R. 395, in discussing the right of executors to sell, it was held that the question there was not under the Devolution of Estates Act, because by the will express power was given to the executor to sell the entire estate.

Here Julius Breterwitz was the absolute owner of the entire property. By his will he devised the land in question to his wife for life, and then used the following words: "I direct that after the death of my said wife my said executors shall sell said real estate as soon as they conveniently can, and divide the proceeds thereof equally among all of my children." There is an absolute power to sell. Under these circumstances, it is the same as if the property was devised to the executors with the usual power to sell and divide the proceeds. . . .

[The learned Judge then quoted the head-note in Emerson v. Humphries, 15 P.R. 84.]

Declaration accordingly. No costs.

CARIQUE v. CATTS AND HILL—LENNOX, J.—FEB. 10.

Fraud and Misrepresentation—Purchase of Interest in Invention—Contract — Rescission — Amendment of Pleadings — Damages.]—Judgment having been given on the 20th January, 1914, with leave to amend (see ante 785), the parties submitted amendments on the 4th February; and the learned Judge, after reserving judgment, allowed the amendments, and assessed the plaintiff's damages at $6,000, for which sum he directed judgment to be entered for the plaintiff with costs, including the costs of a commission executed in New York. Counterclaim dismissed with costs. R. B. Henderson, for the plaintiff. H. D. Gamble, K.C., for the defendant Catts. W. E. Raney, K.C., for the defendant Hill.

EISENSTEIN V. LICHMAN—MIDDLETON, J.—FEB. 11.

Vendor and Purchaser—Agreement for Sale of Land—Binding Offer—Affirmance by Purchaser—Specific Performance—Reference as to Title.]—Vendor's action for specific performance of an agreement for the sale of land. MIDDLETON, J., said that the document in question was signed with the intention of making it a binding offer, and that there was no foundation for the defence set up. After the defendant consulted his solicitor, his conduct was consistent only with an affirmance of the transaction. The plaintiff was ready to close on the day named for closing—the defendant was not. In view of the way the matter was carried on between the solicitors, the failure to meet to close on the 5th looked like a trick to avoid the contract. It was as much the defendant's fault as the plaintiff's that a meeting was not arranged for that day. There was some question as to title, which was not ripe for discussion; there should be a reference as to it. Judgment for the plaintiff with costs. W. Proudfoot, K.C., and J. C. McRuer, for the plaintiff. A. Cohen, for the defendant.

BLACKWELL V. SCHEINMAN—MIDDLETON, J.—FEB. 11.

Vendor and Purchaser — Agreement for Sale of Land — Action for Specific Performance—Parties not ad Idem—Terms of Agreement—Mortgage—Dismissal of Action—Costs—Return of Cash Deposit.]—Vendor's action for specific performance of an agreement for the sale of land, tried at Toronto. MIDDLETON, J., said that it was not necessary, in his view, to discuss the question of reforming the agreement and directing specific performance of the agreement as reformed. The real estate agent was too anxious to force the transaction through; and, in truth, the parties never were ad idem. The plaintiff would not undertake the arrangements necessary to increase the first mortgage from $1,500 to $2,500. The agent assumed that this could be done without trouble, and the only matter of importance was the expense. The defendant agreed to bear this expense, but did not agree to "raise the mortgage," and she did not authorise the change made in the agreement by which the onus of doing this was placed upon her.—On another ground, the action failed. The parties both assumed that the first mortgage could be "raised" from $1,500 to $2,500. The mortgagee refused, and

his mortgage had yet two years to run. When the cash payment was increased from $1,100 to $1,400, the mortgage balance ought to have been reduced from $2,000 to $1,700—this change was neglected. When the time for closing came, a demand was made for a mortgage of $2,000, and $2,072 cash, it being erroneously assumed that the failure to "raise" the extra $1,000 on the first mortgage imposed a burden on the purchaser to pay more cash. In this view of the case, the action ought to be dismissed without costs, and the defendant ought to recover from the plaintiff the $100 paid.—The learned Judge regretted that he could not order the agent, whose bungling or worse had brought about all this trouble, to pay the costs. Both these ladies trusted him to protect their interests, and in the result he had landed them in a law-suit. M. L. Gordon, for the plaintiff. J. C. McRuer, for the defendant.

FITZGERALD v. CHAPMAN—KELLY, J.—FEB. 11.

Nuisance—Obstruction of Lane—Injunction—Stay of Operation to Enable Defendants to Abate Nuisance—Damages—Costs.]—Motion by the plaintiff for an interim injunction, turned into a motion for judgment. KELLY, J., said that a consideration of the material submitted had left no doubt in his mind that the plaintiff was entitled to relief; and judgment should go for an injunction restraining the defendants from allowing horses or other animals, vehicles and other impediments, to stand or remain in or upon the premises described as a lane in the agreement of the 14th November, 1906, referred to in the writ of summons, so as to impede the plaintiff or other persons lawfully using it, and from using that part of the defendants' building abutting on the said lane as a shipping or warehouse entrance, in such manner as to impede, obstruct, or interfere with the plaintiff or such other persons. To enable the defendants to carry this into effect, the operation of the injunction should be suspended till the 11th April, 1914, subject to any right of the plaintiff to damages. The plaintiff in his writ of summons claimed damages as well as an injunction; and counsel will be heard as to damages at any time they so desire. The plaintiff was entitled to his costs. T. N. Phelan, for the plaintiff. Glyn Osler and S. G. Crowell, for the defendants Chapman & Walker Limited. S. W. McKeown, for the other defendants.