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DIVISIONAL COURT.

SEPTEMBER 16TH, 1912.

DAVIDSON v. PETERS COAL CO.

3 O. W. N. 1160; 4 O. W. N. 36.

Negligence—Master and Servant—Injury to Servant—Use of Explosives—Unguarded Receptacle—Cause of Injury—Negligence of Servant—Findings of Fact of Trial Judge—Appeal.

Action under Workmen's Compensation Act for damages for personal injuries sustained by plaintiff, a quarryman, by the explosion of certain blasting powder, alleged to have been caused by the negligence of defendants. The blasting powder was carried in a pail, but the evidence shewed that plaintiff had left it within two feet of the sparks from a fuse which he had ignited to fire a blast.

MULOCK, C.J.EXD., *held*, that while defendants were negligent in supplying only a pail in which to carry blasting powder, yet the negligence of plaintiff and not that of defendants was the cause of the accident.

Action dismissed without costs.

DIVISIONAL COURT dismissed appeal from above judgment with costs.

An appeal by the plaintiff from the following judgment of HON. SIR WM. MULOCK, C.J.Ex.D.

T. J. Bain, for the plaintiff.

A. J. Anderson, for the defendants.

HON. SIR WM. MULOCK, C.J.Ex.D. (25th April, 1912):—Plaintiff whilst in the employment of defendants was injured by an explosion of blasting powder contained in an open pail, and brings this action under the Workmen's Compensation for Injuries Act, for damages because of such injury.

The defendants operate a stone quarry in the township of Caledon, and at the time of the accident plaintiff was engaged as one of their employees in getting out stone. This work was accomplished by drilling holes in the stone

in place, charging them with blasting powder and exploding the charges.

On 9th November, 1911, plaintiff along with two fellow-workmen, Forbes and Ford, had drilled a hole in the rock when plaintiff proceeded to the blacksmith's shop for powder and fuse, and filling a pail with blasting powder carried it along with a coil of fuse to the place where the hole had been drilled, and there put in the charge. When the fuse was about ready to be lighted Forbes left for the purpose of preventing a team approaching the stone. When leaving, plaintiff was still working at the hole, and according to Forbes' evidence the pail with the unused portion of powder in it was on the ground within reach of plaintiff, and Forbes, as was customary, offered to take it away, but plaintiff declined the offer observing that he could manage it himself. When Forbes had gone about 40 or 50 yards from the hole he turned around and observing a cloud of smoke, though the blast had not gone off, returned to plaintiff and finding him injured by the explosion removed him to a place of safety before the blast exploded.

The negligence charged against defendants is for supplying an open pail in which to handle the blasting powder. The pail in question was not, in my opinion, a proper vessel for the purpose in question. An attempt was made at the trial to fasten upon plaintiff the responsibility for its use, but I find that it was supplied by defendants of their own motion. Plaintiff used it, but that fact did not relieve defendants from performing their duty to supply a proper pail, and they were, I consider, negligent in not having done so.

But plaintiff must shew that such negligence was the cause of the accident. Has he done so? Plaintiff was 32 years old; had had 15 years practical experience as a quarryman, both in drilling and blasting, and fully knew the danger to arise from the careless handling of blasting powder. When engaged on behalf of defendants nothing was said as to his duties, and he considered himself engaged as a labourer not to be called upon to perform the work of blasting. Later on, however, at the request of the foreman he also did blasting for defendants.

As to how the accident in question happened plaintiff's evidence is to the effect that after he put the powder in the hole he placed the pail about 10 or 12 feet away in the direction he intended to run, returned to the hole, set fire to

the fuse and in running away stooped to pick up the pail and the powder exploded. His theory is that the explosion was caused either by a spark direct from the fuse or a spark which had lit upon his clothes and fallen into the pail as he stopped to pick it up.

The evidence convinces me that plaintiff did not put the pail in a place of safety 10 or 12 feet away, but deposited it within arm's length of the hole in question, and that the explosion was caused by sparks flying from the lighted fuse directly into the pail.

Plaintiff told Forbes, when being taken home after the accident, that sparks had flown from the fuse into the pail. When Forbes left the hole plaintiff was still working at it, and the pail was standing within his reach. Ford, after the accident, rejoined Forbes and plaintiff, and heard the latter tell Forbes that the powder caught fire from the fuse.

Thomas Morrison, defendant's foreman, was examined as a witness on their behalf, and though his manner of giving evidence was unsatisfactory, I cannot say his evidence was undeserving of credence. He testified that plaintiff told him the pail was within a foot or a foot and a half of the hole, and that the explosion was caused by sparks from the fuse.

John Backus, another of defendants' witnesses, stated that in answer to a question of how the accident happened plaintiff replied that he had placed the can too near the hole, within 18 inches or 2 feet; that Backus asked him if he thought the accident would have happened if the pail had been put behind plaintiff, when he said he did not think it would.

Harry Hoskins, another witness for the defence, swore that he appeared on the scene shortly after plaintiff's injury, when plaintiff stated that when he lit the fuse it "spit" into the pail.

D. Stewart and William Sweaton, Jr., impressed me as not being truthful witnesses.

Plaintiff denies having told anyone that the pail was left within two or three feet of the hole, also that Forbes offered to remove the powder and coil. At most plaintiff only claims to have moved the pail 10 or 12 feet from the hole, and gives as a reason for not removing it farther the fact that the hole was a damp one and the powder if allowed to remain very long in the hole would become too damp and not explode. This examination does not appear to me satisfactory. The hole in question was damp, but it had been

dried out with dust by Forbes, and after the powder exploded Forbes returned a distance of 40 or 50 yards and removed plaintiff to a place of safety. Up to this time the blast had not gone off, which it did later, but when does not appear. Still from what occurred it is clear that the conditions would have permitted plaintiff to have placed the pail at a safe distance from the hole, if he had so desired it, without any risk of the charge becoming too damp; and further whether Forbes did or did not offer to take the pail away, plaintiff could have had Forbes remove it if he had so desired.

A number of samples of the coil used on the occasion were produced in Court and ignited. The fuse is in the centre of the coil, and when first lighted a shower of sparks flew from the end of the coil, but no spark kept lighted a distance of two feet from the point of origin, and when the fire of the fuse receded into the coil two or three inches, which it did in a couple of seconds, no more sparks came from the coil. Further, the sparks were very small, and most of them died at the very end of the coil, none remaining alive, as already observed, at a point two feet from the end; and I am satisfied that at the time of the explosion the pail with its contents of powder was nearer than two feet to the end of the burning fuse. There was no body to the sparks, so that even if aided by the wind they would expire before travelling ten feet.

From the evidence I entertain no doubt that plaintiff deposited the pail within a foot or two of the fuse in the hole, and that the sparks from the fuse fell into the pail and thus caused the explosion. Plaintiff's theory that sparks might have adhered to his sleeve and fallen into the pail at a distance from the hole is not supported by the evidence. The sparks would not live long enough. The evidence as to whether the small sparks would ignite wearing apparel is conflicting. From the practical test made in Court, it is clear that no sparks keep alive during the time required to go a distance of two feet from the point of ignition. Further, sufficient time did not elapse between the ignition of the fuse and the explosion to have allowed immediately of plaintiff's clothing to be so far consumed as to fall away in sparks. There is no evidence whatever to shew that the plaintiff's clothing was set on fire or that any sparks lit upon his clothing. There is ample evidence, however, that the sparks flew directly from the fuse into the pail.

Having regard to plaintiff's experience as a quarryman, perfectly familiar with the danger incident to the use of blasting powder and of fuses, it was, I think, negligence on his part to have deposited the pail within reach of the falling sparks. If he had used proper care he would have placed it at a safe distance, and the accident would not have happened. I, therefore, think, his own negligence was the cause of his injury, and that, therefore, he is not entitled to recover. This action is, therefore, dismissed without costs.

The appeal to Divisional Court from above judgment was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON MR. JUSTICE RIDDELL, on the 16th September, 1912.

T. J. Bain, for the plaintiff, appellant.

A. J. Anderson, for the defendants, respondents.

THEIR LORDSHIPS (V.V), dismissed the appeal with costs.

MASTER IN CHAMBERS. SEPTEMBER 30TH, 1912.

JENKINS v. McWHINNEY.

4 O. W. N. 90.

Lis Pendens—Certificate—Motion to Vacate Registration—Claim for Commission for Sale of Land and Damages for Failure to give Option — Not Claim in Respect of Lands.

MASTER-IN-CHAMBERS *held*, that a claim for a commission and for damages for failure to give an option could not possibly be the foundation of a claim in respect of the lands, the subject matter of the option, and vacated a *lis pendens* filed against them with costs to defendant in any event.

Burdett v. *Fader*, 6 O. L. R. 532; 2 O. W. R. 942; 7 O. L. R. 72; 3 O. W. R. 289, and *Brock* v. *Crawford*, 11 O. W. R. 143, followed.

Plaintiff, a real estate agent, on 16th August last, issued a writ claiming a commission at 5% on $95,000—and a 2½% on $24,600—and a certificate of *lis pendens* against the properties in question "as to the interest of defendants or either of them" in the east half and north-westerly quarter of lot 6—in second concession west of Yonge street, county of YORK—and in lots 20 to 61 both inclusive on plan

1480 in registry division of East Toronto. A certificate was obtained and registered. Defendants now moved to vacate this.

J. R. Roaf, for the defendants' motion.

J. J. Hubbard, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—The doctrine of *lis pendens* is fully considered in *Brock* v. *Crawford,* 11 O. W. R. 143. There it was said (p. 147), that to have a certificate of *lis pendens* removed a defendant must "shew clearly that there is and can be no valid claim in respect of the land; and that the proceedings—not alone the registration of the certificate, but also the claim of which notice is given by such certificate—are an abuse of the process of the Court. That can only be done by proving that under no possible circumstances can the facts as set out in the pleading give any right to the plaintiff in respect of the lands in question."

The notice of motion was served on 25th inst. The plaintiff's solicitor apparently saw (as is incontrovertible) that the indorsement of the writ did not comply with what was said by Boyd, C., in *Sheppard* v. *Kennedy,* 12 P. R., at p. 245: "Where the plaintiff seeks to register a *lis pendens* he should be more precise than in ordinary cases, and by his endorsement he should define generally the grounds of his claiming an interest in the lands."

He, thereupon, on 27th inst. delivered a statement of claim in which after setting out very fully the facts on which the claims to commissions are based, in paragraph 10 it is alleged that defendants agreed to give plaintiff a ten day option (running from August 1st) "to sell the balance of the farm, and a letter was drawn up to that effect, which defendant McWhinney took possession of and agreed to sign and have defendant Radford sign and hand over to plaintiff which was not so handed over."

Paragraph 11 further alleges a refusal by defendants to sign this option.

Nothing is said as to any similar agreement in respect of the Richard street lots—and as to these the certificate should certainly be vacated.

Assuming that a certificate of *lis pendens* issued on a defective endorsement can be rehabilitated by a sufficient allegation in a statement of claim (see *Sheppard* v. *Kennedy, supra,* at p. 244), there is at most here nothing definite or

precise as to what "the balance of the farm" was. It is nowhere stated in the pleading what quantity of land there was in the lot in question—I cannot gather whether the purchaser was to have first 50 acres and then 73, or what the negotiations contemplated. Nor are the 50 acres specified. The 73 acres are called the east 73 acres, but that too, is surely indefinite.

For addition to these difficulties the statement of claim itself states that no memorandum in writing was delivered or signed by defendants, and in the 5th clause of the prayer for relief "damages for refusal to deliver written option agreed on" are properly claimed.

The registration of the certificate of *lis pendens* in the present case is another attempt to do what it was distinctly said could not be done in the analogous case of *Burdett* v. *Fader*, 6 O. L. R. 532, 2 O. W. R. 942—affirmed 7 O. L. R. 72, 3 O. W. R. 289.

Looking at the material and especially at the statement of claim itself, it seems to me that the present is a case in which "under no possible circumstances can the facts as set out in the pleading give any right to the plaintiff in respect of the lands in question:" *Brock* v. *Crawford, supra*, at p. 147.

The certificate will, therefore, be vacated with costs to defendant in any event.

MASTER IN CHAMBERS. OCTOBER 1ST, 1912.

BARBER v. ROYAL LOAN & SAVINGS COMPANY.

4 O. W. N. 91.

Interpleader—Motion to Pay into Court and Interplead—Action by Architect for Fees.

Motion by defendants for leave to pay certain moneys into Court and interplead. The action was brought by an architect to recover fees for services, and defendants disputed his retainer, claiming that another firm of architects were the only persons with whom they had contracted and to whom they were liable. They accordingly moved to have the latter firm made defendants to the action in their stead.

MASTER-IN-CHAMBERS *held*, that there was nothing to indicate that defendants might not be liable to both parties.

Re Scottish American & Rymal, 14 O. W. R. 685, and *Re Smith & Bennett*, 2 O. W. R. 399, followed.

Motion dismissed with costs in cause to plaintiff, payable forthwith to third parties.

This action was begun on 18th April and was brought to recover $1,000 alleged to be due to plaintiff for his services as architect in connection with a building erected for defendants in city of Brantford.

It appears as well from the statement of claim (delivered 12th September), as from the affidavit of defendants' manager that Chapman and McGiffin were also employed on this work. Whether plaintiff was the principal, and the others were associated with him or *vice versa* cannot be now determined. Plaintiff asserted the former and defendants' manager the latter. It was admitted by both sides that before action defendants paid Chapman and McGiffin $925. This was without plaintiff's consent.

Defendants admit being liable for a further sum of $923.05, which amount with $925 to 5% on $36,961, which they said was the total cost of the building.

This balance was claimed by Chapman and McGiffin. Their claim was supported by a resolution of defendant company of 18th March, stating that "this board has no agreement nor arrangement with Mr. Barber (plaintiff), and that his connection with the proposition was a matter entirely between him and Chapman and McGiffin, and finally the board held Chapman and McGiffin responsible for results, and they were hereby urged to finish the work without delay."

This confirmed a letter of March 11th, of defendants' manager to Chapman and McGiffin to the same effect. It also said: "So far as Mr. Barber is concerned, if you choose to take the responsibility of taking the work out of his hands, the board will not interfere."

Defendants moved to be allowed to pay into Court the admitted balance and to have Chapman and McGiffin made defendants in this action instead of the company.

O. H. King, for the defendants' motion.

J. Grayson Smith, for the plaintiff.

G. H. Kilmer, K.C., for Chapman and McGiffin.

CARTWRIGHT, K.C., MASTER:—The case most akin to the present is *Re Scottish American & Rymal*, 14 O. W. R. 685, where the cases are perhaps sufficiently cited and considered; as well as in *Re Smith & Bennett*, 2 O. W. R. 399. Applying the principles to be deduced from the authorities, I do not think the motion can be granted.

It is admitted by defendants' manager that the plaintiff was with their knowledge and consent associated with Chapman and McGiffin up to a certain stage, and that they subsequently dismissed plaintiff with the defendants' acquiescence.

It may be that defendants have incurred a liability both to plaintiff and Chapman and McGiffin as in *Re Scottish American & Rymal, supra.* Here the company has admitted liability to Chapman and McGiffin by the very considerable payment made to them—on the other hand, is the very explicit terms of the resolution of the board of directors passed at the special meeting of 18th March. There it was said: "That it was the prestige of Chapman and McGiffin's firm and the merit of their preliminary design that finally decided the board in appointing them the architects for the building; that this board has no agreement or arrangement with Mr. Barber in regard to the matter," etc., as quoted above.

In view of this, how can it be said that the defendant company stands neutral? It was plainly stated that Chapman and McGiffin are the only architects it recognizes, and it disclaims any relation with Barber. This may be the correct conclusion, but it is not a case for interpleader. It may be very distasteful to the company to have to defend an action by Barber. But many persons have to undergo similar attacks and sometimes by plaintiffs who are financially worthless. The motion is dismissed with costs to plaintiff in the cause and to Chapman and McGiffin forthwith after taxation unless defendants consent to their being fixed at $20—statement of defence to be delivered in a week.

See *Re Elgie,* 8 O. W. R. 33-299. The further history of this matter, at p. 307, 944, shews that here the defendants can still bring an action of interpleader if so advised—see 9 O. W. R. 614, for the end of the case.

DIVISIONAL COURT.

SEPTEMBER 20TH, 1912.

WILLIAMS v. SALTER & KARWICK.

Boundary — Survey — Intention of Surveyor — Lake not Navigable — Dividing Line between North and South Halves of Lot.

Action for a declaration that plaintiff was owner of a certain portion of lot 12, 2nd Con. Tp. of Plummer, district of Algoma, and for an injunction restraining defendant Salter from trespassing thereon. Plaintiff and defendant Salter were respectively the owners under Crown grants of the north and south halves of the said lot 12 on which was situate a small lake known as Caribou Lake, about 1¾ miles long with a depth varying up to 40 feet, and which had no navigable inlets nor outlets. Defendant Salter had had his half of the lot surveyed without including in either half the land covered by the water of the lake, which gave him considerably more dry land than if the land so covered by water had been included, and this surplus was the land in dispute.

STONE, DIST.CO.J., *held*, that Caribou Lake was not navigable water within the meaning of 1 Geo. V. c. 6, and that therefore lot 12 should be divided having no regard to the land covered by water.

Ross v. *Portsmouth*, 17 U. C. C. P. 195, followed.

Judgment for plaintiff with costs.

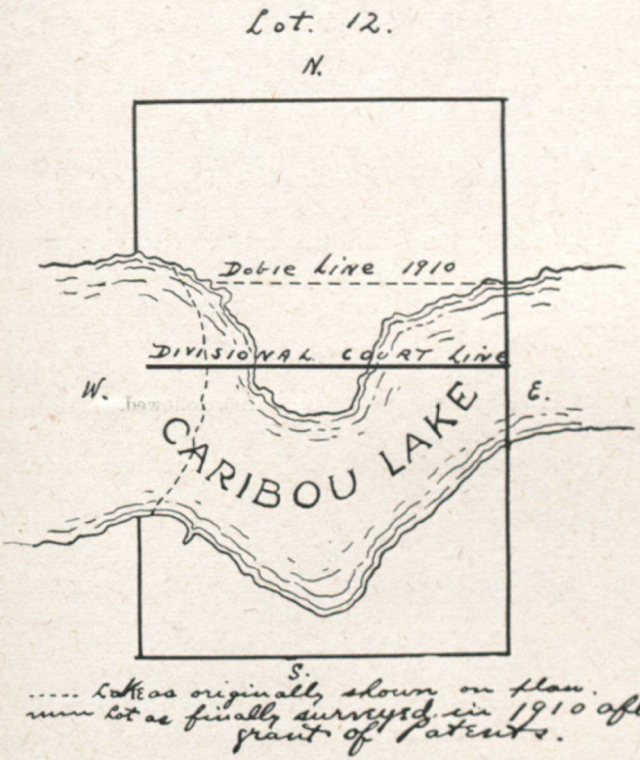
DIVISIONAL COURT affirmed above judgment, holding that they could not consider any intention on the part of Mr. Kirkpatrick, one of the subordinate officers of the Government, no matter how clearly shewn; that they had to construe the patents as they appeared, and that the patents gave to each party the north half and south half of the lot respectively without any reference to water or land, and that each party, therefore, took exactly one-half of the total area of the whole lot and the line must be drawn across the middle of the lot, and the parties were entitled to the waters of the lake.

They found also that the lake itself could not be described as navigable within the meaning of s. 2 of c. 61 George V., there being no navigable outlet nor inlet and the lake not constituting any part of the common highway.

An appeal by the defendant Salter from the following judgment of HIS HONOUR JUDGE STONE, of Algoma District Court.

HIS HONOUR JUDGE STONE (6th June, 1912):—Plaintiff was located under the Free Grants and Homesteads Act on 16th September, 1876, and by Crown grant dated 24th March, 1882, became the patentee and owner in fee of the north half of lot number 12 in the second concession of the township of Plummer, district of Algoma, said in the said Crown grant to contain 200 acres more or less. Defendant Salter is owner in fee of the south half of the said lot 12, said lot to contain 200 acres more or less. The whole area of the said lot 12 is said to be 488 acres more or less. It is in-

tersected by a small lake called Caribou Lake. This lake is a small irregularly shaped body of water, comprised wholly within the limits of said lot 12, and adjoining lots. Its character is set out in the memorandum put in by counsel for plaintiff and defendant Salter as follows:—



Length of lake about 1¾ miles; width as shewn on plan filed. Lake is fed by small streams scarcely large enough for driving, save in spring, when a little pulpwood might be driven. Outlet by creek ¼ mile to Mud lake. Creek large enough by putting a few slides in to drive timber any time of the year.

Mud lake about quarter size of Caribou lake; at mouth of Mud lake was formerly Currie's mill run by water power. Stream known as Portlock river, runs to lake Huron, is a good timber driving stream.

Depth of lake Caribou from shallow to depth of possibly 40 feet in centre.

During the winter of the year 1908, defendant Salter employed one, James S. Dobie, O.L.S., D.L.S., to run the division line between the north and south halves of said lot owned respectively by plaintiff and himself, Salter. The said surveyor placed the line at such point as would give to each party one-half of the area of the land exclusive of land covered by water, with the result that such line is located at a point 9 chains and 75 links northerly of the line which divided the lot into halves superficially without excluding land covered by water.

The land surveyor on the same occasion at the instance of defendant Salter ran the line between the north and south halves of lot No. 11 adjoining the lot in question, of which defendant Salter is also the owner of the south half.

This latter line was run by the said surveyor at a point midway between the northerly and southerly boundaries of the said lot No. 11.

The surveyor explains the difference in methods of survey adopted by him, by saying that he concluded that lot No. 12 was in the opinion of the department a " broken lot " and lot No. 11 an " unbroken lot," and that it was the intention of the department to exclude water from the grants contained in the patents of the north and south halves respectively of said lot No. 12, and that such exclusion of water resulted in placing the division line on lot No. 12 as above stated, and as shewn on the plan of the said surveyor, put in as exhibit 2. Mr. George B. Kirkpatrick, the director of surveyors of the province of Ontario for 33 years, testified that as a surveyor he would return to the department the area of a broken lot excluding water. It is the ownership of this strip of land between what may be called the Dobie line and the line midway between the north and south boundaries of the said lot No. 12, which is in dispute in this action.

After the running of the Dobie line as above stated defendant Salter sold to defendant Karwick certain standing timber upon the disputed strip of land and defendant Karwick entered upon the said land and cut timber until forbidden by plaintiff.

Plaintiff has always treated the strip in question as his own and as part of his farm; his plowed land extends to the extent of 1½ acres or thereabouts south of the Dobie line; he has cut and taken his cordwood therefrom for many years; has cut timber thereon and has pastured his cattle

thereon in connection with the remainder of the north half of the lot. This has continued throughout his occupancy of the place from the year 1876, down, and has been open and known to residents of the community.

The strip of land in dispute is not approachable from the southerly portion of the lot except by boat in summer or over the frozen lake in the winter, and has never been in the possession of defendant Salter nor of defendant Karwick, except in respect of the acts complained of in this action.

Plaintiff asks a declaration that he is the owner of the said strip of land and of the timber cut by defendant Karwick—and an injunction restraining further cutting and removal of timber therefrom and damages.

Defendant Karwick did not appear to the action nor was he represented at the trial, the action coming on as against him by way of motion for judgment.

Defendant Salter claims the Dobie line to be the true line between his property and that of plaintiff, and counterclaims for damages resulting from the action of plaintiff in preventing removal of timber, bark, etc., and for timber and wood cut and removed from the disputed area by plaintiff. The land granted to plaintiff is described in the Crown grant as situate in the township of Plummer, district of Algoma in our said province, containing by admeasurement two hundred acres, be the same more or less, being composed of the north half of lot No. 12 in the second concession of the township of Plummer aforesaid, reserving an allowance of five per cent. on the acreage of the land hereby granted for roads, and reserving to the Crown the right to lay out roads where necessary. The grant also contains the usual reservations of the use of navigable water and of streams and creeks for running of logs and timber.

The question is one of construction of plaintiff's Crown grant. Whatever opinion the surveyors may have had as to the intention of the department as to broken or unbroken lots, the real meaning of the grant is a matter of construction.

Defendant Salter relies upon the retroactive nature of the recent statute, 1 Geo. V., ch. 6, sec. 2. The question, therefore, arises, is lake Caribou navigable water within the meaning of this statute. The small streams which run into Caribou lake (as counsel agree), are only capable of floating pulpwood at time of freshet, the small streams which con-

stitute the outlet of the lake can by artificially constructed slides be utilized for running logs. These cannot be considered navigable streams, *Whelan* v. *McLachlan* (1865), 16 U. C. C. P. 102. This leave us then with a small isolated body of water 1¾ miles long with varying width and depth. Its width where it crosses lot No. 12 being all comprised within said lot and its depth being said to be possibly 40 feet in the deepest spots.

Throughout the cases in which navigability of rivers is discussed are found such expressions as "public highways by water, for the ease and commodity of the people," "public and subservient to public accommodation," "broad and deep channel calculated for the purposes of commerce." I have been able to find no English nor Canadian case in which the question of a small isolated lake such as the one in question has been considered. It is hard to conclude, however, that such expressions as I have quoted above have any application to such a body of water as Caribou lake. I find an American case, to the report of which I have not access, *Hodges* v. *Williams*, 95 N. C. 331, which is stated to have held that an isolated lake, although large, is not navigable. Suppose Caribou lake were only half its size and were comprised wholly within the limits of lot No. 12, would it be reasonable to hold that it was navigable water? I am of opinion that Caribou lake is not navigable water, and that, therefore, 1 Geo. V., ch. 6, has no application. The water being not navigable the language of A. Wilson, J., in *Ross* v. *Portsmouth* (1866), 17 U. C. C. P. 195, is very apt in relation to the present case—where he says, "The grant of land will carry land covered with water, and there is nothing here from which the jury or the Court could infer that the parcel of land so covered, if it were not navigable, was not intended to pass by the grant merely because it was covered by water. It was in measurement a part of this lot No. 12, and the presumption is that it did pass, and was intended to pass unless the contrary be made to appear. If then the land covered by water was included in the grants to the patentees of the respective halves of the lot in question, to adopt the Dobie line, would give to defendant Salter one-half of the land and more than one-half of the land covered by water.

The grants of the land covered by water conveyed to the patentees of the respective halves of the lot in question,

certain exclusive rights of fishing and fowling in the waters covering the lands so granted—*Beatty* v. *David* (1891), 20 O. R. 373. *In re Provincial Fisheries* (1895) 26 S. C. R. 444, considering the rocky character of some portions of the land in question, it may well be doubted whether the actual value of such portions is equal to the value of equal areas in the land covered by water. The division of lot No. 12 by the Dobie line, is not, in my opinion, an equitable division of the property. I am of opinion that the proper division line between the respective halves of lot No. 12 is located midway between the north and south boundaries of the lot.

Counsel for defendant Salter invokes 1 Geo. V., ch. 42, sec. 18 (formerly R. S. O. 1897, ch. 181, sec. 19). I do not read the word aliquot in that section as being intended to differentiate land and land covered by water, but think that its application to the present case gives to each party one-half of the superficial area of the lot (including land covered by water), notwithstanding that the area of each half quite substantially exceeds the 200 acres mentioned in the Crown grants.

In view of the foregoing construction of the Crown grant, it is not necessary for me to consider in detail the question of possession by plaintiff of the land in dispute. I find, however, in addition to the findings hereinbefore made as to possession that defendant Salter has failed to shew that he at any time (save as to the running of the Dobie line and the negotiations with defendant Karwick), conveyed to plaintiff any protest against his use and occupation of the land in dispute.

Plaintiff, therefore, will have declaration that he is owner of the strip of land in dispute as aforesaid, and of the timber thereon, and defendants are restrained from trespassing in any way thereon. Plaintiff's claim for damages was not pressed.

Defendant Salter's counterclaim is dismissed.

Plaintiff will have costs of action and counterclaim.

Defendant's appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL, on the 20th September, 1912.

J. Grayson Smith, for the defendant, appellant.

J. A. McPhail, for the plaintiff, respondent.

THEIR LORDSHIPS held, that they could not consider any intention on the part of Mr. Kirkpatrick, one of the subordinate officers of the Government, no matter how clearly shewn; that they had to construe the patents as they appeared and that the patents gave to each party the north half and south half of the lot respectively without any reference to water or land, and that each party, therefore, took exactly one-half of the total area of the whole lot and the line must be drawn across the middle of the lot, and the parties were entitled to the waters of the lake. They found also that the lake itself could not be described as navigable within the meaning of sec. 2 of ch. 6, 1 Geo. V., there being no navigable outlet or inlet, and the lake not constituting any part of the common highway.

MASTER IN CHAMBERS. OCTOBER 3RD, 1912.

POLLINGTON v. CHEESEMAN.

4 O. W. N. 92.

Parties—Third Party Notice—Motion to Strike out—Dismissed—Rights of Parties should be Left to Trial—Negligence Action—Relief Claimed against Insurance Company.

Motion to strike out a third party notice served upon an insurance company in an action for damages for the death of one of defendant's workmen. The third parties claimed that by the terms of their policy they could not be sued until judgment was had against plaintiff and that the death of the employee did not occur in the employment insured against. Defendant denied this latter statement.

MASTER-IN-CHAMBERS, *held*, that the rights of the parties should be left to the trial and not disposed of on an interlocutory application.

Pettigrew v. *Grand Trunk Rw. Co.*, 22 O. L. R. 23, 16 O. W. R. 989 and

Sweale v. Can. Pac. Rw. Co., 25 O. L. R. 492, 20 O. W. R. 997 followed.

Motion dismissed with costs to defendant in third party issue in any event.

Action brought on 17th January, to recover damages for death of plaintiff's son, while in service of defendant, who was insured against injuries arising out of such accidents in the Travellers' Insurance Company. The policy was in the usual form, and in accordance with its provisions the defence was at first undertaken by the company, and an appearance entered by their solicitors without prejudice to the right of the company to decline to go on with the defence on further investigation.

About a month later the company's solicitor wrote to defendant saying "the company decline to accept the risk of this accident," returning the writ of summons and asking defendant to have the action attended to by his own solicitor. This apparently was done, and on 15th June, defendant obtained the usual third party notice, to which the company appeared and moved to set same aside. This motion, by arrangement, was not heard until 26th September, when following counsel appeared:—

T. N. Phelan, for the motion.

Frank McCarthy, for the defendant.

CARTWRIGHT, K.C., MASTER:—A preliminary objection was taken to the motion as being too late under the decision of the late Mr. Justice Street in *Holden* v. *Grand Trunk Rw. Co.*, 2 O. L. R. 423. This, however, is no longer an authority on this point, as was decided in *Donn* v. *Toronto Ferry Co.*, 6 O. W. R. 973, by Meredith, C.J., after consultation with Street, J. The motion must, therefore, be dealt with on its merits, and have effect given to it if sustainable. The motion was supported on two grounds, the first being that the issuing of the third party notice was in violation of clause E. in the policy which provides that: "No action shall lie against the company to recover any loss under paragraph 1 foregoing unless it shall be brought for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue, and no such action shall lie to recover under any other agreement of the company unless brought by the assured himself to recover money actually expended by him."

If this condition is to be construed literally it would prevent the issue of a third party notice, if such notice is to be considered equivalent to bringing an action against the company. This surely cannot be a tenable position, as it would enable the insurer at his will to prevent the application of the third party procedure—at least, it cannot be so decided on an interlocutory motion. The second ground of objection was that set up in the affidavit of the company's officer that defendant had admitted to him that the deceased at the time the injuries complained of were sustained was not engaged in the business operations of the defendant as described in the policy of insurance issued to him, being No. B.

499670. The affidavit of defendant on which the third party order was made states the opposite. Neither to this objection can any effect be given at the present stage, though it may well be that both of them may hereafter be deemed to prevent any liability of the company to defendant if plaintiff succeeds against him. In the meantime it would seem to be the company's interest to be present at the trial and support the defence as against the plaintiff. Then if that defence fails it will still be open to it to shew that the defendant has no recourse against the company; under the terms of the policy as set out in clause E. This question of the third party procedure was lately dealt with in the following cases:—

Pettigrew v. *Grand Trunk Rw. Co.*, 22 O. L. R. 23; 16 O. W. R. 989; *Swale* v. *Canadian Pacific Rw. Co.*, 25 O. L. R. 492; 20 O. W. R. 997.

The first was a decision of Middleton, J. The latter was decided by a Divisional Court, of which the learned Judge was also a member. At p. 504, he said: "The right to invoke the third party procedure exists whenever the plaintiff's claim if successful, will result in the defendant having a claim, against the third party to recover from him the damages which he has been compelled to pay the plaintiff." It will be observed that it is enough that defendant will have a claim which may or may not succeed. It is sometimes the case that the defendant succeeds at the trial, and then he may have to pay the costs of the third party, as was the result in the recent case of *Walger* v. *Macdonald, ante* p.

In *Pettigrew* v. *Grand Trunk Rw. Co., supra*—Middleton, J., said (at p. 25), after noticing that questions had been suggested as to the possibility of plaintiff failing in his action (as was afterwards the case, see 18 O. W. R. 517, 2 O. W. N. 709, and there the defendant company was ordered to pay the third parties' costs): "These are matters for the trial, and under our present system the facts should be first found and then the law applied. Unless the third party procedure can be made use of in a case like this, it has very largely failed in its object. The third parties are manifestly interested in the questions to be determined between the plaintiff and the defendants sought to be heard at the trial, so as to see that this question is only tried and that the ground of liability is definitely ascertained."

And in the *Swale Case, supra* (at p. 505), the learned Judge said: "I adhere to what I said in *Pettigrew* v. *Grand Trunk Rw. Co.*, 22 O. L. R. 23, as to the way in which applications to set aside third party notices should be dealt with. The real question should be left to the trial; and such applications should form no exception to the general rule that the rights of the parties should not be disposed of on summary applications."

In the same case at p. 504, it had been said by the learned Chancellor that "The liberal provisions of Consolidated Rule 209 should be construed with a view to practical efficiency rather than to scientific accuracy."

My understanding of the principles laid down in the foregoing judgments requires me to dismiss the motion with costs to defendant in the third party issue in any event. The company has not stated its grounds of denial of liability. The defendant may in view of these objections and of the decision as to costs in the *Walker Case, supra,* now move for an order for directions. But if he still thinks that the plaintiff may succeed as against him and that he will then secure indemnity from the company, he cannot be compelled to wait and bring a separate action. Nor does it seem that this course, even if permissible, could be for the company's advantage.

COURT OF APPEAL.

OCTOBER 2ND, 1912.

CAIN v. THE PEARCE CO.

4 O. W. N. 70.

Appeal to Court of Appeal—From Divisional Court—Time for Appealing — Extension Refused.

MACLAREN, J.A., refused to extend the time for appealing from a judgment of Divisional Court dated 23rd May, 1912, reported 22 O. W. R. 174, 3 O. W. N. 1321, where the proposed appellants had taken no step towards appeal until the motion for leave launched 6th September, 1912, where the matter had been much litigated, and where there were no special reasons for granting leave.

Motion by the defendants in the above and four other actions for an extension of time for appealing to the Court of

Appeal from an order of Divisional Court, 22 O. W. R. 174; 3 O. W. N. 1321.

D. Inglis Grant, for the defendants' motion.

H. E. Rose, K.C., for the plaintiffs.

HON. MR. JUSTICE MACLAREN:—The defendants move in five actions that were tried together to extend the time for appealing from a judgment of a Divisional Court, rendered on the 23rd of May last. No notice of appeal was given within the month allowed by the Rules, and it was only on the 6th of September that the first step was taken towards launching the present motion, the excuse being the illness of the defendants' solicitor.

The actions were for damages and an injunction on account of the renewal by defendants of an old dam; the defence that an easement had been acquired by prescription. It has been held that an easement had been acquired, but that the new dam, although no higher than the old one retained the water and flooded the plaintiffs' lands for a longer time than the old one. Moderate damages were assessed of which the defendants do not complain, if the plaintiffs are entitled to any damages. No injunction was granted.

The cases have been much litigated. The trial Judge first found that the defence of prescription was made out in part and ordered a reference to assess the damages beyond the prescription; the Divisional Court sent the cases back to him; he held a further trial and assessed the damages, which the Divisional Court have upheld.

Defendants complain that their easement was not defined or delimited, and urge an appeal because other actions have been taken and are threatened by other proprietors. They also complain strongly that High Court costs were given against them. They have not obtained leave to appeal on this last ground, so that it cannot be considered. Neither will such a judgment as they now seek, determine future actions.

In cases where such an indulgence as is asked for in this case has been granted the fact that the party desiring to appeal has taken some step within the month has been deemed important. See *Ross* v. *Robertson*, 7 O. L. R.. 494; *McClement* v. *Kilgour Mfg. Co.*, 22 O. W. R. 403; 3 O. W. N. 1351. In these cases so far as appears no hint was given of

the intention to appeal before September. I do not find sufficient reason for depriving the plaintiffs of the rights they have acquired, after having had to go through two trials and two appeals.

In my opinion the motion must be dismissed with costs.

DIVISIONAL COURT.

OCTOBER 2ND, 1912.

MILLS v. FREEL.

3 O. W. N. 1240; 4 O. W. N. 79.

Trespass to Lands—Public Road Allowance—Action against Pathmaster—Plaintiff Claimed he had Given Other Lands in Lieu—Possession for 60 Years.

Action against defendant, a pathmaster for trespass on certain lands alleged to belong to plaintiff. The lands in question at one time formed part of a public road allowance but plaintiff claimed that he had given certain other lands in lieu thereof for a new road allowance without compensation, and that he had been in possession of the lands in question upwards of 60 years.

RIDDELL, J., dismissed action with costs.

DIVISIONAL COURT *held*, that the evidence did not establish that the given road was to take the place of the lands in question and that the defendant was only acting in the course of his duties as pathmaster in proceeding as he did.

Appeal dismissed with costs.

An appeal from the following judgment of HON. MR. JUSTICE RIDDELL.

The action was for a declaration that the plaintiffs were entitled to part of the 10th concession road allowance in the township of East Nissouri, in lieu of a forced road taken from the plaintiffs' land, for which no compensation was paid to the plaintiffs nor their predecessors in title,, and for an injunction and other relief.

J. M. McEvoy, for the plaintiffs.

E. Meredith, K.C., and W. R. Meredith, for the defendants.

HON. MR. JUSTICE RIDDELL (6th May, 1912): Further consideration has not changed my opinion formed at the trial.

The action will be dismissed with costs, including all costs over which I have control.

The apeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

J. M. McEvoy and A. G. Chisholm, for the plaintiffs, appellants.

W. R. Meredith, for the defendants, respondents.

HON. MR. JUSTICE LATCHFORD:—I see no ground for interfering with the judgment appealed from. The defendant was acting for the municipality, and within the scope of his instructions as pathmaster, in removing the plaintiffs' fence. As against the municipality the plaintiffs can assert no right of possession unless they can bring themselves within the provisions of sec. 641 of the Municipal Act (3 Edw. VII., ch. 19), and establish that they or their predecessors in title had laid out and opened "in place" of the concession road the road now known as "given road," across their property, without receiving compensation therefor; or, that "in lieu" of the original allowance for road the "given road" had been laid out and opened and no compensation had been paid to the owners for the land so appropriated.

Upon the evidence it is clear that the road across the plaintiffs' property was not laid out or opened "in lieu" or "in place of the original concession road, but was made in addition to the concession road. The original road allowance was not only abandoned, but it was opened for public use. It was actually used by the public throughout its entire length—not, indeed, to any great extent between the gravel pit and the Thames—but even for that short distance occasionally travelled when the river was low and fordable. As the concession road was not "unopened," sec. 642 has no application.

It may be observed that even north of the point of departure of the "given road" from the concession road, the plaintiffs' fence encroaches upon the concession line, there admittedly in continuous public use for upwards of fifty years.

The appeal should be dismissed with costs.

HON. MR. JUSTICE MIDDLETON:—I agree.

HON. SIR JOHN BOYD, C.:—I agree in the result.

HON. MR. JUSTICE LATCHFORD. SEPTEMBER 30TH, 1912.

CUMMING v. CUMMING.

4 O. W. N. 91.

Cancellation of Instruments — Deed — Quit Claim given Mortgagee of Farm Lands — Evidence — Parent and Child.

LATCHFORD, J., dismissed without costs action of plaintiff to set aside a quit claim deed given to mortgagee of certain farm property.

An action by a mother to set aside a quit-claim deed of a farm to her son, and for other relief.

E. F. Lazier, for the plaintiff.

S. F. Washington, K.C., and J. W. Lawrason, for the defendant.

HON. MR. JUSTICE LATCHFORD:—When it appeared during the trial that the quit claim deed from the plaintiff to her son could not be set aside, I brought together the parties and two other children of the plaintiff, who were in Court as witnesses, and endeavoured to effect some arrangement by which their aged mother would be supported elsewhere than in the home of the defendant, where she had after his marriage been uncomfortable and unhappy—partly because of her inability to conform to the changed conditions, and partly because of infirmities occasioned by advancing age. I did not regard the defendant and his wife as in any way to blame for the departure of the plaintiff from her old home. All efforts to bring about an agreement for the support of the mother by her children were fruitless. The defendant and his sister Mrs. Denholm, were willing to contribute, but could not of themselves bear the whole burden. Some hope, however, was expressed that correspondence with other children not present at the trial might be attended with success, accordingly I deferred judgment. I now learn that nothing has come of the negotiations.

The action to set aside the deed fails. The farms were hopelessly encumbered when sold under the powers of sale in the mortgages made by the plaintiff and her late husband to the Landed Banking & Loan Co., and by that company assigned to Denholm. By the terms of both mortgages notice of the sale was not required to be given. The evidence is not clear when the quit-claim deed was executed. But it is

highly probable that a solicitor as careful and experienced as Mr. Wardell, in making a loan of $2,500 to the purchaser of a farm sold for $3,000 would in the absence of evidence that notice of the sale had been served on Mrs. Cumming require a quit claim deed from her to the purchaser. The evidence of Mr. Wardell and his clerk render it impossible to set aside the deed.

On the other issues raised the action also fails. No money is due to the plaintiff under contract for any services rendered to her son for which she may not have received adequate compensation. Whatever furniture or other property belonging to her which remained in his house when she left it has not been claimed or converted by him, and is at her disposal.

The efforts of the defendant to prevent the homestead from passing to strangers have been little less than heroic. While the farm is still burdened with the mortgages, and his means are limited, he is with his sister Mrs. Denholm willing to contribute to the support of his mother. If the other children assist to the same extent, she will be provided for during her declining years.

This, however, is a matter with which I have no power to deal. The utmost I can do to help the plaintiff is to direct that the dismissal of her action be without costs.

DIVISIONAL COURT.

SEPTEMBER 30TH, 1912.

REIFFENSTEIN v. DEY.

4 O. W. N. 78.

Trial—New—Finding of Jury—Unwarranted by Evidence.

DIVISIONAL COURT granted a new trial without a jury of an action for damages for personal injuries where some of the jury's findings in favour of defendant were clearly unwarranted by the evidence and shewed that the jury must have acted unreasonably or have been influenced by improper considerations.

No costs of former trial or appeal.

Motion by the plaintiff for a new trial, or for judgment in the plaintiff's favour, after trial by jury, before HON MR. JUSTICE RIDDELL, at Ottawa, and judgment dismissing the action.

The motion was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

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

Fripp, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—The action is by two ladies to recover damages for injuries sustained as the result of a running-down accident, occasioned, it is said, by the negligence of the defendant.

The jury have answered in the defendant's favour all the questions submitted by the trial Judge; and in ordinary circumstances their decision would be final. But upon some of the questions it is clear that the answers of the jury are not warranted by any possible view of the evidence. Upon other questions there was evidence from which the findings might well be in the defendant's favour.

After careful and anxious consideration we have came to the conclusion that the answers of the jury to some of the questions are so entirely against the evidence that it is apparent that for some reason the jury must have given effect to some improper consideration, or have acted unreasonably, and that there has not been a fair and impartial trial. We have spoken to the learned trial Judge, and he agrees with us that the result must be regarded as unsatisfactory.

In view of the fact that the case had already been tried before Hon. Mr. Justice Britton—when the jury disagreed—and of the fact that the jury notice was given by the plaintiff and the plaintiff now desires trial without a jury, we think it proper to direct a new trial before a Judge without a jury.

We are much impressed by the view that a new trial ought not lightly to be given; but in this case the danger of a miscarriage of justice, if the present verdict is allowed to stand, appears so great that we think this case may be treated as exceptional.

We were pressed by the plaintiff's counsel to pass upon the evidence ourselves instead of directing a new trial. We do not think we should do this, in view of the conflicting evidence upon some of the issues raised.

As a new trial is directed, it is not desirable that we should now comment upon the evidence.

No costs of the last trial or of this appeal.

HON. MR. JUSTICE LATCHFORD:—I agree.

HON. SIR JOHN BOYD, C.:—I agree in the result.

HON. MR. JUSTICE LATCHFORD. OCTOBER 4TH, 1912.

ARMES v. MANCIL.

4 O. W. N. 93.

Architect—Action to Recover Fees.

Action by architect for services rendered by him for those interested in the promotion of a company.

LATCHFORD, J., *held*, that defendant Best had by his actions rendered himself liable to plaintiff but that other defendants had not become liable either by agency or otherwise.

Judgment for $500 and costs against defendant Best, action dismissed with costs as against other defendants.

Action by an architect to recover from defendants $934,53 for plans and specifications alleged to have been prepared by plaintiff upon instructions from the defendants.

Morrison, for the plaintiff.

Wm. Bell, for the defendants.

HON. MR. JUSTICE LATCHFORD:—The plaintiff was, I find employed by the defendant Best and two persons not parties to this action—Perry and Hinterlange. Perry was active in promoting the formation of a company which was to absorb two existing companies. In one of these the defendants Mancil and Wood were interested; and having come to Hamilton to attend a meeting convened for the purpose of organizing the new company, they were present when Armes submitted the plans which he had prepared in accordance with the instructions he had received from Perry, Best, and Hinterlange. Mancil was consulted by someone present—it does not appear by whom—in regard to the plans, and pointed out to the plaintiff, what he thought was a defect in the cornice designed for one of the buildings. He subsequently saw or examined the completed plans at the

office of Humken, the draughtsman, who had made them for the plaintiff.

I think Best incurred a liability to Armes, by acting with Perry and Hinterlange, in instructing the plaintiff to do the work for which he now claims payment. I find, however, that neither Best, Perry, nor Hinterlange was the agent of either Mancil or Woods. Hinterlange like Woods, was an employee of the company of which Mancil was vice-president, but beyond this fact—insufficient in itself—there is nothing in evidence to shew that Hinterlange had any authority to act for Mancil. Hinterlange did not in fact act or profess to act for Mancil, but for the company proposed to be formed. The plaintiff knew the parties instructing him were promoting the new company, and inscribed his plans with legends stating they were for the Acme Motor Company. In the absence of evidence that Mancil and Woods adopted as their own or ratified the acts of Best, Perry, or Hinterlange they cannot be held liable to the plaintiff. What Mancil did at the meeting in Hamilton or subsequently when he called at Humken's office cannot be considered adoption or ratification—neither of which should rest upon probability or conjecture. The evidence against Woods is even weaker. The action as against Mancil and Woods is dismissed with costs. There will be judgment against the defendant Best for $500 and costs. The plaintiff's claim is for a greater amount, but as he himself at one time fixed the amount due him at $500, he cannot be allowed more. Stay of twenty days.

HON. MR. JUSTICE RIDDELL. OCTOBER 3RD, 1912.

WEEKLY COURT.

RE STEELE ESTATE.

4 O. W. N. 80.

Will — Construction — Motion for — Trustees — Investments — Income — Trustees' Discretion.

Motion for construction of will of the late John Steele. The will gave $2,000 to trustees to be invested and the income therefrom paid to the testator's daughter Loretta Steele while she lived and remained unmarried. The *corpus* was given over in case of her death unmarried or married without issue, but in case of her marriage with issue, it was to be paid to her at the trustees' discretion. Loretta Steele was married but had no issue and the question to be determined was whether she was entitled to the income of the fund during her life.

RIDDELL, J., *held*, (*dubitante*) that the income should be paid to Loretta Steele for her life.

Bird v. *Hunsdon* (1818), 2 Swans. 343 followed.

Motion by Catherine Loretta Smith (*nee* Steele), upon an originating notice, for an order determining a question arising upon the construction of the will of the late John Steele.

W. B. Northrup, K.C., for the motion.

B. N. Davis, for John Alex. Steele.

HON. MR. JUSTICE RIDDELL:—The late John Steele in a codicil to his will made the following provision:—

"I hereby revoke the bequest to my granddaughter Catherine Loretta Steele contained in the fourth (4th) paragraph of my said will and in place of said paragraph I hereby will, give, and bequeath unto my grandson John Alexander Steele of Sidney aforesaid, farmer, and Robert Fraser of the town of Trenton in said county of Hastings, Customs Officer, the sum of two thousand dollars ($2,000.00) upon trust to place the same at interest either in some chartered bank in Canada or upon first mortgage upon lands in Ontario, and shall pay over the interest accruing therefrom from time to time annually or oftener to my said granddaughter Catherine Loretta Steele so long as she lives, and is unmarried, and if she dies without having married, or if married without issue then the said sum of two thousand dollars shall at her death go to and be paid over to my said grandson John Alexander Steele, and in case of his having died before such period then to such of

his children as may be living at the period of the death of my said granddaughter, but if my said granddaughter Cathrine Loretta Steele marries and has a child or children then the said trustees shall pay the said principal sum of two thousand dollars ($2,000.00) to my said granddaughter at such time thereafter as the said trustees shall deem best in the interests of my said granddaughter and her child or children."

There is no residuary clause in will or codicil.

The granddaughter is married without issue. The grandchild married, but has no children; and the question arises "is she entitled to the interest upon $2,000?"

I made an order that John Alexander Steele should represent all those *in esse* or otherwise, who would be entitled to this interest in case the granddaughter is not.

It seems to me that the case may fairly be said to be covered by *Bird* v. *Hunsdon* (1818), 2 Swans. 343. There the provision was "the rest of money to be put out at interest . . . and the said Mary Morris to have the said interest to maintain her as long as she remains single and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children." Mary Morris married, but had no child. The Master of Rolls (Sir Thomas Plumer), said pp. 345, 346: "The testator contemplated three periods—1st. her minority; 2nd her remaining single without a child; 3rd the interval between her marriage and death . . . To the third period the interval between her marriage and death, there are no words expressly applicable; but the interest being first given to a favoured object and the capital not given over till the death of that person the Court is driven to the necessity of saying either that there is an intestacy during the remainder of her life, or that she is to take during her whole life. The latter seems the more reasonable alternative. I cannot suppose that the testator meant to leave a partial interest in the property undisposed of; and that on the marriage of Mary Morris, the dividends during her life should devolve on those for whom the will expresses no intention to bequeath more than a legacy of £50 to one."

Theobald on Wills, 7th ed., p. 735 says: "Some of the earlier cases in which a life interest has been implied would probably not now be followed," and mentions *Bird* v. *Hunsdon*. But in *Humphreys* v. *Humphreys* (1867), L. R. 4

Eq., at pp. 478, 479, Sir John Stuart, V.-C., says that *Bird* v. *Hunsdon* has never been overruled—and I cannot find that any later case deals with the matter. *Roe* v. *Summersett*, 5 Burr. 2608, may also be looked at. In *Ralph* v. *Carrick* (1877), L. R. 5 Ch. D., at p. 995, Hall V.-C., mentions *Bird* v. *Hunsdon* without disapproval and distinguishes that case from the case he was then considering. *Ralph* v. *Carrick*, 5 Ch. D. 995; 11 Ch. D. 873, and in *Re Springfield* shew us how careful we must be in applying *Bird* v. *Hunsdon*, but they by no means overrule it. Were there nothing more here than a gift to John Alexander Steele of the $2,000 upon the death of Loretta without issue, these cases would or might apply; but there is more. There are substantially the characteristics which differentiated *Bird* v. *Hunsdon*, spoken of by Hall, V.-C., in 5 Ch. D., at p. 995, "a trust of the income for maintenance of the person named, and a gift over after her death." With the proper changes the result is not very unlike *Bird* v. *Hunsdon*. The testator here contemplated: 1. The time before her marriage; 2. The time thereafter before a child was born; 3. The time thereafter. For the first period, he has provided by giving her the income; for the third by giving her the principal; but for the second which may last for the whole of her married life, he has made no provision in so many words. Must he not, however, have meant that during that period also she was to be provided for? The very tempting argument was advanced that what the testator must have meant was that when she got married her husband should take care of her—and when she had a child, she would receive the principal for the support of herself and child. But the husband might equally well be expected to support Mary Morris in *Bird* v. *Hunsdon*.

Without overruling that case, I think, I should hold that Loretta is entitled to be paid the interest during her life—and although I am not wholly satisfied with the reasoning in the principal case or its exact application to the present case I will so declare.

Costs of all parties out of the corpus of the $2,000 fund.

MASTER IN CHAMBERS. OCTOBER 5TH, 1912.

CHRISTIE BROWN v. WOODHOUSE.

4 O. W. N. 93.

Action — Discontinuance — Taking of any other Proceeding — C. R. 430 (1) — Leave to Discontinue.

MASTER-IN-CHAMBERS *held*, that the issuance of an order to produce and the taking out of an appointment for examination for discovery by a plaintiff after the delivery of the statement of defence constituted "a taking of any other proceeding (save an interlocutory application" within the meaning of C. R. 430 (1), and that therefore plaintiff was not entitled to discontinue without leave.

Schlund v. *Foster*, 10 O. W. R. 1005 followed.

Spincer v. *Watts*, 23 Q. B. D. 352, 353 and

Vickers v. *Coventry*, [1908] W. N. 12 referred to.

This was an action to recover possession of a house in Toronto, which defendant had occupied since 1892, with the consent of plaintiff company and its grantor, the late Wm. Christie. Defendant set up chiefly the Statute of Limitations though another defence of a gift from Mr. Christie was apparently hinted. The action was begun 21st February, and was at issue before vacation. The statement of defence was delivered 18th May. Two days later plaintiff took out the usual order for production by defendant—and also appointment to examine defendant for discovery on 29th May, but did not proceed with it.

On 13th September, plaintiff served a notice of discontinuance. On 1st October inst., defendant gave notice of motion to dismiss action with costs "or for such other order as may seem just."

Edward Meek, K.C., for the motion.

W. B. Milliken, against the motion.

CARTWRIGHT, K.C., MASTER:—It was objected by Mr. Milliken that the notice should have been to set aside the discontinuance, and not to dismiss the action. This is probably correct, but this could be amended now as the simple point for decision is whether plaintiff was within C. R. 430 (1) or must proceed under clause (4). This depends upon whether the action of the plaintiff after delivery of statement of defence was "a taking of any other proceeding (save an interlocutory application)."

In *Schlund* v. *Foster*, 10 O. W. R. 1005, I held that this (amongst others) was such a proceeding. This view seems

to be confirmed by the decision of Lindley and Lopes, L.JJ., in *Spincer* v. *Watts*, 23 Q. B. D. 352, 353, reversing the Judge in Chambers and the Divisional Court in the converse case.

There it was said by Lindley, L.J. (p. 253): "I think that the exception throws some light upon the meaning of the words 'before taking any other proceeding in the action,' and having regard to it and to the object of the rule, I think, what is meant is 'taking any proceeding with the view of continuing the litigation with the person against whom the proceeding is taken.'"

To the same effect Lopes, J.: "I think the rule intended a proceeding which is to have the effect of continuing the action—not a proceeding which has the effect of putting an end to the action." In *Vickers* v. *Coventry*, [1908] W. N. 12, it was held by Warrington, J. (as held in *Schlund* v. *Foster*, *supra*), that the delivery of an amended statement of claim came within the above definition of Lindley, L.J.

I have not found any other authority, nor was any other referred to on the argument. The plaintiff may now have leave to discontinue on the terms approved of in *Schlund* v. *Foster*, 11 O. W. R. 60, 175, 314, in which case the costs of this motion will be in the cause.

If plaintiff desires to proceed then the notice of discontinuance will be set aside with costs to defendant in any event, and the trial should be expedited in view of the age of the defendant and the nature of his defence. I cannot imagine any other proceeding more indicative of a desire to proceed (unless it might be giving notice of trial), than those taken by plaintiff in this case.

HON. MR. JUSTICE RIDDELL. OCTOBER 5TH, 1912.

WEEKLY COURT.

YOUNG v. PLOTYMEKI.

4 O. W. N. 94.

Vendor and Purchaser — Contract for Sale of Land — Default — Rescission — Forfeiture of Sums Paid — Judgment — Costs.

Motion by the plaintiffs for judgment on the statement of claim in default of defence in an action for a declaration that the plaintiffs (vendors) were entitled to determine an agreement for the sale of two lots of land in Fort William

and to retain any sum or sums paid under the agreement, for rescission of the agreement and for possession.

J. D. Bissett, for the plaintiffs.

No one appeared for the defendants.

HON. MR. JUSTICE RIDDELL:—Usual judgment may go for rescission and forfeit of deposit of any payments on account, with costs.

HON. MR. JUSTICE LENNOX. OCTOBER 5TH, 1912.

WALKER v. MAXWELL.

4 O. W. N. 95.

Vendor and Purchaser — Contract for Sale of Land — Rescission — Return of Promissory Notes — Conditions of Sale — Conditions not as Represented.

Action for rescission of a contract to purchase certain land in Saskatchewan, the return of moneys paid with interest and the delivery up of a certain promissory note given in pursuance of the contract. The contract was made subject to certain written conditions that the land was "good farm land, clay loam, slightly rolling and located close to Grand Trunk Pacific Rw., otherwise contracts to be refunded together with cash paid."

LENNOX, J., *held*, that the contract was strictly a conditional one and that none of the conditions were as represented and that plaintiff was entitled to rescind.

Judgment for plaintiff with costs.

Action for the rescission or cancellation of a conditional contract entered into by plaintiff for the purchase from defendants of 320 acres of land, in Saskatchewan, the delivery up of a promissory note given, the repayment of money paid in connection with this contract, and for damages, tried at Owen Sound on 18th June last.

H. W. Wright and J. A. Horning, for the plaintiff.

I. B. Lucas, K.C., for the defendant White.

McEwan, for the defendant Robertson.

A. G. McKay and H. G. Tucker, for the defendants Maxwell and Smith.

HON. MR. JUSTICE LENNOX:—From the way in which the negotiations opened, the wording of the application, the form of the final agreement, and statements incidentally made dur-

ing the giving of evidence, it was evident that the rights and liabilities of the defendants might possibly not be identical; but counsel for the defence conducted it throughout as one of identical interest and liability.

When the evidence was all in, I referred to this united line of defence. Counsel thereupon informed me that they desired no distinction to be made between defendants, and that they were content to be all treated on the same basis, a judgment for all or against all.

The case was then adjourned for argument in Toronto, and was taken up on the 19th of September last. At the opening of the argument Mr. McKay appeared, instead of Mr. Tucker, as counsel for the defendants Maxwell and Smith, and asked leave to call evidence to shew the relations existing between these two defendants and the other two defendants, with the view of ultimately arguing that even if these other two defendants were liable his clients were not. All the other parties objected to this. Having regard to the conduct of the case, and the very great inconvenience and injustice involved in the admission of this evidence, I refused to admit it.

In the view I take of this case, it is not necessary for me to determine whether the representations complained of by the plaintiff in connection with the proposed sale were honestly, or fraudulently, made; or whether the agreement in question should be treated as an executed or an executory contract. If I had to come to a judgment upon the representations, I would have difficulty in coming to the conclusion that they were *bona fide* and innocent.

The formal contracts, exhibits 5 and 6, are dated April 1st, 1911, but it is said were not signed until about the 19th of April. Nothing turns on the date. Those contracts are with Maxwell and Smith. Before they were presented to the plaintiff for execution, the plaintiff had made an application to the defendants, Robertson and White for the purchase of these lands, through an agent, W. J. Winter.

The plaintiff knew nothing whatever about the property; and, to induce the application, the statements afterwards incorporated in exhibit 3, were made by Winter, and relied upon by the plaintiff. Whether this application would have amounted to a contract or not is immaterial, as the parties abandoned it by mutual consent—in fact, never treated it as binding—and substituted the formal contracts, exhibits 5 and 6 and exhibit 3, in place of it.

Winter, amongst other things, had represented that this was good farming land, slightly rolling, and close to a railway; and by a line drawn upon a printed diagram shewed this railway within a few rods of the land in question, judging of the distance relatively to the width of a quarter-section.

When Robertson and Winter presented the proposed formal agreement, exhibits 5 and 6, the plaintiff would not sign them until he had some guarantee in writing as to some of the representations previously made to him. Accordingly, to induce him to sign, Robertson, then representing all the defendants, drew up, signed, and delivered exhibit 3, in these words:—

"Owen Sound, April 19th, 1911. This writing is to certify that James D. Walker, of Owen Sound, agrees to sign and settle land bought in the vicinity of Battleford, Twp. 41, Rge. 17, west 3rd Mer. upon the condition that the land upon inspection is as represented, good farm land, "clay loam," slightly rolling, and located close to G. T. P. Ry., otherwise contracts to be refunded together with cash paid. J. S. Robertson. Witnessed by W. J. Winter." And thereupon the plaintiff signed the contracts, paid the sum of $320 by cheque, and gave his promissory note for $952, payable in twenty-two days, the length of time supposed to be necessary to enable the plaintiff to inspect the property.

This I construe to be not an absolute but a conditional contract—a conditional and partially executed contract; and only to take effect if, upon inspection, the land turned out to be as represented.

It is admitted that the word "refunded" may be read "rescinded;" but the meaning is clear enough; that the contract was to be cancelled or rescinded and the money refunded.

The plaintiff made his inspection promptly, and at once refused to take the property.

I do not propose to consider at all any representations or statements not included in exhibit 3.

I find as a fact that none of the representations contained in exhibit 3 were true. The land described in the contract is not good farm land, it is not "clay loam," it is more than slightly rolling, it is "ridgy" in places to an extent to seriously impede farming operations, and it is several miles from the nearest point on the Grand Trunk Pacific Railway.

A block of three hundred and twenty acres may have some sloughs and stones upon it, and yet, as a tract of land, be fairly described as "good farm land;" but in this case the proportion of waste land is too great, and the impediments in the way of cultivation are too formidable, to justify this description.

There is evidence both ways, of course; and there are extremes; but even the evidence for the defence admits that there are very considerable acreages that cannot be cultivated. I think Robertson himself admits that there are ten acres unworkable on account of stones. The defendants' witness David Brown says there is too much water on the land to class it as even a second-class farm.

Whilst I think the evidence was fairly honest all round, the witnesses who impressed me, as having the requisite combination of honesty and knowledge, were Thompson and Kenney. They are both farmers. Thompson, who lives near the land, and has been in the habit of going over it for years —although he did not know the boundaries until recently— says it is not good farming land; he would not call it farming land at all, and he would not put any value on it as a farm; that stones and sloughs cover more than one-half of it; and that "as a farming proposition," the stones are too plentiful and too large to remove. Kenney says that one-fourth of it is covered with sloughs, that it is generally stony, and is not good farming land. He could not put a value on it for farming.

In my judgment the defendants were not in a position to convey what they agreed to convey; were not able to substantially comply with the conditions upon which this transaction was to be carried out, if carried out at all; and the plaintiff is not bound to accept a conveyance of the land in question or to comply with the provisions of exhibits 5 and 6.

There will be judgment for the plaintiff against the defendants for $320 with interest from the 8th of June, 1911, and the costs of this action; and for delivery up to the plaintiff of the promissory note for $952 mentioned in the pleadings herein; and declaring that the defendants have not complied with the terms and conditions of their contract of sale, and are not entitled to enforce it against the plaintiff. And directing that upon the expiry of the time allowed the defendants for appeal, or upon the dismissal of their appeal if taken, the officer of the Court at Owen Sound in whose

custody the exhibits then are, shall endorse upon exhibits 5 and 6 "Cancelled by order of the Court," and sign the same.

I will give further directions as to the form of the judgment if difficulty arises in settling the minutes.

HON. MR. JUSTICE RIDDELL. OCTOBER 5TH, 1912.

CHAMBERS.

SALTSMAN v. BERLIN R. & C. CO.

4 O. W. N. 88.

Action — Stay of Proceedings — Action by Workmen to Recover Wages — Building Contract — Plaintiffs' Right should not be Determined on Interlocutory Application.

Application by defendants the Berlin R. & C. Co. to stay this action as against themselves. The action is brought by workmen for wages against the applicants, the owners of a building in course of erection and the W. A. Nicheill Contracting Co., who had contracted to put up the building in question, but who had been unable to complete the work owing to financial troubles. The applicants claimed that under their contract with their co-defendants they were to pay 80 % of the cost of the work done as the work progressed which they had done, but that they could not arrive at the balance due their co-defendants until the contract which they were completing themselves by day labour was finished.

COUNTY JUDGE made order staying plaintiff's action until completion of work.

RIDDELL, J., *held*, on appeal from above order that plaintiffs' rights should not be determined on an interlocutory application and that in any case the applicants could not be prejudiced by plaintiffs being allowed to prove their case at the trial.

Appeal allowed and order vacated, costs of application and appeal to be paid to plaintiffs forthwith.

An appeal by the plaintiffs from an order of the Deputy Judge of the County Court of the county of Waterloo, staying all proceedings in this action, which was brought for the enforcement of mechanics' liens.

M. A. Secord, K.C., for the plaintiffs, appellants.

J. C. Haight, for the defendants, the Berlin Robe and Clothing Company.

HON. MR. JUSTICE RIDDELL:—The plaintiffs are workmen who were employed by the defendants, W. A. McNeill Contracting Co., in the erection of a brick building, which that company had contracted to build for their co-defendants the Berlin R. & C. Co. The contract provides for payment

of 80 per cent of the value of the materials and labour done on the 10th of each month, as the work progresses, and the remainder when the work is all complete, and after the expiration of 30 days.

The Berlin R. & C. Co. set out on affidavit: The work began under the contract in April, it was found necessary to order certain extras, and about August 1st, the McNeill Co. found themselves in financial difficulties and unable to pay their workmen; work on the building almost ceased; the workmen being unable to get their pay refused to work longer. Thereupon the Berlin R. & C. Co. took possession of the work themselves, and it is probable they will have to complete the building by day labour. The estimated value of the McNeill Company's work and materials is $4,111 and 80 per cent. of that has been paid to the McNeill Co. The Berlin R. & C. Co. say it will be impossible to ascertain at the present time what will be the cost of completing the work—and that it will be impossible to ascertain what amount, if any, is justly and lawfully due until the completion of the building.

The plaintiffs having delivered their statement of claim, the defendants, the Berlin R. & C. Co., applied on affidavit setting out the above as the facts, for an order staying the action.

The Deputy Judge of the County Court in Chambers made an order staying the action as against the Berlin R. & C. Co. until the completion of the building, reserving leave to the plaintiffs to apply, if at any time it should appear to them that the company was not proceeding with the building with due diligence and reserving the question of costs.

The plaintiffs now appeal.

I am of opinion that the order cannot stand.

The learned Deputy Judge is said to have proceeded upon the ground that the plaintiffs can recover from the Berlin R. & C. Co. only the amount which on the completion of the building is due from that company to the McNeill Company. But there are two answers to such an argument:

(1) Such a question of law should not be determined in Chambers on an interlocutory application, and I do not intend to determine it now. It should either be set down for argument as a question of law arising on the pleadings under Consolidated Rule 259—or preferably determined by the Judge at the trial. In either case the question can be made the subject of appeal in the regular way.

Again, even if the law were clear the plaintiffs are entitled to prove as against the Berlin R. & C. Co., the amount of their claim against their employers—quite a different thing from proving this as against the employers themselves. Working men must be more or less liable to change their residence; and it is nothing but simple justice to enable them to have their rights determined at the earliest possible moment.

I can conceive of no good end to be attained by the order in appeal. The parties can go to trial; the amount of the claims of the plaintiffs determined; if then it be considered that the amount to be recovered from the Berlin R. & C. Co. is the statutory percentage of the amount due and payable at the end of the contract, the Judge will so declare—or if the view of the plaintiffs be accepted the law will be laid down in that sense—in either case in all probability there will be a reference to the Master to determine the amount. How the Berlin R. & C. Co. can be injured by such proceedings I cannot see.

I think the application should not have been made—and that the appeal should be allowed with costs here and below payable forthwith.

The defendants will have until Wednesday, October 9th, to plead as they may be advised.

MASTET IN CHAMBERS. OCTOBER 10TH, 1912.

RICKART v. BRITTON MANUFACTURING CO.

4 O. W. N. 112.

Particulars—Motion for—Premature.

MASTER-IN-CHAMBERS *held*, that a motion by defendants for particulars after the statement of defence had been delivered but before discovery was premature.

Smith v. *Boyd*, 17 P. R. 463, followed.

The defendants moved for particulars of certain paragraphs of the statement of claim.

C. G. Jarvis (London), for the motion.

J. G. O'Donoghue, for the plaintiffs.

CARTWRIGHT, K.C., MASTER:—The statement of defence has been delivered, but there has been no examination of the plaintiffs for discovery.

It, therefore, follows under *Smith* v. *Boyd*, 17 P. R. 463, that the motion is at least premature at present.

It was submitted that the plaintiff who is resident in the province would not be competent to give defendants the information to which they are entitled, and which is necessary for their defence.

And it was said that as the other plaintiffs were resident in the United States, it would be an expensive proceeding to examine them. This, however, may be met by the decision in *Lick* v. *Rivers*, 1 O. L. R. 57, and the defendants can urge in support of a similar order, if such is found necessary, that the plaintiffs are in default in respect of the payment of over $230 of interlocutory costs.

Without deciding anything as to that, it is enough to say at present that the motion is dismissed with costs in the cause to plaintiffs, but without prejudice to its renewal after discovery if it is still considered necessary.