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HIGH COURT OF JUSTICE.

MIDDLETON, J. OCTOBER 26TH, 1912.

STODDART v. TOWN OF OWEN SOUND.

Intervention—Application by Ratepayer for Leave to Intervene and Appeal on Behalf of Municipality—Decision of Council not to Appeal—Absence of Collusion or Improper Motive.

Motion by F. W. Millhouse, a ratepayer of Owen Sound, for leave to intervene and appeal, either in his own name or in the name of the defendants, and upon proper terms as to indemnity, from the judgment of LENNOX, J., ante 830.

W. E. Raney, K.C., for the applicant.
H. S. White, for the plaintiff.
Joseph Montgomery, for the defendants.

MIDDLETON, J.:—The action was brought by a ratepayer for the purpose of having it declared that the submission of a by-law to repeal a local option by-law in January last was, by reason of the failure to observe the provisions of the Municipal Act, a nullity, and does not operate to prevent the submission of a repealing by-law in January next, if the municipality see fit.

At the trial, judgment was given in the plaintiff's favour for the relief indicated.

The municipal council have considered the question of appealing from the judgment, and have determined to accept the decision. There is no suggestion that the decision of the council was arrived at from any other than proper motives. The resolution to acquiesce in the decision of the Court was moved by a

member of the council who is an open and strong supporter of local option, and was passed without any opposition.

No authority was cited which would authorise the making of the order now sought. Re Mace and County of Frontenac, 42 U.C.R. 70, manifestly falls very far short of what is now desired.

Upon principle, I think the motion fails. Under our municipal system, the municipality is represented by the municipal council. Municipal action or inaction must be determined by its voice alone; and where a municipality has by its municipal council determined upon the course to be taken in connection with a particular piece of litigation, that determination binds all the ratepayers.

There is nothing unique or peculiar in this particular action to take it out of the general rule. The council, elected by a majority of the electors, has determined against an appeal. It is not open to an individual ratepayer or to a group of ratepayers, even if they constitute a majority, to overrule the decision of the constituted authority. The whole idea is repugnant to the established system of municipal government. If I allowed intervention here, why might I not allow a ratepayer to intervene in a "damage action" where he thought the verdict against the municipality was unjust—if the council determined not to appeal?

The motion fails, and must be dismissed with costs.

RIDDELL, J. OCTOBER 26TH, 1912.

McLARTY v. TODD.

Assignments and Preferences—Assignment for Benefit of Creditors—Claims on Estate—Wages—Preferential Claim—Extent of—10 *Edw. VII. ch.* 72, *sec.* 3.

An action brought by the assignee of a claim for wages against two companies and their assignee for the benefit of creditors.

L. F. Heyd, K.C., for the plaintiff.
J. P. MacGregor, for the defendants.

RIDDELL, J.:—I held that the plaintiff had established by evidence that his assignor had been duly employed by the com-

panies, and I gave judgment for the amount of the balance of the claim.

As against the assignee of the companies, the question arose as to the amount for which the said claim is a preferential claim under R.S.O. 1897 ch. 156, sec. 2, now 10 Edw. VII. ch. 72, sec. 3. I should not have thought it necessary to write a judgment, had I not been informed by counsel that it has been, by Referees, etc., more than once ruled that the amount of the preference is to be found by taking the amount of the last three months' wages and deducting therefrom the amount of wages paid during the same time. This I think an error: the assignee is to pay "the wages of all persons in the employment of the assignor . . . not exceeding three months' wages . . ." It is not the balance of the last three months' wages, but "the wages . . . not exceeding three months' wages." In other words, the servant may venture to leave in the master's hands a balance of his wages, so long as that balance does not exceed three months' wages.

The wages were $35 per week—3 months=13 weeks at $35 per week—$455.

Accordingly, of the amount of $873.77 found due at the trial, the plaintiff will have a preference to the amount of $455 and a claim for the remainder.

The plaintiff is also entitled to his costs as against the defendant assignee, although the assignee on the facts before him was justified in disputing the claim: Zimmerman v. Sproat, 26 O.L.R. 448.

DIVISIONAL COURT. OCTOBER 26TH, 1912.

BURNEY v. MOORE.

Way—Private Way—Conveyance of Landlocked Lot—Agreement to Convey Right of Way when Survey Made—Vendor and Purchaser—On whom Duty of Making Survey Rests—Tender of Conveyance — Waiver—Action—Costs—Trifling Value of Right in Question—Importance to Parties—Duty of Court.

Appeal by the plaintiffs from the judgment of the Junior Judge of the District Court of the District of Nipissing, dis- ant to make a survey and deliver a conveyance of a right of missing the action, which was brought to compel the defend- way, or for damages.

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

R. McKay, K.C., for the plaintiffs.

G. F. Shepley, K.C., for the defendant.

RIDDELL, J.:—In April, 1906, the defendant entered into an agreement with the plaintiff Thomas Burney for sale to him of a part of lot 10 in the 5th concession of the township of Burke, which is wholly landlocked. The agreement—it is under seal—concludes: "The party of the first part further agrees to give the party of the second part a right of way across lot number 11 . . . from the Haileybury and New Liskeard Road to the property above described, and agrees to make a grant of such right of way when and as soon as the same is surveyed."

The agreement was transferred by Burney to his wife, the other plaintiff—and the defendant duly conveyed the land to her on the 6th April, 1907.

Before the conveyance was made, and shortly after the execution of the agreement, the parties agreed as to the location of the way—the only convenient location, it would seem, on the servient tenement. No survey was made and no conveyance given.

Some time thereafter, the defendant sold part of the land over which ran the way, to one Gillies: but the continual use of the way by the plaintiffs was not interfered with by Gillies. It would seem that the female plaintiff has attempted to sell the property, but failed, as the proposed purchasers objected that she "had no legal right to the right of way." The property is worth about $500 if the right of way be secure, and it is not far from Haileybury.

According to the evidence of Mrs. Burney, which is not contradicted, in the spring of the year 1910 the defendant absolutely refused to give her a grant. He said: "I can't give you the right of way now, because I sold it, but later on I will give you the right of way over another portion of the land." "I told him then that what he proposed to give at a future date was also Mr. Gillies'. This was in May last, after I threatened action, but before the writ was issued."

This action was begun in May, 1910, both husband and wife suing as plaintiffs. They set up the agreement; that the defendant, in 1906, laid out the right of way pursuant to the agreement, and placed them in possession thereof; that they have daily used it: that they have requested him to have it "surveyed and conveyed as agreed;" but the defendant neglects and re-

fuses so to do, and, on the contrary, has sold it, but admits that he has the power to obtain it from his grantee. They claim a survey and grant, or damages.

The defendant admits the agreement, the setting apart of the right of way, and the use thereof by the plaintiffs with his assent; but alleges that the obligation to survey rests upon the plaintiffs, and that he is not called upon to make a grant until after the survey has been made. He says he was not tendered a deed, but is willing to execute a proper deed if tendered to him. . . .

The ground of the decision of the County Court Judge is, that "the plaintiffs could not . . . be excused from the duty of preparing and tendering a conveyance of the right of way for execution by the defendant before action could be brought; and, if it were necessary for the preparation of such conveyance that a survey be made, then the survey should be made by them."

I am of opinion that the judgment is wrong on both points.

Assuming, without deciding, that this conveyance of the right of way should have been prepared by the purchaser, I think that, as matters were at the date of the writ—and in strictness that is what we must consider—the tender of the conveyance was waived. McDougall v. Hall (1887), 13 O.R. 166, decides that where, if a tender had been made, it would have been refused, the tender should, since the Judicature Act, be considered as waived—at least if that appear from the pleadings. I do not think there is any need to wait for the pleadings to determine whether it is safe to proceed without formal tender if it sufficiently appear that a tender would have been a mere useless formality.

In the present case, too, the defendant should not be allowed to be in better case than he would have been had his representations upon or at least after which the action was brought been true. He said that he could not give a deed because he had sold the land. If he had sold the land so as to incapacitate himself from giving the deed, it is plain that no tender of the conveyance was necessary before bringing an action on the agreement: Knight v. Crockford (1794), 1 Esp. 190; Lovelock v. Frankly (1846), 8 Q.B. 371.

But there is more in the case. The agreement provides for the defendant giving a deed of the right of way "when and as soon as the same is surveyed." It is plain that the survey was required not that the parties should know the position on the

ground, but that a proper conveyance could be made; and it is equally plain that no proper conveyance could be made without a survey. The parties might have agreed to define the extent of the right of way by fences, stakes, or other marks on the ground, but they chose—and wisely chose—to have the right of way defined by survey.

Where one person is entitled to a right of way over the land of another, the precise location not having been determined, it is the grantor who has the right and duty to select the precise location, to "define" the way. This is so in rights of way by necessity: Clarke v. Rugge, 2 Roll. Abr. 60, pl. 17, where it is said, "The feoffor shall assign the way where he can best spare it;" Packer v. Welsted, 2 Sid. 111; Pearson v. Spencer, 1 B. & S. 511, 3 B. & S. 761; Bolton v. Bolton (1879), 11 Ch. D. 968; and also in cases of contract: Deacon v. South Eastern R.W. Co. (1889), 61 L.T.R. 377; Metropolitan R.W. Co. v. Great Western R.W. Co. (1900), 82 L.T.R. 451; and once the way is "defined," it cannot be changed by the grantor: Deacon v. South Eastern R.W. Co., supra.

It is, to my mind, clear that the parties agreed that the way should be "defined" by a survey. This, I think, made it the duty of the defendant to have the survey made. When he refused, I think an action lay at the instance of the female plaintiff. Moreover, a survey being a prerequisite to a conveyance, the refusal to make a survey was a waiver of the conveyance.

We need not consider whether the defendant should have the deed prepared, as the plaintiffs express their willingness to have that prepared at their own expense.

I think the defendant must have a proper survey made of the way already agreed upon (which is said to be 16 feet wide), and furnish the correct description to the plaintiffs, and pay the costs of the action and appeal. He must also execute a proper deed of conveyance if and when tendered him on behalf of the plaintiffs—if the parties cannot agree, the conveyance to be settled by the Judge.

Some argument was advanced—perhaps it is better to say some regret was expressed—that the Court should be troubled with this matter, which was described as petty. For my part, I have no sympathy with the suggestion. It should not be considered beneath the dignity of the Court to consider on its merits any question properly before it—and contracting parties should not be allowed wilfully to break their contracts because the damage is small.

Leave should be reserved to the plaintiffs to bring an action for damages, if for any reason the defendant fail to make title.

BRITTON, J.:—I agree.

FALCONBRIDGE, C.J.:—I agree in the result.

Appeal allowed.

MIDDLETON, J., IN CHAMBERS. OCTOBER 29TH, 1912.

CAMPBELL v. VERRAL.

Solicitor—Cross-examination upon Affidavit Made in Cause—Right to Professional Witness-fee—Tariff of Disbursements, Item 119—Practice—Subpœna—Refusal to be Sworn.

Motion by the plaintiff for an order for the committal of Mr. Phelan, a solicitor, for his failure to submit himself for cross-examination upon an affidavit made by him in this action, which was brought subsequently to the action of Campbell v. Taxicabs Verrals Limited, ante 28.

J. MacGregor, for the plaintiff.
J. M. Godfrey, for Mr. Phelan.

MIDDLETON, J.:—The real question is the right of Phelan to demand payment of a professional witness-fee, and I propose to deal with the motion upon that basis.

Mr. MacGregor argued that the objection was taken prematurely, and that Mr. Phelan ought to have been sworn before demanding the fee in question. I do not agree with this; but, even if Mr. MacGregor be right, this defect in Mr. Phelan's conduct is more than offset by the fact that the subpœna served was not in any authorised form, and merely commanded attendance before "John Bruce, special examiner, on Friday the 4th October, 1912, at half past nine o'clock in the forenoon," without specifying, as it should, the purpose for which attendance was to be made. The subpœna did not require more than "attendance."

The right to a professional fee seems clear. Evidence upon a motion may be given by affidavit (Con. Rule 489); but the deponent may be cross-examined (Con. Rule 490); the witness being "required to attend in the same manner as, and his exam-

ination shall be subject to the same rules as apply to, the examination of a party for discovery" (Con. Rule 492.) The examination may, therefore, take place when the witness is "served with a copy of the appointment and a subpœna, and upon payment of the proper fee" (Con. Rule 443.) The proper fee is indicated by the disbursements tariff item 119: "Barristers and solicitors . . . other than parties to the cause, when called upon to give evidence, in consequence of any professional service rendered by them . . ., per diem $4."

The affidavit upon which cross-examination is sought is an affidavit made by a solicitor as solicitor, relating entirely to the proceedings in this cause and another cause in which the plaintiff herein was plaintiff and the defendants were "Taxicabs Verrals Limited." All the solicitor's knowledge was acquired by him in the course of the rendering of professional services; and, manifestly, his evidence is given by reason of professional service rendered by him.

Before the examiner, the position taken was that when a solicitor makes an affidavit "he is entitled only to the ordinary fee of $1." This is clearly untenable.

The motion must be dismissed with costs, which I fix at $15. If the applicant desires, she may have an order directing that, upon payment of the costs and the proper witness-fee, $4, Mr. Phelan do attend and submit to examination at a time to be appointed.

KELLY, J. OCTOBER 29TH, 1912.

TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.

Assessment and Taxes—Lien on Land for Unpaid Taxes—Action for Declaration of Lien and Enforcement by Sale—Assessment Act, sec. 89—Effect of—Declaratory Judgment—Consequential Relief—Acceptance of Promissory Notes for Taxes—Abandonment of Other Remedies—Validity of Assessments—Non-compliance with sec. 22 of Act—Description of Properties—Registered Plans—Subdivisions—Evidence.

Motion for a declaration that taxes to the amount of $9,531.30, for the years 1906 to 1910, both inclusive, on a very large number of parcels of land, were charged by special lien on those parcels in priority to every other claim, privilege, or incum-

brance of every person (including the defendants) except the Crown; and for payment by the defendant or some of them of that sum and interest and the costs ($32.50) of an order permitting the action to be brought; and, in default of payment, to enforce the lien by sale; and also for payment by the defendants the Trusts and Guarantee Company Limited and the liquidator of the defendants the Imperial Land Company Limited of all sums received by them for rents and profits, insurance, or purchase-money, on any of the lands in question.

The action was tried before KELLY, J., without a jury, at North Bay.

G. H. Kilmer, K.C., and J. M. MacNamara, K.C., for the plaintiffs.

S. H. Bradford, K.C., and J. Bradford, for the defendants the Imperial Land Company Limited and E. R. C. Clarkson.

H. W. Mickle and A. D. Armour, for the defendants the Trusts and Guarantee Company Limited.

KELLY, J.:—On the 25th June, 1909, on petition of the plaintiffs, an order was made for the winding-up of the defendants the Imperial Land Company Limited, and the defendant Clarkson was appointed liquidator of that company.

The defendants the Trusts and Guarantee Company Limited are trustees under a mortgage deed of trust to secure bonds issued by the defendants the Imperial Land Company Limited.

Amongst the defences set up are: that no taxes are due as claimed by the plaintiffs; that the assessments for the various years for which the claim is made were not valid; and that the imperative requirements of the Assessment Act and Municipal Act have not been complied with.

On the 1st September, 1908, the plaintiffs accepted from the defendants the Imperial Land Company Limited their promissory notes of that date, as follows: $500 at 3 months; $500 at 6 months; $500 at 9 months; $500 at 12 months; and $957.93 at 12 months; all of which notes bore interest at six per cent. per annum. These notes were given and accepted for the taxes on the lands in question for the years 1906 and 1907.

On the 1st February, 1909, the plaintiffs obtained judgment against the defendants the Imperial Land Company Limited for the amount of the first note; and on the 30th March, 1909, judgment for the amount of the second note.

The defendants contend that, even if the plaintiffs became entitled to a lien in respect of the taxes, they have lost their right thereto for the years 1906 and 1907, by accepting the notes.

On the 5th October, 1908, the plaintiffs passed a resolution instructing the tax collector to mark as paid all taxes owing by the defendants the Imperial Land Company Limited, on the collector's rolls for 1906 and 1907, as the same had been settled by notes; and entries were made in the collector's roll for 1907 accordingly. The collector's roll for 1908 does not shew any arrears for these properties.

The defendants set up, too, that such other persons as may be owners of or interested in any of the lands in question should be added as parties to these proceedings.

On the opening of the trial, counsel for the plaintiffs agreed that, if it should be found that any of the lands in respect of which the plaintiffs claimed a lien were owned by any other person or persons not parties to these proceedings, the plaintiffs' claim for a lien on the lands so owned by others should be abandoned in this action, the plaintiffs reserving their rights to proceed against such other person or persons and the lands owned by them by separate actions or proceedings.

In the first place, is this a case where the Court should be asked to make a declaratory order in respect of the special lien claimed by the plaintiffs?

The plaintiffs not only ask a declaration as to a lien, but also that, in default of payment of the amount claimed, the lien should be enforced by sale of the lands. They rely for relief on sec. 89 of the Assessment Act, 4 Edw. VII. ch. 23. . . .

This cannot be taken to mean that the municipality having such lien has the right to enforce it by sale in such manner as to interfere with or deprive the owner of the right of redemption given by the Act, in the event of a sale for taxes.

The Assessment Act has provided a means of realising taxes which are three years in arrear, and has also given the owner the right to redeem within a year after such sale.

The intention of the Legislature in making the "taxes due" a special lien on the lands was not to give a new or additional means of realising, which might have the effect of accelerating the time for selling, shortening the time for redemption, or otherwise interfering with such right, if not altogether depriving the owner of it, but rather to give the municipality security for such taxes in priority to other claims and incumbrances as mentioned in the Act, until a tax sale or until payment before such sale.

This is not a case where, if a declaratory order were made, consequential relief could be given. Following what was laid down in Mutrie v. Alexander (1911), 23 O.L.R. 396, and for the

reasons given at p. 401 and in the authorities there cited, I refuse the declaration asked by the plaintiffs.

As to the claim for payment by the defendants of the taxes said to be due and the costs of the order: on the evidence submitted, I think the plaintiffs must fail.

So far as the years 1906 and 1907 are concerned, the plaintiffs accepted the company's promissory notes and relied upon that form of payment; and whatever remedy they have against the defendants for the taxes for these years is upon the notes and the judgments obtained thereon.

The defendants, too, deny that any taxes are due for any of the years for which the plaintiffs make claim, on the ground, amongst others, that the description of the lands contained in the various assessment rolls and collectors' rolls "are ambiguous, indefinite, and incapable of being identified upon the ground."

Apart from other objections and apart also from any other errors or irregularities which may have occurred in making the assessments for these years (the effect of which I am not now taking into consideration), the evidence submitted by the plaintiffs does not shew that there was a compliance with the provisions of sec. 22 of the Assessment Act. . . .

The registered plans shewing the subdivisions of the property were not produced at the trial. The only guide before the Court as to these subdivisions is what was said to be a copy of the registered plans or subdivisions, but this copy was not proven or admitted to be correct, nor is it shewn that the lots or subdivisions mentioned in the assessment rolls are those shewn on the registered plans.

In the absence of some positive evidence that the lots and subdivisions referred to in the assessment rolls are according to the registered plans, I am unable to say that the assessment comply with the requirements of clauses (c) and (d) of sub-sec. 1 of sec. 22 of the Act.

After the trial, opportunity was given counsel to produce the original plans, or, in some satisfactory way, to prove the correctness of the copy produced at the trial. This, however, was not taken advantage of; and I have been left to deal with that part of the evidence in its unsatisfactory and incomplete form.

Even assuming that the copy of the plan produced at the trial shews correctly the subdivision into lots and blocks, there is clearly, in many instances, a want of compliance with the requirements of sec. 22, as, for example, where two or more lots or parcels were included in one assessment, or where the lands

intended to be assessed were not designated with such certainty as to enable them to be readily defined or identified, or where the assessment refers to a part of a lot or parcel without designating that part by its boundaries or other intelligent description.

The effect of this non-compliance, or the failure or neglect to prove that there was a compliance, is to render invalid the assessments on the properties intended to be assessed: Blakey v. Smith (1909), 20 O.L.R. 279. Failure or neglect to shew a compliance with the Act in this respect makes it impossible to hold that there are "taxes due" upon these lands which "may be recovered" from the defendants.

What the plaintiffs are seeking to collect from the defendants is taxes for the years mentioned. To impose a tax legally, there must have been a valid assessment. A taxing Act must be construed strictly: Cox v. Roberts (1878), 3 App. Cas. 473. The making of a valid assessment is an imperative requirement.

In Love v. Webster (1895), 26 O.L.R. 453, Armour, C.J., held a tax sale to be invalid when an imperative requirement of the Act had not been complied with; and the decision of a Divisional Court in Waechter v. Pinkerton (1903), 6 O.L.R. 241, is to the same effect.

Section 89 of the Assessment Act presupposes that taxes exist and are due upon the lands; and, in order to shew that taxes have been properly imposed and do exist and are due, there must have been a valid assessment and the fixing of a tax. It cannot be said that a tax exists or is due unless it is shewn that in making the assessment the imperative requirements of the Act have been complied with.

I, therefore, dismiss the action with costs. This, however, is not to be taken as affecting whatever rights the plaintiffs may have to recover upon the notes given for the taxes of 1906 and 1907 or the judgments which they have obtained on any of these notes.

The defendants the Trusts and Guarantee Company Limited claim payment to them of such rents as the plaintiffs may have received from tenants of any of the properties under the order of Mr. Justice Middleton of the 17th May, 1911. If any such rents have been received, they will be paid over to such of the defendants as the Official Referee before whom the proceedings for liquidation of the defendants the Imperial Land Company Limited are pending, finds entitled thereto. He will also ascertain the amount to be so paid, if the parties fail to agree.

RIDDELL, J. OCTOBER 29TH, 1912.

KENNEDY v. HARRIS.

Contract—Mining Property—Bonâ Fide Claim—Release—Option—Partnership—Liability—Right of Action—Time of Accrual—Money Payment—Penalty.

Action by a mining prospector to recover $5,000 under an agreement with the defendant.

W. N. Tilley, for the plaintiff.
J. E. Day, for the defendant.

RIDDELL, J.:—The plaintiff had set up a claim in good faith to a certain mining property, and had commenced and was prosecuting an action to enforce it. The land was also claimed by a company. On the 30th March, 1911, the company and the defendant entered into an agreement which provided for the defendant obtaining a release of the plaintiff's claim and a discharge of his action—and the company, in consideration thereof, gave the defendant an option for $14,000 worth of work to be done on the property and $50,000 cash, as well as paid-up stock to the amount of $300,000 in a company to be formed by the defendant, with a capitalisation of not more than $2,000,000. The defendant was to spend $2,000 on development work, etc., before the 30th June, and $2,000 in each of the months of July, August, September, October, November, and December—or he might pay in cash to the company $500 for each of the months of June and July. The cash, $50,000, was to be paid on or before the 1st January, 1912, and the stock to be delivered not later than the 1st February. Time was made of the essence of the contract—and the defendant was given also an option to purchase, for money payable in stated instalments.

On the same day, the plaintiff and defendant entered into a contract which contained recitals of the plaintiff's claim, the agreement with the company, and continued:—

"And whereas one of the considerations of the said option is that the said Kennedy shall release his caution and all his claims on the said lands, it being agreed that he shall be a partner with Harris in obtaining the said option and entitled to a one-half of all the profits, benefits, and advantages derived or to be derived by the said Harris under and by reason of the said option or by reason of acquiring selling or dealing with the said lands.

"And as a further consideration for the said Kennedy this day releasing the said lands from his caution and his other rights in an action now pending . . . which action shall be dismissed without costs, Harris is to agree with Kennedy that he shall, in case the annexed option is not carried out and completed, that he will on or before the 1st day of June, 1912, pay to Kennedy the sum of five thousand dollars."

The contract then provides that (1) the parties shall be partners, (2) the defendant shall be the selling agent while not in default; "but no sale . . . is to be had or made by Harris without Kennedy's written consent unless Kennedy's share of the profits shall equal $7,500, which shall be guaranteed by Harris in the ultimate result of the transaction."

"3. Harris is to furnish all the moneys required for the purpose of carrying out the said option, and, in case he fails to carry out the said option and complete the purchase, he is then, within one month after default, on or before the 1st day of June, 1912, to pay to Kennedy the sum of five thousand dollars.

"4. Harris shall make the election and make each of the payments called for by the annexed option at least one month prior to the date named for such payment, work, or notice or election, and shall at once notify Kennedy in writing where and when such payment was made. If Harris fails in carrying out the said option, or in doing the work or making the election or in making the payments called for thereby or thereunder, as herein set out, Kennedy shall thereupon be entitled to exercise the said option for his own benefit, as to him seems best, and Harris shall have no rights or interest in said option or thereunder."

"5. Kennedy agreed to release his caution and dismiss his action.

"6. If it becomes necessary in carrying out this proposed purchase, and the parties shall mutually consent to any changes, or if they cannot agree in the changes, the dispute between them shall be settled by W. N. Ferguson, and his decision shall be final as to what changes shall be made."

There are other provisions not material to be mentioned.

The plaintiff discharged his caution and action; the defendant went on with his option. In July, he asked the plaintiff to permit a change in the work, which, by the contract between them, was to be done in July, but by the "option" could be done in August. The plaintiff refused unless $2,000 were paid into the bank as security that the work would be done. The defendant refused this. Mr. W. N. Ferguson, being spoken to, said that he thought the plaintiff's condition perfectly fair.

Mr. Ferguson was never applied to, to make or decide any changes in the contract under clause 6 above quoted. It would have been difficult, but not at all impossible, for the defendant to have done the work in July as agreed. The evidence of the plaintiff is to be fully accepted.

All parties knew that the company rued their bargain, and would get out of it if they could. Accordingly, when the defendant failed to do the work in July, the plaintiff made up his mind to do it, and took tools on the ground for that purpose—this, of course, under clause 4. He also tried to sell, but failed—and he did not in fact do the work required or any of it.

The company cancelled their option, and the plaintiff sues for $5,000 and interest from the 20th October, 1911. The writ was issued on the 29th March, 1912.

The statement of defence sets up that it became necessary to make changes in the contract, but the plaintiff refused to submit the matter to Mr. W. N. Ferguson; that the defendant was prevented from doing the work by a conflagration; that the $5,000 is a penalty; that the plaintiff suffered no damage; and that, in any case, there is nothing payable till June, 1912; and, therefore, the action is premature.

The plaintiff joins issue.

I find, upon the evidence, that there was no refusal or request to submit to Mr. W. N. Ferguson; no prevention of the work by the conflagration; and the questions of law now remain.

In addition to the defences set up in the pleading, another was raised at the trial, viz., that the provisions of clauses 3 and 4 are alternative—and the plaintiff has taken that relief given by clause 4.

An examination of the contract shews its purpose. The defendant was to do the work, etc., a month before the time that his option with the company called for; so that, in case he failed, the plaintiff might do it and keep the option alive. In that case, however, he would keep it alive for his own advantage only; and, while the language is used in clause 4, "If Harris fails in carrying out the said option," etc., it is obvious that what is meant is the acts necessary to keep the option alive during its contemplated currency up to the end of December—otherwise the provision that, on such default, Kennedy was to exercise the option for his own benefit would be wholly nugatory. But clause 3 contemplates something quite different. In the recital it is provided that the defendant is to agree with the plaintiff that "he shall, in case the annexed option is not carried out and completed, . . . pay to Kennedy the sum of $5,000." There is

in clause 3 an agreement which is inserted to implement this. But the express agreement goes further, and provides that the defendant shall, "in case he fails to carry out the said option and complete the purchase . . . within one month after default, on or before the 1st day of June, 1912, pay to Kennedy the sum of five thousand dollars." I think this contemplates the final failure of the defendant to complete the purchase: and that it is quite independent of the provisions of clause 4. Whether, had the plaintiff succeeded in selling, the defendant would still have been liable, is a curious question, but we need not consider it here.

I do not think that the liability of the defendant to pay the $5,000 arose so long as the option was in existence, but that the right of action accrued one month after the company cancelled their option—which was well before this action began.

Nor do I think that this sum is due only on the 1st June, 1912; clause 3 is perfectly specific.

Nor is it a penalty. The Divisional Court has so recently dealt with the question of penalty aut non, that I need not further discuss it: McManus v. Rothschild (1911), 25 O.L.R. 138.

The plaintiff will have judgment for the sum of $5,000 (without interest) and costs.

In case of conflict, the evidence of the plaintiff and of Ferguson is to be given full credit.

BRITTON, J. OCTOBER 29TH, 1912.

*MORRISON v. PERE MARQUETTE R.R. CO.

Railway—Breach of Statutory Duty—Neglect to Furnish Suitable Accommodation for Passengers at Station—Absence of Station-house—Exposure of Passenger to Cold—Dominion Railway Act, secs. 2(31), 151, 167, 258, 284—Damages—Remoteness—Findings of Jury.

Action for damages for injury and illness caused to the plaintiff by reason of the defendants not providing proper accommodation at Marshfield station. There was no station-house; and the plaintiff alleged that he caught cold on the 20th July, 1911, in the evening, while waiting for a train which was late.

*To be reported in the Ontario Law Reports.

The action was tried with a jury; and the jury found that the illness of the plaintiff was occasioned by reason of the absence of a station-house at Marshfield station; and assessed the plaintiff's damages at $1,500.

J. H. Rodd and W. G. Bartlett, for the plaintiff.
E. A. Cleary, for the defendants.

BRITTON, J. (after setting out the facts) :—The liability, if any, depends upon the following sections of the Dominion Railway Act:—

Section 258, sub-sec. 2. In this case there had been location of a station.

There is no doubt about the powers of the railway company to provide the necessary accommodation. See sec. 151, sub-sec. (g); sec. 167, sub-secs. 1 and 2.

Section 284, sub-sec. 1: "The company shall, according to its powers,—(a) furnish . . . at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway." "Traffic" means the traffic of passengers, goods, and rolling stock: sec. 2, sub-sec. 3.

Section 284, sub-sec. 7, renders the company liable to an action at the instance of any person aggrieved by the neglect of the company to comply with the requirements of this section.

I am of opinion that the fact of the Board of Railway Commissioners for Canada having power to compel a railway company to provide a station at any place on the road where required, as proper accommodation for the traffic on the road, does not affect the question of the defendants' liability in such a case as the present.

It was objected by the defendants that the plaintiff was not entitled to recover, as the damages were too remote.

If the plaintiff's right of action depends only upon a breach of contract—express or implied—safely to shelter and carry passengers ready to be carried and to pay their passage money at and from Marshfield, the objection may be well taken. The injury to the plaintiff for which he seeks compensation is not such an injury as can fairly be considered to have been within the contemplation of the parties as the natural result of the breach by the defendants of their duty under a contract merely safely to receive and carry passengers. The plaintiff's right of action is because of a breach of a statutory duty cast upon the defendants. If the plaintiff has suffered from the breach of

duty—and the jury have found for the plaintiff—then the plaintiff is entitled to the actual damages sustained by him, and that amount the jury finds to be $1,500. The plaintiff says he caught the cold from which he became ill on the evening of the 20th July, 1911—the midsummer season of the year. . . . The plaintiff says he did take cold that evening by reason of exposure, and sickness followed. Medical evidence was that the plaintiff might have caught cold as he says; and the jury have found in his favour.

The case is, I think, distinguished from Hobbs v. London and South Western R.W. Co., L.R. 10 Q.B. 111. . . .

McMahon v. Field, 7 Q.B.D. 591, was an action for breach of contract to find suitable stabling for horses. The horses took cold from exposure, and it was held that, in such a contract, damages from that cause were not too remote.

Grinsted v. Toronto R.W. Co., 21 A.R. 578, 24 S.C.R. 570, is in the plaintiff's favour.

Judgment will be for the plaintiff for $1,500 with costs.

RIDDELL, J., IN CHAMBERS. OCTOBER 30TH, 1912.

RE SMITH.

Interpleader—Adverse Claims to Valuable Chattel—Form of Issue.

Appeal by the Art Museum of Toronto from an interpleader order made by the Master in Chambers.

R. C. H. Cassels, for the appellant.

McGregor Young, K.C., for Thomas Fraser Homer Dixon, the respondent.

G. Larratt Smith, for the executors.

RIDDELL, J.:—The late Goldwin Smith lived with Mrs. Goldwin Smith at "The Grange." At the time of the death of Mrs. Smith, there was at "The Grange" an autograph book containing a collection of autographs of various persons of distinction. The book continued in the drawing-room of "The Grange" until the death of Mr. Smith. Mrs. Smith made a will whereby she appointed her husband and others executors: and her husband and Mr. G. Larratt Smith took out letters probate. In

this will such provisions are to be found that it may be that Thomas Fraser Homer Dixon is the legatee of this valuable book, if it were in fact the property of Mrs. Smith. Mr. Smith also made a will, under which, it is admitted, the book became the property of the Art Museum of Toronto, if it were in fact the property of the late Mr. Smith. The executors representing the two estates stand neutral: but applied for an order to have the matter determined, as both Dixon and the Art Museum claimed the book.

The Master in Chambers made the following order:—

"1. It is ordered that the said claimants do proceed to the trial of an issue . . . to inquire whether the autograph book bequeathed by the last will and testament of the late Goldwin Smith was the property of the said Goldwin Smith at the time of his death.

"2. And it is further ordered that in such issue Thomas Fraser Homer Dixon is to be plaintiff, and the Art Museum of Toronto is to be defendant, and that pleadings be delivered by the respective parties in the same manner as in an action going to trial, and that the question of costs and all further questions be dealt with by the Judge before whom such issue shall be tried.

"3. And it is further ordered, upon the consent of both claimants, that the said autograph book remain in the joint custody of the applicants (the executors) pending the decision of the Court on the said issue."

The Art Museum of Toronto now appeals.

I do not think the issue directed by the Master is the proper one. If the book was the property of Mr. Smith, it is admitted that the Museum is entitled to it. It was in Mr. Smith's possession after his wife's death—and not as executor apparently. It was not administered by the executors as being of Mrs. Smith's estate. In the absence of other evidence, Mr. Smith must be taken to have been the owner at the time of his death, and the Art Museum its present owner. Accordingly, if an issue is to be directed at all, it is right that the Art Museum should be a party and the party defendant. But Dixon stands in a different position. He has no right to the book at all unless (1) it belonged to Mrs. Smith, and (2) he is entitled thereto under her will. He would not have any locus standi in the premises at all unless he could prove that, if the book were Mrs. Smith's, he would be entitled to it. The matter could not be determined by simply deciding "whether the autograph book . . . was the property of the said Goldwin Smith at the time

of his death." Such an issue might be sufficient if the executors of Mrs. Smith were asserting a claim, but the present is quite a different case.

What Dixon must take upon himself to establish is, that he—not simply the estate of Mrs. Smith—is entitled.

The appeal must be allowed with costs to the appellant (and the executors) in any event. The order will be amended by striking out in paragraph 1 all the words after the words "Goldwin Smith" where they first occur, and substituting the following "is the property of Thomas Fraser Homer Dixon as against the Art Museum of Toronto."

RIDDELL, J., IN CHAMBERS. OCTOBER 30TH, 1912.

HOODLESS v. SMITH.

Parties—Action for Damage to Land—Non-joinder of Co-tenant of Plaintiff—Order Requiring Plaintiff to Add Party—Penalty for Default—Stay of Trial—Delay in Moving—Costs.

Appeal by the plaintiff from an order of one of the Local Judges at Hamilton requiring the plaintiff to add his wife as a co-plaintiff, within one week, and, in default, that the action be dismissed with costs.

J. G. O'Donoghue, for the plaintiff.
E. D. Armour, K.C., for the defendants.

RIDDELL, J.:—The pleadings set up that one C.B. was the owner of a certain park lot, which he laid out in 54 lots, registering the plan; that he sold 35 of these to the C.L. company, the company in the deed covenanting, for themselves, their successors and assigns, not to erect any building with the front well within less than 6 ft. from the line of Sophia street. The C.L. company sold certain lots to A.M., who entered into similar covenants; A.M. sold to "the plaintiff and his wife, K.H., as joint tenants, and not as tenants in common," part of this property; and the plaintiff and his wife entered into similar covenants. A.M. sold thereafter to the defendants (husband and wife) other parts and adjoining the property of the plaintiff and his wife; and they entered into similar covenants.

The defendants in April, 1912, commenced to excavate a

cellar, and this to a depth below the plaintiff's brick house—and also out to the margin of Sophia street, and have erected a store there. The plaintiff claims a mandatory injunction, etc.

The defendant M.D.S. denies the allegations, and submits that the plaintiff is not the sole owner, denies any covenant but one he did not break, etc.; his wife's defence is the same.

Notice of trial was served for the assizes at Hamilton beginning on the 7th October, 1912, and the case was postponed . . . to the non-jury sittings beginning on the 18th November.

The defendants moved on the 24th October for an order dismissing the action, on the ground that the plaintiff is suing for damages to land of which he and his wife are joint tenants, without joining her as a party; . . . and an order made that the plaintiff's wife be joined within one week, and, if this were not done, that the action be dismissed with costs.

The plaintiff now appeals.

There can, I think, be no doubt that this is a case of non-joinder which is most objectionable: Daniell's Chancery Practice, 7th ed., vol. 1, p. 182; Stafford v. London, 1 P. Wms. 428. But it is argued that the application should be made at the earliest possible moment: and that is true: Sheehan v. Great Eastern R.W. Co., 16 Ch.D. 59; Scane v. Duckett, 3 O.R. 370.

Nevertheless, I cannot see how the plaintiff is hurt: and all rules of practice must, of course, be elastic.

The defendants raise in their defence that the plaintiff is not the sole owner of the land. This is probably a sufficient objection—and the plaintiff would proceed at his peril: Nobels v. Jones, 28 W.R. 726; Lydall v. Martineau, 5 Ch.D. 780. And the Court, while it would not perhaps dismiss the action (Con. Rule 206 (1)), would certainly not proceed in the absence of the co-tenant—but would order that the wife be made a party (Con. Rule 206 (2)).

I think that the order was properly made now that she be made a party; but the penalty should not be (on default) that the action be dismissed; it will be sufficient that the order be made that the action do not come on for trial unless and until the amendment be made.

I think, too, that the costs both here and below may be in the cause, in view of the delay in moving.

RIDDELL, J., IN CHAMBERS. OCTOBER 30TH, 1912.

McDONALD v. TRUSTS AND GUARANTEE CO.

Costs—Action—Reference—Trustees—Conduct of.

Motion by the defendants for an order for payment by the plaintiffs of the costs of the action and reference.

M. L. Gordon, for the defendants.
Featherston Aylesworth, for the plaintiffs.

RIDDELL, J.:—This is the aftermath of the judgment upon the appeal reported in (1910) 1 O.W.N. 886. There a Divisional Court disposed of all the issues in favour of the defendants; but it was rather suggested than claimed in evidence that the defendants as trustees had made charges against the fund which were improper. Accordingly the Court said: "If it be desired to press such a claim, the plaintiffs may have a reference to the Master at Cornwall to take their accounts as trustees. This will be taken by the plaintiffs at their own peril as to costs; if this reference is taken, the general costs of the action and of the reference will be reserved to be disposed of by a Judge in Chambers after the report . . ."

The plaintiffs took the option given them; a reference was proceeded with, and the Master found that "the defendants being chargeable by the plaintiffs with a sum of $13.97 less than the amount the defendants are entitled to credit for, the plaintiffs are not entitled to participate further in the proceeds of the sale of the mortgaged property . . ." The report has been filed and has become absolute. The defendants ask that the costs may now be disposed of.

The Divisional Court held that there was no impropriety in the conduct of the defendants, so far as was made to appear on the evidence then before the Court; the Master has found that in the other matter the plaintiffs have nothing to complain of.

I think that the plaintiffs must pay all the costs so reserved, as well as the costs of this motion, forthwith after taxation—all the costs over which I have any control.

MIDDLETON, J., IN CHAMBERS. OCTOBER 31ST, 1912.

RE RYAN AND McCALLUM.

Municipal Corporations—Regulation of Buildings—Municipal Act, 1903, *sec.* 542—*By-law Requiring Issue of Permit—Ultra Vires—Apartment House—Building By-law—Refusal of Permit—Alterations in Plans.*

Motion by Bridget Ryan for a mandatory order directing the City Architect to issue a certificate approving of the alterations of certain plans for an apartment house in course of erection at the intersection of Palmerston boulevard and Harbord street, in the city of Toronto.

W. G. Thurston, K.C., for the applicant.
C. M. Colquhoun, for the respondent.

MIDDLETON, J.:—Prior to the passing of the by-law prohibiting the erection of apartment houses in residential districts, and prior to the passing of by-law 6023 hereinafter mentioned, the applicant had applied for a permit for the erection of an apartment house. The City Architect, being of opinion that the application ought to be considered by him with reference to the law, municipal and otherwise, as it was on the date of the application, granted a permit. After the building had progressed to some extent, an action was brought, by the owner of an adjoining parcel of land, to restrain the erection of the building, as being a violation of certain building restrictions existing in respect to lands upon Palmerston boulevard.

The action was tried before Mr. Justice Teetzel, who found that the building did infringe the restrictions; and an injunction was granted restraining its erection unless the structure was so modified as to make it conform to the restrictions.

The applicant then prepared modified and amended plans, supposed to comply with the building restrictions. These plans were submitted to the City Architect, with a request for approval. This approval has been declined; and the present motion is the result.

I am not now concerned with the question whether the plans conform to the restrictions, as that matter is not before me in any shape.

There is nothing, so far as I can see, in the Municipal Act, which authorises the passing of a by-law requiring the obtaining of a building permit. The Municipal Act, sec. 542, authorises

the passing of a by-law "for regulating the erection of buildings." As I understand the law, this would enable the council to lay down certain requirements to which buildings to be erected must conform; but I cannot see that it authorises the granting of a permit.

Neither counsel desired to take this position. They asked me to deal with the motion upon the assumption of the validity of the building by-law.

This by-law, in the first place, provides, by sec. 2, that the erection of any building must not be commenced until the owner obtains a permit from the City Architect. Plans of the proposed building are to be deposited; and, when the Architect finds that they are in conformity with all civic requirements, he shall officially stamp the plans and issue the permit. Sub-section 4 provides, inter alia: "If during the progress of the work it is desired to deviate in any essential manner from the terms of the application, drawings or specific notice of such intention to alter or deviate shall be given in writing to the Inspector of Buildings, and his written assent must first be obtained before such alteration or deviation may be made." It is conceded that the alterations sought are alterations which require the assent of the Architect.

On the 15th April, 1912, a by-law was passed amending the building by-law by requiring an open space or yard area of not less than five hundred square feet for each and every suite of apartments or dwellings situated on any floor of the building. The proposed building does not comply with this requirement; and the Architect takes the position that he is justified in refusing to grant what is in effect a new permit based upon the application made on the 4th October, 1912, for permission to alter the plans.

It is also contended that, although the applicant had a vested right to erect the building, by reason of the granting of the original permit on the 20th April, 1912—notwithstanding the passing of by-law 6061 on the 13th May, 1912, prohibiting the erection of apartment houses in the district in question, as I held in City of Toronto v. Wheeler, 3 O.W.N. 1424—yet, when the building for which the permit was granted cannot be erected by reason of the judgment referred to, the Architect is justified in treating this application as substantially a new application for a building permit for an apartment house, which he is, by reason of the by-law of May, 1912, justified in declining to issue.

In the third place, it is said that, while the by-law imposes a duty upon the Architect to issue a permit when the plans conform to the requirements of the building by-law, no duty is

imposed to permit alterations; the written assent of the Architect, required by sub-sec. 4, being entirely discretionary with him.

I am of opinion that the first two grounds relied upon by the Architect are sufficient to dispose of this case. The application is for a building substantially different from that originally proposed; and, though in form an application for leave to alter the plans of the original building, it is in truth an application for a building permit; and the Architect rightly applies to that application the civic by-laws and regulations in force at its date. He was, therefore, justified in refusing to grant the permit sought under either by-law 6023 or by-law 6061.

If I am right in the view that I have indicated, that the provision of by-law 4861, requiring the issue of a permit, is ultra vires, the refusal of this application should not prejudice the applicant if she has the right to complete the building in any way which she pleases, so long as it is in conformity with the requirements of the building by-law at the time she commenced its erection on the 10th October last; this aspect of the case, by reason of the nature of the present application, not being open for consideration.

I can see no reason for withholding costs.

LENNOX, J. OCTOBER 31ST, 1912.

*ERRIKKILA v. McGOVERN.

Assessment and Taxes—Tax Sale—Action to Set aside—Evidence—Production of Tax Deed—Onus—Assessment Act, 4 Edw. VII. ch. 23, sec. 173—"Time of Sale"—Time of Execution and Delivery of Tax Deed—Conduct of Tax Sale—Sale without Regard to Value of Land Sold—Irregularities as to Assessment Roll—Absence of Affidavit—Omission Cured by sec. 172—"In Arrear for Three Years"—Sec. 121—Computation of Time—Right to Redeem—Time—Sec. 165—Construction of, when Read with sec. 172—Joint Assessment of Lots—Illegality—Validating Act, 10 Edw. VII. ch. 124—Construction of sec. 4—Sale Effected when Tax Deed Delivered—Cancellation of Tax Deed—Repayment of Taxes Paid by Purchaser—Costs.

*To be reported in the Ontario Law Reports.

Action to have it declared that the sale for taxes by the Treasurer of the City of Port Arthur to the defendant of lot 35 on the north side of John street, in that city, and the tax deed thereof, were null and void, and for an injunction restraining the defendant from alienating the land, and for delivery up and cancellation of the tax deed.

The tax sale was on the 16th November, 1908, for taxes alleged to be in arrear for 1905, 1906, and 1907. All taxes down to the end of 1904, were paid.

The sale and deed were attacked on the grounds: (1) that the sale was not properly conducted; (2) that in the year 1907 the provisions of sec. 110 of the Assessment Act, 4 Edw. VII. ch. 23, were not complied with—the affidavit made by the collector on the return of his roll not being sworn before any of the persons authorised by the Act, and being insufficient in substance and in form; and (3) that no part of the taxes for which the land was sold was in arrear for three years. The plaintiff was in possession; and his title, apart from the tax sale, was not questioned. The defendant had never been in possession.

H. S. Osler, K.C., and W. McBrady, for the plaintiff.
F. H. Keefer, K.C., and A. J. McComber, for the defendant.

LENNOX, J., referred, first, to the evidence, and said that the defendant furnished no evidence as to the imposition of the tax or other statutory conditions justifying the sale. The tax deed was put in by the plaintiff, and the defendant relied upon the recitals which it contained.

[Reference to Essery v. Bell, 18 O.L.R. 76, 79; Stevenson v. Traynor, 12 O.R. 864; Jones v. Bank of Upper Canada, 13 Gr. 74; Keenan v. Turner, 5 O.L.R. 560.]

The weight of authority seemed to be that the defendant must do more than shew that he was the grantee in a tax deed; but this case was to be decided without balancing as to the person on whom rested the onus of proof.

The learned Judge next referred to the defendant's objection that the plaintiff was barred by sec. 173 of the Act, the deed not having been questioned before some Court of competent jurisdiction within two years from the time of sale. As to this, following Donovan v. Hogan, 15 A.R. 432, he held that "the time of sale," in sec. 173, meant the time when the sale was completed by the execution and delivery of the tax deed, and this was within less than a year before action.

Dealing with the plaintiff's contention that the tax sale was not properly conducted, the learned Judge referred to Harrington v. Black, 12 Gr. 175; sec. 142 of the Act; and Sutherland v. Cotter, 18 C.P. 357; and said that, upon the evidence presented—which shewed that 103 parcels were sold at the same time, all, including lot 35, for a trifling sum, and that the Treasurer in selling paid no attention to the value of the properties—the plaintiff had no legal ground for complaint.

Upon the second ground of objection, the learned Judge referred to secs. 99, 100, 101, 102, and 110, of the Act, and said that there was no affidavit with the roll of 1906; none in connection with the roll of 1905; and, without arrears in 1905, there could be no valid sale in 1908. Yet he felt compelled to hold that this was one of the many "neglects, omissions, or errors" which sec. 172 of the Act was designed to cure.

The Judge was much impressed by the argument for the plaintiff that taxes imposed upon lot 35 for 1905, though remaining unpaid, could not be "in arrear for three years" on the 1st January, 1908, within the meaning of secs. 121, 135, and 136, and that the land could not, therefore, be legally sold in 1908; but—after referring to sec. 21 of 10 Edw. VII. ch. 88, amending sec. 121; Armour on Titles, p. 165; and Corbett v. Taylor, 23 U.C.R. 454—said that, whatever he might have done, if this were a case of first instance, he should not now attempt to put a construction upon sec. 121 so completely out of harmony with the construction impliedly adopted in a long and unbroken line of cases.

Upon another point, not taken in the argument, the learned Judge said that it appeared to be assumed at the trial that because the owner had failed to redeem within a year the right to redeem was gone, and the defendant ipso facto became entitled to a deed. But this was not the law under the statute of 1904—under it, the owner had at least thirteen months within which to redeem; and the plaintiff was still entitled to redeem by reason of the entirely new protection afforded him by sec. 165. Until the treasurer has searched the registry office and the sheriff's office, mailed a notice to the owner, and pointed out to him the right to redeem, with the amount required for redemption, and until the owner has again defaulted for thirty days, the Mayor and Treasurer have no right or authority to execute, and the tax purchaser has no right to obtain, a deed. And the onus is not upon the plaintiff to prove that this was not done. This is, by sec. 165, specifically made a condition precedent. But, in any case, the evidence shewed that sec. 165 was not complied with.

The learned Judge then dealt with the question of reconciling secs. 165 and 172; and, after referring to Kutner v. Phillips, [1891] 2 Q.B. 267; Canada Sugar Refining Co. v. The Queen, [1898] A.C. 741; Hardcastle, 4th ed., p. 216; Ebbs v. Boulnois, L.R. 10 Ch. 479; said that, so far as there was any apparent or actual conflict, he was bound to notice that sec. 172 was an old section and sec. 165 appeared for the first time in 1904; and he would read sec. 172 as if it began with the words, "subject to the provisions of section 165." The alternative would be to treat sec. 172, the earlier enactment, as repealed: Maxwell, 4th ed., p. 235.

It was not a case in which the later clause as it stood in the Act of 1904 should be taken as the will of the Legislature: City of Ottawa v. Hunter, 31 S.C.R. 7.

The learned Judge was, therefore, of opinion that sec. 165 had effect according to the ordinary meaning of its language; that it was imperative; and that, in the absence of compliance with its provisions, the tax deed conferred no title upon the defendant.

Upon the evidence, also, the Judge was not convinced that the provisions of secs. 121 and 122 of the Act were observed. These are imperative provisions, and not cured by sec. 208 and sec. 209 of R.S.O. 1897 ch. 224: Wildman v. Tait, 32 O.R. 274, and cases there collected.

The learned Judge also finds that there were no taxes legally owing or imposed upon lot 35 in the year 1905, because in 1905 lot 35 and five other lots were assessed together at a total sum of $750, and there can be no valid imposition of taxes, and no arrears can arise or accrue, under an attempted assessment of this kind. Lot 35 and other lots were laid out on a plan registered in 1901. A joint assessment is absolutely illegal; and even sec. 172 cannot save it. Reference to Blakey v. Smith, 20 O.L.R. 279, 283; Christie v. Johnston, 12 Gr. 534; Black v. Harrington, 12 Gr. 175; McKay v. Crysler, 3 S.C.R. 436.

But the defendant relied on the Act respecting the City of Port Arthur, 10 Edw. VII. ch. 124, as validating the sale, and being in effect a parliamentary conveyance of the plaintiff's land; the relevant parts being the preamble and sec. 4. The learned Judge was of opinion that the construction placed upon the words "a sale" in Donovan v. Hogan, 15 A.R. 432, should be followed; and, if followed, sec. 4 did not apply, because there was no deed, and consequently, no sale, until the 19th January, 1910. Again, while it was clear that the Legislature intended to do away with the effect of many irregularities, errors, and omissions of the municipality and its officials, the Legislature did

not intend in this case, any more than in the case of sec. 172 of the general Act, to interfere in the slightest degree with the fundamental requirement of every valid tax sale, namely, the existence of legally imposed taxes three years in arrear.

The section is awkwardly worded; but it is the language of the petitioners, to be construed most strongly against them; and to take away the property of another it must be specific and clear, to all intents and purposes. It is not to be presumed that the Legislature intended confiscation, which this would be if taxes were not in arrear, or to encroach upon the rights of others, unless the intention were expressed in terms free from doubt: Western Counties R.W. Co. v. Windsor and Annapolis R.W. Co., 7 App. Cas. at p. 188; Commissioners of Public Works v. Logan, [1893] A.C. 355. And it is to be presumed that the Legislature does not intend to make alterations in the law beyond what it explicitly declares: Arthur v. Bokenham, 11 Mod. 150; or to overthrow fundamental principles or depart from a general system of law, without expressing its intention with irresistible clearness; and such effect cannot be given to general words, however broad: cases cited in Maxwell, p. 122 et seq.

Indeed, there could be no better illustration of these rules of construction than the section itself. In the face of the provisions of sec. 139 and other sections providing for the sale of limited estates in the land, and for the reservation of the rights of the Crown, if general terms are to be taken literally—as the defendant contends—then even the rights of the Crown are set aside; because the section declares that the lands are vested in the purchaser in fee simple. . . .

[Reference to Webb v. Manchester and Leeds R.W. Co., 4 My. & Cr. 116; London and North Western R.W. Co. v. Evans, [1893] 1 Ch. 16; Davies v. Taff Vale R.W. Co., [1895] A.C. 542.]

Judgment for the plaintiff declaring that the deed in question is null and void, and for its delivery up and cancellation, and restraining the defendant from interfering with or alienating the lands in question, and vacating the registration of this deed.

As to costs, the learned Judge said that there are tax sale cases, of which Black v. Harrington, 12 Gr. 175, is an instance, in which costs have been refused to the successful party, upon the ground that the other party to the action was unconnected with the transactions which vitiated the sale. In Irwin v. Harrington, 12 Gr. 179, the plaintiff, as here, had offered to recoup

the defendant, and was allowed costs. The general rule, of course, is costs to the party vindicated.

As to the taxes for 1910, paid by the defendant, the learned Judge said that the municipality can, of course, repay these. He did not stop to consider whether they could be recovered by the defendant as paid under a mistake of fact. It was a small sum; and, as between the plaintiff and defendant, he thought it not unfair that the plaintiff should pay this sum, which he has already offered to pay; but he did not put it upon the ground that the plaintiff had been relieved from payment, as he had already decided that this was not a charge upon his land.

The plaintiff to have full costs of the action, less $15.05 paid by the defendant, with interest at ten per cent. from the date of the auction sale.

FALCONBRIDGE, C.J.K.B. NOVEMBER 1ST, 1912.

PETTIT v. BARTON.

Promissory Note—Action on—Defence—Note Given as Evidence of Debt and for Accommodation of Plaintiff—Onus—Failure of Proof on Facts—Consideration.

Action on a promissory note.

E. G. Porter, K.C., for the plaintiff.
E. M. Young, for the defendant.

FALCONBRIDGE, C.J.K.B.:—The second paragraph of the statement of defence is bad in law, bearing a strong family resemblance to the original defence in Clark v. Union Stock Underwriting Co., 13 O.L.R. 102; affirmed in appeal, 14 O.L.R. 198.

But, treating paragraph 2 as a matter of inducement only, paragraph 3 says (eliminating some allegations which are also bad in law) that the defendant received no consideration, value, benefit, or profit from the said transaction, and that he signed the said note only as evidence of debt and as an accommodation to the plaintiff, etc.

I received all the evidence in the case subject to objection; and I find that, apart altogether from the legal difficulties in the defendant's way, he has failed in proof of the facts, the onus being, of course, upon him. The plaintiff swears that he refused to lend the money to Wilson, but was willing to do so to Barton. The defendant contradicts this, but the defendant's

contradiction involves the contradiction of the two writings, the note sued on and the cheque for $2,000, given by the plaintiff to the defendant. The defendant is a man of intelligence, and apparently an alert man of business, so that one would expect him to refuse to give his note as a mere temporary agreement, when his receipt would answer every purpose. The large amount of interest agreed upon (twenty per cent. for four months) made no difference to the defendant, as he expected Wilson, who was his brother-in-law, to make it good.

Then, eight days after the making of the note, the defendant brought to the plaintiff what he calls "a short form of receipt," which would, if the defendant's account of the transaction were accurate, entitle him to have his note delivered back to him. The plaintiff refused to accept the receipt, saying that he had the defendant's note, and that was all he wanted. That was surely the time for the defendant to insist on getting back his note; but he apparently accepted the situation and allowed that position of affairs to remain until this action was brought.

There were efforts made to get the money from Wilson. This is not at all inconsistent with the plaintiff's position, as he would, admittedly, prefer to save the defendant harmless. The defendant sued Wilson in the Manitoba Court, and got judgment against him, in his own name, for this debt. Wilson is now an undischarged bankrupt.

When the plaintiff threatened suit, the defendant apparently offered no repudiation of liability, but went to the plaintiff and to his solicitor, and offered security.

The defendant entirely fails to shew absence of consideration.

As to the law, counsel referred to Porteous v. Muir, 8 O.R. 127; Woodbridge v. Spooner, 3 B. & Ald. 233; Falconbridge on Banking and Bills of Exchange, p. 431; Abrey v. Crux, L.R. 5 C.P. 37; McNeill v. Cullen, 37 N.S.R. 13.

There will be judgment for the plaintiff for $2,400, with interest from the 11th day of August, 1911, and full costs of suit.

MIDDLETON, J. NOVEMBER 1ST, 1912.

JOHNSTON v. CLARK & SON.

Negligence—Electric Shock—Death of Workman—Erection of Pile-driver in Contact with Electric Wires—Negligence of Contractors—Finding of Jury—Negligence of Electric Company—Undertaking Authorised by Law—Neglect to See that Proper Precautions Taken—Liability of Municipal Corporation—Servants or Contractors—Surrender of Control—Question of Law—Damages—Costs.

The plaintiff sued, under the Fatal Accidents Act, to recover damages for the death of his son on the 18th July, 1912.

The action was tried with a jury at Owen Sound.

D. Robertson, K.C., for the plaintiff.

W. H. Wright, for the defendants Clark & Son.

G. G. Albery, for the defendants the Meaford Electric Light and Power Company.

Glyn Osler and J. S. Wilson, for the defendants the Corporation of the Town of Meaford.

MIDDLETON, J.:—Clark & Son made a contract with the Corporation of the Town of Meaford for the construction of a concrete bridge across the Big Head River. After some preliminary work had been done, it was found necessary to place piling as a foundation of one of the piers, because, instead of finding a rock bottom, quicksand was encountered.

Some negotiations took place between the contractors and those representing the town corporation—which it will be necessary to discuss more at length—resulting in an arrangement by which a pile-driver was constructed and erected by Clark & Son.

The leads of this pile-driver were thirty-five feet high; and, when it was placed in position, the head of the leads was immediately under two of the electric light company's wires, which carried a current of 2,200 volts. The upright leads had been raised against these wires, lifting them and subjecting them to considerable strain. An iron bolt passed through the head of the leads, midway between the two wires, which were eighteen inches apart. This iron bolt extended some four inches above the head, and rested upon an iron washer four inches in diameter; so that it was about six inches from the live wire on either side. The bolt supported an iron pulley or sheave, over

which passed a steel cable used in raising the hammer. This cable ran through a sheave at the base of the leads, through another sheave at the rear of the machine and some ten feet to one side, thence to the winding drum of the hoisting machine.

It passes one's comprehension how the apparatus could have been erected in this fashion without fatal injury to some one; but so dense was the ignorance of the contractor Clark and his son—a young man who said that he had successfully passed his third year examination at the School of Practical Science—that no one up to this time seems to have appreciated the danger of the situation.

The manager of the electric light company was sent for. He was indignant at what had been done, pointed out the danger of the situation, and finally acquiesced in what was proposed by young Clark, namely, that a board should be nailed upon the head of the leads, sufficiently high to carry the wires above the iron bolt. The manager then left the place, assuming that this would be adequate protection.

For some reason this board was not placed. The hammer of the derrick, weighing a ton, had been put on the ground some feet below the foot of the leads. The cable was attached to it, and the engine was started, with the intention of hoisting the hammer so that it would swing below the leads and then be placed in position. The pile-driver was not weighted nor braced; it was merely chained to the main beams, upon which it rested, these in turn resting at one corner upon some loose blocks placed on some old piles which had been cut off at a lower level.

When the strain came upon the cable, it caused the derrick to move far enough to bring the bolt above in contact with the electric wire. The electricity passed immediately, followed the cable, and killed the man operating the hoisting drum. The hammer jammed at the foot of the leads, and, as the engine was not stopped, the whole machine was pulled over to one side, and the blocks fell out below. Johnston, who had been below, attempting to get the hammer into position, started to escape by climbing up the bank. As the pile-driver swung over, the cable came in contact with an old iron stay or bolt running from one of the old piles into the bank as an anchor. Johnston grasped this rod, and received a shock which instantly killed him.

Upon these facts, those responsible might well have been prosecuted for manslaughter.

At the trial, most of the facts were not controverted, and counsel agreed upon a series of question to be submitted to the jury, to determine matters upon which there was dispute. The

jury have found negligence against Clark & Son in the erection of the pile-driver upon insecure foundations, and in working it so as to come in contact with the electric wires, and in not having it properly guyed or weighted, and in leaving the driver in contact with the wires after the conversation with the superintendent of the electric company. They have assessed the damages at $500. Upon these findings judgment must go against the defendants Clark & Son for that amount.

I submitted a question to the jury, whether, in their opinion, there was "negligence on the part of the power company in failing to remove their wires or to cut off the current after they knew of the erection of the driver." This they have answered in the negative. I take it that this means that they thought the manager of the company was justified in leaving the power on after Clark had agreed to place the board above the dangerous bolt so as to prevent a metallic contact with the wires.

Notwithstanding these findings, the plaintiff's counsel asked for judgment; basing his claim upon the theory that the electric light company, being in control of a dangerous electric current, and knowing that a condition of peril existed by reason of the unauthorised and entirely improper conduct of Clark, owed a duty to all who might be brought in contact with that dangerous current by reason of this unauthorised act, to see that such precautions were taken as would secure safety.

I do not think that this is a case falling within the doctrine of Rylands v. Fletcher, L.R. 3 H.L. 330: this not being the case of a non-natural user by the defendants of their own property and premises. It is, on the contrary, carrying on an undertaking authorised by the law of the land; and there is no liability unless negligence can be affirmatively found. The jury have found that there was no negligence. I do not think that I am in a position to say that, upon the undisputed facts, there was negligence. The case is very much like Dumphy v. Montreal Light Heat and Power Co., [1907] A.C. 454, and cannot be distinguished unless the mere fact of knowledge imposes an additional obligation.

As to these defendants, the electric company, I think the action fails, and should be dismissed with costs.

It is sought to make the Corporation of the Town of Meaford liable upon the theory that in the pile-driving Clark & Son were not contractors, but merely servants of the municipality. At the hearing, I thought that this was a question of law, and that in no possible view of the evidence could Clark & Son be regarded as other than contractors. Counsel, however, thought

that in one aspect of the evidence Clark & Son should be said to be employees, or that it would be open to the jury so to find; and, as a precautionary measure, I submitted a question to the jury, in answer to which they have found that Clark & Son were not contractors but were employees.

I retain the impression that this was a matter of law for me, and that in no possible aspect of the case is the answer to the jury justified. There was a contract for the construction of the bridge. Under this contract, the contractors probably had to do all work necessary for the completion of the structure. At any rate, they ultimately assumed the task of doing the piling. Some difficulty arose as to the remuneration. Under the contract, this had to be agreed upon before the work was undertaken, or no allowance would be made. The engineer named a sum which the contractors thought inadequate. A conversation took place with the Mayor, as the result of which the contractors went on with the work.

There is a difference in the recollection of the witnesses as to this conversation. Clark says that the Mayor said: "Go on; do the work; we will pay you what it costs, and allow $6 a day for your own time and for the use of your plant." This is as strong a way as it can be put in favour of the plaintiff; and, accepting it to the full, I think Clark & Son were still contractors, and that this can only be said to be a means of adjusting the price to be paid. Clark, not the municipality, retained dominion over the work. Clark could procure his material where he pleased and when he pleased. Clark could employ whomsoever he thought necessary, and pay such wages as he thought proper. The municipality had surrendered to him complete control of the whole undertaking; and this, it appears to me, is the true criterion.

In this view, the action fails as to these defendants, the municipality, and should also be dismissed with costs.

I was not asked to give a certificate to prevent a set-off of costs, as the amount recovered is within the County Court jurisdiction. After some hesitation, I conclude that I should certify to allow the plaintiff County Court costs without set-off. I think that the verdict of the jury is more than the plaintiff ought reasonably to have hoped to recover. The young man at the time of his death was 27 years old; had been away from home for five years; had during that time given his father $55 and some trifling presents. He seemed to have lost all interest in his home, as he worked near to it for two seasons and never troubled to go and see his parents. He was in receipt of good

wages, yet when he died he had no money except the wages due to him for the few days since the last pay-day. Had I thought the damages assessed on an illiberal scale, I would have given High Court costs. I refuse the set-off because of the gross misconduct of Clark & Son, which disentitles them to any kind of consideration.

LATCHFORD, J. NOVEMBER 2ND, 1912.

RE COLLINS.

Will — Construction — "Balance"—Discretion of Executor — Unused "Balance" Falling into Residuary Estate.

Motion by three of the heirs at law of Agnes Collins, deceased, for an order, under Con. Rule 938, determining a question arising upon the construction of the will.

W. M. Douglas, K.C., for the applicants.

G. B. Burson, for the executor.

T. F. Battle, for the devisees and legatees under the will of Anthony Collins.

LATCHFORD, J.:—The testatrix devised all her property to her executor upon trust to convert the same into money, and out of the proceeds to pay to her daughter "$400 absolutely" and to a son "$400 absolutely." "The balance," the will proceeds, "is to be paid to my husband Anthony Collins by my executor at such times and in such amounts as to my said executor may seem necessary for the proper maintenance of my said husband."

Anthony Collins died about two years after the testatrix. He had been paid certain small sums, which did not exhaust the residue. The applicants, who are three of the heirs at law of the testatrix, now ask for the construction of the will. The clause referring to the legacy to the husband of the testatrix is the only one open to question.

I think the husband was entitled, not to the whole balance or residue of the estate, but only to so much thereof as the executor thought proper to pay him. The general word "balance" is controlled by the explicit direction which follows, limiting the sums to be paid from time to time to so much as to the said executor should seem necessary for the proper maintenance of

the legatee. To adopt the words of the learned Chancellor in Re Rispin, 25 O.L.R. 633 (affirmed by the Court of Appeal, ib. 638): "The whole benefit was contingent on the bona fide judgment and volition of the executor."

There will be a declaration that the undisposed of "balance" forms part of the residuary estate of the testatrix. Costs out of the estate—those of the executor as between solicitor and client.

SUTHERLAND, J., IN CHAMBERS. NOVEMBER 2ND, 1912.

RE HOLMAN AND REA.

Criminal Law—Theft—Police Magistrate—Jurisdiction—Regularity of Proceedings—Criminal Code, secs. 665, 668, 707, 708—*Police Magistrates Act,* 10 *Edw. VII. ch.* 36, *secs.* 24, 31—*Place where Offence Committed.*

Motion on behalf of N. J. Holman for an order prohibiting G. D. Laurier, Police Magistrate in and for the Town of St. Mary's, in the county of Perth, from proceeding further in connection with a certain information or complaint laid by Holman on the 26th September, 1912, before James O'Loane, Police Magistrate in and for the Town of Stratford, in the same county, against Edgerton Rea, in which it was charged that at St. Mary's, on the 14th September, 1912, he, Rea, sold a horse, the property of one William J. Rea.

Featherston Aylesworth, for the applicant.
R. C. H. Cassels, for the respondent.

SUTHERLAND, J.:—The ground set out in the notice of motion is, that the magistrate had no jurisdiction in respect of the matter.

A civil action is pending with reference to the sale of a horse, in which William J. Rea is plaintiff and Holman and one Guest, are defendants. An examination for discovery has been had in the civil action, and the defendant Holman thereafter laid the information. The alleged theft was charged to have been committed at the town of St. Mary's. A warrant was issued on the 26th September, 1912, for the arrest of Edgerton Rea, and he was arrested on that day. He appeared before Police Magistrate O'Loane in Stratford, was admitted to bail,

and directed to appear the next day before Police Magistrate Laurier at St. Mary's.

Police Magistrate Laurier, in an affidavit filed in answer to the motion, states that the accused, on the 29th September, 1912, appeared before him and surrendered himself into custody on the said charge, elected to be tried before him, and pleaded "not guilty." The trial was then fixed by Police Magistrate Laurier for the 30th September, at St. Mary's, at 10.30 a.m.; and the Crown Attorney was notified to appear and prosecute the charge.

On the 30th September, shortly after the hour appointed, the accused again appeared in St. Mary's before the said magistrate, and was surrendered into custody, but the complainant Holman did not appear nor any witnesses on his behalf. It appears from the affidavit of a constable that, on the 27th September, Holman had been informed that the trial was fixed for the 30th and the hour and place of trial. On that day, after Court had adjourned, Police Magistrate Laurier received a telegram from Holman's solicitors in the following terms: "Complainant Holman disputes your jurisdiction in Rea case."

On the 3rd October, at the opening of Court at 10.30 a.m., the notice of this motion was served on Police Magistrate Laurier; and counsel on behalf of Holman appeared and "disputed the jurisdiction of the Court to hear the charge."

The complainant Holman, though subpœnaed to attend, did not do so. The magistrate thereupon proceeded with the case, and, after hearing evidence, acquitted the accused.

The complainant says that Police Magistrate O'Loane directed the accused to appear before Police Magistrate Laurier without any notice to him and without his knowledge, and that he did not hear the complainant in person or by solicitor, counsel, or agent, before making such direction. Under these circumstances, he asks for the order mentioned.

Section 665 of the Criminal Code reads as follows: "The preliminary inquiry may be held either by one Justice or by more Justices than one. (2) If the accused person is brought before any Justice charged with an offence committed out of the limits of the jurisdiction of such Justice, such Justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some Justice having jurisdiction in the place where the offence was committed."

If this section applies, then the Police Magistrate at Stratford did not comply with its terms, since he plainly did not hear both sides before ordering the accused to be taken before

the other Justice. As I understand the counsel for the applicant, he contends, in the first place, that there was no preliminary inquiry at all, under the section, before the Police Magistrate at Stratford; and, consequently, the magistrate could not make the order permitted by the section. He further, however, contends that, even if what was done by the magistrate amounted to a preliminary hearing, it was not regular, in that he did not hear both sides. But does this section apply? I am not clear that it does. Was the alleged offence committed out of the jurisdiction of the Police Magistrate at Stratford, who took the information? By 10 Edw. VII. ch. 36, sec. 24 (O.), it is provided, that "every Police Magistrate shall be ex officio a Justice of the Peace for the whole county or district for which or for a part of which he is appointed."

The Police Magistrate at Stratford is, therefore, ex officio, a Justice of the Peace for the whole county of Perth, and the alleged offence was committed at the town of St. Mary's, in that county. He must, as it seems to me, have been proceeding under some other section.

It is provided by sec. 708 of the Criminal Code that "any one Justice may receive the information or complaint, and grant a summons or warrant thereon, and issue his summons or warrant to compel the attendance of any witnesses for either party, and do all other acts and matters necessary preliminary to the hearing, even if by the statute in that behalf it is provided that the information or complaint shall be heard and determined by two or more Justices."

He could properly proceed under this section. Even if he desired to hear a case outside the limits of the town for which he was Police Magistrate, and had the power to do so, he could not be compelled to do so. See secs. 31 of 10 Edw. VII. ch. 36 (O.)

Under sec. 708, the Police Magistrate at Stratford, therefore, as a Justice of the Peace for the County of Perth, might receive the information in this case and issue his summons or warrant thereon. He did this. He could also, under that section, do all other acts and matters necessary preliminary to the hearing. He could also admit the accused to bail, unless sec. 18 of ch. 36 applies. The alleged offence having been committed in the town of St. Mary's, it was natural and proper that it should be disposed of by the Police Magistrate for that town, either by way of preliminary hearing, or, if the accused elected to be tried by him, by trial and disposition.

Section 668 of the Criminal Code is as follows: "When any person accused of an indictable offence is before a Justice,

whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the Justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed." The Police Magistrate at St. Mary's found the accused before him after being apprehended, as already indicated, or else voluntarily. He should thereupon proceed, and I think it was his duty to do so, to inquire into the matter: Regina v. Mason, 29 U.C.R. 43; Regina v. Burke, 5 Can. Crim. Cas. 29.

On the accused electing to be tried by him, he could proceed under sec. 707 of the Criminal Code to hear and dispose of the case. The informant had been told of the time and place, when and where and the Police Magistrate before whom the accused was directed to appear. He did not appear then, nor on the morning first fixed for the trial. He was thereupon served with a subpœna to attend the trial on the day finally fixed therefor. He was not present in person, but was represented by counsel attending to object to the magistrate's jurisdiction. He cannot complain that full opportunity to appear and give evidence or assist in securing a conviction, if that were possible, in the circumstances of the case, were not given to him.

I think, under the circumstances, that the Police Magistrate at St. Mary's did what he did rightly, and that this motion must be dismissed with costs.

MIDDLETON, J. NOVEMBER 2ND, 1912.

CARTWRIGHT v. WHARTON.

Contempt of Court—Motion to Commit—Disobedience to Judgment Restraining Infringement of Copyright—Preparation of New Edition of Book—Errors Common to Book Infringing and Book Infringed—Explanation—Refusal of Motion—Costs.

Motion by the plaintiff for an order committing the defendant for contempt in infringing the injunction granted by TEETZEL, J., at the trial: 3 O.W.N. 499, 25 O.L.R. 357. This injunction restrained the defendant from publication in his law list of any lists derived or copied from the plaintiff's list or from the defendant's own list published in 1911, which, according to the finding of the learned trial Judge, was improperly derived from the plaintiff's list of 1910.

J. H. Moss, K.C., for the plaintiff.
D. T. Symons, K.C., for the defendant.

MIDDLETON, J.:—The material in support of the motion is an affidavit by the plaintiff, who bases his belief that the defendant's edition of 1912 has been produced in violation of the terms of the injunction, upon the repetition in the 1912 edition of numerous misprints and errors said to exist in the 1911 edition. Fifty-four such errors or misprints are particularised.

At the time of the pronouncing of the judgment—the 4th January, 1912—the defendant had a 1912 edition well under way with his printers, Warwick Brothers and Rutter. This edition was in large measure derived from and based upon the 1911 edition. When the judgment was pronounced, and the defendant learned of his failure in the action and of the fact that all further use of the 1911 edition was prohibited, he determined to compile anew the material necessary for the publication of a new edition. The injunction in no way prevented this, so long as the compilation used in 1912 was based upon the result of original inquiry and work. He, accordingly, on the 5th January—the day after the pronouncing of the judgment—telegraphed to his correspondents in each of the Provinces, other than Ontario, to have prepared a complete new list of barristers, also Judges, court officials, etc., for the respective Provinces. He followed these telegrams by letters advising of the holding of the trial, which necessitated the preparation of new lists without reference to the plaintiff's book or the defendant's 1911 edition. This correspondence is produced. The original lists furnished by the different correspondents are also produced; and the majority of the errors or alleged errors said to be common to both editions, and upon which the plaintiff's charge is now based, are found to exist in the material so furnished.

I am satisfied, from the material produced, that the list published in 1912 is substantially based upon the new material so obtained.

Upon the argument this was practically conceded by the plaintiff's counsel; but he still urges that on close scrutiny enough remains to indicate that some improper use must have been made of the prohibited material. This necessitates a somewhat careful scrutiny of the 54 cases alleged. Fortunately these admit of some classification.

In the first place, items 1, 2, 3, 4, 28, and 40 relate to the misspelling of the names of towns. The defendant contends, and I think rightly contends, that this is not within the scope

of the injunction granted. Secondly, items numbers 32, 33, 34, 35, 36, 37, 38, 39, and 42 relate to numbers placed opposite the names of solicitors by way of reference to the Toronto agents. This, the defendant contends, is not within the scope of the injunction; and I think he is right.

A large number of other objections relate to mistakes in the initials of solicitors, the omission of the title "K.C." in a number of cases, and the fact that solicitors in partnership are reported as practising separately. The great majority of these alleged errors appear to exist in the original material derived from the sources I have indicated. This applies to items No. 5, 6, 7, 8, 9, 10, 11, 13, 15, 17, 18, 22, 23, 25, 27, 29, 30, 31, 41, 42, 43, 44, 45, 46, 47, 48, and 49.

In the preparation of the list, Mr. Wharton has had access afforded him to other lists which are probably the common source from which both lists have in some measure been derived: hence the existence of the common errors.

In reference to some individual names, further explanation has been given. In the case of objections Nos. 12 and 14, sufficient original information was acquired to make the list accurate; but the accurate information was changed to its erroneous form by the defendant, owing to his belief that correction was needed.

Number 19, the name of the Junior Judge of the County Court of Elgin, is given as "C. O. Ermatinger," instead of "C. O. Z. Ermatinger." The name of the learned County Court Judge is given in the same way in the Canada Law Journal Almanac, which is used by Mr. Wharton by the permission of its authors; and I may say that in years gone by I have personally addressed many letters to the learned Judge, and until now did not know of his third initial.

More difficult to deal with is the case of the name of "W. T. McMullen, Local Master, Woodstock"—No. 20. This in the interdicted list is spelled "McMullin;" and in the 1912 list appears in the same incorrect form. The explanation given limps. The material said to have been given to the printer was the official list published by the Inspector of Legal Offices. This list was, no doubt, in Mr. Wharton's possession. The name is there correctly spelled; and it is said that the error was that of the printer. After giving the matter the best consideration I can, I do not think I could find against Mr. Wharton's sworn statement, by reason merely of this one coincidence. I have the less hesitation in adopting this view because manifestly much labour was gone to in order to obtain independent lists. The

inspector's list of county officers for Ontario was in Mr. Wharton's hands, and was in a convenient form for use. There would be a complete absence of motive.

The only other similar case is number 16, that of "S. D. McLellan" whose name appears as "McLennan." Again the printer is blamed. The coincidence is at least singular; but, as accurate independent material was at hand, motive is again wanting.

Number 21, Mr. Ross, whose name is erroneously given as "A. W. Ross," instead of "A. G." I think the explanation is satisfactory. The initial was erroneously given in a card, and was from this carried into the list.

Number 24, W. H. Warke, erroneously spelled "Wark," the information was sought from Mr. Warke, and the original slip in his own handwriting is produced, and it is easy to see how an error might occur.

Number 26, "Cronyn & Betts & Coleridge"—the explanation given as to this is also satisfactory.

These, I think, cover all the cases except the list of Quebec bailiffs. This list, it is admitted, was copied from a list in the former book. Mr. Wharton contends that this is not one of the interdicted lists, because bailiffs are not court officials. The only evidence before me upon the point is that of a Quebec advocate, who says that they are. I can quite readily accept the statement of the defendant as indicating his bona fide belief; and I do not think that this matter is sufficiently serious to warrant any action on the part of the Court.

In the result, I do not think that any order should be made. The question of costs has given me more difficulty and anxiety than the rest of the motion. I have come to the conclusion that the motion ought to be regarded as having substantially failed; and I think that I should give to the defendant three-fourths of his costs.

DELAP v. CANADIAN PACIFIC R.W. CO.—MASTER IN CHAMBERS—OCT. 29.

Pleading—Statement of Defence—Extension of Time for Delivery—Special Grounds.]—Motion by the defendants to extend for three months from the 12th October, 1912, the time for delivery of the statement of defence. The Master, after stating the nature of the action, and the proceedings and negotiations which had taken place, said that, considering the large amount of the plaintiff's claim, the death of the former general solicitor

of the defendants, with whom the oral agreement upon which the action was founded was alleged to have been made, and the mass of correspondence and other documents necessary for consideration in order to prepare a full and definite statement of the grounds of defence, a reasonable time should be granted. Order made extending the time for delivery of the statement of defence until the 23rd November, 1912. Costs in the cause. Angus MacMurchy, K.C., for the defendants. F. Arnoldi, K.C., for the plaintiff.

LEAKIM v. LEAKIM—DIVISIONAL COURT—APRIL 29.

Marriage—Action by Husband for Declaration of Invalidity—Incapacity of Wife—Jurisdiction of High Court—Motion to Strike out Statement of Claim and Dismiss Action—Con. Rules 261, 617—*Judgment.*]—Appeal by the plaintiff from the judgment of RIDDELL, J., 3 O.W.N. 994. The appeal was heard by LATCHFORD, SUTHERLAND, and MIDDLETON, JJ. The Court dismissed the appeal with costs. L. F. Heyd, K.C., for the plaintiff. H. C. Macdonald, for the defendant.

WALL v. DOMINION CANNERS CO.—MASTER IN CHAMBERS—OCT. 30.

Pleading—Statement of Claim—Motion to Strike out Portions—Irrelevancy—Embarrassment—Motion for Particulars before Pleading—Practice—Affidavit—"Arrangement" for Transfer of Shares—Particulars of Time, Place, Persons, etc.]—This action was brought against the company and two individuals to compel "the defendants to transfer to the plaintiff 100 shares of common stock in the defendant company." The company moved, before pleading, for particulars of the statement of claim and to strike out paragraphs 5, 6, and 7 as embarrassing. The motion was supported only by an affidavit of a clerk in the office of the defendant company's solicitors, stating that he had charge of this case; that he had read over the statement of claim; and had been advised by counsel and verily believed that it would be impossible for the defendants to proceed with the trial or to have a fair trial until the particulars sought had been delivered. He was also advised by counsel and verily believed that paragraphs 5, 6, and 7 were embarrassing, and should be

struck out. The Master said, as was said in Smith v. Boyd, 17 P.R. 463, that a motion for particulars at this stage should be based on the defendant's inability to plead. To say that the particulars were necessary for the trial was premature—all such particulars could be obtained on discovery. Also, as was said in Todd v. Labrosse, 10 O.W.R. 772, such an affidavit should be made by one of the defendant company's officers, and not by a clerk of the solicitors, who could know nothing except what he had been told. These objections, however, were not pressed by the plaintiff. The substance of the plaintiff's claim was, that two years ago, he was induced to continue in the service of the defendant company, at their request and that of the individual defendants, two of the directors. As a consideration for so doing, "it was arranged between the plaintiff and all three defendants that he should be granted 100 shares of the common stock of the defendant company" (paragraph 4). "But the defendants, although they have several times promised to grant the stock, have refused to do so" (paragraph 7). The defendant company now asked for particulars of when and where such arrangement was made, and whether it was verbal or in writing. The Master said that, considering the lapse of time and the fact of the defendant being a corporation, these facts should be given, and it should also be stated by whom these shares were to be granted and at what date. Particulars shewing "who were present at the time such arrangement was made" should not be given, unless they were officers or agents of the company, in which case they would be material facts on which the plaintiff could rely.—The defendants asked to have portions of paragraphs 5, 6, and 7 of the statement of claim struck out as embarrassing. The parts of paragraphs 5 and 7 objected to stated only that the plaintiff had not received the 100 shares, though the defendants had frequently promised to give them. The part of paragraph 6 objected to stated the reasons of the desire of the defendants to retain the services of the plaintiff, and why it was easy and natural for the individual defendants to make the alleged offer, as they had been allotted a large block of the common stock for work which was mostly all done by the plaintiff himself. The Master said that he saw nothing irrelevant or embarrassing in these statements, to warrant their excision. Order as above indicated. Costs of the motion to be in the cause to the plaintiff only, as well for the reasons already given as because, after serving a demand for particulars on the Toronto agents of the plaintiff's solicitors, the present motion was launched without waiting for any reply to that demand.

M. L. Gordon, for the defendant company. Frank McCarthy, for the plaintiff.

THOMSON v. MCPHERSON—DIVISIONAL COURT—OCT. 31.

Contract—Sale of Interest in Mining Company—Indefinite and Incomplete Agreement—Time Deemed of Essence—Abandonment—Rescission—Caution.]—Appeal by the plaintiff from the judgment of KELLY, J., 3 O.W.N. 791. The appeal was heard by MULOCK, C.J.ExD., SUTHERLAND and MIDDLETON, JJ. The Court dismissed the appeal with costs. R. C. H. Cassels, for the plaintiff. A. D. Crooks, for the defendant McPherson. W. N. Tilley and G. W. Mason, for the defendant Lobb.

JAMIESON v. GOURLAY—LATCHFORD, J.—NOV. 1.

Damages—Breach of Contract—Reference—Contradictory Evidence—Finding of Master—Appeal—Costs.]—Appeal and cross-appeal from the report of the Master at Ottawa upon a reference by the trial Judge to ascertain what damages, if any, the plaintiff had suffered by any breach by the defendant of the contract between the parties, as construed by the Court. There was a breach by the defendant of the contract, and the resulting damages were found to be $248.83. The amount was not affected by a clerical error stating the number of feet in the eight rafters not supplied to be 43, instead of 430. The plaintiff appealed to have the damages increased; the defendant to have them diminished. The learned Judge said that he had read the voluminous evidence. Upon the reference, as at the trial, it was contradictory upon almost every point in issue. The very able Judge who tried the case expressed his difficulty in arriving at a satisfactory conclusion, where "either the plaintiff or the defendant was stating what was untrue, and doing so deliberately." The position of the Master was one of equal difficulty. His conclusions were upon matters of fact, and there was no ground for disturbing them. Appeal and cross-appeal dismissed. As to costs, it might well be that the cause of the breach of the contract was the insistence of the plaintiff that the defendant should supply timber not called for by the agreement as interpreted by the Court. But the defendant was not thereby justified in failing to deliver what the contract required him to furnish. The plaintiff should have the costs of the reference. As success at the trial was divided, there should be no costs of the action to either party. J. R. Osborne, for the plaintiff. R. J. Slattery, for the defendant.

SEAMAN v. SAUBLE FALLS LIGHT AND POWER CO.—MIDDLETON, J.—NOV. 1.

Water and Watercourses—Injury to Mill by Flooding—Unprecedented Spring Freshets—Failure to Shew Fault on Part of Defendants—Damages.]—An action to recover damages sustained by the plaintiff, in the spring of 1912, through the breaking of a dam on the Sauble river, whereby the plaintiff's mill was flooded and partly undermined, and a quantity of lumber was, it was said, carried away and lost. The learned Judge finds that in the spring of 1912 floods were unusually severe; it was abundantly proved at the trial that they were unprecedented. The plaintiff did not really attempt to controvert this, but sought to shew that the disaster had taken place before the water reached a height which could be regarded as abnormal. The plaintiff failed in this attempt—upon the evidence. Upon the circumstances disclosed, the learned Judge is unable to find any liability on the part of the defendants; and he arrives at this conclusion with the less regret because, as he considers, there was an altogether unjustifiable attempt on the part of the plaintiff to inflate his claim for damages. The amount to be allowed to the plaintiff, if he should succeed in a higher Court, should be very much less than the amount claimed, and should not exceed $585. While the action fails, and must be dismissed with costs, the defendants went to more expense than necessary in having so many witnesses present to testify to the serious nature of the spring floods, and that they should not on taxation be allowed for more than three witnesses called to give general evidence of this kind. W. S. Middlebro, K.C., for the plaintiff. R. McKay, K.C., and C. S. Cameron, for the defendants.

ROGERS v. NATIONAL PORTLAND CEMENT CO.—MASTER IN CHAMBERS.—NOV. 2.

Discovery—Examination of Plaintiff—Default—Failure to Justify—Con. Rule 454*—Order for Plaintiff to Attend at his own Expense.*]—Motion by the defendants, under Con. Rule 454, to dismiss the action for the default of the plaintiff to submit to examination for discovery. The default was admitted, and also that the plaintiff had no legal or technical ground for non-attendance. It was said that the plaintiff's solicitors thought they were being unfairly dealt with by defendants' solicitor, and that he was trying to prevent or delay the examination of

Calder, an officer of the defendants. The Master said that the correspondence might be open to this construction; but there was no undertaking as to Calder, nor was it necessary to have inspection of the defendants' productions before the plaintiff submitted to examination. The only course open was, therefore, to direct the plaintiff to attend again at his own expense, on 48 hours' notice to his solicitors. Costs of the motion to the defendants in the cause. Grayson Smith, for the defendants. F. R. MacKelcan, for the plaintiff.

STUART v. BANK OF MONTREAL—MASTER IN CHAMBERS.—NOV. 1.

Discovery—Examination of Plaintiff—Particulars — Statement of Claim—Sufficiency of Information already Given—Delay in Moving.]—Motions by the defendants for particulars of the statement of claim and for further examination of the plaintiff for discovery. The cause was at issue before vacation. A demand for particulars of the statement of claim was served on the 6th May. This was not complied with; and nothing further was done about it by the defendants at that time. The case was set down on the non-jury list at Toronto, on the 4th September, and was, therefore, liable to be put on the peremptory list on or after the 26th September. The plaintiff was examined for discovery on the 21st October, and made what seems to have been full and candid answers to the questions asked. The action was brought in effect to redeem the one-half share of the plaintiff's deceased father in certain lands which, in October, 1900, were conveyed by the deceased to *his* father, John Stuart. The deed, though absolute in form, is alleged to have been only by way of security for moneys advanced; and it was said that this was within the knowledge of the defendant bank and its officers at the time when these, with other lands, in July, 1904, were conveyed by John Stuart to the bank in satisfaction of his own liabilities to that institution. In the 8th paragraph of the statement of claim it was alleged as follows: "During the negotiations for the transfer of his property, the said John Stuart notified the defendant bank that he was not the owner of the property in question . . . but had only an interest in the same by way of security. The defendants Braithwaite and Bruce had the like knowledge before such negotiations for transfer began." In the 9th paragraph it was alleged that for several years prior to July, 1904, the defendant Bruce had been solicitor for John Stuart, and until the 5th July, 1904, acted as

solicitor for him, as well as for the Bank of Montreal. The demand for particulars was in the usual detailed form, asking when and where and in what circumstances John Stuart notified the bank as alleged in paragraph 8, and the name of the person or persons to whom such notice was given. This was repeated as to Braithwaite and Bruce, and also as to Bruce, as alleged in the 9th paragraph. Numerous letters were produced, and it was apparently on that of the 5th July, 1904, from John Stuart to Bruce that the plaintiff mainly relied, taken together with the correspondence as a whole. He also said that his grandfather notified the bank "verbally—just directly before the settlement." The Master said that as to these facts the plaintiff must rely on his grandfather's evidence at the trial. He was not bound to get all these details from his grandfather beforehand and communicate them to the defendants, who had denied any notice. It would, therefore, be a matter for the trial and for the ultimate tribunal to say whether the defendants had notice, as the plaintiff alleged, and what effect was to be given to it. The plaintiff had apparently given all the information on the matters in question that he had or ought or was bound to have. There is no fiduciary relationship between himself and his grandfather—it might be that they were adverse, though the plaintiff must rely on his grandfather's evidence, if any was thought necessary, beyond the correspondence and the fact of the dual position of the defendant Bruce. The motions failed on the merits; and also it might be that the defendants were too late, after doing nothing since the 6th May last. The delay was said to have been caused in part by the plaintiff having obtained an order on the 10th July for examination de bene esse of John Stuart, which was never acted on. But this did not account for the previous two months' inaction. Motions dismissed; costs to the plaintiff in the cause. H. A. Burbidge, for the defendants. W. M. Douglas, K.C., and W. J. Elliott, for the plaintiff.

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*POWELL-REES LIMITED v. ANGLO-CANADIAN MORTGAGE CORPORATION—DIVISIONAL COURT—NOV. 2.

Judgment Debtor — Company — Examination of Director as Officer—Con. Rules 902, 910—*Appeal—Irregularity—Waiver —Condition.*]—An appeal by E. R. Reynolds from the order of RIDDELL, J., 3 O.W.N. 1444, 26 O.L.R. 490. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court

*To be reported in the Ontario Law Reports.

held that the appeal was irregularly brought, as leave to appeal had not been obtained, and the order was not in its nature final, but merely interlocutory. But, counsel agreeing to waive this objection if the argument was confined to the question of the right of the judgment creditors to examine the appellant, the Court heard the appeal on that question. The Court agreed with RIDDELL, J., that a director is an officer who may be examined under the provisions of Con. Rule 902; and said that, if there could be any possible doubt as to the correctness of this, the case was one in which an order might well be made for examination under Con. Rule 910. An examination under Con. Rule 902 may be had without an order. The appellant, in person. M. C. Cameron, for the plaintiffs.

GRAY v. BUCHAN—DIVISIONAL COURT—NOV. 2.

Broker—Purchase by Customer of Shares on Margin—Contract—Terms—Failure to Keep up Margin—Re-sale by Brokers—Findings of Fact—Appeal.]—Appeal by the plaintiff from the judgment of KELLY, J., 3 O.W.N. 1620, dismissing the action and allowing the defendants the amount of their counterclaim, $18.10. The appeal was heard by FALCONBRIDGE, C.J. K.B., BRITTON and RIDDELL, JJ. The judgment of the Court was delivered by RIDDELL, J., who set out the facts at length, and said that, on the findings of fact, it was plain that, as the plaintiff did not in fact comply with the demand for the margin, made through the agreed channel, he could not complain that the stock was promptly sold—it was just what any one dealing in these stocks expects and must provide against. There was no need to consider the application (if any) of the case cited, Corbett v. Underwood (1876), 83 Ill. 324. Appeal dismissed with costs. J. M. Godfrey, for the plaintiff. G. T. Ware, for the defendants.
