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CARTWRIGHT, MASTER. DECEMBER 2ND, 1907.

CHAMBERS.

SWITZER v. SWITZER.

Particulars—Statement of Defence—Action for Alimony—Defence Alleging Adultery of Wife—Times and Places.

Motion by plaintiff in an action for alimony to set aside the particulars given by defendant of the times and places of the acts alleged in paragraph 3 (a) of the amended statement of defence, or for further and better particulars, etc., because the particulars delivered were too vague, general, and indefinite.

G. H. Kilmer, for the plaintiff.

W. E. Middleton, for defendant.

THE MASTER:—The paragraph 3 (a) alleges that "the plaintiff had, at the defendant's home in the province of Manitoba, on different occasions, the exact dates of which the defendant is at present unable to give, committed adultery with one Arthur Bull, who was then working for defendant on his farm." Under this particulars were first given stating merely that such acts were "committed at the home of the defendant from January, 1903, to July, 1904, at different times in that period." Thereupon an order was made for further and better particulars. It is the particulars delivered in obedience to that order that are now attacked as still too vague and indefinite. These allege that defendant was absent from his home during January and February of 1903, and that during that time "plaintiff and Bull cohabited together practically as man and wife." They then con-

tinued as follows: "Acts of adultery were committed on each of the days during January and February, 1903. During the months of April, May, June, and July, 1904, acts of adultery were committed almost every day, the said acts starting on the 1st day of April, 1904, and continuing up to the 16th day of July, 1904, adultery being committed on that date. All said acts were committed at the house of the defendant on his farm in Manitoba."

For the motion counsel cited and relied on Odgers on Pleading, 6th ed., p. 174, and the cases cited.

On examination there does not seem to be anything in those decisions which shews these particulars to be insufficient. In Coates v. Croyle, 4 Times L. R. 735, the allegation that the plaintiff had committed adultery with the defendant's deceased husband was founded entirely on suspicion, as plaintiff was seeking to recover some $25,000 on an I. O. U. written on a telegraph form and given by the deceased publican to the plaintiff, who had been a barmaid in his service. Even then the order only directed the plaintiff to give such particulars as she could of the alleged misconduct which she intended to rely upon. Both Lord Coleridge and Bowen, L.J., used language which would far more than cover what has been given here. The plaintiff is told with much greater amplitude of detail than is usually possible in these cases what the accusations are that she will have to meet at the trial. In Bishop v. Bishop, [1901] P. 325, only one date was given, "the autumn of the year 1897," and no names were mentioned. In that case there was no order for any specific times or dates, but only the names were directed to be furnished of the servants and guests before whom the defendant had used insulting language about his wife, as she alleged; as it was a material fact that the mistress had been humiliated before her servants and guests, and the defendant was entitled to know who they were. At p. 327 it is said that the principle is "that each side should be fully informed of the particular case intende to be put forward." This seems to have been very clearly done by the defendant in his second particulars, and the motion should be dismissed with costs to defendant in the cause.

The defendant, by leave, has filed an affidavit stating that these are the best particulars he can give, and that he intends to give evidence in support of them all.

ANGLIN, J. DECEMBER 2ND, 1907.

CHAMBERS.

RE SOLICITORS.

Solicitors—Taxation of Costs—Order for Obtained by Solicitors ex Parte—Services Rendered by Solicitors as Parliamentary Agents—Presumption as to Professional Character—Absence of Tariff—Nature of Services Rendered—Agreement for Fixed Remuneration—Conflict of Testimony—Reference to Taxing Officer—Costs.

Motion on behalf of a client to set aside an ex parte order for taxation obtained on 27th May, 1907, by his solicitors, who had delivered their bill of fees, charges, and disbursements on or about 20th April, 1907.

R. McKay, for the client.

Grayson Smith, for the solicitors.

ANGLIN, J.:—The grounds upon which it is sought to set the order aside are: first, that the services covered by the solicitors' bill were rendered not as solicitors but as parliamentary agents; and, second, that there was an agreement between the solicitors and the client fixing the amount of the remuneration.

As to the major part of the work covered by the bill, after carefuly perusing all the material, it is my opinion that although a considerable part of the work charged for is such as might have been done by a parliamentary agent not a solicitor, other services for which remuneration is claimed were certainly of the kind which only a solicitor would be expected to render. For instance, advice appears to have been obtained, and is charged for, in connection with the scope of the Dominion Railway Act, 1903, and of the Ontario Railway Act, 1906; the advantages and disadvantages of charters for railway purposes issued by the Dominion and provincial governments, respectively, were explained to the client, and advice was also given as to the requirements with regard to number and qualifications of directors, capital stock, bond issue, etc. The correspondence between the solicitors and Mr. Fitzpatrick is fully set out in the affidavit of Mr. Dunn, and a perusal thereof makes it reasonably clear to me that the business which

is the subject of the bills of costs is "business connected with the profession of an attorney or solicitor, business in which the attorney or solicitor was employed because he was an attorney or solicitor, or in which he would not have been employed if he had not been an attorney or solicitor." This language of Lord Langdale, M.R., in Allan v. Aldrich, 5 Beav. 401, is quoted by Romer, L.J., in the latest case dealing with the character and scope of professional work as formulating the test which is to determine whether or not the services rendered are such as entitle or subject the solicitor to a taxation of his bill under the Solicitors' Act.

In England there are special statutory provisions for the taxation of the bills of parliamentary agents, and where all the services rendered by a solicitor are such as a parliamentary agent not a solicitor might have rendered, the English Court of Appeal has held that a bill for such services is not taxable under the Solicitors' Act, but if the work done, and for a which a bill is rendered, includes services rendered not merely as a parliamentary agent, but such as only a solicitor would be retained to give, the fact that work which might have been done by a parliamentary agent is included in the bill, does not preclude the right of either the solicitor or the client to have the whole submitted to taxation under the Solicitors' Act: Re Baker, Lees, & Co., [1903] 1 K. B. 189. The fact that we have no special provisions for the taxation of the costs of parliamentary agents affords an additional reason for holding that the bill now under consideration is subject to taxation under the Solicitors' Act.

"Where the employment of a solicitor is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction:" In re Aitken, 4 B. & Ad. 47.

The fact that there is no tariff applicable to the services rendered presents no obstacle to a taxation, which, in such a case, proceeds having regard to the nature and value of the services rendered and the business done: O'Connor v. Gemwill, 26 A. R. 27, pp. 39, 40; In re Attorneys, 26 C. P. 495, 498; In re Johnston, 3 O. L. R. 1; In re Chisholm and Logie, 16 P. R. 162; In re Richardson, 3 Ch. Ch. 144.

Were it admitted that there was an agreement between the client and the solicitors for a fixed remuneration for the services rendered, that fact would render the ex parte order

irregular, and it must be set aside: Re Inderwick, 25 Ch. D. 279; In re Farnshawe, [1905] W. N. 64; O'Connor v. Gemwill, 26 A. R. at p. 38.

In the present case, however, although the applicant swears positively that there was an agreement between himself and the solicitors for their remuneration at a fixed sum, covering the greater portion of the work included in the bill sought to be taxed, one of the solicitors makes affidavit that "no agreement or arrangement was made at any time between myself or my said firm and Mr. Fitzpatrick as to the amount of the expenses of obtaining a charter." Neither deponent has been cross-examined upon his affidavit. If the statement of the solicitor is correct, the solicitors are entitled to maintain their order.

I am not prepared, upon the material before me, to find either that there was or was not an agreement. This is a question which the taxing officer, who will be in a position to take evidence upon it, can determine. Upon the ordinary reference to taxation at the instance of a solicitor, the question of retainer or no retainer is for the determination of the taxing officer. I see no reason why he should not with equal propriety determine this question of agreement or no agreement. To set aside the present order would be in effect to give to the client the benefit of an alleged agreement which is not yet established. This I must decline to do.

The ex parte order for taxation should, however, be varied by inserting a provision that before proceeding to tax a solicitors' bill, the taxing officer shall inquire and determine whether or not there was an agreement binding upon the parties that the remuneration for the work in connection with the obtaining of a charter for the Nipissing Central Railway Company, and the organization of the company, including parliamentary fees, should not exceed $1,100, and that in the event of its being found that such an agreement was made, the taxing officer shall not proceed further under the order, but shall report his finding upon such inquiry; but that in the event of his finding that there was no such agreement, he shall proceed under the order for taxation.

The present application will be dismissed. The costs, however, will be reserved to be disposed of by a Judge in Chambers, after the taxing officer shall have made his report or certificate upon the reference.

DECEMBER 2ND, 1907.

DIVISIONAL COURT.

PERKINS v. FRY.

McDONALD v. RECORD PRINTING CO.

CURRIE v. RECORD PRINTING CO.

Libel—Several Actions against Different Defendants—Consolidation — R. S. O. 1897 ch. 68, sec. 14—Identity of Libels—Trial.

Appeal by defendants from orders of CLUTE, J., ante 874.

W. Nesbitt, K.C., and E. G. Long, for defendants.

R. McKay and G. Grant, for plaintiffs.

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), varied the order by directing that the trial of one action by each plaintiff, to be selected by that plaintiff, be had, and that in the meantime all other actions be stayed, and that the further hearing of this appeal stand until after the trial of the actions selected has taken place. Costs of the day to be costs in the cause.

RIDDELL, J. DECEMBER 3RD, 1907.

WEEKLY COURT.

HALL v. BERRY.

Evidence—Direct Conflict—Appeal from Master's Report—Forgery—Perjury—Prosecution—Solicitor—Law Society.

Appeal by plaintiff from report of local Master at North Bay, on various grounds.

H. H. Dewart, K.C., for plaintiff.

H. D. Gamble, for defendant.

RIDDELL, J.:—In this appeal counsel for both parties state that either plaintiff or defendant was, before the Master, guilty of wilful and corrupt perjury—and I fear that this statement must be considered well founded. Upon the reference which I directed to the Master at North Bay, the plaintiff, a solicitor of the Court, produced a document which he swore to as signed by the defendant in his presence. This the defendant denied. The effect of the Master's finding is admitted to be that, in his judgment, the defendant's account is the correct one. It is a matter of credit to be given to the witnesses, and "according to the well established practice in Ontario," the Master is "the final judge of the credibility of these witnesses:" Booth v. Ratte, 21 S. C. R. 637, 643 . . . ; and see Fawcett v. Winters, 12 O. R. 232; Muter v. Pilling, 9 Q. B. D. 736.

The plaintiff upon this appeal relies upon a comparison of the disputed signature with two signatures of the defendant, the one to a receipt and the other to an indorsement upon a cheque; but I am unable to see that his case is at all strengthened (in my judgment it is weakened) by such a comparison. The evidence of the defendant, if one were to judge of it simply as it appears in black and white, might have been in some instances more ingenuous, but no one who has not seen the witness can say how far his apparent hesitation should affect his credit. Nothing is more dangerous than for one who has not had the opportunity of seeing and hearing a witness to attempt to say what weight should be given to an apparent shuffling.

The only other point is whether the defendant was prevented from doing certain work by the plaintiff or his wife. The witness says (Q. 321) that the plaintiff said to the effect "that you were not to have your fence made to look like a chicken crop, but I had better leave off from making it until you saw Mr. Berry." These words may intimate anything, from a gentle suggestion to a truculent threat, according to the tone and emphasis. I cannot tell. I have only the skeleton, the dry bones of the evidence. I have only the cold type—the Master had the witness before him, and he could and did determine the real effect of these words. He has held that this was an order to stop building the fence. It was open to the Master so to find, and I cannot interfere. The other matters are too clear even for argument.

The appeal will be dismissed with costs.

Had I found in an action tried before me, as the Master has by implication found here, that a witness had committed perjury and forgery or either of them, I should have directed a prosecution, as in the recent case of McCullough v. Hughes, 10 O. W. R. 691. (The defendant in that case was subsequently convicted for perjury on two counts by the Judge at Barrie.) The plaintiff here is not quite in that position, but an officer of the Court has condemned him, and I think that the attention of the Crown Attorney at North Bay must be drawn to the matter. It is also a case for investigation by the Law Society of Upper Canada. . . . .

MABEE, J. DECEMBER 3RD, 1907.

TRIAL.

COSGRAVE v. BANK OF HAMILTON.

Contract—Breach—Bank—Agreement to Advance Money—Authority of Agent of Bank—Restrictions—Knowledge of Borrower—Incomplete Agreement—Damages—Measure of—Proof of Damage.

Action for damages for breach of an alleged agreement to advance money to plaintiffs.

J. H. Moss and C. A. Moss, for plaintiffs.

H. S. Osler, K.C., and Britton Osler, for defendants.

MABEE, J.:—The plaintiffs undertake to make out a clear, definite, and binding agreement upon the defendants to advance to them the sum of $75,000 upon the joint note of the plaintiffs, and in default, of course, the action cannot succeed.

It is admitted that in the spring of 1906 the defendants agreed to make advances up to $40,000. The application for those advances was submitted by Mr. Kilvert, the manager of the Toronto agency, to the head office; the loan of that amount was sanctioned; and part of the money advanced. The plaintiffs say that in July, 1906, they arranged with Mr. Kilvert to advance $75,000 in the same way, except that Mr. Mossop was to take Hinds's place.

There is no doubt that several interviews took place with Mr. Kilvert. Mr. James Cosgrave says that in July he asked Kilvert to advance $125,000, and that the latter said it was a new proposition and would have to be submitted to the directors. Mr. Mossop says Mr. Kilvert said he would have to further consider this proposal, and he (Mossop) understood this meant he would have to consult some other authority. Mr. Kilvert says he had no authority to make the advance they were asking without the sanction of the head office; that he never submitted the application to the head office; and was never authorized to made the advance. This is corroborated by Mr. Turnbull, the general manager. I think the case fails upon this ground alone. The plaintiffs were dealing with an agent with limited authority, and were expressly told by the agent that he could not make the advance without the sanction of the directors or head office. As the plaintiffs themselves say, it is thus incumbent upon them to shew that the bank, through its directors or proper authority at the head office, authorized the agent to make the advance; the contrary of this has been proved.

The case might have been different had there been a general holding out by the defendants of their agent to make agreements of the kind contended for by the plaintiffs, and the agreement had been satisfactorily proved.

I am not overlooking the fact that the plaintiffs say they were led to suppose the matter had been sanctioned at the head office, when, as they put it, the arrangement would go through if the plaintiffs contributed the $50,000, leaving the advance to be $75,000.

This is not the case of the plaintiffs having the right to suppose the agent was not exceeding his authority, or there being a secret limitation of authority, but a case where the plaintiffs were aware that no such advance could be made by the agent without the express sanction by the principal: Bowstead on Agency, 3rd ed., p. 274.

In Forman v. The Liddesdale, [1900] A. C. 190, it is said that where the plaintiffs did not really know the extent of the agent's authority, it was their business to learn it, and they were bound by the restrictions which existed between the principal and the agent. See also Leake on Contracts, 5th ed., p. 347.

I think, in the second place, that no such completed arrangement has been proved as could be enforced, even had Mr. Kilvert authority to enter into it.

Mr. Auger McVean stated that Mr. Kilvert said that "he was satisfied the bank would do their part if we did ours." There was never any understanding whether the bank, or the Cosgrave Company and Mr. Reinhardt, were to be first repaid by Mr. Mossop out of the proceeds of the mortgage. Mr. McVean says there was "no arrangement made as to whether the bank or the brewers were to be paid back first." Also: "I remember now that Mr. Cosgrave said the brewers were to get their money back first, but Mr. Kilvert said nothing." Mr. L. J. Cosgrave said: "Something was said that after the building was completed they could mortgage and pay off the bank or the liabilities."

Mr. Reinhardt said: "As to whether the bank was to be repaid first or the brewers, was left open until a full agreement was drawn. I expected an agreement would be drawn when it would be settled whether we were to be paid first or the bank." And in re-examination he said: "The written agreement I spoke of would be as to the bank as well as the rest."

Now, all this points to an incomplete arrangement between the plaintiffs and defendants. The representatives of the bank were materially interested in knowing when and how the advances were to be repaid, and Mr. Kilvert was waiting for a complete proposition as to all details before submitting the new request of the plaintiffs to the head office. It is true that later on an agreement was made between the plaintiffs themselves, and reduced to writing, but the bank was not a party to it, and it does not appear that Mr. Kilvert had any knowledge of its contents.

I have no doubt that the plaintiffs fully expected that the bank would make the advance, but it is equally clear that the matter had never reached a point where Mr. Kilvert had all the necessary information to submit the whole proposal in detail to the head office.

The foregoing renders it unnecessary to consider the question of damage; but, had an agreement been established, the authorities seem to shew that the measure would have been the difference between the rate of interest agreed upon and the rate the plaintiffs would have had to pay for the money elsewhere. . . . Mennie v. Leitch, 8 O. R. 397; Fletcher v. Tayleur, 17 C. B. 21; Henderson v. Bank of Hamilton, 25 O. R. 64, 22 A. R. 414. I do not think South African Territories Limited v. Wallington, [1898] A. C. 309,

can be regarded as an authority for the plaintiffs' contention, although there are some expressions of opinion that some form of special damage might be recovered. See Bahama Sisal Plantation Co. v. Griffin, 14 Times L. R. 139, where the South African case was cited.

In any event it was not shewn that the plaintiffs could not in February, 1907, have obtained the money elsewhere, had united and persistent effort been made. It was then that the plaintiffs knew that the bank would not make the advance, and the reason for the plantiffs not being able to obtain the money in August was because of the changed conditions of the money market; the like conditions did not exist in February.

The plaintiffs are in this additional difficulty on the question of damages. They say the agreement was that the bank was to make the advance at "current rates;" this would mean an increase from time to time upon renewals, if the rate of discount advanced: so if the plaintiffs had made application for and obtained the money elsewhere, at or about the time the bank refused to make the advances, the rate payable by them elsewhere would have been the same rate the bank would have been entitled to charge, and so there would have been no damage.

I think the plaintiffs' case fails, and the action must be dismissed with costs.

DECEMBER 3RD, 1907.

DIVISIONAL COURT.

CUMMINGS v. DOEL.

Vendor and Purchaser—Contract for Sale of Land—Completion of Houses by Vendor—Purchaser to have Right, on Default of Vendor, to Complete and Deduct Price from Balance of Purchase Money—Payment of Balance of Cash—Refusal of Purchaser to Deliver Mortgage for Part of Price, Houses being Incomplete—Action for Declaration of Rights—Mandatory Order for Delivery of Mortgage—Lien—Costs.

Appeal by defendant from judgment of BRITTON, J., ante 331.

T. D. Delamere, K.C., for defendant.

A. B. Armstrong, for plaintiff.

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), varied the judgment by inserting a declaration that plaintiff has a lien for the amount due in respect of the mortgage, upon it being ascertained how much, if anything, is to be deducted in respect of the work alleged not to be completed according to the agreement of 30th October, 1905, but mortgage not to be delivered until that is ascertained by reference to the Master. Further directions and costs reserved.

CARTWRIGHT, MASTER. DECEMBER 4TH, 1907.

CHAMBERS.

CURRY v. STAR PUBLISHING CO.

Pleading—Statement of Claim—Irregularity—Naming Place of Trial other than that Named in Writ of Summons—Waiver by Taking Proceedings in Action.

Motion by defendants in an action for libel to strike out as irregular the part of the statement of claim which named Toronto as the place of trial, the plaintiff having in the writ of summons named Cayuga as the place of trial.

E. G. Long, for defendants.

Gideon Grant, for plaintiff.

THE MASTER:—Whether in such a case the statement of claim is irregular is one on which some difference of opinion exists. The point has never been expressly decided, though referred to in Town of Oakville v. Andrew, 2 O. W. R. 608, and in Geedy v. Wabash R. R. Co., 9 O. W. R. 677.

If such a variance is to be considered an irregularity, it should be moved against at once, as any subsequent proceedings would be a waiver. Here there has been an important step taken by the motion to consolidate, which has gone to the Divisional Court. The statement of defence was also due on or before 15th November, and on 7th November, and again on 22nd November, time was given for this, on the solicitor for defendants consenting to take short notice of trial, so that plaintiff should not be thrown over the January sittings, "in case any of the cases would be heard then." This could only refer to a trial at Toronto.

In these circumstances, I follow my decision in Geedy v. Wabash R. R. Co., supra, and dismiss the motion without costs.

I venture to repeat what I said in Geedy's case, that it would save trouble if there was no place of trial named unless the writ is specially indorsed. It is only named then because, if a defendant avails himself of Rule 171, there would be no other way for the plaintiff to comply with Rule 529. See Segsworth v. McKinnon, 19 P. R. 178. If this action is not tried at the Toronto January sittings, the defendants can move to have the venue changed to Cayuga, if so advised, notwithstanding the order now made.

RIDDELL, J. DECEMBER 4TH, 1907.

CHAMBERS.

RE HEWARD'S TRUSTS.

Trusts and Trustees—Trust Estate—Expenditure of Principal on Repairs—Consent of Beneficiaries—Leave of Court.

Motion by the Toronto General Trusts Corporation, trustees, for an order authorizing the expenditure of part of the principal of the trust estate in repairs.

J. T. Small, for the trustees.

RIDDELL, J.:—By deed of 13th May, 1857, J. G. conveyed to certain trustees certain mortgages in the deed of conveyance mentioned. By this deed the trustees were given the power to use such part of the proceeds of the said mortgages as they thought fit in purchasing real estate and also to sell real estate so bought, and invest the proceeds. All the principal moneys and the real estate were to be held by the trustees, upon trust to pay the interest, dividends, and profits half-yearly to J. O. H. for the joint lives of himself and wife; in case she survive him, then to her for life, and at her death to their children then surviving, in such shares and according to conditions, etc., to be made by J. O. H. and his wife; in default of such appointment, then accord-

ing to appointment of the widow, and in default of this equally; if no child survive, then as she by her will shall appoint, and, in default of a will, to those entitled under the Statute of Distributions to her personal estate.

Certain real estate, with a house, etc., was bought by the trustees, and it is now desired that the sum of $3,000 be expended by the successors of these, the present trustees, in repairing the house. J. O. H. is dead, his widow is still living, and there are 7 children of the marriage, all adults.

An application is made to the Court for leave to apply $3,000 of the principal money in such repairs. It is sworn that the widow and all the children approve. This being so, they should file a formal consent. Then the only event in which any one could complain would be the death of all her children before the widow, an event indeed possible, but very improbable.

In the facts of this case, as more fully appears by the affidavits filed, I think a case has been made out well within the authorities referred to in Lewin on Trusts, 10th ed., p. 573, to which reference may be made.

The trustees will have their costs.

RIDDELL, J. DECEMBER 4TH, 1907.

TRIAL.

WEBB v. ROBERTS.

Vendor and Purchaser—Contract for Sale of Land—Misrepresentations by Vendor Inducing Contract of Purchaser—Approbation after Discovery of Falsity—Rescission—Damages for Deceit—Possession—Costs.

Action by vendor for a declaration of forfeiture of defendant's rights under an agreement between plaintiff and defendant for sale and purchase of land, and to recover possession, mesne profits, etc. Counterclaim by defendant for rescission and damages.

J. B. Clarke, K.C., and C. Swabey, for plaintiff.

A. J. Anderson, Toronto Junction, for defendants.

RIDDELL, J.:—The plaintiff, with some assistance, had, in the vicinity of Toronto, built a cottage, himself apparently the carpenter. The wife of the defendant, an Englishman who had been in this country but a short time, seeing an advertisement . . . of this cottage for sale, and thinking that it would answer the requirements of her husband and herself, went to the plaintiff about it. The plaintiff represented to the defendant's wife, and afterwards to the defendant and his wife together, that the house was a well built house, built after the old English style, and not jacked up like houses in this country, that it was of good workmanship and double-boarded on the outside, and warm and comfortable. He added that the place was "a little Eden." He told them also that they might trust a brother Englishman. Some statements were made as to the title, which I do not think it necessary to set out.

Although the wife did make a casual inspection of the property, it is apparent, and I find as a fact, that the contract was entered into upon the strength of the plaintiff's representations. The very assurance that they might trust a fellow countryman, instead of acting as a danger signal, as it would to those more experienced in the world's ways, seems to have prevented the defendant and his wife from having any suspicions.

A written contract was entered into on 22nd April, 1907, between the plaintiff and defendant, for sale of the property for $1,400, $125 in cash and $10 on the 22nd day of each month until 22nd May, 1917, and $15 on 22nd June, 1917, interest on unpaid portion of purchase money to be paid quarterly on every 22nd day of July, October, January, and April, until the whole should be paid. Possession was to be given at once, and as soon as the purchase money and interest should be paid the plaintiff was to convey the property. It was further provided that time should be of the essence of the agreement, and, unless the amounts should be punctually paid, all payments made should be forfeited and all rights of the defendant should cease and determine and the plaintiff be at liberty to enter and lease or sell without accounting to the defendant—but that such entry or lease or resale should not impair the right of the plaintiff to enforce the covenant for payment.

The defendant made the down payment of $175, and took possession of his purchase. He soon found that it was not at all what he had been led to believe. It was not well

built. I have no evidence as to what was meant by "old English style," but clearly the parties understood by that something better than our modern Canadian style—and the fact is that the house was not better, but, if anything, worse than the ordinary Canadian house of the kind, and it was "jacked up." The workmanship was not good (the plaintiff seems to have been an amateur carpenter); the house was not double-boarded on the outside, and it was not warm and comfortable. . . . All these defects became apparent from time to time, but the defendant, instead of throwing up his purchase, went on and paid the instalments due 22nd May, $10, 22nd June, $15, and $22nd July, $10, and interest, $18. Before this last mentioned day the defendant and his wife were aware of all the faults of the house and of the falsity of all the misrepresentations of the plaintiff. On that day, upon paying the plaintiff the instalment of principal and interest, the defendant told the plaintiff that the house was not double-boarded on the outside, and he (plaintiff) said that if they used felt paper, the defect could be remedied. The defendant paid the instalment, having made up his mind to take his chance of the remedy suggested by the plaintiff being effective. It did not so prove—the defendant changed his mind—and on the 22nd August coming round, he refused to pay the instalment then due, but continued to hold possession, lest he should lose the money he had paid, including the $20 or $30 he had put on in repairs.

This action was brought on 5th September. The plaintiff's pleading set out the agreement and the payment by the defendant, but added that when the instalment became due on 22nd August, "the defendant neglected and refused . . to pay the same, whereby all the said payments made by the defendant . . . became forfeited to the plaintiff . . . and the plaintiff became and is entitled to . . . take possession . . . but the defendant refuses to deliver up possession . . ." And the plaintiff claims possession, $15 a month for use and occupation since 22nd July, and general relief. The defendant pleads misrepresentation and fraud on the part of the plaintiff, and claims rescission of the agreement, return of his purchase money, and general relief.

At the trial (the defendant still insisting upon and retaining possession) I found the facts I have already set out and others, and these findings may be referred to.

Had it not been for the conduct of the defendant, continuing his payments and his occupation after becoming fully aware of the falsity of the representations made to him to induce—and which did induce—him to execute this contract, there can be no doubt that he would have been entitled to rescission. "Where representations are made with respect to the nature and character of property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a court of common law to recover damages for the deceit so practised: and in a court of equity a foundation is laid for setting aside the contract which was founded upon that basis:" Lord Lyndhurst in Attwood v. Stuart, 6 Cl. & F. 232, 395; Directors and C. R. Co. Venezuela v. Kisch, L. R. 2 H. L. 99, 121.

I find fraud in all the representations made except that as to the house being warm and comfortable. In this case the delay would not deprive the defendant of his right to rescind: Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218; Clough v. London and North Western R. W. Co., L. R. 7 Ex. 26; Morrison v. Universal Marine Insurance Co., L. R. 8 Ex. 197.

The plaintiff, however, contends that, with a full knowledge of all the facts, the defendant elected to affirm the contract, manifesting this election by paying the instalment due 22nd July, and going on repairing and "fixing up" the house in a manner which he thought would result in making it satisfactory. If a party, "knowing of the fraud," elects "to treat the transaction as a contract, he loses his right of rescinding it:" Campbell v. Fleming, 1 A. & E. 40, 42; and the discovery of a new ground for rescission does not revive this right so lost: S. C., at p. 42; Walton v. Simpson, 6 O. R. 213.

So that, even if it should be considered that the representation that the house was warm and comfortable had not on 22nd July been demonstrated to the defendant as being false, he would not, upon this being proved, acquire a new right to rescind if it had once gone. Moreover, I do not find that the last mentioned representation was in fact fraudu-

lent, though I do find it was a mistake; and an innocent misrepresentation, as I think this was, would not be a ground for rescission: Shurie v. White, 12 O. L. R. 54, 7 O. W. R. 773, and cases cited, especially 12 O. L. R. p. 60.

I cannot look upon the acts of the defendant in paying the instalment due on 22nd July, 1907, and continuing in the house and repairing it to suit himself, as anything other than unequivocal acts of ratification, adoption, or confirmation of the voidable contract. The rule as to what is necessary in order that there shall be a ratification of a contract procured by fraud and the like is laid down in several ways. "You must have full knowledge of your rights when you execute the act of confirmation:" Sandeman v. MacKenzie, 30 L. J. N. S. Ch. 838, 842. "A waiver must be an intentional act with knowledge:" Darnley v. L. C. and D. R. Co., 36 L. J. N. S. Ch. 404. There must be full knowledge of all the facts, full knowledge of all the equitable rights arising out of those facts, and an absolute release from the undue influence by means of which the frauds were practised:" Moxon v. Payne, L. R. 3 Ch. 881, 885. "In equity it is considered, as good sense requires it should be, that no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the facts upon which the defect of title depends, but of the consequence in point of law:" Cockerell v. Cholmeley, 1 R. & M. 418, 425. To have any effect or validity . . . it must be shewn that the party was fully acquainted with his rights, that he knew the transaction to be impeachable which he was about to confirm, and with this knowledge and under no influence he freely and spontaneously executed the deed: Dunbar v. Trendenditch, 2 B. & B. 304, 317. . . .

[Reference also to Murray v. Palmer, 2 Sch. & Lef. 474, 486.]

But, applying any of these tests . . . I cannot consider what was done by the defendant as anything but unequivocal acts of ratification—adoption of the contract. . . . .

[Bernard v. Riendeau, 31 S. C. R. 334, distinguished.]

Here there was no repudiation, but, on the contrary, as I think, a complete ratification by the defendant, with full knowledge and intending to ratify. That he afterwards changed his mind makes his case no stronger than it was

on 22nd July, and when going on with his repairs. I think, therefore, the contract is binding and is not to be rescinded.

That decision does not, however, dispose of the case. A common law action lies for deceit inducing any one to enter into a contract, and may be pursued though the contract is not—or cannot be—rescinded. Here there was deceit inducing the contract, and the defendant is entitled to such damages as he can shew resulted from his entering into the contract. By entering into the contract he has been induced to pay certain sums of money to the plaintiff. Not having carried out his contract, he cannot claim the difference in value between the property as it should have been and as it is—he has disabled himself from taking that remedy; and the contract provides that money paid thereunder shall be forfeited, and so cannot be recovered back by an action on the contract. But why should damages not be given to the defendant for being induced to enter into such a contract. I do not see any reason. . . .

[Reference to Pearson v. Dublin, [1907] A. C. 351.]

The damages are the amount of money he has paid, less the value he has had under the contract, that is, the value of the property for occupation purposes. That I fix at $10 per month for the time the defendant was in possession. (I am informed that he has now given up possession.) Except by consent I can deal with this value only up to the time of the trial—but, if both parties consent, I fix the same amount during the whole period of the defendant's occupancy. The plaintiff being under the contract entitled to retain the money paid, and the defendant to recover the same amount back for damages for deceit, together with the $20 paid by him for repairs, less the value he has received for the occupation of the property, the result is the same as though it should be ordered that the plaintiff return the amount paid him, less rent at $10 per month, the sum of $20 being allowed on the rent.

The result financially is the same as though the defendant had succeeded upon the claim for rescission; had I thought that that claim should succeed, I should have given no costs to either party; and, in the result I have arrived at, I think no costs should be given.

MABEE, J. DECEMBER 4TH, 1907.

TRIAL.

ROBERTSON v. ROBERTSON.

Landlord and Tenant — Action for Rent — Conveyance of Land—Reservation of "Life Interest"—Grantee Taking Possession — Occupation Rent — Release—Evidence — Rights of Executors of Grantor—Payment of Debts.

Action to recover $2,400 for arrears of rent or for use and occupation of the east half of lot 2 in the 4th concession of South Monaghan.

A. P. Poussette, K.C., and L. M. Hayes, Peterborough, for plaintiffs.

F. D. Kerr, Peterborough, for defendant.

MABEE, J.:—On 2nd May, 1898, John Robertson conveyed the lot in question to his son William H. Robertson, the expressed consideration being natural love and affection. The habendum in the deed, at the conclusion of the printed portion, contains the following: "And also subject to the life interest therein of the said party hereto of the first part." On the same day William H. Robertson executed a mortgage of the lands to his sisters, Sarah Jane and Mary Ann Robertson, for $3,000, payable at the expiration of 10 years, bearing interest at 4 per cent., payable half-yearly; and at the same time gave them a promissory note for $1,000. The father gave up possession of the farm and farm stock to the son, who had just married. The farm at the time was worth about $5,000. There is no evidence of what the stock consisted of or its value. The son died intestate on 26th September, 1906; and the defendant, Mabel Hannah Robertson, is his widow and administratrix. The father died on 12th January, 1907, and the plaintiffs, Sarah Jane and Mary Ann Robertson, are his executrices, probate of his will having been granted to them on 5th February, 1907. The will is dated 28th May, 1906, and by it all the estate of the testator is given to the daughters in equal portions. There is no direction as to payment of debts other than funeral expenses.

On 2nd May, 1898, the daughters, by a document under seal, "granted and released" to the defendant, in consideration of the aforesaid $4,000, represented by the mortgage and promissory note, "all right, title, interest, claim and demand whatsoever, both at law and in equity or otherwise howsoever, and whether in possession or expectancy, and whether as legatees, heirs-at-law, or otherwise howsoever, of them or either of them, of, in, to, or out of the real and personal estate of their father."

The father had no estate of any kind whatsoever at the date of his death, unless he was entitled to be paid some sum as rent or for use and occupation of these lands by his son.

After the death of the son, his widow, the defendant, left the farm, leasing it to a tenant; and some one on behalf of the father—it did not appear whether by his personal direction or not—gave notice to the tenant to pay rent to him, and, without the knowledge of the defendant, the tenant did make some payments, and since the father's death made payments to the plaintiffs; the amount of such payments does not appear.

During the life of the son the father never made any demand of any kind upon him for the payment of rent or for use and occupation; they were living upon friendly terms, the father frequently visiting at the farm, and being always welcomed to come and go as he pleased, but in no sense did he permanently reside there. The son's widow says the farm stock and grain on the farm at the time the father left belonged to her husband, but the written agreement made at the time seemed to treat the farm stock as belonging to the father. . . .

It was stated at the trial that at the time the father died he was indebted to two banks, but no evidence was given as to the amount or the circumstances connected with these liabilities, and, for all that appears, it may have been as indorser for the daughters. It was also said that the funeral expenses have not been paid. The father's will gives the estate to the plaintiffs, "provided" they pay the funeral expenses. The son paid the $4,000 to his sisters in consideration for the release they executed, and in all respects fulfilled his part of the agreement.

It is clear, I think, that the plaintiffs are not entitled to recover anything from the defendant for their personal benefit. As "legatees" of their father they released the

son. The $4,000 paid to them was to represent all their present and future interest in the lands of every kind, and to order the son, or his estate, now to pay rent for these lands to these plaintiffs would be absurd.

It was contended that they had some right to recover in the interest of these alleged creditors. I do not think so; there is no sufficient evidence of the nature of the claims of these creditors—no claims were proved at the trial, other than, in a general way, that there were outstanding debts to the banks by the father. Again, what is the meaning and effect of the reservation of a "life interest" in the lands for the father's benefit? What is the "interest"? It was clearly not intended that the son should pay the full rental of the farm to the father, and in addition pay the $4,000 and interest to the sisters. There is nothing in the transaction from which it can be assumed the father and son were placing themselves in the position of landlord and tenant; all the circumstances lead to the contrary presumption. Nor is there anything to lead to the inference that the son was to pay for the use and occupation of the land. "Life interest" I do not think has at all the same meaning as "life estate." A right to live in the house, occupying 2 or 3 rooms during his life, might have been a "life interest" in the father; it is impossible to fix any money value as the equivalent of this doubtful "interest." The father never exacted anything, and how can it be said now, after the death of both the principal parties to the transaction, that the Court should step in and say they meant the son should pay the full rental of the lands, and if not the full annual value, then what part should be paid? There is no way of measuring any sum whatever; certainly, if any sum could be fixed, it should not be more than sufficient to pay the creditors; and no evidence has been given as to what that sum is. It is clearly inequitable that the plaintiffs should profit at the expense of the son's estate. I do not think there is any claim that can be reached in this action or made exigible for creditors, even had the existence thereof been given with sufficient exactness.

The action must be dismissed with costs.

MACMAHON, J. DECEMBER 4TH, 1907.

TRIAL.

GILLIES BROTHERS CO. LIMITED v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION (No. 1).

Timber—Destruction by Fire—Crown Lands—Timber License—Renewal—Expiry of License—Timber Vested in Crown—Action by Licensees for Damages for Negligence in Operation of Railway.

Action for damages for timber burnt upon the limits of plaintiffs, as alleged, by reason of the negligence of the defendants, in 1905.

E. F. B. Johnston, K.C., and R. McKay, for plaintiffs.

D. E. Thomson, K.C., and A. J. Thomson, for defendants.

MACMAHON, J.:—The writ of summons was issued on 27th December, 1905.

On 24th September, 1907, an order was made by consent of the parties whereby John J. MacCraken, executor of the will of Mrs. Lumsden, who was executrix of the will of Alexander Lumsden, deceased, and John R. Booth were added as parties plaintiffs, on the terms, as to the right or claim of the added plaintiffs, that the action should be deemed to have been commenced on the date of their being added as parties, and that there should be open to the defendants, as against such added plaintiffs, all defences which would have been available to the defendants had the action been brought on the date of the adding of these plaintiffs.

The plaintiffs were the owners of what has been called "the Gillies timber limit," consisting of 50 square miles on the Montreal river in the rear of Lake Temiskaming.

The license for that limit was first issued in January, 1867, to D. T. Brown; then by several mesne transfers acquired by Gillies Brothers in 1882, and continued to be issued to them up to the season 1899-1900, when it was transferred to the Gillies Brothers Company Limited, and the license was issued in the company's name down to the season of 1906-7.

This limit the plaintiffs sold in February, 1907.

A license was first issued to the late Alexander Lumsden and John R. Booth in 1878 for berth number 33 on the Montreal river, containing 100 square miles, which adjoins the Gillies limit to the south-east. During the life of Alexander Lumsden the license was each season issued to Alexander Lumsden and John R. Booth. After Alexander Lumsden's death the licenses were issued to the representative of the late Alexander Lumsden and John R. Booth, and in the evidence at the trial it is referred to as the "Lumsden and Booth limit."

By an agreement dated 15th February, 1905, it is recited that Margaret Lumsden, the executrix of the late Alexander Lumsden, holds an undivided two-thirds interest in timber limit known as berth 33, situated on the Montreal river, containing 100 square miles; and she undertakes to have the undivided one-third interest held by John R. Booth assigned and transferred to her, and she agrees to sell the said berth to the plaintiff for $515,000. The terms of payment are fully set out in the agreement, the last instalment, of $123,333, being payable in 3 years from date of the agreement; and the buyers have the right to occupy the berth and cut the timber from the date of the agreement. The seller (Mrs. Lumsden) is to hold the license in her name as security till fully paid the whole amount of the purchase money.

Both the Gillies limit and the Lumsden and Booth limit extend for a considerable distance along the line of railway operated by the defendants, the railway going through the limits.

Paragraph 9a of the statement of claim charges that the defendants were guilty of negligence in that they permitted the accumulation of cut timber, brush, chips, and other inflammables, to remain upon the right of way of the railway, and failed to keep the same clear so as to avoid danger of fire starting or spreading on and from the said right of way. It is also charged that the defendants in the operation of their railway caused fire to be set to the timber and trees, the property of the plaintiffs, on the said limits, during May, June, and July, 1905, whereby a large quantity of the plaintiffs' property was burned and otherwise injured by said fires.

. . . .

[The learned Judge made a full synopsis of the evidence, and proceeded:—]

I find it was by reason of the failure of the defendants to remove the combustible material from the railway lands that sparks from the railway engines of the defendants caused the fires which resulted in the destruction of the timber on the said limits at mile 92 on 30th May, at mile 90 on 9th June, and at mile 96 on 1st July, 1905.

By the Crown Timber Act, R. S. O. 1897 ch. 32, sec. 3, sub-sec. 1, it is provided that the licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being on the nominee the right to take and keep exclusive possession of the lands so described, subject to such regulations and restrictions as may be established; and, by sub-sec. 2, the licenses shall vest in the holders thereof all rights of property whatsoever in all trees, timber, and lumber cut within the limits of the license during the term thereof, etc.

By clause 11 of the Crown timber regulations of April, 1865, "all timber licenses are to expire on the 30th of April next after the date thereof, and all renewals are to be applied for and issued before the 1st of July following the expiration of the last preceding license, in default whereof the right to renewal shall cease, and the berth or berths shall be treated as forfeited."

"12. No renewal of any license shall be granted unless and until the ground rent . . and all dues to the Crown on timber, saw logs, or other lumber cut under and by virtue of any license other than the last preceding, shall have been first paid."

An order in council passed on 17th November, 1898, provided: "Whenever such ground rent may have remained unpaid for 3 years from the date of the expiry of the last license issued or renewed, the Minister . . . may declare such berth or berths forfeited, and thereupon the right to renewal of the license to the same shall cease."

The licenses give to the licensees full power to cut the timber described therein upon the location from the date thereof to 30th April, and no longer.

On 30th June, 1905, E. J. Darby, the Crown timber agent at Ottawa (within whose district plaintiffs' limits are) wrote to the plaintiffs acknowledging receipt of cheque "for

$1,641, amount for renewal of ground rent for renewal of your license for current season," and saying that $29.62 was due by them for timber dues, "and consequently the amount stands against you in the books here, and affects the issue of your licenses for current season."

The plaintiffs on 3rd July, 1905, paid the $29.62, and the license for the Gillies timber limit should have been issued within a few days thereafter. The ground rent on the Lumsden and Booth limit was not paid until about 6th July, and the license was then sent from the Ottawa agency for signature by the Commissioner, but was not signed by him till 13th December, 1905.

Although the plaintiffs might have obtained a renewal of the licenses for the season of 1905-6, they were not licensees of the limits until payment of the ground rent and any sum remaining unpaid for timber dues, and therefore had no right to cut the timber on the Gillies timber limit until after 3rd July, 1905, when such payment was made, and on 6th July in respect of the Lumsden and Booth limit, when they would be entitled to renewals of the licenses. . . .

[Reference to McArthur v. Northern Pacific Junction R. W. Co., 15 O. R. at p. 737, 17 A. R. 86; opinion of Mowat, Attorney-General, in reporting on claim of W. A. Scott Estate in 1876, Sessional Papers, No. 21, vol. 10, part IV., 1876, p. 8; Smylie v. The Queen, 27 A. R. 172, 178, 188.]

As the statute gives no right to the renewal of the license, the Crown could, on 30th April, in any year, terminate the licenses and withdraw the limits altogether from the licensing area, notwithstanding the order in council of November, 1898.

There were no licenses in existence when any of the fires occurred for which damages are claimed in this action. As the timber while standing belonged to the Crown, and the plaintiffs' right to cut was only during the term of the respective licenses, and there being no license, the plaintiffs cannot recover.

Action dismissed with costs.

MACMAHON, J. DECEMBER 4TH, 1907.

TRIAL.

GILLIES BROTHERS CO. LIMITED v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION (No. 2).

Crown—Government Railway—Liability for Nonfeasance—Destruction of Timber—Negligence.

Action for damages for timber burnt upon the limits of plaintiffs, as alleged, by reason of negligence of defendants, in 1906.

E. F. B. Johnston, K.C., and R. McKay, for plaintiffs.

D. E. Thomson, K.C., and A. J. Thomson, for defendants.

MACMAHON J.:—The writ of summons was issued on 6th December, 1906. The pleadings are a repetition of those in action No. 1, between the same parties, except that the damages claimed are in respect to a fire alleged to have been caused by an engine of defendants setting fire to combustible material allowed to remain on the right of way, and so communicating to and destroying portions of the timber limits of the plaintiffs (described in action No. 1), on 30th July, 1906.

There was issued to the representatives of the late Alexander Lumsden and to J. R. Booth a license from 9th July, 1906, to 30th April, 1907, to cut on the 100 square miles on the Montreal river. The ground rent was paid by the plaintiffs. A license was also issued to the plaintiffs for the Gillies timber limit, covering the same period.

Mr. Aubrey White, the Assistant Commissioner of Lands and Forests, produced a map shewing the proclaimed fire district, and that the timber limit in question is within the boundaries of the district.

[Synopsis of evidence].

I find that the fire in question was caused by a spark or sparks emitted by engine 101 falling on the combustible material which the defendants' servants negligently per-

mitted to accumulate and remain on the right of way of the railway.

The Act incorporating the defendants is 2 Edw. VII. ch. 9, the preamble to which recited that an exploration of the province has shewn that in the district between Lake Nipissing and Lake Abitibi, and north-westerly from Lake Temiskaming, there are large areas of arable land and extensive tracts of pine and deposits of ores and minerals which are expected on development to add greatly to the wealth of the province, and the district is difficult of access, and it is in the public interest that it should be brought into communication with the existing lines of railway, and that for this purpose a railway should be constructed and operated under the control of the province from a point at or near North Bay to a point on Lake Temiskaming.

"1. This Act may be cited as 'The Temiskaming and Northern Ontario Railway Act.'"

Section 2 provides that the Lieutenant-Governor in council may appoint not less than 3 nor more than 5 persons a board of commissioners for the purpose of the railway to be constructed under the provisions of the Act, and the commissioners shall be a body corporate under the name of "The Temiskaming and Northern Ontario Railway Commission."

"3. (1) The commission shall, subject to any direction of the Lieutenant-Governor in council, have authority to construct a continuous line of railway of a gauge of 4 feet 8½ inches from the town of North Bay to a point on Lake Temiskaming.'"

"8. The commission, subject to any direction of the Lieutenant-Governor in council, shall have, in respect of the said railway and works, in addition to all the powers, rights, remedies, and immunities conferred by this Act, all the powers, rights, remedies, and immunities conferred upon any railway company by the Railway Act of Ontario."

Section 12 provides that the commission may issue debentures to raise money for the construction and equipment and maintenance of the railway.

Sub-section 3 of sec. 12: " . . . The Lieutenant-Governor, by order in council, may also guarantee payment of the principal and the interest of the said debentures."

Section 13, sub-sec. 3, directs the commissioners to "provide a sinking fund at such rate per cent. per annum on the entire amount of the debentures issued as aforesaid as will discharge the principal of the said debentures at the maturity thereof."

"(4) . . The income then remaining shall be paid over by the commissioners to the Treasurer of Ontario at such times and in such manner as the Lieutenant-Governor in council directs, and shall thereupon form part of the consolidated revenue fund of the province."

The railway commission is therefore a department of the Government, and commissioners were appointed under the Act for the management of that part of the government business, "and are not responsible for the neglect or misconduct of servants, though appointed by themselves in the business. The subordinates are the servants of the public, not of the person or persons who have the superintendence of that department, even if appointed by them." See the judgment of Lord Wensleydale in Mersey Docks Co. v. Gibbs, L. R. 1 H. L. at pp. 124-5. . . .

[Reference also to Graham v. Commissioners of Niagara Falls Park, 28 O. R. 1; Sanitary Commissioners of Gibraltar v. Orfila, 15 App. Cas. 400; Municipality of Pictou v. Geldert, [1893] A. C. 524; Quebec v. The Queen, 2 Ex. C. R. 252; The Queen v. McLeod, 8 S. C. R. 1; The Queen v. McFarlane, 7 S. C. R. 216; Gibbons v. United States, 8 Wallace 269; Attorney-General for Trinidad v. Bourne, [1895] A. C. 83—distinguishing this last case.]

In the case in hand, what the evidence discloses is that the dead and rotten wood, chips, dry grass, leaves, and brush, were allowed by the servants of the commissioners to remain on the right of way during the summer months, which was merely nonfeasance.

The parties have settled the causes of action set out in paragraph 1A of the prayer to the statement of claim. And the counterclaim of the defendants having also been settled, there will be judgment for the defendants dismissing the claim as to the other causes of action, with costs.

DECEMBER 2ND, 1907.

DIVISIONAL COURT.

REX v. BOOMER.

Liquor License Act—Conviction of Hotel-keeper for Selling Liquor in Prohibited Hours—Subsequent Conviction of Bar-tender for same Offence—Invalidity of Later Conviction—Validity of Earlier—Statutory Exception in Regard to Sales in Prohibited Hours—Sales for Medicinal Purposes—Necessity for Negativing Exception in Conviction—Information — Burden of Proof — Amendment — Powers of Court—Appeal from Order Quashing Conviction.

An appeal by the Crown, under sec. 120 of the Liquor License Act (R. S. O. 1897 ch. 245), from an order of the Judge of the District Court of Muskoka quashing a conviction of the defendant, upon an information charging that as hotel-keeper of the Royal Muskoka hotel, in the township of Medora, he did illegaly sell or dispose of liquor between the hours of 7 o'clock p.m. on Saturday 10th August, 1907, and 6 o'clock on the Monday morning following, and further charging that he had been previously, to wit, on 9th August, 1906, convicted of a like offence.

J. R. Cartwright, K.C., for the Crown.

J. Haverson, K.C., for defendant.

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

ANGLIN J.:—An information was also laid against one O'Connor, a licensed bar-tender at the Royal Muskoka hotel, charging him with unlawfully selling or allowing liquor to be sold at the said hotel between the hours of 7 o'clock p.m. on Saturday 10th September, 1907, and 6 o'clock on the following Monday morning.

The date charged in this latter information was admittedly a mistake, and was intended to be 10th August, 1907. This appears by indorsement made upon the proceedings by the District Court Judge.

It is conceded by Mr. Cartwright that the evidence would not warrant a contention that separate or different sales of liquor were referred to in the two informations.

Mr. Haverson frankly accepted Mr. Cartwright's statement that the defendant Boomer was first tried and convicted, and that O'Connor was subsequently tried and convicted, by the magistrate, upon the same evidence which had been taken against the defendant Boomer. The District Court Judge, in these circumstances, held that the convictions both of the present defendant and of O'Connor must be quashed as in contravention of sub-sec. 2 of sec. 112 of the Liquor License Act, which permits the prosecution of the occupant of the hotel (i.e., the proprietor or license-holder) and the actual offender (i.e., the person actually selling), separately or jointly, but provides that "both of them shall not be convicted of the same offence, and the conviction of one of them shall be a bar to the conviction of the other of them therefor."

As to the conviction against O'Connor, this order was undoubtedly right. But, the defendant Boomer having been convicted before O'Cnonor was tried, the fact that O'Connor was subsequently tried and convicted cannot affect the validity of the conviction already recorded against the defendant Boomer. The order of the Judge, therefore, could not be sustained upon this ground.

Mr. Haverson, however, points out that in sec. 54 of the Liquor License Act (6 Edw. VII. ch. 47, sec. 13), prohibiting sales of liquor in licensed premises between 7 p.m. on Saturday and 6 a.m. on the following Monday, sales to persons presenting a requisition that liquor is required for medicinal purposes, signed by a duly qualified medical practitioner, or a justice of the peace, are excepted.

The Court of Common Pleas in Regina v. White, 21 C. P. 354 (a decision which stands unquestioned) held that a conviction under the corresponding section of 32 Vict. ch. 32, which omitted to state that the liquor had not been supplied upon a requisition for medicinal purposes, was bad, and the conviction was accordingly quashed. At the date of that decision there was in force a provision corresponding with the present sec. 717 of the Criminal Code, which enacts that if the information negatives any exception in the statute on which the same is founded, it shall not be necessary for the prosecutor to prove such negative, but the defendant may prove the affirmative thereof in his defence.

In the present case the information did not negative the exception contained in sec. 54. The conviction is not before us, but Mr. Haverson contends that we must assume that it followed the information. If the defect were merely in the conviction, it could probably be remedied under sec. 15 of the Ontario statute 2 Edw. VII. ch. 12, which makes applicable to convictions under the Ontario Summary Convictions Act all the provisions of the Criminal Code of Canada as to amendment of convictions or orders, both upon appeal and on their removal by certiorari. Section 754 of the Criminal Code enables the appellate court, on appeal from a summary conviction by a justice of the peace, to dispose of the charge or order complained of on the merits, "notwithstanding any defect in the conviction or order."

But the jurisdiction conferred by this section certainly cannot be exercised where the evidence befor the magistrate fails to disclose the offence of which, by the amendment of the conviction, it is sought to declare the defendant guilty.

In the present case the information did not negative the exception in sec. 54 of Liquor License Act, protecting sales to vendees holding requisitions for the purchase of liquor for medicinal purposes. Therefore, the provision of the Criminal Code casting upon the defendant the onus of proving affirmatively that he was within this exception did not apply. The burden was upon the prosecutor to adduce evidence that the sale in respect of which the charge is laid was not within the exception of sec. 54. There was no evidence whatever before the magistrate upon this point. If the conviction follows the information, and is, therefore, on its face defective, it cannot be rectified; if the conviction goes beyond the information and purports to negative the exception, there is no evidence to support it. In either case the order quashing it must, upon this ground, be upheld.

Although the magistrate, in the course of proceedings before him, might, subject to the provisions of sec. 104 of the Liquor License Act, have amended the information by adding a clause negativing the exception in sec. 54, it would be contrary to every rule to permit such an amendment to be now made, the effect of which would be to dispense with the necessity of the prosecutor proving what he would otherwise be bound to prove in order to establish the offence charged. There is no statutory provision authorizing a course so subversive of natural justice.

The appeal must, therefore, be dismissed.

CARTWRIGHT, MASTER. DECEMBER 5TH, 1907.

CHAMBERS.

McALPIN v. RECORD PRINTING CO.

Libel—Pleading—Statement of Claim—Irrelevant Allegations—Motion to Strike out.

Motion by defendants to strike out paragraphs 6 and 8 and the concluding words of paragraph 10 of the statement of claim "as irrelevant and likely to prejudice the fair trial of the action."

A. G. Ross, for defendants.

N. Sommerville, for plaintiffs.

THE MASTER:—The plaintiffs allege that they have been libelled by the defendants, as is set out in a statement of claim of about 30 folios in length. From this it appears that the McAlpin Tobacco Co. in 1902 amalgamated with the Consumers Tobacco Co. The operations of the new company were unsuccessful, and many farmers and tobacco growers who had purchased stock in the new venture were extremely aggrieved, and formed a combination to defend over 100 suits threatened to enforce payment of notes given by them in payment of shares so purchased.

A test action was tried at the County Court sittings at Sandwich on 12th June and two following days, and while judgment was reserved, on 15th June, the defendants published the first of the libels complained of, laying the blame of the failure of the venture on "Gen. McAlpin's crowd," through a "most deliberate and cold blooded 'freeze out' successfully worked by the McAlpins," and seeking to exonerate those who had been interested in the Consumers Co. Three days later this was repeated in the weekly issue of the Record.

About two months later judgment was given in the County Court action in favour of the defendant, and then the Record published a notice of this, of which the plaintiffs also complained. This was repeated as before in the weekly issue of 3rd September, and on 10th September the plaintiffs wrote requesting an apology. This was refused.

as set out in 10th paragraph of statement of claim, in a letter of 14th September, "in language which added insult to the injury complained of." It is against these words that the defendants move, but they may surely be taken as an assertion by the plaintiffs that they intend to use this letter as proof of malice in fact, and, in my opinion, they are unobjectionable as a matter of pleading.

The 6th paragraph of the statement of claim is 7 or 8 folios in length. It gives a history of the amalgamation, and accounts for the failure of the new company by alleging misapplication by the members of the Consumers Co. of the money of the new company, who used it to pay their own debts, and that then these gentlemen, to replace such moneys, sold shares in the new company to the farmers and tobacco growers in the county of Essex and the adjacent counties. It then speaks of the trial of the County Court case, and in the 8th paragraph states that defendants were present thereat and knew that the evidenc given shewed that the charges made against the plaintiffs "were wholly false and without the least foundation in fact."

In support of the motion the case of Hay v. Bingham, 5 O. L. R. 224, 1 O. W. R. 822, was cited. That, however, does not seem to me to be in point. These paragraphs 6 and 8 are not in any sense a "glorification of the defendants by themselves;" on the contrary, they give an account of the whole matter which plaintiffs contend shews that the defendants have done what they did with a desire to injure the plaintiffs and shield those who had been in the Consumers Co.; and that they will, therefore, not be able to plead that the articles complained of were no more than fair comment on matters of public interest, etc.

As in the case of the concluding words of paragraph 10, these paragraphs 6 and 8 also set out very fully and clearly the grounds on which the plaintiffs will rely to shew express malice. They do not seem to be in any proper sense of the words "irrelevant or likely to prejudice the fair trial of the action."

In my opinion, the motion should be dismissed with costs to the plaintiffs in the cause.

RIDDELL, J. DECEMBER 5TH, 1907.

WEEKLY COURT.

CANADIAN PACIFIC R. W. CO. v. FALLS POWER CO.

Injunction—Motion for Interim Injunction—Electric Wires—Dangerous Proximity to Others—Danger to Employees of Electrical Companies—Danger to Public—Induction—Leave of Town Corporation—Prima Facie Case—Continuance of Injunction—Terms—Speedy Trial—Costs.

Motion by plaintiffs to continue an interim injunction restraining the defendants from erecting poles and stringing wires upon a certain street in the town of Welland.

Angus MacMurchy and A. D. Armour, for plaintiffs.

W. E. Middleton, for defendants the Falls Power Co.

W. H. Blake, K.C., for defendants the Ontario Power Co. of Niagara Falls.

RIDDELL, J.:—The plaintiffs have a telegraph line (with some 8 wires) running through the town of Welland. On Hellems avenue these wires are on the same poles as the wires of the Bell Telephone Co. (some 14 in number.) For a distance on the west side of the avenue these poles are placed on the inside of the sidewalk, and the Falls Power Co. or their co-defendants have poles also on the west side of the avenue, but on the outside of the sidewalk. At Division street the line of the plaintiffs and the Bell Telephone Co. crosses over to the east side of Hellems avenue, and on that side runs on the inside of the sidewalk, leaving the outside free. Until recently there were no other poles on the east side of Hellems avenue, but a few days ago the defendants the Falls Power Co. began erecting poles on the east side of the avenue, two of them, as their own manager swears, in a line with the plaintiffs' poles and projecting through the telegraph and telephone wires. There is some dispute as to the distance these poles go above the present poles, and also as to the amount of "clearance" of the wires—the plaintiffs contending that the amount of clearance will at the most be not more than 3 feet, while the defendants' electrician swears to 10.

The plaintiffs, asserting that the intention was to string wires along these poles and to carry electricity at a very high

voltage (some 22,000 voltage is alleged), applied to the Chancellor and procured an injunction. As the plaintiffs were unable to discover which of the two defendant companies was really doing the acts complained of, an injunction was obtained against both. Upon a motion to continue the injunction, the Ontario Power Co. shewed upon affidavit that they were innocent, and by consent the motion was turned into a motion for judgment as against them, and the action dismissed as against them with costs.

As against the Falls Power Co. the plaintiffs set up that the existence of a line carrying a high voltage, and situate as it is intended the line of that company shall be, will cause grave danger to the employees of the plaintiffs working on or about their lines and poles—and also that the lives of empoyees working miles away would be endangered in case of a wire breaking. Moreover, it is asserted that great damage might be done to the property of the plaintiffs by such an accident—and that in any case induction may be expected sufficient to seriously interfere with the operation of their telegraph line. They also point out that there is no good reason for the defendants not taking the other side of the sidewalk and keeping away from their poles altogether.

The defendants allege that they have a "franchise" from the town of Welland, the poles to be placed where directed by the street committee of the town; that their poles are being put up "with the consent of the chairman of the street committee;" that the likelihood that the wire they propose to put up will break is small; and there will be no induction whatever.

Upon the argument it was agreed that I might use such scientific knowledge as I had—acquired from any source—and I have accordingly looked at certain works of authority. In view of the disposition I propose to make of this case, I did not think it proper to do more than make a somewhat superficial examination of the question of induction. So far as my investigation has gone, I am not at all satisfied—but the reverse—that there will be no induction, and that that induction, considering the relative voltage of the currents, may not be of a very disturbing character. If that be the case—and for the purposes of this motion I hold that a prima facie case has been made out—the fact that the leave of the town has been obtained might not be of importance.

In Ottawa Electric Co. v. Consumers Electric Co. (Supreme Court Cases, vol. 249, in Library) both parties had obtained the leave of the City of Ottawa to string their poles, and the poles of the defendants had been placed precisely where the city engineer directed, but, nevertheless, the trial Judge . . . ordered the removal of all poles and wires of the defendants within a stated distance of the wires of the plaintiffs. This judgment was modified in the Court of Appeal, 14th September, 1903, but in a sense adverse to the defendants, and the Supreme Court dismissed an appeal from that judgment.

But there is another ground upon which the injunction should clearly be continued. Salus populi suprema est lex; and the maxim is applicable to the individual as well as to the body politic. Nothing should be permitted which will unnecessarily endanger the lives of the people. We experience a feeling of horror when some poor fellow is hurried into eternity — surely everything should be done in advance to prevent such occurrences. From cases such as Randall v. Ahearn it is well known that repairers and others are likely to be killed or injured by these high voltage currents; it is well known from such cases as Findlay v. Hamilton Electric Light Co. that wires, even such as are used for the carriage of electricity of high voltage, will sometimes break, with terrible consequences. Sometimes, upon such wires breaking, those many miles away are killed or injured.

Commercial necessity is pleaded for permitting such construction. "Commercial necessity" sometimes, indeed generally, means saving of money; and that plea should only be given effect to as against the protection of the innocent from danger in the clearest case.

The leave of the town has not been proved on the material before me—if the direction of the street committee was to govern the position of the poles of the defendants, that direction does not seem to have been obtained—all that is alleged is the consent of one member of that committee.

It may be that at the trial the defendants may be able to displace the prima facie case of the plaintiffs; or it may be that the law will be shewn to be such as that they have a legal right to do as they propose, dangerous though it may be—but for the purpose of this motion I think the defendants have failed.

But, while the injunction should be continued, the defendants have a right to have a speedy trial. No greater obstacle should be put in the way of a commercial enterprise such as this than is necessary to protect the rights of others. There is no reason why the whole case may not be disposed of in a week. There are no complications; the facts are simple; expert evidence, if required, can be procured in a few days, or indeed hours; elaborate pleadings are not necessary; and examinations for discovery, etc., would be superfluous.

I shall direct the plaintiffs to bring the action on for trial before myself at the Toronto non-jury sittings on Thursday 12th December, 1907, at 9.30 a.m. . . . The plaintiffs will deliver a statement of claim before 1 p.m. of Saturday 7th December, and defence is to be delivered by 1 p.m. of the Monday following. Neither party need give notice of trial.

. . .

The injunction will be continued until 9.30 a.m. of Thursday 12th December, 1907, and until such time as the action directed by this order then to be tried is disposed of. If the plaintiffs do not accept the terms of this order, and proceed to trial accordingly, the injunction will be then dissolved, unless otherwise ordered; if the defendants do not accept the terms of the order, the injunction will be continued till the trial generally.

In any case the costs of this motion will be costs in the cause to the successful party, unless the trial Judge otherwise orders.

TEETZEL, J. DECEMBER 5TH, 1907.

TRIAL.

KITTS v. PHILLIPS.

Master and Servant—Injury to Servant—Negligence—Contractor—Sub-contractor—Independent Contractor—Foreman—Evidence—Partnership—Contributory Negligence—Damages.

Action under the Workmen's Compensation Act to recover damages for injuries sustained by plaintiff while engaged upon railway construction work.

Peter White, Pembroke, for plaintiff.

W. L. Haight, Parry Sound, for defendants Phillips & Co.

F. R. Powell, Parry Sound, for defendants Montgomery and Maybee.

TEETZEL, J.:— . . . Plaintiff was engaged in drilling rock in the construction of a branch of the Canadian Pacific Railway near Parry Sound. While he was so engaged at the bottom of a deep cut, a large rock, which was on the side of the cut and above where the plaintiff was working, became loosened and rolled down the bank and upon the plaintiff, causing him very serious injury. The plaintiff was in the employment of the defendant Montgomery, who, I find upon the evidence, was an independent contractor under the defendants Phillips & Co. The plaintiff sought to establish that defendants Phillips & Co. were the real employers, and as such liable for any negligence of Montgomery or Maybee, but the evidence falls short of such purpose, and the action as against them must be dismissed with costs.

I give credence to the evidence of the witness Murdoch Watts, and find that the accident was occasioned by the falling rock as described by him. I do not credit the defendant Maybee in his evidence describing a rock which a few minutes before the accident he says was examined by him and Montgomery and found to be immovable, and attributing plaintiff's injury to its subsequent fall, in some way which he does not explain. The rock which caused the injury was, I think, thrown upon the side of the cut by the force of a blast. It was the duty of Maybee, as Montgomery's foreman, to see to the removal of all loose or overhanging rocks from the sides of the cut, so that workmen below might not be injured by their fall. I find that by his negligence the rock which injured plaintiff was not removed, and that both he and Montgomery, his employer, are liable in damages to plaintiff.

Plaintiff endeavoured to establish a partnership between Maybee and Montgomery, but in this I think he has failed. Plaintiff's counsel applied to amend by charging liability aginst him as a negligent foreman, and this I would allow.

I find the plaintiff was not guilty of contributory negligence.

I assess plaintiff's damages at $1,200, and direct judgment to be entered in his favour against defendants Montgomery and Maybee for that sum and costs.

NOVEMBER 12TH, 1907.

DIVISIONAL COURT.

BELLEVILLE BRIDGE CO. v. TOWNSHIP OF AMELIASBURG.

Assessment and Taxes—Toll Bridge over Navigable Water—Highway Connecting Municipalities—Interest of Bridge Company Assessable in Township in which one Half Situate.

Appeal by plaintiffs from judgment of BOYD, C., ante 571.

E. G. Porter, Belleville, for plaintiffs.

W. S. Morden, Belleville, for defendants.

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

MEREDITH, C.J.:—This case has been very fully and ably argued, but we think as to the main point it is concluded by authority binding upon us, and that nothing would be gained by reserving judgment.

The action is brought by the appellants, who were assessed by the municipality of Ameliasburg in respect of that portion of a bridge—a toll bridge which they had erected across the waters of the Bay of Quinte—situate within the township of Ameliasburg. They have paid taxes on that assessment, and now sue to recover back the amount paid, alleging that the bridge was not liable to taxation, and that the rate was therefore wrongly imposed, and that they are entitled to get what they have paid returned.

The bridge was erected, as I understand, by the Bay of Quinte Bridge Company, which was incorporated by Dominion Act of 1887, 50 & 51 Vict. ch. 97. By that Act the corporation was created; and by sec. 2 it is provided that "the company may build and complete a bridge across the Bay of Quinte aforesaid, from the points aforesaid, for ordinary traffic purposes, and may erect and construct toll gates, and construct, complete, and maintain the necessary approaches to the said bridge, and may also do and execute all such other matters and things as are necessary to properly equip and

maintain the said bridge in a proper and efficient manner—and for the said purposes may acquire, purchase, and hold such real estate as is requisite for all the said purposes."

Then there is provision that the company should not commence the bridge until the plan had been approved by the Governor in council (sec. 3); then by sec. 4 the bridge is to be provided with "a draw or swing so constructed as to have not less than 100 feet space for the free passage of vessels, steamboats, rafts, and other water craft, which draw or swing shall, at all times, be worked at the expense of the company so as not to hinder or delay unnecessarily the passage of any such vessels, steamboats, or rafts, or water craft; and during the season of navigation the company shall maintain from sundown to sunrise suitable and proper lights upon the bridge to guide vessels, steamboats, and other water craft approaching the draw or swing thereof."

By 62 & 63 Vict. the plaintiffs were incorporated. It appears that there was some difficulty about their purchasing the rights of the Bay of Quinte Compony, and the Act was passed to enable that to be done.

The Act is very much in the form of the other Act, except that sec. 7 provides that the company "may acquire the bridge now constructed across the Bay of Quinte from a point at or near the city of Belleville, in the county of Hastings, to a point on the opposite shore of the said Bay of Quinte in the township of Ameliasburg, in the county of Prince Edward, and the approaches thereto, and may maintain, use, and operate the same for ordinary traffic purposes, and may construct and maintain toll gates and other necessary buildings in connection with the working of the said bridge."

The effect of this regulation undoubtedly was, in my judgment, to confer a perpetual right in the nature of an easement upon the company to construct and maintain the bridge across the navigable waters of the Bay of Quinte.

In the construction of it, they built an embankment leading up to the superstructure crossing the waters, part of which is said to have been upon private property. The piers which supported the superstructure were built into the soil below the waters of the bay, and it seems to me quite clear that the effect was at least to confer upon the plaintiffs an easement in the soil of the Crown in perpetuity. If the property had belonged to an individual, and a similar right had been conferred by deed, it would undoubtedly have conferred

that easement, if indeed it be not a higher right than an easement. It is unnecessary to determine whether a right in the portion of the soil occupied and an easement as to the rest of it, or an easement as to the whole, is conferred: it is sufficient for the purposes of this case if it is an easement.

Then the question is, what is the effect of the Assessment Act? The principle of the Assessment Act, 4 Edw. VII. ch. 23, is embodied in the section (sec. 5) which provides that all real property shall be liable to taxation.

Now, what is real property? The Assessment Act contains this definition (sec. 2 (7)): "'Land,' 'real property' and 'real estate' shall include:

"(a) Land covered with water;

"(b) All trees and underwood growing upon land;

"(c) All mines, minerals, gas, oil, salt, quarries and fossils in and under land;

"(d) All buildings, or any part of any building, and all structures, machinery, and fixtures, erected or placed upon, in, over, under, or affixed to, land;

"(e) All structures and fixtures erected or placed upon, in, over, under, or affixed to any highway, road, street, land, or public place or water, but not the rolling stock of any railway, electric railway, tramway, or street railway."

This bridge was clearly constructed, erected, or placed upon, in, over, under, or affixed to a highway or water, so that it comes within the very words of the definition.

By the Consolidated Municipal Act, 1903, in sec. 2, paragraph 8, it is provided that "land," "lands," "real estate," "real property," shall include "lands, tenements, and hereditaments, and any interest or estate therein, or right or easement affecting the same;" and by a provision of the Interpretation Act, R. S. O. 1897 ch. 1, sec. 10 (I have not the present Act before me, but the provision is the same in it) "the interpretation section of the Municipal Act, so far as the terms defined can be applied, shall extend to all enactments relating to municipalities."

Therefore we have the words "real property" including an easement, which it did not, as was held, before the amendment was introduced containing those words, and we have the structure over water which is "real property" within the meaning of the interpretation section of the Assessment Act.

Then, in order to escape this burden imposed by the general provision that all real property shall be liable to

taxation, it is incumbent upon the appellants to shew that the bridge comes within one or other of the exemptions mentioned in the Act.

Mr. Porter argues, in the first place, that this is land vested in the Crown, or land vested in some person in trust for the Crown, and that it therefore comes within the first exemption contained in the Assessment Act.

It is to be noted that in the last Assessment Act a change was made in the section dealing with property vested in the Crown. The former Acts provided that "all property" vested in the Crown should be exempted from taxation, but that when real property of the Crown was occupied by others than servants of the Crown, the interest of the occupant should be liable to taxation. The language now is, "the interest of the Crown in any property," so that it leaves the interest of any person else not holding for the Crown, or in trust for the Crown, liable under the general words of the statute.

Mr. Porter further argues—it is very difficult for me to follow the argument—that the plaintiffs are agents or trustees for the Crown, but they are certainly not in that position. They have conferred upon them, as I have already pointed out, a right in perpetuity to maintain the bridge, a property right in the soil, and a right, subject to certain conditions, over the waters of the bay, and in no sense can they be said to be trustees for the Crown within the meaning of the exemption.

Then it is said that sec. 37 of the Assessment Act in express terms excludes from liability to assessment this bridge, because it is a bridge over 100 feet in length.

I adopt entirely the view of the learned Chancellor, which is expressed in these words, in the report of the case, ante at p. 572:

"Section 37 of the Act has no application to this case, for here the property, though over a mile in length, is nothing in its totality but a bridge. That section applies only to a long bridge forming part of a toll road. It matters not that the Bay of Quinte, over which the bridge passes, is navigable water, forming in law a public highway; this bridge gives another right of way of legalized character, obtainable upon payment, over that water, without interfering with the absolute public rights of passage and navigation." The only word that I do not adopt is the word

"long;" I do not think that it is necessary that the bridge should be long, and I do not think that the Chancellor so intends.

The next question is: Is the bridge exempt from taxation because it is a public road or way within the meaning of the 5th paragraph of sec. 5 of the Assessment Act? It is unnecessary for us, I think, to discuss that phase of the case or enter into an elaborate inquiry as to the meaning of the paragraph, because there are three decided cases binding upon us and which are fatal to the appellants' case, so far as it depends upon exemption under that section.

The first case arose in 1869, Niagara Falls Suspension Bridge Co. v. Gardner, 29 U. C. R. 194; the same provision exempting a public road and way existed in the Assessment Act then in force as in the Act now in force; the bridge there was a suspension bridge hung from buttresses erected upon soil upon the Canadian and United States sides respectively of the Niagara river; the water between was a river under the jurisdiction and control of the Parliament of Canada, just as the Bay of Quinte in this case is. The Court was of opinion that so much of the bridge as was within the county of Welland was liable to assessment as real estate.

In Re Queenston Heights Bridge Assessment (also the case of a bridge over the same river), 1 O. L. R. 114, it was determined that there was a right to assess the bridge; the only question in dispute there being as to the principle upon which the assessment should be made.

Then the third case is Re International Bridge Co. and Village of Bridgeburg, 12 O. L. R. 314, 7 O. W. R. 497. That also was a bridge over the Niagara river, similar in its character to the bridge in question here, a toll bridge, a bridge for foot passengers and for vehicular traffic; and it was held that it was liable to assessment.

If it had been a sufficient answer to say that the bridge was a public way and therefore exempt, these decisions could not have been come to; and, as I have said, it seems to me that they are conclusive upon this, the most debatable point apart from authority in the case, and therefore the appellants' case fails and must be dismissed.

NOVEMBER 13TH, 1907.

DIVISIONAL COURT.

BOULTBEE v. WILLS & CO.

Shares—Sale of Shares in Mining Company—Vendors Interfering to Prevent Registration of Transfer—Resale by Purchaser—Loss of Profit—Damages—Obligation to see that Purchaser Registered as Owner.

Appeal by defendants Wills & Co. from judgment of MABEE, J., in favour of plaintiff for the recovery of $629.75 in an action for damages for preventing plaintiff from carrying out a profitable sale of 1,000 shares of the capital stock of the Temiskaming Mining Co., which had been bought by plaintiff from the appellants, by the appellants obtaining an injunction (in an action to which the plaintiff was not a party) restraining the registrars of the shares from transferring them upon the books of the mining company.

G. M. Clark, for the appellants.

R. McKay, for the plaintiff.

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

MEREDITH, C.J.:—We think that this appeal fails.

The plaintiff purchased on 13th October, 1906, from the appellants 1,000 shares of mining stock for $700, and received the certificate which had been issued to M. R. Cartwright for these shares, with a transfer in blank indorsed on it; and there is no doubt, upon the authorities, that that completed the duty of the sellers of the shares, and that it was not incumbent upon them to see, and they were in no way responsible, that the purchaser should become registered as owner of the shares upon the books of the company; but it is clear upon principle, and if necessary the authority of the Court of Appeal may be cited in support of it (Hooper v. Herts, [1906] 1 Ch. 549), that a vendor of shares is under obligation to do nothing to prevent his purchaser having the shares registered in his name.

Owing to some difficulties between the appellants and Cartwright, litigation arose which resulted in an injunction being obtained, first a temporary one, restraining the agents of the company, the Imperial Trusts Corporation, from registering any transfers of shares standing in the name of M. R. Cartwright, to the extent of 9,000 shares. Cartwright, without the 1,000 shares which had been sold by the appellants to the paintiff, and which still stood in his (Cartwright's) name, had not 9,000 shares standing in his name; therefore the result of the injunction order was that it operated to restrain the transfer agents, the Imperial Trusts Corporation, from registering the transfer to the plaintiffs of the shares which he had bought from the appellants.

No doubt, that was the result of an unfortunate mistake on the part of the appellants, who had no intention of interfering with that transfer; but the terms of the injunction order were plain, and the transfer agents would not have been justified in refusing to give effect to the provisions of it.

The plaintiff placed the shares in the hands of his brokers, Messrs. Jaffray & Cassels, for sale. They found a purchaser at $1,700. The plaintiff then handed the certificate to his brokers in order that the transaction might be completed. Upon the brokers taking the certificate to the transfer agents for the purpose of having the plaintiff registered as the owner of 1,000 shares and obtaining two certificates for 500 shares each, he was informed by the agents of the injunction order, and they refused to register the plaintiff as owner of the shares. In consequence of this, the plaintiff was unable, or assumed that he was unable, to complete his sale, and he went into the market and bought 1,000 shares for $1,700, and completed the sale.

The injunction was dissolved after a delay of some weeks, and the plaintiff was registered as owner of the shares, and obtained the certificate, and then sold the shares for $1,070.25; this action is brought to recover the damages which he sustained by the wrongful acts of the appellants; and the judgment at the trial was for the plaintiff for the difference between the $1,070.25 and the $1,700, at which price the plaintiff had sold the shares through his brokers.

The contention of the appellants' counsel, and the only point pressed on the argument, was that the plaintiff had made a complete sale of the 1,000 shares, and that he was

under no obligation to see that his purchaser was registered as the owner of them; that he had done nothing to prevent the transfer to his purchaser being registered, and was not responsible for the action of the appellants in preventing the registration of the transfer.

It seems to us, however, that it is plain upon the evidence that the sale to the plaintiff's purchaser was not complete; that it was a term of the sale that the vendor should be in possession of two 500 share certificates, so that the purchaser might have them in that form; and, if that be so, it follows, as a matter of course, that the plaintiff is entitled to recover, because, upon applying for the certificates, the delivery of which was essential to the completion of the contract, he was unable to obtain them.

I am inclined to think—it is not necessary for the decision of this case to decide—that, even if the evidence on this point were not as clear as it is, the brokers dealing in good faith with a highly speculative class of shares, such as these mining shares undoubtedly were, if, acting in good faith, they formed the opinion that it was so doubtful whether the purchase could be forced upon the purchaser that they ought not to insist on completion at the risk of the principal having to embark in litigation with the purchaser, the plaintiff would nevertheless be entitled to recover. It would be a most unfair thing to him, dealing with a stock of that character, to put him in such a position that he would have to take that risk, or, if he did not, lose his right to recover from the appellants.

No injustice is done to these appellants. If the contention of Mr. Clark is right, and the purchase was completed, the purchasers from the plaintiff would have a right of action for the wrong done in preventing the transfer of these shares to him.

Appeal dismissed.

FALCONBRIDGE, C.J. DECEMBER 6TH, 1907.

WEEKLY COURT.

RE EAGLE.

Will—Construction—Devise—Estate — Fee Simple Subject to be Divested on Death of Devisee Leaving Children — Rule in Shelley's Case.

Motion by the administrator of the estate of Mary Jane Hards (née McWhirr), deceased, for an order declaring the

true construction of the will of Rebecca Eagle, the material parts of which were as follows:—

"I give and bequeath and devise to my granddaughter Mary Jane McWhirr all that town lot . . . (describing it), subject to a life estate therein to . . . Thomas Eagle, which I grant in said lands to the said Thomas Eagle during his life. I give, devise, and bequeath to my granddaughter Ann Louisa McWhirr my village lot . . . subject to a life estate therein to . . . Thomas Eagle. . . . I give and bequeath to my granddaughter Mary Jane McWhirr the sum of $500 to be paid her when she attains the age of 25 years. . . . And I will and direct that in the event of either of my said granddaughters predeceasing the other and leaving no issue, then that the share of the deceased sister shall go to the surviving sister or the heirs of the surviving sister, but if either of my said granddaughters should die leaving lawful issue, then that the child or children of the deceased should inherit the share of the deceased mother. . . . And I give and devise to my said granddaughters Mary Jane and Ann Louisa all the rest and residue of my estate, real and personal, not otherwise disposed of. And I will and direct that in case both of my said granddaughters should die leaving no lawful issue during the lifetime of the said Thomas Eagle, then and in that case the shares or portions devised to my said granddaughters shall go to the said Thomas Eagle, and that he shall in such event inherit the real and personal property now given and devised to my said granddaughters."

W. E. Middleton, for the administrator of the estate of Mary Jane Hards.

W. Proudfoot, K.C., for her creditors.

M. C. Cameron, for her infant children.

FALCONBRIDGE, C.J.:—. . . The sale of the lands is confirmed by consent, and the only question is as to the disposition of the money arising therefrom. . . .

The testatrix died 18th December, 1878; Mary Jane Hards died 19th July, 1904, leaving her surviving two children, the above named infants.

It was contended on behalf of the creditors: (1) that the devise was, under the rule in Shelley's case, a devise in fee simple; or (2) that it was a devise in fee simple subject to

be divested if Mary Jane died in the lifetime of the testatrix, and that Mary Jane, having survived the testatrix, took the fee simple subject to the devise over to her issue.

For the infants, it was argued that the devise was in fee (subject to the life estate of the husband of the testatrix) subject to the executory devise over in favour of issue (children) of Mary Jane, if she died at any time leaving issue (children).

The rule in Shelley's case does not apply, as "issue" is by the will interpreted to mean "children," who take as personæ designatæ; "issue" is therefore not a word of limitation, as it does not "import the whole succession of inheritable blood:" see per Lord Macnaghten in VanGrutten v. Foxwell, [1897] A. C. 658, at pp. 667, 677.

The period at which the gift over must take effect is fixed by O'Mahoney v. Burdett, L. R. 7 H. L. 388, which determined that "a gift to X. for life, with remainder to A., and if A. dies unmarried or without children, to B., is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying at any time unmarried or without children." This is subject to the qualification that a contrary intention does not appear by the will. There is no context here which renders a different meaning necessary or proper.

See also Cowan v. Allen, 26 S. C. R. 292; Fraser v. Fraser, ib. 316; Crawford v. Broddy, ib. 345; VanLuven v. Allison, 2 O. L. R. 198; In re Schnadhorst, [1902] 2 Ch. 234.

Re Walker and Drew, 22 O. R. 332, a judgment of my own, is strongly relied on by Mr. Proudfoot. It is distinguishable in this, that it was a case of a devise in fee with a gift over "in the event of death." Death is certain, but it is spoken of as a contingency. In such a case to consider death as a contingency, the will must be read as if the testator had said "in the event of death in my lifetime:" Jarman, 5th ed., p. 1564; Theobald, 5th ed., p. 575.

There is a distinction, however, when the gift over is on death coupled with contingency, and not merely spoken of as a contingency. This is well shewn in the judgment of Fry, J., in In re Hayward, 19 Ch. D. 470, at p. 472, where he

says: "There is, in my judgment, no doubt that when a gift is made to a person in terms absolute, and that is followed by a gift over, in the event of the death of that person sub modo (that is to say, without issue or subject to any other limitation which makes the death a contingency), the effect of the gift over is prima facie to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over. In such a case there is no reason to confine the meaning of the word "death" to death during the lifetime of the testator, or death during the life of the tenant for life. The only reason, or the main reason, why that is done in certain cases is, that the testator has spoken of death, which is certain, as a contingency, but when the testator has spoken of death sub modo, that being contingent, there is no need to render it contingent by introducing any limitation." See also Jarman, 5th ed., p. 1574; Theobald, p. 577.

Mary Jane Hards, therefore, took an estate in fee simple subject to be divested in favour of her children on her death, at any time, leaving children.

The estate consequently passed to the children of Mary Jane under the will, and it did not at her death form part of her estate.

Costs to all parties out of the estate.

DECEMBER 6TH, 1907.

DIVISIONAL COURT.

FOSTER v. ANDERSON.

Vendor and Purchaser—Contract for Sale of Land—Construction—Time of Essence—Delay of Purchaser in Tender of Purchase Money and Deeds—Delay of Vendor—Preparation of Conveyance and Mortgage—Misrepresentation by Purchaser's Agent — Statute of Frauds — Misdescription of Lot in Contract — Falsa Demonstratio — Identity of Premises—Deed Held in Escrow — Specific Performance.

Appeal by plaintiff from judgment of RIDDELL, J., ante 531, dismissing an action for specific performance.

A. H. Marsh, K.C., and W. J. Clark, for plaintiff.

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

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—Stipulations making time of the essence of a contract are to be construed strictly, and require to be distinct and express: Hudson v. Temple, 29 Beav. at p. 543, and Wells v. Maxwell, 32 Beav. at p. 414. In the latter case time was made of the essence of the contract in respect of making objections to the title. The Master of the Rolls asks, "Why does the contract say 'in this respect' if it was meant that time should be of the essence of the contract in every other respect? This is distinctly a case in which no time whatever is limited for the performance of the contract:" p. 414.

I think the strict reading of the clause in this contract, "Time shall be of the essence of this offer," means in respect to the offer—the acceptance of the offer—time shall be essential. Does it mean that in respect of all matters and terms contained in the proposal after its acceptance—which then becomes a contract—time shall be equally essential? It does not say so, and if it is ambiguous, the Court leans against its being extended beyond its obvious meaning.

However, I do not find it necessary to place my decision on this ground. Assume that time was made essential as to the completion of the contract, the rule of the Court is that the vendor cannot claim the benefit of the term making time of the essence if he himself has been guilty of laches—if he has failed to bestir himself when he should have been doing, this policy of inactivity may enure to the exculpation of the other side. The Court may then consider that the time element has ceased to be of an essential character, and that reasonable diligence only has to be regarded.

Now, there is a clause of the contract which imposes a duty on the vendor as to the conveyance. It reads: "The deed of transfer is to contain covenant on part of purchaser to pay off said assumed mortgages and to be executed by purchaser (for the purpose of engaging him personally to its payment), and prepared at the expense of the vendor; and

mortgages to be at my (purchaser's) expense." The general rule, in the absence of other provision, is that the purchaser prepares the conveyance at his own expense: Stevenson v. Davis, 23 S. C. R. 633. The reason of this is discussed in Stephens v. De Medici, 4 Q. B. 427, and Lord Denman, C.J., intimates that the rule seems to be a consequence from the fact that the purchaser is to pay for the conveyance. The language used by Parke, J., Prince v. Williams, 1 M. & W. 13, is now in point, where the instrument (lease) was "to be prepared at the sole expense of the landlord." The learned Judge said: "As the lease was to be prepared at the sole expense of the defendant (lessor), he was to prepare it, and not the lessee. It may be, indeed, that one may be bound by the express terms of a contract to prepare a lease or a conveyance, and yet that it shall be paid for by another, for such stipulations are not inconsistent; but when all that is stipulated for is that it shall be prepared at the expense of the lessor, and there is no context to explain it, it must be intended that the lessor is to prepare it also."

Here the solicitors on both sides understood (and I think rightly) that the vendor was to prepare the deed and the purchaser the mortgage: Clark v. McKay, 32 U. C. R. 589. By the time limits of the contract, the acceptance was on 25th September, 1906—10 days were allowed to investigate title, which would bring it to 5th October, and the sale was to be completed on 10th October. Accordingly, on 4th October the plaintiff's (purchaser's) solicitor writes defendant's (vendor's) solicitor a letter asking that a draft deed be submitted, and that as soon as that was done he would submit draft mortgage. No answer being sent by the defendant's solicitor, the plaintiff's solicitor again writes on 8th October enclosing draft mortgage for approval, and repeats the request for draft deed, and hopes to be ready to close on 10th if the deed is executed in time. Still no answer being given, the defendant's solicitor writes a third time on 10th October, enclosing deed to be executed by the vendor, and intimating preparedness to pay the required purchase money at once upon its execution. Up to the time fixed for completion the solicitor for the plaintiff has been thus active and desirous to complete in due course.

But this defendant has done nothing to accelerate the things needful to be done in order to the due completion; con-

current action was contemplated, and was necessary on the part of both solicitors.

The defendant, however, did take action ex parte in getting a conveyance executed, but kept this from the knowledge of the plaintiff's solicitor. A deed was sent to the defendant (who was then in Texas) some time in the beginning of October, and was executed by her on 6th October, and was in the hands of the defendant's solicitor about 8th October. The draft of this deed should have been submitted, for, simple though the conveyancing be, the deed is drawn incorrectly in making the $5,500 payable in cash, whereas part of it, $4,000, was to be secured by a second mortgage—a prior mortgage to the Messrs. Foster being assumed by the purchaser.

However, this relation of facts justifies the conclusion that the blame for delay rests on the defendant, and not on the plaintiff. It would be "a monstrous injustice" that one who has not complied with a stipulation as to time should seek to enforce the strict observance of it on the other side, who has been diligent. In truth, the essential limit is thus removed, and the course of dealing in completing the transaction rests on the general principles of the Court: Upperton v. Nicholson, L. R. 6 Ch. 443.

I think the grounds upon which the learned Judge proceeded in dismissing the action are not tenable.

But on the appeal the defendant sought to support the judgment on two other grounds: (1) that the plaintiff's agent had been guilty of misrepresentation of a material fact; and (2) that there is no contract enforceable, having regard to the Statute of Frauds.

As to misrepresentation, it is not proved. The statement relied on as such was made in a letter by the agent of the vendor and not of the purchaser, and it was a statement of what had occurred, according to his recollection, in an interview with the defendant's solicitor. The trial Judge accredits the evidence of Hill, this agent, and that ends the matter. The real reason why the defendant was desirous to get out of the contract was because the place was better rented than she supposed to be the case when she signed the acceptance.

As to the Statute of Frauds, the objection is that the lot so'd is described as lot 22 in the offer signed, whereas the true lot is No. 24, in Ann street, in the city of Toronto. It is designated as part of park lot 8 and "known as 22 Ann

street," giving metes and bounds. To Hill, the agent, and Dr. Foster, the purchaser, it was "known as" lot 22, whereas it was in truth lot 24. It was an error common to both, and amounts to falsa demonstratio and nothing more. It is easily corrected, and no question of conflict of evidence arises. There is absolutely no doubt that the parties were dealing about the same subject matter, and the identity of the premises is beyond peradventure. . . . Proof of the contract, with proper description of land, and sufficient under the Statute of Frauds, is contained in the deed of conveyance (held in escrow) dated 6th October, which set it forth as subject to the prior mortgage, but which is in error as to the cash payment.

All these things, being in proof, taken together, relieve the written contract from any vagueness or uncertainty. It is needless to go through the cases in detail, but I refer as authorities to Coote v. Borland, 35 L. C. R. 282; Gillatley v. White, 18 Gr. 1; Plant v. James, [1897] 2 Ch. 281; Clark v. Walsh, 2 O. W. R. 72. . . . I am aware that Gillatley v. White has been suspiciously looked at, but I do not consider its value as an authority impaired. The same holding with reference to a deed in escrow was maintained by a very strong Court in Massachusetts in 1899, of which Holmes, C.J., was the presiding Judge: Hibbard v. Hatch Storage Co., 174 Mass. 296. The result, after consideration of the appeal and what is erroneously termed the cross-appeal, is that the usual judgment for specific performance should be directed with costs of action and appeal to be paid by the defendant, and reference to the Master to settle conveyancing, if the parties cannot agree.

RIDDELL, J. DECEMBER 7TH, 1907.

CHAMBERS.

RE ROCKLAND PUBLIC SCHOOL BOARD AND ROCKLAND HIGH SCHOOL BOARD.

Schools—Membership of High School Board of Village—Representative of Public School Board — Rural School Section—Union School Section — Village School Board—High Schools Act—Mandamus—Costs.

Motion by the public school board for a mandamus to compel the high school board to admit the representative of the former as a member of the latter board.

W. E. Middeton, for the applicants.

H. M. Mowat, K.C., for the respondents.

RIDDELL, J.:—About 1860 the township council of the township of Clarence, in the county of Russell, set apart a portion of that township as school section No. 2, Clarence. In 1885 a portion of this territory was set apart and erected into an incorporated village, Rockland by name, and thereafter the school number 2 seems to have been known as Rockland public school. In 1905, under the provisions of 1 Edw. VII. ch. 40 (O.), the village of Rockland became a high school district, and a high school has been established accordingly.

In January, 1907, the Rockland public school board, purporting to act under the provisions of sec. 13 (7) of the said Act, appointed Mr. P. as their representative upon the high school board. The high school board refused to allow Mr. P. to take his seat, and the public school board now apply for a mandamus.

No technical difficulties are thrown in the way; and both boards desire a decision on the merits.

The statutory provision to be interpreted is, as mentioned, to be found in 1 Edw. VII. ch. 40, sec. 13 (7)—"Except in the case of a board of education, the public school trustees of every city, town, or incorporated village, in which a high school board is situated, may appoint annually one trustee of and for the high school board," etc.

Here the high school board contend that the public school board are not, in the sense contemplated by the statute, "the public school trustees of" an "incorporated village;" that their jurisdiction is over a portion of the adjacent township; and that it would not be just that ratepayers quite outside the village should have any part in directing the policy of the high school, as they might if trustees selected by them should nominate a high school trustee who might sway that board or determine its policy. On the other hand, it is contended that the fact that the school section of an incorporated village takes in more territory and includes more ratepayers than those in the village does not make the board any less the board of that village, and should not take away the right of the ratepayers in the village itself.

I do not know that the argument ab inconvenienti helps one party more than the other; . . . the words of the statute, reasonably interpreted, must govern. Of course, the right to appoint a high school trustee is a purely statutory right, and those claiming to exercise that right must bring themselves within the statue; but at the same time an unreasonable strictness in applying the statute is to be avoided.

The Act in force at the time of the formation of the village of Rockland was 48 Vict. ch. 49 (O.) That Act, sec. 93, provides that "in case a portion of the territory comprising one or more school sections becomes incorporated as a village or town, the boundaries of such school section or sections shall continue in force and be deemed a union school section, notwithstanding such Act of incorporation, until altered as provided in section 86 of this Act." The language employed is not accurate, but there can be no doubt that what is meant is that the former rural school section becomes a union school section. Upon the formation or incorporation of the village, the school section became then a union school section. The legislation was carried on with a slight change in the language through R. S. O. 1887 ch. 225, sec. 93; 54 Vict. ch. 55, sec. 93; 59 Vict. ch. 70, sec. 49; R. S. O. 1897 ch. 292, sec. 49 (1); and now contained in 1 Edw. VII. ch. 39, sec. 52 (1).

By the Act of 1891, 54 Vict. ch. 55, an amendment was made to this section of the original Act, by adding, "And the provisions of the Act respecting the election of public school trustees in towns or villages shall apply thereto," until such union should be altered or dissolved. This provision was also continued by the subsequent legislation, and is to be found now in the same sub-section of the present Act.

Had it been the intention that the school section so continued should be or be considered a village school section, nothing would have been easier than to say so. This was not done, and the reference to sec. 86 of the original Act makes it plain that such a school section was to be not only called a union school section, but that it should be considered for all purposes as belonging to two municipalities—special provisions being made for voting so that each ratepayer should vote in the same way, and for inspection.

Some assistance may be derived from the markedly different provisions in a case not at all unlike, that is, where any portion of a township is annexed to a city or town. In 1888, by the statute 51 Vict. ch. 28, sec. 40, it was provided that "the portion so annexed shall for all school purposes be deemed to be part of such city or town," subject to a proviso not material to be considered here. This provision was continued by 52 Vict. ch. 36, sec. 43, the proviso being modified; then by 54 Vict. ch. 55, sec 94. In 1896 the expression "urban municipality" was introduced, defined as being "a city, town, or incorporated village" (sec. 2 (9)), and so the section was changed (59 Vict. ch. 70, sec. 50 (1)), to read, "When any portion of a township municipality is annexed to an urban municipality by proclamation, the portion so annexed shall for all school purposes be deemed to be part of such city or town, provided," etc. This was continued by R. S. O. 1897 ch. 292, sec. 50 (1), totidem verbis, and also by 1 Edw. VII. ch. 39, sec. 53.

The distinction between the two methods of dealing with two cases not analogous is striking: in the case in hand the old section continues, but as a union school section; in the other case the part brought into the urban municipality becomes part of the urban municipality for all school purposes. The Act 1 Edw. VII. ch. 39, by sec. 45, provides that all union school sections which existed on 1st April, 1901, should continue to exist—and therefore the school section in question is still a union school section, by whatever name it may be called. That being so, I do not think that the board of trustees are "the public school trustees of" an "incorporated village," within the meaning of the High Schools Act, 1 Edw. VII. ch. 40, sec. 13 (7). They may not necessarily be all or any of them in the village, but that cannot be the test. The only way of arriving at what is meant by the legislation is to find out what is the meaning of the language employed, interpreted reasonably. If my conclusion is opposed to the intent of the legislature, the Act may be easily amended; but with that, of course, I have nothing to do.

The application must fail.

In regard to costs; there is no suggestion that the plaintiffs are not acting in good faith, the parties on both

sides are public bodies exercising public functions, the case is a novel one, and I do not think that this is a case for costs. . . .

TEETZEL, J. DECEMBER 7TH, 1907.

CHAMBERS.

PEW v. NORRIS.

Particulars — Statement of Claim — Contract — Services Rendered—Sufficiency of Particulars.

Appeal by defendant from order of Master in Chambers dismissing defendant's application for further and better particulars of the statement of claim.

F. Arnoldi, K.C., for defendant.

Macdonald (Curry, Eyre, & Wallace), for plaintiff.

TEETZEL, J.:—I would have had no hesitation in dismissing the appeal at the close of the argument but for . . . Gunn v. Turner, 7 Times L. R. 280. Further consideration of the somewhat meagre report of that case satisfies me, however, that it does not warrant the order asked for here. In that case the agreement sued on does not appear to have been alleged with sufficient particularity, while in this case the agreement sued on is sufficiently identified between the statement of claim and the particulars already served. Then in that case it does not appear that even in a general way did the plaintiff allege the nature of the work and services rendered, while here the plaintiff does allege in his particulars that the work consisted in his going to Ottawa and soliciting the support and influence of several members of Parliament on his behalf, and that as a result of the support and influence so solicited the subsidy was re-voted.

The action is upon an agreement for a lump sum payable on the accomplishment of a certain result, and it is immaterial whether the plaintiff spent days or only hours in

accomplishing it, if he can establish that the result of his and the defendant's joint efforts was success.

What particulars are to be furnished before defence must depend upon the facts of each case. As stated on p. 114 of Odgers on Pleading and Practice, 6th ed., the only general rule that can be laid down is that there must be particulars sufficient to apprise the Court and the other party of the exact nature of the question to be tried.

In this case I think the plaintiff has satisfied this rule, and that the statement of claim and particulars are sufficiently explicit to enable the defendant to properly frame his statement of defence.

Appeal dismissed with costs to be paid by defendant in any event.

DECEMBER 7TH, 1907.

C.A.

RE CONIAGAS MINES CO. AND TOWN OF COBALT.

Assessment and Taxes — Income Tax — Mining Company— Surplus from Year's Operations after Paying Expenses— Distribution in Dividends—"Income Derived from the Mine"—Assessment Act, sec. 36 (3).

Appeal by the company from a decision of the Ontario Railway and Municipal Board dismissing an appeal by the company from a decision of the Court of Revision for the town of Cobalt affirming an assessment of the company, in 1907, by the town, for $100,000 in respect of income from their mines.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. H. Collier, K.C., for the company.

E. D. Armour, K.C., for the corporation of the town of Cobalt.

Moss, C.J.O.:— . . . The company were incorporated in . . . 1906, under the Ontario Companies Act, with a capital stock of 800,000 shares of the par value of $5 each, and all have been issued and are held as fully paid up. They were issued in the first instance to the proprietors of the mining property in consideration of the transfer thereof to the company. The property consists of 40 acres, area of mine. Mining operations are being carried on, and there are no receipts except from the sale of ore taken from the mine. It is admitted that, after deducting working expenses, there remains a sum of $100,000, and that if the mine is liable to an income tax, that sum is a reasonable assessment. It is also admitted that dividends have been declared based upon the net receipts ascertained in the manner above stated.

The company contend that the Railway and Municipal Board erroneously held that sum to be "income derived from the mine," within the meaning of those words as employed in sub-sec. 3 of sec. 36 of the Assessment Act. The argument is that, inasmuch as the ore—the product of the mine—represents the capital of the company, every withdrawal is in fact a return of so much of the capital, and therefore, until all the capital has been returned, there can be no income capable of assessment under sec. 36 (3).

English and Scottish cases decided upon the various Income Tax Acts from time to time in force in Great Britain shew that the same argument has been urged against the application of these Acts to somewhat similar instances, but, with perhaps one exception, always with indifferent success; and in Coltness Iron Co. v. Black, 6 App. Cas. 315, Lord Blackburn (at p. 336) accepts it as a settled rule that the constant course, from the statute 43 Eliz. ch. 2 downwards, was to construe an annual tax imposed on coal mines, quarries, and the like, as being imposed on that which is produced from them. But, in truth, the cases in the English Courts lend little, if any, assistance.

The question falls to be determined by reference to the language of the enactment. So far as material, it is in these words:—

"36 (1)—Except in the case of mineral lands hereinafter provided for, real property shall be assessed at its actual value. . . .

"(3) In estimating the value of mineral lands, such lands and the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes, but the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under this Act."

What did the legislature mean should be taxed when it declared that the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under the Act? It is plain that the legislature intended that mineral lands should bear a tax exceeding that to be imposed on the value of the lands in the neighbourhood for agricultural purposes, but the imposition of the additional tax was to be dealt with in another and exceptional way. And it must be assumed that in declaring that the income derived from any mine or mineral work should be subject to taxation, it had in mind the usual and ordinary method by which the products of mines is won and disposed of or dealt with, and the result, to the proprietors, of the operations of the year.

A quantity of ore, greater or less according to the extent of the operations or the productiveness of the mine, is brought to the surface. The working expenses or actual cost of production being deducted from the gross receipts, the sum left represents that which is realized for the proprietors. It is what has been gained from the year's operations, that which comes in to the proprietors, and so falls readily within the term "income derived from the mine or mineral work."

There appears no good reason for doubting that such was the intention of the legislature, for, however true it may be that the effect of continuing the working of the mine is gradually to exhaust the product, and so end the income derivable therefrom, that has for many years been recognized as the inevitable result of mining operations, without at all altering the view, long entertained, that the investors in property of this nature are not at liberty to regard for assessment purposes the annual gains or income in the light of replacement of capital. And more especially so when, as in this case, they have been treated as properly the subject of dividends.

Appeal dismissed.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

DECEMBER 7TH, 1907.

C.A.

REX v. SUNFIELD.

Criminal Law—Murder—Evidence—Statement of Deceased—Dying Declaration—Expectation of Death—Threats made by Prisoner to Deceased—Admissibility—Threats by Prisoner to other Persons—Inadmissibility—No Substantial Wrong or Miscarriage—Crown Case Reserved—Conviction Affirmed.

The prisoner, Jacob Sunfield, was tried and convicted before FALCONBRIDGE, C.J., and a jury, on an indictment which charged him with the murder of one Andrew Radzig, and was sentenced to death.

During the trial evidence was given of a statement made by the deceased Andrew Radzig as to the cause of his death, which was admitted by the Chief Justice as a dying declaration. Evidence was also given with regard to quarrels between the prisoner and the deceased, as well as in some cases with other persons.

Subsequent to the trial the Chief Justice, by direction of the Court of Appeal, given upon the application of counsel for the prisoner, stated a case and submitted for the opinion of the Court the following questions:—

1. Was the evidence of the dying declaration properly admitted?

2. Was the evidence as to quarrels properly admitted?

The case was heard by Moss, C.J.O., Osler, Garrow, Maclaren, Meredith, JJ.A.

J. L. Counsell, Hamilton, and J. G. Farmer, Hamilton, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

Moss, C.J.O.:—The evidence taken at the trial was made part of the case, and upon the first application, as well as upon the argument of the stated case, it was fully and ably discussed by the prisoner's counsel.

The prisoner and the deceased were both natives of some part of Poland. They were both employed at the Deering Harvester Company's works in Hamilton. The deceased and his wife carried on a boarding house, in which a number of their countrymen and countrywomen lodged, and amongst them the prisoner. He had lived in the house for more than a year prior to 12th July, 1907. In the afternoon of that day the deceased was found lying on the floor of a bedroom on the ground floor of his house in a pool of blood. He was lifted up and laid upon the bed, and it was found that he had received a wound from a pistol bullet, which appeared to have entered on the left side of the head immediately below the ear; and it was subsequently shewn that this wound was the cause of his death. The bedroom opened from the dining-room of the house. Among the first to enter the bedroom when the deceased was found lying on the floor, was the prisoner, but in a short time he passed into the dining-room and sat down at the table. Shortly afterwards one William Walsh, a witness at the trial, came in, and, passing the prisoner where he sat at the table in the dining-room, went into the bedroom wh re the deceased was lying on the bed. There was no one else in the bedroom at the time. After a short interval he went out through the dining-room into the kitchen, where one Brandon, who had assisted to lift the deceased to the bed, was washing his hands, and, after looking out to see if there was anybody in the yard, he returned to the bedroom. He then spoke to and endeavoured to rouse the deceasel, who had evidently lost much blood, and was apparently unconscious or in a stupor. Eventually he succeeded in raising him so that he made an effort to sit up in the bed, but fell back. What then happened was described by the witness as follows:—

"Q. Then what? A. Then I called him, and he kind of opened his eyes a little brighter; they were opened all the time, but to my intents (sic) he seemed quite a bit brighter, and I spoke and said, 'What is the matter, Andy?' and I said, 'Somebody cut you?' No, I said, 'Who cut you?' And he says, 'Hello, Billy, no cut, Jake shoot.'

"Q. What next happened? A. I asked him if he was badly hurt, and he did not answer me, and, realizing that he was, I said to him, 'Andy, now lie down and we send for a doctor.' And he said, 'No doctor, Billy, me die.'

"Q. Did you put him down again on the bed? A. I pulled his left arm from in under him and put him on his back and let him lie down easily.

"Q. What next did you do? A. I went out of the room."

He found the prisoner still sitting at the table with his head down upon his arms as if he were sleeping, but he did not speak, and in answer to a question, "But you had no further conversation at that time either with Radzig or the prisoner?" he said, "I never said another word to either of them."

Upon cross-examination he said he did not think the prisoner could hear what the deceased said, for the simple reason that he spoke just above a whisper. He further stated that, although he had been told there had been shooting at the house, he did not at first, when he saw the deceased lying there, think he had been shot; his impression was that he had been knifed. He was then asked:—

"Q. Repeat again the conversation that took place between you and Andrew Radzig, the Pole. A. I asked Radzig, I says, 'Hello, Andy, who cut you?' He says, 'Hello, Billy, no cut, Jake shoot.' I says, 'Well, Andy, better lie down, I will send for a doctor for you.' He said, 'No good doctor, Billy, me die.'

"Q. Did you put him down then? A. I put my hand to his back and let him go over easily, and his feet were towards the foot of the bed, and his body towards the middle of the bed towards the wall. That was the last position I saw him in.

"Q. And he never spoke to any other witness? A. No. When I saw Radzig move the first time, I called for somebody, and nobody answered me, and I came to the conclusion if Radzig should speak I should be there and not waste time for anybody.

"Q. You were expecting him to speak? A. Yes."

Further on he said he did not think the decaesed was unconscious when he was there, he was only semi-unconscious.

Shortly afterwards the deceased was removed to the hospital, where he remained apparently unconscious until his death, which occurred between 4 and 5 hours after his removal from his house. He was not seen by a physician before his removal to the hospital, but he had been seen by others before he was seen by William Walsh, and they speak of his condition and describe the wound. One of them (Schwartz) asked him some questions in his native tongue, and received one answer, in the same language, in the prisoner's presence and hearing. The question was, "Who shoot you?" And the answer, "This fellow shot that has got the revolver," or "This fellow that shot me is the fellow that got the revolver," Whichever it was, it shews that he realized and understood that he had received a wound from a revolver, and, as the event proved, it was a mortal wound.

Now, it was for the Chief Justice to determine, in view of all the circumstances shewn in evidence, whether the statement as to the prisoner being the person who fired the revolver should be received as a dying declaration. It appears to have been the opinion of Martin, B., that the question was one for the trial Judge exclusively, and not for the Court of Appeal: Regina v. Reaney, Dears & B. 151, 7 Cox C. C. 209; but it is now firmly settled that the decision of the trial Judge is subject to review. But in review the question is not whether, if another Judge had been presiding, he would have done the same thing, but whether, the trial Judge having ruled in favour of its admission, that ruling should be set aside. It is true that in this case the Chief Justice inclined at first to admit the statement as one made in the prisoner's hearing, but this ground was displaced when it appeared, upon Walsh's cross-examination, that the deceased spoke in so low a tone that it could not be heard by the prisoner. But that

could be no reason for excluding it from admission on the other ground, if the circumstances justified its admission.

Nor, as the decisions shew, does the circumstance that the incriminating statement was made before the deceased had expressed any opinion or made any statement with regard to his condition evidencing his belief in impending death from the injury he had received, prevent its admission. His mental condition is a matter of inference from the attendant circumstances, including in this case, of course, his statements.

The Chief Justice had to satisfy himself that the deceased spoke under a belief, without hope, that he was about to die from the wound that had been inflicted upon him.

Various forms of expression have been used by Judges by way of defining the necessary mental condition. "If," says Kelly, C.B., in The Queen v. Jenkins, L. R. 1 C. C. R. at p. 192, "we look at the reported cases and at the language of the learned Judges, we find that one has used the expression 'every hope of this world gone,' another 'settled hopeless expectation of death,' another 'any hope of recovery, however slight, renders the evidence of such declarations inadmissible.'"

Taking any one or all of these as the criterion in this case, there is no difficulty in concluding that the Chief Justice could not but be convinced that the statement was admissible. The words spoken, in the existing circumstances, in answer to a statement of intention to procure medical assistance, shew very strongly that he had abandoned all hope of benefiting by human aid, and was fallen into a settled hopeless expectation of death. Whether Walsh said, "Andy, now lie down and we send for a doctor," as he stated in his examination in chief, or "Well, Andy, better lie down, I will send for a doctor for you," as he stated in cross-examination, and whether the reply was, "No doctor, Billy, me die," as stated in chief, or, "No good doctor, Billy, me die," as stated in cross-examination, they lead to the same conclusion—a declaration of belief that every hope of this world is gone. He was aware, as his previous statement to Schwartz shews, that he had been shot; he was in fact in a dying state; and he was evidently conscious of that fact. In the circumstances,

there was ample reason for admitting the statement in evidence.

The first question ought, therefore, to be answered in the affirmative.

As to the second question, there can be no reason for excluding the testimony proving quarrels between the deceased and the prisoner, and the latter's threats. Taken in the connection in which it was given, it tended to shew an animus and furnish a motive for the crime with which the prisoner was charged. The only other instance of threats was in the case of the witness Aggi Radzig. That came out in the course of giving testimony to shew that the prisoner possessed a revolver, and it was in connection with proof of that fact that the witness testified to a threat to shoot her made on one occasion. Strictly, it should not have been received, but no special weight was attached to it, and, although the learned Chief Justice alluded to it in his charge, he only did so incidentally and in connection with the other testimony as to the prisoner's quarrels with and threats against the deceased.

We have to consider whether its reception, under the circumstances, ought to vitiate the proceedings. The case of Makin v. Attorney-General, [1894] A. C. 57, was pressed upon us. In that case the evidence objected to was held to be properly admissible, but the Judicial Committee expressed an opinion as to the scope and effect of a section of the Criminal Law Amendment Act of New South Wales and its bearing on the case in review, assuming that the evidence was not admissible. The words there under consideration are very dissimilar to those in sec. 1019 of the Code. The words of the New South Wales Act are: "Provided that no conviction or judgment thereon shall be reversed, arrested, or avoided in any case so stated unless for some substantial wrong or other miscarriage of justice." Their Lordships were of opinion that it could not properly be said that there had been no substantial wrong or miscarriage of justice, where, on a point material to the guilt or innocence of the accused, the jury had, notwithstanding objection, been invited by the Judge to consider in arriving at their verdict matters which ought not to have been submitted to them. Stress was laid on the fact that the evidence was on a point material to the guilt or innocence of the accused. In another part of the judgment (p. 70) it is remarked that the evidence improperly

admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence, which might appear to the Court sufficient to support the conviction, might have been reasonably disbelieved by the jury, in view of the demeanour of the witnesses. It is clear that neither of these considerations could have any special application to the circumstances of this case. Very probably they were expressed in the light of the testimony which was objected to in the case before them. It is impossible to suppose in this case that the jury might have reasonably disbelieved all the other evidence and rendered their verdict upon the evidence of a threat to shoot Aggi Radzig.

Section 1019 of the Code declares that "no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial."

This enactment imposes on the Court the duty of considering the probable effect of the evidence improperly admitted, and to say whether, in its opinion, any substantial wrong or miscarriage of justice was occasioned by its admission. The Court is thus placed in a position quite different to that occupied by the Court in the case before the Judicial Committee. This was pointed out by Osler, J.A., in Rex v. Drummond, 10 O. L. R. at p. 549, 6 O. W. R. 211. And, in view of all the evidence and the whole facts and circumstances of this case, there is no good ground for the opinion that any substantial wrong or miscarriage of justice was occasioned on the trial by reason of the evidence in question. And that should be the answer to the second question.

MACLAREN and MEREDITH, JJ.A., each gave reasons in writing for the same conclusions.

OSLER and GARROW, JJ.A., also concurred.