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HIGH COURT OF JUSTICE.

MULOCK, C.J.Ex.D. APRIL 1ST, 1910.

RE TAYLOR AND VILLAGE OF BELLE RIVER.

Municipal Corporations—Closing of Part of Village Street—Injury to Property not Abutting on Street—Diversion of Traffic from Hotel—Municipal Act, sec. 447—Property "Injuriously Affected"—Compensation—Injury not Differing from that Done to General Public—Loss of Trade Profits—Injury to Value of Property.

Appeal by the village corporation from an award of three arbitrators appointed to ascertain what damages, if any, the respondent, Miss C. R. Taylor, was entitled to by reason of the closing of that portion of a public highway known as Tecumseth road, lying between Chisholm and Church streets, in the village of Belle River

The respondent was the owner of hotel property situate on the north-east corner of Tecumseth road and Sixth street.

Tecumseth road began at the corner of Main and Chisholm streets, and proceeded in a north-easterly direction diagonally through the block of land lying between Main and Broadway streets in a straight line until it reached and ran past the respondent's hotel. A substantial portion of the patronage of her hotel came from the west, the patrons entering the village by Main street, and proceeding, via Tecumseth road, to the hotel. When the portion of the road in question was closed up, traffic from the west no longer proceeded in a direct line from Main street past the hotel, but, to reach the hotel, a detour of 185 feet must be made.

Evidence was given before the arbitrators to the effect that some of the travelling public from the west, who might otherwise have patronised the hotel, continued easterly along Main street

for some distance, only returning to the Tecumseth road when well past the hotel, and in consequence did not patronise it, which resulted in direct loss of custom to the respondent.

Evidence given shewed also that the closing up of the portion of the road was a substantial injury to the respondent, because of the diversion of traffic from her hotel; and the case sought to be made on her behalf before the arbitrators was, that the market value of her property was materially injured by reason of the action complained of.

The arbitrators unanimously found that her property was injured to the extent of $500, which sum they awarded her as a reasonable compensation.

From this award the corporation appealed on the following grounds: (1) that no portion of the respondent's land was taken or injuriously affected; (2) that the alleged damages are too remote and speculative; (3) that the nearest portion of the part of the road closed was 365 feet from the hotel, and, notwithstanding such closing, other streets equally convenient were available to those desiring to go to and from the respondent's premises; (4) that the respondent is not entitled to compensation because her lands do not abut on any portion of the street closed; (5) that the damage sustained by the respondent is no different from that sustained by the general public; (6) that the arbitrators have not distinguished between loss of profits on business of the hotel and loss in value of the property in question.

F. E. Hodgins, K.C., for the appellants.

J. H. Rodd, for the respondent.

MULOCK, C.J. (after setting out the facts as above):—Section 447 of the Municipal Act enacts: "Every council shall make to the owners or occupiers of . . . real property . . . injuriously affected by the exercise of its powers due compensation for any damages . . . necessarily resulting from the exercise of such powers . . ."

Mr. Hodgins contended that the act of the council in closing up the road . . did not affect the respondent in any special degree, but only as one of the public. The finding of the arbitrators, however, does not support this view. They held that her property was damaged to the extent of $500 by reason of the interference with the access thereto, which, but for the expropriation, she was entitled to enjoy.

It was also contended that, inasmuch as the respondent's land did not front or abut on any part of the closed portion of the road, her property was not "injuriously affected," within the

meaning of the section. Such is not, I think, the test. The property may not have fronted or abutted upon a highway which has been closed by the council; but, nevertheless, if its proximity to such highway enhanced its value, and the closing of such highway depreciated its value, then, in the latter case, the land has been "injuriously affected," within the meaning of the section . . .

The question is . . . whether the loss of access to the property consequent on the closing of the highway has depreciated its value. Here the arbitrators have tried this question, and have found that the closing of the road has damaged her property. Thus she is shewn to be a sufferer, not as one of the public, but in a special degree because of her ownership of the land in question. . . .

[Reference to Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 243, 263; Caledonian R. W. Co. v. Walker's Trustees, 7 App. Cas. 259.]

The arbitrators, as a jury, have found, on the evidence before them, that as a matter of fact the value of the property has been diminished because of the action complained of. Thus she is injured in a special degree, and is entitled to compensation.

Once the fact is established that premises are so situate with respect to a highway that their value is substantially diminished by the closing thereof, the right to compensation arises. Therefore, according to this view, the objections Nos. 1, 2, 3, 4, and 5 fail.

As to the 6th objection, the arbitrators have found "that . . the . . claimant is entitled . . to compensation for injury to her property by the closing up of a portion of the Tecumseth road . . and we award her for such injury the sum of $500 as a reasonable compensation."

The fair meaning of this finding is, that, in the arbitrators' opinion, Miss Taylor's property is diminished in value to the extent of $500. They do not appear to have made any allowance for loss of profits on business at the hotel. . . . Where lands upon which the owner is carrying on trade are expropriated or injured, damage to the goodwill, in addition to damage to the property, is a proper subject of compensation: Re McCauley and City of Toronto, 18 O. R. 416. . . . I fail to see how the appellants have been injured on that head.

Appeal dismissed with costs.

MEREDITH, C.J.C.P. APRIL 1ST, 1910.

*ROSS v. TOWNSHIP OF LONDON.

Public Health Act—Employment of Physician by Local Board of Health to Attend Smallpox Patients—Remuneration—Absence of Contract—Quantum Meruit — Action against Members of Local Board—Parties — Municipal Corporation — Condition Precedent—Inability of Patients to Pay — No Proof of—Remedy by Mandamus.

Action by a medical practitioner, who was the Medical Health Officer for the Corporation of the Township of London for 1908 and 1909, and for some previous years, against the township corporation and the persons who in 1908 constituted the Local Board of Health for that township, to recover $2,300 for certain services.

The plaintiff's case was that in November, 1908, a number of smallpox cases appeared in the township; that he was requested by the individual defendants (the members of the Local Board of Health) to attend persons suffering from smallpox within the township; that it was agreed that he should be paid for his services at the rate of $100 a week; that a resolution appointing him for that purpose was passed by the Board; and that he began his services on the 14th November, 1908, and continued to attend persons suffering from the disease from that day until the 24th April, 1909.

For these services the plaintiff claimed $2,300, and asked for a mandatory injunction or order directing the individual defendants to sign, execute, and deliver an order upon the defendant corporation for the amount of his claim, and that the defendant corporation be ordered to pay the amount.

The defendants disputed the claim, and contended that in any case the charge of $100 a week was excessive.

The resolution of the 14th November, 1908, made no reference to the rate of remuneration, but was that the plaintiff "continue in charge of the case and make every effort to prevent the spread of the disease."

J. M. McEvoy and E. W. Scatcherd, for the plaintiff.

E. Meredith, K.C., and J. C. Judd, K.C., for the defendant corporation.

T. G. Meredith, K.C., for the other defendants.

* This case will be reported in the Ontario Law Reports.

MEREDITH, C.J.:— . . . My conclusion is that there was not a consensus as to the remuneration the plaintiff was to receive, and that he is, therefore, not entitled as a matter of agreement to be paid at the rate of $100 a week, but is entitled to be remunerated on a quantum meruit.

Nor do I think that on a quantum meruit the remuneration should be $100 a week. . . . Having regard to the fact that while attending the smallpox patients he carried on his ordinary practice, and was not isolated, payment by the visit would be the proper mode of remunerating him, and . . . $25 would be a proper allowance for each visit. . . .

The next question is, what, upon this state of facts, are the plaintiff's rights, and what is his remedy?

He is not, in my opinion, entitled to judgment against the defendants who constituted the Board of Health personally. . . The Board has no power to raise money that may be required to enable it to perform the duties with which it is charged, but is dependent upon the vote of the council for what is required for carrying on its work (Public Health Act, R. S. O. 1897 ch. 248, sec. 56), and upon what it has power to require to be paid under the provisions of sec. 57.

That section reads as follows: "57. The Treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the Local Board, or any two of them, for services performed under their direction by virtue of this Act."

It is to the means of payment provided by this section, whatever it may mean, that it must be taken, I think, and to that alone, that the contracting parties intended that the plaintiff should look for his remuneration.

The only section of the Public Health Act to which I was referred, or which I have been able to discover, which confers power on a Local Board of Health to employ a physician to attend smallpox patients at the expense of the municipality is sec. 93. That section authorises the Board of Health, in the case of a person such as those with whom the section deals, to provide "nurses and other assistance and necessaries for him at his own cost and charge, or the cost of his parents or other person or persons liable for his support, if able to pay the same, otherwise at the cost and charge of the municipality."

Referring to that section, Burton, J.A., in Township of Logan v. Hurlburt, 23 A. R. 628, said (p. 657): "No reference is made in the judgment to the boy's inability to pay, and I was at first

of opinion that the case would fail in consequence of an omission to prove that fact, which would seem to be a condition precedent to the liability of the plaintiffs, but I find in the evidence that there is a statement to the effect that the boy had no money, and his parents were under no legal obligation to pay the expenses incurred."

No evidence was given on this point, though, after the close of the case, I intimated to the counsel for the plaintiff that, if they desired it, I would re-open the case to enable them to shew that the condition mentioned in the section, which is referred to by Burton, J.A., as a condition precedent to the liability of the municipality, existed; but they declined to avail themselves of the opportunity, and stated that they were content to rest their case on the evidence as it stood.

Even if I had not reached the same conclusion from an independent consideration of the provisions of the Act, I ought, I think, to follow the clearly expressed opinion of Burton, J.A., and hold that the plaintiff's case fails because the existence of the state of things which the learned Judge deemed to be a condition precedent to the liability of the municipality was not proved.

A consideration of the provisions of the Act has, however, led me to the same conclusion as that which was come to by Burton, J.A. . . .

[Reference to secs. 69 (2), 78, 82, 83, 93, 99, 100, 106.]

In Bibby v. Davis, 1 O. W. R. 189 . . . the point upon which I decide this case was not taken. . . .

It is unnecessary to say anything as to the right of the plaintiff to bring an action, or as to whether his proper remedy . . . was not to be obtained by a motion for a prerogative writ of mandamus, as was held by the Chancellor in Toronto Public Library Board v. City of Toronto, 19 P. R. 329, to be the proper practice. . . .

In any view of the plaintiff's rights, the defendants the Corporation of the Township of London were improperly joined . . The corporation were not in default, and non constat, if an order had been given by the Local Board for the payment of the plaintiff's claim, it would not have been paid by the Treasurer.

The action is dismissed with costs.

DIVISIONAL COURT. APRIL 4TH, 1910.

BILSKY v. PETERSON LAKE SILVER COBALT MINING CO.

Jury Notice—Striking out—Order of Judge at Jury Sittings—Transfer to Non-jury List.

An appeal by the defendants from the order or direction of MEREDITH, C.J.C.P., presiding at a jury sittings at Toronto, striking out the defendants' jury notice and transferring the case to the non-jury list.

The appeal was heard by BRITTON, TEETZEL, and RIDDELL, JJ.

R. S. Robertson, for the defendants.

Joseph Montgomery, for the plaintiff.

The judgment of the Court was delivered by RIDDELL, J.:—The authorities are conflicting, but we think the later case, Bank of Toronto v. Keystone Fire Insurance Co. (1898), 18 P. R. 113, should be followed rather than the earlier, Skae v. Moss (1896), 18 P. R. 119 (n.)

In view of the conflict of authority, we give leave to appeal to the Court of Appeal.

The appeal is allowed, the jury notice restored, and the plaintiff permitted to set the case down for the next jury sittings at Toronto. Costs in the cause.

The order is without prejudice to the right of the trial Judge before whom the case comes on to dispense with a jury and try the case himself.

DIVISIONAL COURT. APRIL 5TH, 1910.

*GREGSON v. HENDERSON ROLLER BEARING CO.

Negligence—Unsafe Premises—Injury to Servant of Lessee—Liability of Lessee—Liability of Landlord—Occupier of Premises—Right to Enter to Complete Work.

Appeals by the defendant Eckhardt and the defendants the Henderson Roller Bearing Co. from the judgment of MAGEE, J., upon the findings of a jury, in favour of the plaintiff for the recovery of $1,000 damages against both defendants for injuries

* This case will be reported in the Ontario Law Reports.

sustained by the plaintiff by reason of a platform falling upon him. The platform was erected by the defendant company, who were the employers of the plaintiff, in a building owned by the defendant Eckhardt and leased to the defendant company. The platform, in order to make way for some repairs being done by the defendant Eckhardt, was moved from its place and left standing on its edge, and, it was alleged, was insecurely fastened. It had been used for the purpose of an approach to the elevator in the building.

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

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

A. H. F. Lefroy, K.C., for the defendant company.

L. F. Heyd, K.C., for the plaintiff.

RIDDELL, J. (after stating the facts and the findings of the jury):—As to the defendants the Henderson company, I think the jury were wholly justified in finding that the platform was not safely placed. It is plain that a structure like this, some 6½ feet wide, with a slant given only by a base of some 12 inches, so that if by any means the centre of gravity is displaced outward by more than six inches it will fall, may well be found to be negligently placed. Again, the rope simply placed round a projection in a single knot may well by the jury have been considered an insufficient provision against the platform becoming displaced—and that the Henderson company's foreman and superintendent should have made better provision against accident; and this is quite irrespective of the effect of the very considerable vibration of the building at that time. Even though it may have been the duty of the landlord to place the platform in a safe position, the defendant company are not relieved of their duty in the premises.

. . .

[Reference to Thomas v. Quartermaine, 18 Q. B. D. 685.]

The defendant company were the occupiers of this property; the plaintiff was lawfully upon the property; and, whatever the duties of others may have been, it is quite clear, to my mind, that the company cannot get rid of the obligation to have the property in a safe condition.

Nor can the company claim any relief against their co-defendant. I do not suggest that in any case such relief could be claimed (Malone v. Laskey, [1897] 2 K. B. at p. 154, may, however, be looked at); but, even if such relief could by any method be obtained, the company cannot obtain it in this action, there

being no order to try such issue: Cope v. Crichton, 18 P. R. 462; Burke v. Pittman, 12 P. R. 662; Flower v. Todd, [1884] W. N. 47. The fact that the claim is made in the pleadings does not advance the position of the defendant company: Cope v. Crichton, ut supra.

The liability of the defendant Eckhardt is to be determined by somewhat different considerations.

The same remarks in respect of negligence will apply to his case as in the case of the company, if it be considered that he owed any duty to the plaintiff. Of course, as has been said so often, "there is no such thing as negligence in the abstract—negligence is simply neglect of some care we are bound by law to exercise toward somebody:" Daniels v. Noxon, 17 A. R. 206; Thomas v. Quartermaine, 18 Q. B. D. 685, 694; Woodburn Milling Co. v. Grand Trunk R. W. Co., 19 O. L. R. 276, 281; Lowery v. Walker, [1910] 1 K. B. 173, 180, 183.

It must be clear that, if the plaintiff had been a trespasser, he would not be entitled to recover. The last case cited is the most recent I have seen on the subject.

There can be no liability to the plaintiff upon the ground of non-repair. . . .

[Reference to Payne v. Rogers, 2 H. Bl. 350; Russell v. Shelton, 3 Q. B. 449, 458; Nelson v. Liverpool Brewing Co., 2 C. P. D. 311, 313; Cavalier v. Pope, [1905] 2 K. B. 757, [1906] A. C. 428; Cameron v. Young, [1908] A. C. 176, 179.]

Nor is the position of the plaintiff advanced by the fact that the landlord actually came in and did work on the property. . .

[Reference to Malone v. Laskey, [1907] 2 K. B. 141, 154, 155, 159.]

Except as to one point . . . the present case is, in my view, almost identical with Malone v. Laskey. . . . As in that case, so in the present, there was no attempt made to shew actual knowledge on the part of the landlord of the defect; and Sir Gorell Barnes says, in language applicable to the present case as well: "The utmost that can be said is that what was done amounted to a representation by the defendants that the plaintiff might safely use" the property, "and, even if that did amount to such a representation, it was an innocent representation, and gave the plaintiff no cause of action." . . .

The point which differentiates the present case . . . is that the landlord had apparently not finished his work, and that his men would need at some time to return. It might accordingly be argued that he was in occupation of that part of the premises at least so long as it might be necessary for the purpose of finish-

ing the job. Being so in occupation, it would be contended that he was liable under the rule in Indermaur v. Dames, L. R. 1 C. P. 274, L. R. 2 C. P. 311. That the landlord was not in actual occupation was plain; and, even if the rule can be applied to any one not in actual occupation, I do not think it extends to the present case. There is no evidence that the work to be done by the landlord was made an obligation upon him by anything but the terms of the lease—no city by-law or regulation is proved or anything of that kind. This term of the lease is introduced for the benefit of the tenant, and the tenant could waive it at any time. There was then no absolute right on the part of the landlord to enter for the purpose of finishing the drain, etc.—the tenant could at will exclude him, and he could not legally force himself or his servants upon the premises to "fix up" the defect. He had, indeed, the right to enter and view state of repair; but that is quite a different thing. Using, mutatis mutandis, the language of Kennedy, L.J., in Malone v. Laskey, [1907] 2 K. B. at p. 156: "If the plaintiff had written a letter of complaint to the defendant Eckhardt, the Henderson company might well have refused to allow the defendant Eckhardt to come in and do the work in premises to which he had no right of entry for such purpose." So, without going so far as to say that the occupancy to render one liable under Indermaur v. Dames is that power of control which renders a landlord liable under certain circumstances—and that by Lord Atkinson in Cavalier v. Pope, [1906] A. C. at p. 433, is defined as implying "the power and the right to admit people to the premises and to exclude people from them—in the present case it cannot be said that Eckhardt could be considered an occupier. It may be that Lord Atkinson's definition should be applied here; at all events, the extent of the power and right of the landlord fall far below those stated. While the work done by the landlord may not have been "repair," strictly speaking, and the injury may not have been caused by non-repair, the principles must be the same in the present case as in those cited.

While I share with Lord Halsbury the regret expressed by him that the law is so, it is, of course, obligatory upon us to follow the law as we find it.

The appeal of the defendant Eckhardt should be allowed, and the action against him dismissed—and, as the plaintiff took his chances of a verdict against both, instead of confining his claim to the party actually liable, the costs should follow.

The appeal of the Henderson company should be dismissed with costs; that of Eckhardt allowed with costs, and the action against him dismissed with costs.

TEETZEL, J. APRIL 6TH, 1910.

PETERSON LAKE SILVER COBALT MINING CO. v. NOVA SCOTIA SILVER COBALT MINING CO.

Lease—Mutual Mistake in Description of Property—Rectification—Mining Companies—Lease of Part of Location by one to the other—Common Officers of Companies—Agreement on Behalf of Companies—Validity, in Absence of Fraud—Strip of Land in Dispute—Injunction—Way of Necessity—Forfeiture—Violation of Provisions of Lease—Acquiescence — Account of Ore Mined and Royalties.

The plaintiffs were the owners of a mining location in the township of Coleman; the defendants were the owners of a location adjoining and to the east of the plaintiffs'; and there was a common boundary between them, 1,200 or 1,300 feet in length.

Before February, 1908, the defendants had developed a mine on their location, and were extensively engaged in mining and shipping silver ore. One of their shafts was located near the boundary.

Beyond lowering the waters of the lake and some exploration work, the plaintiffs had not developed their property.

Early in 1908 a proposal was made by the defendants to purchase from the plaintiffs 30 acres of the plaintiffs' location immediately adjoining the defendants' property, but was rejected.

At that time David M. Steindler was president of the defendants and managing director of the plaintiffs; Edward Steindler was president of the plaintiffs and a director of the defendants; and J. A. Jacobs was a director and secretary-treasurer of both companies; and these three were the largest shareholders in both companies, and constituted a majority of the board of five directors of each company.

About the same time the plaintiffs had leased ten acres of their property to be operated by the Little Nipissing Mining Co.; and on the 25th February a meeting of the plaintiffs' directors was held and a resolution was passed instructing the president and secretary-treasurer to sign a lease to the defendants of 30 acres of land belonging to the plaintiffs, and shewn on their map, being such portions of lot 13, 14, and 15 in sections F, G, and H, as belonged to the plaintiffs, the lease being stated in the minutes to be on the same terms and conditions as that given to the Little Nipissing Mining Co., with the exception that the term was to be ten instead of five years. At this meeting four directors only were present—the three alrady named and Mc-

Laren, who alone dissented. A letter was read from the other director in favour of leasing on the same terms as those of the Little Nipissing lease.

The lease was executed by the president of each company and by Jacobs, the secretary-treasurer of each company, and described the property as "beginning at all such portions of lots 13, 14, and 15, sections F, G, and H, as are property of lessors as shewn on the map of said property, comprising 30 acres of ground more or less."

The description in the lease did not in terms embrace any property of the plaintiffs adjoining that of the defendants, and, in the result, by following the description in the lease, there was left a wedge-shaped portion of the plaintiffs' land lying between the defendants' land and the part of the Nipissing company's land on the east and south-east and the land described in the lease on the west.

With the exception of the boundary between the plaintiffs' and defendants' properties, the plaintiffs' property was entirely surrounded by the Nipissing company's property.

The fact that the wedge-shaped piece was not included in the lease was not discovered until June, 1909, when a mining engineer employed by the plaintiffs discovered, by reference to the map (exhibit 3) which was referred to in the lease, that the wedge-shaped piece was omitted from it.

The plaintiffs alleged that the defendants, through their executive officers, procured the making of the lease, not for the purpose of developing and working the property for the benefit of the plaintiffs as well as for the defendants, but for the wrongful purpose of exploiting a portion of the plaintiffs' property for the benefit of the defendants and for their own personal use, and asked a declaration that the defendants were not entitled to any interest in the lands mentioned in the lease, on the ground that it was obtained by fraud.

The plaintiffs also alleged that the defendants were trespassers upon the wedge-shaped parcel, and obtained an interim injunction restraining the defendants from using it, which they asked to have continued; and claimed on account of ore removed therefrom.

The defendants counterclaimed to have the lease rectified by adding to the description the lands owned by the plaintiffs in the block indicated on map (exhibit 3) as block 169, which would take in all the lands adjoining the defendants' property.

W. Nesbitt, K.C., and R. S. Robertson, for the plaintiffs.

I. F. Hellmuth, K.C., McGregor Young, K.C., and Joseph Montgomery, for the defendants.

TEETZEL, J.:— . . . Not a tittle of evidence was offered by the plaintiffs or elicited in the cross-examination of the three officers named to warrant any charges of fraud; but, on the contrary, I find that, so far as disclosed upon the evidence, the agreement between the companies was entered into in good faith by the executive officers on behalf of both the companies, with the honest intention of mutual advantage to the two companies. . . .

It is perfectly clear upon the evidence that the three executive officers named, together with the consulting engineer of both companies, intended that the lease should, and they all supposed that it did, cover all the lands of the plaintiffs immediately adjoining the defendants' property; and the omission of the wedge-shaped portion was clearly the result of the mistake of Mr. Jacobs . . . and until the discovery in June last both parties acted upon the assumption that the lease did extend to the easterly boundary of the plaintiffs' land.

While I find that the common intention was as above stated . . . and that the incorrect description . . was the result of mutual mistake, the question remains whether the defendants are entitled to have the lease rectified. . . .

[Reference to Superior Savings and Loan Society v. Lucas, 44 U. C. R. 106, 121, 15 A. R. 748; Leake on Contracts, 5th ed., p. 214.]

Now, is it impossible to rectify the mistake as to description in the writing owing to the indefiniteness of the property claimed in the real agreement between the parties?

I think one way of testing the defendants' right to rectification is to determine whether, assuming that shortly after the execution of the lease in its present form, and while the defendants were working on the disputed strip, the plaintiffs had forbidden them proceeding further, on the ground that they were trespassing, the defendants could have maintained an action for specific performance of the true agreement, and in that action have obtained a rectification of the writing. Upon the authorities, I think, such an action would have been maintainable. . . .

[Reference to Olley v. Fisher, 34 Ch. D. 667; Clark v. Walsh, 2 O. W. R. 72; Carroll v. Erie County Natural Gas Co., 29 S. C. R. 591; Jenkins v. Green, 27 Beav. 437.]

Objection was taken on behalf of the plaintiffs that the three . . common officers of both companies could not, as agents for both, enter into an agreement on behalf of their principals. . . . I . . . am unable to find any case which would indicate that, in the absence of fraud, the objection . . .

could prevail. I therefore think the defendants are entitled to rectification.

If I am wrong in holding that the defendants are entitled to rectification, I should have thought, although the question was not raised upon the argument, that in any event the plaintiffs would not be entitled to an injunction restraining the defendants from using the tunnel or passageway through the strip in question for the purpose of ingress and egress and for conveying the ore out of the mine to the defendants' shaft, on the ground that such passageway is an easement of necessity. . . . See Gale on Easements, 2nd ed., p. 871 et seq.

Any portion of the road allowance embraced in the piece of land in dispute which has been acquired since the action must be regarded as covered by the lease as rectified, for, while when the agreement was made the plaintiffs had only the right to acquire the road allowance, the fact that they have obtained a patent since, merely "feeds the estoppel" created by the lease.

It was conceded on the argument that the plaintiffs are entitled to an account of all ore mined on their property and of the royalties payable thereunder.

The plaintiffs also contended that the lease was forfeited for non-performance of the conditions therein contained; but I am unable to find any evidence warranting a forfeiture. The operations were carried on under the supervision of officers employed by both corporations, and, while there may have been a failure, in some particulars, literally to comply with the terms of the lease, I think any such failure was acquiesced in by representatives of the plaintiffs.

Judgment dissolving the injunction, directing rectification of the lease, and directing a reference to the Master in Ordinary to take the above accounts. Further directions and the question of the costs of the action and of the reference reserved until after the Master's report.

SILL v. ALEXANDER—MASTER IN CHAMBERS—APRIL 4.

Security for Costs—Sufficiency of Surety—Value of Shares in Company—Cross-examination of Surety—Information as to Affairs of Company.]—Motion by the defendant to disallow a bond filed by the plaintiff for security for costs, or to require the surety to attend for further examination at his own expense and answer certain questions he refused to answer when cross-examined upon his affidavit of justification. The surety stated that he had no property except 47 shares in a company of which he was managing director. He said he had sold 20 shares of his own at par. The

stock was not listed. He declined to answer questions as to the financial affairs of the company, directed to obtaining information as to the value of the shares. The Master referred to Wooster v. Canada Brass Co., 7 O. W. R. 748, 807; Walters v. Duggan, 33 C. L. J. 362; Howland v. Patterson, 1 O. W. R. 653; Daniel v. Birkbeck Loan Co., 5 O. W. R. 757; Sub Target Co. v. Sub Target Gun Limited, 6 O. W. R. 439; Stone v. Stone, 10 O. W. R. 1088, 11 O. W. R. 336; and said that it did not seem necessary to do more at present than to direct that the name of the purchaser of the 20 shares be given. Then, if the defendant was not satisfied, he might ask to be allowed to examine one of the officers of the company as a witness on the motion. If the name of the purchaser is given, and the defendant is thereby satisfied, or receives sufficient information from the company, the motion will be dismissed, with costs in the cause to the defendant. Otherwise, the witness should attend without further payment, and at least apply for permission to give information as to the financial condition of the company: Douglas v. Blackley, 14 P. R. 504. The surety to undertake, as in the Wooster case, not to deal with the shares without notice.

McComb v. Beck—Sutherland, J.—April 5.

Injunction—Contract to Sell Shares.]—Motion by the plaintiff to continue an interim injunction restraining the defendants from selling or transferring 3,612 shares of stock in the Anglo-American Fire Insurance Company owned or controlled by the defendant Beck for himself or his co-directors. The plaintiff alleged that the defendant Beck accepted an offer made by the plaintiff to purchase 3,612 shares, and agreed to endeavour to secure that number of shares from the various holders. It appeared from the examination of the defendant Beck that he had not obtained options from his co-directors, nor agreed to sell his own shares to the defendant Thompson; and also that he was willing to sell his own shares to the plaintiff at the agreed price. The motion to continue was refused with costs. W. N. Ferguson, K.C., for the plaintiff. F. E. Hodgins, K.C., for the defendants.

Bouttete v. Township of Tilbury North—Riddell, J.—April 5.

Highway—Non-repair—Action by Ratepayer.]—Action by a ratepayer of the township to compel the defendants to repair and keep in repair a certain highway, and for damages for non-repair. Action dismissed with costs. O. E. Fleming, K.C., for the plaintiff. A. H. Clarke, K.C., for the defendants.

RE GOBLE—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—APRIL 7.

Death—Presumption — Declaration—Evidence.]—Motion by executors for an order declaring William Goble, who has not been heard of for many years, to be dead. Held, that the Court should be chary in making such order. Further affidavits to be filed. If an order is eventually made, a bond to refund moneys paid out, in the event of the return of the absentees, will be required. J. G. Wallace, for the executors. Peter McDonald, for Emma N. Carey and May Goble.

RE COPEMAN AND VILLAGE OF DUNDALK—FALCONBRIDGE, C.J.—APRIL 7.

Municipal Corporations—Local Option By-law—Voting on—Voters Deprived of Votes by Improper Tender of Oath—Majority not Affected—Third Reading of By-law—Prevention of Scrutiny.]—Application by George Copeman to quash a local option by-law on various grounds of objection. (1) While the first objection was not formally abandoned, it was insisted on only with reference to the case of one Tryon, who left the municipality in November. (2) The second objection was: "That the returning officer required . . certain persons who presented themselves to vote . . . to take certain oaths before giving them ballot papers, and that the oaths so required . . . were not authorised by law, and the said persons were therefore illegally prevented from voting, and the voting was therefore not conducted in the manner prescribed by the Consolidated Municipal Act, 1903, and amendments thereto." The Chief Justice did not consider it necessary to enter into the question whether the bribery clauses applied to voting on local option by-laws. The applicant, in order to succeed, admittedly must take off five of the votes cast in favour of the by-law. Giving him the benefit of the Tryon vote, it would be necessary for him to shew that four others (named) were prevented from casting their votes by the action of the returning officer in presenting to them the oath prescribed for voters in municipal elections, which oath they refused to take. As to one of these four, Walter Howes, the case was not proven; and the objection failed. (3) The third objection was that dealt with in In re Duncan and Town of Midland, 16 O. L. R. 132. It does not appear as a result of the judgments in that case that the fact that a scrutiny was applied for here alters the effect of the judgment. (4) The fourth objection was not pressed. Motion dismissed with costs. J. Haverson, K.C., for the applicant. W. E. Raney, K.C., and I. B. Lucas, K.C., for the village corporation.