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THE

ONTARIO REPORTS,

VOLUME XXVIII.

CONTAINING

REPORTS OF CASES DECIDED

IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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JUDGES

OF THE

HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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ERRATA.

Page 42, line 18, for "735" read "235."

Page 59, lines 12 and 14, for "endowment" read "emolument."

Page 127, 1st line of head-note, delete "of."

Page 195, 10th line of head-note, delete "of."

Page 297, line 4, for "*Humber* v. *Layton*," read "*Humble* v. *Langston*.

Page 382, line 17, for "Confederate" read "Confederation."

Page 382, line 24, for "7 Ch. 801" read "6 Q. B. 276."

Page 533, note, after "*Blair* v. *Assets Co.*" add "[1896] A. C. 409."

Page 662, line 12 of head-note, for "(*O.*)" read "(*c*)"

Page 663, line 13 from bottom, for "sec. 7" read "sec. 70."

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

1

[DIVISIONAL COURT.]

GRAHAM v. COMMISSIONERS FOR QUEEN VICTORIA NIAGARA FALLS PARK.

Crown—Negligence—Niagara Falls Park Commissioners—50 Vict. ch. 13, secs. 3, 4, 10 (O.)—Obligation to Maintain Fences—Highways—Visitors to Park—Status of Commissioners—Liability of Crown.

There is no liability on the part of the commissioners for the park to the public using the highways in the Queen Victoria Niagara Falls Park by reason of the absence or insufficiency of a fence, railing, or barrier on the edge of the cliff, there being no statutory obligation in that behalf imposed on them.

Gibson v. *Mayor of Preston*, L. R. 5 Q. B. 218; *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Municipality of Pictou* v. *Geldert*, [1893] A. C. 524; *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433, followed.

Nor are the commissioners liable for an accident happening under the above circumstances to a person while resorting to the park, who, paying nothing for the privilege, is in the position of a bare licensee, to whom no duty would be owing, unless the accident occurred by reason of some unusual danger known to the commissioners, and unknown to the person injured.

Southcote v. *Stanley*, 1 H. & N. 247; *Ivay* v. *Hedges*, 9 Q. B. D. 80; *Schmidt* v. *Town of Berlin*, 26 O. R. 54; and *Moore* v. *City of Toronto*, *ib.* 59*n*, followed.

The commissioners, under the provisions of the statutes in that behalf, under any circumstances, act in the discharge of their various duties as "an emanation from the Crown" or as agent of the Crown, which is not liable for the acts of the subordinate servants of the commissioners.

Mersey Docks Co. v. *Gibbs*, L. R. 1 H. L. 93; *The Queen* v. *Williams*, 9 App. Cas. 418; and *Gilbert* v. *Corporation of Trinity House*, 17 Q. B. D. 795, distinguished.

The enactment in Ontario of legislation establishing the liability of the Crown for wrongs committed by its servants, suggested.

Statement. THE plaintiff's claim was based upon the alleged negligence of the defendants in maintaining upon the property vested in them under the provisions of 50 Vict. ch. 13 (O.), known as the "Queen Victoria Niagara Falls Park," a fence or railing, in close proximity to the edge of the cliff forming the bank of the river Niagara, in such a defective and insecure condition that the plaintiff, while lawfully there, and placing her hands or arms upon it, in viewing the scenery of the river and surroundings, caused it to fall or break down, in consequence of which she was precipitated forward and down the bank, and suffered very severe injuries.

The action was tried before FERGUSON, J., and a jury, at Welland, at the Autumn Assizes, 1895, when a verdict was found for the plaintiff on all the issues with $2,000 damages, upon which judgment was entered by the learned Judge for the plaintiff for the damages so awarded, with costs of suit.

The defendants moved to set aside the verdict and judgment, and to have judgment entered in their favour, on the ground that the judgment was against the law and evidence and the weight of evidence; that no evidence of negligence was shewn in the defendants; and on the ground that the defendants were not the owners of the lands and premises in the pleadings mentioned where the alleged accident occurred, but simply held the same as trustees for and servants of Her Majesty the Queen, as represented by the Government of the Province of Ontario; and that no duty was imposed on the defendants to erect a railing or fence along the edge of the cliff where the alleged accident occurred, as a protection against accident or otherwise; and on grounds disclosed in the pleadings and evidence.

The motion was heard by a Divisional Court composed of MEREDITH, C.J., and ROSE, J., on the 26th November, 1895. Argument.

Irving, Q.C., and *W. M. German*, for the defendants. As a matter of law, there is no duty to fence off a dangerous place: *Toms* v. *Corporation of Whitby*, 35 U. C. R. 195; *Cornwell* v. *Metropolitan Commissioners of Sewers*, 10 Ex. 771; *Wilson* v. *Mayor, etc., of Halifax*, L. R. 3 Ex. 114; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345. The condition of the fence arose from the action of the railway company about six weeks before the accident, and no duty arose in the interval. It was suggested that the fence was in the nature of a trap, but the trap was not set by the defendants. By sec. 3 of 50 Vict. ch. 13 (O.), the lands are vested in the defendants as trustees for the Province, but the vesting only goes as far as is necessary for the exercise of the particular powers conferred. The word "vest" does not necessarily imply an absolute title—you must look at the purposes. What is the tenure of the trustees or commissioners, and can they be got at by an action? See as to the meaning of "vest," *Coverdale* v. *Charlton*, 4 Q. B. D. 104, at pp. 116, 120, *per* Bramwell and Brett, L. JJ. These defendants are no more than a department of Crown lands: see 48 Vict. ch. 21, sec. 3; 50 Vict. ch. 13, sec. 4, sub-sec. (5); sec. 7 (O.). As to what the position of commissioners is, see *Mersey Dock Trustees* v. *Cameron*, 20 C. B. N. S 56, 11 H. L. C. 443; *Tyne Improvement Commissioners* v. *Chirton*, 1 E. & E. 516. These commissioners are by the statutes in the position of serving public purposes. They cannot be sued unless a petition of right against the Crown has been allowed. The principle has been settled in *Muskoka Mill Co.* v. *The Queen*, 28 Gr. 563, 577; *The Queen* v. *McLeod*, 8 S. C. R. 1; *The Queen* v. *McFarlane*, 7 S. C. R. 216; *i.e.*, the non-liability of the Crown for the nonfeasance or misfeasance of its servants. In the absence of a statutory provision, no duty exists to keep the place in repair: *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433; *Municipality of Pictou* v. *Geldert*, [1893] A. C. 524.

Argument. *Aylesworth*, Q.C., and *F. W. Hill*, for the plaintiff. There was an obligation on the defendants to maintain the fence, or to strengthen it, or to remove it altogether. As to the position of the board of commissioners, see 48 Vict. ch. 21, preamble and sec. 12; 50 Vict. ch. 13; *Niagara Falls Park Commissioners* v. *Howard*, 23 O. R. 1. There is nothing in the statutes inconsistent with applying the revenues of the commissioners in payment of compensation for act or omission. The guard was a trap; it looked substantial; the plaintiff never would have gone near but for the fence; it was built as a guard. It is possible that the defendants and the municipality within which the park is situated may both be liable: *Wettor* v. *Dunk*, 4 F. & F. 298. The defendants are not a department of the Crown at all. As trustees, they are the actual owners of the legal estate, for the purposes of the trust: *Barnes* v. *Ward*, 9 C. B. 392. As to the liability of the defendants as commissioners, they referred to *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93; *Mersey Docks Trustees* v. *Cameron*, 11 H. L. C. 443. When premises are in a dangerous condition, there is an obligation upon the owner to fence the highway: *Pickard* v. *Smith*, 10 C. B. N. S. 470; *Southcote* v. *Stanley*, 1 H. & N. 247; *Gully* v. *Smith*, 12 Q. B. D. 121; *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400; *White* v. *France*, 2 C. P. D. 308; *Corby* v. *Hill*, 4 C. B. N. S. 556. The neglect to keep the fence in proper repair was not merely nonfeasance, but misfeasance.

Irving, in reply.

September 15, 1896. MEREDITH, C. J.:—

I have reluctantly come to the conclusion that the plaintiff's action cannot be maintained. I say reluctantly because the jury have found that the plaintiff has, without any contributory negligence on her part, suffered a very severe injury owing to acts of negligence on the part of the defendants' servants, for which she has a moral claim to be indemnified, and which, had the Legislature of

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this Province adopted what I may be permitted to call the more enlightened policy as to the liability of the Crown for wrongs committed by its servants which finds a place in the legislation of Canada and of several of the colonies of the Empire, might possibly have been a legal claim also against the Province.

The place where the accident happened was not within the limits of the lands mentioned in sec. 3 of 50 Vict. ch. 13 (O.), and which are sometimes spoken of as the "park proper," but upon that part of the property which, after the acquisition by the commissioners of the rights of the St. Catharines, Thorold, and Niagara Falls road, became vested in them by force of the provisions of sec. 4, and which is by that section included within the park, and as to which sub-sec. 5 further provides that all the provisions of 50 Vict. ch. 13 and the Niagara Falls Park Act are to apply as if it were included within the park at the time of the passing of the Act, "saving the reservation of a public way between the Clifton House and the limit between said lots 92 and 93" [of Stamford], "such public way being subject to reasonable tolls upon horses and carriages passing over the same;" and it was upon a part of the public way so reserved that, as I gather from the evidence, the accident happened.

By 51 Vict. ch. 7, sec. 2, the purchase money having been paid to the road company, the rights, title, possession, and franchises which were held and exercised by the company, or by the person or persons having the title, interest, and possessory rights thereof in respect of that part of the road which was acquired by the commissioners, were, so far as relates to that portion of it between Table Rock and the Niagara Falls Suspension Bridge on lot 92 of Stamford, transferred to and vested in the commissioners; and by sec. 3 the commissioners were authorized, subject to any direction of the Lieutenant-Governor, to "abolish the collection of tolls over the gravelled or macadamized road within the points above described."

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The commissioners, in the year 1888, by authority of an order in council of 15th June of that year, abolished the tolls.

By sec. 10 of the Act of 1887 it is provided that the park grounds shall be open to the public, subject to any rules and regulations as to management approved by the Lieutenant-Governor in Council.

The plaintiff was at the time of the accident upon the property of the commissioners, either under the provisions of sec. 10, or as one of the public in the enjoyment of the public way provided by sec. 4.

I am unable to find in any of the Acts relating to the park any provision which expressly or impliedly casts upon the commissioners the duty of keeping the public way in repair or the obligation to maintain a fence, railing, or other barrier upon the edge of the cliff; and, in the absence of such provision, in my opinion, no such duty or obligation towards the plaintiff exists.

The fence or railing which there was along the edge of the cliff had been built before and was existing at the time the park was vested in the commissioners.

Whether the commissioners are to be viewed as servants of the Crown or not, no action, in my opinion, lies against them for not keeping in repair the fence or railing, if it be viewed either as a protection for those resorting to the park or as a necessary protection for the travelling public in the use of the public way provided by sec. 4 of the Act of 1887, the absence or insufficiency of which might, in the case of a municipal corporation, render it liable as for a default in discharging its statutory duty to keep its highways in repair.

The cases of *Gibson* v. *Mayor of Preston*, L. R. 5 Q. B. 218 (1870); *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400 (1890); *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Municipality of Pictou* v. *Geldert*, [1893] A. C. 524; *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433, seem to be conclusive against the plaintiff, if the alleged liability of the defendants is

treated as depending on a duty to keep the *locus in quo*, as a part of the public way, in repair.

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These cases establish that, in the absence of some statutory provision imposing such a duty on a person or corporation in whom a highway is vested, the duty does not exist, and that where such a duty does exist, in the absence of a provision giving a right of action to persons suffering injury in consequence of a failure to discharge it, an action will not lie for mere nonfeasance, though it would be otherwise if the want of repair was due to misfeasance of the person or corporation upon whom the duty is cast.

In this case the condition of the fence or railing was not due to misfeasance, but to nonfeasance, for the unauthorized act of the railway company in removing it and putting it up again in a defective condition and more dangerous position cannot be charged to the defendants as an act of misfeasance on their part.

If, however, the defendants' liability is based upon the allegation of a duty to maintain the fence or railing for the protection of those resorting to the park, the plaintiff's case also fails, for as to her no charge was made for the privileges which she enjoyed, and she, as it appears to me, occupied as to the defendants at most the position of a bare licensee, as to whom, though there would be a duty in respect of unusual danger known to the defendants and not to her, there would be none as to a bare defect of construction or repair which the defendants were only negligent in not finding out or anticipating the consequences of: *Southcote* v. *Stanley*, 1 H. & N. 247 (1856); *Ivay* v. *Hedges*, 9 Q. B. D. 80 (1882); *Schmidt* v. *Town of Berlin*, 26 O. R. 54 (1894); and *Moore* v. *City of Toronto* (1893), cited in note to that case; Beven on Negligence, 2nd ed., p. 523 *et seq.*

Mr. Aylesworth relied upon the case of *Mersey Docks Co.* v. *Gibbs*, L. R. 1 H. L. 93 (1866), as supporting the right of the plaintiff to recover.

As Lord Watson points out in the *Orfila* case, p. 408,

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the rule expressed by Lord Blackburn, and approved by the House of Lords in the *Mersey Docks* case, was "that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created;" and the proper canon of construction stated by Lord Blackburn was that "in the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things."

Acting upon these rules, the principle established by the case of *Lancaster Canal Co.* v. *Parnaby*, 11 A. & E. 230 (1839), as to the liability of an ordinary company for negligence was applied to the Docks Company, which, as Lord Watson also points out in the *Orfila* case, p. 412, was "a corporate body, entirely independent of Government and of Government control, and differing in no material respect from a private enterprise authorized by statute, save in the fact that its undertaking and profits were held by trustees in the public interest, and not for the benefit of private corporators."

The *Mersey Docks Company* case was followed by the Privy Council in *The Queen* v. *Williams*, 9 App. Cas. 418 (1884). That was an action for negligence brought against the Executive Government of New Zealand by a shipowner under the following circumstances:—The Executive Government was by an Act of the Legislature of the colony made liable where in the like case a subject of Her Majesty would be liable for, amongst other causes of action mentioned in the Act, the following, a wrong or damage independent of contract done or suffered by or under the authority of the Government on behalf of Her Majesty or of Her Majesty's Executive Government in the colony, in, upon, or in connection with, certain defined classes of public works.

The Executive Government possessed the control and

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management of a tidal harbour, with authority to remove obstructions in it, and the public had the right to navigate in it subject to its regulations and without payment of harbour dues; the Executive Government owned the staiths or wharves and received wharfage and tonnage dues in respect of vessels using them.

The plaintiff's vessel when alongside the staiths or wharves suffered injury owing to the negligence of the officers of the Executive Government in not removing obstructions from the harbour—the injury being caused at the fall of the tide by the vessel coming in contact with the obstructions.

Sir Richard Couch in delivering the judgment of the Board pointed out that, although the case differed from *Lancaster Canal Co.* v. *Parnaby* and *Mersey Docks Trustees* v. *Gibbs*, in that there were no harbour dues, and that the public had the right to navigate subject to the harbour regulations, the harbour was under the control and management of the Executive Government, which had authority to remove obstructions from it, and it was held that the case came within the principle upon which the two cases referred to were decided, and that upon the facts proved it was the duty of the Executive Government to take reasonable care that vessels using the staiths in the ordinary manner might do so without danger to the vessel.

The *Mersey Docks* case was also followed in *Gilbert* v. *Corporation of Trinity House*, 17 Q. B. D. 795 (1886).

It was there contended that the Trinity House Corporation represented the Crown, and was not, therefore, liable for negligence, but it was decided that, although it was invested with large powers which were to be exercised for the benefit of the public at large, and extended to all the light-houses and beacons of the country, it had begun its existence as a private body, and was in no sense an emanation from the Crown, or in any way whatever a participant of any royal authority, but liable, like any other body, for its own negligence.

These three cases appear to me quite distinguishable

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from the present one. In the first two of them the works were made for the purpose of profit, and opened to the public upon the payment of tolls, and the common law therefore imposed upon the proprietors of them a duty to take reasonable care so long as they kept them open for the public use of all who might choose to use them, that they might do so without danger to their lives or property; and in the third case the injury which was complained of was due to an act of misfeasance on the part of the defendants.

These cases, in my opinion, do not, apart from these considerations, apply to a corporation constituted as the defendant corporation is.

In *The Queen* v. *Commissioners of Woods and Forests*, 15 Q. B. 761 (1850), the question arose as to the position and liability of a body somewhat similar in its constitution to the commissioners in this case, and Mr. Justice Patteson, in delivering the judgment of the Court, said at p. 774: "But a private company to whom an Act is granted for their profit differs materially from commissioners appointed under a public Act to do on behalf of the executive Government certain things for the benefit of the public; and the principle that imposes liabilities upon a private company, as arising in consideration of the statute granted to them, has no application in the case of such public commissioners."

In the *Orfila* case Lord Watson, referring to the provisions of the ordinances and orders in council relating to the sanitary commissioners, at p. 413 said: "Their Lordships are, in that state of facts, unable to resist the conclusion that the Government, in so far as regards the maintenance of the retaining walls belonging to it, remains in reality the principal, the commissioners being merely a body through whom its administration may be conveniently carried on. They do not think that it was the intention of the Crown, in giving the sanitary body administrative powers subject to the control of the Governor, to impose upon it any liability, which did not exist before, in respect of original defects in the structure of the retaining wall which supported the Castle road."

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The facts to which Lord Watson refers find their parallel in the Acts relating to the defendants in this case.

By sec. 3 of the Act of 1887 (50 Vict. ch. 13), the lands selected for the park were vested in the commissioners as trustees for the Province, and although, as I have already mentioned, the place where the accident happened was not upon those lands, it was upon lands which by sec. 4 are made part of the park and subject to the provisions of the Act, as well as of the Niagara Falls Park Act, 48 Vict. ch. 21, and must therefore, I think, be taken to be held upon the same trusts as apply to the lands mentioned in sec. 3, although the grant to the commissioners contains no mention of the trusts.

Almost all the powers vested in the commissioners are subject to the control or approval of the Crown.

The powers conferred by sec. 8, which deals with the construction and operation of inclined planes, lifts, boats, and vessels, with the pulling down of buildings and selling the materials in them, with the laying out, planting, and enclosing the park, with the collection of tolls for the use of the works, vessels, or appliances provided by the commissioners, and with the opening and closing of the gates and entrances to the park, are to be exercised by the commissioners subject to any direction of the Lieutenant-Governor.

The plan of all works proposed and all tariffs of tolls require the approval of the Lieutenant-Governor before being acted on: sec. 9.

The by-laws of the commissioners regulating the use, government, control, and management of the park, the appointment of officers for the superintendence and management of it, are subject to the approval of the Lieutenant-Governor, and even the employment of gardeners and workmen and their dismissal are to be subject to any directions of the Lieutenant-Governor in Council: sec. 11.

The manner of investing the sinking fund to be provided for payment of the debentures which the commissioners are authorized to issue, is under the control of the

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Lieutenant-Governor, and the application of the sinking fund in discharging the debentures is to be under his direction, and he is to direct even the manner of remitting the share applicable to the sinking fund to the Provincial Treasurer: sec. 13.

The provisions of certain sections of the Act to provide for the better auditing of the public accounts are to apply to the accounts of the receipts and disbursements of the commissioners: sec. 15.

The commissioners, it is true, have by sec. 7 power to raise for the purpose and objects of the Act $525,000, and no more, by the issue of debentures, but the appropriation and application of the moneys raised are to be assured to the satisfaction of the Lieutenant-Governor, and the commissioners themselves hold office during the pleasure of the Lieutenant-Governor in Council (sec. 2), and have been recognized by the Legislature as representing the Government of the Province: see the agreement in the schedule to 55 Vict. ch. 8.

These provisions seem to me to demonstrate pretty clearly that the commissioners were intended to act in the discharge of their duties under the Act, as Mr. Justice Day puts it in the *Trinity House Corporation* case, "as an emanation from the Crown;" or, as put by Lord Watson, that it was intended to make the Government the principal and the commissioners merely a body through which its administration might be conveniently carried on.

In the *Mersey Docks* case Lord Wensleydale, speaking of the immunity of the Post Master General from responsibility for the acts of the servants of the post office department, though he might appoint or dismiss them, said, at pp. 124-5, that even if the Crown were to make a corporate body for the regulation and government of the post office, the corporate body would not be responsible for the neglect of their servants.

The principle upon which the immunity rests, as stated by Lord Wensleydale in the same case, at p. 124, is "that when a person is acting as a public officer on behalf of

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Government, and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same 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."

Where the injury is the result of the negligence of the public officer himself in the performance of duties assigned to him by the Legislature, a different rule would seem to prevail, and he, and he alone would be liable: *Viscount Canterbury* v. *Attorney-General*, 1 Phillips at p. 324.

In the present case there was, as I have said, no negligence on the part of the commissioners, but the negligence was that of the subordinate officers who had been appointed under the provisions of the Act, and the effect of a recovery would be to charge the property of the Crown vested in the commissioners with damages and costs for a wrong committed by a servant of the Crown, for which the Crown is not, by the law of this Province, liable.

Upon the whole, therefore, I am of opinion that the appeal must be allowed, and the verdict and judgment entered thereon set aside, and judgment be entered dismissing the action, and the costs must, if the defendants ask for costs, follow the result.

ROSE, J.:—

I agree that, having regard to the principle laid down in *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93, and *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400, the plaintiff must fail.

I exceedingly regret that we can find no way to grant her any relief. The place where the accident occurred was a veritable trap, and the plaintiff was seriously injured.

I trust the Government may deem it proper to make the plaintiff a substantial grant.

I might refer to *Corporation of City of Quebec* v. *The Queen*, 3 Ex. C. R. 164, for a discussion of the question

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of the legislation of the Parliament of Canada creating a liability on the part of the Crown, and giving a remedy to the person injured against the Crown, where damage is caused by negligence of a public officer.

I agree with the learned Chief Justice in thinking that it might be expedient for the Legislature of this Province to pass similar legislation.

E. B. B.

Re Toronto, Hamilton, and Buffalo Railway Company and Kerner.

Railways and Railway Companies—Legislative Authority—Alteration of Grade of Street—Arbitration and Award—Appeal—Dominion Railway Act, 1888, sec. 161, sub-sec. 2—Damages—"Structural Damages"—"Personal Inconvenience."

Held, that the railway company, though incorporated by 47 Vict. ch. 75 (O.), was, by 54 & 55 Vict. ch. 86 (D.), subject to the legislative authority of the Parliament of Canada, and its power to do the work of altering the grade of a street, in the doing of which the damages claimed by a landowner arose, was under sec. 90 of the Dominion Railway Act, 1888; and the rights of the parties in an arbitration to ascertain such damages were governed by the provisions of that Act.

And where the arbitrator awarded that the land-owner had suffered no damage:—

Held, that, having regard to the provisions of sec. 161, sub-sec. 2, no appeal lay from the award:—

Held, also, that the arbitrator had no power to allow the land-owner "structural damages" caused to his buildings, or damages for "personal inconvenience" by reason of his means of access being interfered with.

Ford v. *Metropolitan R. W. Co.*, 17 Q. B. D. 12, distinguished as to the former kind of damages, and followed as to the latter.

Statement.

An appeal by John Kerner from an award under the Dominion Railway Act, and a motion by him for an order setting aside or varying the award, or referring it back to the arbitrator.

The award was made by Colin G. Snider, appointed sole arbitrator by order of a Judge, made on the 17th April, 1896, and bore date the 27th July, 1896.

The award was intituled in the matter of the General Railway Act of 1888, and in the matter of an arbitration

between the above named parties, and in the matter of lots 93 and 94 on the north side of Hunter street, between Park and Bay streets, in the city of Hamilton. Statement.

The material parts of the award were as follows:—"Having proceeded conformably to the said Railway Act to ascertain the compensation to be paid by the said railway company to the said John Kerner for damages which his said lands have suffered or may suffer from the alteration of the grade of Hunter street and the erection of a retaining wall thereon, and generally all the changes and alterations made by the said railway company of, in, and upon Hunter street aforesaid. * * I do hereby order, award, and adjudge that the said John Kerner has suffered no damage from such cause or causes, or any of them. And I hold, for reasons given in my judgment delivered herewith, that the structural damages caused to the buildings of the said John Kerner on his said land by explosions during the work of construction should not form part of this award, and I award and adjudge accordingly; but, in case I am wrong in so holding, and to avoid the necessity for further reference, I award and adjudge that the said damages amount to the sum of $189."

The reasons referred to by the arbitrator were as follows:—

"It appears to me that I can only award compensation for such things as, under sub-sec. (*b*) of sec. 146 of the Act of 1888, the company must declare its readiness to pay a certain sum for, that is, for land proposed to be taken and powers intended to be exercised. The notice is given for 'land to be taken,' that is, before it is taken, or for 'powers intended to be exercised,' that is, before they are exercised, and in case the parties cannot agree, the matter proceeds, as here, to arbitration.

"Now, the damages for which the company is, in advance, to tender a named sum, which the owner must, in advance, accept, or arbitrate, must certainly be only such damages as will result from the effect of the completed work or its operation afterwards.

Statement.

"It cannot be that the owner, if he had accepted this offer, and afterwards by one of these explosions his house had been levelled with the ground, would be barred thereby from obtaining additional compensation. If he would not be barred, then it seems to me that the only reasonable construction to put on this Act is that the company are to name a sum in compensation for the land taken and for damages which it is foreseen the completed work will cause, but not for structural damage that may or may not be done to the owner's adjacent buildings or fences, etc., during the course of construction, the happening of which could not be foreseen nor the extent or value thereof be estimated by any one in advance.

"If I am correct in thinking that the sum named in the notice is not intended to provide compensation for damages of this nature, then it follows that they should find no place in my award."

The grounds of the appeal from and motion to set aside or vary the award were as follows:—

1. The award was against the evidence, the weight of evidence, and the law.

2. The arbitrator was wrong in not allowing Kerner damages for the permanent injury to his said lands owing to the alteration of the grade of Hunter street, the construction of a retaining wall thereon, and the taking away of one mode of access thereto, and making the other modes of access less easy and convenient.

3. The arbitrator was wrong in not awarding damages in respect of the injury to the said lands during the period of construction of the railway, from 20th June, 1895, when Hunter street was interfered with, until 1st June, 1896, when it was restored to a condition fit for use.

4. The arbitrator should have awarded to Kerner the $189 which he found was the amount of structural damages.

The appeal was argued before FERGUSON, J., in Court, on the 8th September, 1896.

Bruce, Q. C., for John Kerner. He is entitled to damages for permanent injury to his property, one way of access to it having been cut off, and that the nearest and most convenient: *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243, 257; *Caledonian R. W. Co.* v. *Walker's Trustees*, 7 App. Cas. 259; *Fleming* v. *Newport R. W. Co.*, 8 App. Cas. 265. The arbitrator thought that the appellant had a separate cause of action for the structural damages. The reference was to ascertain the damages arising by the exercise of any of the powers granted to the railway company: sec. 144 of the Railway Act of Canada, 1888. See *Corporation of Parkdale* v. *West*, 12 App. Cas. 602. The arbitrator's reasons appear in a document referred to in the award, and therefore, if he is wrong in law, the award is bad on its face, and can be set aside upon motion. The appellant is entitled to the structural damages assessed at $189, and also to damages for the inconvenience and loss during the period of construction of the road: *Ford* v. *Metropolitan R. W. Co.*, 17 Q. B. D. 12; *Hughes* v. *Percival*, 8 App. Cas. 443; *St. Catharines R. W. Co.* v. *Norris*, 17 O. R. 667. See as to remitting back the award R. S. O. ch. 53, sec. 37; *Green* v. *Citizens' Ins. Co.*, 18 S. C. R. 338. Argument.

D'Arcy Tate, for the railway company, relied on the reasons given by the learned arbitrator, and referred to Abbott's Railway Law of Canada (1896), pp. 179, 203, 224; *Herring* v. *Metropolitan Board of Works*, 34 L. J. M. C. 224; *Atlantic and North-West R. W. Co.* v. *Wood*, [1895] A. C. 257; *Ricket* v. *Metropolitan R. W. Co.*, L. R. 2 H. L. 175; *Kerr* v. *Atlantic and North-West R. W. Co.*, 25 S. C. R. 197; Lewis on Eminent Domain, pp. 633, 830.

Bruce, in reply.

September 10, 1896. FERGUSON, J.:—

This is an appeal from an award made by the sole arbitrator, bearing date the 27th day of July last, whereby it was ordered, awarded, and adjudged, that the above named

Judgment.
Ferguson, J.

John Kerner had not suffered any damages from the causes or any of them set forth in the award, namely, supposed damages which his lands had suffered or might suffer from the alteration of the grade of Hunter street, in the city of Hamilton, and the erection of a retaining wall thereon, and generally all the changes and alterations made by the railway company of, in, and upon Hunter street aforesaid.

The notice of appeal contains also a motion to set aside the award in whole or in part, or varying the same, or directing the payment to the said John Kerner of the amount of "structural damages" caused to his buildings, as found by the arbitrator, or for an order referring the matter back to the arbitrator.

The award is accompanied by a judgment of the learned arbitrator in which he finds as a fact that the buildings of the said John Kerner were injured by the shocks of the explosions of dynamite, flying stones, etc., during the progress of the work of the railway company, when the work was going on opposite to or near these buildings, to the extent of $189, and this is what is referred to in the notice of motion as "structural damages." The learned arbitrator was, however (for reasons which he gives), of opinion that he could not include this sum in his award, and, as before stated, he awards no sum in favour of the said John Kerner, and, of course, no sum to the other party to the arbitration, the railway company.

The railway company seems to have been first incorporated by an Act of Ontario, 47 Vict. ch. 75, which was amended by 52 Vict. ch. 83, and afterwards by 53 Vict. ch. 126.

On a perusal, however, of the Dominion Act 54 & 55 Vict. ch. 86, particularly the preamble and the 1st and 2nd sections of the Act, it seems clear that the "undertaking" is to be considered a work for the general advantage of Canada, and that the company is subject to the legislative authority of the Parliament of Canada, and I think the learned arbitrator is entirely right when he says that the power of

the company to construct the work in the doing of which it is said the damages claimed arose, was under the 90th section of the Dominion Railway Act of 1888, 51 Vict. ch. 29; and I think the rights of the parties in an arbitration such as this is (or was) must be governed by the provisions of this Act.

By sub-sec. 2 of sec. 161 of the Act, any party to the arbitration may appeal from the award when the sum awarded exceeds $400. See also Abbott's Railway Law of Canada, Appx., p. lxxiii.

The subject was not at all discussed on the argument. I do not find any provision authorizing an appeal from the award when the sum awarded is less than $400; although the Ontario Railway Act seems to give the right of appeal without any regard to the amount awarded: R. S. O. ch. 170, sec. 20, sub-sec. 20.

In the present case no sum was awarded. It cannot be said that the award exceeds $400, and I am of the opinion that, as an appeal, this appeal does not lie, unless there is some later legislation on the subject; I was referred to none, nor have I found any such legislation.

I do not find nor can I see any sufficient reason for setting aside the award or for referring the matters back to the arbitrator.

I have perused all the authorities that were referred to, with some interest and a good deal of labour. Counsel for Mr. Kerner relied much upon the case *Ford* v. *Metropolitan R. W. Co.*, 17 Q. B. D. 12, in which the case *Ricket* v. *Metropolitan R. W. Co.*, L. R. 2 H. L. 175, 194, is commented on. *Ford* v. *Metropolitan R. W. Co.* would afford authority for his contention as to the $189, the amount of what was called the "structural damages" arising during the progress of the work, if one could see that the effect of the provisions of the English Railway Act on the subject is the same as the effect of our Act of 1888 (Dom.). The provisions of the English Act on the subject are found in the 7th ed. of Hodges, vol. 2, at p. 66 *et seq.*, and a perusal of these and those of our Act of 1888 shews that they

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Ferguson, J.

are materially different so far as the present question has concern. I think the reasoning of the learned arbitrator on this subject is quite correct.

The same case, *Ford* v. *Metropolitan R. W. Co.*, as I read it, affords authority against the claim for damages in respect to what was called "personal inconvenience," and I do not see that the difference between the provisions of the respective Acts in England and here bears upon this subject, as upon the other.

I am of the opinion that the appeal should be dismissed with costs, and that the application or motion in other respects should be refused with costs.

Appeal dismissed with costs and motion refused with costs.

E. B. B.

ROBINSON V. DUN ET AL.

Defamation—Libel—Mercantile Agency—Confidential Report—Privilege—Reasonable Care.

In an action of libel brought by a trader against the conductors of a mercantile agency, it appeared that the libellous matter was sent to a few subscribers on their personal application. The information on which the statement complained of was founded in reality related to another trader of the same surname as the plaintiff:—

Held, that the publishing of the information was a matter of qualified privilege, but that the want of reasonable care in collecting the information was evidence of malice which destroyed the privilege.

Todd v. *Dun*, 15 A. R. 85, followed.

Cossette v. *Dun*, 18 S. C. R. 222, discussed.

Statement.

THIS was an action for libel brought by R. S. Robinson, a shopkeeper of the city of Stratford, against R. G. Dun & Co., the conductors of a mercantile agency in the Dominion of Canada.

The statement of claim alleged: (2) That the defendants, in the course of their business, issued, to their customers who made inquiries regarding the plaintiff, a circular in which they stated that a short time before the issue of the circular, which was dated 2nd March, 1896, the plaintiff had been involved in a law suit with one Frank over a promissory note, which suit, the defendants alleged, went against the plaintiff, and that he had lost a little in the way of costs. (3) That the defendants then in the circular went on to say, speaking of the plaintiff, "Is said to have a very easy way of swearing in Court, and locally the fullest confidence is not felt in him." (4) That the plaintiff had no law suit with one Frank, and the imputation that he was guilty of perjury, which was the meaning of the defendants in saying that he had a very easy way of swearing in Court, was utterly untrue; the plaintiff gave no evidence in any suit with Frank. (5) That by reason of the allegations contained in the circular, the standing and credit of the plaintiff had been greatly injured, and he had been refused goods by houses from whom he had purchased the same, and had otherwise been greatly damnified.

Statement.

The defences were: (1) That the publication complained of was made to certain persons, firms, and corporations with whom the defendants were under contract to communicate any information relative to persons in business or trade, and such persons had an interest in receiving such information, and the defendants were under a duty to disclose the same, and so wrote and published the article complained of without malice and under the circumstances referred to, and the same was published upon an occasion of privilege. (2) That the words complained of did not bear the meaning attached to them in the statement of claim. (3) That so soon as the facts were brought to their attention, the defendants made a full and ample retraction and apology.

The action was tried before BOYD, C., and a jury, at London, on the 29th September, 1896.

Gibbons, Q. C., for the plaintiff.

Wallace Nesbitt and *R. McKay*, for the defendants.

The jury gave a verdict for the plaintiff for $25 damages.

Judgment was reserved on the question of privilege.

October 19, 1896. BOYD, C.:—

One rule of law as to mercantile agencies I take to be accurately expressed by Osler, J. A., in *Todd* v. *Dun*, 15 A. R. 85, to this effect: that they have no higher privilege for their business publications than other members of the community, and that a general publication of libellous matters to all their subscribers indiscriminately is not privileged.

Another rule of law as to these bodies, which is the actual decision in *Todd* v. *Dun*, is this: that when particular information is obtained as to the character and standing of a trader for the purpose of being communicated to subscribers specially interested therein, and in response

Judgment.

Boyd, C.

to their inquiries—the publishing of this information is a matter of qualified privilege. The latter rule applies to the present case, where the libellous matter was sent to a few subscribers on their personal application.

I recognize that there is language in the judgment of the Chief Justice of Canada in *Cossette* v. *Dun*, 18 S. C. R. 222, which appears to be somewhat at variance with the doctrine of qualified privilege laid down by the Court of Appeal in the earlier case. But all that is said in that regard is *obiter dicta*. The case itself was one of false information volunteered by the defendants. The particular point which arises in this case was alluded to but not passed upon by Mr. Justice Gwynne, who says at p. 256: "Whatever privilege the defendants might have insisted on if the information they had given to their client had been confined to the particular matter they were requested to obtain information upon (as to which, or as to the effect which their great negligence which occasioned that information to be false should have on the question of privilege I express no opinion.) * * "

Assuming qualified privilege in this case, yet there was evidence of want of care in the getting of it amounting to negligence, if not recklessness, in the opinion of the jury, who were asked to consider this question. The evidence shews that the report published was derived from the witness Mowatt, upon whom Dun's traveller called. He gave it thus in the witness box: "He asked about our friend Robinson. I said he had a suit lately, and there was some pretty tall swearing. I was" (*i. e.*, had been) "in the office of a local solicitor, and the plaintiff was passing by, and he said that was quite a celebrated case of Robinson's in the Court." There was nothing to shew that the traveller and the witness were speaking about the plaintiff, and in point of fact the suit and swearing were referable to another Robinson altogether. The report did not lose by transmission, and appeared in the confidential report of the defendants as set forth in the statement of claim.

Judgment.

Boyd, C.

Now the law is settled, I think, that want of reasonable care in collecting information by these agencies is evidence of malice which destroys the privilege. This is the view of law taken by the Chief Justice, at p. 240 of *Cossette* v. *Dun*, and it is in accord with the charge of Cockburn, C. J., in *Blake* v. *Stevens*, 4 F. & F. 232, and the opinion of Mr. Justice Cross in *Carsley* v. *Bradstreet*, M. L. R. 3 Q. B. pp. 108 and 114. The American cases, which are perhaps more favourable than English law to these bodies, agree in the care needed to ascertain the truth of reports thus disseminated. I may note what is said in *Locke* v. *Bradstreet*, 22 Fed. R. 771; *Bradstreet* v. *Gill*, 72 Tex. 115. See also *Robshaw* v. *Smith*, 38 L. T. N. S. 423. Upon the general law affecting these agencies, see *Pollasky* v. *Minchener*, 81 Mich. 280; *Mitchell* v. *Bradstreet*, 116 Mo. at p. 238; *Searles* v. *Scarlett*, [1892] 2 Q. B. 56; and *Reiss* v. *Perry*, 11 Times L. R. 373.

My ruling at the trial was agreeable to what I now find to be the law; and, although I left the point open for argument after verdict and before judgment, I do not think it necessary to call on the parties for further discussion. The jury gave a very restrained verdict, and I now direct judgment to be entered for the plaintiff with $25 damages and costs.

E. B. B.

JOHNSTON v. HENDERSON ET AL.

Auctioneer—Conversion of Goods—Chattel Mortgagee.

An auctioneer who, at the instance and on the premises of the mortgagor, sells at auction in the ordinary course the goods in a chattel mortgage, valid and in full force as regards the parties to it, and delivers possession of the goods to the purchaser, is liable to the mortgagee for conversion of the goods, although the mortgage may be void as regards creditors of the mortgagor or subsequent purchasers for value.

Cochrane v. *Rymill*, 27 W. R. 776, 40 L. T. N. S. 744, followed.

National Bank v. *Rymill*, 44 L. T. N. S. 767, and *Barker* v. *Furlong*, [1891] 2 Ch. 172, distinguished.

Statement.

THIS was an action brought by J. T. Johnston against C. M. Henderson & Co., auctioneers, to recover $1,000 damages for the alleged wrongful conversion and sale by the defendants of certain household furniture mortgaged by one Annie Webber to the plaintiff. The facts are stated in the judgment.

The action was tried before FERGUSON, J., without a jury, at Toronto, on the 13th and 14th October, 1896.

E. B. Ryckman and *A. T. Kirkpatrick*, for the plaintiff.

Charles Macdonald, for the defendants.

October 19, 1896. FERGUSON, J. :—

The action is for the alleged wrongful conversion of goods, the same being household furniture, etc.

The plaintiff was a chattel mortgagee of the goods.

The defendants are auctioneers, who, at the instance of the mortgagor, though under the name of another, a relative of the mortgagor, (for what legitimate purpose one does not, on the evidence, clearly see) sold the goods in the usual way of auctioneers' sales. The sale was at the house of the mortgagor, and the goods were sold under the auctioneer's hammer, and possession given by the defendants to purchasers, excepting some articles that were too heavy for immediate removal, such as a cooking or kitchen range, etc. There was some contention that, as

Judgment.

Ferguson, J.

the mortgagor was herself present at the sale part of the time, and, as stated, said some things in respect of certain items of the goods, the sale was not one at which and in respect of the goods the defendants exercised that dominion over the goods that is usually exercised by auctioneers as such, but, on the evidence, I am clearly of the opinion that this contention cannot be successful. I think the evidence shews that the sale was one at which the defendants had, or professed to have, dominion over the goods, and professed to pass the property in the goods to the purchasers, and professed to give and did give possession to the purchasers, as above stated.

The plaintiff's mortgage was given to secure him against his indorsement of a promissory note for the accommodation of the mortgagor and any renewal thereof that should not extend the liability of the mortgagee, the plaintiff, beyond the period of one year from the date of the mortgage, and against any loss he might sustain by reason of his indorsement of the note or any renewal of the same. The amount of the note was $860.57. There were several renewals of the note for balances after part payment or satisfaction; and some of these notes, called renewals, extended beyond the period of one year from the date of the mortgage. The plaintiff, however, denied that these were renewals, saying that they were taken from time to time merely to shew the state of the account and as collaterals.

There seems also an error, probably a very serious one, in the affidavit made by the mortgagee, if the contention were between him and a creditor or creditors of the mortgagor or subsequent purchasers in good faith. Comments were also made in respect of the statement made for the purpose of renewing the mortgage and the renewal itself. All these matters might be of very great importance if the rights of creditors of the mortgagor or of subsequent purchasers of the goods in good faith and for value, intervened or were to be considered; but such is not the case, and whatever may be said in these regards, the mortgage

seems a good and valid document as between the mortgagor and mortgagee, and good in the hands of the mortgagee against a wrongdoer, in respect of the goods, though instructed by the mortgagor, and in fact intending no wrong, so long as the contract between the mortgagor and mortgagee stated in the mortgage remained on foot as a contract. Judgment. Ferguson, J.

The mortgage contains a full conveyance of the goods to the plaintiff, subject to a proviso, which proviso substantially is: "that if the mortgagor, her executors, etc., do and shall pay or cause to be paid the aforesaid promissory note at maturity, or any renewal thereof, which shall not extend the liability of the mortgagee beyond one year from the date of the mortgage, and all interest, and pay and indemnify and save harmless the mortgagee from all loss, costs, charges, or expenses in respect of the note or any renewal thereof, then these presents shall cease and be utterly void."

The mortgagor did not fully pay or satisfy or cause to be paid or satisfied the original note or any renewal of it, the time in which expired within the year from the date of the mortgage, or any of the so called renewals, the time in which did not so expire, and there still remains unpaid and unsatisfied, as I understand the evidence, the sum of $265.94, with interest thereon since the 4th day of April last, assuming that it is a case for the allowance of interest. Nor did the mortgagor indemnify and save harmless the mortgagee (who still remains liable in respect of this sum), as required by the proviso.

I am of the opinion that performance by the mortgagor of what is required by the proviso in order to render the document void has not taken place; and that the mortgage, as between the mortgagor and the mortgagee, was at the time of the alleged conversion by the defendants, and still is (but for the sale of the goods complained of), in full force.

The plaintiff had not taken possession of the goods, but, as conceded by defendants' counsel, there had been the

Judgment.

Ferguson, J.

attempt to sell the goods, and the right to take possession thereupon arose.

The plaintiff was, I think, owner of the goods, or in the position of owner of them, to the extent, at all events, of the amount necessary to satisfy the unpaid balance owing to him, as against the mortgagor or any mere wrong-doer, one not being or claiming under a creditor of the mortgagor or a subsequent purchaser as aforesaid.

The case *Cochrane* v. *Rymill*, 27 W. R. 776, also 40 L. T. N. S. 744, shews, I think, that these defendants, auctioneers, so placed themselves as to be liable in an action for the conversion of the goods.

The cases on the subject seem to be in a large measure collected in the case *Consolidated Company* v. *Curtis*, [1892] 1 Q. B. 495. See also Hart's Law relating to Auctioneers, pp. 34, 35, and 36.

The case *National Mercantile Bank* v. *Rymill*, 44 L. T. N. S. 767, I think distinguishable and not in point here —nor do I think *Barker* v. *Furlong*, [1891] 2 Ch. 172, in point in the present case.

I am of the opinion that it has been sufficiently shewn that the defendants were guilty of the conversion alleged against them by the plaintiff; and that the plaintiff has shewn that he is entitled to recover against the defendants for such conversion the sum of $265.94 with interest on the same since the 4th day of April last past, 1896.

There will be judgment for the plaintiff against the defendants for this sum, $265.94, with interest from the 4th day of April last, with full costs of the action—and upon the higher scale, if necessary to say so here.

Order accordingly.

E. B. B.

[DIVISIONAL COURT.]

MUNRO ET AL. V. WALLER.

Landlord and Tenant—Assignment with Leave—Reassignment without Leave—"Any Person"—R. S. O. ch. 106.

The words "any person or persons" in the long form of the covenant not to assign or sublet without leave in the Act respecting Short Forms of Leases, R. S. O. ch. 106, include the original lessee, and where an assignment by him has been made with consent a reassignment to him without a fresh consent is a breach of the covenant.

McCormick v. *Stowell*, 138 Mass. 431, not followed.

Varley v. *Coppard*, L. R. 7 C. P. 505, and *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461, referred to.

Judgment of STREET, J., affirmed.

THIS was an appeal from a judgment of STREET, J. Statement.

The action was brought to recover rent from the assignee of a lease or for damages for the breach of certain covenants contained therein, the plaintiffs being allowed at the trial to amend and claim damages for breach of the covenant not to assign or sub-let without leave.

It appeared that the plaintiffs had on 17th November, 1876, leased the premises in question to one William Patterson, who had covenanted therein not to assign or sublet without leave: that Patterson had in June, 1890, assigned the lease to the defendant with the consent of the plaintiffs, as found by the trial Judge: that the defendant had on 1st July, 1890, mortgaged the lease to Patterson by way of sub-lease for one day less than the term, and not being able to pay the mortgage had released to Patterson all his interest in the lease by assignment dated the 28th December, 1894.

The action was tried at the Toronto Assizes on March 25th, 1896, before STREET, J., without a jury.

Judgment was given finding that the assignment of the lease by defendant to Patterson was made in order that defendant might get rid of his liabilities as assignee of the lease, and declaring that he had broken his covenant not

Statement.

to assign without leave; that the right to recover damages for the breach had not been waived by the plaintiffs, and a reference was directed to ascertain the damages past and future to which the plaintiffs were entitled by reason of such breach. Costs to the trial were given to plaintiffs but those of the reference were reserved.

From this judgment the defendant appealed to the Divisional Court, and the appeal was argued on April 30th, 1896, before MEREDITH, C.J., and ROSE and MACMAHON, JJ.

D. Urquhart, for the appeal. The defendant never was the assignee, as the estate was never in him but was in the mortgagee, the assignment to the defendant and the mortgage to Patterson being but one transaction: *Potts* v. *Meyers*, 14 U. C. R., at p. 509; *Heney* v. *Lowe*, 9 Gr., at p. 271; Elphinstone, Norton & Clarke on the Interpretation of Deeds, p. 6. What the defendant released to Patterson was only an equity of redemption, and could not make him liable. The covenant should be strictly construed: Redmond & Lyon's Law of Landlord and Tenant, 4th ed., p. 244. The right to forfeit is co-existent with the right to damages, and as he could not forfeit he is not liable in damages. The covenant not to assign in the long form of the statute R. S. O. ch. 106, is not to assign to "any person or persons whomsoever without the consent," etc. "Any person" means any *other* person: *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461. Here the covenant means to any other person, and as the assignment or release was to the original tenant there is no breach: *McCormick* v. *Stowell*, 138 Mass. 431. The evidence shews notice and waiver.

C. Millar, contra. Patterson was the original tenant and plaintiffs consented to defendant becoming the tenant. They had the right to consent or refuse, and had good reason to consent in 1890 and refuse in 1895.

Urquhart, in reply. On the question of assignment for

less than the whole time, I refer to Preston on Conveyancing, vol. 2, p. 125; *Jamieson* v. *London and Canadian, etc., Co.*, 23 A. R. 602. As to the whole term being vested: see *Mayor, etc., of Carlisle* v. *Blamire*, 8 East 487; *Cox* v. *Bishop*, 8 D. M. & G. 815. As to the construction of the covenant: *Palmer* v. *Edwards*, 1 Douglas, 186; Woodfall's Landlord and Tenant, 14th ed., 269. Argument.

September 15, 1896. The judgment of the Court was delivered by

ROSE, J.:—

The facts and contentions appear substantially in the pleadings and judgment.

The question to be determined is whether the mortgage of the 1st July, 1890, and the assignment of the 28th December, 1894, were, or either of them was, a breach by the defendant of the covenant not to assign or sub-let without leave, contained in the lease to Patterson and assigned to the defendant in June, 1890.

This assignment must on the evidence, be taken to have been with the plaintiff's consent.

The order of dates is as follows:—Lease, Munro to Patterson, dated 17th November, 1886; assignment of lease, Patterson to Waller, June, 1890; mortgage, Waller to Patterson, 1st July, 1890; assignment, Waller to Patterson, 28th December, 1894.

The lease to Patterson contained a statutory covenant not to assign or sub-let without leave. That covenant extended to the defendant as assignee. Any doubts raised in *Crawford* v. *Bugg*, 12 O. R., p. 8, were set at rest by the amending statute 49 Vict. ch. 21 (O.), R. S. O. ch. 106, sec. 4, and schedule B, sec. 5.

It was found as a fact that there was no consent given by the plaintiffs, the lessors, to the mortgage from the defendant to Patterson, or to the assignment from the defendant to Patterson, and I do not think we can properly interfere with such findings of fact. The mortgage

Judgment.
Rose, J.

was by way of sub-lease, the defendant excepting from the grant one day of the term. The assignment of the 28th December contained the following words:—"The said parties of the first part do hereby grant, bargain, sell, assign, transfer and set over unto the said party of the third part, his executors, administrators and assigns, all and singular the said parcel or tract of land * * together with the said indenture of lease, and all benefit and advantage to be had and derived therefrom."

The learned Judge has found as a fact that this last mentioned deed was made for the express purpose of getting rid of the liability under the covenant and transferring it, if possible, to an insolvent person. There have been, in terms, both a sub-lease and an assignment contrary to the express words of the covenant contained in the lease.

The long form in the statute, with the words introduced by the amendment referred to, reads as follows:—"And also that the lessee, his executors, administrators and assigns, shall not nor will during the said term, assign, transfer or set over * * the said premises or any of them * * unto any person or persons whomsoever without the consent in writing of the lessor, his heirs or assigns, first had or obtained."

In Stroud's Legal Dictionary the construction placed upon the word "Any" is discussed and many instances given. The learned author says as follows:—"'Any' is a word which excludes limitation or qualification (*per* Fry, L. J., *Duck* v. *Bates*, 53 L. J. Q. B. 344; 12 Q. B. D. 79); 'As wide as possible' (*per* Chitty, J., *Beckett* v. *Sutton*, 51 L. J. Ch. 433)."

It is clear, therefore, that there has been a breach of this covenant unless a reassignment to the lessee is not within the covenant on the theory advanced by the defendant's counsel that the lessee is not embraced within the words "any person." In support of this argument was cited the case of *McCormick* v. *Stowell*, Mass. R. vol. 138, p. 431. The judgment is by Charles Allen, J., and is as follows:—

"The covenant by the lessee, that he or others having his estate in the premises will not assign this lease without the written consent of the lessor, does not by its true construction extend so far as to prohibit a reassignment to the lessee himself without a new and special consent of the lessor. By the lease itself, the lessor consents to take the lessee as his tenant for the full term mentioned in the lease. This consent is available for any reassignment to the original lessee during the term. There was, therefore, no breach of the covenant."

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I confess I am not able to follow this reasoning. I could well conceive that a lessor would gladly consent to an assignment by an insolvent lessee to a solvent assignee, knowing that thereby he would obtain a person financially responsible for the due performance of such a covenant, and I can also well understand that such lessor would decline, and reasonably decline, to consent to a reassignment by such solvent assignee to the insolvent lessee. That the lessor was originally willing to take the lessee as his tenant for the full term does not lead my mind at all to conclude that he would be willing to take him back as lessee when his financial condition had changed from that of solvency to insolvency, and he, the lessor, had by the assignment of the lease, obtained a solvent assignee in place of the insolvent lessee. But I do not think we are concerned with the reasons which might operate to lead the lessor to desire such a covenant as he has here. Here are a clear contract and a clear breach in terms, and I think we should be frittering away the words of the statute and contract made between the parties if we made an exception from the words of the covenant that the parties did not choose to make them themselves. The tendency of modern decisions, as I understand it, is to construe the contract according to the very wording of it: see *McLean* v. *Brown*, 15 O. R. 313; 16 A. R. 106, and cases there cited.

In *Varley* v. *Coppard*, L. R. 7 C. P. 505, it was held by Willes and Keating, JJ., that where A. and B., partners in

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trade, were assignees of a lease which contained a covenant by the lessee, for himself and his assigns, that he would not, neither should his executors, administrators or assigns, assign the demised premises without the consent in writing of the lessor, and where on a dissolution of the partnership A. assigned all his interest in the premises to B., that this was a breach of the covenant. Mr. Justice Willes gives his reasons for this opinion in his judgment.

It was said that doubt has been thrown upon this case by the judgment in the *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461. All that was decided in that case was that where two partners dissolve partnership the giving up by one of them to the other of the sole possession of the leasehold premises was not a breach of the covenant not to part with the possession of the property, because each partner had before the assignment possession, and Jessel, M. R., said, "How can possession be parted with to a person who already has it?" (p. 465.) During the argument the Master of the Rolls said, referring to *Varley* v. *Coppard*, 'I do not know that I should have decided even that case in the same way, for the deed was not in point of law an assignment but a release" (p. 465). That does not, in my opinion, throw any doubt upon the proposition that an assignment by one person to another would be a breach of covenant not to assign. It merely throws a doubt upon the construction placed upon the deed by the learned Judges in *Varley* v. *Coppard*.

I think, therefore, that our plain duty is to construe the covenant according to its very words as indicating the intention of the parties, which I do without any substantial doubt, and even if I had a doubt, I certainly have not a conviction that the judgment of my learned brother Street is wrong, and so I think it must be affirmed.

The motion should be dismissed with costs.

G. A. B.

MOORHOUSE V. KIDD.

Principal and Surety—Contribution between Co-sureties—Refusal to Enforce Security—Depreciation.

A surety who holds collateral security from the debtor on behalf of himself and co-surety, and who has paid more than his share of the principal debt, is not obliged before enforcing contribution to take proceedings on the collateral security at the request of the co-surety, and the latter is not discharged from liability by reason of depreciation of the security occurring subsequently to a refusal to take such proceedings, and not arising from any act of the surety.

Statement.

ACTION brought by Joseph Moorhouse against George E. Kidd for contribution, and tried before STREET, J., without a jury, at the Ottawa Sittings, on the 12th October, 1896. The facts are stated in the judgment.

Chrysler, Q. C., for the plaintiff.

McCarthy, Q. C., for the defendant.

October 23, 1896. STREET, J.:—

The plaintiff, the defendant, and one Loucks were co-sureties for E. R. Moorhouse, the plaintiff's brother, for the payment of a debt due one McLaren. E. R. Moorhouse failed to pay the debt, and the plaintiff and Loucks paid it; the amount paid by them being $1,600, of which the plaintiff paid $900 cash in September, 1891; the remaining $700 was raised by Loucks and the plaintiff upon their own note to a bank, upon which both are still liable, but which Loucks is to pay as between the plaintiff and himself. The interest upon the $1,600 to the present time amounts to about $500. The defendant has paid nothing, and this action is brought by the plaintiff to recover from the defendant his proportion of the amount which the plaintiff has paid, with accrued interest.

The only question reserved by me at the trial was whether the defendant has been discharged from any liability to contribute, by the conduct of the plaintiff under the following state of facts. At the time the three sure-

Judgment.
Street, J.

ties became bound to the creditor, the debtor gave them by way of indemnity a mortgage upon certain lands in Manitoba, which were already incumbered. When the plaintiff and Loucks paid the debt, the mortgage deed passed into the plaintiff's custody. The defendant was called upon by the plaintiff for his contribution towards the amount paid to the principal creditor McLaren, and, instead of paying anything, he insisted that the plaintiff should proceed upon the security and realize it, or that the plaintiff should hand over the mortgage deed to him in order that he might take proceedings upon it. The plaintiff refused to take either course, giving as his reason his dislike to being a party to turning his brother, the debtor, out of house and home. At the time the defendant made this request, the mortgaged property was sufficient to cover both the first incumbrance and the sum paid by the sureties; but at the time the present action was begun, it had become so depreciated in value as to be insufficient to cover the first mortgage.

In my opinion, the defendant is not relieved from liability by the plaintiff's neglect or refusal to sell the mortgaged property. The plaintiff, having paid the debt to McLaren, the creditor, stood in McLaren's place as a creditor of the defendant: *Re Parker*, [1894] 3 Ch. 400.

The depreciation in the value of the security held for the debt was not due to any act of the plaintiff, and he was under no obligation, by contract or otherwise, to the defendant to take proceedings to realize it at any particular time. The defendant was entitled to the benefit of the security upon payment to the plaintiff and Loucks of the amount of their advances, and might have obtained it at any time by paying them; or, without making such payment, he might probably have instituted proceedings to have the security realized. I have, however, been unable to find any authority for the contention that a creditor, holding a mortgage as collateral security for his debt, is bound to take steps, even at the request of his debtor, to sell the mortgaged premises upon pain of being required

to credit upon his claim the amount which might have been realized from them. There will, therefore, be judgment for $366.66* with interest from September, 1891, and full costs of the action. Judgment. Street, J.

E. B. B.

[DIVISIONAL COURT.]

RE MAGANN AND BONNER.

Landlord and Tenant—Overholding Tenants Act R. S. O. ch. 144—Sufficiency of Notice—Jurisdiction of County Court Judge.

The questions whether a three months' notice to determine a tenancy required by a lease should be lunar or calendar months, and whether a notice given by the lessor after conveyance of the reversion is sufficient, should not, when there is any doubt in the matter, be decided by a county court Judge on an application under the Overholding Tenants Act and amendments.

THIS was an appeal from a junior Judge of the county of York in a matter under the Overholding Tenants Act, R. S. O. ch. 144, and amending Acts 58 Vict. ch. 13, sec. 23 (O.), and 59 Vict. ch. 42, sec. 4 (O.). Statement.

The lease under which the tenant held contained the following clause:

"And in the event of a *bonâ fide* sale being made of the property of the lessor of which the premises hereby demised forms a part, the lessor may terminate this lease at any time after the 1st day of October, 1895, by giving the lessee three months notice in writing."

A sale had been made and a notice, by the lessor after she had conveyed away the property, dated the 2nd day of April terminating the lease on the 1st day of July was

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* This amount was arrived at upon the following calculation:

Plaintiff paid	$900
Loucks assumed	700
	$1600

Each surety's share was one-third of this, or $533.34. Defendant owes plaintiff the difference between $900 and $533.34, or $366.66.

Statement. sent by registered letter to the tenant, which he contended was insufficient.

On an application before the county Judge, it was held that the notice was sufficient in the following judgment:

"It is clear that a month means lunar month, unless otherwise expressed by statute or agreement of the parties, or unless a contrary intention can clearly be gathered from the contract.

In this case I cannot gather from the lease that the parties intended calendar months, and, therefore, the three months referred to in the lease means lunar months, and having been admittedly received by the tenant on the 4th April, 1896, for the 1st July, 1896, the notice is in this respect valid and binding as against the tenant.

The proviso expressly says that this notice should be given by the lessor, and this was done.

The amendments to the Overholding Tenants Act hereby give me power to hear this application.

The usual order for possession must therefore go with costs."

From this judgment the tenant appealed to a Divisional Court, and the appeal was argued on September 15th, 1896, before MEREDITH, C.J., and ROSE, J.

John McGregor, for the tenant. The word "months," in the clause in question, was intended to be calendar months. The same word appears in other parts of the lease, and all the parties both the former as well as the present owner and the tenant acted on calendar months in the payment of rent, etc. The overholding was under a *bonâ fide* belief of right. At the time the notice was given by the former owner the reversion had passed, and she had no power to give the notice: see *Stevens v. Copp*, L. R. 4 Ex., p. 20. The statute provides that notice should be given by the landlord: section 3.

[MEREDITH, C.J., she was the original lessor, but surely

no such question should be tried by a county Judge in Chambers.] *McGregor*—The county Judge should not try the matter at all if there is a *bonâ fide* question of right in dispute: *Price* v. *Guinane*, 16 O. R., at p. 267. In *Gilbert* v. *Doyle*, 24 C. P. 60, the tenant had shewn no ground for possession as against the landlord: *per* GALT, J., at p. 73, and the county Judge had, therefore, power under the statute to order possession. HAGARTY, C. J., at p. 73, dissented, and held there was some question to be tried and the county Judge had no power. See also *Bartlett* v. *Thompson*, 16 O. R. 716; *Re Reeve*, 4 P. R., at p. 28: *per* RICHARDS, C. J. Argument.

Worrell, Q. C., for the landlord. The "months" in this contract must be construed as "lunar" months. The conduct of the parties subsequent to making the contract cannot be considered in interpreting its meaning. Nowhere in the lease does it appear that the parties meant "calendar" months, except in the repair clause. The *reddendum* clause does not make yearly rent payable monthly, if it did, then it might be argued calendar months were intended, but here the provision is monthly only. Even if the former owner could not give the notice as owner she could as agent for the present owner. The evidence before the county Judge shews that it was such a plain case as the amendments to the statute meant the County Court Judge to determine. I refer to Woodfall, 15th ed., pp. 356, 372, 378; *Rogers* v. *The Dock Co. Kingston-upon-Hull*, 34 L. J. Chy. N. S. 165; *Nudell* v. *Williams*, 15 C. P. 348; *Barlow* v. *Teal*, 15 Q B. D. 501; *The Manufacturers Life Ins. Co.* v. *Gordon*, 20 A. R., at p. 331; *Miller* v. *Levi*, 44 N. Y. R. 489; *Matthews* v. *Lloyd*, 36 U. C. R. 381; *Jones* v. *Phipps*, L. R. 3 Q. B. 567.

McGregor, in reply. A different rule prevails in England where the tenancies run from certain Feast days: see *Sheets* v. *Selden Lessee*, 2 Wallace 177; *The People* v. *The Mayor of New York*, 10 Wend. 395; *per* Nelson, J., at p. 398; *The Queen* v. *The Inhabitants of Chawton*, 1 Q. B. 247; *Lang* v. *Gale*, 1 M. & S. 111.

Judgment. Per Curiam.

Per Curiam. A determination of the rights of the parties involves a somewhat difficult question of law, and it cannot be said that "it appears to the Judge that the case is clearly one coming under the true intent and meaning of section 2, * * and that the tenant holds wrongfully against the right of the landlord."

That it should so appear is required by section 5 in order to give jurisdiction to make the order.

The appeal must, therefore, be allowed, but as the case should have come before us by *certiorari*, the writ may now issue, but the appellant should get the costs only of a contested application for the writ.

G. A. B.

[DIVISIONAL COURT.]

RE THE BRANTFORD ELECTRIC AND POWER COMPANY AND DRAPER.

Landlord and Tenant—"Buildings and Erections"—Payment for—Fixtures and Machinery.

A covenant in a lease to pay for "buildings and erections" on the demised premises, covers and includes fixtures and machinery which would have been fixtures but for 58 Vict. ch. 26, sec. 2, sub-sec. (*c*) (O.). Judgment of FALCONBRIDGE, J., affirmed.

Statement.

THIS was an appeal from a judgment of FALCONBRIDGE, J.

The Grand River Navigation Company had, by lease dated the 1st day of July, 1852, leased, with rights of renewal from time to time, certain premises and water power to drive wood-working machinery to one James A. Perkins, and the Brantford Electric and Power Company had, by various mesne assignments, become entitled to all the rights of the lessors; and one Thomas Draper had,

Statement.

by various mesne assignments, become entitled to all the rights of the lessee.

During the currency of the lease, or a renewal thereof, the corporation of the city of Brantford, who were then the owners of the demised premises and privileges by deed permitted the use of the water power for grist mill purposes.

In the lease was a provision, that if before the expiration of any of the terms, the lessors should demand a higher rent than the lessee was willing to pay, they should, at the expiration of the then existing term, pay the value of the buildings and erections then on the demised premises, to be ascertained by arbitration.

In an arbitration under this clause the arbitrators, while allowing for a frame structure used as a grist mill with the flume, water wheel, spur wheel, pinion and pinion shaft, hurst frame, partition, conductor and hopper bins, and other things of a similar nature, declined to value and allow certain fixtures and machinery which would have been fixtures, but for the right of the tenant to remove them under the provisions of 58 Vict. ch. 26, sec. 2, sub-sec. *c.* (O.).*

From this award the lessee appealed, and the appeal was argued on February 12th, 1896, before FALCONBRIDGE, J.

James Harley, and *E. Sweet*, for the appeal.
Wilkes, Q.C., and *A. E. Watts*, contra.

The learned Judge reserved his decision, and subsequently delivered the following judgment:

* (*c*) By changing the numbers of the present covenants, numbered 9 and 10 in columns of 1 and 2 of schedule B. to the the said Act, to numbers 11 and 12 respectively; and by inserting in column 1 of the said schedule, immediately after number 8 therein, a proviso to be numbered 9 as follows:—

"(9) Provided, that the lessee may remove his fixtures."

And by inserting in column 2 of the said schedule opposite thereto a proviso to be numbered 9 as follows:—

"(9) Provided always and it is hereby expressly agreed that the lessee

Judgment.

Falconbridge, J.

May 22nd, 1896. FALCONBRIDGE, J., [after disposing of certain objections to the award not necessary to be considered]:—

Grounds five and six are the only substantial ones, namely, as to the construction to be placed on the words "buildings and erections." "Erection" is a raising up or fixing something in an upright position, *e.g.*, a building, a column or a flagstaff.

Then its secondary meaning is that which is erected, especially (but not solely), a building or structure of any kind.

In *Bidder* v. *Trinidad Petroleum Co.*, 17 W. R. 153, it was held that "erections" was a wider term than buildings, and might include trade fixtures.

In *Regina* v. *Whittingham*, 9 C. & P. 234, a scaffold erected above the bottom of a mine was held to be an "erection" under 7 & 8 Geo. 4th, c. 30, sec. 7, *Patteson*, J., saying, at p. 735, that "'erection' is clearly meant to denote something different from a 'building.'"

And under the same statute, a wooden trough, or trunk, by which water was conveyed from a spring to a pool at a distance from a mine for the purpose of washing ore, was held by the Queen's Bench to be an "erection" used in conducting the business of the mine: *Barwell* v. *The Hundred of Winterstoke*, 14 Q. B. 704.

The putting up of wooden hoardings for advertising purposes was held to be a breach of a covenant "not to erect or make any other building or erection": *Pocock* v. *Gilham*, 1 Cab. & El. 104. See also *Oppenshaw* v. *Evans*, 50 L. T. N. S. 156; *Mitchell* v. *The City of London Fire Ins. Co.*, 12 O. R. 706, 15 A. R. 262; *Carr* v. *The Fire*

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may at, or prior to the expiration of the term hereby granted, take, remove and carry away from the premises hereby demised, all fixtures fittings, plant, machinery, utensils, shelving, counters, safes or other articles upon the said premises in the nature of trade or tenants' fixtures or other articles belonging to or brought upon the said premises by the said lessee, but the lessee shall in such removal do no damage to the said premises, or shall make good any damage which he may occasion thereto."

Assurance Association, 14 O. R. 487; *Adamson* v. *Rogers*, 22 A. R. 415.

Judgment.

Falconbridge, J.

It is sworn that the machinery, or parts thereof, which two arbitrators have refused to value, cannot be removed without tearing frames to pieces, and that the effect of removing them would be to render what would be taken away by the proprietor and what he would leave behind both comparatively valueless. The company, in the exercise of their strict rights, but perhaps somewhat arbitrarily, demanded a largely increased rental, and I think on every principle of construction the provisions of the lease which I am considering ought to be taken most strongly against them.

The last clause of the lease, providing for the supervision by the company's engineer of the "construction or erection of all machinery, water course* flooms (*sic.*) and erections" lends colour to Draper's contention.

I agree with that contention, and I refer the award back to the arbitrators to re-value in accordance therewith.

There is no complaint about the value as far as they have gone, so that ground need not be gone over again.

The company will pay Draper's costs of this motion forthwith after taxation.

From this judgment the Brantford Electric and Power Company appealed to a Divisional Court, and the appeal was argued on September 14th, 1896, before MEREDITH, C. J., and ROSE, J.

Wilkes, Q. C., and *A. E. Watts*, for the appeal. The landlord was not bound, under the terms of the lease, to pay for the tenant's fixtures. The tenant should take them away.

*The clause was as follows:—

"And that in the construction or erection of all machinery, water course flooms (*sic.*) forebays and erections in, upon or through the said demised premises and appurtenances, or any part thereof, the said lessee, his executors, administrators or assigns shall and will, in all cases, follow and obey the instructions and directions of the engineer of the company for the time being in relation to the same."

Argument. They were not included under the words "buildings and erections": *Adamson* v. *Rogers*, 22 A. R. 415; 26 S. C. R. 159. The lease shews that only sufficient water power was leased to run certain machinery in a wood-working mill which could easily have been removed, and even if the lessors assented to a change from a saw mill to a grist mill, that did not enlarge the covenant to pay for "erections and buildings." Those words must be construed as under the circumstances existing at the time the lease was granted. "Building" and "Erection" mean the same thing: Stroud's Dic. I refer to *Barwell* v. *The Hundred of Winterstoke*, 14 Q. B. 704, and other cases referred to in the judgment of Mr. Justice FALCONBRIDGE.

James Harley, and *E. Sweet*, contra, were not called on.

MEREDITH, C.J., (at the close of the argument):—

I think that it was the intention of the parties to the original lease, that if the lessor or those entitled under him demanded a rent so high that the lessee, or those claiming under him, were unable or unwilling to pay it, the lessor should pay for all the buildings and erections, and that these words cover and include all machinery, etc., which would have been fixtures under the old law, and could not have been removed by the tenant except for the provisions of 58 Vict. ch. 26, sec. 2, sub-sec. (*c*.) (O.), and that the award should be sent back to the arbitrators with this direction.

ROSE, J.—I agree in that entirely.

G. A. B.

[DIVISIONAL COURT.]

WOLFE V. MCGUIRE.

Landlord and Tenant—Receipt for Rent—Lease or Agreement—Implied Covenant—Fire.

An informal document which acknowledges the receipt of rent of premises for a future definite term, and under which possession is taken by the person paying the rent, is a contract of letting and hiring and not merely an agreement for a lease.

In the absence, in a lease, of an express covenant to repair by the lessee, he is not liable for permissive waste, and an accidental fire, by which the leased premises are burnt, is permissive not voluntary waste.

Judgment of FALCONBRIDGE, J., at the trial, affirmed.

THIS was an appeal from the judgment of FALCONBRIDGE, J. Statement.

The action was for damages for the loss by fire of a stable which had been leased for a month by the plaintiff to the defendant; but no lease other than the document hereafter mentioned, had been executed. The rent had been paid, and the defendant was in possession when the fire occurred. When the rent was paid the following receipt was given by the plaintiff:

"October 20th, 1894.

"Received from A. G. McGuire the sum of $9.00, in full payment for rent of stable from the 25th of October, 1894, to November 25th, 1894."

The action was tried at Ottawa on January 17th, 1896, without a jury.

It was attempted to be proved that the defendant had agreed to deliver up possession of the leased premises and buildings in as good condition as they were at the commencement of the tenancy, but the evidence on this point was conflicting, and it was also contended by the plaintiff that in the absence of agreement the usual covenants (including the covenant to repair) must be implied.

Statement. The trial Judge dismissed the action saying, "I find there was no such special agreement as set up by the plaintiff, and the law appears to be clear that without such special agreement upon the destruction of the premises there is no obligation on either party. I therefore think upon this branch of the case the plaintiff fails, and so far as that is concerned the action must be dismissed with costs."

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on April 28th, 1896, before MEREDITH, C. J., and ROSE and MACMAHON, JJ.

McCarthy, Q. C., for the appeal. On a letting without more there is an implied covenant to repair. A. agreeing to rent, and B. agreeing to pay rent, can hardly be said to be the whole contract. The receipt here shews a demise at a future date, and is an agreement. What are usual covenants is discussed in Davidson's Precedents, 3 ed., vol. 5, pt. 2, p. 51-52. The question what are usual covenants is one of fact when usual covenants are stipulated for but one of law where the agreement contains no such stipulation: Woodfall's Law of Landlord and Tenant, 15th ed., p. 129. See also *Kendall* v. *Hill*, 6 Jur. N. S. 968. A covenant to repair is a usual covenant: Woodfall, p. 129; a covenant "not to assign" is not: *Hampshire* v. *Wickens*, 7 Ch. D. 555. If there is a covenant to repair the tenant must rebuild: Woodfall, ch. 16. An exception against fire is not a usual exception: *Sharp* v. *Milligan*, 23 Beav. 419.

Wallace Nesbitt, contra. The whole bargain and contract is in the receipt here, and there is no implied covenant at all. No covenant to rebuild is implied by law. I refer to Clarke's Landlord and Tenant, 637; Woodfall, 15th ed., 186, 632; Foa's Law of Landlord and Tenant, 2nd ed., pp. 122, 123; *United States* v. *Bostwick*, 94 U. S. R. 53; *Smith* v. *Kerr*, 108 N. Y. R., at p. 34.

McCarthy, Q. C., in reply cited *Walsh* v. *Lonsdale*, 21 Ch. D. 9.

September 15, 1896. MACMAHON, J. :—

Judgment.

MacMahon, J.

Action brought to recover damages for the destruction by fire on the 13th of November, 1894, of a stable alleged to be worth $900, rented by the plaintiff to the defendant for one month from the 25th of October to the 25th of November, 1894.

The contract between the parties is in the form of a receipt signed by the plaintiff, and is as follows: "October 20th, 1894. Received from A. G. McGuire the sum of $9.00, in full payment for rent of stable from the 25th of October, 1894, to November 25th, 1894."

The plaintiff by her statement of claim set up, and at the trial endeavoured to prove, that it was a term of the agreement between herself and the defendant that the defendant would at the expiration of one month from the 25th of October, deliver up possession of the property leased, with the buildings thereon, in the same, or as good condition as they were at the commencement of her tenancy under the lease.

The view entertained by the learned trial Judge was that there was no such special agreement as that set up by the plaintiff, and he dismissed the action with costs. He, however, assessed the damages contingently at $200.

Although the ground is taken in the notice of motion, it was not suggested during the argument, that the finding of fact could be interfered with. The only ground argued was the one setting up that even if there was no express contract to repair, where there is a lease simply for a term certain, which is silent as to covenants, there the usual covenants must be considered as embodied in the contract, including the covenant to repair.

The judgment of the trial Judge having negatived the special agreement set up by the plaintiff, we are only called upon to consider the effect of the document or contract put in at the trial. And, first, did it constitute a present demise? That eminent jurist, Judge Story, in *Jenkins* v. *Eldredge*, 3 Story, at p. 330, says: "One test,

Judgment.

MacMahon, J.

whether it is a present demise or not, is founded upon this consideration, whether a future formal lease is contemplated by the parties." And in dealing with the question whether a particular document is a lease or an agreement for a lease, Foa's Law of Landlord and Tenant says (p. 63): "The most general rule applicable in deciding the question is, that the intention of the parties, as declared by the words of the instrument, must govern the construction (*Poole* v. *Bentley*, 12 East. 168), and where there is an instrument, * * by which it appears that one party is to give possession and the other to take it, that is a lease, unless it can be collected from the instrument itself (*i.e.*, without reference to extrinsic circumstances or subsequent acts of the parties), that it is an agreement only for a lease to be afterwards made." See, also, *Jenks* v. *Edwards*, 11 Ex. 774.

In the case before us the document acknowledges the receipt of the rent; states the term for which the rent was payable, and the defendant entered into possession under the contract, shewing that no further act or demise was contemplated between the parties.

If that was the completed contract and possession taken by the defendant under it, what implied stipulation on the part of the lessee is carried with it? In Woodfall's Law of Landlord and Tenant, 15th ed., 632, it is said the implied obligation in such a case is to use the demised premises in a tenant-like manner. The full text is: "The contract of tenancy usually contains some express stipulation for repair by the tenant, but if it contain no such stipulation, or only contain a stipulation for rent, and whether it be by deed, writing without deed, or by parol only, a stipulation is implied by law—in the absence of any express stipulation, but not otherwise—that the tenant will use the demised premises in a tenant-like manner.

"* * A tenant at will is clearly not liable for permissive waste, nor is a tenant from year to year."

In the case of *United States* v. *Bostwick*, 94 U. S. R. 53, no formal lease of the property was executed; but the

Court held that the correspondence under which the United States entered into occupation constituted a contract of letting for one year with a privilege of three at $500 per month. Judgment. MacMahon, J.

In that case it was held that unless excluded by the operation of some express covenant or agreement there results from the relation of landlord and tenant an implied obligation on the part of the latter not to commit waste, nor, by his failure to exercise reasonable care, permit it to be committed. And that in the absence of an express covenant to repair, a tenant is not answerable for accidental damages, nor is he bound to rebuild, if buildings are accidentally destroyed by fire or otherwise.

Chief Justice Waite in delivering the judgment of the Supreme Court said, at p. 68: "As to the destruction of part of the buildings by fire. There was, as has been seen, no express agreement to repair in the lease. The implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary, as far as possible. It is in effect a covenant against voluntary waste, and nothing more. It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild, if the buildings were burned down or otherwise destroyed by accident."

So the effect of that decision is, that where there is no express covenant on the part of the lessee to repair he is not liable for permissive waste; and that an accidental fire, without negligence, is permissive, not voluntary waste.

The law as to implied covenants on the part of the lessee is laid down in Foa's Law of Landlord and Tenant, pp. 121-2, in almost the same terms as by Chief Justice Waite in the *Bostwick Case*. The author says, at p. 122: "A covenant or agreement is implied on the part of the lessee to use the premises in a tenant-like manner. This obligation falls under two heads, which it is convenient to treat of separately:—(1) Where the demised premises consist of houses or buildings, where the obligation resolves itself into one to do repairs of a certain kind.

Judgment.

MacMahon, J.

(2) * * (1) The amount or character of the repairs necessary to fulfil this implied obligation, in the case of leases or agreements for a term of years, has apparently never been defined with precision. This for the obvious reason that such instruments almost invariably contain an express covenant—which displaces the implied one—by the tenant to the same effect. * * It may be mentioned here, however, that a tenant for years, whether under a covenant to repair or not, will be liable for permissive waste; but he is not liable, in the absence of an express agreement to the contrary, or of an undertaking to repair, for damages by accidental fire, *i.e.*, arising neither by design nor by negligence, to the demised premises."

Could the document produced by any possibility have been regarded as an agreement for a lease, and it was contemplated between the parties that a formal lease should have been executed, we then would require to consider the question much discussed at bar, as to what would be the "usual covenants" required to be given by a lessee on a simple demise of one month's duration. As, however, the document executed by the lessor must be regarded as the contract between the parties, we are not called upon to consider that question.

The motion, I think, should be dismissed with costs.

MEREDITH, C. J. :—

I concur.

ROSE, J. :—

I agree. Reference may be had to *Lewis Bowles's Case*, Tudor's, L. C., on Real Property and Conveyancing, 3rd ed., pp. 107-110, as to waste voluntary and permissive.

G. A. B.

THE BANK OF TORONTO v. HAMILTON.

Mistake—Over-credit by Bank—Change of Position—Repayment—Notice.

The plaintiffs, under telegraphic instructions from one of their branches, telephoned from the head office to one of their sub-agencies to credit the defendant with $2,000. The sub-agency, however, by some misunderstanding, credited him with $3,000, which he drew out. The $2,000 had been paid into the branch bank in the first instance by way of an advance on the shipping bills of certain cattle bought from the defendant for about $2,800, but of this the plaintiffs had no notice. The defendant, however, refused to repay the difference between the $2,000 and the price of the cattle, on the ground that in faith of the payment to him he had allowed them to be shipped abroad, which by his agreement for sale was not to be done till payment of the price in full:—

Held, that the defendant was bound to repay the excess over the $2,000.

Statement.

IN this action the Bank of Toronto sought to recover certain moneys from the defendant under circumstances alleged in their statement of claim as follows:—That on July 19th, 1895, the plaintiffs received at their office in Montreal from W. G. Elliott $2,000, who requested them to telegraph it to Toronto to the defendant's credit, with instructions to advise the plaintiffs' branch office at 719 King street west, which was done, but by error in transmitting the message the amount was received as $3,000 instead of $2,000; that subsequently the defendant called at the said branch office and enquired as to any money having been received to his credit, and was then by mistake informed that there was to his credit the sum of $3,000, and he thereupon drew a cheque for the $3,000 and received the amount; that shortly afterwards the plaintiffs discovered the mistake and thereupon notified the defendant thereof and demanded the return of the $1,000, and the defendant repaid part of the $1,000, but refused to pay the balance, which the plaintiffs now claimed.

The facts as proved at the trial are sufficiently mentioned in the judgment, and on them the defendant relied in his defence, and pleaded that though he had repaid part of the $1,000 to which he had no claim as against Halliday, in the judgment mentioned, he declined to return the remainder, because he was in no way a party

Statement.

to the alleged mistake, and had in consequence of the payment made to him surrendered all claim to the cattle, as the purchase money for which the sum was owed to him by Halliday.

The action was tried at the Toronto non-jury sittings before BOYD, C., on October 5th and 7th, 1896.

Moss, Q.C., and *Garrow*, Q.C., for the defendant, who were first called on, cited *Moss* v. *The Mersey Dock and Harbour Board*, 20 W. R. 700, 26 L. T. N. S. 425; *Chambers* v. *Miller*, 13 C. B. N. S. 125; *Pollard* v. *Bank of England*, L. R. 6 Q. B. 623; *Cocks* v. *Masterman*, 9 B. & C. 902; *The London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7; *Freeman* v. *Jeffries*, L. R. 4 Ex. 189.

Wallace Nesbitt and *T. P. Galt*, for the plaintiffs, cited *Durrant* v. *The Ecclesiastical Commissioners*, 6 Q. B. D. 234; *Leeds and County Bank* v. *Walker*, 11 Q. B. D. 84.

October 8th, 1896. BOYD, C.:—

The advice sent by the bank from Montreal to Toronto was, "Credit I. Hamilton $2,000, per Elliott; advise King street." The King street agency of the bank was advised, but by a blunder in the transmission by telephone $3,000 was credited in the King street agency, and this was chequed out to Hamilton about one o'clock on Friday, July 19th, 1895. The bank thus by mistake and in the hurry of business made an overpayment of $1,000 to the defendant.

At Montreal this was the transaction: Halliday came to Elliott with a shipping bill of cattle (which he had bought from Hamilton) and asked an advance upon that security, and Elliott agreed to advance $2,000, and this being accepted, he issued a cheque for $2,000, payable to the Bank of Toronto on account of Hamilton. This being paid in about 11 a.m. on Friday, was wired to the Toronto office, as already stated.

Judgment. Boyd, C.

The cattle came to Montreal early on Saturday and were shipped at 7 a.m. on that day. The bank, after using all diligence, were only able to notify Hamilton of the error and overpayment about midnight on the same Saturday and after the cattle had been shipped.

The private bargain between Hamilton and Halliday was that the cattle should not be shipped unless $2,827 were paid to Hamilton.* If this money was not obtained and paid to Hamilton he was to have or resume possession of the cattle. This by-bargain, however, was not made known to Elliott or the bank, but the defendant relies upon this as a reason for withholding the money overpaid sufficiently to satisfy his full claim against Halliday.

These are the salient facts. Hamilton had the right to be paid $2,827 by Halliday. Halliday not disclosing this arranges for the payment of $2,000 only to Hamilton —getting that advance from Elliott in exchange for the delivery and possession of the cattle: Elliott pays that amount ($2,000) into the bank for Hamilton, and the bank by the error of its officers pays out $3,000 instead of $2,000 to the defendant Hamilton.

Halliday being entrusted by Hamilton with the shipping bill of the cattle, was able to transfer them to Elliott in consideration of the $2,000 advance, and the money instead of being paid to him and transmitted to Hamilton, was paid into the bank by Elliott to Hamilton's credit. Hamilton was Halliday's nominee for payment, and as against the bank and Elliott has no higher rights than Halliday. This is one way of viewing the facts, going to shew that Hamilton's right to retain the surplus is to be measured

* The statement of defence stated that after the agreement of sale, the cattle were placed on the cars at Wroxeter for shipment to Montreal, when Halliday alleging himself unable to pay the $2,827, it was thereupon agreed that the cattle should go forward to Montreal, that the defendant should follow them, and that if Halliday did not transmit the money by telegraph to Toronto to the defendant, the defendant having followed the cattle to Montreal should there reclaim and resume possession of them, and that until the money was fully paid the cattle should remain the property of the defendant.—Rep.

Judgment.

Boyd, C.

by Halliday's right to retain had he received the money, which could not be argued.

In another respect this case seems to fall within the principle laid down by Parke, B., in *Kelly* v. *Solari*, 9 M. & W. 54, "that where money is paid to another under the influence of a mistake (that is, upon the supposition that a specific fact is true) which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it."

The specific fact which induced the action of the bank here was that $3,000 had been placed to the credit of the defendant by the action of their Montreal branch, only $2,000 in fact being so placed. Though the defendant may have had the right to more than $2,000 as against Halliday, that appears to give no equity to retain the proper money of the Bank—which to the extent of $1,000 was paid over to the defendant without consideration. It may be fairly said that there was a common mistake in this case, for the plaintiffs believed that the direction of their agent was to pay $3,000 to the defendant on account of Halliday, and the defendant believed that Halliday had carried out the private arrangement between them, by which at least $2,827 was to be obtained in respect of the cattle before they were to be shipped. But the real fact was that only $2,000 was asked for and obtained by Halliday.

The cases cited for the defendant appear plainly distinguishable. *Moss* v. *Mersey Docks Board*, 20 W. R. 701, depends, as Cockburn, C. J., said, not on a mistake of law or fact, but on the statutory powers of the board, and he says further, if there was a mistake it was not made by the person who paid the money but by another, on whose mistake the plaintiff acted. *Chambers* v. *Miller*, 13 C. B. N. S. 125, was simply a decision as to the property in money having vested upon payment of a cheque, and that though there was a mistake in paying, the money could

not be retaken by violence. The mistake there was one between the bank and its customer, to which the holder of the cheque was no party. Judgment. Boyd, C.

The other cases were on collateral points.

I therefore adhere to the provisional judgment given at close of the case and make it absolute so far as I am concerned.

A. H. F. L.

Ellis v. The Town of Toronto Junction.

Municipal Corporations—Police Magistrate—Salary—Reduction of—R. S. O. ch. 72, secs. 5, 23.

In 1892 the plaintiff was appointed by the provincial government of its own motion police magistrate, without salary, under R. S. O. ch. 72, sec. 5, of a town whose population exceeded 5,000. The plaintiff then demanded a salary of $800 as his right under section 2 (*b*), which was for a time conceded, but, in 1894, reduced to $400, and by resolution in 1896 withdrawn altogether by the council:—

Held, that the council had a right so to do and R. S. O. ch. 72, sec 28, did not apply.

THIS was a special case stated for the opinion of the Court on the following questions: Statement.

(1) Whether the plaintiff, who was police magistrate of Toronto Junction, was entitled by virtue of his commission and by law to receive a salary of $800 per annum, apart from any acts of the defendants, or to receive fees only; (2) whether the acts of the defendants as disclosed in the case entitled the plaintiff to a continuance of the said salary of $800 without any power in the defendants to free themselves from liability therefor; (3) the population having fallen below 5,000, had the defendants power to and did they lawfully refuse to pay any further salary after such fall in population; (4) assuming the plaintiff entitled to receive $800 per annum, when the reduction to $400 hereinafter mentioned was made, was the said reduction bind-

Statement.

ing; (5) was the plaintiff entitled to recover, and if so how much.

It appeared from the case that on August 11th, 1890, the council passed a resolution that the Ontario Government be requested to appoint a police magistrate for the town, the appointment to date from January 1st, 1891, and the plaintiff was appointed on June 21st, 1892, under commission of the Lieutenant-Governor, expressed to be without salary. On August 5th, 1892, he wrote to the council stating that he presumed that the population of the town then exceeding 5,000 he was entitled to a salary of $800 as the salary fixed by statute, and asking that an appropriation be made in the estimates providing therefor. On August 8th, 1892, the council adopted the report of the committee on finance recommending compliance with the plaintiff's communication of August 5th. On January 22nd, 1894, however, the council resolved that the clerk write to the plaintiff that it was the opinion of the ratepayers that a police magistrate was not required, and asking him to send in his resignation. On January 26th, 1894, the plaintiff replied through his solicitor that he was appointed and held office during the pleasure of the Lieutenant-Governor, and was not subject to the jurisdiction of the council, and had no intention of asking the Lieutenant-Governor to rescind his commission, and that the population having been over 5,000 when the appointment was made in 1892, the statute R. S. O. ch. 72, governed in the matter of salary. On February 1st, 1894, a report of the executive committee was adopted that the plaintiff be paid $400 per annum, he to do his own "clerking"; and on March 6th, 1894, the plaintiff wrote accepting these terms. On February 4th, 1895, a resolution was passed that the plaintiff's salary be discontinued, but that he be allowed to collect and retain the fees derivable from his office, said change to take effect on February 28th, 1895. The defendants paid the plaintiff $800 per annum from August 3rd, 1892 to February 1st, 1894, and $400 per annum from the latter date to February 28th, 1895, since which date

they had paid him nothing. The plaintiff claimed he was entitled to recover arrears of salary at the rate of $800 per annum from February 1st, 1894, less the amount received, while the defendants alleged that the plaintiff having been appointed without salary became in law entitled to collect and retain fees as his sole remuneration, and that the council was never under a legal obligation to pay a salary as alleged by the plaintiff, and the plaintiff was entitled under the circumstances to receive fees only, or if the Court should be of opinion that he was entitled to salary then he was so entitled at the rate of $400 per annum. Statement.

The case was argued on October 20th, 1896, before BOYD, C.

Raney, for the motion. No power to cut off the police magistrate's salary is to be found in the Municipal Act, 55 Vict. ch. 42 (O.). Sections 282 and 288 of the Act provide for exercise of powers by by-law. Section 28 of Police Magistrates Act, R. S. O. ch. 72, especially prohibits a municipal council reducing the salary of a police magistrate. The population being over 5,000 at the time of his appointment, the right of Ellis to the salary at once attached: R. S. O. ch. 72, secs. 2, 3 and 4; *Wilkes* v. *The Town Council of Brantford*, 3 C. P. 470; *Central Bank of Canada* v. *Ellis*, 20 A. R. 364; *Watkins* v. *Watkins*, 12 Times L. R. 456; *In re Robinson*, 27 Ch. D. 160; *Holland* v. *The Town of Port Hope*.*

Going, for the corporation. The plaintiff should have

* ARMOUR, C. J. April 30th, 1896, unreported. This was a motion to quash by-law 723 of the Town of Port Hope (passed March 16th, 1896), to reduce the salary of the plaintiff as police magistrate to $400, on the ground (among others) that when the plaintiff was appointed in 1871 the population was over 5,000 and under 6,000, and that in 1873 the Legislature by 36 Vict. ch. 48, sec. 330, sub-sec. 2, fixed the salary at $800 per annum, and the town had no power to alter. The defendants produced evidence that at the time of the passing of the by-law the population was under 5,000. Armour, C. J., quashed the by-law on the above ground, according to information received from counsel in the case. There was no written judgment.—REP.

Argument. moved to quash within a year. The commission was without salary: R. S. O. ch. 72, sec. 5. Even if voted to him, this did not bind the corporation to continue a salary. If the population does not exceed 5,000 in the first instance, the appointment of a police magistrate is not obligatory at all. The Legislature does not seem to have contemplated the contingency of the population falling under 5,000. The Act nowhere says $800 is the minimum salary of a police magistrate, except in case of a town of 5,000. Besides the plaintiff is estopped by his own acts. He made a bargain reducing his salary to $400, and afterwards agreed to it being taken away altogether. He made returns on this basis. If the corporation had known he was going to take this position, they could have gone to the Lieutenant-Governor and stated their position, and had him removed. No by-law was required to reduce the salary, which was in the nature of the ordinary business of the corporation.

Raney, in reply. If the resolution of 1894 was good, it was only good for one year, and if there was any contract the plaintiff would be entitled to notice, and could not be dismissed in this summary way.

October 22nd, 1896. BOYD, C.:—

The resolution of August 11th, 1890, asking the government to appoint a police magistrate, though not formally rescinded, was adverse to views of nearly one-half the councillors as subsequently expressed. It fixed no amount of salary, and requested the appointment to be made as of January 1st, 1891. But it does not appear that any governmental action was taken thereon. Nothing further happened as to the appointment during 1890 and through 1891; but on June 21st, 1892, letters patent issued appointing the defendant to the office without salary. At this time the population was over 5,000, but before in 1890 and 1891 and since in 1893 to 1896, the population has been below 5,000. It cannot be said that the appointment was made at the instance of

Judgment.

Boyd, C.

the council in office in the year 1892, and I would take it that the action of the government was spontaneous under section 5 of ch. 72. From the facts agreed on, it would appear that notice of the increase of population to 5,000 was not in possession of the government when this appointment was made, and one may infer that the government took action of its own motion in the interests of good government because of the disagreement of the council in 1890, and inertia of the council thereafter.

At all events the office was conferred upon Mr. Ellis, and by the terms of his appointment he took it "without salary"—though with "the rights, privileges, endowments, fees and perquisites" pertaining thereto—*i. e.*, such fees and endowments as are given in section 25 of the Police Magistrates Act. He was not appointed as a salaried police magistrate, and though this did not prevent the council from voting and paying him a salary, it gave him no right thereto as one of the incidents of office, which might not be modified by the council. The salary was reduced in 1894, and that reduction was acceded to by the plaintiff; it was discontinued in 1895, and that provoked this action.

As an unsalaried officer—having taken the office on that footing—I cannot read into the patent the provision of section 28 of the Act, that no council shall have power to reduce the salary without the sanction of the Lieutenant-Governor in Council.

I would, therefore, answer the questions submitted thus:

1. The plaintiff is not entitled by his commission and by law to a salary apart from the acts of the council, but he is entitled to fees only.

2. The acts of the defendants did not entitle the plaintiff to a continuance of salary, but the defendants could free themselves therefrom by resolution as they did.

3. The defendants in the circumstances can refuse to pay any salary irrespective of the number of the population.

4. The fourth is answered in the foregoing.

5. The plaintiff is not entitled to recover anything.

A. H. F. L.

[CHANCERY DIVISION.]

BEATY V. GREGORY.

Church—Mortgage of Site—R. S. O. ch. 237—Trustees—Covenant—Personal Liability.

Land for the purpose of a site for a church was conveyed to certain persons their successors and assigns as trustees therefor, and a mortgage for the balance of the purchase money was given by them to the vendor, who was aware of the nature of the whole transaction, in which, in addition to giving their individual descriptions, the mortgagors were stated to be "trustees under R. S. O. 1887, ch. 237" of the designated church. The mortgage contained the usual covenants, including a covenant by the mortgagors for payment of principal and interest, and was executed by the mortgagors individually with their own seals, there being no corporate seal:—

Held, that they were not personally liable on the mortgage.

Statement. THIS was an action for redemption or foreclosure of a mortgage brought by John Beaty, against A. T. Gregory and six others, the plaintiff alleging in his statement of claim as amended, after setting up that the defendants personally covenanted to pay the mortgage money, that the defendants contended that they entered into the said covenant in a corporate capacity, and were not personally liable thereon, but that he submitted that the covenant was an individual and personal covenant of the defendants, and that they were personally liable.

In their statements of defence, the defendants said that under the provisions of R. S. O. ch. 237, they were a corporation, and that, therefore, they were not in any way personally liable for the payment of the moneys due on the mortgage, any covenant therein contained having been given by them in their corporate capacity and not as individuals; and that the lands comprised in the mortgage were sold by the plaintiff to the Parkdale Baptist Church as a site for a church or meeting house, and the said lands were conveyed by the plaintiff to the defendants as the trustees appointed by the said Parkdale Baptist Church to receive the said conveyance, and the mortgage in question was made for the purpose of securing the purchase money of the said lands, and was executed by them in their capa-

city as such trustees and not otherwise and without any intention of rendering themselves liable as individuals. Statement.

The action was tried at Toronto before FALCONBRIDGE, J., on February 27th and 28th, 1896.

Moss, Q.C., and *Urquhart*, for the defendants. The defendants only hold the land, and can only deal with it as trustees under the statute, R. S. O. ch. 237. The only mortgage they could make was as trustees. Personal liability is so contrary to the scope of the instrument, that it could not be held to exist without special covenant separating the two capacities. The defendants are a body corporate: *Re Wansley and Brown*, 21 O. R. 34. They are a corporation by implication of law: *Coleman* v. *Moore*, 44 U. C. R. 328; *Humphreys* v. *Hunter*, 20 C. P. 456; *Randall* v. *Van Vechten*, 19 Johns. 60; *Whitford* v. *Laidler*, 94 N. Y. 145, *S. C.*, 46 Am. R. 131.

Urquhart, on the same side. The defendants are trustees under the authority of the statute, and, therefore, it is like a case of one giving a mortgage by direction of the Court: *Glenn* v. *Allison*, 58 Md. 527. We must read the deed and mortgage together: *Standly* v. *Perry*, 3 S. C. R. 356, 372; *Trustees of the Franklin Church* v. *Maguire*, 23 Gr. 102; *The Episcopal Church of St. Peter* v. *Varian*, 28 Barb. 644

J. B. Clarke, Q.C., and *Swabey*, for the plaintiff. The defendants executed under their individual seals. The defendants have not all the attributes of corporate bodies by virtue of R. S. O. ch. 237, sec. 1. Section 10 expressly empowers them to covenant in a lease; and section 12 to distrain. No name is given to the defendants by the deed conformably to section 1. A corporation must have a corporate seal: Brice on *Ultra Vires*, 3rd ed., pp. 1-5. The Courts are careful not to call them a corporation: see *Coleman* v. *Moore*, 44 U. C. R., at p. 335; *Trustees of the Ainleyville W. M. Church* v. *Grewer*, 23 C. P. 533; *Trustees of The Franklin Church* v. *Maguire*, 23 Gr.

Argument. 102; *Re Wansley and Brown*, 21 O. R. 34. They are personally liable: *Paice* v. *Walker*, L. R. 5 Ex. 173; *Hough* v. *Manzanos*, 4 Ex. D. 104; *McCollin* v. *Gilpin*, 5 Q. B. D. 390; *Appleton* v. *Binks*, 5 East 148; *Hancock* v. *Hodgson*, 4 Bing. 269; *In re International Contract Co.*, L. R. 6 Ch. 525; *Hagarty* v. *Squier*, 42 U. C. R. 165; *Madden* v. *Cox*, 44 U. C. R. 542; *S. C.* in App., 5 A. R. 473; *Clapp* v. *Moore*, 6 Kans. 22; Lindley on Company Law, 5th ed., pp. 220-1, 225; *Kelner* v. *Baxter*, L. R. 2 C. P. 174. If the defendants were a corporation, the mortgage would be inoperative: Brice on *Ultra Vires*, 3rd ed., p. 23. They are not a corporation, though they hold things in a corporate capacity: *Williams* v. *Hathaway*, 6 Ch. D. 544; *Furnivall* v. *Coombes*, 5 M. & G. 736; *Ruitz* v. *The Roman Catholic Episcopal Corporation of Sandwich*, 30 U. C. R. 269; *Stinchfield* v. *Little*, 1 Me. 231; *Dutton* v. *Marsh*, L. R. 6 Q. B. 361; *Lennard* v. *Robinson*, 5 E. & B. 125. A mortgage should be taken most strongly against the parties executing: Lindley on Company Law, pp. 231, 240; Brice on *Ultra Vires*, 3rd ed., p. 660; Thompson's Law of Corporations, pars. 5074-5088, citing *Taft* v. *Brewster*, 9 Johns. 334. If we are not entitled to foreclosure, we have a vendor's lien. The land is vested in the defendants as individuals, and we are entitled to relief on both branches of the case.

Moss, in reply. Section 8 of R. S. O. ch. 237, gives distinct power to mortgage, which takes this case out of the old cases cited: *Brown* v. *Sweet*, 7 A. R. 725, 740; Brice on *Ultra Vires*, 3rd ed., pp. 210-1, 217, 224, 228, 232. Under the Church Temporalities Act, churchwardens here are a corporation, and have power to bind their successors: *Maynard* v. *Gamble*, 13 C. P. 56. A common seal is not necessary to their existence as a corporation: *The Proprietors of the Mill Dam Foundry* v. *Hovey*, 21 Pick. 417; *Reynold's Heirs* v. *Trustees of Glasgow Academy*, 6 Dana 37. The proper parties are not before the Court for enforcing a vendor's lien. The estate is vested by deed in the corporation. As regards the point as to name, see

Grant on Corporations, p. 13; *South School District* v. *Blakeslee*, 13 Conn. 227; *Smith* v. *Tallasea Branch of Central Plank Road Co.*, 30 Ala. 650, 664. Argument.

September 8th, 1896. FALCONBRIDGE, J.:—

The mortgage sued on represents the whole purchase money of the property. The plaintiff knew the purpose for which the property was wanted. He knew of the appointment of trustees before he took his mortgage, and knew the purpose for which they were appointed, although he believes, to the best of his knowledge, he was not present when they were appointed. Though not of their communion, plaintiff used to attend defendants' church occasionally, and was sometimes present at church meetings when business was discussed. He was very friendly towards defendants and their church, and was interested in their getting a place of worship, and thought it would improve the neighbourhood. So in pursuance of an understanding to that effect he purchased the lot as a site for the church, and let the church have it at the same price that he was paying for it, taking back a mortgage bearing 6 per cent. which they agreed to give at the time.

The deed bears date November 9th, 1888, and is made between the plaintiff of the first part, his wife to bar dower of the second part, and the defendants ("trustees appointed under the statutory powers in that behalf as hereinafter mentioned") of the third part. Recites R. S. O. ch. 237, and that there is a religious Society of Baptists known as "The Parkdale Baptist Church" in Parkdale; and that "the Church" has purchased the lands for $3,250 for the purposes hereinafter mentioned; and that the said Church at a meeting duly called hath appointed the parties of the third part as trustees thereof for the purpose of having the lands conveyed to them and to hold them in and upon the trusts hereinafter declared; and that said parties of the third part have accepted the trusts thereof

Judgment.

Falconbridge, J.

The grant is to the defendants, their successors and assigns, *habendum* unto and to the use of the said parties of the third part, their successors and assigns, upon trust for the members of a Baptist church composed of persons baptized on a profession of their faith in Christ, and holding the following doctrines * *.

Then follow declarations (1) as to number of trustees and mode of filling vacancies; (2) in the event of extinction of Church where powers shall vest.

Ordinary short form covenants for title. Executed by all parties, grantors and grantees.

The mortgage bears even date. It purports to be made in pursuance of the Act Respecting Short Forms of Mortgages, between defendants with their particular additions "(Trustees under R. S. O. 1887, ch. 237) of the Parkdale Baptist Church," and plaintiff.

Ordinary short form printed covenants, as if mortgage made by individuals, and these words added in writing at the end: "with privilege to the mortgagors, their successors or assigns, to pay off this mortgage at any time without notice."

Executed by all the defendants individually with individual seals. There is no corporate seal.

The plaintiff allowed his mortgage to be postponed for one given to a company to raise money to build a church. The church was erected on the site, and is now used as a place of worship by the congregation.

The mortgage becoming in default the plaintiff issued his writ on May 31st, 1895, against the defendants, "*Trustees under R. S. O. 1887, ch. 237 of the Parkdale Baptist Church*," and delivered his statement of claim on June 29th, 1895.

On application of the plaintiff the Master in Chambers made an order on October 3rd, 1895, giving the plaintiff leave to amend the writ and pleading and proceedings by striking out the words which I have italicized wherever they occur.

Apt words were added to the statement of claim to

charge the defendants as on an individual and personal covenant, and not merely in a corporate capacity; and the sole question to be tried is whether or not they are so liable. Judgment. Falconbridge, J.

There is nothing in R. S. O. ch. 237, expressly erecting religious societies or congregations which may be within the Act to the position of corporations; nor does there appear to be any provision for a common seal. These bodies have been described as quasi-corporations. By the 9 Geo. IV. (U. C.) ch. 2, after reciting that religious societies of various denominations of Christians find difficulty in securing the title of land requisite for the site of a church, etc., for want of a corporate capacity, and that it is expedient to provide some safe and adequate relief in such cases it was enacted that certain religious congregations (including "Anabaptists") could have lands held for them by trustees and their successors in perpetual succession.

This Act was held in *Re Wansley* v. *Brown*, 21 O. R. 34, to have the effect of creating the trustees a corporation by implication.

The question (whether the trustees were created a corporation or not) was left open by *Humphreys* v. *Hunter*, 20 C. P. 456; by *Coleman* v. *Moore*, 44 U. C. R. 328; and by *Trustees of the Franklin Church* v. *Maguire*, 23 Gr. 102.

Be that as it may "this contract was made and recognized both by the plaintiff and defendants as the contract of the corporation or quasi-corporation. It took possession of the premises, built a church, and paid interest to the plaintiff. The receipt of January 23rd, 1891, reads: "Received from the Trustees of the Parkdale Baptist Church." That of May 7th, 1891, says: "Received from Rev. Mr. Mihell" (he is no party to the mortgage or action), "$75 * * re Baptist Church."

The addition of the words, "trustees under R. S. O. * * ," in the mortgage, is not a mere matter of description of the mortgagors. Their individual addition

Judgment.

Falconbridge, J.

or description has been already given as "artist," "gentleman," etc. So that the words "trustees, etc.," are meant to limit and qualify the character in which they are to be held answerable, and therefore notwithstanding the apparently unrestricted covenants which follow, it appears on the face of the instrument that they did not mean to bind themselves personally: *Glenn* v. *Allison*, 58 Md. 527.

It is often a question whether the covenantor had a right to bind himself in a fiduciary character. In the last case it was held to be immaterial for the determination of the covenantor's personal liability, but in *Randall* v. *Van Vechten*, 19 Johns. 60, it was held that in order to excuse the defendants from personal responsibility it was incumbent on them to shew that the plaintiff had a legal remedy against the corporation. See also the *Episcopal Church of St. Peter* v. *Varian*, 28 Barb. 644.

I have no doubt but that the plaintiff has his remedy here against the church or quasi-corporation, at least so far as the power to mortgage is concerned as provided by section 8 of R. S. O. ch. 237.

The model deed prescribed for the Wesleyan Methodist Church in Canada, may be pointed to as analogous. The 35 Vict. c. 107, directs the grantees to be named individually with their usual additions, and also as "The Trustees of the congregation of the Wesleyan Church in Canada."

It has been held to be incident to every corporation aggregate to have a common seal: Dillon on Municipal Corporations, 4th ed., old section 130; Grant on Corporations, p. 58.

"And although in general an interest can only be divested under the common seal, yet if a resolution had been duly passed by the corporation that they would alien certain property, and upon the faith of that resolution expenditure incurred with reference to the property, equity would probably compel the corporation to make a legal grant of the property in pursuance of such resolution, although it were not under the common seal": Grant, *ibid.* p. 57, and cases there cited.

The fact that the intention of all parties has been carried out by the securing of the debt by a mortgage upon the land pursuant to section 8 excludes the application of the principles laid down in *Price* v. *Walker*, L. R. 5 Ex. 173; *Gadd* v. *Houghton*, 1 Ex. D. 357; *Hough* v. *Manzanos*, 4 Ex. D. 104. Judgment. Falconbridge, J.

True it is that section 8 contains no express power to covenant on the part of the Church, but if it had been intended by the parties that any personal security should be given that object would have been attained in accordance with the general practice by taking a personal bond of the trustees, or of other substantial members of the church.

A covenant to repay the principal and interest is no necessary part of a mortgage: Fisher on Mortgages, 3rd ed., section 10.

But every mortgage implies a loan, and every loan implies a debt for which the personalty of the borrower is liable, though he have neither entered into bond nor covenant for payment of it; but the debt is of the nature of simple contract only unless there be a bond or covenant to give it the character of a specialty: *ib.*, section 1112.

Therefore, in no respect is the plaintiff without his remedy against the principal of these agents and trustees, and he cannot invoke against them the stringent rules laid down in *Furnivall* v. *Coombes*, 5 M. & G. 736; *Stinchfield* v. *Little*, 1 Me. 231; *Taft* v. *Brewster*, 9 Johns. 334.

Cases on bills of exchange are not applicable, such as *Hagarty* v. *Squier*, 42 U. C. R. 165; *Madden* v. *Cox*, 44 U. C. R. 542, 5 A. R. 473. Nor are cases where there is no existing principal like *Kelner* v. *Baxter*, L. R. 2 C. P. 174, where the company had not yet been incorporated.

And churchwarden cases are inapplicable for they are under the Church Temporalities Act a corporation, and may bind their successors in office: *Maynard* v. *Gamble*, 13 C. P. 56.

Patterson v. *McLean*, 21 O. R. 221, is an instance of a case where a party holding land as a trustee without any

Judgment.

Falconbridge, J.

consideration to him therefor, or intention to become personally liable, executed a mortgage containing a covenant to pay the mortgage debt, and the covenant was held to be not enforceable against the mortgagor personally even by the assignee of the mortgage for value without notice.

The plaintiff fails as against the defendants personally, and under the circumstances I dismiss the action as against them without costs in the hope that this litigation may not proceed further, but that on the contrary the congregation may make some effort to lighten the grievous burthen which the plaintiff has apparently taken upon his shoulders for their benefit.

I give the plaintiff leave, if necessary, to amend again so as to charge the defendants as trustees, and to charge them as such trustees or the Church as on a simple contract for the debt and otherwise as he may be advised, and I pronounce the ordinary decree for foreclosure with a reference to the Master and costs as of an undefended suit for that purpose.

A. H. F. L.

[DIVISIONAL COURT.]

McQUARRIE ET AL. V. BRAND.

Bills of Exchange and Promissory Notes—Independent Contemporaneous Agreement—Parol Evidence—Admissibility.

It is a good defence to an action by the personal representatives of the payee against the maker of a promissory note for value received, that at the time of the making of the note an oral agreement was entered into between the payee and the maker which has been fully performed, that if the latter would pay interest on the note, and, although not liable to do so, would support for life a relative of the former, the note should be considered paid; and evidence to the above effect was held admissible in an action on the note brought after the complete performance of the agreement by the defendant.

Judgment of the County Court of Perth reversed.

Statement

THIS was an appeal from the County Court of the county of Perth.

The plaintiffs were executors of one Mary Fuller, and brought the action on a promissory note made by the defendant.

The action was tried on October 6th, 1896, at Stratford, before his Honour Judge WOODS, without a jury, when *Idington*, Q. C., appeared for the plaintiffs, and *H. B. Morphy*, for the defendant.

It appeared that the defendant had been indebted to Mrs. Fuller in the sum of $450 on a mortgage; that he was supporting his wife's mother, a Mrs. Schenck, and being a poor man, application was made to Mrs. Fuller, who was Mrs. Schenck's sister, and was comparatively well off to aid in the expense, the result being that Mrs. Fuller threw off $150 from her claim, discharged the mortgage and took a note for $300, and agreed that if the interest on the note was paid and Mrs. Schenck taken care of by the defendant until her death, the note would then be considered as paid. The defendant did provide for Mrs. Schenck for about six years, and she died in his house during the lifetime of Mrs. Fuller.

At the trial, the defendant's counsel tendered oral evidence to shew that such was the agreement.

Statement. The County Court Judge allowed the evidence to be given so as to be available in case of an appeal, but disregarded it in his judgment, saying: "I am clearly of the opinion that the evidence I have allowed in, is wholly inadmissible. The fundamental doctrine underlying all these cases, is that no oral evidence shall be allowed to add to, vary or contradict a written instrument. You may attack an instrument, but you must not alter or vary it. A promissory note is an unconditional promise in writing made by one person to another to pay on demand, or at a fixed time, a sum of money,": and he gave judgment in favour of the plaintiffs for the amount of the note.

From this judgment the defendant appealed to a Divisional Court, and the appeal was argued on November 9th, 1896, before ARMOUR, C. J., and FALCONBRIDGE, J.

Masten, for the appeal. The oral agreement made contemporaneously with the note is admissible in evidence, because it is a distinct and separate agreement, and is consistent with the note. It does not purport to vary the terms of the note, but is an agreement that upon performance of the defendant's undertaking the note should be satisfied, given up and cancelled: Taylor on Evidence, 9th ed., 745, 755; *Lindley* v. *Lacy*, 17 C. B. N. S. 578; *Morgan* v. *Griffith*, L. R. 6 Ex. 70. It was founded on good consideration, namely, the defendant's undertaking to continue to maintain Mrs. Schenck till her death—his previous services having been voluntary: *McHugh* v. *Grear*, 18 C. P. 488. Even if the contemporaneous oral agreement is not admissible, the subsequent conversation and undertaking (two years after the note) to do so, is admissible, and discloses a valid substituted agreement, which being performed, satisfied the note. This agreement was performed and the note so satisfied before action brought: Chitty on Contracts, 12th ed., 758, 779.

Miller, Q. C., contra. The bargain sought to be proved was one made contemporaneously with the note, and the

tenor of the evidence admitted was to vary that written contract, and was inadmissible; the admissible evidence shewed that the defendant did not take the same position, while Mrs. Fuller was alive. I refer to Maclaren on Bills and Notes, 2nd ed., 36, 37; *Porteous* v. *Muir*, 8 O. R., at p. 137. Argument.

Masten, in reply.

November 13th, 1896. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The defence set up at the trial of this cause, was established by the evidence of the defendant whom the learned Judge believed, and his evidence was sufficiently corroborated by other evidence to entitle him to succeed, but the questions arise (1) Whether the defence set up was a good one in point of law; and (2) Whether the evidence in support of it was admissible as varying the terms of the promissory note; and my opinion is in favour of the defendant upon both grounds.

The contract set up by the defendant was a contract independent of his contract to pay the note, and was not involved in the consideration for the note. It was a contract for a separate and distinct consideration,—the consideration being the defendant at the request of Mary Fuller, agreeing to continue to keep the said Annie Schenck for the residue of her natural life—and this was a good consideration for the promise by Mary Fuller, for at the time of the promise, the defendant was under no liability to keep the said Annie Schenck.

The defence set up was, therefore, a good defence in point of law, and I think that the evidence in support of it did not vary the terms of the note.

If the note had been sued upon before the complete performance by the defendant of his contract, the contract set up by him, could not probably have been given in evidence

Judgment.

Armour, C.J.

to shew that the note was not to be payable till after the performance by the defendant of his contract; for this would have been an attempt to vary by oral testimony the express terms of the written note, but the contract of the defendant having been completely performed at the time the note is sought to be enforced, this difficulty does not arise, for the defendant is not seeking to vary the terms of the note, but to shew that the note has been satisfied by the performance by him of his contract; and the cases of which *Abrey* v. *Crux*, L. R. 5 C. P. 37, is a sample, do not stand in his way.

The appeal should be allowed with costs, and judgment should be given in the Court below, dismissing the action with costs.

G. A. B.

[DIVISIONAL COURT.]

KERVIN ET AL.

v.

THE CANADIAN COLOURED COTTON MILLS COMPANY.

Negligence—Master and Servant—Cause of Accident—Evidence.

In an action for damages for negligence causing the death of an employee, the evidence shewed that in the defendants' factory two large wheels 45 feet apart had been placed partly in a trench in the floor of the basement for the purpose of driving a wide belt with great rapidity. The deceased was employed to oil the bearings and to see that they did not heat. His dead body was found much injured close to one of the wheels; but there was no evidence as to how he had met with his death. The wheels were not guarded by fencing; but there was evidence that deceased had on previous occasions crossed the trench on two planks placed over it between the upper and lower moving belt, and there was evidence that he had been cautioned against doing so, and that the planks, although removed by the superintendent, were there at the time of the accident:—

Held (MEREDITH, J., dissenting), that there was evidence proper to be submitted to the jury that the accident was caused by the negligence of the defendants.

Statement.

THIS was a motion to set aside a judgment for $3,500 recovered against the defendant company by the plaintiffs, the widow and children of James Kervin, who was killed in the factory of the defendants.

The action was tried at Cornwall on October 10th, 1895, before ARMOUR, C. J., and a jury.

D. B. Maclennan, Q. C., and *C. H. Cline*, for the plaintiffs.

McCarthy, Q. C., *Leitch*, Q. C., and *R. A. Pringle*, for the defendants.

It appeared that the defendants, who were a manufacturing company, were driving part of their machinery with two large pulleys or wheels about 45 feet apart, which were partly sunk in a trench in the floor of the basement driving a wide belt, and making about 220 revolutions a minute.

Statement.

The deceased was employed to oil the bearings and see that they did not heat. His dead body was found much injured close to one of the wheels, but no one saw how the accident happened.

The evidence shewed that the wheels and belt were not guarded in any way by fencing or otherwise, and there was also evidence that the deceased had on previous occasions crossed the trench on two planks he had placed over it between the upper and lower moving belt.

It was objected that there was no evidence of negligence on the part of the defendants, and that even if there was, there was nothing to connect the negligence with the accident, and that the jury could only surmise or guess how the deceased came to his death.

ARMOUR, C.J.—I think I will have to leave the question to the jury. There is evidence from which they could reasonably infer that he was killed by coming in contact with the moving machinery, the belt and pulleys combined; I think there is evidence of that. Then, from the position of the body and the condition and the way in which the belt was moving, there are circumstances to go to them from which they may come to the conclusion that it was at the pulley the accident occurred.

[The learned Chief Justice then fully considered the evidence and stated the law to the jury, and proceeded:] "If the defendants are guilty of negligence, and the deceased, himself, was also guilty of negligence which contributed to the injury, the plaintiffs cannot recover; that is, if Kervin was guilty of negligence in crossing those planks. Supposing you disbelieve what Ashton said,* still if he crossed those planks would you think the man was using ordinary care? Ordinary care must be measured according to the danger of surrounding circumstances. Could you say he was using ordinary care in crossing those

* That he had previously removed the planks and forbidden Kervin to use them any more.

planks with that belting running close above him? If you disbelieve Ashton, and think he crossed the planks and was not using ordinary care, then the plaintiffs are not entitled to recover. Judgment. Armour, C.J.

If, however, you think he was not crossing the planks at the time he met his death, and that his death occurred by reason of the negligence of the defendants in not taking proper precautions for his safety, or in not securely guarding this belting, or by reason of there being a defect in the condition of the belting, then the defendants are guilty of negligence, and are liable in this action."

The jury brought in a verdict for $3,500 apportioned in different sums among the plaintiffs.

The defendants moved to set aside this verdict, and the motion was argued on June 26th, 1896, before a Divisional Court composed of BOYD, C., and ROBERTSON, and MEREDITH, JJ.

McCarthy, Q. C., and *R. A. Pringle*, for the motion. The jury may have found a negligent act on the part of the defendants in the want of a fence, but the plaintiffs are bound to shew that the accident was caused by the absence of the fence, and having not done so, cannot recover: *Wakelin* v. *The London and South-Western R. W. Co.*, 12 App. Cas. 41. How the accident happened is pure theory and surmise, as there is no evidence of it. The effect of what evidence there is on that point is to shew that Kervin was negligent himself in using the planks to cross in a dangerous manner, and that when warned and instructed not to do so, he said he could take care of himself: *Smith* v. *Baker*, [1891] A. C. 325; *Moyle* v. *Jenkins*, 8 Q. B. D. 116; *Keen* v. *Millwall Dock Co.*, *ib.* 482; Smith's Law of Negligence, 2 ed., 103.

D. B. Maclennan, Q. C., and *Aylesworth*, Q. C., contra. The evidence shews that the accident could not have happened if there had been what is required even at common law, viz.: a guard, or a fence: *O'Connor* v. *The Hamilton Bridge*

Argument. *Co.*, 25 O. R. 12; *Rogers* v. *The Hamilton Cotton Co.*, 23 O. R. 425; *Smith* v. *Baker*, [1891] A. C. 325. The position in which the body was found and the surrounding circumstances afforded in themselves sufficient evidence that the death was caused in the manner contended for by plaintiffs: *Smith* v. *South-Eastern R. W. Co.*, 12 Times L. R. 67; *Fenna* v. *Clare*, [1895] 1 Q. B. 199. There was no contributory negligence: *Britton* v. *Great Western Cotton Co.*, L. R. 7 Ex. 130. The obligation to guard the machinery arises as soon as it commences to work: *O'Connor* v. *The Hamilton Bridge Co.*, 25 O. R., at p. 21.

McCarthy, Q. C., in reply. In *Fenna* v. *Clare*, the wall was a nuisance on the highway, and the defendant, who was guilty of the nuisance, should have been held liable for a consequence. In *Smith* v. *South-Eastern R. W. Co.*, the signal man neglected his duty, and the deceased had a right to assume there was no danger.

September 22, 1896. BOYD, C.:—

The question of moment is whether or not there was evidence to be submitted to the jury. That is, was there anything beyond mere conjecture to guide them as to how the death happened? The better view, in my opinion, is that the case could not have been withdrawn from the jury; and that being so, their conclusion should not be disturbed.

There was unquestionably evidence of negligence on the part of the company—a dangerous structure was in use without the statutory safeguards called for in order to protect the workman. Then it is equally unquestionable that the deceased man was killed by coming in violent contact with the revolving machinery at this place of danger, *i.e.*, the open belt pit on a level with the earthen floor, the edges of which were slippery with grease at the point where the workman's duties usually called him.

The material thing is this: that the place of danger which the law required to be fenced was also the place of death.

Judgment.

Boyd, C.

This state of facts fulfils the essential duty resting on the plaintiffs to prove that there was some negligence which caused or materially contributed to the injury or death. I use the language of Lord Watson in *Wakelin* v. *London & South-Western R. W. Co.*, 12 App. Cas., at p. 47. Then no conduct on the part of the deceased person is proved or found by the jury which detracts from the effect of this primary negligence.

The circumstances of the accident and the marks found upon the body and the belt-pit, though not shewing precisely how the death happened, do, however, in my opinion furnish reasonable data from which the jury may fairly infer that the negligence of the defendants was the cause. Due care on the part of the deceased may be inferred from the plaintiff's evidence, and the jury have found against the defendants' contention that the deceased exposed himself to the danger by crossing the planks. He is proved to be of experience in the duties of oiling and watching the machinery under his charge, and his usual manner of going to his work by a safe course is spoken of by the witnesses; one of whom saw him, just about ten minutes before the body was found, with oil-can in hand apparently going to his work.

The case seems stronger in favour of submission to the jury than was *Williams* v. *The Great Western R. W. Co.*, L. R. 9 Exch. 157, in which the defendants neglected a statutory duty, and thereby presumably allowed a child to stray on to the line. See also *Fenna* v. *Clare*, [1895] 1 Q. B. 199, and *Moxley* v. *Canada Atlantic R. W. Co.*, 14 A. R. 309. Altogether I favour the affirmance of the judgment and with costs.

ROBERTSON, J.:—

The plaintiffs contend that the action is maintainable at common law, and, in my judgment, the learned Chief Justice who tried the case, properly laid down the law in that regard, in his charge to the jury. He said "Where a

Judgment.

Robertson, J.

master employs his servant in a dangerous work, it is his duty to use all reasonable precautions for the safety of that servant; and if he does not use all reasonable precautions for the safety of his servant, then he is guilty of negligence. The first question for you is: did the company use all reasonable precautions for the safety of the deceased? He was engaged as 'oiler' of machinery. Is it your opinion that that was a dangerous employment? Then the company were bound to use all reasonable precautions for his safety in that employment, and if they failed to use all reasonable precautions, they would be guilty of negligence, so far as the deceased is concerned."

I think that is a proper exposition of the common law doctrine. There is no manner of doubt from the evidence that the deceased met his death by coming in contact with the large driving wheel or pulley, at the north end of the trench, as it is called, in which that wheel or pulley and another at the south end of the trench were employed in driving certain machinery in the defendants' factory. These two wheels or pulleys, were connected by a very heavy leather belt, and were about fifty feet apart, and were operated in the trench, which was excavated thirty-three inches below the surface of the ground which formed the floor of the basement of the factory; it was three feet six inches wide between its walls which were of brick, and eighteen inches thick. On the top of the walls there are timbers on which are placed the bearings on which the shaft which carries the pulleys is placed and revolves. These pulleys or wheels are five feet in diameter and two feet wide on the face, and the belt is seventeen and a half inches wide. The belt on the upper side runs from north to south and from south to north on the lower side, and it was said that at the time of the accident the pulleys were revolving at 220 revolutions in a minute. The lower belt ran at the distance of ninteen and a quarter inches from the bottom of the trench. No one saw how the accident happened. Shortly after, however, his body was found lying face downwards across one of the timbers

Judgment. Robertson, J.

referred to, about seven feet north of the journal or shaft of the northern pulley; the head was towards the west, the chest was on the timber. The deceased had been seen about ten or fifteen minutes before, standing about thirty or thirty-five feet to the west of that place, with his oil-can in his hand.

On a post mortem examination it was found that there was a bruise over the left temple, a cut on top and one on the back of the head; a fracture on the upper part of the sternum and it was driven in upon the chest, evidently by some external violence; also fracture of four ribs on the left side; there was also a compound fracture of both bones of the right leg, just above the ankle.

In the opinion of the surgeon who performed the post mortem, death was caused by the body coming violently in contact with the beam on which it was found. The wounds in the head, he was of opinion, were caused by the head coming in contact with the brickwork of the trench, where he himself and two others found some hair and a part of the skin of the scalp, which, in his opinion, belonged to the deceased. The wound of the leg was probably caused, he said, by being caught in the large belt before referred to.

It also appeared in evidence that there were two loose planks laid across the trench, about five feet south of the pulley at the north end of the trench, over which the deceased and other servants in the defendants' employment had on two or three occasions crossed, in order to get from one side of the trench to the other, and that these planks were only three feet one or two inches below the upper belt, and that there was great danger in doing this as a man would have to stoop down in order to pass clear under the belt; and further, that deceased had been told some weeks before his death, by an overseer in the mill, that he should not pass over in that way; that it was dangerous to do so, and the planks were then removed, but appeared to be there at the time of the accident; but it was not in evidence that he had ever

Judgment.
Robertson, J.

passed over in that way since the overseer had told him not to do so.

And it is pretty clear that the jury did not believe the statement of the overseer (Ashton) as to his having forbade deceased to cross over the planks.

The plaintiff's contention was that the death was caused by the deceased having slipped down between the large pulley or wheel at the north end of the trench, while he was engaged, either in feeling whether the shafting at the journal, on the west side of the pulley was heating, or while in the act of oiling the journal at that point. The defendants contended at the close of the plaintiff's case, that there was not sufficient evidence to warrant that conclusion, and, moreover, they contended that there was evidence from which it might be inferred that the deceased had been guilty of contributory negligence by having walked over the two planks across the trench, and being knocked off or fallen into the trench and carried with great force by the lower belt, and forced upwards between the pulley and the west wall of the trench and thrown where the body was found.

The learned trial Judge refused to nonsuit, and left the case fully to the jury. On this particular point he said: "It is said that the injury was occasioned by the deceased disobeying orders. It is said the injury occurred not by his falling against this belting or falling into this trench from any part of it except from certain planks that were placed across it and which he attempted to cross on the occasion when he met with the injury. Of course those planks would not have been there if it had been fenced, but that makes no difference if he disobeyed orders given to him, crossed on those planks and by reason of crossing on those planks met his death. And for this reason. He was ordered—if you are to believe the evidence of Ashton—not to cross upon those planks and in disobedience of the orders he crossed, as alleged by the defendants, and so met his death. If a servant in direct defiance of his master's orders, does a

particular thing and is injured by it, the master cannot be liable for it. Judgment. Robertson, J.

But the question is, did he meet his death by crossing these planks or not? He met his death in some way or other by this belting. There is a considerable extent of it —I forget how far it stretches—some forty or fifty feet I believe. The defendants allege that they have given evidence which ought to satisfy you that he met his death by going across these planks. Are you satisfied that he met his death by going across these planks or in some other way? If he met his death by going across on these planks, then the plaintiffs could not recover, because he was going across the planks in defiance of the orders of Ashton, his superior officer, if you believe Ashton's testimony.

Now I shall have to refer you to this model. [The learned Chief Justice here referred to a model in evidence.] These planks were placed somewhere here, it is said. Nobody tells us in what position precisely they were before this man met with his injury. No one speaks of seeing them that day at all or knowing the position they occupied. After this accident two of the witnesses, I think, say that this end of the two planks was a little this way, two or three inches. Well, whether the planks were that way in the afternoon before he crossed or not, no one can say. Crossing here and being struck by the belt, his feet being on the planks, it is said the planks would have been pushed this way, instead of that, if they were pushed at all, but there is no evidence whatever that they occupied any different position after this injury, than they did before, because it is not shewn how they were before.

Then it is said that his cap was found down here, I think. If his cap was found there, how did it get there? Can anyone tell how it came there?

Then his body was found on this beam. His head was injured and hair was sticking on the side here, according to three of the witnesses—according to Mr. MacPherson it was on the end.

Judgment.

Robertson, J.

If he was oiling this bearing and the lower part of his body caught by the belting and thrown in front of the pulley, would that account for the position in which he was found? If he had been struck and gone over this way could it be reasonably supposed that only his leg went under the pulley and not his whole body or a considerable part of it? It does not appear that his body or his head went between the belt and the pulley because, as one of the witnesses said, he would be flattened as flat as a pancake if he had.

The argument on the part of the plaintiffs is that he was oiling this bearing, and that he tripped in some way or other, fell, and was thrown in the way in which he was found.

The argument of the defendants is that he was struck by this belt, thrown from the planks, and carried under by the belting.

I do not know how he could have been carried, because there is only nine inches between the pulley and the side of the trench.

Ask yourselves which is the most reasonable way. Was he using those planks in crossing there, or did he meet with the injury in some other way? If so, was it by reason of the defendants not taking reasonable precautions for his safety, or was it because they had not fenced as the law required them to do, or securely guarded this belting, or was it because there was a defect in the condition of their plant by reason of there being no guarding? As I have said, if you come to the conclusion that he met with his death by crossing these planks and at no other part of this trench, then if you believe that Ashton forbade him doing that, and he was doing it in defiance of orders, the plaintiffs cannot recover.

But, supposing Ashton had not forbade him at all, could it be said that a man using these planks was using the ordinary care which every person must use who is working amongst dangerous machinery?"

[The learned Judge then referred to the portion of the charge to the jury, *ante* p. 74, and continued:]

Judgment. Robertson,

The evidence also shewed that it was most dangerous to have left this trench and the pulleys or wheels unenclosed by a fence; that from the situation of things at or near the pulley in question, the deceased was placed in jeopardy whenever he attempted to perform his duty there as "oiler." And Mr. McPherson, the superintendent of the defendants' mill, recognizing that fact, ordered Ashton, the mechanical overseer, to have that done after some proposed alterations in regard to the machinery had been accomplished. Notwithstanding that the superintendent was of opinion that it was dangerous to leave the pulleys and trench open, he left the place in that state during the time when the pulleys were in full operation.

The case relied on by the defendants is *Wakelin* v. *The London & South-Western R. W. Co.*, 12 App. Cas. 41, the headnote of which says: "That even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident: that there was therefore no case to go to the jury and that the railway company were not liable."

The facts shortly stated are as follows: A railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A watchman who was employed by the railway company to take charge of the gates at the crossing during the day, was withdrawn at night. The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual headlight but did not whistle, or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on the line. It appeared also that there was a slight curve at the crossing; that assuming the deceased to have been crossing the line from the down side and standing inside the hand gates but not on the line, he could have seen a train approaching on the down side at a distance of nearly if not quite half a mile, but that when standing in the centre

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of the line he could have seen a train approaching on the down side at a distance of more than one mile; that the body of the deceased was found on the down side of the line and that he was run upon and killed by a down train; that the lights carried by the engine were visible at the distance above mentioned; that the company did not give any special signal or take any extraordinary precautions while their trains were travelling over the crossing.

In my judgment there is a marked distinction between that case and this. There there was nothing whatever to shew how the accident happened, and there was very strong circumstantial evidence to shew that it must have been caused by want of reasonable care on the part of the deceased. The train at the time the deceased attempted to cross the line must have been between him and the half-mile limit of vision of the headlight; if it was not, there is no doubt he had ample time to cross over; and if it was not visible when he stepped through the hand gate, it must have been visible when he had reached half way across, so that, although the company did not give any special signal or take very extraordinary precautions while their trains were travelling over the crossing, it was clear that the circumstances presented were such that in the absence of evidence to shew how, or at what precise time, the deceased met his death, there was nothing to leave to the jury. There was, in fact, evidence to shew that the deceased must have been guilty of negligence in not looking out for a train, no matter whether he was aware that a train was due to travel over that crossing at the time or not. No man can be considered freed from the charge of negligence on his own part who crosses a railway at night without looking both up and down the line for that signal which is always carried in front of a locomotive after dark.

It was not such a case as involved the proposition put by Lord Fitzgerald, at p. 52, in regard to negligence and contributory negligence; there was no conflict on the facts in proof; therefore, there was nothing to go to the

jury. But here there is conflict or doubt as to the proper inference to be deduced from the facts in proof, in which case it was for the jury to decide. If the plaintiff can establish his case in proof without disclosing any matters amounting to contributory negligence, or from which it can reasonably be inferred, then the defendant is left to give such evidence as he can to sustain that issue.

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Now, what has the plaintiff in this case established? The facts are clear and not denied, that the deceased met his death by coming in violent contact with the large pulley or wheel at the north end of the trench. He was seen on the west side of that wheel, with the oil-can in his hand about twenty-five or thirty feet from the trench, about fifteen or twenty minutes before his dead body was found lying across a beam on which the journal or shafting or the wheel revolved. On the east side of the west wall of the trench, a short distance below its surface, and about fourteen or sixteen inches from the north end, some of his hair, with a portion of the skin or scalp attached to it, was found sticking to the wall. The injuries to the body were such as to make it reasonably clear that the deceased had passed between the west side of the large pulley and the east side of the wall of the trench. His duty was to "oil" the journals of that wheel, and to watch and ascertain whether the journal was heating or not; in performance of this duty he was obliged, by reason of the negligence of the defendants, to put himself in a dangerous position by leaning over in close proximity to the pulley, which was revolving at the rate of 220 revolutions per minute, creating a violent whirl in the atmosphere, which might tend to draw his body towards it.

The negligence of the defendants consisted in not having this dangerous machinery fenced in, by such means as would enable the deceased to perform his work free from danger. Now leaving the case there, is there any doubt that the cause of death was by coming in contact with that pulley in some way or other? That being the case, could the trial Judge have withdrawn the case from the

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jury? But the defendants shew that, at the time of the accident, two planks were lying across the trench about five feet south of the pulley, and from that fact alone, the defendants contend that the inference to be drawn is, that the deceased met with his death in attempting to cross on these planks under the revolving belt, and therefore the defendants say it was just as likely that the latter took place as the former; and, therefore, there was nothing to go to the jury. There was no evidence of the deceased having been on these planks on that day; it is a mere suggestion, that, because, on a former occasion, weeks before, he had been seen to do so, it was a necessary inference to be drawn from the fact of these planks being present at the time of the accident. Now, is not that the proposition put by Lord Fitzgerald that, if there is a conflict or doubt as to the proper inference to be deduced from the facts, then it is for the jury to decide? Had these planks not been there, could there be any doubt that the case should go to the jury? Then, the fact of there being present surely is not sufficient to warrant the case being withdrawn. It was on the defendants to shew the contributory negligence, if any; a mere suggestion that by crossing over the planks the accident might have occurred is not sufficient.

It appears to me that the case of *Smith* v. *South-Eastern R. W. Co.*, [1896] 1 Q. B. 178, is authority in support of the ruling of the learned Chief Justice who tried this case. Bearing in mind that in this case there was negligence on the part of the defendants in not having the pulleys and belt properly protected, and the fact that the deceased met his death in some way connected with this pulley and belt while in discharge of his duty, yet that, I agree, would not be sufficient to entitle the plaintiffs to recover, if the deceased was also guilty of contributory negligence; no action in that case could be maintained, and it may be said that it is not made out that the defendants' negligence was the sole cause of the accident, or that the negligence of the defendants was not the cause of the

accident because it was caused by the joint negligence of the defendants and the deceased. Judgment. Robertson, J.

Now, in such a case, Lord Esher, M. R., at p. 182, says: "The question in this case seems to reduce itself into this: Could the Judge properly have directed the jury as a matter of law that negligence on the part of the deceased was proved? It is an admitted proposition of law that, if there is no evidence of some material fact which forms an essential part of the plaintiff's case, then the Judge is bound to withdraw the case from the jury." If the assumed knowledge of the deceased in that case, as to the duties of the watchman in charge at the crossing when a train was signalled, could be taken into consideration by the jury, and that the fact of his remaining in his house might have produced in the mind of the deceased a sense of security which would prevent its being a want of reasonable care not to look up and down the line to see whether a train was coming; surely it was for the jury to say whether the mere fact of these two planks being placed across the trench by some one, there being no evidence as to whether the deceased had so placed them or not, was sufficient to warrant them in concluding that the deceased had met his death by crossing over them. There is no doubt he might have done so, but it was for the defendants to establish the fact, not merely to point out that it was possible, in the face of the other evidence which the jury were bound to consider, that the death was caused by coming in contact with the pulley while engaged in oiling or ascertaining if the journal was heated.

In the same case the remarks of Kay, L. J., at p. 188, are, in my judgment, most applicable. "I venture to say, that with all respect for those who hold a different opinion, that as long as we have trial by jury and juries are judges of the facts, it should be a very exceptional case in which the Judge could so weigh the facts and say that their weight on the one side and the other was exactly equal. There may be such cases, and the House of Lords seems to have considered that there

Judgment. Robertson, J.

might be. I can only say that I think they must be very rare, and I certainly do not think that the present case is one of them."

MEREDITH, J. :—

Assuming that in leaving the belt pit unfenced the defendants were guilty of actionable negligence, can the plaintiffs recover in this action?

Upon general principles I would answer, no; because they have not proved that such negligence was the cause of the injury complained of.

In an action such as this, it is very plain that the plaintiff must fail, unless he proves not only actionable negligence, but that such negligence was the proximate cause of the injury for which damages are sought.

It is obvious, that, no matter how gross the negligence, no action lies unless it was the cause of the injury.

In this case the workman was no doubt killed by the belt and a wheel upon which it revolved: that is not disputed: but was the omission to fence the cause of the injury? There is no direct proof that it was; there was no eye-witness of the accident; the man was found dead, and there were such marks made as indicated that he had been killed at and by the belt and wheel. That is all.

Then it was proven—and there is no shadow of doubt—that the workman had been in the habit, for his own convenience and against orders and after warning of the danger, of crossing the pit on planks—no doubt placed there by himself—between the extremely rapidly revolving belt, the upper side of which was only 3 feet and 2 inches above the planks, so that he was obliged to stoop considerably, in crossing, to avoid coming in contact with it.

It is admitted that if injured in thus crossing the pit no action lies, and it is admitted also, as it must be, that it is pure surmise when, and how, the workman came in contact with the machinery.

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It may have been in thus wrongly crossing the pit, or it may have been in examining the bearing of the wheel, or it may have been in walking beside the pit. No man can tell how; any man can guess any one of the three, but if right in his surmise he would be right not upon evidence, but purely on chance.

The whole evidence seems more consistent with the workman having fallen in at some other place than at the bearing of the wheel; there the wheel would prevent that to some extent; he was seen with the oil-can in his hand, not long before the accident, but before the accident it had been put away in its place—together indicating that he had done any needed oiling a short time before the accident; he was last seen going in a way which would bring him on the far side of the belt race, and he was not seen to return; the position of the cap and the injuries received and the marks indicating the course of his body are just such as probably would have been if the accident had happened in crossing at the planks; falling forward, or his head touching the belt, his cap might be thrown where it was found; his body going forward might fall against the far side of the pit, one foot remaining on the swift running belt, till caught by the wheel, the rest of the body going down, with the impetus of the fall, between the belt and the side of the pit; but these, like all else, are but possibilities upon which a guess, not a reasonable conclusion from evidence, could be based.

There is no presumption that the man was doing right when the accident happened: the chances of it happening were very greatly increased if he were doing wrong—crossing in that most dangerous way he had adopted for his own convenience.

Under these circumstances, unless there is to be a great departure from the principles upon which such cases as *Hammack* v. *White*, 11 C. B. N. S. 588; *Cotton* v. *Wood*, 8 C. B. N. S. 568; and *Wakelin* v. *The London and South-Western R. W. Co.*, 12 App. Cas. 41, were decided, the

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Meredith, J.

plaintiffs cannot recover upon the evidence adduced at the trial of this action.

There was no reasonable evidence that the injury complained of was caused by the alleged negligence, which I have assumed to have been proved.

Deal with the evidence as you will there still remains the fact that the workman had wrongly crossed the pit, and that no one can say that his injury did not come while endeavouring thus to cross.

The jury are not at liberty to guess; a verdict supported entirely upon mere surmise cannot stand. The case ought not, in my judgment, to have been left to them; it was the duty of the trial Judge to have ruled that there was no reasonable evidence to go to them that the man's death was caused by the alleged negligence of the defendants; and to have dismissed the action.

It is not, at this stage, a question of contributory negligence, but is a question of proximate cause. Was there any reasonable evidence upon which a jury could find that the absence of a fence, and not the workman's own risky act, really caused the injury?

I have been unable to find any case quite like this, though the principles upon which many of them, such as I have referred to, were decided, seem to me quite applicable to it.

In the *Wakelin Case*, which is probably the most in point, the negligent omission complained of, if performed, might not have prevented the injury; here the fencing of the pit effectually would doubtless have prevented it, because it would have stopped the practice of crossing on the planks and have forced the workman to go around or adopt some other expedient as "a short cut." But the defendants were not bound to fence against their servant's disobedient, dangerous and wrongful act. And, on the other hand, if it had been shewn that Wakelin had been in the habit of crossing the railway in such a manner as would have made him a trespasser, and might have been so crossing when killed, the grounds for non-suiting would have been much strengthened.

Judgment.
Meredith, J.

Williams v. *The Great Western R. W. Co.*, L. R. 9 Ex. 157, and *Smith* v. *South-Eastern R. W. Co.*, [1896] 1 Q. B. 178, are both so unlike this case that I have been unable to derive any assistance from them.

If *Fenna* v. *Clare*, [1895] 1 Q. B. 199, cannot be supported on the ground that whether the child was injured by stumbling against the spiking, or by climbing upon the wall, the defendants would be liable—on the authority of such cases as *Lynch* v. *Nurdin*, 1 Q. B. 29—I do not see how it can be supported at all. There are in this case these two important differences at least: this is not the case of a dangerous nuisance in a public place; and the person injured was not a child of tender years but was a man who knew as well as anyone could the risk he ran in working and going about the machinery, and against the wish of his employers increased greatly the danger and took much greater risk for his own convenience.

Upon this ground, applicable of course to the plaintiff's claim whether based upon common law or upon the statute, I would allow this motion and dismiss the action, with costs, if asked.

It is not needful to discuss the other grounds of the motion, some of which I may however say seem to me quite formidable.

G. A. B.

[DIVISIONAL COURT.]

IRVINE v. MACAULAY ET AL.

MCLELLAN v. MACAULAY ET AL.

Limitation of Actions—Payment of Purchase Money by Instalments—Possession—Accrual of Right of Entry.

Where a purchaser is in possession of land either under a written contract of sale, or with the assent of the vendor, the purchase money being payable by instalments, the vendor's right of entry does not first accrue until default occurs in payment of an instalment.

Statement. THIS was an appeal from a judgment of ROBERTSON, J.

The trial was commenced at Cobourg, without a jury, on October 30th and 31st, 1895, and was subsequently proceeded with and concluded at Toronto on November 30th, 1895, and January 30th and 31st, 1896.

Clute, Q. C., and *E. C. S. Huycke*, for the plaintiff.
Shepley, Q. C., and *H. W. Delaney*, for the defendants.

The following statement of facts is taken from the judgment of ROBERTSON, J.

This action was commenced on 19th October, 1874, by suing out a writ of summons in ejectment against Henry Macaulay, Margaret Macaulay and Jane McGuire, and all persons entitled to defend the possession of the east half of lot No. 10, in the 1st concession of the township of Murray, to the possession whereof the Honourable George Irvine claimed to be entitled.

The defendants appeared on 26th January, 1875, and defended for the whole land; and besides denying title of plaintiff, asserted title in themselves by virtue of long possession in themselves and those under whom they claim.

On 11th May, 1893, by an order made by the local registrar, at Cobourg, the action was revived in the name of Catherine McLellan, plaintiff, she having, by deed dated

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14th May, 1886, become the owner in fee simple of the land from the Honourable George Irvine; and against the defendant Henry Macaulay, Jane Lafferty and James Lafferty as defendants. The defendant Margaret Macaulay, since the action was commenced, having departed this life, leaving the defendants Henry Macaulay and Jane McGuire, her son and daughter respectively, both surviving her, and the defendant Jane McGuire having intermarried with James Lafferty while suit pending.

I find the following facts:

On the 14th October, 1840, it was agreed on behalf of Henry LeMesurier and James Dean, by their agent C. O. Benson, of Belleville, to sell lot No. 10 in the 1st concession of Murray, 200 acres, to Henry Macaulay, James Hall and Hugh Tate, at one pound and ten shillings per acre, and the purchasers paid to Mr. Benson £50, on account of the purchase money; the said parties to pay another fifty pounds on the said Henry LeMesurier and James Dean being enabled to give a sufficient title for the said lands, and the remainder in annual instalments of £100 each, with interest, the said purchasers being bound to give a mortgage on the premises to secure the payment of the instalments.

A receipt signed "C. O. Benson, agent for H. LeMesurier and James Dean" per D. Cameron, was given for the above instalment, setting forth the above facts. The names of the purchasers are also written at the foot of that paper.

The east half of the lot was taken possession of by Henry Macaulay, and the west half by Hall and Tate, and it appears to have been understood between them, that they should ultimately have those respective portions.

Afterwards Hall and Tate came to some arrangement with Mr. Adam Henry Meyers, of Trenton, by which they sold out their interest to him, and it was ultimately on the 16th November, 1852, agreed by and between Meyers on the one part and LeMesurier and Dean on the other, that Meyers should pay LeMesurier and Dean for the west half of the lot, as follows: £40 in six months from that

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date, and the balance of £175 in three equal instalments thereafter, with interest.

And the plaintiff contends, and I find some evidence of the fact, and have concluded with some doubt, that on the 6th March, 1852, Henry Macaulay entered into an agreement with C. O. Benson, as agent for the owner, for the purchase of the east half of the lot, for £240, payable in six yearly instalments of £40 each, with interest on 1st November in each year, the first instalment to be paid on 1st November, 1853.

The evidence is not very satisfactory as to the existence of this agreement, but both the McLellans, the plaintiff's solicitors, swear they saw it in the possession of C. O. Benson's brother a short time before it was destroyed by a fire in Benson's house. They made a memorandum of its contents which are as above.

Had I to rely on this evidence as proof of the agreement I should hesitate, but as the defendants for the purposes of this branch of the case waive strict proof for the present, I will assume there was such an agreement.

Then it is in evidence that on the 19th October, 1853, Henry Macaulay came to the office of Mr. D. Murphy, a practicing solicitor at Trenton, and requested him to write to Mr. LeMesurier as to how he, Macaulay, could make a payment on his land, being east half of the lot. An answer to a letter written by Murphy came from Mr. LeMesurier, dated Quebec, 22nd October, 1853, requesting him, Murphy, to pay the instalment then due by Macaulay on east half of lot 10 in 1st concession Murray into the hands of Mr. Q. Macnider, agent of the Bank of Montreal to be applied to his, Mr. LeMesurier's, credit. In terms of the letter it appears that on 1st November, 1853, Mr. Macnider received from Macaulay the sum of £44 for H. LeMesurier, Esquire, of Quebec, in accordance with his letter to D. R. Murphy, Esquire, of 22nd October instant.

At this time and, in fact, from and inclusive of the year 1840, Henry Macaulay was living on the east half of the

lot, and he up to the time of his death, and the defendants since, have been in possession thereof, claiming to own the same, and have ever since treated it and dealt with it as their own property. Statement.

There is nothing in writing between the parties which shews that Macaulay was to have, or to be entitled to the possession of the property or any part thereof, until payment or default made in payment of any instalment.

In view of the contention of the parties, it is not necessary to go into the question of paper title of the plaintiff. The defendants in urging their defence assume that the plaintiff has a paper title, but contend that such title has been lost by a paramount title acquired by defendants and those through whom they claim by right of possession, the late Henry Macaulay having entered into possession so far back as 1840, without any legal right to so enter as against the owner. Or in case it should be found that he entered into an agreement to purchase the east half of the lot, that agreement was on the 6th March, 1852, from which time he has held undisturbed possession.

If the latter contention prevails, then defendants say on 6th March, 1852, the most that can be said is, that on that day Henry Macaulay, admitted the ownership of the land to be in Henry LeMesurier, from whom he agreed to purchase; that there was no agreement that he was to go into possession in the meantime, but the fact is he did either go, or, what is more correctly speaking, he did not leave possession from that date, so that he was there at most as a tenant at will. That state would terminate at the end of a year, if not sooner put an end to. The Statute of Limitations would commence to run on 6th March, 1853. The action was not commenced until 19th October, 1874, and it is contended that nothing has been done to stay the operation or to create a new tenancy.

The learned trial Judge reserved his decision, and subsequently delivered the following judgment :

Judgment. Robertson, J.

February 13, 1896. ROBERTSON, J., (after setting out the facts as above):—

In *Doe d. Tomes* v. *Chamberlaine*, 5 M. & W. 14, it appeared the defendant had been let into possession of the land in question by the plaintiff, under an agreement of purchase dated the 22nd February, 1833, by which it was stipulated that defendant should be let into possession forthwith, paying interest at the rate of five per cent. per annum on the amount of the purchase money until completion of the purchase, which was to be completed by 22nd May then next. The defendant had remained in possession of and built upon the land, and no evidence was given to shew that any conveyance had been tendered him, or that the plaintiff had taken any steps to enforce the completion of the purchase; but the defendant having failed to pay interest punctually, ejectment was brought, no notice to quit having been first given. It was contended for the defendant that by the operation of the agreement a tenancy from year to year was created between the parties. The learned Judge was of opinion that defendant had nothing more than an estate at will, and directed a verdict for plaintiff, giving defendant leave to move to enter a non-suit. Afterwards the full Court refused to grant a rule, holding that it was only a tenancy at will, which might be determined without notice to quit.

In that case the action was tried in 1839, defendant having been six years in possession, and made improvements under the agreement to purchase. In equity, of course, he could have redeemed, but he had no remedy at law; and the question here is, could the defendants, had the action been brought at any time after they had gone into possession, say after March, 1852, and before the statute had run, have successfully resisted ejectment? The Common Law Procedure Act, 1856, would have allowed the defendant to set up an equitable defence, and that might have been to pay balance of purchase money into Court,

and ask for specific performance, but, if he did not do so, he could not defend on other grounds. He could have been turned out of possession clearly. Then, if that is so, the title of old Henry Macaulay began to run from the day he took possession. His title was one at will, the lowest estate known to the law, and which may be determined by demand, or by entry; and the commencement of an action is a demand. See also *Ball* v. *Cullimore*, 2 C. M. & R. 120 to same effect, where a feoffment by lessor with livery of seisin made on the land was held to operate as a determination of a tenancy at will, although the tenant was off the land at the time the livery is made, and had no notice of the determination of the will.

Judgment. Robertson, J.

Another case almost exactly in point is *Jones* v. *Cleaveland*, 16 U. C. R. 9, where A. entered into possession of land in 1833, and in 1834 made an agreement to purchase it from B., the owner, the purchase money being payable by instalments, with interest, the last of which would fall due in 1839, when a deed was to be given. Nothing was said in the agreement about possession or the right to it; and A. continued to hold for more than twenty years without making any payment. Held, that A. was a tenant at will; that the will determined at the expiration of a year from the execution of the agreement; and that B., bringing ejectment in 1857, was barred by the statute.

In that case there had been no payment whatever, but there had been a contract of purchase, signed by both parties on 18th June, 1834, and under seal. It expressed that the vendee was to pay £125 for the lot: £25 with interest from 1st January then last past (1834) to be paid 1st January in each year thereafter until all paid. This was an acknowledgment of title by the vendee, in the vendor, on the date of the agreement. This, however, only made him a tenant at will, and Sir John Robinson refers to *Doe d. Tomes* v. *Chamberlaine* and *Ball* v. *Cullimore* (before referred to) in support of this position. After the first year from the execution of the agreement the statute began

Judgment.
Robertson, J.

to run. The writ was issued 27th January, 1857: held, too late.

Now, assuming for argument sake, that payment of £44 was made on the 1st November, 1853, could defendant have resisted an action to recover possession brought, say, within three months thereafter? I do not see how he could; there is nothing whatever to shew that he was to have possession until default. On the day after the payment of the £44, for all that appears, an action to turn him out of possession could have been maintained. That being so, the statute was running from the expiration of a year from the time old Henry Macaulay took possession under the agreement of March 6th, 1852, and nothing has been done to stop it: *McLaren* v. *Morphy*, 19 U. C. R. 609. B. having entered with the consent of the owner was tenant at will, so that the statute began to run at the expiration of a year, and the evidence shewed possession for twenty-one years. Here the statute began to run from the expiration of a year from the time Macaulay went into possession on the 6th March, 1852.

Day v. *Day*, L. R. 3 P. C. 751, is a strong case in favour of defendant's contention. There it was held that the statute commences to run at the expiration of the year in which the party took possession, and twenty-one years having elapsed between that date and the date of the defendant having taken possession, the plaintiff, as devisee of her husband who had acquired title against his father, the owner, by reason of his undisturbed possession, was held on appeal to the Privy Council to be entitled to recover.

Now, take for the purposes of argument, the agreement of the 6th March, 1852. If there was such an agreement, I think Macaulay, if he was a party to it, and there is no evidence that he signed it, but assuming that he did, that would be an acknowledgment on his part of title in LeMesurier on that day. He was then in possession, but as tenant at will only. That tenancy expired on 6th March, 1853, and the statute on that day commenced to

run, and on the 6th March, 1873, the title was complete in Macaulay, and the payment afterwards to Macnider would not stop the statute, or create a new tenancy. I do not see, therefore, how the plaintiff can recover. Assuming that he has the paper title, I think the undisturbed possession of the defendants and those through whom they claim has extinguished that title, and the defendants are entitled to judgment with full costs of the action. Judgment. Robertson, J.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on April 28th and 29th, 1896, before MEREDITH, C. J., ROSE and MACMAHON, JJ.

Clute, Q. C., for the appeal. A new agreement was entered into on March 6th, 1852. The first instalment became due November 1st, 1853, and was paid. The next matured November 1st, 1854, and default was made. The plaintiff's right to possession then arose for the first time. The date the payment was made was a new starting point, and the Statute of Limitations did not begin to run until a year after that, when default was made: Leith's Blackstone, 1st ed., pp. 210, 211; *Ryan* v. *Ryan*, 5 S. C. R. 387, at p. 415; *Doe d. Bourne* v. *Burton*, 15 Jur. 990; Sugden's Property Statutes, 2nd ed., 56. The letter from Murphy, the answer from LeMesurier, and the payment into the bank in pursuance of it, amounts to a clear admission of title. Where a tenancy at will exists it is ended by an agreement to purchase: Dart 252, 436; *Daniels* v. *Davison*, 16 Ves. 252. As to demand of possession see *Robertson* v. *Slattery*, 10 U. C. R. 498; *Lundy* v. *Dovey*, 7 C. P. 38. In a mortgage suit the statute does not run until default made: *Fletcher* v. *Rodden*, 1 O. R. 155, at pp. 158, 162. I refer also to *Doe d. Shepherd* v. *Bayley*, 10 U. C. R. 310; *Doe d. Bennett* v. *Turner*, 7 M. & W. 226, 9 M. & W. 643; Dart on Vendors and Purchasers, 5th ed., 384, 438, 958; *Slater* v. *Mosgrove*, 29 Gr. 392. *Shepley*, Q. C., and *H. W. Delaney*, contra. The evi-

Argument. dence shews that the contract was in 1840. Henry Macaulay occupied until 1858 when he died. When the payment of the instalment of the purchase money was made the land was vested in Henry LeMesurier, jr., and the payment was made to Henry LeMesurier, sr. Even if the agreement of March 6th, 1852, was proved, which was not done, there was no acknowledgment in writing or payment of rent within twenty years: *Doe Perry* v. *Henderson*, 3 U. C. R. 486. The vendors title was extinguished by the period of time between November 1st, 1853, and November 1st, 1873. See also *Jones* v. *Cleaveland*, 16 U. C. R. 9; *Ruttan* v. *Smith*, 35 U. C. R. 165; *Cahuac* v. *Scott—Cahuac* v. *Erle*, 22 U. C. R. 551; *Keffer* v. *Keffer*, 27 C. P. 257; *Henderson* v. *Henderson*, 27 O. R. 93; 23 A. R. 577.

Clute, Q. C., in reply. The vendee was not in default until November, 1854, and no action for possession could have been successfully maintained against him until he was.

September 15th, 1896. MEREDITH, C.J.:—

Appeal by the plaintiff from the judgment of Mr. Justice Robertson after the trial, dismissing the action with costs.

The action was begun on the 19th October, 1874, and is an action of ejectment for the recovery of possession of the east half of lot No. 10, in the 1st concession of the township of Murray, in the county of Northumberland.

The plaintiff's right to recover, unless his right of action is barred by the Statute of Limitations, is practically conceded.

Although the learned Judge has not specifically so found, it is, I think, satisfactorily shewn that Henry Macaulay, under whom the defendants claim, on the 6th March, 1852, entered into an agreement in writing with Henry LeMesurier and James Dean, the plaintiffs' predecessors in title, for the purchase from them of the lands in question

for £240, payable in six equal yearly instalments of £40 each, payable on the 1st November in each year, the first of them to be paid on the 1st November, 1853, with interest on the instalments as they respectively became due.

Judgment. Meredith, C.J.

This agreement was not produced at the trial—it was probably destroyed by fire at the house of Mr. Benson—but a memorandum of its date and terms of payment made by Mr. Duncan McLellan from the original, which was then in the possession of Mr. S. M. Benson, a brother of Mr. C. O. Benson, the agent of the vendors, and who is now dead, was given in evidence by Mr. McLellan, whose evidence in this respect was corroborated by his brother, Mr. A. L. McLellan.

Although Mr. Shepley strenuously urged that the evidence of the two McLellans, as to the existence and contents of the agreement to which I have referred was not to be relied on, I see no reason for so thinking, and the surrounding circumstances seem to me to afford strong ground to support the truth of their statements as to it.

Macaulay and James Hall and Hugh Tate had, as the learned Judge found, and as the agreement which was produced and proved at the trial shewed, on the 14th October, 1840, purchased the whole of lot 10 from LeMesurier and Dean, through C. O. Benson, their agent, and Macaulay, at all events, was let into possession at or about the time of this purchase.

It was proved that one Adam Henry Meyers, having made some arrangement with Hall and Tate, for the acquisition of their interest in the lot on the 16th November, 1852, entered into an agreement with LeMesurier and Dean for the payment to them for the west half of the lot of £40 in six months and £175 in three equal annual instalments thereafter.

It is, I think, a fair inference from the facts proved and this agreement, that a division of the lot between Hall and Tate or Meyers, as the purchaser of their interest, and Macaulay had taken place, by which Meyers became enti-

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tled to the west half and Macaulay to the east half of the lot, and it is most probable that an agreement as to the east half was made with Macaulay similar to that made with Meyers as to the west half.

The existence of the agreement, sworn to by the McLellans, is further corroborated by the fact that on the 1st November, 1853, Macaulay paid into the Bank of Montreal at Belleville, to the credit of LeMesurier £44, the amount of the first instalment payable under the terms of it made up of £40 principal, and £4 for interest on the £40 from the date of the agreement until the date of the payment.

Assuming then, as it must I think be assumed, the agreement of the 6th March, 1852, and the payment of the first instalment on the 1st November, 1853, to have been proved, when did the statute begin to run against the right of the plaintiffs' predecessor in title, no payment having been afterwards made, and Macaulay and those claiming under him having ever since been in undisturbed possession of the l[illegible]

H[illegible] regard to the usual course of dealing in this country in such matters, it may, I think, in view of the possession of the land by Macaulay, evidently with the assent of his vendors, be properly inferred either that the agreement of the 6th March, 1852, contained a provision entitling Macaulay to possession until he should make default in the payment of his purchase money, or that it was so verbally or otherwise agreed between the parties, and making that inference the vendors had no right to determine the possession of Macaulay until he made such default, which was not until the 1st November, 1854, and the right of entry of the plaintiffs' predecessors in title did not, therefore, accrue until then, and that being so, would not, as the law stood when this action was begun, have been barred for twenty years from that date, and the action having been begun within that period, on the 19th October, 1874, as I have already mentioned, it follows that the defence based on the Statute of Limitations fails.

I have thus far treated the action as it affects the legal rights and estates of the parties, but if it be viewed as an action to enforce the right of the plaintiff as an unpaid vendor to recover out of the land the unpaid purchase money, the same result would be reached, as the right to recover the purchase money did not accrue until the 1st November, 1854, and would not have been barred until twenty years had elapsed from that date: C. S. U. C., cap. 88, sec. 24.

Judgment.

Meredith, C.J.

It is, in the view I have taken, unnecessary to determine whether the principle enunciated in *Warren* v. *Murray*, [1894] 2 Q. B. 648, is applicable, though it is difficult to see why it is not, if the vendors are to be treated as trustees of the legal estate for the purchaser and the trust an express trust.

In my opinion the appeal should be allowed, and the judgment pronounced by my brother Robertson should be reversed with costs, and judgment should be entered for the plaintiffs, for the recovery of possession of the land, with costs.

The defendants should, however, if they desire it, be allowed to pay the arrears of the purchase money and interest (such interest as the plaintiff is entitled to as a charge on the land only being allowed) and on payment of the amount due and the costs of the action proceedings should be stayed, and a proper conveyance of the lands made to them.

MACMAHON, J.:—

As the whole of the lot was purchased by Henry Macaulay, the elder (father of the defendant Henry Macaulay) and Hall and Tate in 1840, at £1 10s. an acre, or £300, and as the evidence is that on the 6th of March, 1852, Henry Macaulay, the elder, entered into a contract to purchase the east half of the lot for £240, what then took place amounted to an actual entry and determination of the original tenancy at will, and the creation of a new

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MacMahon, J.

tenancy: *Locke* v. *Matthews*, 13 C. B. N. S. 753, and *Doe d. Shepherd* v. *Bayley*, 10 U. C. R. 310. That what was done amounted to an actual entry and determination of the original tenancy at will is further evidenced by the owner of the lot in the same year (October, 1852) selling to Adam Henry Meyers the west half of the lot for £215, he (Meyers) having acquired the interest of Hall and Tate in that part of the lot.

It probably is the case that the contract entered into by Macaulay in March, 1852, was silent as to the right of possession. And in Leith's Blackstone, 1st ed., p. 211, the author says: "Where there is in the contract of sale no clause giving the vendee right of possession till default, and he is let into possession, he becomes tenant at will, and time will run as provided by section 7 (of the Limitations Act), at the end of the year from commencement of the tenancy."

So in *Low Moor Co.* v. *The Stanley Coal Co.*, 34 L. T. N. S. 186, it was held that where a bargainee took possession of land included in an indenture of bargain and sale which was not enrolled, this operated to make the bargainee a tenant at will, and time began to run from the end of the first year. In that case Lord Chancellor Cairns said, at p. 189: "It is an elementary proposition that, where a purchaser is let into possession of lands, the sale not having been carried out by a proper instrument of conveyance, at common law the purchaser is tenant at will, in equity he is regarded as the real owner of the property. Numerous cases which I have before me go to shew this."

However, in the present case, Macaulay went into possession under the agreement for sale of March, 1840, and he remained in possession of the east half—it must be assumed with the assent of the vendor—under the contract of March, 1852; and although a new tenancy was created as to such east half, yet, until default had been made by the vendee in payment of the purchase as provided by the terms of contract, the statute would not commence to run against the vendor. As said by Sir J. B. Robinson in

Jones v. *Cleaveland*, 16 U. C. R., at p. 13: "The consequence is, that the statute having begun to run after a year from the execution of the agreement, Palmer Cleaveland being then in possession, and Sir Daniel Jones being then living and in Canada, it has continued to run from that time; and there having been no written acknowledgment of title given since, nor any payment of rent or purchase money proved, there is nothing to prevent the usual effect of the lapse of twenty years."

Judgment. MacMahon, J.

Here, by the terms of the contract an instalment of £40, part of the purchase money, was payable on the 1st of November, 1853, which was, together with the interest on the purchase money, duly paid into the Bank of Montreal to the credit of the vendor under instructions received from him. There being another instalment of £40 payable on the 1st of November, 1854, until default had been made in payment of such instalment the statute would not commence to run against the vendor.

There must be judgment in the terms as stated by the learned Chief Justice.

ROSE, J.:—

I agree to the inference drawn from the evidence and the conclusion arrived at by the learned Chief Justice.

G. A. B.

In re Ermatinger, Trustee.

Trustee—Compensation—Railway Company—Trustee of Bonus Debentures—R. S. O. ch. 110—58 Vict. ch. 113 (O.).

A person into whose custody debentures of municipalities in aid of a railway company are delivered in trust to be transferred to the company upon the completion of the railway as provided for in the by-laws of the municipalities is a trustee under the Trustee Act, R. S. O. ch. 110, and as such is entitled to remuneration under that Act before delivering over the debentures.

So held with reference to the trust created by by-laws of municipalities confirmed by 58 Vict. ch. 113 (O.).

Statement. This was a petition by C. O. Ermatinger, Junior Judge of the county of Elgin, brought under R. S. O. ch. 110, for the advice of the Court as to whether the Tilsonburg, Lake Erie and Pacific Railway, incorporated under 53 Vict. ch. 56 (D.), to construct and operate a railway from a point on Lake Erie, near Port Burwell, in the county of Elgin, passing through Tilsonburg, to some point on the Canadian Pacific Railway at or near the town of Woodstock or Ingersoll, was now completed within the meaning of certain by-laws of the townships of Bayham, Malahide, Houghton, and the village of Vienna, whereby the said municipalities provided for the giving to the company, by way of bonus, debentures to be delivered to the petitioner, in trust to deposit them in some chartered bank, and deliver them to the company upon the completion of the railway to the points in the by-laws respectively mentioned.

These by-laws are set out in the schedules to 58 Vict. ch. 113 (O.), an Act passed to confirm them.

The petitioner, who accepted the trusts under the by-laws, also asked under R. S. O. ch. 110, for compensation for his services in the trust, and that he might be declared to have a lien on the debentures therefor.

The petitioner set out certain services he had to perform in his capacity of trustee of the debentures, which are sufficiently alluded to in the judgment, and were principally directed to ascertaining whether the railway had

been duly completed according to the terms of the by-laws, which had been disputed by the municipalities, who accordingly required the petitioner to withhold the debentures, delivery of which was demanded by the Imperial Bank, who held an assignment of the railway company's interest in them. Statement.

The petition was argued on September 22nd, 1896, before Robertson, J.

Moss, Q.C., and *Saunders*, for the petitioner. The petitioner is a trustee within the statute: *In re The Commissioners of Cobourg Town Trust*, 22 Gr. 377; *Re The Toronto Harbour Commissioners*, 28 Gr. 195; and is entitled to compensation for the duties imposed on him by 58 Vict. ch. 113 (O.). See, also, *Hughes* v. *Rees*, 10 P. R. 301; *Life Association of Scotland* v. *Walker*, 24 Gr. 293, at p. 297; *Re Berkeley's Trusts*, 8 P. R. 193.

Bicknell, for the Imperial Bank of Canada. I refer to *In re Williams*, 22 A. R. 196; *In re Williams*, 1 Ch. Ch. 372. The petitioner was a bailee, not a trustee: Lewin on Trusts, 8th ed., p. 13; Story on Bailments, 8th ed., sec. 2. What was the so-called trustee to do? He is only a stakeholder: Story, *ibid*, sec. 61. On receiving the debentures he had nothing to do but hand them to the bank: *Packard* v. *The Board of County Commissioners of Jefferson County*, 2 Colo. 338, at p. 348. As a bailee he is not entitled to any lien. The statute R. S. O. ch. 110, is dealing throughout with "an estate." It is implied throughout that there is an estate, requiring care and management. The cases cited are cases where moneys had to be invested, books kept, and all things necessary for the care of the estate done.

W. C. Kerr, on the same side, for the railway company.

Moss, in reply. Even if the petitioner be a bailee, which we dispute—a bailee is a trustee under the Act. He was not at any rate a naked bailee. He has been treated throughout as a trustee. Even if a bare trustee, he would

Argument.

be entitled to compensation under the Act: *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582, at p. 584. A bare trustee is one who has no beneficial interest, but he must have some duties to perform, for that is implied in the very nature of a trustee. A trustee has a lien for his proper charges, which must be satisfied before a conveyance can be demanded: Lewin on Trusts, 8th ed. (Blacks.), p. 803, sec. 12; *Life Association of Scotland* v. *Walker*, 24 Gr., at p. 297. In the Colorado case cited on the other side, the depositary is throughout called and treated as a trustee.

Bicknell also referred to Edwards on Bailments, 2nd ed., secs. 2, 10 and 18; *Re Prittie Trusts*, 13 P. R. 19; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1.

September 26th, 1896. ROBERTSON, J.:—

The prayer is: 1st. That the petitioner may be advised (*a*) whether the said railway is now completed within the meaning of the said by-laws:—

(*b*) If so, upon what date it was so completed.

(As to these the application is abandoned.)

2nd. That he may be paid a just and reasonable amount for his care, trouble, responsibility and expenses in the said trust, and that the Court may direct by whom the same shall be paid, and that until payment thereof, he may be declared to have a lien upon the said debentures, etc. The bank is now entitled to have the debentures delivered over to them, by reason of an assignment thereof by the railway company whenever they are properly deliverable, etc.

And it is contended that the petitioner is not a trustee within the meaning of the Trustee Act (R. S. O. 87 ch. 110), and is, therefore, not entitled to remuneration under that Act.

It appears that the bank offered to pay the petitioner the sum of $200 for the delivering up to it of the debentures, but the petitioner refused to accept that sum, on the

grounds that it was not a sufficient amount, etc., and claimed $700. This latter sum the bank offered to pay under protest, leaving the whole question open to litigation, as to whether petitioner was entitled to anything. This was refused, and hence these proceedings. It appears an action has been commenced by the bank, to recover the debentures from the petitioner, no other party or parties being made defendants or plaintiffs, but on an application of the plaintiffs, the Master has added the several municipalities interested as parties defendant.

Judgment. Robertson, J.

The case has been very ably argued by Mr. Moss, Q.C., for the petitioner, and by Mr. Bicknell, for the bank, and numerous cases and authorities referred to, all of which I have examined and considered, and without going into detail, the conclusion I have come to is that the trust created by the several by-laws, all of which are set out in the several schedules to chapter 113 of 58 Vict. (1895) (O.), comes within the province of the Trustee Act R. S. O. 1887, ch. 110, and that the only remaining question is, what is a fair and reasonable amount, which should be allowed the trustee for his care, trouble, responsibility and expenses in the trust.

The affidavits and papers filed, give one a pretty fair idea of what the trustee has been obliged to do, as well as shew the nature of the responsibilities which devolved upon him, when he consented to act as trustee at the request of the promoter of the railway, and the several municipalities who agreed to aid the railway in the manner mentioned.

The amount is considerable, being in the whole $73,420. The work which he has to do, and the judgment that the petitioner has to exercise in performing his duty, according to the several by-laws, is of a responsible nature. He has, in order to do that faithfully, been obliged not only to examine the railway from end to end, but to employ civil engineers to assist him in ascertaining whether the railway has been completed. I do not propose to enter into a detailed statement of all this, but in my judg-

Judgment.

Robertson, J.

ment he has made out a case which warrants me in settling and fixing the amount of his remuneration for everything connected with the trust, at the sum of $750, and I think he is entitled to hold the debentures until that amount is paid over to him, and I order the same accordingly. I should state, that since the date at which the petitioner offered to accept $700, he has felt bound to employ engineers to pass over the road and report to him, etc., which has added considerably to the expense he has been put to.

I do not determine the question as to whether the railway or its assignee is entitled, at this time, to a delivery of the debentures. Should the several municipalities, by resolution, authorize or declare that so far as they and each of them are concerned, there is no reason for withholding the debentures, I should suppose the matter could be settled in that way. Nor do I determine out of whose pocket the remuneration fixed by me should come, that is a question between the several municipalities and the railway company, not brought up under this petition, or discussed before me.

I think, in reference to the costs of this motion, that the petitioner is entitled to them, in addition to the amount that I have determined he is entitled to for remuneration for his care and trouble in performing the trust, and I order the same accordingly.

A. H. F. L.

CERRI V. THE ANCIENT ORDER OF FORESTERS.

Insurance—Life Insurance—Benefit Society—Misrepresentation as to Age—Good Faith—52 Vict. ch. 32, sec. 6 (O.).

The Ontario Insurance Amendment Act, 1889, 52 Vict. ch. 32, applies to benefit societies; and where a person was admitted to the defendants' order on the strength of a representation as to age, which was false, but made in good faith, and without any intention to deceive:—

Held, that by virtue of section 6 of the above Act, the contract of insurance was not avoided thereby.

If the true age of the deceased had been stated, he could not have been admitted to the order, nor could he have effected any insurance:—

Held, nevertheless, he being a member in good standing at the time of his death, and his membership not having been attacked in his lifetime, his certificate of insurance was not avoided by this fact.

Statement.

THIS action was brought by the widow of the late William Cerri to recover from the defendants the sum of $1,000, the amount of a beneficiary certificate issued by them on the life of Cerri, the plaintiff being the beneficiary therein mentioned.

The defendants denied their liability, alleging that the deceased in his application for the policy and on his medical examination had wilfully and fraudulently deceived the defendants and thereby induced them to enter into the contract sued upon: first, by false statements in regard to his previous state of health, and particularly in regard to an illness which he had some eighteen months before the insurance was effected; and secondly, because he had stated he was born in 1847, when in reality he was born in 1846, and was over forty-five years of age, and under their rules he could not have been admitted to membership in the order if his true age had been known.

The plaintiff pleaded in reply that if there was an untrue statement as to the age, such statement was made in good faith and without any intent to deceive, and therefore did not vitiate the policy.

The action was tried before FERGUSON, J., and a jury, at the Toronto Assizes, on February 4th, 5th and 6th, 1895.

It appeared from the evidence that the deceased made an application to the subordinate lodge to become a member of that lodge, on the same day that he made the appli-

Statement.

cation for the insurance in question, and the defendants tendered in evidence not only the application for the insurance, but the application to become a member of the subordinate lodge, that is, to become a member of the defendants' order, on the bottom of which was printed a notice that no person who is over forty-five years of age could be admitted to membership in the order. The learned trial Judge, however, refused to admit this application in evidence, on the ground that the contract sued upon admitted that deceased was a member in good standing, and, the membership not being in question, it was wholly immaterial how deceased became a member so long as he was a member in good standing when he applied for the insurance and continued such till his death.

The following questions were submitted to the jury, and answered by them in regard to the age of deceased:—

1. Q. Was the statement made by the late William Cerri respecting his age and date of his birth in his application true or false? A. False.

2. Q. If such statement was false, was it false to the knowledge of the late William Cerri? A. No.

2*a*. Q. Was the statement made in good faith without any intention to deceive? A. Yes.

6. Q. Was the statement respecting the age and date of birth material to the contract? A. No.

After argument the learned Judge directed judgment to be entered for the plaintiff making a reduction in the amount to be recovered owing to the mistake made by the deceased in his age as provided by 52 Vict. ch. 32, sec. 6 (O.).

The defendants then moved before the Chancery Divisional Court to set aside the verdict and to dismiss the action, or in the alternative for a new trial, and the Court affirmed the verdict and findings of the jury on the first branch of the case as to health, etc., but on the second branch as to the age of the deceased, granted a new trial on account of the rejection of the evidence of the earlier application, on the ground that it bore on the question of the materiality of the answers as to age.

Statement.

The new trial was had before STREET, J., and a jury, at the Toronto Assizes, on September 25th, 1896, and the jury found that the statement as to age of the deceased was made by him in good faith and without intent to deceive.

During the course of the trial, the defendants having given evidence that the deceased was born in the year 1846 instead of the year 1847, as stated by him in his application, the plaintiff proposed to give in evidence (to shew Cerri's belief and his good faith), statements made by him during his lifetime to his wife and neighbours, and also written applications made by him to other insurance companies. This was objected to by the defendants as being hearsay and declarations made in the party's own interest and not part of the *res gestæ*. After argument, the learned Judge admitted the evidence, on the authority of *Fellowes* v. *Williamson*, Moo. & M. 306.

The plaintiff then moved for judgment in his favour.

Aylesworth, Q. C., for the defendants. 52 Vict. ch. 32 (O.), does not apply to benefit societies, and even if it did, by the defendants' rules a person cannot be admitted a member of the order if he is over forty-five years of age. Although the deceased was a member *de facto* he was not a member *de jure*, because being under forty-five was a condition precedent to membership: *Devins* v. *Royal Templars of Temperance*, 20 A. R. 259.

G. G. Mills, and *A. Mills*, for the plaintiff. 52 Vict. ch. 32 (O.), does apply. Section 3 defines "contract" and "company" as in R. S. O. ch. 167, sec. 2, sub-sec. (4) and (6). The conditions relied on to vitiate the contract were not set out in full on the face or back of the contract, and were not limited to cases where such condition is material, as required by sections 4 and 5: *Village of London West* v. *London Guarantee and Accident Co.*, 26 O. R. 520. The standing of the deceased cannot be attacked after his death, and therefore his membership and consequently his right to be insured are absolute: *Gravel* v. *L'Union St. Thomas*, 24 O. R. 1.

Judgment.

Street, J.

October 10th, 1896. STREET, J.:—

The deceased William Cerri obtained admission to the defendants' order by the untrue statement that he was born in 1847, and was therefore under forty-five years of age, the truth being that he was born in 1846, and was over forty-five years of age.

Upon the faith of this statement the defendants admitted him into their order and issued to him the insurance certificate sued on. Had his age been truly stated, he could not have been admitted into the order, because the 42nd law prohibits the admission of any person over forty-five years of age, and he could not have effected the insurance, because none but members of the order can be insured. If the statement as to his age had been made fraudulently, I think it is clear that the plaintiff could not have taken any benefit which resulted from the fraud, but the jury have found that it was made in good faith, and the question is whether the plaintiff is not entitled to the benefit of the 6th section of ch. 32 of 52 Vict. (O.). The defendants object that the section does not apply to benefit societies, and that even if it does, it does not help the plaintiff, because the laws of the defendants do not contemplate the insurance of persons over forty-five years of age. I think that I must overrule both these objections. In my opinion the 6th section above referred to applies to benefit society insurances as well as to the ordinary life insurance company policies. Chapter 167 of the R. S. O. did not apply to benefit societies, but it contains a definition of the word "contract" as applied to insurances which is adopted in ch. 32 of 52 Vict. without any limitation of its effect to the contracts of those companies which are within R. S. O. ch. 167, and that definition is wide enough to include the present contract. I see no objection to the plaintiff's recovery in the fact that no scale of premiums is published in the laws of the order, for the third section of the Act ch. 32 of 52 Vict. provides a means of arriving at the proper scale. The laws of the order do not prohibit the

insurance of members over forty-five years of age, but only the admission to the order of persons over that age. The evidence shews that the deceased was admitted into the order and appeared on their books as a member in good standing at the time of his death. Had his membership been attacked during his life time, he might have been expelled under the laws of the order; but a comparison of the terms of the application for the certificate of insurance with those of the certificate itself (into which they are incorporated by reference) shew, I think, beyond question, that some action on the part of the order is necessary to terminate a membership which has once been permitted, and the laws of the order provide tribunals for the trial of such questions. The deceased being then at the time of his death a member in good standing, and there being nothing in the defendants' laws depriving him of his rights, his certificate of insurance is governed by the considerations applicable to ordinary contracts of that nature, and is binding on the defendants, subject only to the reduction prescribed by the 6th section of ch. 32 of 52 Vict. in cases of a mistaken statement as to age. If the parties are unable to agree upon the amount payable according to this computation, I will hear evidence to ascertain it. Subject to this being ascertained, there will be judgment for the plaintiff with full costs of the action.*

Judgment. Street, J.

A. H. F. L.

* Subsequently evidence was heard and the amount fixed according to the Hm. table referred to in 52 Vict. ch. 32, sec. 3, at $958.25: (See Hm. table in Hunter on Insurance, pp. 251-2).

[DIVISIONAL COURT.]

THE TRUSTS CORPORATION OF ONTARIO
v.
CLUE ET AL.

Husband and Wife—Separate Estate—Property Received from Husband during Coverture—R. S. O. ch. 132, sec. 4, sub-sec. 4.

Where the only property possessed by a married woman, without a settlement, consisted of an interest in personal property given by her husband to her during coverture:—
Held, that this was separate estate liable for her debts.
Judgment of the County Court of Bruce, reversed.

Statement. THIS was an appeal from the County Court of Bruce in an action brought against Elizabeth Clue, a married woman, and Charles Clue, her husband, on a promissory note.

The note was signed by both defendants, and was made payable to one Emma Pratt, whose administrators the plaintiffs were.

The action was tried at Walkerton on 3rd July, 1896, before His Honour Judge BARRETT, without a jury, when *D. Robertson* appeared for the plaintiffs, and *A. Shaw*, Q.C., for the defendants.

It appeared that the husband was a labouring man who gave his wages to his wife, who managed the house, purchasing furniture, on one occasion a piano, and generally dealing with his money as she pleased. Subsequent to the making of the note the husband had received a legacy which was deposited in a bank in her name, and with which a house was purchased and conveyed to her. She borrowed money from the deceased, for which the note sued on was given, and she used the money in paying off a chattel mortgage on the furniture which had been signed by her. It did not appear, however, whether her husband had signed the chattel mortgage.

On this state of facts the Judge found that either solely or jointly with her husband she had an interest in the

property when she signed the note, but whether that interest was such separate property as would entitle the plaintiff to a proprietary judgment in this action depended on the construction to be placed on R. S. O. ch. 132, which he decided to be as follows:—"The only section of the Act which could make it separate property is sec. 4, sub-sec. 4 * *. Such a woman may hold all her personal property as if unmarried, excepting any property received by her from her husband during coverture. Statement.

All this woman's property has been received from her husband during coverture. She says she never earned any money, never received any from any one except her husband and Mrs. Pratt, and Mrs. Pratt's money she paid to the mortgagee of the furniture; that she never had any money of her own * *.

This woman then having no property except that received from her husband during coverture, even if married without a marriage settlement, would not have at the time of signing the note sued on any separate estate, and is, therefore, not liable upon the note."

From this judgment the plaintiffs appealed to a Divisional Court, and the appeal was argued on November 9th, 1896, before ARMOUR, C. J., and FALCONBRIDGE, J.

Aylesworth, Q. C., for the appeal. The trial Judge has really found the married woman had separate estate when he found she had an interest in the property, but he held it was not technically separate estate, because it was received from the husband during coverture. The whole evidence shews she owned the furniture even if bought with the husband's money; she bought it, she mortgaged it; and she says, "we both owned it." Subsequently she got his legacy, and she got the house. Section 4, sub-sec. 4, of R. S. O. ch. 132, only excepts property received from the husband as free from his debts and only applies to his creditors: *Sherratt* v. *The Merchants' Bank of Canada*, 21 A. R. 473.

Argument. *W. R. Riddell*, contra. Separate estate must be proved: *Leak* v. *Driffield*, 24 Q. B. D. 98. The finding is she had only an interest, not any separate estate. The evidence shews she never earned any money, but merely looked after the husband's for him, and made purchases. The property never was hers, and his creditors could reach it: *Barrack* v. *M'Cullough*, 3 K. & J. 110; *Messenger* v. *Clarke*, 5 Ex. 388; *Abraham* v. *Hacking*, 27 O. R. 431, and cases there cited; *Schaffer* v. *Dumble*, 5 O. R. 716.

ARMOUR, C. J., at the close of the argument delivered the judgment of the Court:—

We think that there is no doubt that the wife had separate estate in respect of which she could contract, and the learned Judge has in effect so found. But he was wrong in holding that she having received it from her husband during coverture was incapable of contracting with regard to it.

The appeal must be allowed with costs.

G. A. B.

RUSTIN V. BRADLEY.

County Court—Jurisdiction—Legacy under $200 Charged on Land—59 Vict. ch. 19, sec. 3, sub-sec. 13 (O.).

A County Court has jurisdiction under sub-sec. 13 of sec. 3 of 59 Vict. ch. 19 (O.), in an action brought by the legatee against the devisee of land, to recover a legacy of $5 charged on the land, as involving equitable relief in respect of a matter under $200.

The subject matter involved in such an action is the amount of the legacy and not the value of the land.

Judgment of the County Court of York varied.

Statement.

THIS was an appeal from the County Court of the county of York in an action brought by a legatee against the devisee of land on which was charged a legacy of $5.

The clause in the will by which the legacy was bequeathed was as follows:—

"I will and bequeath to my son Henry Bradley after my wife's death the east half of lot number 14 in the 5th concession township of Albion, containing 100 acres of land, and my son Henry to pay to my daughter Ann Lee the sum of $100 in one year after my wife's death, and to pay to my daughter Margaret Shore the sum of $100 in two years after my wife's death, and to pay to my daughter Sarah Elliott the sum of $100 in three years after my wife's death, and to pay to my daughter Jane Elizabeth Rustin the sum of $5 in one year after my wife's death."

The defendant resided at the town of Pictou, in the county of Pictou, in the Province of Nova Scotia, and the legacy and interest were demanded, but there being a dispute as to the interest this action was commenced.

An order giving leave to issue the writ for service out of the jurisdiction was made by one of the Junior Judges of the county and the writ was served and statement of claim filed when a motion was made in Chambers before His Honour Judge McDougall to set aside all the proceedings and dismiss the action, and an order was made to that effect on the ground of irregularity in the service of the writ and of want of jurisdiction in the County Court.

Argument.

From this order the plaintiff appealed to a Divisional Court, and the appeal was argued on October 12, 1896, before BOYD, C., and MEREDITH, J.

T. Hislop, for the appeal. The action was properly brought in the County Court. The legacy was charged on land and the Division Court had no jurisdiction. The defendant would not pay it although it was duly demanded. The County Court has jurisdiction under the equitable jurisdiction given by 59 Vict. ch. 19, sec. 3, sub-secs. 11 and 13 (O.). If the County Court had no jurisdiction the County Judge could have made no order, except under R. S. O. ch. 47, sec. 38, and 54 Vict. ch. 14, sec. 1 (O.), and 59 Vict. ch. 19, sec. 10 (O.): *Powley* v. *Whitehead*, 16 U. C. R. 589; *Re Cosmopolitan Life Association*, 15 P. R. 185.

D. C. Ross, contra. The action was improperly brought in the County Court. The land on which the legacy was charged exceeded $1,000 in value, so there was no jurisdiction under sub-sec. 10 of sec. 3 of 59 Vict. ch. 19 (O.). The plaintiff is not aided by sub-sec. 11, because it refers to enforcement by foreclosure, sale or otherwise of mortgages, judgments, liens or securities for debts; nor will sub-sec. 13 help him, as the case of legacies is specially provided for under sub-sec. 10. Even if a County Court had jurisdiction, the County Court of Peel, where the probate was granted, was the proper one: 59 Vict. ch. 19, sec. 10 (O.), and the plaintiff did not ask to have the cause transferred. In any event there is no appeal against the first portion of the order setting aside the proceedings, as that was only an interlocutory proceeding: R. S. O. ch. 47, sec. 42.

Hislop, in reply.

November 2, 1896. MEREDITH, J.:—

It was not contended that no appeal lies in a case of this kind: on the contrary, counsel for the respondent expressed the opinion that it did, when the point was sug-

gested during the argument. I shall assume, therefore, that it does, and deal with the case just as it was presented to us. Judgment. Meredith, J.

The action was dismissed on the ground of want of jurisdiction in the Court below to entertain it. No reasons seem to have been given for the conclusion reached by the learned County Court Judge; but probably he was of opinion that the case came under sub-section (10) of section 3 of the County Courts Act, 1896, and was brought in the wrong County Court—see section 10—or was not within the $1,000 limit of the sub-section (10), though there was not sufficient evidence before him to exclude jurisdiction on either of these grounds if the case were one within that sub-section.

I cannot think sub-section (10) applicable to a case of this kind; for here the plaintiff is not seeking payment of a legacy by the legal representative of the testator, or out of the testator's estate come to his hands to be administered, but is seeking to enforce payment of a charge, created on the land in question, out of the land: a case not intended to be covered, and not covered, as it seems to me, by the words of the sub-section: see section 4, 19*b*, and *Goldsmith* v. *Goldsmith*, 17 Gr., at p. 218.

Nor is sub-section (11) applicable, for this is not the case of a "lien or security for a debt."

But if the "subject matter involved" does not exceed $200 the case comes under sub-section (13), for the plaintiff is seeking equitable relief, and, by that sub-section, jurisdiction is given "in actions by any person seeking equitable relief in respect of any matter whatsoever where the subject matter does not exceed $200."

Then, does the subject matter involved exceed $200? Nothing but payment of this one claim of $5, with some trifling sum for interest upon it, is sought; and if ever a judgment were made giving relief against the land, it would be for the sale merely of a sufficient part to satisfy the amount claimed and interest, if any. How then can it reasonably be said that the whole value of the land is the

Judgment.

Meredith, J.

subject matter involved? I have no doubt that only the amount charged upon, and to be realized out of, the land, is the subject matter involved; and so the learned County Court Judge erred in his conclusion that that Court had not jurisdiction; in my judgment it has: see *McKay* v. *Magee*, 13 P. R. 106 and 146; *Forrest* v. *Laycock*, 18 Gr. 611, and *In re Scott, Hetherington* v. *Stevens*, 15 Gr. 683.

But the action is one of a most trivial character. There was no need, one might say no excuse, for the bringing of it; and there is none for continuing it, the owner of the land having been, and yet being, willing to pay the claim. And we are empowered and ought to make such order as appears requisite and just: The Law Courts Act, 1895, section 44, sub-section (4).

The order which the learned Judge might, and ought to, have made is one which I find was—substantially—made by the Vice-Chancellor Sir W. M. James, in the case of *Rudd* v. *Rowe*, L. R. 10 Eq. 610, namely, staying all proceedings in the action forever on payment of the small amount due to the plaintiff; and that clearly appears to me the order which, upon this appeal, it is requisite and just that this Court should make: and our discretion as to costs, here and below, will fitly be exercised by making no order as to them.

The order appealed against will be varied as I have indicated, and there will be no order as to costs of the proceedings in the Court below nor of this appeal.

BOYD, C.:—

I agree with the appellant that the County Judge had jurisdiction to deal with this case, and I agree with the judgment of my brother Meredith that his order should have been to end litigation on payment without costs of the nominal sum claimed in the action.

G. A. B.

REGINA V. LORRAIN.

Gaming—Lottery—Art Association—Pictures—Part Value in Money—Criminal Code, sec. 205, sub-sec. (b), sub-sec. 6 (c).

The defendant, an agent of an incorporated art society, was convicted by a police magistrate for that he did "unlawfully sell and barter a certain card and ticket for advancing, selling, and otherwise disposing of certain property: to wit, pictures or one-half the stated value of each picture in money by lots, tickets, and modes of chance":—

Held, that "property" in sub-sec. (*b*) of sec. 205 of the Code is not necessarily to be read "*specific* property," the essence of the enactment being in the disposal of *any* property by any mode of chance:—

Held, also, there being evidence of an option reserved to the society to give money instead of pictures to the winning tickets, this destroyed the privilege in favour of works of art under sub-sec. 6 (*c*) of the Code.

Conviction affirmed.

THIS was a motion to quash a conviction of the defendant by the police magistrate of the city of Toronto. Statement.

The defendant was an agent of the "Society of Arts of Canada (Limited)," and sold tickets entitling the purchaser to share in a distribution by lot among the ticket holders of paintings, drawings, or other works of art, in the following form:

Incorporated by Letters Patent. 27th February, 1893. Capital Stock, $100,000.

THE SOCIETY OF ARTS OF CANADA, Limited.

Head Office—Montreal, Canada.

Founded with a view to spread the taste for arts and to encourage and help artists.

10 Cts. For value received the bearer has the privilege to buy the works of art of this Society at a reduction of 5%, or is entitled to compete in the distribution authorized by law, of works of art of the Society, which will take place at the date mentioned on the back of this script. 85609.

After three months from said date, this script will not be held good, and any erasure, alteration or mutilation renders it void.

The Society of Arts of Canada (Limited). 85609.

On the back was stamped Distribution 29 April, 1896.

Statement. The charge was laid under sub-sec. (*b*) of sec. 205 of the Criminal Code, and the conviction was in the words: "For that he (the defendant) did unlawfully sell and barter a certain card and ticket for advancing, lending, giving, selling, and otherwise disposing of certain property; to wit, pictures, or one-half the stated value of each picture in money by lots, tickets and mode of chance, contrary to the form of the statute, etc."

The motion was argued on October 13th, 1896, before BOYD, C., and MEREDITH, J.

F. A. Anglin, for the motion. The evidence does not shew that the ticket sold by the defendant was for the "disposing of any property" under sub-sec. (*b*) of sec. 205 of the Code. "Property" means specific property. The holder of a winning ticket had no right to any specific property. The conviction is bad under *Regina* v. *Dodds*, *per* HAGARTY, C. J., at p. 393. The definition of "property" in the Code, sec. 3, sub-sec. (*v*), is no wider than it was under C. S. C. ch. 95, sec. 7, and the winner was not to be entitled to any specific picture, but only to a choice of one or more out of many pictures. The society reserved to itself the right to decide that the winners must take pictures, and only gave cash if deemed advisable in the interest of the society, and the pictures offered were the works of its members. In any event, as the society was incorporated, the sale of the tickets is specially excepted under sub-sec. 6 (*c*).

John Cartwright, Q. C., Deputy Attorney-General, contra. "Property" under the Code includes "every kind of real and personal property": sec. 3, sub-secs. (*v*) (i). The evidence shews the whole thing was a scheme. Paintings were purchased for the lottery prizes, and while the tickets did not announce that half the value of the prizes could be had in money, the ticket agents did, and the common practice was to give money, and the magistrate held the pictures were a mere pretence for the money scheme.

Anglin, in reply.

November 3, 1896. The judgment of the Court was delivered by Judgment. Boyd, C.

BOYD, C.:—

The conviction for that Lorrain did "unlawfully sell and barter a certain card and ticket for advancing, lending, giving, selling, and otherwise disposing of certain property, to wit: pictures, or one-half the stated value of each picture in money, by lots, tickets, and mode of chance," is complained of on two grounds:

First, that the evidence shews that no specific property was to be thus disposed of by chance.

And second, that the evidence shews the case to be within the exception extended to distribution by lot of works of art.

In support of the first objection the interpretation clause of the Code as to property is relied on, and the opinion of the Chief Justice expressed in *Regina* v. *Dodds*, 4 O. R., at p. 393, that the original of the present law contemplated and was limited to dealing with lotteries of specific lands, goods and chattels. The phrase in the Code 205 (*b*) is "disposing of any property," and the clause of interpretation as to property simply states that it includes "every kind of real and personal property." So that from the mere language of the Code I do not perceive that property in this connection is to be read "specific property." The essence of the enactment lies in the disposal of any property by any mode of chance, and it would be an easy evasion if the statute could be got rid of by designating no particular thing, although the winner would be able to exercise his choice among the available prizes offered. As said in *Taylor* v. *Smetten*, 11 Q. B. D., at p. 212: "It seems utterly immaterial whether a specific article was or was not conjoined with the chance, and as the subject-matter of the sale." See also *Commonwealth* v. *Wright*, 137 Mass. 250.

I may also quote the pertinent words of Mr. Justice

Judgment.

Boyd, C.

Montague Smith in *Regina* v. *Harris*, 10 Cox C. C. 352, 353, where he said the mischief struck at by the Lottery Act was where subscribers were induced to part with their money in the hope of obtaining not only their alleged shilling's worth, but something of much greater value, the right to which was to be ascertained by chance. The judgment of the Court in *Regina* v. *Dodds*, does not turn on the opinion expressed by the Chief Justice, and the case itself is not in point here.

The other objection rests on the evidence, and having read it, I cannot say that there is a lack of evidence to warrant the finding that money might be had instead of pictures by the winning tickets. The agent so represented on the sale of the ticket, and the agent at headquarters paid over money on request to various winners. This element destroys the privilege in favour of the dissemination of works of art, and lets in the vulgar non-æsthetic aspect of chance-venture for money common to these lottery undertakings.

Even if there was uncertainty in the getting of money on the tickets because of it being reserved for the option of the society, as was argued, that does not appear to be material. This would only intensify the precariousness of the whole transaction, and add another chance to the excitement of the investor: see *Morris* v. *Blackman*, 2 H. & C. 912, and *The State* v. *Shorts*, 3 Vroom (New Jersey) 398.

Altogether there appears to be no reason to disturb the conviction, and it stands affirmed with costs.

NOTE.—The proceedings in this matter were entitled in the High Court of Justice, but no comment was made thereon.

G. A. B.

HALL

v.

THE BOARD OF PUBLIC SCHOOL TRUSTEES FOR THE UNITED SCHOOL SECTION NO. 2 OF THE TOWNSHIP OF STISTED.

Public Schools—Guardian — Infant "Boarded Out" — Right to Compel Public School to Receive—54 Vict. ch. 55, sec. 40, sub-sec. 3 (O.).

The word "guardian" in section 40 of sub-sec. 3 of 54 Vict. ch. 55 (O.), the *Public Schools Act, 1891*, is used therein in its strict legal sense, and does not include a person resident in a school section, with whom and under whose care a boy under fourteen years of age has been placed by a benevolent association under a written "boarding-out undertaking" to clothe, maintain and educate him, and such person cannot compel the trustees of the school section to provide accommodation for and allow the boy to attend school as a pupil.

Statement.

THIS was an action brought by Frederick Hall by his guardian and next friend George Spiers against the above board of school trustees to compel them to allow him to attend the school of the said school section and if necessary to make such provision as would afford proper accommodation for him in said school.

The action was tried at Bracebridge on July 7th, 1896, before FERGUSON, J., without a jury.

The facts fully appear in the judgment.

E. Coatsworth, for the plaintiff. All public schools are free, and every person between the age of five and twenty-one years has the right to attend: 54 Vict. ch. 55, sec. 9 (1) (O.). All children between eight and fourteen years must attend: 54 Vict. ch. 56, sec. 2 (O.); and see also school regulations, sec. 5, sub-secs. 1, 3 and 5. Spiers is the guardian of Hall. He has received him in his house: 54 Vict. ch. 56, sec. 3 (O.), and a duty is imposed on him by that section, so he is entitled to the correlative right, and Hall is entitled to attend the school: *Taylor* v. *Timson*, 20 Q. B. D. 671. If so, the board must provide accommodation. Any person assuming the care or charge of a minor

Argument. becomes a guardian: R. S. O. ch. 142, sec. 2. See *In re Hutchison and The Board of School Trustees of St. Catharines*, 31 U. C. R. 274.

Shepley, Q. C., contra. The plaintiff does not bring himself within the meaning of sub-sec. 3 of sec. 40, 54 Vict. ch. 55 (O.), where the children, "whose parents or guardians are resident in the (school) section" are to be provided with school accommodation. Spiers is not his guardian: R. S. O. ch. 137, provides for the appointment of guardians and is exhaustive. Spiers does not come within it nor within R. S. O. ch. 142, sec. 2. The boarding out undertaking does not appoint Spiers guardian even if the agent of the home had any authority to appoint a guardian. The evidence shews the board has provided ample accommodation for two-thirds of the pupils whose parents or guardians reside in the section. 54 Vict. ch. 56 (O.) does not apply where the child has no right to attend the school: see sec. 44, particularly sub-sec. 4.

October 12, 1896. FERGUSON, J.:—

The defendants are the board of public school trustees of union school section number 2, in the township of Stisted, in the district of Muskoka.

The plaintiff Frederick Hall is of the age of about thirteen years, and resides in the school section with his next friend in the action, George Spiers, under the provisions of a document called a "Boarding out undertaking," which is as follows:—

"Undertaking made this 11th day of September, 1894, respecting the boy Frederick Hall, aged twelve, recently an inmate of Dr. Barnardo's Homes, and at present under the guardianship of the manager of said homes.

"I, George Spiers, senr., of the township of Stisted, in the county of Muskoka, in consideration of my being paid the sum of five dollars per month, do hereby engage with Alfred B. Owen, agent of the said Dr. Barnardo's Homes, to receive the said Frederick Hall as a member of my house-

hold, to bring him up carefully, kindly, and in all respects as one of my own family, to provide him with sufficient and proper food, clothing, washing, lodging and all necessaries, exclusive of medical attendance, to secure his regular attendance at school, providing all necessary school books and apparatus, and to take care that he duly attends church and Sunday school. Judgment. Ferguson, J.

"I do also hereby engage to communicate once every three months with the agent of the homes regarding the health and well-being of the said Frederick Hall, and to afford every facility to any duly authorized representative of the homes who may visit him to make such inspection as he may consider necessary.

"I further engage that I will in no case transfer the said Frederick Hall to any other person, or allow him to leave my custody without first informing the agent of the home and obtaining his sanction, and in the event of the boy leaving me without my consent I will immediately notify the agent, and use every reasonable effort to ascertain his whereabouts and to secure his return, and I further engage promptly to give up possession of him to any duly authorized person representing Dr. Barnardo's Homes.

(Signature of custodian) "GEORGE SPIERS."

George Spiers has living with him two boys other than the plaintiff, three in all, and all upon the same terms and in the same way, there being a similar document called an understanding in each instance and, as the evidence shews, there are in the school section fifteen boys all boarding out in the same way, there being in respect of each a document similar to the one above set forth.

The school-house in and for the school section was built several years ago, and was so constructed that it contained seating accommodation for fifty-two pupils or thereabouts. The evidence on the subject is not all alike, but there is not much difference between or amongst the witnesses. This continued and was the condition during the year 1895, and the plaintiff was a tolerably regular attendant at the school during that year.

Judgment.
Ferguson, J.

In October, 1895, the inspector was at the school, and in the presence of the teacher told one of the trustees (Silas Smith) that there were too many pupils for one teacher, and that the desks were too close together, intimating, as I understand from the evidence, that the school-room was not in accordance with the departmental regulations, and the teacher says that there was no remedy for this but the removal of some of the desks. After this a change was made by removing ten of the desks, each of which had been calculated to accommodate two pupils, so that the desk accommodation was thereafter sufficient for only thirty-two pupils. There was a slight insinuation that this change was made with the view of excluding from the school boys from the Barnardo Home, but I do not see any sufficient reason for thinking that it was not done on account of the intimation given by the inspector, and in view of the regulations then existing which did not exist at the time of the construction and equipment of the school-house.

The inside measurements of this school-house were given in the evidence, and according to these and the requirements of the regulations as to air-space, and desk room, there is room only for the accommodation of thirty-two pupils—perhaps a trifle less than is required for thirty-two—the regulations requiring that there should be at least twelve square feet desk room for each pupil, and that for each pupil there should be at least 250 cubic feet of air-space.

In the year 1895 there were forty-six children between the ages of five and sixteen years whose parents or guardians were resident in the school section, and in addition to these there were in the section the fifteen boys from Dr. Barnardo's Home under boarding out undertakings such as the one above set forth.

According to the Act 54 Vict. ch. 55, sec. 40, sub-sec. 3 (O.), it is the duty of school trustees (amongst other things) to provide adequate accommodation for two-thirds of the children between the ages of five and sixteen years whose

parents or guardians are residents of the school section, as ascertained by the census taken by the municipal council for the next preceding year, there being a proviso which excludes from the enumeration children of parents on whose behalf a separate school is established. This proviso has, however, no place in the present contention, there being no separate school. Judgment. Ferguson, J.

According to such census for 1895 the number of children between the ages was, as above stated, forty-six and the fifteen boys from Dr. Barnardo's Home.

Some of the officers in making their returns indicated upon the rolls that these boys from Dr. Barnardo's Home were children whose parents or guardians were resident within the school section. This is, however, as I think, not material, for these officers had, as I understand, no power to determine this question or matter.

The teacher being called, says that the average attendance in the school in the month of January, 1896, was twenty-seven pupils, and that the largest attendance in that month was somewhere in the thirties. The average in February, 1896, was twenty-six, and the largest attendance thirty-two. In March the largest attendance was thirty-three and the average thirty. In April, 1896, the largest attendance was thirty-five, and the average thirty-one. The teacher was sick in May. In June, 1896, the largest attendance was forty-one, and the average thirty-six. These figures the witness took from the roll or register, and they should be, as I think, considered reasonably accurate.

George Spiers says that he and all the others in the school section who had boys from Dr. Barnardo's Home sent them to this school on the first day of school in January, 1896. This appears to have been in pursuance and in accordance with instructions from Mr. Owen, the agent in Toronto of Dr. Barnardo's Home; and Spiers says that it is Owen on behalf of the home who is maintaining this action, and that he (Spiers) is indemnified by the home. Spiers brought and sent the plaintiff and the other

Judgment.
Ferguson, J.

boys he has from the Barnardo Home more than once to the school, but they were not received as pupils.

At the trial, counsel for the defence stated and admitted that the trustees, the defendants, did and do refuse to permit the plaintiff and other boys in his position to attend the school as pupils.

The plaintiff asks a mandatory order requiring the defendants to allow him to attend the proper school in the said school section, and to receive instruction thereat, and an injunction restraining the defendants from preventing him from attending the same (one of these prayers for relief would seem to be involved in the other).

2. An order requiring the defendants, if necessary, to make such provision as will afford proper accommodation to enable the plaintiff to attend school in the said school section. He also asks general relief.

On the part of the plaintiff it is contended that Spiers is the plaintiff's guardian, and this the defendants deny.

Spiers is not a parent of the plaintiff, nor is it made known whether the plaintiff's parents are living or dead. Spiers has not, so far as shewn, been appointed the plaintiff's guardian according to any of the provisions of ch. 137, sec. 10 *et seq.*, R. S. O., nor according to anything contained in ch. 142, R. S. O.

The definition (in law) given of the word guardian is: A person appointed to have the custody of the person and property of an infant, or of a person incapable of directing his own affairs.—Worcester, Nuttall, Webster.

In Wharton's Law Lexicon, 9th ed., the author says, under "Guardianship," that in modern times guardians may be said to be of six kinds—testamentary, maternal, customary, *ad litem*, by appointment of Chancery, and guardians in tort or by intrusion. I cannot see that Spiers is, as to the plaintiff, any one of these kinds of guardian.

I have also searched for definitions of, and kinds of guardians under the older law without being able to see that Spiers is guardian of the plaintiff, even if such older law were applicable at the present time.

It was contended that sec. 2 of ch. 142, R. S. O. applies to the case. I am, however, of the opinion that it does not. Even if it were assumed that the Barnardo Home or the agent, Mr. Owen, had power (I do not see that either of them had) to appoint a guardian for the plaintiff, it does not appear that Spiers was so appointed. The document (the boarding out undertaking) appears to me entirely insufficient for the purpose. Even if properly executed by one having such power, it contains clauses and provisions antagonistic to the powers and duties of a guardian being given to Spiers. Judgment. Ferguson, J.

I do not think that the Legislature, having so often dealt with the word "guardian," can be considered to have used it in a colloquial or any other than its legal sense in sec. 40, sub-sec. 3 of 54 Vict. (O.), above referred to, and on the case and contentions in respect of this subject, I am of the opinion that it does not appear that Spiers was or is the guardian of the plaintiff. On the contrary, of this I am of the opinion that it appears that Spiers is not the guardian of the plaintiff, and assuming this to be so, the other persons respectively resident in the school section who have boys from Dr. Barnardo's Home under similar boarding out undertakings are not the guardians of such boys respectively.

The defendants the trustees have furnished and provided so far as air-space and desk room have concern, for thirty-one or thirty-two pupils in their school-house. This number is as nearly as possible the two-thirds of the number forty-six, which is the number of children between the ages of five and sixteen years in the school section ascertained in the manner required. This seems, in these regards, a compliance with the requirements of the statute and regulations, and one does not see how upon legal grounds they can be required to do more. Whether they have or have not complied with all the departmental regulations is not a question here.

If the defendants were to include in their computation the fifteen boys from the home they would require to

Judgment.
Ferguson, J.

provide accommodation for forty-one pupils, but this, as already said, I do not think they were obliged or required to do.

When the Legislature enacted that the trustees should provide accommodation for two-thirds of the children between the ages of five and sixteen years whose parents or guardians were resident in the school section, it seems to me that this must have been done upon an estimate or conjecture that in all probability not more than two-thirds of these would be in attendance at any one time, and if so, this indicates what children are the children intended to be accommodated; those who would have the right, or, in case the accommodation proved insufficient, the first right, to embrace the benefit of the accommodation. Then, looking at the actual attendance in the school in January, February, March, April, and June, 1896, it is difficult to say that there was more or greater accommodation than was required for these children, or that the defendants acted unlawfully or improperly in the exercise of the powers, functions and duties of their office (as defined by the Legislature) in refusing to permit the plaintiff (he being a boy whose parents or guardians did not reside in the school section) to attend the school, and this, especially in view of the other fourteen boys from the home, similarly circumstanced, pressing at the same time for the exercise or enjoyment of the same alleged or claimed right.

It may, I think, be fairly said that the defendants had not, in fact, accommodation for him, the plaintiff, and as already said, I am of the opinion that, as a matter of law, the defendants were not bound to provide accommodation for him.

The plaintiff's counsel referred to 54 Vict. ch. 56, sec. 2 (O.), providing that all children between the ages of eight and fourteen years shall attend school, etc. This is what is called "The Truancy Act," and it provides that there shall be no penalties in cases in which there is not accommodation.

54 Vict. ch. 55, sec. 9 (O.), provides that all schools shall be free schools, and that every person between the ages of five and twenty-one years shall have the right to attend some school. This provision is extremely general, and cannot, as I think, be considered to interfere so largely as contended for with the working out of the particular provisions of the other enactments and the regulations. It certainly does not provide that the plaintiff or a child circumstanced as he is, shall have the right to attend this school. So far as it may conflict with other provisions, the rule that the general provision must give way to the special and particular provision does, I think, apply.

Judgment. Ferguson, J.

On the whole case, I am of the opinion that the plaintiff fails and that the action should be dismissed. I do not perceive any reason for withholding costs, and the dismissal will be with costs.

G. A. B.

[DIVISIONAL COURT.]

RE JENISON.

Water and Watercourses—Water Privilege—Owner of—Riparian Proprietor—Use and Improvement of Privilege.

The owner of land abutting on the chain reserved by the Crown for a public highway along the Kaministiquia river, who is also the licensee of the interest of the Crown in such reserve, is a riparian proprietor; and, as such, he is the owner, within R. S. O. ch. 119, of a water privilege which adjoins that part of the reserve lying between his land and the river:—

Held, however, that, proposing to place a dam at the upper end of such water privilege, such a reparian proprietor, not being the owner or legal occupant of any water privilege above it, was not a person desiring to use or improve his water privilege, and was, therefore, not entitled to an order to exercise the powers mentioned in the Act.

Statement. THIS was an appeal by the Kakabeka Falls Land and Electric Company (Limited) from an order of the Judge of the District Court of Thunder Bay, under the Act respecting Water Privileges, R. S. O. ch. 119, authorizing one Edward Spencer Jenison to exercise the powers mentioned in the Act, and to erect dams, take lands, and divert the waters of the river Kaministiquia at certain points in the township of Oliver and Paipoonge, in the manner mentioned in the judgment of the Divisional Court, to the alleged detriment of the appellants and others, whose lands lay lower down upon the river.

Section 1 of the Act is as follows:

Any person desiring to use or improve any water privilege, of which, or a part of which, he is at such time the owner or legal occupant, for any mechanical, manufacturing, milling, or hydraulic purposes, by erecting a dam and creating a pond of water, increasing the head of water in any existing pond, or extending the area thereof, diverting the waters of any stream, pond, or lake into any other channel or channels, constructing any raceway, or other erection or work which he may require in connection with the improvement and use of the said privilege, or by altering, renewing, extending, improving, repairing, or

maintaining any such dam, raceway, erection, or work, or any part thereof, shall have the right to enter upon any lands which he may deem necessary to be examined, and to make an examination and survey of the same, doing no unnecessary damage in performing such work, and paying the actual damage done, if any; and if, upon an application to the County Judge as hereinafter provided, he obtains authority, he shall be at liberty to take, acquire, hold, and use such portions of the said lands so examined as he may deem expedient for the completion, improvement, or maintenance of the water privilege and works in connection with the same. Statement.

The appeal was taken upon the following grounds:

1. That the appellants were riparian proprietors and the owners of a water privilege on the Kaministiquia river, which would be destroyed or damaged so as to be practically useless by the exercise of the powers and privileges granted to Jenison, the respondent.

2. That there was no jurisdiction to make the order, because:

(*a*) The respondent was not an owner or legal occupant of a water privilege within the meaning of the Act, and was not a person by whom the Act could be invoked.

(*b*) The powers applied for and granted by the order were not for the improvement or maintenance of an existing water privilege, but for the creation of a new one.

(*c*) The river Kaministiquia is a navigable river.

3. That there was no power to grant liberty to acquire and use the public highways or road allowances in the order mentioned, or to divert the waters of a navigable river, or to build a dam or weir across the same.

4. That the height of any dam authorized to be constructed should be specifically indicated in the order.

5. Even if there should, for any reason, appear to be jurisdiction to make an order, the jurisdiction should not have been exercised, under the circumstances appearing in evidence, in favour of the enterprise of one prospector, and

Statement. to the detriment of others who had already acquired a water privilege at the place in question and expended a large amount in connection with the acquisition and improvement of the same.

6. That the damages awarded to the appellants were inadequate.

The appeal was argued before a Divisional Court composed of ARMOUR, C. J., and STREET, J., on the 22nd October, 1896.

W. Cassels, Q. C., and *T. A. Gorham*, for the appellants, referred to *Regina* v. *Meyers*, 3 C. P. 305; *Gage* v. *Bates*, 7 C. P. 116; *McLaren* v. *Caldwell*, 6 A. R. 456, 9 App. Cas. 392; *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *North Shore R. W. Co.* v. *Pion*, 14 App. Cas. 612; *Giles* v. *Campbell*, 19 Gr. 226; *Cockburn* v. *Eager*, 24 Gr. 409; *McArthur* v. *Gillies*, 29 Gr. 223; *In re Burnham*, 22 A. R. 40.

Aylesworth, Q. C., for Jenison, cited *Giles* v. *Campbell*, 19 Gr. 226; *Cockburn* v. *Eager*, 24 Gr. 409; *Kirchoffer* v. *Stanbury*, 25 Gr. 413; 59 Vict. ch. 51, sec. 19 (O.).

J. R. Cartwright, Q. C., for the Attorney-General for Ontario, referred to the Mining Act, R. S. O. ch. 31, sec. 9, sub-secs. 2 and 4; *Elliot* v. *North-Eastern R. W. Co.*, 10 H. L. C. 333.

November 14, 1896. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The respondent, Jenison, is the owner of twelve and one-half acres of lot 19 in the 2nd concession of Oliver, abutting on the chain reserved by the Crown for a common and public highway along the Kaministiquia river, and has been granted a license to use the interest of the Crown in such chain reserve, which interest of the Crown is the ownership of the soil and freehold of the said chain reserve, subject to the right of the public to a way over it.

Such ownership and such license constituted, in my opinion, the respondent a riparian proprietor as to that part of the river Kaministiquia flowing past the said twelve and one-half acres and the said chain reserve. Judgment. Armour, C.J.

Adjoining the chain reserve lying between the twelve and one-half acres and the river, there is a water privilege, consisting of the fall in the river when in its natural state as it passes along the said chain reserve, and being the difference of level between the surface where the river first touches such chain reserve and the surface where it leaves it. And the respondent, being, as I have held him to be, a riparian proprietor in respect of such ownership and license, is the owner of such water privilege, and is a person owning a water privilege within the meaning of the Act R. S. O. ch. 119, and is entitled to the benefit of that Act in respect of such water privilege.

But the difficulty in the respondent's way is that he is not desiring to use or improve such water privilege, for he intends putting his dam at the upper end of it, and above the intended dam he does not appear to be the owner or legal occupant of any water privilege.

The respondent does not, therefore, bring himself within the Act, and the order must be set aside, but it will be without costs.

E. B. B.

HARRISON v. PRENTICE.

Seduction—Right of Action—Service—Pregnancy.

In an action for seduction, it appeared that the connection took place while the plaintiff's daughter resided at service with the defendant. There was no evidence of any possible loss of service by the father, and, although a slight illness occurred subsequent to the connection, there was neither birth of a child nor pregnancy:—

Held, that the father had no right of action, either at common law or under the Act respecting seduction, R. S. O. ch. 58.

Kimball v. *Smith*, 5 U. C. R. 32, and *L'Esperance* v. *Duchene*, 7 U. C. R. 146, followed.

Statement. ACTION for seduction.

Statement of claim:—2. The plaintiff's wife having died in the year 1882, leaving the plaintiff with two small children, the defendant, who is an uncle of the plaintiff's children, came to the plaintiff and offered to accept and provide for his daughter Mabel Irene Harrison, and to take her to his, the defendant's, home and provide for and protect her, for her services, whereby the plaintiff, by reason of the representations and promises made by the defendant, did, in or about the year 1893, allow his said daughter Mabel Irene Harrison to go and live with the defendant, and the defendant accepted the said Mabel Irene Harrison on the terms and conditions hereinbefore set forth.

3. The defendant, during the absence of his wife from his home, debauched, seduced, and carnally knew the plaintiff's daughter Mabel Irene Harrison, and while she was still an infant, whereby the plaintiff lost the services of his said daughter, and was otherwise greatly injured and damnified.

The plaintiff claims $5,000 for the damages sustained, and his costs.

Statement of defence:—2. The defendant denies the allegations contained in the statement of claim and puts the plaintiff to the proof thereof.

3. The defendant did not debauch, seduce, and carnally know the said Mabel Irene Harrison.

The action was tried before ROSE, J., and a jury, at Belleville, on the 4th November, 1896.

Argument.

At the close of the plaintiff's case, *W. B. Northrup*, for the defendant, moved for a nonsuit, on the ground that pregnancy was not alleged or proved, and referred to the following authorities: *Evans* v. *Watt*, 2 O. R. 166; *Mulligan* v. *Thompson*, 23 O. R. 54; *Cole* v. *Hubble*, 26 O. R. 279; Addison on Torts, 6th ed., p. 585; Pollock on Torts, Bl. ed., pp. 151, 155; R. S. O. ch. 58.

E. G. Porter, for the plaintiff, cited *Manvell* v. *Thomson*, 2 C. & P. 303; *Boyle* v. *Brandon*, 13 M. & W. 738; *Westacott* v. *Powell*, 2 E. & A. 525; *Evans* v. *Watt*, 2 O. R. 166; *Cole* v. *Hubble*, 26 O. R. 279; *Blagge* v. *Ilsley*, 127 Mass. 191, 34 Am. Rep. 361; *Vanhorn* v. *Freeman*, 6 N. J. L. 322; *Abrahams* v. *Kidney*, 104 Mass. 222, 6 Am. Rep. 220; *White* v. *Nellis*, 31 Barb. (N. Y.) 279.

Subject to the motion for nonsuit, the case was left to the jury, who returned a verdict for the plaintiff for $100 damages. Subsequently the learned trial Judge delivered the following judgment on the motion for nonsuit.

November 19, 1896. ROSE, J.:—

The statement of claim does not aver that pregnancy followed the acts of intercourse, and the evidence shewed that it did not.

The action was by the father of the girl alleged to have been debauched.

The result of the authorities seems to be that where the parent sues under the statute, there is an irrebuttable presumption that at the time of the wrongdoing the daughter did perform acts of service for the parent, and this although she was at the time of the seduction, as in this case, serving and residing with the defendant upon hire or otherwise.

If in the statute by "seduction" is meant simply carnal intercourse, although not followed by pregnancy, then this action is on the evidence maintainable, for evidence was given that there was such a disturbance of the system

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as in some slight degree might have created a disability to serve, for it would appear that under the statute whatever would render the girl less able to perform service would be evidence of damage, whether she was residing at home or with another. In other words, whatever facts would entitle the parent to recover if the daughter were dwelling at home at the time of the seduction would entitle him to recover although the daughter was at such time residing with the defendant or with another.

But does seduction in the statute mean simply carnal intercourse, not followed by the birth of a child or pregnancy?

In *Kimball* v. *Smith*, 5 U. C. R. 32, Robinson, C. J., spoke of "the seducing plaintiff's daughter whereby she became pregnant" as the "gist of the action," and the Court granted a new trial because, while the jury found for the plaintiff £50 damages, they said they did so on the ground that they were unable to agree as to who was the father of the child. And Jones, J., said: "It is certain that pregnancy does not always follow seduction, but I see no case, nor have I heard of any other than the present, where an action for seduction was attempted to be supported when pregnancy was not proved to be the consequence."

In *L'Esperance* v. *Duchene*, 7 U. C. R. 146, Robinson, C. J., said: "Few things, perhaps, could be less desirable, than that parties should be encouraged to suppose that an action for seduction could be maintained upon the mere proof of criminal intercourse, not followed by the birth of a child, nor even by pregnancy."

Draper, J., points out that the action in England was maintainable on two grounds, namely, the relation of master and servant; and secondly, the loss of service owing to the defendant's wrongful act; and that it made no difference in the action of trespass whether the trespass be for assault and battery, or for assault and criminal intercourse—adding "the *per quod servitium amisit* is the gist of the action; and case for seduction rests in England on precisely the same relation of master and servant, and the consequen-

tial injury by loss of service." This learned Judge held that to give a cause of action not only must pregnancy follow the act of intercourse, but, dissenting in this from the rest of the Court, that "when the daughter, when seduced, lived away from her parent, and continued absent from his family, so that the seduction caused no consequential damages by way of loss of service and of expense to the parent, the birth of a child must precede the bringing of an action." *Kimball* v. *Smith* was referred to as holding "that, not only must be proved that the defendant 'debauched and criminally knew' the plaintiff's daughter, but that her pregnancy was the consequence." His judgment calls attention to the wording of the statute as shewing the assumption that a child was born in consequence of the seduction: see p. 155 of the judgment. Judgment. Rose, J.

In *McIntosh* v. *Tyhurst*, 23 U. C. R. 565, Draper, C. J., calls attention to the pleading in *Irwin* v. *Dearman*, 11 East 24, where the declaration was for debauching the adopted daughter and servant of the plaintiff, by which he lost her service, with a second count simply for debauching his servant, *per quod*, etc.

In *Westacott* v. *Powell*, 2 E. & A. 525, Richards, C. J., pointed out (p. 526) that "at common law the action lies for the loss of service, and as soon as the plaintiff's servant becomes ill, in consequence of the wrongful act of the defendant, the right of action is complete." He stated that he concurred in the judgment of the Court of Queen's Bench in *Kimball* v. *Smith*, that the Legislature did not contemplate any other change in the law in relation to the action of seduction, than simply to enable the father, or, in the event of his death, the mother, to bring the action, though the daughter was not at the time residing with him or her.

The learned Chief Justice seems to have assumed that there must be pregnancy to found the action, for he accepts the law as laid down in *Kimball* v. *Smith*, and further said (p. 528): "I think in the case before us, if the jury were satisfied that the plaintiff's daughter was with child by the defendant," etc.

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Spragge, V.-C., (p. 531) was of the opinion that "the act of seduction is intended to be made the cause of action;" that (p. 532) "the cause of action was complete without the birth of the child, and without proof of sickness, or of a condition entailing loss of service;" and (p. 533) "that the birth of the child, being the natural result of that for which damages have already been recovered, can furnish no new cause of action."

Hagarty, J., (p. 533) said: "A father, I consider, acquires no right of action against a defendant merely for an illicit connexion with the daughter, not causing illness," etc., citing the observation of the late Sir J. B. Robinson in *L'Esperance* v. *Duchene*, above quoted. The learned Judge (Hagarty) was of the opinion that an action was "maintainable before the birth of a child, if proof be given of a pregnancy, proved to have caused illness or weakness, in any sensible degree affecting the ability of the servant to work for or serve the master, (*i. e.*, in nearly every case the parent). If any injury or sickness followed the act of intercourse creating the same disability, the cause of action would be equally complete." He adds: "I cannot accede to the proposition stated thus, that connexion, followed by pregnancy, gives a cause of action. Add to it the qualification suggested, as to disability, and I think it is law."

A. Wilson, J., was of the opinion that the statute gave a right of action for carnal knowledge alone without proof of service or loss of service.

Mowat, V.-C., was of the opinion that an action lay before the birth of a child, but that some evidence of damage, however slight, being sustained by the father, was still necessary.

The decision was that the action lay before the birth of a child, and *per Curiam* (Spragge, V.-C., and A. Wilson, J., dissenting), that the statute does not dispense with proof of pecuniary loss or damage. The fact was that pregnancy was proved, so the question raised here did not squarely arise.

In *Smart* v. *Hay*, 12 C. P. 528, at p. 530, Draper, C. J.,

referred to *Kimball* v. *Smith* as overruling the dictum, "'even if it (the evidence) went to establish that the defendant was not the father of the child' in *McMahon* v. *Skinner*, 2 U. C. R. 272." Judgment. Rose, J.

He also referred to *L'Esperance* v. *Duchene* as being "an important decision * * that the cause of action is complete if there be seduction followed by pregnancy, though the child is still unborn." Again, at p. 531, "when, by the pregnancy of the daughter, the cause of action became complete."

In *Evans* v. *Watt*, 2 O. R. 166, Armour, J., at pp. 170-1, states what it is necessary to allege and prove, viz., "the relationship of father and daughter, her seduction by the defendant, that pregnancy resulted from such seduction, and that the defendant is the father of the child of which she is so pregnant, or of which she has been delivered, as the case may be." Again: "The seduction followed by pregnancy gives the father the right of action, which may be brought as soon as pregnancy has resulted from the seduction."

In *Cole* v. *Hubble*, 26 O. R. at pp. 281-2, Meredith, J., discusses the right of action at common law, and is of the opinion that connexion followed by any sickness, whether caused by pregnancy and childbirth or not, would give a right of action.

In Addison on Torts, 6th ed., p. 585, it is said: "Incontinence on the part of a young woman cannot be made the foundation of an action against the person who has tempted her and deprived her of her chastity; but, if she is living with her parent at the time of the seduction, and the seduction is followed by pregnancy and illness, whereby," etc., "an action is maintainable against the seducer." The author refers to *Satterthwaite, Widow*, v. *Dewhurst*, 4 Doug. 315 (A.D. 1785). The head-note is: "No action will lie for debauching a daughter, though the mother maintain her and her child during her lying-in, unless on the ground of the loss of service."

In *Evans* v. *Watt*, 2 O. R. at p. 168, Hagarty, C. J.,

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quotes from the judgment of Richards, C. J., in *Westacott* v. *Powell*, 2 E. & A. at p. 528, that what our Legislature meant was "simply to make the service, to whomsoever rendered, in law be considered service, to the parent, and to place the law in this country in all cases just where it is in England."

Where, as in this case, the connexion took place while the daughter resided at service with the defendant, and there was no evidence of any possible loss of service to the father, and there was neither birth of a child nor pregnancy, it seems to me, having regard to the cases of *Kimball* v. *Smith* and *L'Esperance* v. *Duchene*, which have not, as far as I have seen, been in any way overruled, that there is no right of action either at common law or under the statute. Not at common law, because, apart from any other reason, no loss of service was proved; nor under the statute, because there was no pregnancy.

In view of the finding of the jury and the fact that shortly after the alleged connexion, and while in the service of the defendant, he being her uncle, the daughter became with child by the defendant's son, I think I may, while feeling bound to grant the motion for nonsuit, do so without costs.

E. B. B.

GUNDRY V. JOHNSTON.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Composition Arrangement—Distinction—R. S. O. ch. 124, sec. 13—Penalty.

An instrument in writing whereby a debtor transfers all his assets to an assignee for the purpose of paying a fixed sum on the dollar to the creditors, and of securing to the debtor the enjoyment of the residue, is an arrangement by way of composition, and not an absolute assignment under R. S. O. ch. 124, although stated in the instrument to be under that Act; and an action for penalties against the assignee for not advertising and registering such an instrument, pursuant to that Act, will not lie.

Statement.

THIS was an action brought by W. H. Gundry, on behalf of himself and all the creditors of Patrick O'Dea, against W. R. Johnston, to recover $10,000 for penalties.

The statement of claim alleged:

(1) That on the 20th April, 1895, one Patrick O'Dea, a retail merchant, made an assignment under R. S. O. ch. 124 of his stock-in-trade and other chattel property to the defendant, for the general benefit of creditors.

(2) That no notice of such assignment had ever been published in the Ontario *Gazette*, or in a newspaper circulating in the county in which the property assigned was situated, nor had any counterpart or copy of such assignment been registered in the office of the clerk of the County Court of the county in which O'Dea resided at the time of the execution of the assignment, as required by R. S. O. ch. 124, whereby the defendant became liable to the plaintiff (under sec. 13) to a penalty of $25 a day for each and every day which passed after the issue of the number of the newspaper in which the notice of said assignment should have appeared, until the same should be published; and to a like penalty of $25 for each and every day which should pass after the expiration of five days from the execution of the assignment until the same should be registered.

By his statement of defence, the defendant (1) denied all the allegations of the statement of claim.

(2) Alleged that the assignment made by O'Dea was not

Statement.

an assignment under R. S. O. ch. 124, nor was it intended to be such an assignment, but, on the contrary, was intended by O'Dea to be an assignment of certain of his property for the purpose of procuring a composition from his creditors at the rate of seventy-five cents on the dollar of his liabilities, and, after the payment of such composition, the balance of the assets was to be handed over to him, and it was by the deed of assignment declared, or intended to be declared, that the same was not a transfer under the Act.

The action was tried before BOYD, C., without a jury, at Goderich, on the 16th November, 1896. The facts shewn in evidence are sufficiently stated in the judgment.

Garrow, Q. C., and *Dancey*, for the plaintiff.
Watson, Q. C., for the defendant.

November 21, 1896. BOYD, C.:—

There are various methods by which arrangements can be made between a debtor and his creditors for the satisfaction of their claims. As put by Wetherfield, "Composition Deeds," p. 33: "A deed of assignment is the simplest that can be made, being nothing more than an absolute conveyance of the debtor's estate and effects for the equal benefit of his creditors." That is evidently the form of instrument which is contemplated by the provisions of the R. S. O. ch. 124. The mere execution of an assignment and the transfer of the assets does not release the debtor, in the absence of a release clause assented to by the creditors: *Watson* v. *Johnstone*, 6 Bell Sc. App. 245: and the Ontario statute does not provide for the insertion of such a clause, for that would be a provision peculiar to jurisdiction in bankruptcy, which is not intended by this legislation: see the usual form of assignment in Mr. Cassels's useful manual, p. 33.

As contrasted with an assignment, there is the deed of

composition, which provides for the payment of a composition to the creditors, *i.e.*, something less, usually, than the full amount of their claims. This is always based upon an agreement to discharge the debtor upon due payment of the composition: Lawrance "Deeds of Arrangement," p. 4; and see the contrast as to the two instruments at p. 14.

As contrasted, the essential distinction of a statutory assignment for the benefit of creditors is that all the assets go to all the creditors till they are paid in full—then the surplus, if any, to the assignor; while in the case of a composition deed the creditors agree, upon receiving a smaller sum in full satisfaction of larger claims, to discharge their debtor. Here, though all the assets are transferred, it is only for the purpose of paying seventy-five cents on the dollar to the creditors and of securing to the debtor the enjoyment of the residue. I think, therefore, that this document styled "memo. of agreement" partakes of the character of an arrangement by way of composition rather than of a transfer by way of absolute assignment under the Act. It is in these words:—

Memo. of Agreement made the 20th day of April, 1895.

Between PATRICK O'DEA, of Goderich,

The first party,

and

W. R. JOHNSTON, of Toronto,

The second party.

Whereas the first party is unable to pay his liabilities as they mature, and he is desirous of making arrangements for the liquidation of his indebtedness by placing his assets in the hands of the second party to that end.

Witnesseth that the first party transfers and hands over unto the second party all his stock-in-trade and other chattel property in the store on Market square, Goderich, now occupied by the first party, * * and all his other property whatsoever and wheresoever situate.

The second party is to submit to the creditors of the first party an offer of seventy-five cents on the dollar, and

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if same is accepted, the stock is to be run off by the first party for the second party as speedily as possible, and all over what pays seventy-five cents on the dollar is to belong to the first party, he running off the stock; the first party is to get $10 per week and to make weekly returns of all sales.

If the second party concludes that it would be better to sell out the stock at once, he may determine to do so, in which event it is to be sold as the second party may direct, the first party submitting the same entirely to the good judgment of the second party; the proceeds when sold to be applied on the seventy-five cents on the dollar among the creditors *pro rata*.

The object to be gained is to realize seventy-five cents on the dollar and thus enable the first party to get a discharge.

This transfer of assets is under R. S. O. 1887 ch. 124 and amendments.

In presence of J. PARKES. } P. O'DEA.

The plain meaning of these provisions is that the assignee shall take the assets in order to pay the creditors seventy-five cents on the dollar of their claims; that this shall be accepted as payment in full, the assignor discharged from further liability, and that the surplus (after paying the seventy-five cents) shall go back to the assignor. If the creditors are willing to accept this composition, the whole transaction goes to completion on that footing; if they decline, or any one declines, the whole thing is inoperative, and may be attacked as a fraud upon creditors: *Cooper* v. *Thornton*, 1 E. & B. 544. The proper method of ascertaining whether the instrument is under R. S. O. ch. 124 is to regard it as a whole: *Smith* v. *Cooke*, [1891] A. C. at p. 301; and so regarded, the last clause relied on by the plaintiff appears to be nugatory, if not insensible. The announcement that this transfer of assets is under R. S. O. 1887 ch. 124 and amendments will not make it to be so, if in legal effect it does not fall within the scope of that enact-

ment. I think that the true explanation of this clause is supplied by the evidence of Mr. Parkes, the draftsman, who says that these last words were added after the rest of it had been drawn, and after the lapse of some time, when just before signature he hurriedly inserted the words, to shew it was not under the Act; but, as sometimes happens, the emphatic word "not" was dropped in the act of writing.

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It is proved that all the creditors agreed to accept the seventy-five cents on their claim, and that the sale and realization of the assets went forward on that condition, although in the outcome much less has been obtained out of the estate.

The penalties under sec. 13 are to be exacted only in case the assignment is for the general benefit of creditors under the Act, and I do not find that the instrument can be so classed. I have not found it needful to consider the effect of the Statute of Limitations, but dismiss the action with costs on the main point.

E. B. B.

[DIVISIONAL COURT.]

HARGRAVE v. ELLIOT ET AL.

Bankruptcy and Insolvency—R. S. O. ch. 124, sec. 7—Creditor—Right of Action—Fraudulent Sale of Assets of Estate—Assignee.

Section 7 of the Assignments Act, R. S. O. ch. 124, applies only to transactions made or entered into by the insolvent; and a creditor of the insolvent has a right of action in his own name against the assignee to set aside a sale by the latter of the assets of the estate, as fraudulent. *Reid* v. *Sharpe*, *post* p. 156, *note*, followed.

Statement. THIS was an action brought by John H. Hargrave against R. W. Elliot and Henry Barber, assignee of the estate of George E. Gibbard, to set aside a sale of the assets of the estate by the defendant Barber to the defendant Elliot.

The statement of claim alleged:

(2) That the plaintiff was a creditor of George E. Gibbard, who, on or about the 9th March, 1896, being insolvent, made an assignment of all his estate and effects to the defendant Barber, for the benefit of his creditors, pursuant to R. S. O. ch. 124.

(5) That at the time of the assignment, the sheriff was in possession of a certain stock of goods under the plaintiff's execution upon his judgment against Gibbard, and that the defendant Elliot, at the time of the seizure by the sheriff, held a chattel mortgage thereon which had ceased to be valid as against the plaintiff and other creditors of Gibbard by reason of its non-compliance with the Bills of Sale Act and the failure of the defendant Elliot to renew the same.

(6) That at the time of the assignment, the defendant Elliot was a creditor of Gibbard to the amount of $2,373.83.

(7) That on the 20th March, 1896, a meeting of the creditors of Gibbard, convened by the defendant Barber, was held.

(8) That the defendant Elliot was represented at the

Statement.

meeting by one Edwards, a bookkeeper in his employment, and that Elliot and one Scales, a creditor, were appointed inspectors of the estate.

(9) That by virtue of his position as an inspector, and by his vote as representing the largest creditor, Edwards, acting for and in the interest of the defendant Elliot, procured the defendant Barber, at the meeting, to sell the estate of Gibbard, consisting of the stock of goods referred to, valued at $2,159.02, to the defendant Elliot, at twenty-five cents on the dollar.

(10) That, notwithstanding the protest of the representative of the plaintiff at the meeting that the stock should not be disposed of without being advertised, or without a proper effort being made to obtain a fair price therefor, the sale to the defendant Elliot was completed and a bill of sale thereof executed to him by the defendant Barber, the total amount received therefor being $539.

(11) That the stock so purchased by the defendant Elliot was, on the 28th April, 1896, resold by him to Gibbard for $2,207, and was worth that sum.

(12) That the sale was at a price much below its value, and what could have been readily obtained for it at a public sale, and the sale and resale were parts of a scheme concocted by the defendants and Gibbard at the time of the assignment, and in pursuance of which the assignment was made and the sale carried out in fraud of the plaintiff and other creditors of Gibbard.

(13) That the sale to the defendant Elliot was brought about by the vote of Elliot exercised by Edwards, and through the influence of Edwards as inspector of the estate, to which office he had been elected by his own vote.

(14) That the defendant Barber, as a trustee for all the creditors, acted fraudulently, wrongfully, and improperly in making the sale.

The plaintiff claimed:

That the sale from the defendant Barber to the defendant Elliot be set aside, and the defendant Barber ordered to sell the estate for the benefit of the plaintiff

Statement. and other creditors of Gibbard, or, in the alternative, that an account be taken of the profit made by the defendant Elliot out of the purchase by him, and that he be ordered to pay such profit over to the defendant Barber, and that the defendant Barber be ordered to distribute the same ratably among the creditors of Gibbard, including the plaintiff.

The defendant Elliot by his statement of defence denied the allegations of the statement of claim, and alleged that if any cause of action existed, it was vested in the assignee by virtue of sec. 7 of R. S. O. ch. 124, and that the plaintiff had no *locus standi* to prosecute this action without permission as provided for by sub-sec. 2 of sec. 7, and that such permission had not been granted.

The defendant Barber denied all charges of fraud, alleged that the sale was made in good faith and for the best price obtainable, and also set up the same defence as the defendant Elliot.

Section 7 of the Act respecting Assignments and Preferences by insolvent persons is as follows:

(1) Save as provided in the next succeeding sub-section the assignee shall have an exclusive right of suing for the rescission of agreements, deeds and instruments or other transactions made or entered into in fraud of creditors, or made or entered into in violation of this Act.

(2) If at any time any creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the trustee, under the authority of the creditors or inspectors, refuses or neglects to take such proceeding, after being duly required so to do, the creditor shall have the right to obtain an order of the Judge authorizing him to take the proceedings in the name of the trustee, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee, as the Judge may prescribe, and thereupon any

benefit derived from the proceedings shall belong exclusively to the creditor instituting the same for his benefit, but if, before such order is granted, the assignee shall signify to the Judge, his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceeding, if instituted within such time, shall appertain to the estate. Statement.

The action came on for trial before FALCONBRIDGE, J., at Toronto, on the 27th October, 1896. No evidence was taken.

Argument was heard as to the *locus standi* of the plaintiff.

Kilmer, for the plaintiff.

Delamere, Q.C., and *Reesor*, for the defendant Elliot.

F. J. Travers and *J. A. Mills*, for the defendant Barber.

FALCONBRIDGE, J., was of opinion that the objection taken was entitled to prevail, and dismissed the action.

The plaintiff appealed from this judgment, and his appeal was argued before a Divisional Court composed of MEREDITH, C.J., and ROSE, J., on the 16th November, 1896.

Kilmer and *W. H. Irving*, for the plaintiff. We submit that this case does not fall within sec. 7 of the Assignments Act. This is a transaction arising out of the administration of the trust, and we are not dependent upon the statute. The exact point was decided by this Court in *Reid* v. *Sharpe* (not reported). We refer also to *Morrison* v. *Watts*, 19 A. R. 622; *Segsworth* v. *Anderson*, 23 O. R. 573, 21 A. R. 242.

Delamere, Q.C., for the defendant Elliot.

F. J. Travers and *Keyes*, for the defendant Barber, referred to *Campbell* v. *Hally*, 22 A. R. 223.

Judgment. Meredith, C.J.

MEREDITH, C. J. (at the close of the argument) :—

The case seems very clear. The trial Judge held that the action should be brought by the assignee or by some creditor, in the name of the assignee, under sub-sec. 2 of sec. 7. With great respect, we are of opinion that sec. 7 does not affect the case. Any one who looks at the history of the enactment will perceive the object which the Legislature had in view in passing it. It was to remedy the inconvenience which arose from numerous actions being brought by creditors to avoid transactions entered into by the insolvent debtor. The section uses the words "made or entered into in fraud of creditors." That means, made or entered into by the debtor in fraud of creditors. It is unnecessary to express any opinion as to the extent to which sub-sec. 2 applies. The plaintiff's pleading speaks of the transaction in question being in fraud of the plaintiff and other creditors of Gibbard. The language is inartificial; it should have been in fraud of the plaintiff and other persons for whom the defendant Barber was trustee. The action is, in effect, by a *cestui que trust* against his trustee to cancel an improvident sale of the trust estate. We think the plaintiff should be allowed to go into his case, whatever the result may be.

The appeal should be allowed with costs, the judgment set aside with costs, and a new trial ordered.

ROSE, J. :—

I am of the same opinion as I was in 1892, when I delivered the judgment of the Court in *Reid* v. *Sharpe*,*

* In *Reid* v. *Sharpe* the judgment of the Common Pleas Division was delivered on the 27th February, 1892, by ROSE, J. The following portions are pertinent to the question above discussed.

ROSE, J.—This was an action tried before Armour, C. J., without a jury, at Toronto, in January, 1891, when judgment was given ordering the lands to be sold, the money paid into Court, and the costs of the plaintiffs, between solicitor and client, to be paid thereout, and the balance to be paid to the assignee Sharpe for distribution among the

and I refer to what I said there. I agree to the learned Chief Justice's disposition of this appeal. Judgment. Rose, J.

E. B. B.

[DIVISIONAL COURT.]

PAYNE V. CAUGHELL ET AL.

Way—Public Road—Municipal Corporation—Power to Lease to Private Person.

Prior to the 13th May, 1851, the London and Port Stanley road belonged to the Government of Canada, as one of the public works of that Province. On that day the Government, by an order-in-council or proclamation, issued under the authority of 12 Vict. ch. 5 and 13 & 14 Vict. ch. 14, granted the road, for valuable consideration, to the county of Middlesex. The part of the road lying within the limits of the county of Elgin afterwards fell into the hands of the corporation of that municipality, who, on the 16th February, 1857, leased it to the defendants' predecessor or assignor for the term of 199 years :—

Held, that the county corporation had the power to sell or lease the road to any grantee or lessee, being a local authority or company, mentioned in the above statutes, and the further power to let to farm the tolls on the road, but had not the power to lease or sell the road, or any part of it, to a private person; and therefore the defendants had no title to the road, and were not justified in obstructing it by bars and exacting tolls upon it.

THIS was an action brought by James Payne, on behalf of himself and all other subjects of Her Majesty who used or were entitled to use a road called the London and Port Stanley road, to have it declared that the defendants had no right or authority to exact tolls on the road, or to Statement.

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creditors, the plaintiffs to rank upon the estate for the amount of the judgment and executions therein referred to.

It appears that the plaintiffs Reid & Co. obtained judgment against one W. J. Trimmer, and issued execution thereon; that subsequently they obtained an attaching order dated the 7th December, 1888, attaching all debts due or accruing due from Daniel McMinn. On the 27th December, 1888, one Hogaboom, manager for the plaintiffs, was appointed receiver in the interests of the plaintiffs, and to recover the amount of the plaintiffs' claim; and subsequently an order was made directing McMinn to pay to Hogaboom the moneys which had been attached under the attaching order referred to; and that order not having been obeyed, Hogaboom, on the 23rd May, placed executions in the hands of the

Statement.

obstruct it by placing toll-bars on it; for an order directing the defendants to remove these obstructions; for an injunction restraining the defendants from hereafter demanding or exacting tolls for the use of the road; for damages; and for a return of tolls paid by the plaintiff on the 12th October, 1895. The defendants' alleged right to the road and to exact tolls from those using it was based upon a lease from the corporation of the county of Elgin to one Hepburn, whose assigns the defendants claimed to be, of the road and all the appurtenances, etc., for 199 years. The facts are fully stated in the judgment of FERGUSON, J.

The action came on for trial at St. Thomas at the Spring Sittings, 1896, before MEREDITH, C. J., who, after hearing the evidence, was of opinion that the case was not ripe for judgment until the corporation of the county of Elgin should be added as parties defendant, and made an order or direction that the plaintiff should add the corporation.

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sheriff of the county of Simcoe to levy from the lands of McMinn $257.59. On the 25th February, 1889, after the attaching order, but prior to the subsequent proceedings, McMinn assigned to the defendant Sharpe, under the statute, for the benefit of creditors. After McMinn had been served with the attaching order, he conveyed to the defendant Sharpe, who conveyed to the defendant Ellen McMinn, wife of the defendant Daniel McMinn, the lands and premises in question; and thereafter, by proceedings in this action, a decree was made setting aside these conveyances and declaring them fraudulent and void as against creditors. Sharpe was a party, and, as found by the learned Chief Justice, he was the suggestor and adviser of the impeached transaction. The defendant Sharpe acted under the assignment, but concealed from the knowledge of the creditors the fact of the impeached conveyances, and denied the plaintiffs' right to rank upon the estate. After the judgment herein, which is now attacked, the lands were sold and the moneys paid into Court.

I see nothing to quarrel with in the finding of the learned Chief Justice that this suit is properly constituted. I think that upon the orders, as they stood, the plaintiffs were entitled to have the relief they sought, and that the judgment setting aside the fraudulent conveyances ought to stand. I do not think we need be careful to consider all the antecedent steps, but, upon the history of the case, which I have not very fully set out, I do not see how Sharpe or McMinn can complain of the execution which was issued against McMinn subsequently to the assignment. I do not think that McMinn, by assigning to Sharpe, could defeat the

Neither the plaintiff nor the defendants, however, desired that the corporation should be added as parties, and they therefore consented and agreed to have the action reheard before a Divisional Court, upon the evidence already taken, as upon a motion for judgment upon a special case. Statement.

The case was accordingly argued before a Divisional Court composed of BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 8th and 9th April, 1896.

James A. McLean, for the plaintiff. This road was opened by the Quarter Sessions for Middlesex in 1822, as a road to be used in lieu of the town line between Yarmouth and Southwold. It was laid out under 50 Geo. III. ch. 1, sec. 3, and under sec. 35 of that Act the freehold became vested in the Crown. In 1842 it was assumed by the Government of Canada as a military road, under 4 & 5 Vict. ch. 38. Under order-in-council dated 13th May,

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right of the plaintiffs to continue their proceedings under the attaching order; and the judgment thus obtained is evidence of the rights of the parties which the Court was justified in acting upon in making a decree setting aside the fraudulent conveyances.

The plaintiffs—for I do not distinguish between Reid & Co. and the receiver Hogaboom, for the purpose of considering the rights of Reid & Co.—having what I think was a valid judgment against McMinn, and having proceeded, as I think, quite regularly to have the fraudulent conveyances set aside, the property was available for the benefit of creditors.

I agree to what the learned Chief Justice has said as to the facts of this case taking the transaction out of the provisions of sec. 7 of R. S. O. ch. 124. I should be sorry to think that the Court would be practically powerless to investigate a transaction of this sort, where the assignment for creditors has been to a fraudulent transferee of the debtor's estate, and where the assignee had concealed from the creditors the fact of the existence of such estate. I think that the parties complaining had a perfect right to bring all the parties before the Court and have their rights as to such property investigated and the fraudulent transaction set aside. But it is not necessary, perhaps, to give a decided opinion upon such question, having regard to the history of the proceedings in this case. I therefore find that here was a valid decree setting aside the fraudulent conveyances, and that that property was by the action of the plaintiffs made available for the creditors of McMinn, among whom the plaintiffs are to be ranked by reason of the proceedings referred to. The appeal, therefore, of Sharpe as against the decree thus far fails.

Argument.

1851, it was conveyed by the Government of Canada to the county of Middlesex. The order-in-council is published in the Canadian *Gazette*, 1851, as No. 10988. The county of Elgin became separated from the county of Middlesex on the 1st January, 1853. On the 16th February, 1857, the county of Elgin leased the road to Robert Hepburn for 199 years. On the 25th January, 1866, the county of Elgin passed by-law No. 138, casting upon the local municipalities the burden of maintaining all town line roads. By 9 Vict. ch. 37 power is given to the Governor-in-Council to assume any public highway as a provincial work. Section 12 enacts that the Governor-in-Council shall have power, by proclamation, to impose and authorize collection of tolls and dues, and, from time to time, to alter the same, provided they should not exceed the amount specified in schedule B. to the Act. No proclamation appears to have been issued authorizing the collection of tolls on this road. Section 18 gives the Governor-in-Council power to enact, from time to time, regulations for the management, etc., of any public works and for the collection of tolls thereon, and enacts that such regulations shall be published in the *Gazette*. The collection of tolls is justified by the defendants under by-law No. 37 of the county of Elgin, passed on the 27th February, 1856, but neither this by-law nor the schedule of tolls therein authorized was published in the *Gazette*. The plaintiff contends: (1) That the county of Elgin never had any right or authority to lease the road to the defendants. (2) That if they had such authority, they should have passed a by-law authorizing the execution of the lease. (3) That the amount of tolls collected being largely in excess of the amount required to maintain the road, the collection is excessive and bad as to the whole. Under 12 Vict. ch. 5 the Governor-in-Council had power to dispose of the road, only to a municipality or a joint stock company. The county could not acquire any greater rights than the Government had, and in any event the defendants could have power to collect only such tolls as might have been decided upon and published in the

Gazette. The Act 12 Vict. ch. 5 is amended by 13 & 14 Vict. ch. 14. The 7th section of the order-in-council refers to "assigns," but that must be read as limited to "successors," which word alone is in the *habendum*. The Municipal Act of 1849, 12 Vict. ch. 81, sec. 41, sub-sec. 1, gave municipalities power to pass by-laws either to buy or sell real or personal property. Where one mode of disposition of the property of a corporation is pointed out, it is restricted to that mode: see Am. & Eng. Encyc. of Law, vol. 15, p. 1064. The intention of the Legislature in making the grant to the county of Middlesex was that only sufficient toll should be exacted from the public to maintain the road in repair. That was all the power the Governor-in-Council had under 9 Vict. ch. 37, and it is not fair to assume that the intention of the Legislature was that these roads should be placed in the hands of corporations or individuals to make large sums of money out of. The intention in opening the road was to benefit the whole country, not to encourage speculation. Argument.

Laidlaw, Q. C., for the defendants. By sec. 6 of the order-in-council of the 13th May, 1851, the powers of the Governor-in-Council which under 12 Vict. ch. 5 could be granted to the municipal council, on enacting regulations for the regulation and management of the works, or for ascertaining, fixing, or varying the tolls, are vested in the municipal council and their successors. By sec. 13 of 12 Vict. ch. 5 it is enacted that any of the powers vested in the Crown or Governor-in-Council with regard to the public works thereby granted may be vested in the grantee. The powers given to the Governor-in-Council by 9 Vict. ch. 37, sec. 18, therefore became vested in the municipality; and this Act was extended the following year by 10 Vict. ch. 24, sec. 8, which gave power to order that the tolls at the several toll-gates should be farmed or leased, and that the lessees should have certain rights. The clause (sec. 12 of 12 Vict. ch. 5) which limits the power to lease to local corporations or companies is the first amendment to the Road Companies' Act, but that clause is, the defen-

Argument.

dants contend, repealed by 16 Vict. ch. 190, an Act to amend and consolidate the several Acts for the formation of joint stock companies for the construction of roads and other works in Upper Canada, and is not re-enacted in the consolidation. The 5th section of the order-in-council is the only one which gives the plaintiff any right to travel upon this road, and that right is declared to be subject to the payment of tolls. On the question of the alleged excess of tolls over the amount necessary for the maintenance of the road, the provisions of 9 Vict. ch. 37 mean that the Government, while owner of the roads, shall not collect more tolls than are needed for the repair and extension of the road. See the schedules to the Act. Next year the whole financial basis was changed, and in the new debentures issued under the Act these tolls were pledged. See 10 & 11 Vict. ch. 24, sec. 7; 12 Vict. ch. 5, sec. 5; 16 Vict. ch. 190, secs. 25, 26, 59; *Wilson* v. *Groves*, 17 U. C. R. 419; *Township of Ancaster* v. *Durrand*, 32 C. P. 563; *Vanderlip* v. *Smyth*, *ib.* 60; *Campbell* v. *Kingston and Bath Road Co.*, 18 A. R. 286, 20 S. C. R. 605. The 8th section of the order-in-council declares that the tolls to be collected shall be those mentioned in the schedule to 12 Vict. ch. 4, and that Act repeals the schedules to 9 Vict. ch. 37, and substitutes new schedules. All road legislation is applicable to this road. A lease of tolls may unquestionably be made, and whether or not this extends to a lease of the road, matters not; the Court has to deal only with the question of the right to collect tolls; if the lease is good as to tolls, that is enough, and the defendants must succeed. The statutes 14 & 15 Vict. ch. 57 and ch. 124 empower municipal bodies to acquire public works and to contract debts to Her Majesty for the purposes of public works. The corporation have a common law title to the road, and can lease or sell it: Dillon on Municipal Corporations, 4th ed., vol. 2, sec. 575; *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581, 629; *Township of Pembroke* v. *Canada Central R. W. Co.*, 3 O. R. 503. A municipal body has proprietary, and not merely legislative

or administrative, powers: Morawetz on Private Corporations, vol. 2, sec. 707. The municipal powers were properly exercised by a lease under the corporate seal: see 12 Vict. ch. 81, secs. 32, 108, 198. The first statutory provision which declares that the powers of the council shall be exercised by by-law is 22 Vict. ch. 99, sec. 186; see secs. 405, 407. A legislative recognition of the power to lease toll-roads will be found in 52 Vict. ch. 27 (O.), and of the private ownership of toll-roads, in 53 Vict. ch. 42 (O.). See also R. S. O. 1887 ch. 159, sec. 157; *Simpson* v. *Mayor of Godmanchester*, [1896] 1 Ch. 214. Argument.

James Bicknell, on the same side. The plaintiff has no right to maintain the action. He sues as one of the public, and on behalf of all others of the public. No question as to the validity of the by-law is thus involved. He claims to be entitled to use the road without paying any toll whatever. The lease is not attacked. The plaintiff says he claims nothing against the council. No evidence is given that the tolls exacted exceed the proper rate to be levied. Similar legislation of the Dominion Parliament (31 Vict. ch. 12, sec. 52) was considered in *Smith* v. *Township of Ancaster*, 27 O. R. 276, 23 A. R. 596. The by-law of 1856 did not apply to this road at all.

McLean, in reply. *Township of Pembroke* v. *Canada Central R. W. Co.*, 3 O. R. 503, was a case between the municipality directly and the contractor. The first legislative recognition of the right of an individual to hold a toll-road and collect tolls is in 31 Vict. ch. 31, sec. 13 (O.). The county had no power to make a profit out of the public by the sale of the road, and this was in effect a sale. See Am. & Eng. Encyc. of Law, vol. 15, pp. 1042, 1055, 1065; *Niagara Falls Road Co.* v. *Benson*, 8 U. C. R. 307. By 12 Vict. ch. 81, sec. 191, the collection of tolls is limited to ten years.

November 17, 1896. BOYD, C.:—

After the best investigation I have been able to give, and aided by the arguments, oral and written, of the coun-

Judgment.
Boyd, C.

sel in this case, my conclusion conforms to the opinion of the "eminent legal authority" procured by the township in February, 1857. Mr. Wilson, Q.C., afterwards Mr. Justice John Wilson, was then of opinion that the council could not sell the road as proposed to a private person, but could only deal with a road company formed, or to be formed, for the purpose of acquiring the road. The whole trend of legislation confirms this view of the law. The recognition of the right of an individual to purchase such property does not appear in old Canada, but is first declared and enacted by the Ontario Legislature in the first Legislature after Confederation: 31 Vict. ch. 31, sec. 13, (1867).

This transaction was carried out in favour of the defendant in 1857, and, after counsel's opinion, the form was changed so that, instead of a sale, was substituted a lease for 199 years, which the municipal committee deemed "equal to a purchase." (See report annexed to opinion.)

But this change of form is to my mind equally inefficacious to convey the property as a leasehold. The road itself is dealt with and transferred, and the tenant agrees to keep the road in repair and indemnify the council against all liability. The utmost that could be legally done by the municipality would have been to farm out or lease the tolls so far as the collection thereof was concerned. This dealing is sanctioned by 10 & 11 Vict. ch. 24, sec. 8 (1847), but this does not apply to the entire property and franchise, which could not be turned over to private hands. Nor do I see, at present, that any power was conferred by the charter of the municipality which is embodied in the order-in-council of 1857 to make a charge of tolls in excess of the legal standard fixed by the Act 12 Vict. ch. 4, secs. 1 and 2, whereby the rates were much reduced from those fixed in 9 Vict. ch. 37, which were repealed by this later statute. The municipality take from the Crown, as Mr. Wilson points out, only conditionally—the sale is made, according to the phrase of the order-in-council, "subject to the terms, provisions, and conditions following," and the 8th is a proviso that the tolls shall not exceed the

maximum fixed by the schedule to the Act 12 Vict. ch. 4. Although sec. 6 of the order-in-council vests in the municipal council all that can legally be granted in the way of fixing and varying tolls, that cannot be read as overruling the explicit provision in the 8th section of the order-in-council. The policy of the Legislature was declared by the 12 Vict. ch. 4 to be towards reduction of the tolls—subject to that the order-in-council is made—and no general words conferring powers can be used to impose rates in excess of the legislative maximum.

Judgment.

Boyd, C.

These considerations strike at the root of the matters raised on this record, and my judgment on the whole is in favour of the plaintiff, with costs.

FERGUSON, J.:—

The action is brought by the plaintiff on his own behalf and on behalf of all other subjects of Her Majesty who use or are entitled to use the road in question. He alleges that there has been since the year 1823 a common public highway in the county of Elgin used by all Her Majesty's subjects, and known as the London and Port Stanley road, and that the plaintiff, with the rest of Her Majesty's subjects, is entitled to the free and uninterrupted use of the same; that for a long time previous to the 12th day of October, 1895, the defendants wrongfully and illegally erected and caused to be erected on this highway certain toll-bars, thereby obstructing the same, and wrongfully demanded and exacted from the plaintiff and others certain sums of money as tolls for the privilege of passing and repassing; that on the said 12th day of October, 1895, the plaintiff, while lawfully driving along the said highway, was wrongfully and illegally obstructed by the defendants, their officers, etc., by the erection of certain bars across the said highway, and compelled to pay a certain sum of money, namely, the sum of seven cents, for the privilege of so passing, etc.

The plaintiff then asks that it may be declared that the

Judgment.
Ferguson, J.

defendants have no right or authority to demand or exact tolls on the said highway, or to obstruct the same by the placing of toll-bars thereon. He also asks for an order directing the defendants to remove the obstructions, and an injunction enjoining the defendants from hereafter demanding or exacting tolls for the use of the said road. He asks damages, as well, for the wrongs complained of, and a return of his money, costs of the action, and general relief.

The defendants say that they and their predecessors in title erected the toll-bars referred to in the statement of claim by and with the authority and consent of the municipal council of the county of Elgin, and under and by virtue of title derived from that municipality. They rely upon resolutions, orders-in-council, and grants conferred upon them and their predecessors in title by the same municipality, and they seem to rely particularly upon an indenture of lease bearing date the 16th day of February, 1857, made between the said municipality of the one part, and one Robert Hepburn of the other part, whereby (as the defendants say) the municipal council of the county of Elgin demised and leased the highway in question to the said Hepburn, his successors and assigns, for and during the term of 199 years from the date of the said lease. They say that they are assigns and successors in title of the said Hepburn, and are assigns of the said lease, and claim all the rights thereby conferred.

The indenture of lease of the 16th February, 1857, is produced. It is under the seal of the municipality, and the contention, I may say the sole contention, before us was as to the validity or not of this document to confer the rights claimed by the defendants. It was not disputed that the defendants are the assigns of Robert Hepburn, and have whatever rights, if any, he took under and by virtue of this document.

The action came on for trial before Meredith, C. J., and was ordered to stand over to enable the plaintiff to make the corporation of the county of Elgin parties defendant.

Judgment.

Ferguson, J.

Counsel for all parties, nevertheless, now appear and request that this Court shall hear and determine the case in the absence of the corporation of Elgin, neither party desiring that the municipality should be made a party, and each counsel undertaking that no complaint of any kind shall hereafter be made in respect of the want of parties, or the like. Counsel thus unite in asking that the case should, in this way, be heard and determined, after the manner, as nearly as may be, of a motion for judgment; and, being thus requested and pressed, this Court entertained and proceeded to hear the case.

The road in question is a part of the road formerly known as the planked toll road, situate in the county of Middlesex, running from the town of London to the village of Port Stanley, in the said county, and it is true beyond question that on and before the date of an order-in-council or proclamation, the 13th day of May, 1851, this road belonged to the Government of Canada, as one of the public works.

On that day, the 13th May, 1851, this order or proclamation was issued under the authority of the statutes 12 Vict. ch. 5, and 13 & 14 Vict. ch. 14, and it appears to have been properly published.

There can, I think, be no doubt that this order or proclamation operated as a grant of this road and other roads and bridges for the consideration of £4,500 to the county of Middlesex, and that the authority exercised in making the grant was the authority, and that only, derived from these statutes.

The Act 12 Vict. ch. 5, sec. 12, enacted that it might be lawful for the Governor-in-Council to enter into arrangements with any of the municipal or district councils, or other local corporations or authorities, or with any company in Lower or Upper Canada, incorporated for the purpose of constructing or holding such works, or works of like nature, for the transfer to them of any of the public works, harbours, bridges, or public buildings, which it might be found more convenient to place under the

Judgment.

Ferguson, J.

management of such local authorities or companies, and on the completion of such arrangements, to grant (and by so granting to transfer and convey), forever, or for any term of years, all or any of such roads, harbours, bridges, or public buildings, to the district or municipal council, or other local authority or company with whom such arrangement may have been made, and upon such terms and conditions as may have been agreed upon.

By sec. 13 of the same statute it is enacted that by such order, any or all of the powers and rights vested in the Crown, or in the Governor-in-Council, or in any officer or department of the Provincial Government, with regard to the public work thereby granted, may be granted to and vested in the grantee to whom the public work itself is thereby granted, and that such order may contain such conditions, clauses, restrictions, and limitations as may have been agreed on.

The statute 13 & 14 Vict. ch. 14 is an Act to extend the Acts for the formation of companies for constructing roads and other works to companies formed for the purpose of acquiring public works of like nature; and by it these Acts, 12 Vict. ch. 56 and 12 Vict. ch. 84, are extended to companies formed for purchasing public works under 12 Vict. ch. 5.

After the grant by means of the proclamation or order-in-council to the corporation of the county of Middlesex, the corporation had, as I think, the power to sell or lease the road to any such grantee or lessee as is mentioned in 12 Vict. ch. 5, or 13 and 14 Vict. ch. 14, and that municipality had, as I think, the further power to let to farm the tolls on the road: see 10 & 11 Vict. ch. 24, sec. 8, and the terms of the order-in-council by force of which the grant to the municipality took place—the aforesaid proclamation. But, after what I think a diligent perusal of all the statutes and authorities referred to on the argument—and, I may add, some others—I cannot say that I have seen anything shewing or indicating that that municipality had authority or power either to lease or sell this

London and Port Stanley road, or any portion of it, to a private person, and I think the municipality has not this authority or power. Judgment. Ferguson, J.

The part of this road lying within the limits of the county of Elgin afterwards fell into the hands of the municipality of that county, how or in what manner it is not needful here to inquire, as there was no difference or contention on the subject. It took place, presumably, at or shortly after the setting apart of Elgin from Middlesex.

It is not suggested or contended that the county of Elgin had any greater power, in respect of the portion of this road that fell to it, than had the county of Middlesex over the whole, while the latter county was the owner of the whole. Yet, the county of Elgin, after having had the advice of counsel, to whom reference is made in its records as "eminent legal authority," to the effect that there was no power to sell to a private person, undertook to make, and did (in form) make, the lease to Hepburn above mentioned and referred to.

After a perusal and consideration of all that was referred to in this case, I am of the opinion that the municipality of the county of Elgin had not any power or authority to make or execute the lease to Hepburn, and that the document is not a valid one, even if nothing be said in regard to the want or absence of a by-law on the subject, a matter that, in the view I take, it is not needful to consider, though much was said about it on the argument.

It follows then, as I think, that these defendants have not a title to the road, and that they are not justified in obstructing it by bars and exacting tolls upon it.

The plaintiff is, I think, entitled to the declaration, the order, and the injunction he asks, and to his costs of the action. In the circumstances, I do not think the matter of the damages claimed need be seriously considered.

ROBERTSON, J. :—

The road in question never ceased to be a public highway, and as such was vested in Her Majesty. It was first

Judgment.
Robertson, J.

converted into what is generally known as a "toll road," when the Government of Canada took possession of it for the purpose of converting it into a plank or gravel road, and established the right to take and collect tolls thereon. In 1851 the road, with all the rights and privileges attached to it in regard to collecting and exacting tolls, were conveyed and granted by the Governor-in-Council to the then county of Middlesex, in consideration of £4,500, to be paid therefor. Afterwards, when the county of Elgin was set apart from Middlesex, that part of the road which was within the limits of the new county became the property of the latter, and that municipality continued to hold it, keep it in repair, as they were bound to do under the terms of their purchase, and to levy tolls. The grant was to the municipal council and their successors, and in July, 1867, the council of Elgin purported to lease and to farm let the road with all bridges, toll-gates, bars and buildings, weigh-scales, and erections thereunto belonging, for the term of 199 years, at a rent for the first nineteen years, grading upwards from £212 10s. 7d. for the first year, to the sum of £429 1s. 5d. for the nineteenth year, after which, for the residue of the term, at the rent of five shillings currency per year. It is in evidence that the council wished to sell the road, out and out, but, having been advised that they could not legally do so, they hit upon this device to do what, to all intents and purposes, practically amounts to the same thing. This lease was made to a private individual, who had no corporate powers.

After giving the matter much consideration, and after referring to and considering the numerous statutes referred to by learned counsel on both sides, the conclusion I have come to is, apart from the question of whether the want of a by-law authorizing the leasing of the road is of importance or not, that there was no power in the council of Elgin to rent and farm out the road itself. I am of opinion that the municipality could not divest themselves of the road to a private individual, but they had power to

lease or farm out the tolls collectable by law, at the several gates or toll-bars erected across the road, but nothing more. The keeping in repair would then be in the hands of the county authorities. Here the whole work has become the property of a private individual, who disposes of it as he sees fit. At present, it is said, these defendants, who claim to be the lessees, are his heirs-at-law, or persons to whom he has assigned the term. Judgment. Robertson, J.

I think this is contrary to public policy. It never was intended that a public highway should become the private property of an individual, or individuals. The Joint Stock Road Companies Act was passed for the express purpose of making it easy to acquire roads, bridges, and other public works by joint stock companies.

In *Smith* v. *Township of Ancaster*, 27 O. R. 276, the Queen's Bench Divisional Court held that the corporation of the township of Barton had no authority to transfer that part of the Hamilton and Brantford macadamized road which the Government had abandoned, and which the municipalities through which it ran had the right to assume, and to collect tolls thereon, to the adjoining township of Ancaster, to enable the latter to keep same in repair, and levy tolls therefor, etc.

E. B. B.

[QUEEN'S BENCH DIVISION.]

REGINA v. MCMILLAN.

Municipal Corporations—Early Closing By-law—Excepted Times—Uncertainty.

A by-law providing for the closing of shops for the sale of watches and jewelry at a certain time every day, "excepting * * the days during which the Central Canada Exhibition Association is being held, * * *," such days being fixed by by-law of the association pursuant to statute, is not invalid for uncertainty.

Statement. THIS was a motion to quash a conviction by a police magistrate under an early closing by-law, on the ground that the by-law was invalid for uncertainty.

The by-law was passed by the municipal council of the city of Ottawa under "The Ontario Shops Regulation Act, 1888," as amended by 52 Vict. ch. 44 (O.), and provided for the closing at seven o'clock of all shops for the sale of watches and jewelry, "each and every day throughout the year, excepting Saturdays, the days immediately preceding public holidays, the days during which the Central Canada Exhibition Association is being held,* and the last two weeks of the month of December in each year."

The motion was argued on November 9th, 1896, before ARMOUR, C. J., and FALCONBRIDGE, J.

W. H. P. Clement, for the motion. The by-law is invalid for uncertainty. The uncertainty is when the Central Canada Exhibition is to be held. The by-law is in restraint of trade, and a tradesman should be in a position to look forward to and be certain of the days on which he can trade. He cannot do so under the exceptions in this by-law. It has been held that a provision in a by-law of the town of Almonte excepting "the pay day at the Rosa-

* NOTE.—By 51 Vict. ch. 79, sec. 10 (O.), An Act to incorporate the Central Canada Exhibition Association, the directors may make by-laws fixing the time for the holding of exhibitions, annual or periodical.

mond Woollen Mills" from its operation, rendered the by-law entirely bad for uncertainty.* I also refer to *Re Cloutier*, 11 Man. Rep. 220, and *Elwood* v. *Bullock*, cited at p. 230. Argument.

H. M. Mowat, contra. There is no uncertainty. The holding of the Central Canada Exhibition is publicly known. The tradesmen are not bound to open their stores any day, but they have the privilege, except on certain days. There is no hardship, and no delegation of right to fix the time to any other person. Want of clearness of expression or uncertainty in a by-law is no ground for quashing: *In re Smith and The City of Toronto*, 10 C. P., at p. 228, *per* Draper, C. J. See also *State* v. *Parker*, 26 Ver. 357; *The People of the State of New York* v. *The Fire Association of Philadelphia*, 92 N. Y. 311.

Clement, in reply.

The judgment of the Court was delivered at the close of the argument by

ARMOUR, C. J.:—

We do not think that the by-law upon which the impeached conviction is founded is invalid by reason of any delegation of authority thereby or uncertainty therein.

It is a rather far fetched argument to urge that because the days during which the Central Canada Exhibition is being held are to be fixed by a different body from the body which passed the by-law, the body which passed the by-law has delegated to the body fixing these days the authority to say what days the provision of the by-law shall not apply to. There is no delegation of authority in providing that certain days upon which something may take place, and the fixing of which belongs to another body, shall be excepted from the operation of the by-law any more than it would have been a delegation of authority to

* *Per* MEREDITH, C. J., ROSE, J., MACMAHON, J., *Regina* v. *Reid*, 26th November, 1894, not reported.

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Armour, C.J.

have excepted any day appointed by the Governor-General or Lieutenant-Governor for a public holiday.

It would surely not have made the by-law void for uncertainty had there been excepted from its application any day appointed by the Governor-General or Lieutenant-Governor for a public holiday, and there is no greater uncertainty in excepting the days during which the Central Canada Exhibition is being held, the public notoriety of the latter where this by-law was passed being presumably as great as that of the former.

Re Cloutier is not a decision binding on this Court, and the judgment of the Chief Justice in that case commends itself to us rather than the judgment of the Court.

G. A. B.

CARRIQUE V. BEATY ET AL.

Promissory Note—Alteration after Maturity—Signature by New Maker—Release—Time—Presentment—Delay—Prejudice—Continuing Security.

A promissory note, payable one year after date, was made by two persons, one signing for the accommodation of the other. After maturity the note was signed by a third person, with the object of giving additional security to the holder:—

Held, that the third person was to be regarded as an indorser, and his signature did not constitute an alteration in the note such as would discharge the original accommodation maker; and, upon the evidence, that there was no agreement to give time for payment which would discharge him, if regarded as a surety.

Ex p. Yates, 2 DeG. & Jo. 191, followed.

Kinnard v. *Tewsley*, 27 O. R. 398, distinguished.

2. *Held*, that, treating the last signer as an indorser on a note payable on demand, it was not shewn that he had been prejudiced by non-presentment for payment prior to this action, the instrument having been dealt with as a continuing security, and there having been no unreasonable delay in presentment.

Statement.

ACTION on a promissory note, brought by Henry Carrique against William C. Beaty, James Beaty, and John Albert Beaty. The writ of summons was issued on the 11th January, 1895.

The statement of claim alleged that all three defendants, on the 17th December, 1892, made a promissory note whereby they promised to pay to the plaintiff or his order $500 twelve months after date, with interest at seven per cent. per annum until paid; that the note became due on the 20th December, 1893, and the defendants had made no payments on account thereof, excepting a payment of $35 on the 23rd January, 1894; and the plaintiff claimed for principal and interest $538.45 at the time of the commencement of the action, and interest thereon to judgment.

The defendant William C. Beaty did not appear or defend.

The defendant James Beaty denied that he made the note sued on; he said that he signed a promissory note for $500 in favour of the plaintiff, dated 17th December, 1892, payable twelve months after date, as surety for the defendant William C. Beaty, and without receiving any consi-

Statement.

deration therefor, all of which the plaintiff well knew; that the last mentioned promissory note, after the issue and delivery thereof to the plaintiff, was rendered void by a material alteration therein, viz., by adding thereto the name of one John Albert Beaty as a maker thereof; that in or about the month of June, 1894, the plaintiff, for good consideration, granted an extension of time to the defendant William C. Beaty to pay the said note, without the knowledge, privity, or consent of this defendant, whereby this defendant had suffered damages, and had been thereby released, if under any obligation whatever to pay the said note; that the said alleged note was not duly presented for payment at maturity, nor did this defendant receive any notice of the dishonour thereof, nor of the nonpayment thereof; that in or about the month of June, 1894, the defendant John Albert Beaty signed the alleged promissory note, as a maker thereof, in consideration of the plaintiff extending the time for payment of the said note, which extension of time and alteration had discharged this defendant (if he ever was liable) from all liability to pay the said alleged promissory note.

The defendant John Albert Beaty set up that he signed the note in June, 1894, merely as a surety for the defendant William C. Beaty, and without receiving any consideration therefor, all of which the plaintiff well knew; that when this defendant so signed the note, a new arrangement was made and the time for payment extended until October, 1894; that the note was not duly presented for payment at maturity, nor did this defendant receive notice of dishonour nor of nonpayment.

In reply the plaintiff said that at the time of the original issue and delivery of the note to the plaintiff, the defendants William C. Beaty and James Beaty were the only parties thereto; that in or about the year 1894 the defendant John Albert Beaty, with the assent of the other defendants, became a party to the note, for the purpose and with the intent of giving the plaintiff further security for its payment, or of becoming an indorser thereof, and

the note was thereupon delivered to the plaintiff, with the assent of the defendant John Albert Beaty, as a collateral or continuing security, and was still held by the plaintiff as such security. Statement.

The action was tried before BOYD, C., without a jury, at Milton, on the 10th December, 1896. The evidence is sufficiently stated in the judgment.

J. W. Elliott, for the plaintiff.
J. C. Hamilton, for the defendant James Beaty.
E. W. Boyd, for the defendant John Albert Beaty.

December 17, 1896. BOYD, C.:—

Upon the evidence it is very plain that the defendants W. C. Beaty and James Beaty signed the promissory note sued upon as joint makers. The currency of that note was for a year, which expired in December, 1893. In June, 1894, it is also plain from the evidence that the instrument was signed by the defendant J. A. Beaty in order to give additional security to the plaintiff. In this respect I cannot distinguish the case from *Ex p. Yates*, 2 DeG. & Jo. 191, where Turner, L.J., says, in language appropriate to this case: "I think the intention of the parties was not to add a new maker of the note, but to add a new person to those already liable. This might be done by adding his name without constituting him a new maker of the note or altering it in any way."

Prior to as well as under the Bills of Exchange Act, a person so signing is to be regarded as "incurring the liabilities of an indorser:" see Act of 1890, secs. 56 and 88; and *Duthie* v. *Essery*, 22 A. R. 191; *Ayr American Plough Co.* v. *Wallace*, 21 S. C. R. at p. 259, *per* Strong, J.

I do not find upon the evidence that there was any agreement on the part of the plaintiff to give time for the payment of the note, or that any extension of time was agreed upon when the name of J. A. Beaty was added to the note. There is an absence of evidence sufficient to

Judgment.

Boyd, C.

discharge either of the defendants, if regarded merely as a surety for the payment of the $500.

This case differs from *Kinnard* v. *Tewsley*, 27 O. R. 398, where the evidence established that the new signer had come into the transaction as a guarantor, in consideration of a personal benefit so obtained.

Treating the last signer, then, as an indorser on a note payable on demand, the evidence shews that he has not been prejudiced by non-presentment for payment prior to this action. It was expected by him that time would be given for payment—his name was added because it was rumoured or supposed that W. C. Beaty (who afterwards assigned for creditors in January, 1895,) was in a shaky financial condition—and it is evident that nothing would have been collected from W. C. Beaty by this indorser in exoneration of his liability, even had the note been earlier presented for payment.

The provisions of the Act now are that when a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement, but not if it is delivered as a continuing security; and in determining what is a reasonable time regard shall be had to the nature of the instrument * * and the facts of the particular case: sec. 85 (1 and 2).

This instrument was dealt with as a continuing security, though there was no express or binding agreement to give time, and time was in fact given by the holder till the assignment of W. C. Beaty precipitated this action. I find no unreasonable delay in presentment, and no reason on this head to discharge the last signer: *Chartered Mercantile Bank of India* v. *Dickson*, L. R. 3 P. C. 574.

The result is that judgment should be for the plaintiff against all three defendants; credit to be given for the $12 received as dividend from the W. C. Beaty estate assigned, and interest to be computed from the last payment as to the two makers, and as to J. A. Beaty from June, 1894; only six per cent. after the note was due. Costs to the plaintiff.

E. B. B.

RE HOOPER.

Settled Estates Act—Sale of Vacant Land—Life Tenant—Income—Taxes—Infant—Maintenance.

The Settled Estates Act was intended to enable the Court to authorize such powers to be exercised as were ordinarily inserted in a well drawn settlement, and ought accordingly to receive a liberal construction.

Where the widow of the settlor was entitled to the whole income of the estate for her life, not charged with the support and maintenance of the children, who were the remaindermen, an order was made, upon the petition of the widow and adult children and with the approval of the official guardian, authorizing the sale, in the widow's lifetime, of vacant and unproductive land forming part of the estate, notwithstanding that the effect would be to relieve the widow of the annual charge upon such land for taxes, to add to her income the profit to be derived from the investment of the proceeds of the sale, and to deprive the remaindermen of the benefit of any increase in the value of the land; the price offered being the best obtainable at the time or likely to be obtained in the near future; the Court deeming the sale in the best interests of all parties; and the widow agreeing to charge her income from the settled estates with the obligation of maintaining the infant remainderman.

THIS was an application by petition, under sec. 14 of the Settled Estates Act, 1895, for authority to sell a vacant lot of land in St. George street, in the city of Toronto. The facts are stated in the judgment. Statement.

The application was made before MEREDITH, C. J., in Court, on 2nd December, 1896, and renewed on the following day, upon additional affidavits.

J. E. Jones, for the petitioners.

J. Hoskin, Q.C., official guardian, for the infant.

December 18, 1896. MEREDITH, C. J.:—

Charles Edward Hooper by his will (which is the settlement), after providing for the payment of several pecuniary legacies, devised and bequeathed to his wife Isabella Louise Hooper (one of the petitioners) all the residue of his real and personal estate in trust to receive and take during her natural life the annual income or profit arising from it; and he provided as to the ultimate disposition of the corpus in these words:—

Judgment.

Meredith, C.J.

"And after her decease, I will, devise, and bequeath the said property, both real and personal, to my several children absolutely, share and share alike, if more than one, and if only one, to that one; but if any die and leave children prior to the decease of my said wife, the said children or child, if only one, shall inherit the parent's share, but if no child of my own, or children of my deceased children living at the death of my said wife, then I will, devise, and bequeath the said property to my brother and sisters, share and share alike, that may be living at the time of my decease, absolutely."

The authority to sell is desired in consequence of the land being unproductive, and subject to an annual charge of $87.91 for taxes; and in order to increase the income of the widow so as to enable her the better to provide for and support the children of the testator, which the income is said to be at present insufficient properly to do.

All of the children except one are of age; the adult children join in the petition; and the official guardian, representing the infant, approves of the sale being made.

The persons entitled in the event of the devise and bequest to the children and grandchildren of the testator not taking effect have released their interests in the lot.

The price offered is $2,400, and is shewn to be the best price obtainable, and is, I think, under existing circumstances, as much as can be hoped to be got now or in the near future.

I have no doubt that a prudent owner of the whole of the testator's estate would do what the petition asks the Court to authorize to be done.

I at first doubted whether, having regard to the fact that the widow is entitled to the whole income of the estate for her life, and that it is not charged with the support and maintenance of the children, it can be said that it is "proper and consistent with a due regard for the interests of all parties entitled under the settlement," that the sale should be authorized, because the effect of the sale will be to relieve the widow of the annual charge upon the land for taxes,

and add to her income the profit to be derived from the investment of the proceeds of the sale, and to deprive those entitled in remainder of the benefit of any increase which may take place in the value of the land; but further reflection has led me to the conclusion that these considerations ought not to induce me to refuse to grant the prayer of the petition. Judgment. Meredith, C.J.

There is no certainty that any substantial increase will take place in the value of the land, and, inasmuch as the widow is supporting and providing for the children out of the income, I do not doubt that, substantially and in reality, it is for the best interests of all those having rights in the property that the sale should be made, though, in a narrow or technical sense, it might perhaps be said to be not so.

The English Settled Estates Act of 1877, from which the Provincial Act is in the main taken, was intended to enable the Court to authorize such powers to be exercised as were ordinarily inserted in a well drawn settlement: *per* Lord Macnaghten in *Lord Henry Bruce* v. *Marquess of Ailesbury*, [1892] A. C. at p. 364; *Re Shepheard's Settled Estate*, L. R. 8 Eq. at p. 573; *Beioley* v. *Carter*, L. R. 4 Ch. at p. 240: and ought accordingly to receive a liberal construction.

Upon the whole, therefore, I am of opinion that the petitioners' case has been made out, and that the Court may properly authorize the sale as prayed; but I think it not unreasonable that this should be done only on the widow agreeing to undertake the legal obligation of maintaining the infant, and charging her income from the settled estates with that obligation.

The purchase money must be paid into Court, and, after payment out of the costs of the petitioners and the official guardian, the residue of it will remain subject to the provisions of sec. 33 of the Act; and the order will provide that the conveyance to the purchaser be executed by the widow.

E. B. B.

HESSELBACHER v. BALLANTYNE.

Sale of Goods—Executory Contract—Possession—Nonpayment of Price—Loss of Goods—Liability.

Where goods, the subject of an executory contract of sale, have passed into the possession of the vendee, without payment therefor being made, and have while in such possession been lost or destroyed, through no fault of the vendor, the vendee is liable for the price, notwithstanding that the property in the goods had not, by the terms of the contract, passed to the vendee, and notwithstanding that no negligence on his part is shewn.

Statement. THIS was an interpleader issue arising out of an action of *King* v. *Nesbitt*, and was tried before ROSE, J., without a jury, at Sault Ste. Marie, on the 12th December, 1896. The facts appear in the judgment.

Rodd, for the plaintiff.

W. H. Hearst and *J. McKay*, for the defendant.

December 19, 1896. ROSE, J.:—

The defendant, Ballantyne, had contracted to sell a quantity of what was called pulpwood to Nesbitt, the defendant in the original suit, and the plaintiff, Hesselbacher, by agreement between Ballantyne and Nesbitt, had taken Nesbitt's place under the contract, a new contract in similar terms being entered into between Ballantyne and Hesselbacher.

King, the plaintiff in the original suit, had instructed the sheriff to seize the wood, and, in order to get possession of the wood, which, as I understand it, was in the form of short logs, Hesselbacher paid to the sheriff $4,275. This was pursuant to an order of the Court. By agreement between the parties, but, however, so that their rights should not be affected, the sheriff disbursed a considerable sum of money—some $1,360—and paid into Court some $2,915. Hesselbacher claims of this money $2,027.60 as being an overpayment upon Ballantyne's account.

Pursuant to the terms of the contract, Ballantyne was

to deliver the logs at the mouth of the Thessalon river, and, admittedly, after the logs were once there, he had nothing further to do than to receive the purchase money.

Judgment.

Rose, J.

I find as a fact that there were delivered at the mouth of the Thessalon river in a boom more than sufficient logs to answer the contract. It was within the contemplation of the parties that there would come down the river, with the logs that answered the contract, logs which did not answer the contract, and that, when Hesselbacher took the logs out of the boom for the purpose of placing them in vessels for shipment, it would be necessary to select and reject or to cull, and that he would leave in the boom such logs as did not answer the contract.

I find further that it was within the contemplation of the parties that some logs would be taken out of the boom by the plaintiff which were not in accordance with the contract, and which it would be impracticable to reject until the logs reached their destination.

By the terms of the contract, after payment of $3,500 on account, a draft by the defendant Ballantyne upon the plaintiff for $1.50 per cord of the wood included in each shipment was to be annexed to the bill of lading, it being stated to be the fact that if such draft were annexed to the bill of lading, the master of the vessel would not give up the logs without payment of the amount of the draft. The balance of the purchase money was to be paid when all the wood was shipped. It appears, however, that the term of the contract as to the draft was, by agreement, waived or abandoned. I am not quite sure whether any draft was drawn pursuant to the first arrangement. There appeared to me to be a difference between the plaintiff and defendant as to this; but it is not material, for no question arises as to the wood shipped, except as to the culls, which I will deal with hereafter.

Under the new arrangement the plaintiff was to send to the defendant an account of the wood received and pay the defendant the price thereof.

After the logs were in the boom at the mouth of the

Judgment.

Rose, J.

river, the plaintiff, for his own convenience in shipping, and with the concurrence of the defendant, removed them from the boom at the mouth of the river to a boom in the harbour about a mile and a half distant. This was done at his own instance and by his own servants and at his own expense, and the logs in such boom were thereafter under his own control for the purpose of shipment. While in the second boom and during the time that the shipments were being made, the sheriff, at the instance of King, the plaintiff in the original action, made a seizure, and while he was in possession the boom broke, and many of the logs escaped and were lost. Many logs were also lost by escaping from the rafts which were made to take them from the boom to the vessel. Some of the logs were undoubtedly lost in conveying them from one boom to the other, and if there was, as I am bound on the evidence to find, a sufficient quantity of wood to answer the contract in the boom at the mouth of the river, the substantial portion of the loss occurred in changing the logs from one boom to the other, in transferring them from the boom to the vessel, and by the breaking of the boom allowing the logs to escape. There was also a further loss by sinking of water-soaked logs; but whether such sinking occurred when the logs were at the mouth of the river or in the harbour, I am unable to say.

The question is whether the vendor or the vendee is to bear the loss.

The plaintiff charges the defendant with the freight of the logs placed on board the vessels and carried to various points, but this charge, I think, is clearly wrong and cannot be supported. If the plaintiff, to save expense, chose not to cull closely, but to carry logs which did not answer the contract, I think it is clear that, whatever may be said as to his being liable to account to the defendant for the value of such logs, he cannot make a charge for carrying them.

The contest at the trial was largely as to whether the property in the logs had passed to the vendee. For the

Judgment.
Rose, J.

purpose of my finding I will assume that it did not pass, although I do not say that it might not properly be found that it was the intention of the parties that the property should pass; but the logs did pass into the possession of the vendee, and the loss occurred while they were in his possession, through no fault of the vendor, and the position the plaintiff assumes is that, having promised to pay for these logs, he is excused from paying, because, while in his possession, they escaped and were lost. This seems contrary to natural justice, and is, I think, also contrary to law.

I have not found any case in our own Courts where the point has been decided. It is suggested, however, by Hagarty, C. J. O., in *Sawyer* v. *Pringle*, 18 A. R. at p. 222, where he said that it might be plausibly argued that where there was an executory agreement for a future sale on the performance of certain named conditions by the purchaser, and the vendor had taken the property out of the possession of the purchaser, and, while in the vendor's possession, it had been destroyed, without any default on his part, as by accidental fire, that the vendor was not thereby debarred from recovery. If such be the law, it covers the case in question.

I find, however, that the principle has been discussed in the Courts of the United States. The cases to which I shall refer may be found in the 6th edition of Benjamin on Sales, at p. 283. They are *Tufts* v. *Griffin*, 107 N. C. 47, and *Tufts* v. *Burnley*, 66 Miss. 49. In the former case the facts are stated by Shepherd, J., as follows:—"This is a case of the first impression in this State. We have here an absolute promise of the defendant to pay the plaintiff a certain sum, it being the balance of the purchase money due the plaintiff upon the sale of a soda apparatus to the defendant. The sale was a conditional one, * * and under the contract the defendant took the apparatus into his possession and used it in all respects as his own. Without any negligence on the part of the defendant, and before any default in the payment of the purchase money,

Judgment.

Rose, J.

the property was destroyed by fire. The question is, who shall bear the loss? The defendant insists that it should fall upon the plaintiff, because the transaction amounted to nothing more than an executory agreement to sell, and that, inasmuch as the plaintiff cannot now perform the contract, the defendant should not be compelled to pay." The learned Judge refers to *Tufts* v. *Burnley*, and proceeds:—"As is said in the foregoing extract, the vendor has done all that he was required to do, and the transaction amounted to 'a conditional sale, to be defeated upon the non-performance of the conditions. * * The vendee had an interest in the property which he could convey, and which was attachable by his creditors, and which could be *ripened* into an absolute title by the performance of the conditions:' 1 Whart. Cont., 617. The vendee had the actual legal and rightful possession, with a right of property upon the payment of the money: *Vincent* v. *Cornell*, 13 Mass. 296. The vendor could not have interfered with this possession 'until a failure to perform the conditions:' *Newhall* v. *Kingsbury*, 131 Mass. 445. Having acquired these rights under the contract, and the property having been subjected to the risks incident to the exercise of the exclusive right of possession, it would seem against natural justice to say that there was no consideration for the promise, and that the loss should fall upon the plaintiff."

In the case before me there was no evidence as to why the boom broke, and it seems to me that it would not be fair to require the defendant to account for the breaking of the boom, even if, as was contended on behalf of the plaintiff, the defendant was not chargeable with the loss unless it was occasioned by his own negligence. I think it is more in accordance with natural justice that from the time the defendant assumed control of the property for the purpose of taking it out of the boom at the mouth of the river, he was to be accountable for any loss which might thereafter occur, and if he chose to put it in a boom of his own, he should have seen that the boom was sufficient to answer

all reasonable pressure upon it, and that he should have provided against loss by reason of logs escaping either from the breaking of the boom or from stress of weather in carriage of the logs from one point to another. Judgment. Rose, J.

The plaintiff's counsel admitted that his client must be held responsible for the loss occasioned by the escaping of logs during the process of conveying them from the boom to the vessel. I think he must also be held accountable for the loss occasioned by the breaking of the boom and from the changing of the logs from one boom to the other. I do not think I can find that there was a sufficient percentage of the logs which sank by reason of their being water-logged to materially affect the question.

I think, therefore, the plaintiff must fail, and that it must be found that the money which is the subject of this interpleader is the money of the defendant and not of the plaintiff.

As far as I have power over the question of costs, the plaintiff must bear them.

E. B. B.

[DIVISIONAL COURT.]

SPEERS ET AL. v. SPEERS ET AL.

Surrogate Courts—Vacant Senior Judgeship—Junior Judge—Jurisdiction—Subsequent Appointment of Senior Judge.

A junior County Judge who has heard the evidence and tried an issue in a Surrogate Court while the office of senior County Judge is vacant has the right to deliver judgment in such case after a new senior Judge has been appointed.

Statement. THIS was an appeal from the Surrogate Court of the county of Huron, upon the ground of want of jurisdiction in the junior County Judge who tried the issue without a jury, and afterwards delivered the judgment.

The will of one Joseph Speers, deceased, was being proved in solemn form and the evidence had all been taken before the junior Judge who reserved judgment.

There was at the time of the trial, no senior County Judge, he having died, and the junior County Judge was acting as Surrogate Judge under R. S. O. ch. 50, sec. 6.

After the trial, a new senior Judge was appointed, and subsequent to his appointment, judgment was delivered by the junior Judge in favour of the plaintiffs.

Against this judgment, the defendant Joseph Speers, appealed to a Divisional Court, and the appeal was argued on October 14th, 1896, before BOYD, C., ROBERTSON, and MEREDITH, JJ.

Osler, Q.C., for the appeal. The senior Judge is the Surrogate Judge. While the office was vacant the junior Judge could have acted, but as soon as a new senior Judge was appointed, the junior Judge was *functus officio*, and could not deliver any valid judgment: R. S. O. ch. 50, sec. 6, as amended by 59 Vict. ch. 20, sec. 6 (O.). This is not a case of a resigning Judge under R. S. O. ch. 44, sec. 4, and the passing of such an Act as that shews that even a resigning Judge would have no such power except by virtue of the Act.

Garrow, Q.C., and *Malcolmson*, contra. This is not a case where the junior Judge was displaced from the Surrogate Court. He is always attached to it: *Hoey* v. *McFarlane*, 4 C. B. N. S. 718. During the vacancy in the office of senior Judge, he had "all the powers and privileges" by statute: R. S. O. ch. 50, sec. 6. He had the right to reserve judgment and to deliver it when he was ready. He had full power: R. S. O. ch. 46, sec. 12. Even if a request from the senior Judge was necessary, it must be assumed to have been made. I refer to *Regina* v. *Fee*, 3 O. R. 107; *In re Leibes* v. *Ward*, 45 U. C. R. 375; *Regina* v. *Runchy*, 18 O. R. 478. Argument.

Osler, Q.C., in reply.

November 7th, 1896. BOYD, C.:—

The English cases on deputy Judges of the County Courts do not help in this appeal. Because those Judges are regarded as merely the appointees of the actual Judge, who is principal *quoad* his deputy. Hence the decision that on the death of the Judge, the authority of the deputy ends: *Hoey* v. *McFarlane*, 4 C. B. N. S. 718, and the decision that if the Judge returns before the deputy has disposed of a case he has heard, the deputy cannot give judgment, though his conclusions may be adopted by the Judge so as to become the judgment of the Court: *Rathbone* v. *Munn*, 9 B. & S. 708. To remedy the result of the earlier decisions, was passed the statute 19 & 20 Vict. ch. 108, sec. 11 (Imp.), by which the appointment of a deputy Judge was not vacated by the death of the Judge; he might go on to act as Judge till a successor to the Judge should be appointed.

In our judicial system, the junior Judge is a Judge with plenary powers subordinate in certain respects to the directions and the action of the senior county Judge, but otherwise competent to act as the Judge in all cases, even in the Surrogate Court when requested by the senior Judge when that office is vacant. That appears as the

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result of the provision in the Local Courts Act, R. S. O. ch. 46, sec. 12, which is rightly recognized by Mr. Howell in his work on probate law, as applicable to the Surrogate Court as one of the local courts, *i.e.*, one of the courts of the county (R. S. O. ch. 50, sec. 3). That clause briefly gives to the junior Judge all the statutory and other powers of his senior, "subject, however, to the general regulation and supervision of the senior Judge." This fits well into the other provisions of chapter 50 R. S. O. sec. 6, by which the senior Judge is made *ex officio* the Surrogate Judge, but with power to the junior to act at the request of the senior, or when that office is vacant. In surrogate matters, the request of the senior is needed to put the junior in motion, if there is a senior Judge.

In this case the office of senior Judge was vacated by the death of Judge Toms; thereupon the surrogate work devolved as of right upon the junior Judge, Doyle, who took up the contested matter respecting this estate, and heard all the evidence and argument thereon, so that nothing remained but to give his decision at the time when the new Judge, Masson, was appointed as senior Judge. At this point Judge Doyle was seized of the matter, and it was ripe for decision. There was no intervention on the part of the new Judge—indeed, judicial decorum forbad that—and rather it is to be taken for granted that the Judge in possession of the case was requested to complete his work—though I do not think a request was needed to enable him to "perform" (that is to fulfil) the judicial responsibility undertaken by him of not only hearing but also determining the contest.

In brief, Judge Doyle was, in my opinion, still the Surrogate Judge *pro hac*, and no intervention on the part of the new Judge was necessary to give him jurisdiction to the end.

This is a case in which the duties of Oyer and Terminer ought not to be divided. It is, perhaps, not needful that the decision should be placed on such high grounds; it would be enough if the Judge acting, were so *de facto*, even if not *de jure*, Judge of the Surrogate.

In *Knowles* v. *Luce*, Moore 109, Manwood, C. B., intimates that a judicial officer continuing to exercise an office after his time has expired, was a good officer *de facto*. That is to be read as limited to cases where he had no good reason to believe that his continuing to act was in question, and he is allowed to act without disturbance by the rightful officer: *The King* v. *The Corporation of Bedford Level*, 6 East 356. Judgment. Boyd, C.

Here the circumstances amply justify the action of the junior Judge as being of a *de facto* character, to say the least, and if so, the Court will not investigate as to competency in the case of *de facto* Judges.

Thus in *Milward* v. *Thatcher*, 2 T. R. 87, Buller, J., says: "In such cases the question whether they be properly Judges or not, can never be determined; it is sufficient if they be Judges *de facto*. Suppose a person were even criminally convicted in a court of record, and the Recorder of such court were not duly elected, the conviction would still be good in law, he being the Judge *de facto*."

So in a case of *Carli* v. *Rhener*, 27 Min. 292 (decided in 1880), it was held that a person claiming and having colour of title to a judicial office by election or appointment, and in possession thereof, exercising its functions and duties is the officer *de facto*, and his acts as to the public and parties interested in them are valid and cannot be questioned, notwithstanding another person may be the Judge *de jure*. See also *The Company of Proprietors of the Margate Pier* v. *Hannan*, 3 B. & Ald. 271.

Upon the *de facto* doctrine as to judges and judicial officers, I would further note these cases, *McInstry* v. *Tanner*, 9 Johns. N. Y. 135; *McGraw* v. *Williams*, 33 Grattan (Virginia), 510; *Woodside* v. *Wagg*, 71 Me. 207; and an elaborate judgment by Deady, J., in *In re Ah Lee*, 6 Sawyer (U. S. C. C.) 410.

I do not follow the matter further, as I am satisfied the preliminary point as to the jurisdiction being open to question on this appeal, fails. This clears the way for the argument on the merits, if that is to be prosecuted.

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Since writing the foregoing, the certificate of Judge Masson has been filed, which shews a request to the junior Judge to prosecute this matter, and so concludes the question of jurisdiction.

ROBERTSON, J. :—

I concur.

MEREDITH, J. :—

The surrogate courts have been for many years courts of record of this Province, having very considerable jurisdiction and powers, and have been presided over by one Judge respectively—the Judge of the County Court of the same county—whose remuneration has been paid by way of fees or commutation of fees.

There has been, there could be, under the enactments existing for many years past, but one Judge of each of these courts, though all the powers and privileges and duties of the Judge were conferred and imposed upon the junior or acting or deputy Judge of the County Court, in case of the illness or absence, or at the request of the Judge, and when the office of Judge was vacant: see sections 3 and 6 of "The Surrogate Courts Act," R. S. O. ch. 50.

I cannot at all agree in the contention that by virtue of "The Local Courts' Act," R. S. O. ch. 46, junior Judges of the County Courts are made, or given the power and authority of, Judges of the Surrogate Courts.

The Act has reference to courts of which both are Judges, and matters done by virtue of judgeship in the County Court. The words of section 12 are "exercisable by the senior Judge of a County Court." The Surrogate Court Judge's "power and authority," are not exercised by him as a Judge of the County Court; but are exercised by him under the Surrogate Courts Act, as Judge of the Surrogate Court; all that that Act did

was to make a statutory appointment of the person who is senior County Court Judge to the office of Surrogate Court Judge; there is no other connection between the two distinct judgeships; and the Local Courts Act does not purport to confer any of the privileges or emoluments of the senior Judge upon the junior Judge, which doubtless it would if it had been intended to impose the duties of the Surrogate Court Judge upon him. Judgment. Meredith, J.

To give effect to any such contention, would be quite contrary to the provisions of the Surrogate Courts Act, which Act deals expressly and clearly with the subject; and, I venture to say, would be a surprise to every one, for I doubt its ever having been seriously suggested, much less acted upon in any of the many Surrogate Courts of the Province.

It would be strange if a general Act passed for a different purpose, and which from first to last has no reference to the Surrogate Court, but deals with Judges of the County Courts, senior, junior, and deputy, and their powers and duties only, in so far as it deals with judgeships, should override the provisions contained in the same statute book constituting the Surrogate Court, and making express and plain provision as to the office of its Judge, and the exercise and enjoyment of his powers and privileges and the performance of his duties: see the oath of office under each Act.

We are not to create a needless conflict between the provisions of the two Acts. If the express provisions of the Surrogate Courts Act were to have been overridden, we might well expect the making of necessary amendments in it.

Nor can I see how it can rightly be said that the junior Judge was *de facto*, if not *de jure* Judge of the Surrogate Court; for the moment the senior Judge was appointed, he became and was *de facto* as well as *de jure* the Judge, and the one office being thus filled, there was no room for another *de facto* Judge. He could not then have the reputation of having the powers of a Surrogate Court Judge by

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reason of a vacancy in that office. The case might be very different if there were but one person acting in the one office, and the question were one affecting merely the regularity of appointment or sufficiency of qualification.

But in this case the junior Judge had admittedly power to try the case when the evidence was taken before him, the office of senior Judge of the County Court being then vacant; and he had power when he gave judgment, for he was then acting at the request of the Surrogate Court Judge who had meanwhile been appointed, a request comprising that which he did in this case—complete the cases he had entered upon.

In the absence of authority requiring it, I am quite unprepared to give effect to the contention that the junior Judge could not, under any request, give judgment in the case without re-trying it. It is true that he heard the evidence when rightly acting under certain circumstances, and that he gave judgment when also rightly acting, but under different circumstances; but that fact alone ought not to form an absolute barrier between the hearing and the judgment, destructive, for no good purpose whatever, of all that had been done, and necessitating needless expense and trouble.

Upon this ground, I would dismiss the appeal in this respect, and proceed with the hearing of it upon the merits, if the appellant sees fit to prosecute it further; if not, the appeal should be dismissed with costs.

I have dealt with the case as if the peculiar amendment of section 6 of the Surrogate Court Act by section 6 of ch. 20, 59 Vict. (O.), had no effect upon the question, for whatever its effect it cannot be to aid the appellant's contention: and it is said to have come into force after the appointment of the new senior Judge of the County Court.

G. A. B.

TOWNSEND

v.

TORONTO, HAMILTON AND BUFFALO RAILWAY COMPANY.

Damages—Liquidated or Penalty—Equitable Relief—Ontario Judicature Act, sec. 52, sub-sec. 3.

Under a covenant contained in a lease granting a right of way over certain lands to a railway company for the purpose of a switch to a gravel pit, the lessees on default in removing the tracks and ties from the land within fifteen days from the termination of the lease, were to forfeit and pay to the lessor $5 a day as liquidated damages and not as a penalty for each day after the said time, that the lands and premises should remain in any way obstructed:—

Held, that such damages were liquidated:—

Held, however, that under the circumstances set out in the judgment this was a proper case in which to grant relief under sec. 52 of sub-sec. 3 of the Ontario Judicature Act, 1895, by awarding actual damages estimated on a liberal scale.

Statement.

THIS was an action tried before MEREDITH, C. J., without a jury, at St. Catharines on the 19th October, 1896.

Rykert, for the plaintiff.

D'Arcy Tate, for the defendant.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment:

December 22nd, 1896. MEREDITH, C. J.:—

The plaintiff who is the owner of part of lot number 6 in the 8th concession of the township of Pelham, by indenture, dated the 16th October, 1895, leased to the defendants a right of way two rods in width across his land, described as the line for the gravel-pit switch, as the same was then laid out and surveyed across the lot, from the date of the lease until the 15th March following. The rent was $300 for the term, and included "all damages to crops, fruit and vines thereon."

The lease contains among other covenants on the part of the defendants a covenant to put in a proper crossing for teams and vehicles over the switch at such place as the plaintiff should designate; and a covenant in these words:

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"The said lessee further covenants that it will within fifteen days after the termination of this lease, or so soon thereafter as the state of the ground will permit, (and for this purpose the said lessee is entitled to ingress and egress to and upon said lands), remove from the said premises hereby leased its track and ties; and, in default of the said lessee fulfilling this covenant fully and completely and in all respects, the said lessee shall forfeit and pay to the lessor the sum of five dollars as liquidated damages, and not as a penalty for each day after the time aforesaid that the said lands and premises shall remain in any way obstructed."

The defendants did not remove their track and ties as they covenanted to do, and they still remain on the plaintiff's land. The defendants intend building a branch of their railway on the land demised, and have since this action was begun obtained statutory authority to do so, and have given to the plaintiff notice that they intend to take his land for the purpose of a branch railway.

By the lease the plaintiff agreed that it might on its termination be renewed for such further term, and for such further consideration, as the parties to it should then agree on.

The defendants' agent after the expiration of the lease saw the plaintiff once or twice with reference to a renewal of it, but no agreement for a renewal was come to.

The plaintiff's farm consists of about thirty acres, and it was crossed diagonally by the defendants' track so as to leave a triangular part of the farm containing nearly seven acres to the north of the track: and there is no doubt that very serious inconvenience was occasioned to the plaintiff by the neglect of the defendants to remove their track and ties, and to conform to the covenants on their part contained in the lease; and upon the evidence I think that his damages may be fairly assessed at $100.00; but the plaintiff contends that the damages to which he is entitled are liquidated, and that he ought to be awarded the $5 per day mentioned in the lease for each day which

has elapsed since the end of March up to the time when the defendants served notice of their intention to expropriate the land. Judgment. Meredith, C.J.

The authorities, I think, require me to hold that the damages stipulated for in this case are liquidated.

In *Law* v. *Local Board of Redditch*, [1892] 1 Q. B. 127, at p. 130, the Court treated as a recognized canon of construction "that where the parties to a contract have agreed that in case of one of the parties doing or omitting to do some one thing, he shall pay a sum to the other as damages, as a general rule such sum is to be regarded by the Court as liquidated damages, and not a penalty;" but that as a general rule at any rate, "where the parties to a contract have agreed that the one is to pay and the other to be paid a sum of money in respect of the doing or failure to do any of a number of different things of very different degrees of importance, * * such sum of money is to be treated as a penalty not as liquidated damages."

The latter of these two rules was, notwithstanding the adverse criticism of it by Sir George Jessel in *Wallis* v. *Smith*, 21 Ch. D. 243, affirmed and applied by the Court of Appeal in *Willson* v. *Love*, [1896] 1 Q. B. 626, and is supported by the opinions of Lord Herschell and Lord Watson in *Lord Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Cas. 332.

In *Willson* v. *Love*, Lord Esher restated the rule in these terms, at p, 130: "When a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification."

Lord Justice Rigby, it is true, doubted the correctness of the rule, but did not dissent from the conclusion arrived at by the majority of the Court.

The question in this case then is, is the sum stipulated for, to be paid on the omission of the defendants to do some one thing within the meaning of the first of these

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Meredith, C.J.

two rules? In my opinion it is. By the contract in question, in the case of *Law* v. *Local Board of Redditch*, which was for the construction of sewerage works, it was provided that the works should be completed in all respects and cleared of all implements, tackle, impediments and rubbish by a specified date, and in default of such completion the contractor was to pay £100 and £5 for every seven days during which the works should be incomplete after that date as and for liquidated damages; and the Court of Appeal decided that the non-completion of the works, whether the completion of them within the meaning of the contract did or did not include the removal of the implements, etc., was a single event, and that the sums agreed to be paid were to be regarded as liquidated, and not as penalties.

The default of the defendants in this case in removing their works from the plaintiff's lands, or their non-removal of them, was, in my opinion, just as much a single event only, as the default of the contractor in the case referred to in the completion of the works, or his non-completion of them; and as Lord Justice Kay pointed out, though non-completion may involve many matters, some very small, or, as he put it, there might be different causes of non-completion, still non-completion was only a single event.

I refer also to the case of *Craig* v. *Dillon*, 6 A. R. 116, which supports the view I take.

Counsel for the defendants contended that a third rule was established by the cases—that spoken of by Lord Esher in *Law* v. *Local Board of Redditch*, at p. 130, in the following terms (referring to the exceptions to the rule, that specific sums agreed to be paid, are to be treated as liquidated when they are to be paid, in the event of the doing, or omitting to do, some one thing); "and I should think that another exception would be where the sum agreed to be paid is, with regard to the matter in respect of which it is agreed to be paid, so large as to make the damages so absurd that the Court would be compelled to arrive at the conclusion that it was to be paid, not as liquidated damages, but as a penalty."

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Meredith, C.J.

Assuming the rule, as stated to exist, and as to that, there may be some doubt, I do not think that the sum agreed to be paid in this case, comes within it. Had the default of the defendants continued for but a short time, the sum stipulated for would not have been excessive, viewed as compensation to the plaintiff for the loss and inconvenience to which he was subjected by the default of the defendants; and it was moreover in the power of the defendants at any time to put a stop to the payments by removing their track and ties as they had agreed to do; and having regard to these considerations, in arriving at what was the intention of the parties—for that is the nature of the inquiry in every case—how can I say that the parties did not mean exactly what they have said; and that if the defendants wrongfully and obstinately left their track and ties upon the lands of the plaintiff, they should pay the sum per day, which they have agreed to pay.

I think, however, that the provisions of sub-section 3 of section 52 of the Judicature Act of 1895, justify me in relieving on equitable terms the defendants from the payment of the agreed sum, even if it is to be treated as liquidated damages.

By that sub-section, it is provided that "3 (subject to appeal as in other cases), the High Court shall have power to relieve against all penalties, forfeitures, and agreements for liquidated damages, and in granting such relief, to impose such terms as to costs, expenses, damages, compensation, and all other matters as the Court shall think fit."

As far as I am able to discover, this provision was first introduced by 49 Vict. ch. 16, sec. 38 (O.), and it has no place in the English Judicature Act.

It is unnecessary to consider what, if any, limit is to be placed upon the wide general language of this provision, or whether the effect of it is to place liquidated damages on the same footing as penalties, as far as the jurisdiction to relieve from the payment of them is concerned—and to apply to liquidated damages the old rule of equity, that "where a

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penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred,"—the existence of which rule, as Lord Justice Kay pointed out in *Law* v. *Local Board of Redditch*, at p. 134, led to the insertion in contracts, of the words "as and for liquidated damages."

However that may be, this case is one in my opinion in which the Court has under the statute the power to relieve. The fact that the $5 per day are not to be paid as rent for the period after the expiration of the lease for which the defendants should hold over, but as compensation for the loss which the plaintiff would incur by their holding over, the sum is to be "forfeited and paid," and it is to be paid "as liquidated damages, and not as a penalty;" language pointing, I think, to its being used as a measure of the damages which the plaintiff might suffer by the defendants' breach of their agreement: the fact of the negotiations for the renewal of the lease which probably necessarily delayed the removal of the defendants' track and ties; the fact that the defendants did not arbitrarily retain possession, but did so in view of their contemplated expropriation of the plaintiff's land which they were putting themselves in a position lawfully to effect, and lastly, the fact that compensation on the basis of an allowance of $5 per day would be several times more than the actual loss of the plaintiff, estimating it, as I have done, in fixing the damages at $100, very liberally, make together, in my opinion, a strong case for relieving the defendants, and I cannot conceive what cases are to be within the Act if this be not.

It appears to me, therefore, that the defendants should be relieved from the payment of the stipulated damages on the terms of their paying the $100 damages awarded and the costs of the action on the High Court Scale; and there will, therefore, be judgment for the plaintiff for that sum with costs on the High Court Scale.

G. F. H.

PATCHING v. SMITH.

Landlord and Tenant—Rent Payable in Advance—Breach of Covenant not to Assign without Leave—Damages.

Where, a few days prior to the accruing due of a quarter's rent payable in advance, the lessee assigned without the lessor's leave, in breach of a covenant contained in the lease, the lessor was held entitled to recover, as damages for such breach, the rent so payable in advance without any deduction for rents realized during the said quarter under new leases created by the lessor, who, finding the property vacant, had taken possession.

Statement.

THIS was an appeal from a report of a referee to whom had been referred the amount of damages recoverable upon the breach of certain covenants in a lease.

The only question reserved on the argument of the appeal besides that of the costs of the appeal, was the amount of damages which should be assessed for breach of a covenant not to assign without leave under the following circumstances.

The defendant had become the assignee with the consent of the plaintiff, the lessor, of the lease in question. On 16th April, 1895, an instalment of rent amounting to $450, being for three months in advance, became due. Three days before it became due, the defendant made an assignment of the lease to one Martin, who was possessed of no means of payment. On 22nd April, 1895, the plaintiff brought the present action, claiming possession of the property and damages. The claim for possession was afterwards struck out, and the action proceeded as one for damages only. On 6th May, 1895, the possession being vacant, the plaintiff took possession of the main property, and after making certain repairs, put in a new tenant at a reduced rent, which began on 1st June, 1895. The plaintiff has also received rent from a tenant of another part of the property, who was in possession as tenant to the defendant. The referee allowed the plaintiff, as damages, for breach of the covenant, not to assign without leave, the $450, due 15th April, without

Statement. making any reduction in respect of the moneys realized by the plaintiff, from the new tenancies created by her, during the quarter for which the $450 due 15th April, was payable.

From this decision, the defendant appealed, and the appeal was argued in Court on 11th November, 1896.

Talbot Macbeth, for the appeal.

W. M. Douglas, for the respondent.

November 13th, 1896. STREET, J.

The question to be determined in this case is, "What sum of money will put the plaintiff in the same position as he would have been in if the covenant not to assign the lease had not been broken, and the plaintiff had retained the liability of the defendant instead of an inferior liability": *Williams* v. *Earle*, L. R. 3 Q. B. 739, at 751.

If the defendant had not assigned the lease, the plaintiff would, on 15th April, 1895, have been entitled to recover absolutely from the defendant $450, being the quarter's rent due on that day, and the defendant would not have been entitled to recover any of it back, even though the plaintiff should have evicted him the day after it was paid for breach of any of his covenants; nor would such eviction have been any defence to an action for such rent: *Ryerse* v. *Lyons*, 22 U. C. R. 12.

By the defendant's wrongful act in assigning without leave to a man of straw, the plaintiff has been prevented from recovering from the defendant upon the covenant to pay rent; but she has in place of that, a right to recover from him such damages as will place her in the same position; and I think it plain that the substituted right must be to recover as damages the $450, which she would have been entitled to as rent.

I am unable to see how this right can be affected by the fact that the plaintiff has taken possession during

quarter, in respect of which the rent was payable. The lease is in the statutory form, and gives the lessee a right to enter at once for breach of the covenant in question. It seems to me immaterial that she re-entered peaceably without a judgment, instead of proceeding to judgment for possession. Judgment. Street, J.

The defendant has partially succeeded upon one of his grounds of appeal, and has failed as to the rest. The plaintiff should have three-quarters of the costs of the appeal against the defendant. The damages for non-repair were reduced at the argument to $427.45, and the appeal is dismissed as to the other matters.

G. F. H.

JOHNSON ET AL. V. THE DOMINION EXPRESS COMPANY.

Carriers—Express Company—Profession of Carrying—Discrimination in Customers—Charges.

An express company is not bound to carry except according to its profession, and is entitled to discriminate as to its customers, and is not confined by any rule or regulation as to the charges it may make, providing they are reasonable.

An action by a rival company which collected together small parcels for the carriage of which it charged a rate much smaller than the defendant, an express company, did for similar parcels, packed them together in one large parcel, and sought to compel the defendant, at great loss, to carry such parcel by size and weight rate, was dismissed.

THIS was an action brought by William Johnson and others trading under the name of the National Package Dispatch Company, to compel the defendants to carry goods tendered to them for transportation, under the circumstances set out in the judgment. Statement.

The action was tried at Toronto, on October 29th, 1896, before ROSE, J., without a jury.

D'Alton McCarthy, Q. C., and *Leighton McCarthy*, for the plaintiffs. The defendants are common carriers. They

Argument.

have not been asked to carry anything unreasonable, and their tariff is reasonable. They do not refuse to carry for the plaintiffs because the burden is greater, but because they are rival carriers.

They referred to the following authorities: MacNamara's Law of Carriers, pp. 11, 17; Story on Bailments, 9th ed., sec. 508 & note; *The Directors, etc., of the Great Western R. W. Co.* v. *Sutton*, L. R. 4 H. L. 226, at p. 242; *Crouch* v. *The Great Northern R. W. Co.*, 11 Ex. 742; *Crouch* v. *The London and North-Western R. W. Co.*, 14 C. B. 255, at pp. 291, 295; *Johnston* v. *The Midland R. W. Co.*, 4 Ex., at p. 372; *Riley* v. *Horne*, 5 Bing. 217; *The Nitro-Glycerine Case*, 15 Wallace 524 at p. 535; *Pickford* v. *The Grand Junction R. W. Co.*, 10 M. & W. 399; *Piddington* v. *The South-Eastern R. W. Co.*, 5 C. B. N. S. 111; *Baxendale* v. *The Eastern Counties R. W. Co.*, 27 L. J. C. P. 137.

Robinson, Q.C., and *S. H. Blake*, Q.C., for the defendants. The English cases are decided on the equality clause of their railway statutes. There are no express companies in England, and carriage of goods is paid for there as freight on railways. Express companies in Canada, are not common carriers in the ordinary sense. The obligation of a common carrier at common law is to be reasonable. They are not bound to do business unless they publicly profess to do it.

They referred to the following authorities: *Vicker's Express Co.* v. *Canadian Pacific R. W. Co.*, 13 A. R. 210; *Johnson* v. *The Midland R. W. Co.*, 4 Ex. 367; *Barker* v. *The Midland R. W. Co.*, 18 C. B. 46; *Express Cases*, 117 U. S. R. p. 1, at p. 20; *The Atlantic Express Co.* v. *The Wilmington R. W. Co.*, 111 N. Car. (Davidson) 469; *Commonwealth* v. *Power*, 7 Met (Mass.) 596; *Jencks* v. *Coleman*, 2 Sumner (Circuit Court) 220 at p. 226; *Barney* v. *The Oyster Bay, etc., Co.*, 67 N. Y. R. 301; Hutchinson on Carriers, 2nd ed., sec. 546; *The D. R. Martin*, 11 Blachford 233 (Circuit Court); *Maginn* v. *Dinsmore*, 62 N. Y. R. 35; Angell's Law of Carriers, 4th ed., par. 125; *Pickering-Phipps* v. *London and North-Western R. W. Co.*, [1892] 2 Q. B. 229, at pp. 246-9.

McCarthy, Q.C., in reply, referred to MacNamara's Law of Carriers, Art. 275, and note pp. 355, 356.

November 13, 1896. ROSE, J.:—

Judgment.

Rose, J.

The plaintiffs are not an incorporated company. The defendant company is a common carrier. This action is brought to compel the company to carry the goods tendered to it by the plaintiffs to be carried, and for damages for refusing to carry them.

It appears that the defendant company has obtained facilities from the Canadian Pacific Railway Company by means of a contract under which the defendant is bound to maintain an express service over the whole line of the railway company, guaranteeing the railway company about $300,000 a year, and actually paying them in one year about $400,000. Under this contract, and generally for the purpose of carrying on the business, the defendant company has in its employ over 700 agents. It has established a rate of charges or tariff, varying the charges according to the weight of the parcels. Its most profitable business is the carrying of small parcels short distances. Its most onerous and least profitable business is the maintaining of agencies at distant points, to which very few parcels are sent, this part of the business being carried on often at a loss. The carrying of small parcels under 30 pounds in weight, constitutes, if I remember correctly, about 40 per cent. of the whole business.

The plaintiffs have established agencies in Toronto and elsewhere at convenient points not far from Toronto, where the largest amount of business will ordinarily be done, and practically confine themselves to carrying parcels under 30 pounds in weight, preferring parcels weighing under 10 pounds. They charge for carrying these parcels much less than the ordinary and regular charges by the defendant company, charging for some parcels, say ten cents, for others, fifteen cents, and for others, twenty cents, where the defendant company would charge at least twenty-five cents a parcel.

The plaintiffs' custom is to gather together a number of these smaller parcels, put them in hampers or packed par-

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Rose, J.

cels and tender them to the defendant company to be carried on the tariff charged for parcels under 100 pounds in weight, paying for such packed parcels very much less than would be charged for the several parcels if sent separately.

The plaintiffs' counsel stated that the intention of the plaintiffs was, if possible, to solicit and obtain all the business that was to be done in the carrying of parcels under 30 pounds in weight, and to take such business away from the defendant company.

The defendant company asserts the right to decline to carry packed parcels for the plaintiffs. Secondly, it asserts the right to charge for each parcel according to the ordinary rates, and to require from the plaintiffs a statement of the number of parcels placed in the packed parcels.

It is admitted that if the defendant company has the right to charge for each parcel in the packed parcel, it may require from the plaintiffs a statement of what the packed parcels contain.

The plaintiffs assert the right to demand of the defendant company the carriage of the packed parcels at the same rates as any other parcel similar in size and weight would be carried under the defendant's tariff, without reference to the fact that such packed parcels contain several parcels addressed to different persons to be delivered by the agents of the plaintiffs for reward in that behalf.

It is manifest that if the plaintiffs succeed in business, they will deprive the defendant company of the most lucrative part of its business, and will compel it to carry parcels at a loss, so that the plaintiffs may make a profit; and Mr. McCarthy, for the plaintiffs, admitted that the result of the plaintiffs' claim, if tenable, would be that the company might be compelled at the instance of the American Express Company, a rival corporation, to carry all the light and profitable business of such American Express Company, making use of the facilities which it, the defendant company, has obtained from the Canadian Pacific Railway Company to its own detriment, if not destruction, and to the profit of its rival.

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The plaintiffs rely on decisions in England as to packed parcels. It is to be noted that nearly all the cases cited, depend on what is called the equality clause of the Railway Acts, and upon the principle "that where a railway company carries on some other business, it must, in respect of such business, be taken to be, *quoad* the railway, in the position of third parties": see note to Article 275, MacNamara's Law of Carriers, p. 355. The note further states: "Many of the cases decided by the Court of Common Pleas under sec. 2 of the Railway and Canal Traffic Act, 1854, were applications for an injunction by carriers competing with railway companies, and complaining that in sending goods by railway, and in carting them to and from railway stations, the companies subjected them to disadvantages, and gave themselves and their agents preferences which were undue. The same ground of decision as stated in this Article, will be found in all the carriers' cases."

The general principles of law governing common carriers may be found stated by Mr. Justice Blackburn in *The Directors, etc., of the Great Western R. W. Co.* v. *Sutton*, L. R. 4 H. L., at p. 237. The learned Judge said: "At common law a person holding himself out as a common carrier of goods, was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him, was to accept and carry all goods delivered to him for carriage, according to his profession (unless he had some reasonable excuse for not doing so), on being paid a reasonable compensation for so doing."

To create a liability on the part of a common carrier to carry goods tendered to him for carriage, it must appear that he has professed to carry such goods, for "a person may be a common carrier of one thing, while he is not a common carrier of another."—MacNamara, Article 19, p. 12; and, secondly, the compensation tendered must be reasonable.

Mr. Justice Blackburn in the *Sutton Case*, at pp. 239-240,

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said: "The consignor in the present case, was what has been called an 'intercepting carrier,' competing with the defendants in one of the most lucrative branches of their traffic. They would have an intelligible motive for wishing to clog his trade, and I do not see that there would be anything immoral or improper in their doing so by any legal means." The decision in that case, turned upon the clauses of the Railway Act, and it does not assist to analyze or discuss the judgments apart from such clauses.

But I find language in the judgment of Mr. Baron Bramwell, the dissenting Judge, which I think may be used as pertinent to the enquiry, whether in this case it was reasonable for the plaintiffs to demand of the defendant company the carriage of packed parcels for the purpose of their business, at the same rates as other parcels of like size and weight would be carried for under the tariff of the company? At page 253, that learned Judge said: "The plaintiff is a carrier, and forwards the property of others, never his own. The wholesale houses are not carriers, and principally forward their own goods. The plaintiff forwards all sorts of goods, no doubt principally drapery, but still he does forward all sorts. The wholesale houses do not. *All* the plaintiff's packages are packed. *All* those of the wholesale houses are not. According to the evidence of Hill, only 50 to 100 out of 700 to 1,000. The plaintiff is paid for what he forwards; the wholesale houses are not. What they do, they do for their mutual accommodation and that of their friends and customers. What the plaintiff does is for profit." The pertinency of such language to the enquiry whether or not the demand of the plaintiffs is a reasonable one in this case, is apparent when one considers the evidence tendered on behalf of the plaintiffs that the company carried similar packed parcels for wholesale houses and other customers, at the rates which the plaintiffs are willing to pay, and which they contend were reasonable. I am not convinced that the defendant company knew that any wholesale house was making a business of sending packed parcels; and

certainly if they did send packed parcels, the language of Mr. Baron Bramwell points out the difference between the carriage of goods for such houses, and the carriage of goods for the plaintiffs.

The case of *Crouch* v. *The Great Northern R. W. Co.*, 11 Ex. 742, was pressed upon me as a decision upon the question of the common law liability to carry packed parcels at a reasonable rate, and as a decision not depending upon the equality clauses. Pollock, C. B., in that case, said at p. 750: "Whether or no, the defendants were entitled to charge extra for packed parcels, is, in my opinion, a question of fact, and not of law." The jury in that case had found the fact for the plaintiff, and the Court would not interfere.

The facts in that case are not the same as in this, and the finding there cannot control the finding here.

It is my duty as Judge of the fact, to take into consideration all the facts and circumstances upon which the defendant company relied, or may reasonably be held to have relied or may be entitled to rely, in fixing its tariff or rates for carriage. Surely if the fact was that the wholesale houses and the customers generally, would send from any given point, say the city of Toronto, a very large number of small parcels separately packed, that would be something to be considered in determining what would be a fair charge for each parcel so as to give the company a fair revenue and a fair profit; and if the company, in fixing its rates, knew that instead of sending the parcels separately packed, the wholesale houses had combined to send all their small parcels in packed parcels, the different houses sending to one packer so that one large packed parcel might be made up for any given point, it would reasonably take that fact into consideration in determining at what rates it would carry such a packed parcel. Would it not be absurd to say otherwise, because the rates must be determined on the basis of a living profit?

No such case as the one before me, could have been in contemplation of the defendant company. That a number

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of persons should combine to carry on a business in competition with the defendant, to take from it the most profitable part of its business; to make use of its capital and facilities for its destruction, cannot be assumed to have been considered or provided for by the company in fixing its present tariff. Nor do I think that the plaintiffs or any of the public could for a moment fairly argue or assert that they believed, or were led to believe, that the defendant company professed to carry such packed parcels, or was an association doing business in such a manner.

In the United States, it has been held that a common carrier is not bound to allow its cars or boats, or vehicles or premises, to be made use of by a rival concern for the purpose of soliciting away its business, or of establishing a rival business; and it was held that a railway company did not hold itself out as a carrier of express companies, or as giving such facilities, or as put by one of the Judges, as 'a common carrier of common carriers.' I refer to the *Express Cases*, 117 U. S. R. 1.

As, therefore, the defendant company was not bound to carry except according to its profession; was entitled to discriminate; was not confined by any rule or regulation as to the charges it might make, providing they were reasonable; it seems to me that the question comes simply down to this, did the defendant company hold itself out as a carrier to carry goods for persons in the position of the plaintiffs, and for the purposes for which the plaintiffs desired them to be carried; and, secondly, if it did: does the tariff rate or rates charged to others, on the evidence before me, establish that the amount tendered by the plaintiffs, was a reasonable amount, or that the defendant company might not well charge for each parcel in a packed parcel according to its ordinary rates?

I find as a fact that the rates tendered by the plaintiffs, or which they were willing to pay, were not reasonable under the circumstances. I do not find it necessary to determine whether or not the defendant has the right

absolutely to decline to carry parcels so packed for the plaintiffs, but I say I do not think the defendant ever intended to hold itself out to the public as the carrier of the goods of a rival express company, making use of its capital and its facilities for doing business to the aggrandizement of its rival and its own destruction. An argument which would lead to the conclusion that Mr. McCarthy candidly, but boldly avowed on behalf of his clients, seems to me so unjust as to shew that it is not logically sound.

Judgment. Rose, J.

In my opinion the action should be dismissed with costs.

G. A. B.

RE MCDONALD V. DOWDALL ET AL.

Prohibition—Division Court—Interest—Splitting Demand—R. S. O. ch. 51, sec. 77.

Where the plaintiff sued in a Division Court for $100 interest upon moneys deposited with the defendants, and it appeared that she had treated the deposit receipt in her hands as one upon which the whole sum was past due and collectable:—

Held, that the action came within sec. 77 of the Division Courts Act, R. S. O. ch. 51, whereby the splitting of causes of action is forbidden; and prohibition was granted.

In re Clark v. *Barber*, 26 O. R. 47, followed, but commented on as irreconcilable with such cases as *Dickenson* v. *Harrison*, 4 Pri. 282, approved in *Attwood* v. *Taylor*, 1 M. & G. 307.

Statement. THIS was an application by the defendant Kirkland for prohibition to the 6th Division Court in the county of Lanark to prohibit further proceedings in a plaint in that Court wherein Catherine McDonald was plaintiff and R. J. Dowdall and J. T. Kirkland were defendants.

The particulars of demand annexed to the summons issued by the plaintiff in the Division Court stated that in September, 1892, while the defendants carried on business as solicitors, they were paid and received on the plaintiff's account $914, which they retained, giving the plaintiff the following writing:—

"The undersigned acknowledge to hold on deposit for Miss Catherine McDonald the sum of $914 * * which sum, less any account of the undersigned, is to bear interest at six per cent. per annum for the benefit of Miss McDonald; interest thereon to be payable to Miss McDonald quarterly.

Dated September 17th, 1892.

R. J. DOWDALL.
J. T. KIRKLAND."

That there was then due the defendants for accounts $20.85, which left $893.15 on deposit in their hands for the plaintiff.

That the defendants had paid the plaintiff $80 on account of interest.

Statement.

That there was due to the plaintiff on the 17th day of June, 1896, after deducting the $80, for interest the sum of $120.

That the plaintiff abandoned $20, a portion of the $120.

That the plaintiff claimed $100, interest up to the 17th June, 1896.

The summons was issued on the 4th August, 1896.

The defendant Kirkland disputed the plaintiff's claim and the jurisdiction of the Division Court.

Upon the motion for prohibition the defendant Kirkland filed an affidavit and exhibited two letters written to him by the solicitor for the plaintiff before the action, in the first of which he asked for a cheque for the whole amount of $914 and interest, and in the second of which he asked for something on account of her claim, and stated that "if paid the interest at present, she will not press for the principal."

The plaintiff's affidavit in answer stated that the money referred to in the particulars of claim was left with the defendants upon the understanding that the principal was to remain on deposit for a length of time, and that she was to be paid the interest quarterly.

In an affidavit of the defendant Kirkland filed in reply he stated that prior to August, 1895, the plaintiff had filed a claim upon the insolvent estate of the defendant Dowdall for the full amount of the deposit and interest, without suggesting that such claim was not then past due and immediately enforceable.

The motion for prohibition was argued before BOYD, C., in Chambers, on the 25th January, 1897.

J. E. Jones, for the defendant Kirkland, contended that the claim for $100 interest was part of a larger claim for principal and interest, and the action was therefore brought in violation of sec. 77 of the Division Courts Act, R. S. O. ch. 51, forbidding the splitting of demands, citing *Re*

Argument. *Clark* v. *Barber*, 26 O. R. 47; and also that the claim was for the balance of an unsettled account in the whole exceeding $400, and therefore brought in violation of the same section.

Masten, for the plaintiff, contra.

January 25, 1897. BOYD, C.:—

The affidavits, letters, and papers shew that the plaintiff has treated the deposit receipt in her hands as one upon which the whole sum is past due and collectable; that fact brings the case within the decision of the Divisional Court in *Re Clark* v. *Barber*, 26 O. R. 47, which is binding upon me.

I am not satisfied with that decision, not because it overruled my order refusing prohibition, 25 O. R. 253, but because it appears irreconcilable with such cases as *Dickenson* v. *Harrison*, 4 Pri. 282, approved in *Attwood* v. *Taylor*, 1 M. & G. at p. 307, where it was held that if two distinct sums are due to the same person on the same day under the same instrument, he may sue for either at his election —they may be the subject of separate actions, and are distinct and separable, though the one be for principal and the other for interest. To sue separately in such a case is not to split one entire cause of action, and would appear not to violate the meaning of sec. 77 of the Division Courts Act.

But, as the case stands, I have to order prohibition without costs.

E. B. B.

[DIVISIONAL COURT.]

RUSSELL V. FRENCH ET AL.

Lien—Mechanics' Lien—Materials—Drawback—59 Vict. ch. 35, sec. 10 (O.).

Under sec. 10 of the Mechanics and Wage-Earners' Lien Act, 59 Vict. ch. 35 (O.), it is the duty of the owner to retain out of the payments to be made to the contractor, as the work progresses, twenty per cent. of the value of the work done and materials provided, to form a fund for the payment of the lien-holders, not subject to be affected by the failure of the contractor to perform his contract.

Goddard v. *Coulson*, 10 A. R. 1, *Re Cornish*, 6 O. R. 259, and *Re Sear and Woods*, 23 O. R. 474, are not now applicable.

Statement.

THIS was an action to enforce a mechanic's lien for materials supplied to the defendants F. J. French & Son, the contractors, against whom the plaintiff claimed $373.20, the balance of the price of such materials. The plaintiff also asked that he should be declared entitled to a lien upon the lands of the defendants John W. Carroll, Alfred E. Carroll, and Eleanor Davies for that sum, and that these defendants should be ordered to pay that sum, and in default that all the estate and interest of these defendants in the said lands, or a competent part thereof, might be sold, and the proceeds applied in or towards payment of the sum claimed and the costs of the action, pursuant to the Mechanics and Wage-Earners' Lien Act, 1896.

The defendants Carroll *et al.*, the owners, alleged that the price for the erection and completion of the houses upon the lands in question, according to the contract between these defendants and the defendants F. J. French & Son, the contractors, was $2,358, of which sum these defendants paid to the contractors, in accordance with the contract and upon the architect's certificate, $1,275, before any notice of any lien, and previous to the dismissal of the contractors, on account of the failure of the contractors, pursuant to the terms of the contract, and previous to the final abandonment of the contract by the contrac-

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tors; that subsequently these defendants, the owners, paid for the completion of the houses to another contractor the sum of $923, in pursuance of the terms of the original contract, and in addition thereto to wage-earners for wages earned and work done by them on the houses, for which they had a preferred lien under the statute, the sum of $23.20; that the balance left after paying these sums of $1,275, $933, and $23.20, was $126.80, apart from any damages that might be claimed by these defendants, the owners; that, besides the plaintiff, several other persons claimed to be entitled to mechanics' liens on the property in question; that these defendants, the owners, in pursuance of a demand made upon them under sec. 27 of the Act, furnished such alleged lien-holders, including the plaintiff, with full particulars of the contract and of the sums paid out by them, and also offered, for the sake of peace, to pay such alleged lien-holders the said sum of $126.80, all alleged lien-holders assenting thereto and discharging these defendants' lands from their liens (if any), which offer was not accepted by the plaintiff or such other alleged lien-holders; and they brought $126.80 into Court.

The action was tried by Mr. James S. Cartwright, an official referee, who gave judgment as follows:—

In this case I have to determine the rights of the parties under the following admissions of fact.

The plaintiff furnished bricks to the contractors, French & Co., who engaged to do certain work for their co-defendants in the erection of houses on land owned by them. The contract is admitted. It was for the sum of $2,358. After the work had proceeded to a certain point, the contractors were discharged by the architect under the terms of the contract, and the contractors and owners put an end thereto. At that date work had been done to the value of $1,636, of which the architect had certified for $1,593.75, of which latter sum the owners had paid $1,275 to the contractors, and $23.20 for wages. The owners then com-

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Cartwright, Off. Ref.

pleted the work, according to the original contract, at a cost of $933. These amounts added together make $2,231.20, and, being deducted from the original contract price of $2,358, leave a balance of $126.80, which the defendants the owners have paid into Court as being all the moneys in their hands liable to the plaintiff's lien.

The plaintiff's contention is that, under the law as it now stands, he is entitled to call upon the owners for twenty per cent. of the value of the work done at the time when the contract was taken away from French & Son, which would be $304, after allowing them $23.20 paid for wages, as being preference claims. He further argues that, in any event, the case of *Reggin* v. *Manes*, 22 O. R. 443, has laid down how the percentage is to be ascertained under the facts of this case.

The point is new, and has not, so far as I can ascertain, come up for decision.

Section 8 of the Act of 1896, 59 Vict. ch. 35 (O.), is identical with sec. 10 of R. S. O. ch. 126. Unless in some part of the former Act this provision has been so varied as to assist the plaintiff in the present case, he cannot recover more than the defendants have admitted and brought into Court. By sec. 13 of the Act of 1896, this sec. 8 is expressly suspended in such a case as the present, in favour of wage-earners, but no similar provision is to be found in favour of material men. In view of the plain language of sec. 8, and the fact of its being expressly re-enacted, I do not see how the plaintiff's contention can succeed. The only view in which it could prevail would be that the whole purpose of the Act of 1896 was to create a fund of twenty per cent. (or fifteen per cent. in some cases) of the value of the work done from time to time, which would always be forthcoming to satisfy any claims of lien that might be successfully established. But, in the absence of any provision to that effect, I think it must be left to the Legislature so to enact, if such was their intention.

The case of *Harrington* v. *Saunders*, 7 C. L. T. Occ. N.

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Cartwright, Off. Ref.

88, seems very much in point. The reasoning in that case must be applied to the terms of sub-sec. 4 of sec. 13 of the Act of 1896.

In my view, $126.80 is all that in this case is "the sum payable by the owners to the contractor" (sec. 8 of the Act of 1896), and the plaintiff cannot recover any more against the land.

As the point is new, and not by any means clear, I cannot give any costs of this proceeding except as against French; but will allow the defendants the owners $5 for costs of judgment and registering discharges of all liens.

The plaintiff appealed from this judgment to a Divisional Court, and his appeal was argued before MEREDITH, C. J., and ROSE and MACMAHON, JJ., on the 12th January, 1897.

J. H. Denton, for the appellant. 1. The intention of the Mechanics and Wage-Earners' Lien Act, 1896, is to set apart a fund of twenty per cent. of the value of the work done for lien-holders on which a lien attaches, notwithstanding that such drawback may never be due and owing to the contractor: sec. 10.* It was held under the sections of the former Act, R. S. O. ch. 126, dealing with the same matters, in *Re Sear and Woods*, 23 O. R. 474, that under the words "the price to be paid," unless a lien-holder could establish that there was money owing by the owner to the contractor, no lien attached. See also *Goddard* v. *Coulson*, 10 A. R. 1, and *Re Cornish*, 6 O. R. 259. But the language of this new section is entirely different, and provides for a drawback of twenty per cent. on the value of the work only. 2. The increased cost of completing the contract, which the owners claim

*10.—(1) In all cases an owner shall as any contract progresses deduct from any payments to be made, and retain for a period of thirty days after the completion or abandonment of the contract, twenty per cent. of the value of the work, service, and materials actually done, placed or furnished, as defined by sec. 5 of this Act, and such values shall be calculated on the basis of the price to be paid for the whole contract; provided that where a contract exceeds $15,000, the amount to be retained shall be fifteen per cent. instead of twenty per cent., and the liens created

to deduct from the drawback, is a claim in the nature of damages, and no such claim can be made here, because the contractor and the owners on the 7th August, 1896, formally in writing cancelled and rescinded the contract. See *Petrie* v. *Hunter*, 2 O. R. 233. 3. In any event the learned referee erred in the manner of his computation. A payment in excess of the contract price made to complete a building owing to the failure of the contractor should be deducted from the contract price, and the twenty per cent. calculated on the balance of the contract price after such deduction: *Reggin* v. *Manes*, 22 O. R. 443. Argument.

Snow, for the defendants Carroll *et al.*, the owners. Section 10 of the Act of 1896 gives no greater rights to lienholders than they had before that Act. The lien is to be limited to the sum "justly owing" by the owner: sec. 50. As pointed out by the referee, sec. 8 is exactly the same as sec. 10 of R. S. O. ch. 126. By sec. 13, sub-sec. 4, it is shewn that sec. 10 is not intended to apply to material men, but only to wage-earners. I refer to *Townsley* v. *Baldwin*, 18 O. R. 403; *Harrington* v. *Saunders*, 7 C. L. T. Occ. N. 88; *Truax* v. *Dixon*, 17 O. R. 366; *McBean* v. *Kinnear*, 23 O. R. 313.

Denton, in reply.

MEREDITH, C. J.—(at the close of the argument):—

The cases of *Goddard* v. *Coulson*, 10 A. R. 1, *Re Cornish*, 6 O. R. 259, and *Re Sear and Woods*, 23 O. R. 474, are not now applicable owing to the change in the statute.

In our opinion, the fund upon which the plaintiff is

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by this Act shall be a charge upon the amounts directed to be retained by this section.

(2) All payments up to eighty per cent. (or eighty-five per cent. where the contract price exceeds $15,000) of such value made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor before notice in writing of such lien given by the person claiming the lien to the owner, contractor, or the sub-contractor, as the case may be, shall operate as a discharge *pro tanto* of the lien created by this Act.

Judgment.

Meredith, C.J.

entitled to a charge is to be calculated, according to sec. 10, at twenty per cent. on $1,593.75, the value of the work actually done by the original contractors, after deducting $23.20, the amount paid by the owners to wage-earners. That percentage it was the duty of the owner to retain out of the payments to be made to the contractor, and it appears to have been intended to form a fund for the payment of the lien-holders, and not subject to be affected by the failure of the contractor to perform his contract.

The plaintiff has substantially succeeded, and should have costs. We fix the plaintiff's costs of the whole proceeding, including the appeal, at $100.

ROSE, J.:—

It seems to me that sec. 10 of 59 Vict. ch. 35 requires that the owner shall deduct from any money that he agrees to pay the contractor as the work progresses, whether it be fifty, sixty, eighty per cent., or any other sum, twenty per cent. of the value of the work done and materials furnished, such value being calculated on the basis of the price to be paid for the whole contract, and such twenty per cent. so deducted is to form a fund for the lien-holders; that is, instead of going to the contractor, it goes to the lien-holder; for, the owner being willing that the contractor should receive the stipulated percentage, and that no part of the same should be retained as security, the statute takes from such percentage twenty per cent. of the value of the work, and sets it apart as a fund for the lien-holders, and thereafter it is available for them only, and not as a fund to which the owner can resort as security against or to make good any loss occasioned by the non-completion of the contract. Section 8 must be read in the light of sec. 10, *i.e.*, "as herein provided."

MACMAHON, J.:—

I agree.

E. B. B.

FOSTER v. THE CORPORATION OF THE VILLAGE OF HINTONBURG.

Municipal Corporations—Limitation of Annual Rate—"School Rate"—Debentures for School House—Con. Mun. Act, 1892, 55 Vict. ch. 42 (O.).

The annual amount required to pay for debentures issued under a by-law passed for the purchase of a school site and the erection of a school house thereon, comes within the term "school rates" and is excluded from the two cents, to which by sec. 357 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), the annual rate permitted to be levied by municipalities, is limited.

Statement.

THIS was a motion to continue an interim injunction, restraining the defendant corporation from proceeding to collect the taxes imposed by the corporation for the year 1896.

On January 7th, 1897, *G. G. S. Lindsey*, supported the motion. Under sec. 357 of the Consolidated Municipal Act, 1892, 55 Vict. cap. 42 (O.), the annual rate to be levied must not exceed two cents on the dollar, exclusive of school rates. Here, the annual rate exceeds the two cents. This appears by reference to the tax bill. The amount required to be levied each year by by-law 449, under the debentures issued for the erection of a school house, brings the amount beyond the two cents. This amount does not come within the term "school rates." Section 67 of the Public School Act, 1896, 57 Vict. ch. 70 (O.), shews what is meant by school rates, namely, such amount as may be required for teachers' salary and other expenses. The words, "other expenses," must be read as expenses *ejusdem generis*, for instance, the lighting and heating of the school-house, salary of caretaker, etc.: Maxwell on Statutes, 3rd ed. 459; Hardcastle on Statutes, 2nd ed., 172, 209.

Clement, contra. There is no excess in this case. The amount is within the two cents. Section 357 expressly shews that two cents shall be exclusive of school rates, and the amount required to be allowed by by-law 449 is a school rate. It is a rate for school purposes. Section 69 of the

Statement.

Public School Act refers to the annual expenses, while sec. 357 of the Municipal Act is not so limited, but includes all rates for school purposes. In any event, the amount of the excess is so trifling, as not to justify an injunction being granted, restraining the collection of taxes throughout the whole township, but the plaintiff should be left to his remedy by action.

Lindsey, in reply. The excess required to be paid by the plaintiff is not to be alone considered, but the amount payable by all the ratepayers which amounts to a very large sum. This is a proper case for an injunction. It was so decided in *Wilkie* v. *Corporation of Clinton*, 28 Gr. 557, where an injunction was granted on it being shewn that for the purpose of erecting a market house, the municipal council was required to levy a rate in excess of the two cents.

January 10th, 1897. MACMAHON, J.:—

The ground taken by the plaintiff is that the council had assessed for the year 1896 more than an aggregate rate of two cents on the dollar on the actual value of the ratable property within the corporation limits, exclusive of school rates.

There were three affidavits filed on the motion. That of Benjamin Foster who states his property is assessed for $1,500, on which sum his taxes at two cents on the dollar would be $30. The notice served on him shews that his assessment amounts to $41.43, made up according to the notice as follows:

County rate $·000412 in the dollar		$ 0 62
Village rate $·018488 in the dollar		27 73
Special rate under village debenture:		
By-law number 27 $·0011 in the dollar		1 65
		$30 00
Public School rate $·0062 in the dollar	$9 30	
" " " under by-law of the corporation of Nepean: number 449 $·00142 in the dollar	2 13	
		11 43
		$41 43

Judgment.
MacMahon, J.

James Newton states his property is assessed at $800; and the notice requires him to pay $22.14 as taxes on his property. Of this sum $4.96 is for public school rate, and $1.14 as public school loan rate under by-law 449 = $6.10 making the amount otherwise assessed $16, or two cents on the dollar on $800.

Jonas Bullman's affidavit shews his property is assessed at $750, and the notice demands payment of $20.71 as taxes. Of this sum $4.65 is public school rate, and $1.07 under by-law 449 = $5.72, making the amount otherwise taxed against his property at $14.99.

By-law No. 449 was passed by the township of Nepean (out of which the village of Hintonburg was carved on the 16th of August, 1888), for raising for public school section No. 18 in the township $6.500, to pay for a school site and the erection of a school-house thereon, and for the raising of which the township issued debentures payable in twenty years; and it is to meet the annual sum required to pay such debentures that such extra rate is levied, said school section No. 18 now being in Hintonburg.

The amount assessed in each case under by-law 449 clearly forms part of the school rates. When the debentures were sold, the amount realized was required by law to be paid over to the secretary-treasurer of the school section for the purpose of building the school-house. The indebtedness so created was chargeable against and payable by the public school supporters of that school section, and was not a debt assessable against the property owners of the whole township of Nepean. There were at least eighteen school sections in that township. One section might be content with a school-house costing $1,000, while another might require one costing $10,000. It was never intended that the school supporters in a section with a school-house built for the smaller sum should help to pay for the erection of a school-house costing the larger amount.

If this was a debt payable by the township out of the whole of the ratable property in the municipality then

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MacMahon, J.

the property of separate school supporters would be assessed for the building of such public school.

The "expenses of the schools" mentioned in sec. 62, sub-sec. 9 of 59 Vict. ch. 70, include all the charges and expenses in connection therewith, including, of course, the payment of the yearly sum to meet the debenture debt maturing each year, together with the interest thereon.

The injunction must be dissolved; the costs of this motion will be disposed of by the trial Judge.

G. F. H.

[COMMON PLEAS DIVISION.]

REGINA v. QUINN.

Justice of the Peace—Adjudication—Adjournment Sine Die—Conviction.

A justice of the peace in summary proceedings before him cannot adjourn *sine die* for the purpose of considering his judgment.
Conviction quashed.

Statement.

THIS was a motion to quash a conviction of the defendant made by James Clement and Patrick Jordan, two justices of the peace for the united counties of Stormont, Dundas and Glengarry, for an assault committed on Gordon Rupert.

The information was laid by the complainant Rupert, before James Clement, one of the justices, on the 16th November, 1895. The complaint was heard on the 22nd November, before the above named convicting justices, and James H. McMillan, another justice of the peace for the said counties.

Du Vernet, for the motion.

No one appeared in opposition thereto.

The argument took place on October 16th, 1896, before the Common Pleas Division, composed of MEREDITH, C.J., ROSE and MACMAHON, JJ.

January 25th, 1897. The judgment of the Court was delivered by

Judgment.

MacMahon, J.

MacMahon, J.:—

From the papers returned in answer to the *certiorari* it appears that all the evidence, both for the prosecution and for the defence, was heard at the sitting on the 22nd November, 1895. No adjudication, however, was then made, as the justices desired to take the opinion of Mr. Dingwall, the county crown attorney, as to whether the defendant on the evidence had made out that the assault committed by him was justified, having regard to the 53rd section of the Criminal Code.

The justices, although seeking the advice of the county crown attorney before adjudicating on the matter, named no day for giving judgment.

Mr. Clement, after receiving a reply from the county crown attorney expressing the opinion that the defendant should be fined or committed for trial, communicated it to the other justices; and Mr. McMillan states in an affidavit filed on behalf of the defendant, that he was notified by Mr. Clement to meet him at his (Clement's) residence on the 2nd of December, where he attended, defendant and his solicitor also being present. The evidence given at the hearing on the 22nd of November was discussed; but Mr. Clement and Mr. McMillan being unable to agree, no adjudication was made.

The adjournment on the 22nd of November without a day being named on which judgment was to be delivered, was in itself sufficient to render any further proceeding nugatory. But in addition to that, no adjournment was made on the 2nd of December to any particular day, and no further action was taken by the justices until a communication was received from the county crown attorney requiring the justices to make an adjudication and a return to the clerk of the peace. Then a notice was given by Mr. Clement to the other two justices desiring them to meet

Judgment.

MacMahon, J.

him at a time and place named on the 13th of April, 1896, to deliver judgment. Mr. Clement and Mr. Jordan, two of the justices, met at such time and place and, in the absence of the defendant, and even without notice to him or his solicitor, delivered judgment convicting the defendant of the assault charged, and inflicting a penalty, and directing him to pay the costs.

This proceeding was wholly beyond the jurisdiction of the magistrates, and was in my opinion absolutely void.

In England, prior to the passing of the Imp. Act, 11 & 12 Vict. ch. 43, in cases of summary proceedings, the power existed at common law in the magistrate to adjourn the hearing, and the practice as to such adjournment is thus stated in Paley on Convictions (ed. 1838), pp. 40 and 41: "The hearing may, either upon the application of the defendant, or, for any other cause, be adjourned to a subsequent day; taking care not to exceed the time, if any be limited by the Act, for making the conviction. But if the limitation refers only to the time in which the offence must be prosecuted, * * and not * * to the time of making the conviction, then, provided the information has been laid in due time, the hearing and subsequent proceedings to judgment will be valid, though postponed to a term beyond the period mentioned in the Act."

Subject to the limitations above referred to, the power of the justices at common law to adjourn during the hearing appears to have been almost unlimited. But the question of adjournment after the hearing for the purpose of delivering judgment is not treated or discussed at length in any of the text books I have consulted. When, however, an adjournment took place after the hearing for the purpose of adjudication, it would, in the language of the text already quoted from Paley, be a "subsequent proceeding to judgment," and would be valid. Such an adjournment must unquestionably have been to a day certain, which would be stated by the justice in the presence of the parties.

Under both the Imperial Act, 11 & 12 Vict. ch. 43, sec.

16, and the 48th section of our Act, R. S. C. ch. 178, the justices in their discretion may adjourn the hearing to a certain time and place to be stated in the presence of the parties or their attorneys; the difference between the Imperial Act and ours being that under the former the length of time to which the hearing may be adjourned is unlimited, while under our Act the adjournment cannot be for more than one week.

Judgment. MacMahon, J.

However, the 52nd section of our Act provides that the justice, having heard what each party has to say and the witnesses and evidence adduced, shall consider the whole matter, and unless otherwise provided, determine the same, and convict or make an order upon the defendant, or dismiss the information or complaint as the case may be. The justice may, if the nature of the case permit, be able to consider the case at the close of the hearing, or he may properly, in order to consider the whole matter, be obliged to reserve his decision until a future day. And it has been held that where an adjournment is made at the close of the hearing for the purpose of delivering judgment, the magistrate is not confined to the limit of time mentioned in section 48, but may adjourn for a longer period: *Regina* v. *Hall*, 12 P. R. 142; *Regina* v. *Alexander*, 17 O. R. 458.

But the time to which the adjournment is made must be to a day certain and in the presence of the parties or their solicitors, so as to enable them to be present when the decision is given, otherwise the accused would or might be deprived of his right of appeal. And it was held where several informations depended on the same point of law and a case was granted for the opinion of a superior Court on one conviction, the justices may adjourn the hearing of the other cases to a future day, and the Court of Queen's Bench refused a mandamus to compel them to proceed to an adjudication: *O'Leary's Case*, Q. B., 22 Nov., 1872, cited in Stone's Justices' Manual, 26th ed., 741. If, however, the adjudication is adjourned *sine die*, a question has been raised whether the whole proceedings do not fall to the ground: *ib.* p. 741.

Judgment.

MacMahon, J.

The question, however, was fully considered in Nova Scotia in 1890, in *Regina* v. *Morse*, 22 Nova Scotia 298, where it was held that where a justice adjourned the trial without day, stating in the presence of all the parties that he would make up his judgment and notify the parties affected, which he did in time for an appeal from the conviction, that no conviction could be made, the justice having lost jurisdiction by the adjournment without day. Mr. Justice Townsend in his judgment, at page 300, made these pertinent observations: "Here the magistrate closed his Court without even putting the defendant under his own recognizance, and thus lost all jurisdiction over him on the particular prosecution before him. One way in which to test the question is to ask, in what way known to the law could he have brought the defendant again before him for the purpose of giving his decision? Again, if not bound to name a day certain, there is nothing to oblige him to give notice of his decision until it is to be acted upon, and how then could the defendant get the full benefit of his right of appeal. All these considerations, to which others might be added, shew that his proceedings after the adjournment of the Court without day were without authority, and the conviction therefore bad." And Mr. Justice Wetherbe said, at p. 301: "No Court, I think, has ever held such a conviction good, and no Judge has suggested that such a decision could be sustained as a conviction."

In this case there was no notification whatever of the intention of the justices to meet and deliver judgment, so that this is even a stronger case for the defendant than the one referred to from the Nova Scotia Court.

The conviction must be quashed with the usual protection to the magistrates.

G. F. H.

AIKIN v. CITY OF HAMILTON AND THE TORONTO, HAMILTON AND BUFFALO R. W. CO.

Railways—Highway Crossing—Accident—Damages.

Where a highway in a city was crossed by a railway, the rails being raised some two feet above the sidewalk, the part between the rails being filled in with broken tiles over which loose boards were placed, and the plaintiff, in attempting to get over the crossing to reach her destination at a point beyond the tracks,—the street in question being the only mode of access thereto—slipped, and was injured, the railway company were held liable therefor.

Keachie v. *Corporation of Toronto*, 22 A. R. 371, distinguished.

Statement.

THIS was an action brought against the defendants, the corporation of the city of Hamilton, to recover damages sustained by the plaintiff by reason of a defective crossing on Bailie street in that city.

The action was tried before FALCONBRIDGE, J., without a jury, at Hamilton, on the 22nd October, 1896.

The defendants, the corporation of the city of Hamilton, had the Toronto, Hamilton and Buffalo R. W. Co., made party defendants.

The evidence shewed that at the place where the defendants' railway crossed the sidewalk on the street, it was raised some two feet above the sidewalk, the portion between the tracks being filled up with broken tiles, over which loose boards were placed. The plaintiff was walking along the street, on her way to see a friend living on the street beyond where the crossing was, and on reaching the place where the tracks were, she got up on to the tracks and, in attempting to get down again, she slipped and fell and was injured. It was proved that there was no other way of getting to the place where the plaintiff was going to except by going over this crossing. It was also proved that the crossing had been in the state it was for some weeks.

Permission from the Railway Committee of the Privy Council to cross the street in question, under section 187 of the Railway Act, 1888, had been obtained by the railway company.

Statement.

The defendants claimed that there was no negligence on their part, and that the accident occurred through the plaintiff's own contributory negligence in attempting to go over the crossing in daylight, being a place which she claimed to be dangerous, and which, therefore, she should have avoided, relying on *Keachie* v. *Corporation of Toronto*, 22 A. R. 371.

The defendants, the corporation of the city of Hamilton, also set up that if there were any obstruction to the highway it was caused by the defendants, the Toronto, Hamilton and Buffalo R. W. Co., from whom they had a contract of indemnity; and they claimed relief over against them.

J. W. Nesbitt, Q.C., and *John Greer*, for the plaintiff.

Mackelcan, Q.C., for the defendants the corporation of the city of Hamilton.

Carscallen, Q.C., for the defendants the Toronto, Hamilton and Buffalo R. W. Co.

The learned Judge reserved his decision, and subsequently delivered the following judgment:

October 28th, 1896. FALCONBRIDGE, J.:—

I distinguish *Keachie* v. *Corporation of Toronto*, 22 A. R. 371, from the present case in this, that there close at hand a safe passage was provided, which plaintiff well knew, but here no such provision was made.

The evidence on the questions of negligence of the defendants and contributory negligence of the plaintiff largely preponderates in the plaintiff's favour; and I find as facts both issues for her; and I hold that neither the legislation of the city and Province, nor the orders of the Railway Committee absolve the defendants from the performance of their duty to the public in this regard.

In a case like this where the patients' symptoms are entirely, or almost entirely, subjective, and the medical evidence is contradictory, I should not feel myself at liberty to award very heavy damages.

I think I am dealing fairly by the parties when I assess the plaintiff's damages (including a reasonable sum for what she will have to pay her medical attendants) at the sum of $225, for which sum I enter judgment with full costs. Judgment. Falconbridge, J.

The Toronto, Hamilton and Buffalo R. W. Co. will indemnify the city of Hamilton, and pay the city's costs of defence.

G. F. H.

[CHANCERY DIVISION.]

REGINA EX REL. BROWN

v.

THE ROBERT SIMPSON COMPANY (LIMITED).

Criminal Law—Procedure—Provincial Criminal Law—Criminal Code—Special Case under sec. 900—Right of Magistrate to State—R. S. O. ch. 74.

A magistrate has no power to state a case under section 900 of the Criminal Code, for an alleged offence against an Ontario Statute, not involving the constitutionality of the statute, the procedure by way of appeal to the sessions provided for by Ontario legislation applying in such a case.

SPECIAL case stated by the police magistrate of the city of Toronto. Statement.

The defendant company is a company incorporated under the Joint Stock Companies' Letters Patent Act, R. S. O. ch. 157, for the following purposes, that is to say:—

To buy, sell, manufacture and deal in goods, wares and merchandise generally, and for the said purposes to acquire the necessary real and personal property, including the stock-in-trade and business now carried on by Robert Simpson as a departmental store, corner of Queen and Yonge streets, Toronto.

The said company has a large departmental store at the corner of Queen and Yonge streets, in the city of Toronto, and was charged before me on the information and com-

Statement. plaint of one Alfred Brown: that the said company did, during the months of June and July, 1896, unlawfully keep open shop at the city of Toronto, for retailing, dispensing and compounding poisons, contrary to the form of the Pharmacy Act and amendments thereto.

On the ground floor of the said store or building, a space is set apart for a drug department, which department is, and has been under the management of one Charles P. Lusk, a duly qualified pharmaceutical chemist, registered under the Pharmacy Act, and who had taken out a certificate under the provisions of section 18 of the said Act.

It was admitted that the said Lusk did, in said department, dispense certain drugs containing poisons, and sell certain poisons to the complainant, all of which poisons are mentioned and set out in the schedule "A" of the Pharmacy Act and amendments thereto.

The said Lusk is the holder of one share of the stock in said company, and the position occupied by him in the said business is, that he manages the drug and patent medicine business carried on in the said store of the said incorporated company at the corner of Queen and Yonge streets in the city of Toronto; and that he sells, dispenses and compounds all the poisonous drugs and medicines required in carrying on said business. The said Lusk received for his services aforesaid, the sum of $15.00 a week. The agreement for hiring between the said company and the said Lusk, may be terminated by either party on one week's notice. All the goods, including said poisons required for the said department, are from time to time purchased by the said Lusk on his own judgment, but with the moneys or upon the credit of the said company, which said company receives the proceeds of all sales made in said department, such proceeds going into the general cash receipts of the whole departmental store.

On the foregoing facts, which were admitted, the police magistrate in his view of the law, following the case of *Pharmaceutical Society of London* v. *Provincial Supply Association*, 5 App. Cas. 857, dismissed the informa-

tion and complaint of the said Alfred Brown; and his order of dismissal being questioned by the prosecutor, on the ground that the defendants were guilty of the offence charged on the information under section 24 of the Pharmacy Act, he stated this case so that his decision on the law of the case might be reviewed by a Division of the High Court of Justice. Statement.

On November 25th, 1896, before the Chancery Division of the High Court of Justice composed of BOYD, C., FERGUSON, and ROBERTSON, JJ., the special case was argued. On *Osler*, Q. C., and *E. T. Malone*, for the private prosecutor, proceeding to argue the case, *Shepley*, Q. C., for the defendant, raised the preliminary objection that the police magistrate had no power to state a special case. The Court decided that they would hear the case subject to the preliminary objection, and *Osler*, Q. C., and *Ritchie*, Q. C., for the defendant, argued the case on its merits.

Shepley, Q. C., in support of the preliminary objection. The police magistrate had no power to state a case for this Court. The Ontario Acts, R. S. O. chs. 74 and 75, contain the complete procedure for offences under Ontario Acts. These two Acts cover the whole field of procedure in the case of summary convictions and appeals under the Ontario Statutes. Section 65 of 32 & 33 Vict. ch. 31 (D.), provided for the right of appeal to the sessions, and this was embodied in secs. 76 and 77 of the R. S. C. ch. 178. No power is there granted to a magistrate to state a case. The first Act which gave magistrates power to state a case was 52 Vict. ch. 15, sec. 5 (O.). That is limited to cases where the question is as to the constitutionality of the Act under which the conviction is made. The matter is discussed in *Regina* v. *Wason*, 17 A. R. 221, and it is pointed out that where there is what may be termed provincial criminal law, there is the right to enact provincial procedure with regard to offences against that law. The Provincial Legislature having enacted a complete

Argument. code of procedure to govern cases of this kind, including an appeal to the sessions, and limited the stating of a case to matters involving the constitutionality of Provincial Acts, they have, so to speak, occupied the field, and having in no way embodied section 900 of the Criminal Code as part of the Provincial Legislation, it cannot, therefore, apply to this case, being limited to offences over which the Dominion Parliament has jurisdiction. This is in substance an appeal, and therefore applying the cognate provisions of the Dominion Code would be in effect to oust the jurisdiction of the Province.

Osler, Q. C., contra. Section 1 of R. S. O. ch. 74, is quite wide enough to cover the stating of a case. It adopts the Dominion procedure then in force, that is in force at the time the case comes on for trial. The contention that the field, so far as the stating of a case is concerned, has been occupied by the provincial legislation, is not correct. The field there occupied is of a limited character, namely, as to the constitutionality of certain statutes, leaving all other matters open. The reason was that it was not deemed advisable that a magistrate should decide on constitutional questions. Section 1 is limited by section 2, namely, that it is not to affect the procedure on appeals. The effect of sec. 9 of the R. S. O. ch. 74, is merely to delay the coming into force of the Dominion legislation until the next session of the Ontario Legislature, to enable it to legislate on the subject if it so desire, but if it does not do so, then the Dominion legislation becomes effective. The effect of section 900 of the Code is not to interfere with the appeals on the evidence, but merely for the statement of a case for the settlement of the law.

December 12, 1896. BOYD, C.:—

In the Criminal Code of Canada, 55 & 56 Vict. ch. 29, the classification of contents gives as Title VII. "Procedure," of which part LVIII. contains all the provisions as to "Summary Convictions," embracing sections 839 to 909 inclusive.

Judgment.

Boyd, C.

Sections 879 to 888 (also 899), relate to an appeal to the General Sessions as well upon the facts as the law (section 881). Sections 889 to 895 relate to proceedings to quash upon *certiorari*. Section 900, the one in question, is a long section containing the practice upon the statement of a case by the magistrate, in order that it may be reviewed on the ground that it is erroneous in point of law, or is in excess of jurisdiction.

The internal evidence supplied by this section is, that the proceeding is regarded and spoken of as an appeal; the dissatisfied person is styled the "appellant"; he is to give a recognizance conditioned to "prosecute his appeal without delay." The "judgment appealed against," is mentioned. The justice is declared to be not liable for costs by reason of such appeal against his decision. And sub-section 14 provides that any person who appeals under that section 900, from which he is entitled to appeal under 879 to the sessions, shall be taken to have abandoned any appeal to the sessions. The Code, therefore, treats this method of stated case to be but a form of appeal equivalent to the ordinary appeal upon the facts and law to the General Sessions.

Now turning to the Ontario Statute as to summary convictions, R. S. O. ch. 74, it appears to incorporate into provincial law, all the enactments of the Dominion law touching procedure on such convictions, except that procedure in appeals shall not be affected. Appeals, that is from convictions under Ontario laws are to be lodged and prosecuted as provided by provincial enactment, and are withheld from being subject to Dominion legislation. This position covers the whole question of the right to proceed by way of stated case, which though a method given by the Criminal Code, is not extended to a summary conviction under the Pharmacy Act, R. S. O. ch. 151.

The analogous provision for stating a case in the Ontario law, found in 52 Vict. ch. 15 (O.), is in *pari materiâ* with section 900 of the Code, or as it first appears in 53 Vict. ch. 37, sec. 28 (D.), and both are taken from the Imperial

Judgment.

Boyd, C.

Statute 20 & 21 Vict. ch. 43, as added to by 42 & 43 Vict. ch. 49, sec. 33. These English enactments are treated of in Paley on Convictions, 7th ed., ch. 4, p. 213, under the head of "Appeal by Special Case," and are spoken of in the decisions of highest value as providing for appeals: *South Staffordshire Waterworks Co.* v. *Stone*, 19 Q. B. D. 168, approved and followed in *Lockhart* v. *Mayor, etc., of St. Albans*, 21 Q. B. D. 188.

The preliminary objection being well taken renders it needless to examine into the merits of the appeal.

The judgment must be for the respondent with costs.

FERGUSON, J.:—

Where a penalty or punishment is imposed under the authority of any statute of the Province of Ontario, or of any other statute or law in force in Ontario, and relating to matters within the legislative authority of the Legislature of the Province, and is recoverable before, or may be inflicted by a justice of the peace, or a police or stipendiary magistrate, the first section of chapter 74 of the R. S. O., adopts the procedure given in the statutes of the Dominion at the time in force, unless in any Act thereafter passed, imposing a penalty or punishment, it should be otherwise disclosed. But it also provides that nothing in the section contained, shall affect procedure on appeals.

The alleged offence in the present cases, is one for an alleged contravention of the provisions of a statute passed by the Legislature of Ontario, and no question arises as to the legislative authority to pass the Act.

This case comes before us in the form of a case stated by the magistrate professedly under the provisions of section 900 of the Criminal Code; one of the sections in the group of sections in part 58, relating to summary convictions. The language employed in various parts of this section 900, shews, as I think, clearly that such a case stated is an appeal.

Then, granting that this is an appeal from the decision

of the police magistrate, and turning to the provision in the Ontario Act, ch. 74, sec. 1, that nothing in the section contained, shall affect the procedure on appeals, the conclusion is reached that a procedure by way of stated case under the provisions of section 900 of the Code, is unauthorized. Judgment. Ferguson, J.

Assuming that an appeal would lie in the present instance, it seems to me a case for an appeal under the procedure of the Province, and on such an appeal, questions of law and fact can both be determined.

The only instance in which in the procedure of the Province respecting summary convictions, a case can be stated, is confined to very narrow ground, and is not this case, and besides such a case is necessarily presented to and heard before the Court of Appeal. See *The Queen* v. *Wason*, 17 A. R. 221.

I agree in the conclusion that the preliminary objection taken by Shepley, Q.C., must prevail.

ROBERTSON, J., concurred.

G. F. H.

BAKER v. FOREST CITY LODGE, INDEPENDENT ORDER OF ODDFELLOWS.

PARKHOUSE v. DOMINION LODGE, INDEPENDENT ORDER OF ODDFELLOWS.

Benevolent Societies—Rules and Regulations—Alterations in—Amount of Sick Benefit—Reduction of.

The plaintiff became a member of an Oddfellows' Lodge by subscription that he had examined the general laws and by-laws, and was ready and willing to yield obedience thereto. At that time there was a by-law in force fixing the amount of the weekly sick benefit payable to members, and also another by-law by which the society could repeal, suspend or amend existing by-laws by a by-law passed by a two-thirds vote. Subsequently a by-law was passed reducing the amount of the sick benefit, whereupon the plaintiff availed himself of the various appeals permitted by the constitution, and on his failing thereon, brought an action seeking a declaration that the action of the lodge was contrary to natural justice and that he was entitled to payment of the amount fixed when he became a member :—

Held, that this was a matter within the competence of the society and therefore the Court could not interfere.

Statement. THESE were two actions tried before BOYD, C., without a jury, at London, at the Winter Assizes, on the 13th January, 1897.

The trial took place on admissions of fact made by the parties, the substance of which, so far as material, is set out in the judgment.

I. F. Hellmuth, and *Fitzgerald*, for the plaintiffs.
Shepley, Q.C., and *R. K. Cowan*, for the defendants.

The following authorities were referred to in addition to those mentioned in the judgment: *McCabe* v. *Father Matthew's, etc., Society of South Brooklyn*, 24 Hun N. Y. 149; *Poultney* v. *Bachman*, 31 Hun N. Y. 49; *Davies* v. *Second Chatham Permanent Building Society*, 61 L. T. N. S. 680; *Stohr* v. *San Francisco Musical Fund Society*, 82 Cal. 557, 22 Pacific Reporter, 1125; *St. Patrick's Male Beneficial Society* v. *McVey*, 92 Penn. St. 510; *Scott* v. *Avery*, 5 H. L. Cas. 811; *Beland* v. *L'Union St. Thomas*, 19 O. R. 747; Bacon on Benefit Societies, 2nd ed., sec. 91*a*.

The learned Chancellor reserved his decision, and subsequently delivered the following judgment:— Judgment. Boyd, C.

January 21st, 1897. BOYD, C.:—

The plaintiff Baker became a member of the Forest City Lodge in January, 1865, by subscription under his hand that he had examined the general laws and by-laws, and was ready and willing to yield obedience thereto.

That Lodge had then by its constitution power to provide for the payment of weekly sick benefits to its members such amount as might be fixed by by-law; and had also power to adopt from time to time such by-laws as might be deemed expedient. The by-law then in force, provided for the payment of three dollars per week to those of a certain degree as such benefit; and another by-law provided for the repeal, suspending, or amending of existing by-laws upon a two-thirds vote.

The plaintiff Parkhouse became a member of the Dominion Lodge in July, 1872, under like conditions, stipulations and powers.

The complaint of both plaintiffs is, that after having enjoyed for a length of time the weekly payment of three dollars for sick benefit, the by-law was changed, so that there was a reduction to one dollar in the case of Parkhouse, and to two dollars in the case of Baker.

No complaint is made as to the regularity of the steps taken to pass these amending by-laws; but it is urged that it was not competent to deprive either plaintiff of the amounts fixed when he became a member, or to reduce the amounts first enjoyed by him as a recipient of the sick benefit.

Both members took the various appeals permitted by the constitution and practice of the Society of Oddfellows—first to the Grand Lodge of Ontario, and last, to the Sovereign Grand Lodge, but without avail. Then the contest is changed to the Courts of Justice, and the plaintiffs seek a declaration that the action of the Lodges is incompetent and contrary to natural justice.

Judgment.

Boyd, C.

It seems to me very plain that the principle of such cases, as *Wright* v. *Incorporated Synod of the Diocese of Huron*, 11 S. C. R. 95, and *Pepe* v. *City and Suburban Permanent Building Society*, [1893] 2 Ch. 312, is conclusive against the plaintiffs. They enter into no contract to receive a specific sum; on the contrary, as members of a society which has powers of internal regulation and legislation, they are willing to take the benefits from time to time defined by the by-laws of the Lodge. The very notion of being governed by by-law, indicates that change, repeal, and amendment, are expected, if not invariable, concomitants of such a power according to changed circumstances and in view of the best interests of the private society so organized.

There is no question here as to the good faith of the membership in making this change, or as to the express power to change from time to time; and that being so, it seems inevitable that these two members put themselves into the hands of the whole body, agreeing to abide by the decision of the required majority as to any changes in the matters regulated by by-laws. Apart from American decisions cited, there are two English in the Queen's Bench Division in 1891, exactly in point: *Stooke* v. *Mutual Provincial Alliance*, Wollsteins Cases Affecting Friendly Societies, p. 226, and *Dixon* v. *Thompson*, *ib.*, 259.

The actions fail and are dismissed, but I hope costs will not be asked.

G. F. H.

[DIVISIONAL COURT.]

MARSHALL v. THE CENTRAL ONTARIO RAILWAY COMPANY.

Defamation—Slander—Corporation—Master and Servant—Railway Company—Employee Drinking on Duty—Summary Dismissal—Railway Act, 51 Vict. ch. 29 (D.).

An action for slander will not lie against a corporation.

It is good cause for the summary dismissal by a railway company of one of its employees that he was proved while on duty to have drunk intoxicating liquor with other employees; and although only a recipient of the intoxicating liquor, such conduct constitutes a participation in a criminal offence under sec. 293 of the Railway Act, 51 Vict. ch. 29 (D.), which prohibits anyone selling, giving or bartering spirits or intoxicating liquor while on duty.

Statement.

THIS was an action for wrongful dismissal and slander by the defendants tried before ROSE, J., and a jury at Belleville

The slander complained of was that "the defendants falsely and maliciously spoke and published of the plaintiff the words following, *i.e.*, 'he was drunk' meaning that the plaintiff was drunk while in the employ of the defendants and on duty as their roadmaster, such words being spoken of and concerning him by the defendants in relation to his business and calling as roadmaster."

The learned Judge ruled that slander would not lie against a corporation; and he dismissed the action as to this count.

At the time of the dismissal of the plaintiff he was the roadmaster of the defendants having as such charge of their railway from Ireton to Coehill, some fifty-four miles in all; and while on duty on the 16th day of May, 1895, a special train left Coehill for Trenton for the purpose of picking up ties along the railway from Coehill towards Trenton. Riding upon the engine of this train were the conductor Bowler, the driver Berry, the fireman Reynolds, and the plaintiff.

At Rathbun, a station on the railway, a bottle of whiskey was procured either by the plaintiff or driver, and from this bottle the plaintiff, conductor and driver drank in the course of the journey, the plaintiff on one occasion receiving the bottle from the conductor; and for so drinking the conductor, driver, and the plaintiff were dismissed by the defendants from their service, which was the alleged wrongful dismissal.

Statement.

The learned trial Judge was of the opinion that such drinking justified the defendants in dismissing the plaintiff from their service, and gave judgment dismissing the action with costs.

The plaintiff moved on notice to set aside the judgment and for a new trial.

On January 18th, 1897, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ., *Clute*, Q.C., supported the motion. The learned Judge should have proceeded with the trial of the slander count as well as that for the wrongful dismissal. Slander lies against a corporation under the circumstances appearing here. [ARMOUR, C. J.—There will be no object in proceeding with the argument on the slander count, as we are all agreed that slander will not lie against a corporation.]* Then as to the wrongful dismissal. The only thing proved against the plaintiff was taking a drink of whiskey out of a bottle, which was handed him by the conductor. This of itself would not justify a dismissal. It should have been shewn that it had the effect of preventing him properly performing his duty. So long as he was properly able to do his duty, the company could have no ground for complaint.

W. R. Riddell, and *Monro Grier*, contra. This case must be read in the light of section 293 of "The Railway Act," 51 Vict. ch. 29 (D.), which renders every person selling, giving or bartering spirituous or intoxicating liquor to or with a servant or employee of the company while on duty liable to a penalty, etc. The plaintiff in taking the liquor was, therefore, participating in the offence prohibited by the section, and his dismissal was, therefore, justifiable. But apart from this provision of the statute his dismissal was proper. It is the duty of the company to see that their road is properly managed, and that no risk to travellers is incurred; and it cannot be for a moment argued that

*See Morawetz on Corporations, 2nd ed., par. 727. Townshend on Slander, 4th ed., sec. 265, at p. 474. Odgers, 3rd ed., p. 435. *Gilbert* v. *Crystal Fountain Lodge*, 80 Ga. 284, 4 S. E. R. 905.

where the company see men drinking, or it comes to their knowledge that they were drinking while on duty, they are not justified in dismissing them. The plaintiff was in a most responsible position. He was foreman of the gang for the purpose of collecting and distributing the ties. The evidence also disclosed that he had been caught drunk on a former occasion while on duty, and was warned that if he was caught drinking again, he would be dismissed. The case of *Pearce* v. *Foster*, 17 Q. B. D. 536, shews that the dismissal was proper. Argument.

Clute, Q. C., in reply. Section 293 has no application to this case. It only applies to the case of the person giving the liquor, and not to the person receiving it. It never could be intended that for merely taking a drink from another employee of the road the plaintiff can be dismissed.

January 25th, 1897. The judgment of the Court was delivered by

ARMOUR, C. J. :—

I think that the judgment of the learned Judge was right and should be affirmed.

It was said by Lopes, L. J., in *Pearce* v. *Foster*, L. R. 17 Q. B. D. 536, at p. 542, that "If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant."

The plaintiff in this case was, in my opinion, in drinking whiskey as and when he did while on duty, conducting himself in a way inconsistent with the faithful discharge of his duty to the defendants, and in a manner which was

Judgment. Armour, C.J.

prejudicial or was likely to be prejudicial to the interests of the defendants, and they were therefore justified in discharging him from their service.

He was, moreover, in so doing, concurring in the commission of a crime, and this also was, in my opinion, such misconduct as justified his dismissal.

Section 293 of "The Railway Act," 51 Vict. ch. 29 (D.), provides that "every person who sells, gives or barters any spirituous or intoxicating liquor to or with any servant or employee of any company, while on duty, is liable on summary conviction to a penalty not exceeding $50, or to imprisonment with or without hard labour for a period not exceeding one month, or to both."

This provision extends, in my opinion, to the case of one servant or employee of the company selling, giving or bartering any spirituous or intoxicating liquor to or with another servant or employee of the company, and in this case the servant or employee of the defendants who gave the whiskey to the plaintiff was guilty of a crime under this provision, and the plaintiff in receiving the whiskey was concurring in the commission of it.

The motion must therefore be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

ROSE

v.

THE CORPORATION OF THE VILLAGE OF MORRISBURG.

Water and Watercourses—Ditches and Watercourses Act—Completion of Work by Engineer—Time for Engineer to take Action—Municipal Corporations—Placing Amount for which Owners Liable on the Collector's Roll—Reeve—Corporate Act—R. S. O. ch. 220, secs. 15, 18—57 Vict. ch. 55, secs. 28, 30 (O.).

By section 28 of 57 Vict. ch. 55 (R. S. O. ch. 220, sec. 15), the Ditches and Watercourses Act, it is provided that "the engineer, at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same, if required in writing so to do by any of the owners interested, * * and may let the work * * to the lowest bidder," etc.;—

Held, that even the lapse of two years did not debar the engineer from acting under the above section, where it was plainly made to appear that the drain was not made, within the time or after the time, of the proper dimensions, by the person who had the first option to do the work:—

Held, also, that the amount the several owners are liable for may be placed upon the collector's roll under 57 Vict. ch. 55, sec. 30 (R. S. O. ch. 220, sec. 18), on the authorization of the reeve of the municipality.

MEREDITH, J., dissenting.

Statement.

THIS action was commenced by special summons in the Fifth Division Court in the united counties of Stormont, Dundas and Glengarry, on December 22nd, 1894, to recover $107 paid under protest to the defendants' collector for money placed upon the collector's roll, pursuant to two certificates of the engineer of the township of Williamsburg, within which lie the boundaries of the village of Morrisburg.

The certificates in question were given pursuant to R. S. O. ch. 220, sec. 16, of the Ditches and Watercourses Act, as to work done in respect to a certain ditch, and the amounts due for the same.

The award made under the said Act on December 10th, 1890, ordered the ditch in question to be dug. It began in the township of Williamsburg, ran through lands in Morrisburg, and ended in Williamsburg. The award provided that the work should be done and completed by

Statement. August 1st, 1891, and a portion of it was required to be done by the plaintiff.

In October, 1893, the township engineer was for the first time notified to inspect the ditch, and carry out the award. He accordingly made an inspection, and caused what further work he found necessary, to be done, and gave the certificates above mentioned.

The further facts of the case sufficiently appear from the judgments.

On September 9th, 1896, judgment of nonsuit was given, and on October 1st, 1896, an application for a new trial was refused.

The plaintiff moved by way of appeal before the Divisional Court on grounds referred to in the judgments.

The motion was argued on November 2nd, 1896, before BOYD, C., and FERGUSON, and MEREDITH, JJ.

A. H. Marsh, Q. C., for the plaintiff. All those interested having been notified to inspect the drain when the work was finished, are estopped from complaining The engineer had no jurisdiction to make the inspection at the time he made it, long after the completion of the drain. There was nothing to base the jurisdiction on. The filing of the certified copy of the award is necessary. There should have been some corporate act under R. S. O. ch. 220, sec. 26, before the money was put on the collector's roll. I refer to *Municipal Corporation of the Town of Trenton* v. *Dyer*, 24 S. C. R. 474.

Adam Johnston, for the defendants. It is not true that all parties were notified to attend and inspect the drain. The time mentioned in the statute is directory only. When the certificate of the engineer came in the money had to be paid. The township engineer is a judicial officer. All parties knew that the ditch was not in accordance with the award. The plaintiff did not do the work, as it was

her duty to do it; it was enforced by the engineer, and when it was done it was her duty to pay for it. The township council and village council are mere collecting agencies. The plaintiff and her son had full notice of what the award was: see *Township of Pembroke* v. *Canada Central R. W. Co.*, 3 O. R. 503; *O'Byrne* v. *Campbell*, 15 O. R. 339; *Hepburn* v. *Township of Orford*, 19 O. R. 585. Argument.

December 17th, 1896. BOYD, C.:—

Upon the evidence and merits of this appeal I agree with the judgment in appeal, that the plaintiff was liable to pay for the outlay made under the directions of the engineer for the proper completion of the drain over the property of the plaintiff. She failed to do the work within the time fixed for completion, and made no application for the extension of the time under section 15 of the Ditches and Watercourses Act, R. S. O. ch. 220. The inspection of the ditch in the fall of 1891 on the part of some of the landowners interested does not upon all the evidence show satisfaction with and adoption of the work; on the contrary, the very man (Jarmack) who did the work says that the ditch was not up to the standard of the award when dug in 1891. Other witnesses say that it was little more than half dug according to the fixed dimensions, and that it would not carry the water off. Written complaint was made to the engineer in September, 1892, and in August and October, 1893, which resulted in his making the examination required by the statute, and, finding it unfinished, he let out the work to be completed, which was done at a cost of $107. There is no evidence of estoppel or laches which can affect the action of the municipality and its officers in the premises, if the complaint was in time. Now, if the work of construction is not completed within the time fixed by the award by the person who is directed to do the work, the remedy for non-completion is not to be sought in the Courts, but the performance of the work shall be secured in the manner provided for by the Ditches

Judgment.

Boyd, C.

and Watercourses Act, 52 Vict. ch. 49, sec. 4 (2), (1889). And by the Act of 1894, 57 Vict. ch. 55, sec. 24, it is provided that the award shall be valid and binding to all intents and purposes whatsoever, notwithstanding any defect either in form or substance * * in any of the proceedings relating to the works to be done thereunder taken under the provisions of that Act. Though this section does not expressly cover the award in hand, it sufficiently indicates that a strict method of viewing the proceedings is to be deprecated—as the local community is left to be a law unto itself in carrying out the award.

Therefore, I think, that in construing the expression used in sec. 15 of R. S. O. ch. 220, which is repeated also in section 28 of the last Act, viz., "the engineer shall at the expiration of the time limited by the award for the completion of the works inspect the ditch or drain, if required in writing so to do by any of the parties interested," one is not to read the preposition "at" as controlling the whole, and restricting the person requesting the inspection to act contemporaneously with the date fixed for the completion of the work. The meaning is that the proprietor through whose land the ditch partly goes, is to be allowed the whole period fixed by the award for the completion of the work by himself on his own land, and if he fails to complete within that time, then it is open for those interested to bring on the engineer in order to have the whole work properly completed. The lapse of a year or of even two years I do not consider fatal if it is plainly made to appear that the drain was not made within the time or after the time of the proper dimensions by the one who had the first option to do the work.

The purpose of the Act is that the drainage contemplated be made effective according to the award by the method provided under the Act, and it would frustrate the whole object of the landowner, if the power to remedy an important piece of work disappears unless complaint is made forthwith at the very day when the time fixed by the award for completion by the owner expires.

Judgment.

Boyd, C.

The forms given by the statute R. S. O. ch. 220, indicate that no special importance is centred on the point of time. Thus the award form E. is to provide for the doing by each person of the share allotted to him, thus: "And said portion shall be made and completed within (name time within which to be completed)," and in form F., the engineer is to certify that certain work has been completed under his direction "which the said —— having failed to do was by me subsequently let to, etc." In brief I read the word "at" of this section as meaning "after," agreably to *Re Railway Sleepers' Supply Co.*, 29 Ch. D., at p. 206; and *The Queen* v. *Arkwright*, 12 Q. B., at p. 970.

The evidence is very meagrely taken down, and some facts have to be groped for, but it was conceded that this sum of $107 was paid to the contractors who did the work under sec. 16 of the Act (see also sec. 13), by the municipality of Williamsburg. Thus it appears that in respect of the lands in Morrisburg, where plaintiff's lands are, the clerk of Williamsburg forwarded in September, 1894, to the clerk of Morrisburg the certified copy of the engineer's certificate as to their amounts under section 20 of the Act of 1894 then in force (57 Vict. ch. 55), and this and other sums were paid by Morrisburg to Williamsburg. This amount payable by the plaintiff not being paid by her to recoup the municipality it was put upon the collector's roll by the clerk under the instructions of the reeve. To the legality of this course two objections were made, (1) that no certified copy of the award was filed with the clerk of Morrisburg, and (2), that there was no corporate act of Morrisburg in directing the levy of the amount claimed from the plaintiff.

As to the first, there is no requirement under the law in force when the award was made (December 10th, 1890), that it should be filed with the adjoining municipality. By sec. 10 of R. S. O. ch. 220, the award was to be filed with the clerk of the municipality wherein the undertaking was begun (*i.e.*, Williamsburg in this case), and then certified copies of the award might be given in evidence as

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Boyd, C.

mentioned. By section 26, if the drain was continued into a neighbouring municipality there was a direction that the clerk of the first municipality shall forward to the clerk of the other a certified copy of the award. There is no direction to file it, and there is no satisfactory evidence here to shew that all was not rightly done by the then officers of the locality. The award and copies of it are spoken of in evidence as being in the hands of the landowner and the contractor in 1891, and *non constat* that one of these was not the copy forwarded to the clerk. But apart from this, I do not think the objection is open to the plaintiff. The last statute under which the levy was made seems to contemplate that the forwarding of the certificate is the important document on which the compulsory action is to be based: see sec. 20 of Act of 1894, by which the council were empowered to take proceedings for the collection of the sums so certified to be paid. The form of engineer's certificate issued in this case on November 22nd, 1893, reads that the amount shall, unless forthwith paid, be added to the collector's roll as provided by sec. 18 of the Act (see R. S. O. ch. 220, Form F., p. 2372). Though these latter words were left out in the form in the new Act, yet this certificate was issued before the Revised Statutes was replaced by the Act of May 5th, 1894 (see sec. 42 of Act of 1894).

This form of certificate also indicates that the act of adding the amount on the roll was an administrative act of a merely ministerial character not needing the intervention of the council as a deliberative body. The new Act, 57 Vict. ch. 55, (O.) sec. 12, recognizes the action of the reeve as representative of the council, and as to this point I think the council may delegate the matter to him, and his direction to the clerk to add to the roll the amount payable by the plaintiff would in that event be sufficient authorization on the part of the corporation. I assume that the reeve had authority to direct as he did: see *The Queen* v. *The Justices of Frodsham and Edwards*, 62 L. J. M. C. 120.

Altogether, therefore, I find no ground to justify reversing the judgment and order of the county Judge on this appeal. Judgment. Boyd, C.

Appeal is dismissed with costs.

FERGUSON, J. :—

It seems clear that the plaintiff did not properly construct the part of the ditch or drain falling to her to be constructed.

The engineer might, as I think, properly interfere as he did, and at the time he did, having been moved as he was by a requisition in writing such as is meant and contemplated by the statute. The words "at the expiration of the time limited by the award for the completion of the work" in the first and second lines of section 15 of the Act, R. S. O. c. 220, should not, as I think, be read according to the letter. The engineer is to inspect only if required in writing so to do; and should the precise time pass, by inattention or otherwise, without any such written requirement, is one to say that there never can thereafter be any requirement or inspection or any adjustment of the rights and liabilities under the Act?

The others concerned and interested in the matters of the ditch or drain were not estopped by their silence or want of action at a particular period, as contended for on behalf of the plaintiff, so as to deprive the one who gave the written requisition to the engineer of the right so to do. The necessary elements of an estoppel do not appear. As to the contention in respect to the copy of the award, it does not appear that a copy of the award was not sent. It is only not shewn that a copy was sent and no copy was found upon the sort of search that was made. A certified copy of the proper certificate was sent or forwarded, and to me this seems to have been the important document. It is the one that declares the liabilities, and it is virtually upon this declaration that the proceedings for collection are had.

Judgment.

Ferguson, J.

It appears that the amount was placed upon the collector's roll by the reeve or by his immediate direction. The Act requires that the council shall cause this to be done. It does not require that this shall be done by by-law, resolution or any thing of the sort, and I cannot but think that the fair inference is that the act was done by the reeve for the council, at their instance or by their direction and instruction, and, taking this to be so, the council caused the sum to be added to the collector's roll. I think the plaintiff's contention in this regard should not succeed.

It seems to be true that the money was paid by the plaintiff under "pressure and protest," but it was rightly demanded, so far as I am able to perceive, and was rightly paid, and cannot be recovered back. I can see no ground on which the plaintiff should be held entitled to recover. I think the judgment appealed from is right and should be affirmed with costs.

MEREDITH, J.:—

It is not contended that the plaintiff cannot recover the money in question, if wrongly exacted from her; if is indeed admitted that if the tax was not rightly imposed she can recover it; so, that which is now to be determined is, whether or not the defendants had the right to compel the plaintiff to pay.

They claim that right under the provisions of The Ditches and Watercourses Acts; and but for such enactments it is manifest there would be no such right.

These Acts must be treated as remedial ones, but as they provide for somewhat arbitrary interference with common law rights of property the defendants ought to shew at least a substantial compliance with their provisions before obtaining protection under them; while giving full effect to their expressed purpose care should be taken that such effect is given only in the way provided, and that common law rights are not unwarrantably interfered with.

No one questions, in this action, the validity of the

award made by the engineer under the Acts; the question is whether the subsequent proceedings are warranted by the Acts; whether the engineer had any power to let the work, which he did let, upon the plaintiff's lands at her expense; and whether, if so, the plaintiff could be compelled to pay that expense without the council of the municipality in which the lands are situate having required it. The other points urged for the plaintiff are not, in my opinion, for the reasons stated during the argument, substantial. Judgment. Meredith, J.

The first question for consideration is, therefore, whether the engineer's action was authorized by the enactments; and, if not, whether the plaintiff's conduct precludes her from the benefit of her claim that it was not.

The award was made on the 10th day of December, 1890, and the time limited by it for the completion of the work expired on the first day of August next following.

The 15th section of The Ditches and Watercourses Act, R. S. O. ch. 220, provides that the engineer, if required in writing by any of the parties interested, "shall, at the expiration of the time limited by the award for the completion of the work," inspect the ditch or drain, and that if he finds the work or any portion of it not completed in accordance with the award, he may let it in sections, as apportioned in the award, after certain notice; or if satisfied of the *bona fides* of the person doing the work, and that there is good reason for the non-completion, may extend such time; and by an amendment to that section—52 Vict. ch. 49, sec. 3 (O.)—he is empowered to let the work a second time, or oftener if necessary, in order to secure its performance and completion.

Under a requisition in writing, signed by George Dawley and Simon Dawley, the latter only being one of the parties interested, the former his brother, who according to his own testimony lives with him and does most of the business for him, but has no other interest in the matter, and bearing date October 6th, 1893, the engineer for the time being, who was not the engineer by whom the award

Judgment. Meredith, J.

was made, professing to act under the provisions of section 15, let the work which he considered necessary for the completion in accordance with the award of those portions of the drain which under it the plaintiff was to make, and it is the cost of such work that is now in question between the parties. And the question is, had the engineer any power, more than two years after the expiration of the time limited by the award for the completion of the work, to do that which under the section in question he was empowered to do "at the expiration" of such time?

For two reasons I would answer the question in the negative: first, because the legislature has said "at" not "after" the expiration of the time limited; and I am quite unprepared to say that the legislative assembly did not know the difference between the words "at" and "after;" and, second, because it seems to me to be contrary to the whole sense of the proceeding to hold that this somewhat arbitrary power can be exercised at any time whether two or ten or any other number of years after the time limited for the completion of the work.

The legislature has seen fit to make the engineer's jurisdiction in this respect depend upon a requisition in writing by a party interested, and upon its being exercised at the expiration of the time limited by the award for the completion of the work, two simple and plain things: what right have we then to say that it is not to depend upon this, but is to depend upon whether it is plainly made to appear that the drain is not made of the proper dimensions, disregarding time altogether; a thing not mentioned in the Acts, nor likely to have been, as, unless the jurisdiction was invoked or exercised at the time fixed for the completion of the award as the Act provides, it would be apt to raise a contention upon a difficult question of fact in many cases; and it could hardly have been intended to leave the validity of the engineer's action dependent upon that doubtful question.

The engineer's authority is to be invoked and exercised

Judgment. Meredith, J.

at the time fixed for the completion of the work, because then he can best, and then only can he in a satisfactory manner, see and find whether it has been completed in accordance with the award; then he can by the exercise of his powers prevent delay and the injury arising from it; and then he can, if he sees fit, "extend such time," if satisfied of the *bona fides* of the person in default, and that there is good reason for such default.

To those who construct such drains as that in question, otherwise than merely mentally, the great difficulty, if not the impossibility, of finding after a lapse of less than two years whether the work was completed in accordance with the award, is obvious. The landowner is not required to make an efficient drain, he is required only to make it in accordance with the award; the award may provide for a system which is not sufficient; and the engineer is not to be tempted to make up for his shortcomings by adding additional burdens upon the landowner under colour of the power conferred upon him by section 16. Nor is the owner to be compelled under this section to clean out the ditch, a work necessary before completing it; often necessary before one can form any sort of opinion whether it was originally constructed according to plans and specifications or not.

Take the case of an ordinary building contract under which the architect may at the expiration of the time agreed upon for the completion of the work be called on to inspect it, and if not, in his judgment, completed then in accordance with the contract, may have the work done and charge the cost to the contractor, could any one say that he could, more than two years after that time, exercise that power? Could any one rightly say that the provision as to the time when that power should be exercised had no effect so long as it was plainly made to appear that the work was not done in accordance with the contract?

The Act of 1894 provides that every award after an appeal against it or after the time for appealing against it has elapsed shall be binding, notwithstanding any

Judgment. Meredith, J.

defects in form or substance in the award or in the proceedings; but for very obvious reasons there is no such provision as to anything done under section 15 or as to the engineer's certificate provided for in section 16; therefore, those who seek to shelter themselves under these provisions of the Act must shew a case coming within such provisions, that is, shew jurisdiction in the engineer: see *Murray* v. *Dawson*, 17 C. P. 588; *Dawson* v. *Murray*, 29 U. C. R. 464; *York* v. *Township of Osgoode*, 24 O. R. 62, 21 A. R. 168, and 24 S. C. R. 282; *Hus* v. *The School Commissioners for the Municipality of the Parish of Ste. Victoire*, 19 S. C. R. 477; and *Trustees of Roman Catholic Separate School of Arthur* v. *The Municipal Corporation of the Township of Arthur*, 21 O. R. 60, *per* Boyd, C., at pp. 71-2.

Such cases as *Re Railway Sleepers' Supply Co.*, 29 Ch. D., at p. 206, and *In the Goods of Thomas Ruddy*, L. R. 2 P. & D. 330, and *Ex parte Rosenthal, In re Dickenson*, 20 Ch. D. 315, *Collins* v. *Welch*, 5 C. P. D. 27, and *Ex parte Lamb, In re Southam*, 19 Ch. D. 169, afford to me no assistance in this case, being so entirely different from it. The case of *The Queen* v. *The Commissioners for Special Purposes of the Income Tax*, 21 Q. B. D. 313, is also a very different case, but it is an instructive one, and I think helps the plaintiff here very much. There the words in question were "within or at the end of the year," and so there was some ground for contending that the word "at" meant "after," for if it meant at the very moment that the year ended it would mean nothing, because that moment would be included in the word "within," which would give the whole year; and so it was contended that "at" meant "at any time after;" but even in that case the Court refused to give so loose a meaning to the word, the Master of the Rolls saying, at pp. 318-9, "I think the proper construction of them,"—the words "within or at the end of the year,"—"is that they mean that the overpayment must be found out and proved in as short a time after the end of the year as is possible in the particular case with exer-

tion on the part of the person claiming repayment. I will not say that the statute simply means within a reasonable time after the end of the year. I think it must be the shortest time in which it could be done if every exertion was made that ought to be made. If a person makes delay in examining into his affairs so as to exceed this time, though such delay may not be unreasonable, still, I think, he would be too late. The case would not, in my opinion, come within the meaning of the words 'at the end of the year,' as used in the section. If, on the contrary, the person claiming repayment has made every exertion which he ought to have made then it does not follow, because several months or even a year or even two years have elapsed from the end of the year, that he is too late; if he could not have taken less time than he has I think he would have satisfied the terms of the section."

Judgment. Meredith, J.

That case is so entirely different from this, so much more obviously unfavourable to the plaintiff, that I refer to it only to shew that were the cases alike the judgment of the Court of Appeal in that case would be a direct authority in the plaintiff's favour, for more than two years before the engineer's inspection of the work the persons complaining, as well as all other persons concerned, knew that the drain had not been completed by the plaintiff in accordance with the award.

In this case the very purpose of requiring the engineer to inspect the work is that he may ascertain and determine whether the work has been properly done, and, if not, that he may have it so done, or extend the time for doing it. He is not called on solely to take the work out of anyone's hands; he may as rightly be called in to see if, and determine that, the work has been done according to the award.

I cannot by any process bring my mind to conclude that the legislature meant that at any time after the completion of the work, when probably there would have been a change of the engineer, and possibly the lands affected might have changed owners several times, any of the per-

Judgment. Meredith, J.

sons concerned in the ditch can have the right to call in an engineer again under this section and have the lands encumbered and made liable to sale for taxes. If so, it will introduce another element of difficulty in purchasing and investigating the title to lands.

Surely what the legislature meant and what the Act says, is this: any of the persons concerned in the drain may, if desired, require the engineer not only to lay out the work, but also see that it is completed, and for that purpose may require him at the proper time—the time fixed for the completion of the work—to pass it as sufficient, or to have it then, unless he sees fit to extend the time, completed in accordance with the award.

If, as it well might have been provided, the Act had required the engineer to do that which now is to be done only if required in writing by some of the parties interested, could it be contended that the words at the expiration of the time limited for the completion of the work meant at any time after the time so limited? Surely no practical person would suggest that there could be any such meaning to the words used: anything so unusual, so unpractical, and so unfair to the engineer, as well as to everyone concerned, would seem to me to be out of the question.

There is nothing unpractical, nothing difficult, nor anything unfair in requiring anyone desiring to have the benefit of the section either as proof of having performed his part of the work, or in compelling others to do so, to give the notice in time so that the engineer may attend and inspect the work at the proper (for all purposes) time, and at the time expressly fixed by the enactment.

"At the expiration of the time limited for completion of" the work does not, of course, in a case of this kind, mean any particular moment of time; if the thing is done as soon as practically possible after the expiration of the time limited it is done "at the time": see *In re Tunnel Mining Co.*, 56 L. J. Chy. 104; 3 Times L. R. 584. It is not a thing that can be done in an instant of time.

Judgment. Meredith, J.

And it may be pointed out that if the parties interested do not see fit to avail themselves of the benefit of the section, or let slip the opportunity, they are not compelled to submit always to any disadvantage; they can compel the deepening or widening of the drain, or the maintenance of it in the manner provided by the award, or have the award reconsidered under the several provisions of the Acts in those respects.

Then upon the other point, sec. 18 of The Ditches and Watercourses Act, R. S. O. ch. 220, contains the legislation applicable to this case; and it provides that the council shall pay the engineer his additional fees mentioned in his certificate given under section 16, and may pay the person who has done the work, the amount which according to the certificate, he is entitled to for it, and thereafter shall, if the amounts are not paid by the person declared by the certificate to be liable, cause the amount of liability to be added to the collector's roll, to be, with interest at seven per cent., a charge against the lands of the person liable, to be collected in the same manner as other municipal taxes.

Now it is very plain to me that under this legislation the council is required to do something more than play the part of a mere automaton; the members of the council are required to exercise their judgment and their discretion. The council should in the first place be satisfied that the certificate is really one under sec. 16, and that the case is one in which there was at least *primâ facie* jurisdiction in the engineer. The council is not required, nor competent, to sit in appeal upon the engineer's action; but it is surely bound to be satisfied that the case is one within the powers conferred on him by the Act: they are not bound to pay, for instance, according to a certificate, not based upon any award; they must exercise some judgment; they must satisfy themselves that the certificate is the engineer's certificate, and that, *primâ facie* at least, the matter is one within the Act. Then they must exercise their discretion whether the corporation will pay for the work, and collect the amount as taxes afterward, or collect

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Meredith, J.

it as taxes and then pay it over to the person entitled. The section is not very plainly expressed in this respect, but that is apparently what is meant by the permission to pay in connection with the provision at the end of the section for payment over to the person entitled when collected.

I say that section 18 is the governing section because, although the lands in question are in an "adjoining municipality," and the section expressly applicable to them is the 26th, that section provides that the municipal council of the adjoining municipality "shall have and take all the proceedings for the collection of the sums so certified to be paid as though all the proceedings had been taken and carried on in the adjoining municipality," which I take to mean shall have the power, and shall take such proceedings. The latest Act, 57 Vict. ch. 55, sec. 20 (O.), has it: "shall have power to take all proceedings;" this Act differing from the other in this respect, however, in requiring the adjoining municipality to pay the other municipality apparently before collection.

In this case it is shewn beyond question that the council of the "adjoining municipality" did nothing; that the matter never came before the council; but that the reeve of the municipality directed the clerk to place the amounts in question on the collector's roll, and that the clerk did so without any other authority. There is no evidence to support the suggestion that the council delegated its power and duty to the reeve; if there had been, I would have thought that proceeding quite unwarranted—that the case is a plain one for the application of the maxim "*Delegata potestas non potest delegari.*" The direct testimony of the clerk leave no room for presumptions or assumption contrary to the facts.

It is said that the latest of the Acts recognizes the action of the reeve as representative of the council in section 12. But that is only to the extent of signing a name.* The Act requires in some instances the signature of the parties

* See 57 Vict. ch. 55, sec. 12, O.—REP.

concerned and this provision seems to be made only for the purpose of enabling the municipality effectually to sign ; but if it were otherwise, that would make against rather than for the power of the reeve or other head of the council. Why say the council if the reeve or other head of the municipality is meant, the legislature having used the words reeve or other head of the municipality when it meant such officer ? Judgment. Meredith, J.

But can anyone doubt that if these proceedings were to be mere matters of form the Act would have required the clerk to perform them, to insert the amounts in the roll independently of the council; he is in other enactments required in the assessment and collection of taxes to act independently of the council—and he is in these Acts in other respects also so required in several things. Why introduce the council at all ? It has very little control over the collector's roll.

If the action of the council is merely ministerial ; merely to pay and collect according to the engineer's certificate, why does the present Act, 57 Vict. ch. 55, require that the engineer shall file with the clerk of each municipality his award and plans, papers and specifications (sec. 18); and why did the former Act, R. S. O. ch. 220, require that the clerk of the municipality in which the proceedings were taken should send as well as the certified copy of the engineer's certificate, a certified copy of the award under and for the purposes of section 26 ? What purpose in having a copy of the award if the members of the council are not to exercise any judgment or discretion in the matter ?

If the case is one within the Act, the council, whatever its members might think of the engineer's judgment, must of course give effect to the certificate in one or other of the ways provided for in section 18, R. S. O. ch. 220, in a case coming under that section; but if the council see fit to pay in a case where the engineer had no power to act they cannot recoup the corporation out of the lands unless the owner has in some way precluded himself from objecting.

Judgment.

Meredith, J.

Because, therefore, the engineer had no jurisdiction to act under section 15 at the time when he acted, and also because the defendants' council have never, so far as the evidence shews, acted under section 26, or ratified, if they could, the action of the reeve and clerk, the defendants, in my opinion, do not bring themselves under the protection of the Acts. They had no right to compel the plaintiff to pay the money in question, and accordingly, as conceded in argument, she is entitled to recover it in this action, upon the evidence adduced in it, as that evidence is presented to us.

The merits of the matter, if we are concerned as to them, seem to me much in the plaintiff's favour; she hired an apparently competent ditcher—for to the same man was let by the engineer the completion of part of the work in question. When he had finished the work and demanded his pay, the plaintiff's son acting for her, called together all the persons interested so that they might inspect the work, and be satisfied before payment was made; they attended and made no objection, and then the ditcher was paid his full price for doing the work in accordance with the award. What took place looks very much like a substitution for the inspection of the engineer, it took place at the time that the Act provides for such inspection, and it seems from the evidence that the parties had agreed to take that matter in their own hands, and had appointed one of themselves to act so as to save the expense of the engineer's inspection.

Again, according to the evidence of the plaintiff's son, not contradicted by anyone, the plaintiff once or twice, in order to satisfy the chief mover in the subsequent proceedings, George Dawley, who complained only because the ditch needed cleaning out, not that it had not been properly made, had the portion of the drain in question cleaned out; on the last occasion, if it were done twice, at George Dawley's suggestion, and so that there might be no more complaint by him, his own brother, James Dawley, was hired to do the work "to fix it to suit his brother," and

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Meredith, J.

the work was done and paid for; this probably accounting for the delay from 1892 to 1893.

George Dawley, though examined as a witness at the trial, did not contradict this, nor did he or any other witness deny that the inspection was had for the purpose of satisfying all parties concerned that the plaintiff's portions of the work were done in accordance with the award, and that payment was withheld until they were satisfied on this point, and that payment was then made to their knowledge in the faith of their being so satisfied. So that in my opinion, the plaintiff would have had good ground for an injunction against any of these persons, and especially George Dawley, from afterward, even if in time, putting in force the provisions of section 15; though that may be no ground of resistance of the defendant's claim if they had no notice of the facts. The plaintiff's better course would have been to have prevented any proceedings under the section.

There does not appear from the evidence to have been any writing signed by either of the Dawley's in 1892, requiring an inspection of the work; the solicitor's letter refers, as I gather from the engineer's evidence, to a verbal request; and the letter of August 23rd, 1893, is signed by George Dawley only, who had no interest in the matter, and does not purport to be written in his brother's behalf; that of the 6th of October, 1893, purports to be signed by both.

Then what ought to be done with this action under all the circumstances of the case? The plaintiff is entitled to recover upon the material before us, but upon evidence so meagrely and unsatisfactorily noted, and so carelessly copied and presented to this Court, one cannot feel satisfied that the facts sufficiently appear to enable any Court now to do complete justice between the parties. As the case stands, the plaintiff is entitled to recover, but it may be that she is precluded as against these defendants from questioning the authority of the engineer's action; if she permitted the proceedings to be taken, and the money to be paid

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Meredith, J.

without objection, and the council paid in good faith without knowing, and without being chargeable as if they had known, the facts, she ought not to be permitted now to object; and on the other point, there seems to be nothing to prevent the council now acting under sections 26 and 18, and so the plaintiff would be obliged to pay sooner or later; and so her costs of this action only would be the most material question.

I would, therefore, allow this appeal with costs; and would direct that judgment be entered for the plaintiff for the amount in question with interest and costs; unless within two weeks the defendants choose to take a new trial upon payment of the costs of the former trial, the motion for a new trial and of this appeal.

A. F. H. L.

[DIVISIONAL COURT.]

McGillivray v. The Mimico Real Estate Security Company (Limited).

Damages—Covenant against Incumbrances—Sale of Land—Breach—Measure of Damages.

Where the vendee of lands who had himself after purchasing mortgaged the property, brought action for breach of covenant against incumbrances; and the mortgage, constituting the breach, covered other lands as well as his, and was for an amount much greater than the present value of the land, and it was impossible to apportion it:—

Held, that the measure of damages was the whole amount due on the mortgage, which should be paid into Court, to insure its reaching its proper destination.

MEREDITH, J., dissenting.

Statement.

In his statement of claim the plaintiff alleged that on April 17th, 1891, the defendants conveyed to Matilda Wadham Haynes, certain lands in Etobicoke, by deed in pursuance of the Act respecting Short Forms of Conveyances, which deed contained the usual covenant against incumbrances, and for quiet enjoyment, free from incumbrances; that in breach of such covenants, the defendant had mortgaged the lands to George Keith for $5,000, on which mortgage $3,500 was now due; that on December 24th, 1895, Haynes conveyed the lands to the plaintiff, who claimed $3,500 and costs.

The action was tried on April 8th, 1896, at the Toronto spring non-jury sittings, by MEREDITH, C. J., who on October 15th, 1896, gave judgment, ordering the defendants to discharge the above mortgage in one month, and in default, referring it to the Master-in-Ordinary to ascertain the present value of the lands, and adjudging that the plaintiff recover as damages, the amount which the Master may so find, with costs.

The plaintiff moved before the Divisional Court by way of appeal from this judgment, on the ground that the true measure of his damage was not the present value of the land, but the amount of the mortgage placed thereon by the defendants in breach of their covenant against incumbrances.

Argument.

The motion was heard on November 3rd, 1896, before BOYD, C., and FERGUSON, and MEREDITH, JJ.

C. D. Scott, for the appeal. *Connell* v. *Boulton*, 25 U. C. R. 444, is exactly on the point. It is not right to measure the damages by the present value of the lands; for they have greatly depreciated in value—and the plaintiff has been unable to deal with the land because of the incumbrance: *Lethbridge* v. *Mytton*, 2 B. & Ad. 772; *Empire Gold Mining Co.* v. *Jones*, 19 C. P. 245; Mayne on Damages, 5th ed., pp. 216-8; Dart's Vendor and Purchasers, 6th ed., vol. 2, at p. 892; Sugden's Vendor and Purchasers, 14th ed., p. 610.

No one for the defendants.

December 17th, 1896. BOYD, C.:—

This is an action on the covenant that the vendor has done no act to incumber the lands. The breach proved is a prior mortgage on this and other lands: *Connell* v. *Boulton*, 25 U. C. R. 444, is precisely in point, decided in 1866, and not since questioned. It was there held that the measure of damages was the whole amount due on the mortgage, although it exceeded the purchase money and interest; and though the mortgage included other lands worth more than the amount of the mortgage.

This case is noted in English and American authors (Sedgwick on Damages, 8th ed., vol. 3, p. 125, note; and Hamilton on Covenants, p. 40). *Connell* v. *Boulton*, is based on *Lethbridge* v. *Mytton*, 2 B. & Ad. 772, which was the case of a covenant to pay off a specific incumbrance, but the Court held that a covenant, such as the present, was not distinguishable. I do not understand that any opinion at variance with *Connell* v. *Boulton*, is expressed in the language of Field, J., in *Wigsell* v. *School for Indigent Blind*, 8 Q. B. D. at p. 367, where he says there are cases in which in actions upon covenants against incumbrances, or to pay off specific incumbrances, it has been held that

the damages are the diminution in value of the estate by reason of the existence of the incumbrances, and if the contract is to pay off a specific incumbrance, the owner may recover the whole amount, although no claim has been made or damages proved.

Judgment.

Boyd, C.

Here it is impossible to apportion the incumbrance so as to ascertain the incidence of the burden upon the particular lot, so that to relieve this lot, the whole mortgage has to be paid; that is the measure of the damages, but in order that the money, if paid, shall reach its proper destination, judgment should be against the defendant to pay the amount secured by the mortgage into Court (as was done in *Boyd* v. *Robinson*, 20 O. R. 404, and approved of in *Mewburn* v. *Mackelcan*, 19 A. R. 729).

The judgment should be vacated and framed as now indicated, and the plaintiff to get costs below and of this appeal.

FERGUSON, J.:—

I concur with the judgment just read.

MEREDITH, J.:—

In view of the claims made, and the opinions expressed, in this case, it is well to state plainly the important facts of it.

Some ten acres of land in the outskirts of Toronto appear to have been purchased by the defendants—a company formed, as their name indicates, for the purpose of speculating in such lands, during the existence of the bubble which soon broke so disastrously for all concerned in such speculations—the land was subdivided into small lots, and one of the lots was sold by them to one Hayes, and by her it was subsequently sold to the plaintiff. For the purposes of their purchase the defendants appear to have been obliged to mortgage the whole land for $5,000; and Hayes on buying her lot mortgaged it to a loan company for

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Meredith, J.

$600, and then to the defendants for $500; all these mortgages are outstanding, but the first of them has been reduced in the amount of principal to $3,500. Hayes, or the plaintiff, commenced building upon her lot, but abandoned it before completion, and now the building is in such a state that, according to the only evidence upon the subject, the "land might possibly be better if it was not there at all," it having collapsed, and the whole value of the lot in its present state is apparently not more than $75, indeed there is no sale for it; quite a number of lots in the vicinity with houses on them having recently been sold for the municipal taxes upon them.

The plaintiff sues for breach of the defendants' covenants for quiet possession, and against incumbrances, contained in the deed from them to Hayes, and notwithstanding the facts I have stated it is said that he is entitled to judgment for the full amount, secured by, and now unpaid upon, the first mentioned mortgage—$3,000 principal and interest thereon from November 9th, 1893, and taxes.

This is certainly a startling proposition. Startling enough in this case, but perhaps more startling if applied—as it should be if right in this case—in a case where the amount of the mortgage is an hundred times more than the value of the land in question, and a release of it can be had for the amount of its value.

I would have thought a bare statement of the facts enough to refuse so extravagant, so extraordinary, and so unjust a claim.

In actions upon contracts a party's damages surely ought not to exceed his loss by reason of the breach of contract; and indeed a breach of contract for the sale of lands is an exception to the ordinary rule, an exception in which the general rule is sometimes much restricted: *Bain* v. *Fothergill*, L. R. 7 H. L. 158; and *McKinnon* v. *Burrows*, 3 O. S. 590.

Why a man who loses at most $75, if he loses the land altogether, should recover as damages for the breach of the contract in question some $4,000 is a thing that passes my power to comprehend.

It was, I think, admitted in argument to be a thing incomprehensible even to counsel who contended for it; but it was urged that case law clearly and unbendingly required it. Judgment. Meredith, J.

But is that so?

Lethbridge v. *Mytton*, is the leading case upon which this contention was based; and it was urged that subsequent cases, irrespective of circumstances, were and must be all hung upon that case. With all respect for those who have expressed such an opinion, I feel obliged to say that I cannot doubt that if the learned Judges who decided that case were living now they would be as much surprised as the most of us, at the wide (may I not add wild?) results which are said to necessarily flow from that judgment.

If one divorce some of the expressions of opinion reported in that case from the facts of the case no doubt enough can be found to warrant the claim in this case, but that is an obviously unfair and misleading mode of dealing with them.

Looking at the circumstances of the case, and treating it from a common sense point of view, no other objections can perhaps be urged against that decision than that given effect to in many of the Courts in the United States of America—the very thing that was contended for in the defence of that action—that the plaintiff should not have substantial damages until he had actually sustained them; and also that after paying the amount of the mortgage to the plaintiff the defendant might be compelled to pay it again to the mortgagee.

In that case the covenant was to pay off a certain mortgage on a certain day; a mortgage covering the land in question only; *the amount of it being less than the value of the land.*

And in that case the suggestions as to the defendant going into equity for relief were, I have no doubt, made solely with a view to saving the defendant from the danger of being obliged to twice pay the mortgage debt—to hav-

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Meredith, J.

ing the money applied directly in payment of the mortgage, or secured for that purpose, a difficulty which this Court will now provide against by requiring the money to be paid into Court and then properly applied: see *Boyd* v. *Robinson*, 20 O. R. 404. In *Loosemore* v. *Radford*, 9 M. & W. 657, a like suggestion is more plainly made by Parke, B., at p. 658, in these words: "The defendant may perhaps have an equity that the money he may pay to the plaintiff shall be applied in discharge of his debt."

But can anyone reasonably imagine that judgment would have been given in *Lethbridge* v. *Mytton* for the full amount of the mortgage debt if, as here, that had been proved to have been more than fifty times greater than the value of the land in question, and if there were a score or perhaps an hundred other grantees of the defendants in exactly the same position, and entitled to the same rights at common law against them.

As I understand that case it decides this only: that at common law a plaintiff in an action for damages for breach of a covenant to pay off a specific mortgage on a specified day is not limited to nominal damages where he has sustained no actual loss; but in a case where the value of the land is greater than the amount of the mortgage, may have judgment for that amount, and that the defendant must look to equity to compel the proper application of the money when recovered so that he may not run any risk of having to pay the amount more than once.

Connell v *Boulton*, 25 U. C. R. 444, so much relied upon, does not profess to extend the law as laid down in *Lethbridge* v. *Mytton*, as to the measure of damages, but only to follow it, and to follow it with a feeling that the intervention of some other Court was necessary to do complete justice between the parties. The Court seems to have been very careful to profess to act entirely under the authority of the English case. It is true that the mortgage covered other land than the plaintiff's, but it is also true that the value of the plaintiff's land, with the improvements made by him thereon, was greater than the full amount of the

mortgage. Possibly the Court thought that the again suggested intervention of equity would save the defendant from other actions by other grantors as well as by the mortgagee by compelling the payment and discharge of the mortgage out of the money recovered in the action, if thought of at all. In that case there was also no covenant to pay off the mortgage at a certain time, but only the usual covenant against incumbrances; and regarding this Hagarty, J., the only Judge who expressly referred to the point, said that he was unable to recognize any substantial difference between a covenant to pay off an existing mortgage and a covenant that the defendant had not incumbered the land, referring with approval to an opinion expressed in Mayne on Damages, that there is no difference in principle between a covenant against incumbrances and a covenant to pay off incumbrances. Judgment. Meredith, J.

I am not aware of the same questions or either of them having since arisen in any reported case, or of this case having been approved, disapproved or commented upon, here or in England. Certainly no such question as that to be determined in this case has ever been held to have been determined by that case, much less by *Lethbridge* v. *Mytton*.

Indeed I gather that even in Mr. Mayne's opinion those cases cannot govern this, for he goes on to say: "The question is, how much is the value of the estate diminished at the moment by the existence of the incumbrances?" That, in my judgment, is the true measure of the damages —the loss arising from the breach of the contract. It may be that in 99 cases out of 100, that loss is the sum required to relieve the land from the incumbrance, the land being of greater value than that sum; but the principle applicable is not to be arrived at merely from the result in most cases; the mortgage may, even after breach of a covenant to pay it off, become valueless by reason of the Statute of Limitations, or in other ways, and, if it does, can it be that the amount which the vendor covenanted with his purchaser to pay off is the measure of

Judgment.

Meredith, J.

damages? And if a release of the portion of land in question can be had for a small portion of the mortgage money can it be that the whole sum covenanted to be paid off is still the measure of damages? Or, as in this case, where the value of the fee simple unincumbered of the whole land in question is $75 or less, could the plaintiff recover $4,000 even if the covenant had been to pay off the mortgage in question on a certain day instead of a covenant that no incumbrance existed?

Of three eminent writers upon the subject under discussion no two of them agree as to the effect of *Lethbridge* v. *Mytton*. Mr. Mayne's opinion is that it was rightly decided and in principle applies to covenants against incumbrances; that is the decision, as I understand him, on the facts of that case, where the land was greater in value than the amount of the mortgage. Mr. Sedgwick's opinion was that the case was wrongly decided, that the plaintiff was entitled only to nominal damages until actual damage sustained or expense incurred. While Mr. Rawle's opinion is that the case was rightly decided because the covenant was one to pay a certain amount on a certain day; but that it is not applicable to the case of a covenant against incumbrances.

And there is much to be said in support of Mr. Rawle's view of the matter. A covenant to pay off a certain sum due on a certain mortgage at a specified time very materially differs from a covenant that no incumbrance exists. The one asserts the other denies the existence of incumbrances. In the one the covenant would, if Mr. Mayne's opinion is right, be broken as soon as made, in the other there would be no breach until the time fixed for payment; a difference which may very seriously affect the plaintiff's right of action here, as I shall presently point out, and if Mr. Mayne's opinion is right the covenant against incumbrances would be an exception to the general rule as to covenants for title both here and in England in this, that they are continuing covenants running with the land which may be sued upon from time to time as fresh damages arise: see *Platt* v. *Grand Trunk R. W. Co.*, 19 A. R. 403.

Judgment.
Meredith, J.

Upon first principles, the damages, in such a case as this, ought to be measured by the loss the plaintiff sustains; if it be substantially the land entirely, then he should have its value, but that is under ordinary circumstances the most: and there is nothing in either of the cases relied upon, in my opinion, to the contrary.

Therefore, if there were no subsequent incumbrances the measure of the plaintiff's damages here should be the amount by which the value of the land is depreciated by reason of the existence of the incumbrance in question. By bringing his action he fixes the time at which that value is to be ascertained. There was not a complete failure of consideration, for under the deed he has had possession, and has been enabled to raise $600 on the security of the land. It may be that a release of this small portion of the mortgaged lands can be had for less than the value of the land, and if that be so (subject to that which I shall presently state), that sum should be paid as in *Boyd* v. *Robinson*, or in some other way, so as to relieve the mortgagors to that extent from the mortgage. In no case can the plaintiff's damages exceed the value of all he can lose by reason of the existence of this mortgage, in respect of which he is in no way personally liable.

But throughout the case the existence of the subsequent incumbrances seems to have been overlooked; they, however, were created by the plaintiff or his vendor and subsist, and would seem to prevent the plaintiff recovering anything in this action until they are released: *In re McKenzie et al.*, 31 U. C. R. 1, and *Proctor* v. *Gamble*, 16 U. C. R. 110. So that the plaintiff by reason of his excessive greed may lose all.

If the plaintiff is liable to pay these mortgages, they may after payment be an element in the damages the plaintiff ought to recover.

Again, if the plaintiff's contention is right, if the case of *Lethbridge* v. *Mytton* governs this case, then this covenant was broken as soon as made, and broken once for all, and the right of action, therefore, is in Hayes and never passed

Judgment.

Meredith, J.

to the plaintiff, and so his action should be dismissed: see *Spoor* v. *Green*, L. R. 9 Exch. 99, and *Platt* v. *Grand Trunk R. W. Co.*, 19 A. R. 403.

And apart from either of these considerations the inconsistency of judgment in favour of the plaintiff for more than fifty times the whole value of the land which is the subject matter of this action is increased by the fact that the same land was mortgaged back to the defendants, and is yet incumbered in their favour for more than eight times its value; as well as by the fact that a like claim may be made by the first of the subsequent incumbrancers, whose rights are prior to those of the plaintiff, who took expressly subject to them.

These several questions were not gone into at the trial, and the evidence there adduced does not seem to me sufficient to enable this Court to determine what in my judgment are the real questions arising in the action; I would, therefore, vary the judgment in appeal so as to simply refer it to the proper local officer to ascertain and state what sum, if any, the plaintiff is entitled to recover from the defendants for breach of the covenants sued on, reserving further directions and all questions of costs.

The action in so far as it is based upon the covenant for quiet enjoyment entirely fails, as the plaintiff's possession has never been in any way disturbed; the report would therefore, unless the evidence upon the reference is very different from that at the trial, shew that the plaintiff is not entitled to recover on this branch of the action, and on further directions it could be dismissed.

A. H. F. L.

[DIVISIONAL COURT.]

RODGER V. MORAN.

Executors and Administrators—Administrator Ad Litem—Tax Sale—Action to Set Aside—Locus Standi of Plaintiff—Rule 311.

The plaintiff was appointed under Rule 311 administrator *ad litem* of a deceased person's estate in a summary administration matter more than twelve months after the death :—

Held, that he had no *locus standi* to maintain an action to set aside a tax sale of land belonging at the time of death to the estate of the deceased.

Argument.

THIS was an action by William Rodger, the administrator *ad litem* of the estate of Ellen Quirk deceased, against a purchaser at a tax sale, and a sub-purchaser, to set aside the tax sale and the subsequent sale on the ground of irregularity.

The facts are sufficiently stated for purposes of the present report in the judgments.

The action was tried before FALCONBRIDGE, J., at Toronto, on June 11th, 1896, who dismissed the action with costs, and the plaintiff appealed to the Divisional Court.

The motion was argued on November 3rd, 1896, before BOYD, C., and FERGUSON, and MEREDITH, JJ.

Aylesworth, Q.C., for the plaintiff.*

Rowell and *Gow*, for the defendants. There is no property in the plaintiff, what there was went to the heirs : *In re Martin*, 26 O. R. 465 ; *Meir* v. *Wilson*, 13 P. R. 33 ; *Clough* v. *Dixon*, 10 Sim. 564. The plaintiff who is a mere administrator *ad litem*, has no *locus standi* ; nor is he an administrator within section 4 of The Devolution of Estates Act, R. S. O. ch. 108 : Holmested & Langton's Ontario Judicature Act, p. 332.

Aylesworth, in reply. The order is to be found under the head 'administrator *ad litem*' in Williams on Execu-

*The argument largely proceeded upon the alleged irregularities in the tax sale, in which respect it is unnecessary to report it.—REP.

Argument. tors, 9th ed., p. 449. The Court has authority to appoint a general administrator or an administrator *ad litem*, who has all the rights of an administrator *pendente lite*. I submit the plaintiff has all the rights of a general administrator: *Haldan* v. *Smith*, 25 C. P. 349; Con. Rule 311. At any rate I ask for an order appointing the plaintiff administrator *ad litem*, as far as this estate is concerned. I refer to *Fenton* v. *M'Wain*, 41 U. C. R. 239.

December 17th, 1896. BOYD, C.:—

The plaintiff sues by writ dated June 2nd, 1894, as administrator of the property of Ellen Quirk deceased. He was appointed to represent the estate of the deceased under Con. Rule 311, by order made in *Fitzgerald* v. *Quirk*, on November 14th, 1892.* There is no other grant of administration.

The deceased, who was the owner of the land conveyed by the tax sale, died on January 15th, 1887, intestate (or in 1888, according to the order for administration). The tax sale was in 1891, and the deed in December, 1892. By the Devolution of Estates Act and amendments, the land would become vested in her heirs within twelve months after her death, though there was no personal representative. That would put the title of these lands, assuming an invalid tax sale, in Ellen Quirk's heirs, of whom Rodger is not one; the enactments being retro-

* The order here referred to was worded as follows:—

"It is ordered that William Rodger, accountant of the city of Guelph, be, and he is hereby appointed to represent the estate of the late Ellen Quirk, deceased, for the purposes of this action, and that the administration of the real and personal estate and effects, rights and credits of the said Ellen Quirk of the township of Glenelg, in the county of Grey, spinster, deceased, who died at the said township of Glenelg, in the county of Grey, in the year 1888, and who, at the time of her death, had a fixed place of abode in the aforesaid county of Grey, be and the same is hereby granted to the said William Rodger, of the city of Guelph, in the county of Wellington, accountant, limited for the purpose only of attending, supplying, substantiating and confirming the proceedings already had, or which may hereafter be had in this action, or in any other action which may here-

active: R. S. O. ch. 108, sec. 4; 54 Vict. ch. 18, sec. 1; 56 Vict. ch. 20, secs. 3 and 4; *In re Martin*, 26 O. R. 465. Judgment. Boyd, C.

The order made in *Fitzgerald* v. *Quirk*, which was *ex parte* so far as the defendant was concerned, appears to be entirely nugatory, as to conferring any status to sue in this action to avoid the tax sale. That order besides was made *alio intuitu*, and was not aimed at divesting the estate lodged in the heirs, and conveying it to the new plaintiff for the purpose of active litigation.

The lands now in question had ceased to be part of Ellen Quirk's estate on the execution of the tax deed. Any right to question the sale, would be vested in the heirs of Ellen Quirk, and the administration order does not extend to a case like this, where an attack is to be made on land in possession of a stranger to the estate under adverse title. This would be a step entirely alien to the functions of a temporary administrator appointed *pendente lite*, the scope of whose duties is well defined by Hart, L. C., *Ellis* v. *Deane*, Beat. R., at pp. 12-15.

There has been no effective attack upon the tax sale by a person interested in the lands, and for want of title and interest, the plaintiff fails.

I place my opinion affirming the judgment in appeal, on this ground, and do not investigate the grounds of attack, which may still be open in a properly constituted action.

Judgment affirmed, but with no costs of appeal. The point of success is one which should have been raised as a preliminary objection at the outset of the litigation.

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after be commenced between the parties hereto, or any other parties touching or concerning the subject matter of this action, to obey and carry into execution all orders and directions of this Court relating to the said subject matter and to this action until judgment shall be entered herein and the same carried into execution, and the execution thereof fully completed, but no further, or otherwise, or in any other manner whatsoever.

And it is further ordered that the giving of the security by the said administrator be, and the same is hereby dispensed with."

The order then proceeded to direct the usual enquiries and accounts for the administration and final winding-up of the estate of the said Ellen Quirk.

Judgment.

Ferguson, J.

FERGUSON, J.:—

The intestate, Ellen Quirk, to whom the land in her lifetime belonged, died, as was said, on the 15th day of January, 1887, but at latest, in 1888. There was no administration till November 14th, 1892, when an order for administration *ad litem* was made under the provisions of Rule 311, appointing the plaintiff such administrator.

In my view, sec. 3 of 56 Vict. ch. 20, (O.), sets the matter at rest, for the lands vested in the heirs-at-law of the intestate, at the period of twelve months after her decease. No application was made, or proceedings of any kind had, under the provisions of the first section of the Act, even if anything of the kind could have been done. It is, as I think, impossible to say that the making of the order for administration *ad litem*, made, when it was made, could have the effect of divesting these lands out of the heirs and vesting them, or any interest in them, in the plaintiff.

If this view is the correct one, as I think it is, the plaintiff has no interest whatever in the lands, and would have no interest in them, even if they had not been sold, and has, therefore, no *locus standi*.

Affirm the judgment.—I agree as to the disposition of the costs.

MEREDITH, J.:—

The plaintiff's right to maintain this action is questioned: it is said that he is administrator of the deceased's estate solely for the purposes of the matter in which he was appointed, and so never had any such right of action; and that, even if he ever could have any such right, it devolved upon the deceased's heirs-at-law long before this action was commenced.

It seems to me clear that the first of these objections is well taken; and therefore it is not needful to consider the other or the merits of the case; for as against a pur-

chaser, for the full value of the land, without notice of any invalidity or irregularity in the tax title, and a purchaser who has been and is in possession, and has made considerable improvements upon the land, as the defendant Moran is, the plaintiff ought not now to be aided in making a new action of this, in a new representative character, or by substituting the heirs-at-law as plaintiffs, or joining them with him as co-plaintiffs, so as to deprive this defendant of any benefit arising from the lapse of time between the tax sale or deed and the beginning of the action to set it aside.

Judgment. Meredith, J

Then is the plaintiff in a position to maintain this action? That may depend upon the nature and effect of his appointment as administrator in the other proceeding.

The authority of this Court to appoint a representative of the estate of a deceased person, seems to be threefold: first, the power under the practice, now contained in Con. Rule 310: see G. O. 56, and 39 Vict. ch. 7, sec. 23 (O.); second, the power conferred by section 53 of the Surrogate Courts Act, R. S. O. ch. 50; and third, the power conferred by section 11 of the Administration of Justice Act, 1885, 48 Vict. ch. 13, now contained in Con. Rule 311.

It was not contended that the appointment was made under section 53 of the Surrogate Courts Act; it could not have been so made, for power to appoint is there given only in an action touching the validity of a will, or for obtaining, recalling, or revoking any probate or grant of administration. The plaintiff was appointed in a summary administration matter.

Then was the plaintiff appointed under Rule 310, or under Rule 311? If he were appointed under the former, he never had any such right of action; if under the latter, any such right seems to depend upon whether 54 Vict. ch. 18, sec. 1, is or is not retrospective: see *In re Martin*, 26 O. R. 465, and *In re Baird*, 13 C. L. T. 277.

Rule 310 permits proceeding in the absence of any representative of the estate of a deceased person, or the appointment of some person to represent such estate—for all the purposes of such action or proceeding—in any action or

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Meredith, J.

proceeding in which it is made to appear that a deceased person, who was interested in the matters in question, has no legal personal representative.

A narrow construction was always given to the power of the Court under the practice in this respect, here and in England; and amendments enlarging the power in several particulars, were made here, in consequence of the cases, which amendments are contained in the Rule 310; one of such amendments having been made, no doubt, to enable the Court to appoint an administrator *ad litem* in and for the purposes of a case such as that in which the plaintiff was appointed, it having been previously held that the practice was not applicable to a case in which the estate of the deceased person was being administered by the Court.

But the Court of Appeal, in the case of *Hughes* v. *Hughes*, 6 A. R. 373, has expressed an opinion that that purpose has not been sufficiently expressed to enable the Court to act upon it in cases such as *Hughes* v. *Hughes*, because the former part of the rule was left unaltered, and that part limited the power conferred in it to actions and other proceedings, where it is made to appear that a deceased person, who was interested in the matters in question, has no legal representative. That was the case of a devisee suing to recover a share of the deceased's estate; and so, literally speaking, the deceased person, it might be said, never was interested in the matter; it was a question which could arise only after his death.

It has not, so far as I am aware, been decided that the rule would not be applicable if the proceedings had been brought by a creditor to enforce his claim.

But the case in hand is governed by the case of *Hughes* v. *Hughes*, being a proceeding by one of the next of kin of the deceased, for the administration and distribution by this Court of her estate, and not by a creditor to enforce payment of a debt due by the deceased; and, therefore, if the appointment was made under Rule 310, it would be ineffectual; there was no power under it to make such an

appointment, even for the purpose of such a proceeding only. Judgment. Meredith, J.

Rule 311, however, is very much wider in its effect; it seems to give to the High Court the like power of the Surrogate Courts to appoint an administrator or an administrator *pendente lite*, in cases where no probate of the will of the deceased or letters of administration of his estate, has, or have been granted by a Surrogate Court, and representation of such estate is required in any action or proceeding in the High Court. The words *ad litem*, not *pendente lite*, used in the earlier part of the rule, create no doubt or difficulty, the latter part of the same paragraph of the rule declaring that the person appointed shall have the rights, authority, and responsibility of an administrator or administrator *pendente lite* (as the case may be) appointed by the Surrogate Court.

When power under this rule is exercised, it seems to supersede the power of the Surrogate Court to make the like appointments; it is in effect the same appointment which the Surrogate Court might have made, and formerly alone had power to make; but when made by the High Court, and made under the circumstances mentioned in the rule, is made by that Court, instead of the Surrogate Court, once for all.

In paragraph (*b*) of the rule, the appointment is called a grant of administration, and the registrar of the High Court is required to send to the Surrogate clerk a copy of it, and a copy of the will, where the grant is "with the will annexed," and the clerk is to make similar entries to those he is required to make upon returns from the registrars of the several Surrogate Courts, made under section 14 of the Act, of grants of probate and administration.

The power, therefore, conferred on this Court by the rule, is substantially to appoint an administrator or an administrator *pendente lite*, as the case may require, in the circumstances mentioned in the rule.

Now the circumstances under which an administrator *pendente lite* is appointed, and his rights and powers are

Judgment.
Meredith, J.

well-known, and indeed are here provided for by statute. He is appointed pending litigation, touching the validity of a will, or the grant or revocation of probate or letters of administration; and he has all the rights and powers of a general administrator, except distributing the residue of the estate; but his office ceases at the final determination of the litigation, and he is subject to the immediate control of the Court, and is to act under its direction: see "The Surrogate Courts Act," sections 53 and 59; and *Beatty* v. *Haldan*, 4 A. R. 239, and *Haldan* v. *Smith*, 25 C. P. 349.

So that under Rule 311, this was a case for the appointment of a general administrator, or none at all, an administration *pendente lite* was out of the question.

But whatever may have been the several powers of the Court in this respect, the plaintiff's rights cannot be more extensive than those conferred upon him by the order appointing him; and that order appears to me from its form, not to be one under Rule 310 nor under Rule 311.

Under section 310, the form would be the short, simple, and common one, in these or the like words:

This Court doth order that be appointed to represent the estate of deceased, for the purposes of this action.

Under Rule 311, whether the appointment were general or *pendente lite*, the form would be short and simple like the form of letters of administration in the Surrogate Court, and containing sufficient information for the purposes of the paragraph (*b*), and security would doubtless be required (see *Stanley* v. *Bernes*, 1 Hagg. 221), in all but very exceptional cases.

Now the form of the order in question, is neither, nor anything like, the one or the other; but it is, mainly, word for word, the long settled and well-known form of letters of administration granted by the Probate Court in England, appointing a legal personal representative of a

deceased person for the special and limited purpose of commencing or substantiating proceedings in Chancery. Judgment. Meredith, J.

The words of the order shew this, and plainly exclude any notion of a general administrator—"limited for the purposes only," etc. The words "any other action touching or concerning the subject matter of this action," mean any other action for the administration and distribution of the estate under the direction of the Court; certainly not an action to set aside a tax sale.

Whatever may have been intended by the applicant for the order, or by the learned Judge who made it, it seems very plain to me that no such power or authority as is claimed in this action, was conferred upon the plaintiff, but what was conferred upon him, if anything, was merely the right to carry on the summary administration proceedings then pending, or any other proceedings of the like nature, that might thereafter be commenced.

But according to the cases in England, such an order, even when made by a Court having undoubted authority to grant letters of administration in the same words, is not a sufficient authority for an administration action; the person appointed does not sufficiently represent the estate for the purposes of administration proceedings; in such proceedings, a general administrator is necessary: *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294; so that it would seem that, apart from any question as to the power of this Court to make any such order, the plaintiff did not sufficiently represent the estate under it, even for the purposes of the proceeding, in which he was appointed.

I am, therefore, of opinion that the plaintiff never had any right or authority to bring this action, and accordingly it was rightly, and this motion should be, dismissed.

It was contended that this objection to the plaintiff's claim, is not open to the defendants, because not specifically pleaded under Rule 411. But that rule is not applicable to this case, for the plaintiff does not allege merely that he is administrator, but only that under the order in question he was appointed administrator to represent the estate in

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Meredith, J.

question; the answer is not a denial of such appointment, but an admission of it, and a denial that it conferred any right to maintain this action.

But the grounds on which the defendants succeed, should have been pressed early in the action, and the cost of the trial of it upon the merits, should have been avoided. The preliminary objections were not even suggested upon the motion before us, until a long argument upon the merits of the case, in support of the motion, was concluded. It may have suited the defendants to keep those objections in the background longer than they should, so that they might gain any advantage there might be in the greater lapse of time between the making of the tax deed, and the beginning of a new action, properly constituted, to set it aside, or in the less likelihood of the Court allowing this action to be turned into one so properly constituted.

Because not pressed earlier, and because the costs of the action have been thereby very much increased needlessly, I would not give the defendants any costs of this motion.

A. H. F. L.

[DIVISIONAL COURT.]

BOULTBEE V. GZOWSKI ET AL.

Broker—Sale of Shares—Undisclosed Principal—Marginal Transfer—Indemnity—Assignment of Right to—Statute of Limitations—Former Judgment—By-laws of Stock Exchange—Arbitration.

The plaintiff sold and transferred his shares in a bank to C., a broker, who sold them on the Stock Exchange to the defendant, also a broker, in ignorance that the latter was acting for a customer. The transfer in the bank books from C. was effected by leaving the transferee's name blank, and marking the shares in the margin of the transfer as subject to the order of the defendant, who similarly marked them subject to the order of his principal, whose name was filled in as transferee, and who duly accepted the transfer.

Within a month from the sale by the plaintiff, the bank was ordered to be wound up, and in the liquidation the plaintiff was compelled, as a contributory, to pay the double liability under sections 70 and 77 of the Banking Act, R. S. C. ch. 120. The plaintiff recovered judgment against C. for the amount he had paid, and afterwards took an assignment from C. of his right to indemnity against the defendant.

In an action to enforce this right :—

Held, (*a*) that the obligation to indemnify arose from the purchase, and not from the transfer: that a broker acting in his own name, for an undisclosed principal, assumes the liability of the latter, and the fact that the transfer was executed in a form intended to enable the defendant to pass the shares to the ultimate purchaser did not relieve the defendant from his liability.

(*b*) That although C. had not satisfied the judgment, he was entitled to indemnity from the defendant, and after judgment, to assign his rights to the plaintiff, who could enforce them :—

Held, also, that the mere existence of a liability to indemnify plaintiff gave no right of action to C., and that the Statute of Limitations did not begin to run in favour of defendant until the recovery of judgment against C.

Sutherland v. *Webster*, 21 A. R. 228, and *Eddowes* v. *The Argentine Loan Co.*, 63 L. T. N. S. 364, followed :—

Held, further, that plaintiff's right against C. first accrued when the liquidators became entitled to immediate payment.

Before this action, plaintiff sued defendant and C. on an assignment to him of C.'s claim against the defendant, made before the plaintiff's judgment against C., which action was dismissed against defendant on the ground that C. had not before judgment been damnified, and the defendant sought herein to set up that dismissal in bar of this action :—

Held, no defence to this action.

A by-law of the Stock Exchange, not authorized by their Act of incorporation, provided that all disputes between members, arising out of transactions on the Exchange, should be referred to arbitrators :—

Held, that they had no right to pass such a by-law ousting members from their right to resort to the Courts of the Province.

Essery v. *Court Pride of the Dominion*, 2 O. R. 596, considered.

Judgment of Meredith, J., at the rial reversed.

Statement. THIS was an appeal from a judgment of MEREDITH, J., in an action brought by Alfred Boultbee against C. S. Gzowski.

The following facts are taken from the judgment of STREET, J., in the Divisional Court.

The facts in this case are not, I think, seriously in dispute and are substantially as follows:—On the 22nd of October, 1887, the plaintiff was the holder of twenty shares of fully paid up stock in the Central Bank of Canada standing in his name upon the books of the bank, and on that day he sold and transferred them to one Cochran, who paid him for them, and procured the transfer to himself in the books of the bank to be made.

It appears to be contended by the defendant that Cochran only acted as broker for Boultbee, and not as purchaser from him, but Mr. Justice Meredith finds the fact as I have stated it, and Mr. Justice Ferguson found in the same way upon practically the same evidence, and I think we should adopt these findings, which appear to be supported by the evidence.

Cochran was a broker upon the Toronto Stock Exchange, and on the 26th October, 1887, the defendant Gzowski, who is also a broker upon the same Exchange, having a commission from a client named Henderson to purchase shares of the Central Bank, purchased these twenty shares from Cochran upon the Exchange. The name of the principal for whom Gzowski acted in making the purchase was not disclosed: in the ordinary course of business upon the Exchange, it never is. Brokers sometimes buy there upon their own account, though the defendant seldom did, and the defendant had never purchased Central Bank shares upon his own account.

On the same day, or the day after, Gzowski paid Cochran for the shares with money received by him for the purpose from Henderson, and thereupon Cochran signed a transfer of these shares upon the books of the bank with the name of the purchaser in blank, and with

a marginal note initialled by him* by which the shares were placed under the control of Gzowski & Buchan, the firm of brokers in which the defendant was a partner. It has been agreed, however, that all the transactions here in question are to be treated as if the defendant, and not his firm, were concerned, so that the case is to be treated as if the shares had been placed by Cochran's transfer subject to the order of the defendant, who thereupon, so far as Cochran was concerned, might have transferred them into his own name, or into the name of any other person. The nature and form of such a transfer is fully considered and set out in the judgment: *In re Central Bank of Canada—Baines's Case*, 16 A. R. 237. Statement.

On the 29th October, 1887, Gzowski, by a marginal note in the bank books, placed these shares under the control of his principal, Henderson, who, on the same day, executed an acceptance of the transfer to himself of them upon the bank books, and thereby constituted himself the legal holder and transferee of the shares. Cochran had no knowledge of, or dealing with, any person but Gzowski in the transaction, and did not know whether he was purchasing for himself or for a principal.

On 15th November, 1887, within one month after the transfer by the plaintiff to Cochran, the Central Bank sus-

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* Assignment from Cochran to J. D. Henderson.

For value received from....., I, R. Cochran, of Toronto, do hereby assign and transfer unto....., of ....., twenty shares (on each of which has been paid....., dollars, amounting to the sum of two thousand dollars) in the capital stock of the Central Bank of Canada, subject to the rules and regulations of the said bank.

Witness my hand at the said bank, this 26th day of October, one thousand eight hundred and eighty-seven.

Witness,

(Signed) A. B. ORDE. (Signed) ROBERT COCHRAN.

I do hereby accept the foregoing assignment of twenty shares in the stock of the Central Bank of Canada, assigned to me as above mentioned at the bank, this 29th day of October, one thousand eight hundred and eighty-seven.

(Signed) J. D. HENDERSON.

Statement.

pended payment and was on 16th December, 1887, ordered to be wound up. In the course of the winding-up proceedings the plaintiff was made a contributory, as having been the holder of shares in the bank one month before the suspension of payment, which he transferred within the month; and he was compelled to pay to the liquidators $1,000 on 26th April, 1890, and $1,125 on 30th April, 1890, in satisfaction of his liability.

On the 13th April, 1894, Cochran executed a transfer to the plaintiff of all his right of action against Gzowski in any way arising from the sale of the shares in question.

On the 21st April, 1894, the plaintiff, in an action against Cochran and Gzowski, recovered judgment against Cochran for the amount he had been compelled to pay the liquidators in respect of these shares, and in the same action he sought, as assignee of Cochran, to recover from Gzowski the same amount.

Mr. Justice Ferguson, before whom the action was tried, was of opinion that the plaintiff was not in a position to recover from the defendant Gzowski under the assignment of Cochran's rights, because Cochran at the date of the assignment had not been damnified, and the assignment, therefore, passed nothing; and he ordered that the action as against Gzowski should be dismissed with costs, refusing an application made by the plaintiff to add Cochran as a party plaintiff.

The plaintiff moved in the Queen's Bench Division by way of appeal from this judgment, and that Division being of opinion that the pleadings should be amended so as to raise all the substantial questions between the parties, gave to Cochran leave to amend by claiming over against Gzowski, and allowed the plaintiff as an alternative to concur in the recovery over by Cochran, notwithstanding his assignment to the plaintiff. The defendant Gzowski appealed to the Court of Appeal, who allowed his appeal.

Thereupon the plaintiff began the present action against Gzowski on 26th November, 1895, setting forth the recovery and entry of the judgment by the plaintiff against

Cochran, and a further assignment by Cochran to the plaintiff of his rights against the defendant Gzowski, executed subsequent to the recovery of such judgment, and claiming as assignee of Cochran to recover the amount from Gzowski. Statement.

Upon this action coming on for trial before the Hon. Mr. Justice Meredith, an order was made by him by consent that the former action brought by the plaintiff against Cochran and Gzowski should stand dismissed as against the defendant Gzowski, subject to such order, if any, as the Queen's Bench Divisional Court should make as to costs, but without prejudice to the present action or to any claim made, or which might be made by amendment, therein, and giving leave to the plaintiff to amend by adding parties or otherwise as he might be advised. The trial of the present action then proceeded, and the learned Judge having reserved judgment, ordered that the action should be dismissed with costs upon the grounds set forth in his written judgment.

H. J. Scott, Q. C., and *R. Boultbee*, for the plaintiff.
Moss, Q. C., and *Walter Barwick*, for the defendant.

April 30, 1896. MEREDITH, J.:—

This is a case involving several difficult and somewhat complicated questions of fact and law, but fortunately the way out of most of them is made more or less plain by the numerous cases of recent years upon the subject of stock exchange transactions, and the well-considered and exhaustive judgments delivered in some of them; and by other cases of stock transactions, not upon the stock exchange, to which sufficient attention was not directed during the argument, but to which I shall presently more fully refer, as they seem to me very much in point.

The cases upon the subject generally are well collected, and the rules and usage of the London Stock Exchange, which played so important a part in some of them are

Judgment.

Meredith, J.

pretty fully set out in Lindley's Law of Companies, 5th ed., pp. 491 to 516, and Roscoe's Nisi Prius Evidence, 16th ed., pp. 548 to 557; see also Fry on Specific Performance, 3rd ed., pp. 655 to 671; and the rules are given in full in a footnote to *Grissell* v. *Bristowe*, L. R. 4 C. P. 36, beginning at p. 53.

The transaction in question in this case took place between stock brokers, and, in the first place, upon the Toronto Stock Exchange; but there are no rules, nor any usage, of that exchange bearing upon the nature or effect of the transaction, so far as the evidence shews: and it therefore stands to some extent upon a different footing from many of the cases referred to; and must be dealt with as an ordinary transaction, so far as the nature and effect of it are concerned, unaffected by any such special rules or usage.

And it is now well settled that, quite apart from any such rules or usage, a purchaser of shares, besides paying for, and accepting a transfer of, them, is under an obligation to indemnify his vendor against all liability in respect of them arising after he had become, and, at the least, while he remains, the owner of them.

This was the rule in chancery, founded upon a like equitable obligation to that which required the purchaser of an equity of redemption to relieve his vendor from incumbrance subject to which the land was purchased.

And it was likewise the rule at common law, based upon the judgment in *Burnett* v. *Lynch*, 5 B. & C. 589—a case in which the Court seemed to struggle with some difficulty in putting the plaintiff's right to recover upon any then well defined common law rule or principle, and to be guided very much by the manifest justice of the thing, and the lamentable effect of a determination that the common law court could afford no relief in such a case—but a decision which the common law courts were inclined rather to enlarge than to circumscribe, even if the Judges still found it somewhat difficult to agree upon the common law rule or principle upon which it could be plainly put: see *Moule* v. *Garrett*, L. R. 7 Ex. 101.

Judgment. Meredith, J.

Burnett v. *Lynch* was a strong case in favour of the plaintiff, for there the assignment, under which the defendant took and held the property, was expressly made subject to the payment of the rent and performance of the covenants reserved by, and contained in, the lease which was assigned.

It is, now that law and equity are administered in the one court, of course immaterial whether a party's right be legal or equitable, full effect must be given to it whatsoever its nature.

But this obligation to indemnify, as I understand it, if not expressed, is one which is to be implied from the circumstances of the case, and implied in the sense of being the tacit agreement between the parties, not implied in any sense of being imposed by law whether the parties agreed to it tacitly or not, not to be forced upon them by law or in equity willing or unwilling.

That seems to me to be, practically, the rule in regard to the equitable obligation to which I have adverted: see *Corby* v. *Gray*, 15 O. R. 1; *British Canadian Loan Co.* v. *Tear*, 23 O. R. 664; *Beatty* v. *Fitzsimmons*, 23 O. R. 245; *Humfrey* v. *Doll*, 7 E. & B. 266; and *Walker* v. *Dickson*, 20 A. R. 97; and the whole tenor of the judgments, both at law and in equity, shew it to be so in these stock transactions. Where a person buys property subject to a mortgage, and the amount of the incumbrance is allowed in part payment of the price of the property, the inference, from that alone, that there was an agreement that the purchaser should relieve the vendor from all personal liability in respect of it, is irresistible; the only difficulty that can arise, must be from the manner in which the conveyance or other writing is drawn.

So, too, in regard to many stock transactions, where the shares are not fully paid up; and especially so in those cases where they are sold at a loss, at a discount greater than the amount paid upon them, so that it is obvious that the vendor is selling solely or primarily to get rid of all liability respecting them, the conclusion is irresistible that

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the purchaser was to so relieve the vendor, that is the tacit, when not the expressed, bargain.

It is impossible, speaking generally, to read the cases in which the rule, that it is the duty of the purchaser to indemnify the seller, has been applied without feeling that a very irrational conclusion would have been reached, and a very palpable departure from the intention of the parties, would have been involved, in a decision that there was no such obligation because none was expressed; in all of them, in which relief has been given upon the implied obligation either at law or in equity, it will, I think, be found that the facts of the case sufficiently shewed the understanding of both parties that the purchaser or assignee should take the estate *cum onere*, and should relieve the seller or assignor from personal liability. It is obvious that neither buyer or seller contemplates the seller paying off charges upon the property, sold subject to them, for the benefit of the buyer, without any consideration or reason.

In stock transactions, ordinarily, the vendor sells free from all past calls and obligations, and the purchaser buys subject to all future calls and obligations.

All this being so, it is obviously of the utmost importance to ascertain, as exactly as possible, what the transaction in question really was; the plaintiff's case must stand or fall upon the facts as found; these questions are really the most difficult ones.

In this case we start with this fact, that there is no writing which either helps to shew what the real contract was, nor stands in the way of finding the very truth of the matters in dispute, as writings inaccurately or insufficiently expressed sometimes do.

The material facts, as I find them, are these: The plaintiff held twenty shares of the capital stock of the Central Bank of Canada; he sold them to one Cochran for ninety-seven cents in the dollar of their par value, which value had been paid in full by the plaintiff to the bank; Cochran was a stock broker and a member of the Toronto Stock Exchange, and he, very soon after buying the shares, offered them for

sale in the ordinary way at the Exchange, and they were then bought by the defendant, who was also a stock broker and a member of the Toronto Stock Exchange, for one Henderson, part at ninety-seven and part at ninety-five cents in the dollar, Henderson having previously employed him to buy such stock. Judgment. Meredith, J.

This stock was "listed" on the Exchange, and these particular shares were sold in the ordinary course of business, thus:—An officer of the Exchange "calls" the stock in its order, and then offers and bids (if any) are made until the buyer and seller come together as to price, when one or the other, as the case might require, says "sold," and an entry of the transaction by that officer, probably more for general information as to sales and prices than for the purpose of recording the transaction as between the parties to it, is made; on the following business day, the dealing brokers conclude the transaction, including it with any others that may have taken place between them, the one paying the other the balance coming to him, the shares being then transferred, or put in the power of the buying broker to transfer.

The name of the buying broker's principal was not disclosed at the Exchange; in the ordinary course of business there it never is. Brokers sometimes buy there on their own account, though the defendant seldom did, and never any Central Bank shares.

This transaction took the usual course, and when the shares were paid for by the defendant, as they were on the day following the purchase, Cochran executed the usual transfer in the bank's book kept for that purpose, but did not transfer them to the defendant; he made what has been called a "marginal transfer," as fully set out and explained in *Re Central Bank of Canada—Baines's Case*, 16 A. R. 237; that is, he executed the form of transfer, leaving the space for the name of the transferee blank, and giving power, by a marginal entry, to the defendant, to fill in the transferee's name, or to empower some one else to do so.

Judgment.

Meredith, J.

The main general purpose of that form of transfer must have been to avoid personal liability in respect of the shares, and to let that fall upon the real purchaser and transferee, and that has been considered to have been the effect of it in *Re Central Bank of Canada—Baines's Case*, 16 A. R. 237, in regard to liability upon the shares.

In this particular transaction the purpose of that form of transfer was that the shares might be transferred directly to the real purchaser Henderson; but of course if Henderson failed to pay, the defendant had the power to sell and transfer the shares to anyone else.

I cannot think it was ever contemplated, by either party to the transaction, that the defendant should, in any case, become the transferee. It seemed a matter of indifference to Cochran whether the sale was to the defendant or to anyone else, for the shares were fully paid up, and he was to get from ninety-five to ninety-seven cents in the dollar of their par value before parting with them.

It was obviously not then considered within the range of possibility that any further liability could attach to the transferor, as such liability could arise only under sections 70 and 77 of the Bank Act, which impose the "double liability" upon past shareholders only in case of the commencement of suspension of payment by the bank within one month after the transfer of the shares; suspension could hardly have been dreamed of by a seller getting ninety-five cents to ninety-seven cents in the dollar for his shares and paying ninety-seven cents in the dollar for them a day or two before; much less an insolvency necessitating a resort to the double liability provisions.

Whatever may be the usual course of business, or whatever the facts in any other case, I am quite satisfied upon the evidence afforded by the surrounding circumstances as well as the testimony given at the trial, that the real contract in question between these two brokers was that the defendant should be personally answerable for the payment of the price of the shares on the day following the purchase of them, and that upon such payment the seller

would transfer them to anyone the defendant might name, or by way of "marginal transfer" put it in his power to transfer them to anyone competent to take such a transfer; and that it was never contemplated by either party that the defendant should be in any case bound to take a transfer of them himself, or otherwise come under any personal liability in respect of them, beyond payment of the purchase money and procurement of a valid transfer of them. Judgment. Meredith, J.

If it were simply and purely an ordinary sale, then the seller had a right to insist upon the defendant taking a transfer of the shares himself, or at least entering into some agreement of indemnity if the transfer were made to his nominee; but instead of so insisting he made the transfer in such a manner that it became a transfer from him directly to Henderson, the real purchaser, establishing direct privity of contract in writing between them, and establishing also the relationship of principal and surety between them; both liable in the events that happened, to the same creditors in respect of the same shares—Henderson the real purchaser primarily, and Cochran the seller secondarily.

Under these circumstances I cannot consider that law or equity imposes any such obligation upon the defendant as that which the plaintiff seeks to enforce in this action.

But the plaintiff's claim, in my opinion, fails upon grounds based upon well defined common law principles, which may, perhaps, be considered narrower and more technical than those already stated, and may be shortly stated thus: The transfer of the shares, made in the way I have stated, was either an election to deal with the real purchaser, and not to hold the agent as a principal, or else it amounted to a novation.

This seems to me to be quite supported by the cases, I may say by leading cases, at law and in equity.

In *Walker* v. *Bartlett*, 18 C. B. 845, the defendant was the real purchaser, and yet it was considered that he was not bound to take a transfer of the shares in his own

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name, but could cause the shares to be registered in his own name or that of some other person to be named by him as the owner thereof, the seller having signed an order for a transfer of the shares, leaving a blank space for the name of the transferee.

The decision was not affected by any stock exchange rules or usage; the sale was not a stock exchange transaction. The defendant was, however, held liable, because he had not taken the transfer in his own name or to anyone else, but had left the shares standing in the seller's name, whereby he was made liable for and obliged to pay subsequent calls.

One cannot but gather from that case that though the defendant was the real purchaser he would have fulfilled the contract on his part and have avoided all possibility of further liability, if he had filled in the name of some other person, competent and willing to take the shares, as transferee of them.

In that case the liability arose from the neglect of the defendant to have the transfer made to anyone. In this case the liability arises out of the extraordinary provisions of the statute; and it had undoubtedly arisen long before the plaintiff put his shares upon the market; though unknown to him and to the defendant and Cochran, the plaintiff was really selling a liability, an indebtedness of $2,000, and getting $1,940 for it; the purchaser was really paying $1,940 for the privilege of being saddled with a debt of $2,000.

Having regard to this serious misapprehension, under which buyer and seller laboured, it may be that equity would not aid the seller if he were seeking to enforce specific performance of the contract: see *Hawkins* v. *Maltby*, L. R. 4 Eq. 572; and *Re Central Bank of Canada—Baines's* and *Nasmith's Cases*, 16 O. R. 293.

In *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241, the liability of the plaintiff was one imposed by statute upon past members in case present members were unable to pay. But there the liability arose after the transfer to the defendant,

who was the real purchaser. The judgment in this case seems to indicate, as do those in other cases, that the liability to indemnify lasts only as long as the defendant is or should be the registered owner: see *Humber* v. *Layton*, 7 M. & W. 517; and *Walker* v. *Bartlett*, 18 C. B. 845; and that it extends to future liabilities only, and that the arising of the liability, not the making of the call, is the test. Coleridge, C. J., put it thus, in *Kellock* v. *Enthoven*: that the transferor has a right to come to his transferee and say, "As between you and me, when I parted with the shares to you, the implied contract was, that you would discharge in respect of them all liability that might arise during the time of your holding. This is a liability which arose during the time you held the shares, though the call was not made till after you had parted with them": p. 248; and again he says: that in *Maxted* v. *Paine*, L. R. 6 Ex., at p. 134, the Court assumed that there is an implied contract on the part of the transferee to indemnify the transferor from any calls or liability which may arise in respect of the shares during the time the transferee holds them. This subject was much discussed in one of the Courts of one of the United States of America, and the ultimate decision was in favour of the more limited liability: see *Brinkly* v. *Hambleton*, 8 Atl. R. 904; see also *Lessassier & Binder* v. *Kennedy*, 36 Louisiana An. R. 539.

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In this case the liability arose while the plaintiff himself held the shares, and the calls were made after the real purchaser, Henderson, had become the registered owner.

Humble v. *Langston*, 7 M. & W. 517, is a case very much in the defendant's favour. The considered judgment of the Court delivered by Parke, B., contains a good deal that is pertinent to this case; and, though the Court doubtless took a narrower view of a purchaser's liability than is taken at the present time; and though the authority of that case does not remain in all respects unshaken, a good deal remains to aid the defence in this case, against which no good reason can be advanced.

That even if the defendant had not been merely an

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agent for Henderson, privity of contract would exist between Cochran and Henderson, and that nothing would stand in the way of the former having relief directly against the latter, if entitled to any relief from anyone, is shewn by such cases as *Brown* v. *Black*, L. R. 15 Eq. 363; and in appeal, L. R. 8 Ch. 939; *Evans* v. *Wood*, L. R. 5 Eq. 9; *Maxted* v. *Paine*, L. R. 6 Ex. 122; *Coles* v. *Bristowe*, L. R. 4 Ch. 3; *Grissell* v. *Bristowe*, L. R. 4 C. P. 36; *Paine* v. *Hutchinson*, L. R. 3 Ch. 388; *Bowring* v. *Shepherd*, L. R. 6 Q. B. 309; and *Loring* v. *Davis*, 32 Ch. D. 625.

Then in *Shaw* v. *Fisher*, 5 DeG. M. & G. 596, one of the leading cases in equity supporting a vendor's right of indemnity, it was held that after the vendor had transferred the shares there in question to a sub vendee at the vendee's request, all liability of the vendee to indemnify was at an end.

The judgment there was based upon the ground that the vendor could not have enforced specific performance of his contract, because by reason of his transfer of the shares to the sub-vendee, he could not make title to the vendor.

The Lord Chancellor from the observations reported at page 609, seems to have been of opinion that if the transfer had been made for the vendee's convenience so that the vendor would be acting as it were merely as an agent for the vendee in making the transfer, it would not have been a bar to relief, but that as the transfer was made to the sub-vendee upon the footing that he was the person who had purchased from the vendor, and as such entitled to the transfer, he considered that put an end to the plaintiff's case.

In this case the transfer was by Cochran's own act, made directly from him to the real purchaser, and that the more should put an end to this plaintiff's case: see *Castellan* v. *Hobson*, L. R. 10 Eq. 47; *Coles* v. *Bristowe*, L. R. 4 Ch. 3; *Maxted* v. *Paine*, L. R. 4 Ex. 203, and L. R. 6 Ex. 132; and *In re Towns' Drainage, etc., Co.—Morton's Case*, L. R. 16 Eq. 104.

In *Walker* v. *Dickson*, 20 A. R. 96, the real purchaser

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was held liable to indemnify, in the case of a sale of lands subject to a mortgage, although the conveyance had been made to his mortgagee; but there it was considered that a vendor was bound to convey to any nominee of the purchaser; which is not the case in stock transactions, at all events not without indemnity by the purchaser being first provided for, which of course makes a vast difference in the cases.

That case may be supported upon the observations of the Lord Chancellor in *Shaw* v. *Fisher*, which I have referred to; the person held liable was the real purchaser, the conveyance to his nominee was made merely for his convenience; the conveyance was not made to the grantor on the footing that he was the person who had purchased from the vendor, and as such entitled to the conveyance.

Walker v. *Dickson*, seems to me to be an authority for the defendant in this action, upon the ground on which I have first dealt with this case; that is the person held liable to indemnify, was the real purchaser, the person intended and tacitly agreed to be liable.

Upon principle and authority, and according to my view of the very truth and right of the matters in controversy, any and all liability of the defendant ended when the purchase money was paid and the transfer made from the seller directly to the real purchaser, Henderson, and accepted by him.

I have used the word transfer throughout, as the shares of the bank were transferred in one way only, namely, by means of the forms contained in the bank's transfer book, which were filled up and signed at the bank's head office, and at once effected an assignment from the one party to the other, acceptance by the other, and registration, and notice to the bank of the assignment and acceptance.

And I have also spoken of the defendant as the purchasing broker, although he and his partner were really the purchasing brokers, but the parties have agreed that the partner's name shall be dropped and the matter dealt with as if the defendant alone were concerned.

Judgment.
Meredith, J.

A number of other interesting questions raised and argued at the trial, do not call for any consideration, as I have been able to reach a conclusion upon the merits of the case, which, if right, disposes of it entirely and finally and in the most satisfactory manner.

The action must be dismissed with costs.

If the plaintiff desire it, proceedings will be stayed, say for one month.

From this judgment the plaintiff appealed, and his appeal was argued on 27th May, 1896, before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE, and STREET, JJ.

H. J. Scott, Q. C., and *R. Boultbee*, for the appeal. The evidence shews the practice of stock exchange brokers was to transfer shares either under a power of attorney or by what is called a marginal transfer: *Re Central Bank of Canada—Baines's Case*, 16 A. R. 237. Here the stock was actually sold by Cochran to Gzowski without any knowledge of his agency for another, and the transfer was made in a form to satisfy Gzowski. Cochran's right to indemnity does not arise upon the transfer, but upon the sale. When the sale was made to Gzowski, he assumed all the liability on and burdens of the shares. The trial Judge should have found there was a sale by Cochran to Gzowski, who, when he chose to act for an undisclosed principal, made himself personally liable. The contract of sale was complete on the Exchange, and the transfer was a mere detail to carry it out. There is no evidence of any novation. Cochran knew no one in the transaction but Gzowski. The case of *Kellock* v. *Enthoven*, L. R. 8 Q. B. 458; L. R. 9 Q. B. 241, would be this case if Gzowski had taken an absolute transfer to himself, and then transferred to his principal Henderson. Plaintiff has recovered a judgment against Cochran who, since its recovery, has assigned all his rights over against Gzowski to plaintiff, so the plaintiff is now entitled to recover in this action. I refer

to *Maxted* v. *Paine*, L. R. 4 Ex. 81; L. R. 6 Ex. 132, *per* Blackburn, J., at p. 151; *Rennie* v. *Morris*, L. R. 13 Eq. 203, overruled in part; *Merry* v. *Nickalls*, L. R. 7 Ch. 733; 7 H. L. 530; *Grissell* v. *Bristowe* L. R. 3 C. P. 112 and 4 C. P. 36; *Coles* v. *Bristowe*, L. R. 4 Ch. 3; *Loring* v. *Davis*, 32 Ch. D. 625, at p. 634; *Roberts* v. *Crowe*, L. R. 7 C. P. 629; *Walker* v. *Dickson*, 20 A. R. 96. Argument.

Moss, Q.C., and *McGregor Young*, contra. The judgment appealed from is a complete answer to plaintiff's case. Even if there was any implied obligation it is on the real or intended real purchaser: *Beatty* v. *Fitzsimmons*, 23 O. R. 245. Henderson was the purchaser: Gzowski was not. He was not even the transferee, but a mere intermediary to put through the transfer in a certain form of the Stock Exchange. He was under no liability whatever except for payment to Cochran: *Re Central Bank of Canada—Baines's Case*, 16 A. R. 237. In *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241, referred to in *Brinkly* v. *Hambleton*, 8 Atl. R. 904 the principal arrived at is that the payment was made for the benefit of the real owner so he was liable to indemnify and that is in harmony with sec. 77 of R. S. C. ch. 120. The shares were duly accepted by Henderson: R. S. C. ch. 120, sec. 29; R. S. O. ch. 109. The stock was paid up, and no other liability was in contemplation. The privity of contract was between Cochran and Henderson: *Shaw* v. *Fisher*, 5 DeG. M. & G. 596. The new assignment to plaintiff from Cochran gives him no better right than he had before: *Sutherland* v. *Webster*, 21 A. R. 228. The plaintiff's right to litigate is founded on Cochran's right, and he is bound under the by-laws of the Exchange to resort there for his remedy: *Field* v. *The Court Hope of Ancient Order of Foresters*, 26 Gr. 467; *Essery* v. *Court Pride of the Dominion*, 2 O. R. 596.

Scott, Q.C., in reply. The question of the assignment is concluded by *Boyd* v. *Robinson*, 20 O. R. 404.

December 26, 1896. The judgment of the Court was delivered by

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Street, J.

STREET, J. :—

Under the provisions of the Banking Act, R. S. C. ch. 120, sec. 70: "In the event of the property and assets of the bank being insufficient to pay its debts and liabilities, the shareholders of the bank shall be liable for the deficiency so far as that each shareholder shall be so liable to an amount, over and above any amount not paid up on his shares, equal to the amount of such shares." And by section 77: "Persons who, having been shareholders in the bank, have only transferred their shares or any of them to others, or registered the transfer thereof within one month before the commencement of the suspension of payment by the bank, shall be liable to all calls on such shares as if they had not transferred them, saving their recourse against those to whom they were transferred."

Under these sections every holder of a share of bank stock assumes a liability to contribute to the assets of the bank, in the event of its insolvency, a sum equal to the par value of the share; and in the case of persons coming within these sections this liability continues in force even after the registration upon the bank books of a transfer of the share to a third person, and is only extinguished when the bank has continued for a month after such registration to carry on its business without any suspension of payment. All transactions in bank shares must be taken to be made subject to the possibility that this well-known statutory liability may be enforced in case of the insolvency of the bank happening within the statutory period.

As between the plaintiff and his immediate transferee of the shares in question, Cochran, I can see no ground whatever for doubting that the latter was bound both upon reason and authority to assume and indemnify the plaintiff against the liability attached to the ownership of the shares created by the sections of the Banking Act to which I have referred. The principle laid down with regard to the liability of the purchaser of an equity of redemption to indemnify the mortgagor has not been confined to mort-

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gages of land, but is treated as applying to every species of property which is transferred while subject to a burthen: *Waring* v. *Ward*, 7 Ves., at p. 337; *Burnett* v. *Lynch*, 5 B. & C. 589; *Walker* v. *Bartlett*, 18 C. B. 845; *Wynne* v. *Price*, 3 DeG. & Sm. 310; *Walker* v. *Dickson*, 20 A. R. 96; *Beatty* v. *Fitzsimmons*, 23 O. R. 245; *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241.

In some of the cases it is put upon the ground of implied contract, in others upon the breach of a duty cast upon the transferee and in others upon an equity arising irrespective of contract, but the broad principle that a person taking the advantage must take with it the burthen is always enforced under one head or another. The last of the cases above referred to was a decision in the Exchequer Chamber upon a sale of shares, the principle of which establishes beyond any question, I think, the liability of Cochran to indemnify the plaintiff against the sums which he has been required to pay.

The authorities further are agreed upon the point that the obligation to indemnify arises not from the transfer, but from the fact of the purchase: *Walker* v. *Bartlett*, 18 C. B. 845; *Walker* v. *Dickson*, 20 A. R. 96; *Shaw* v. *Fisher*, 2 DeG. & Sm. 11; 5 DeG. M. & G. 596.

In the present case the only purchaser with whom Cochran dealt and the only person whom he knew in the transaction was Gzowski; it was never disclosed by Gzowski to Cochran that he was purchasing for Henderson and not for himself, and therefore, upon the well-known rule that an agent dealing in his own name, though really acting for an undisclosed principal, renders himself personally liable upon the contract into which he enters and assumes the liabilities of a principal, Cochran became entitled to treat Gzowski as a principal in the transaction. If Gzowski had really been the purchaser for his own benefit he would clearly have been liable to indemnify Cochran, just as Cochran was liable to indemnify the plaintiff and this is, therefore, the liability which he assumed to Cochran by failing to disclose that he was merely acting as agent for Henderson.

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Street, J.

The fact that Cochran did not transfer the shares to Gzowski, and that he executed the transfer in a form which was designed to enable Gzowski to pass them to Henderson without taking the transfer in his own name, does not help Gzowski. A similar transfer in *Walker* v. *Bartlett*, 18 C. B. 845, was treated as made for the convenience of the purchaser, and as imposing upon him an obligation to discharge all liabilities that might arise while the purchaser refrained from taking the transfer in his own name.

The decision in *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241, shews that a liability such as the present, is to be treated as arising during the whole of the statutory period of a month before the stoppage of payment by the bank, although the calls were not made until afterwards. The judgment of the Court of Exchequer Chamber delivered by Lord Coleridge, C. J., thus shortly describes the position which, I think, Cochran was entitled to take with regard to Gzowski: "As between you and me, when I parted with the shares to you, the implied contract was, that you would discharge in respect of them all liability that might arise during the time of your holding. This is a liability which arose during the time you held the shares, though the call was not made till after you parted with them. You may have some further remedy against somebody else, but as between you and me that was the contract. I have had to pay and you must repay me:" p. 248.

While I entirely agree with my brother Meredith, that it is highly improbable that either Cochran or Gzowski regarded the double liability imposed by the Banking Act as an element in their transaction, still less as one likely to affect Gzowski in connection with it, I am unable to concur in his view, that we should, therefore, assume them to have contracted to disregard the liabilities arising either at law or in equity from the respective positions in which they were placed.

The defendant raises as a defence to the present action, the dismissal of the former action by the same plaintiff against him in which the plaintiff obtained final judgment against Cochran.

That action failed, however, as appears by the judgment of Mr. Justice Ferguson, because it was founded upon an assignment made by Cochran to the plaintiff, before the recovery of any judgment against him by the plaintiff and before Cochran had been in any way damnified; and it was held that there was nothing to assign. Since then, however, and before the commencement of the present action, the plaintiff recovered judgment against Cochran upon the latter's liability to indemnify him, and Cochran then assigned to the plaintiff his claim against Gzowski to be indemnified against the judgment. Under the decision in *Mewburn* v. *Mackelcan*, 19 A. R. 729, the recovery by the plaintiff of a judgment against Cochran without payment of it, gave the latter a cause of action against the person to whom he was entitled to look for indemnity, that is Gzowski. That this is a liability on the part of Gzowski which may be assigned by Cochran and enforced by his assignee, seems clear from *British Canadian Loan Co.* v. *Tear*, 23 O. R. 664.

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What must be taken to have been determined in the former action in Gzowski's favour is that under the assignment made by Cochran before he was damnified, nothing passed to the assignee; but it was not determined that after becoming damnified he might not have a right of action and assign it as he has done.

The defendant has set up, as a defence to the plaintiff's claim, a certain by-law of the Toronto Stock Exchange, of which both Cochran and Gzowski were members, providing that all disputes between members of the Exchange arising out of transactions upon the Exchange, should be referred to arbitrators, to be chosen in the manner provided by the by-laws.

Assuming that the present claim is one which comes within the provisions of the by-law in question (as to which there may be room for argument), I cannot find in the matter set up any defence to the action. The Toronto Stock Exchange is incorporated by the Ontario Statute of 1878, 41 Vict. ch. 65. The Act of incorporation con-

Judgment.
Street, J.

tains no provision authorizing the corporation to pass any by-laws ousting its members from their right of recourse to the Courts of the Province for the settlement of disputes arising from their transactions with one another upon the Exchange; and it is well settled law that the authority of the Legislature to pass such a by-law is essential to its validity as a bar to an action. Here it is not alleged that any reference to arbitration has taken place; and there is, therefore, in my opinion, nothing to bar the plaintiff's right of action in the by-law which is set up: *Mulkern* v. *Lord*, 4 App. Cas. 182; *The Municipal, etc., Building Society* v. *Kent*, 9 App. Cas. 260; *Clarkson* v. *The Toronto Stock Exchange*, 13 O. R. 213; Angell and Ames on Corporations, 10th ed., sec. 341.

Cases such as *Essery* v. *Court Pride of the Dominion*, 2 O. R. 596, and those upon which it is founded establish, not that the members of an association are bound by by-laws requiring them to refer their disputes to arbitration, but that where the members of an association have passed by-laws providing for the expulsion or punishment of members convicted of offences against the by-laws, and have provided domestic tribunals for the trial of such offences, a member complaining of expulsion or punishment is bound to exhaust the remedies provided by the by-laws before coming to a court of law for relief: Angell and Ames on Corporations, 10th ed., sec. 410, *et seq.*

The defendant further pleads the Statute of Limitations as a defence, alleging that the plaintiff's cause of action occurred more than six years before the commencement of the present action. The facts, however, do not support that contention in my opinion.

It is to be remembered that the plaintiff is here seeking to recover as assignee of Cochran. Cochran was not made a contributory as appears from the papers before us. His position was, that he only became a shareholder within the period of one month before the suspension of payment (which was on 15th November, 1887), and that he transferred his shares before the suspension of payment occur-

red, so that he was not brought within either of the classes who are by the Bank Act declared liable. Judgment. Street, J.

Not being a contributory, Cochran was, therefore, not made a debtor by any of the winding-up proceedings, and had no right of action against his transferee of the stock until the recovery by Boultbee of judgment against him on 1st June, 1894, in an action begun on 21st April, 1894.

I think we must hold upon the authority of *Sutherland* v. *Webster*, 21 A. R. 228; and *Eddowes* v. *The Argentine Loan, etc., Co.*, 63 L. T. N. S. 364, that the mere existence of a liability to indemnify Boultbee, which might never be enforced, gave no right of action to Cochran, and that therefore the statutory period did not begin to run against him until the recovery of that judgment. That it did then begin to run because he then had a right of action against his transferee, is shewn by *Mewburn* v. *Mackelcan*, 19 A. R. 729; *Boyd* v. *Robinson*, 20 O. R. 404, and the cases referred to in them.

Then as to Boultbee's right to recover against Cochran, which is disputed upon the ground that the statutory period had elapsed, the dates are as follows:—

15th November, 1887, the bank suspended payment.

16th December, 1887, the winding-up order was made.

30th December, 1887, the order referring to the Master the settlement of contributories was made.

24th March, 1888, the persons alleged to be contributories were ordered to shew cause on 18th April, 1888, why they should not be settled on the list of contributories.

30th June, 1888, master's report made, settling Boultbee on the list as a contributory for $2,000.

26th April, 1890, Boultbee paid the liquidators $1,000 on account of his liability.

30th April, 1890, Boultbee paid the liquidators $1,125, being the balance of his liability.

21st April, 1894, Boultbee sued Cochran.

1st June, 1894, Boultbee recovered judgment against Cochran.

Judgment.
Street, J.

15th November, 1895, Cochran assigned his rights to indemnity to the plaintiff.

26th November, 1895, this action was begun.

The mere fact that, from the time of the suspension of the bank, a liability to be called upon to contribute to the payment of its debts, hung over his head, gave Boultbee no right of action against the person liable to indemnify him: nor is his right to such an action accelerated by the terms of the 46th section of the Winding-up Act R. S. C. ch. 129, which converts the liability to contribute into a debt presently existing, but payable only when calls are made. Boultbee's right of action first accrued at some date, later than 30th June, 1888, when calls were made upon the contributories, settled by the Master's report, of that date, and when the liquidators were entitled to immediate payment: he could not bring an action to be indemnified against a debt not yet payable: *Wolmershausen* v. *Gullich*, [1893] 2 Ch. 514; *Nicholson* v. *Harper*, [1895] 2 Ch. 415; *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561; DeColyar on Guarantees 309.

So that Boultbee's action against Cochran appears to have been brought in time, and the damages recovered by him in that action seem to have been such as he was entitled to recover, and, as I have already shewn, the present action brought by Boultbee as Cochran's assignee against Gzowski seems also to be brought in time.

I think I have examined all the grounds of defence urged by the defendant before us, and for the reasons given I am of opinion that the judgment of Mr. Justice Meredith should be set aside, and that judgment should be entered for the plaintiff for the amount recovered by him against Cochran with subsequent interest and the costs of the action and motion, against which must be set off the defendant's costs of the former action and the motions and appeals in it.

G. A. B.

[DIVISIONAL COURT.]

REGINA V. MACHEKEQUONABE.

Criminal Law—Manslaughter—Pagan Indian—Evil Spirit—Delusion.

A pagan Indian who believing in an evil spirit in human shape called a Wendigo shot and killed another Indian under the impression that he was the Wendigo was held properly convicted of manslaughter.

Statement. THIS was a case reserved under the Criminal Code 1892 and amending Act 58 & 59 Vict. ch. 40 (D.) as to whether the prisoner was properly convicted of manslaughter.

The trial took place at Rat Portage on the 3rd of December, 1896, before ROSE, J., and a jury.

Langford, for the Crown.
Wink, for the prisoner.

It appeared from the evidence that the prisoner was a member of a tribe of pagan Indians who believed in the existence of an evil spirit clothed in human flesh, or in human form called a Wendigo which would eat a human being.

That it was reported that a Wendigo had been seen and it was supposed was in the neighbourhood of their camp desiring to do them harm.

That among other precautions to protect themselves, guards and sentries, the prisoner being one, were placed out in pairs armed with firearms (the prisoner having a rifle); that the prisoner saw what appeared to be a tall human being running in the distance, which he supposed was the Wendigo; that he and another Indian gave chase, and after challenging three times and receiving no answer fired and shot the object, when it was discovered to be his own foster father, who died soon afterward.

The jury found affirmative answers to the following questions:

Are you satisfied the prisoner did kill the Indian?

Statement.

Did the prisoner believe the object he shot at to be a Wendigo or spirit?

Did he believe the spirit to be embodied in human flesh?

Was it the prisoner's belief that the Wendigo could be killed by a bullet shot from a rifle?

Was the prisoner sane apart from the delusion or belief in the existence of a Wendigo?

The learned trial Judge then proceeded with his charge as follows:—"Assuming these facts to be found by you, I think I must direct you as a matter of law that there is no justification here for the killing; and culpable homicide without justification is manslaughter, so that unless you can suggest to yourselves something stated in the evidence, or drawn from the evidence to warrant a different conclusion, I think it will be your duty to return a verdict of manslaughter. You may confer among yourselves if you please, and if you take that view, I will reserve a case for consideration by the Court of Appeal as to whether he was properly convicted upon this evidence."

The jury found the prisoner guilty of manslaughter recommending him to mercy, and the learned Judge reserved a case for consideration whether upon the findings of the jury in answer to the questions he had submitted and upon his direction to them and upon the evidence the prisoner was properly found guilty of manslaughter.

The case was argued on February 8th, 1897, before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE, and STREET, JJ.

J. K. Kerr, Q.C., for the prisoner. The evidence shews the Indian tribe were pagans, and believed in an evil spirit clothed in human form which they called a Wendigo, and which attacked, killed and ate human beings. The man that was shot was thought to be a Wendigo, a spirit as distinguished from a human being. It is true there was

a mistake, but there was no intention even to harm a human being much less to kill. The evidence shews the mistake was not unreasonable. At common law the following of a religious belief would be an excuse. The trial Judge wrongly directed the jury to find the prisoner guilty. There should be a new trial at least. I refer to *Levet's Case*, 1 Hale 474; 1 Bishop on Criminal Law, 7th ed., sec. 305 and note; *Territory* v. *Fish*, cited in note p. 185, is almost a parallel case; *Plummer* v. *The State*, 4 Texas App. 310; *Regina* v. *Rose*, 15 Cox C. C. 540; *Regina* v. *Wagstaffe*, 10 Cox C. C. 530; *State* v. *Nash*, 88 N. Car. 618; *Regina* v. *Mawgridge*, Kelyng's C. C. 167 [119]. Argument.

John Cartwright, Q. C., Deputy Attorney-General was not called on.

The judgment of the Court was delivered by

ARMOUR, C. J.:—

Upon the case reserved if there was evidence upon which the jury could find the prisoner guilty of manslaughter it is not open to us to reverse that finding, and the question we have to decide is whether there was such evidence.

We think there was, and therefore do not see how we can say that the prisoner was not properly convicted of manslaughter.

G. A. B.

RE MACKENZIE TRUSTS.

Trusts and Trustees—Settlement—Power of Revocation—Defective Execution of—Direction to Trustee—Breach of Trust.

A settlement in which the trustee was authorized to invest the funds in "Dominion, Provincial and Municipal bonds and debentures, or first mortgages upon real estate," contained a power of revocation by deed in favour of the settlor, with the consent of the trustee.

The latter invested some of the trust moneys in the stock of a loan company under instructions by letter from the settlor:—

Held, that there was no breach of trust and that what was done amounted to a defective execution of the power which the Court would aid.

The principle on which *In re Mackenzie Trusts*, 23 Ch. D. 750, was decided, applied.

Statement. THIS was an appeal by the official guardian *ad litem* of an infant *cestui que trust* from the report of the local Master at Sarnia, allowing the trustee in passing his accounts a sum of $8,107.50 invested by him in the purchase of shares in a loan company.

The facts are stated in the judgment.

The appeal was argued in Court on February 24th, 1897, before MEREDITH, C.J.

Hoskin, Q. C., for the appeal. The deed of settlement authorized the investment of the trust funds in "Dominion, Provincial or Municipal bonds and debentures, or first mortgages upon real estate." The moneys in question were invested in the stock or shares of a loan company under instructions in writing (by letter) from the mother who had a life interest in the moneys. It is true there is a power of revocation in the settlement, but it was to be exercised by deed only with the consent of the trustee and a letter is not sufficient.

Moss, Q.C., contra. There was a power of revocation to the mother. She could have settled the whole fund for her own sole benefit if she chose to literally comply with the power. Her control was such that the equitable rules as to defective execution of powers should be applied and followed in her favour. The investment was a prudent

one, no loss has occurred. It was made at the mother's request. Even if the request was defective in form it should be remedied. The want of a seal or the form of the document is no objection: Taylor's Equity Jurisprudence, p. 33; Bispham's Principles of Equity, 4th ed., sec. 193. Argument.

February 24th, 1897. MEREDITH, C.J.:—

The trust fund was settled by Sally Poole Mackenzie, the mother of the infants, in trust in the events which have happened, for the infants by deed dated the 31st May, 1880.

By the terms of the settlement the fund was to be invested in Dominion, Provincial or Municipal bonds and debentures or first mortgages upon real estate.

The settlement contains a power of revocation in these words:—"It shall be lawful for the said Sally Poole Mackenzie at any time hereafter, with the consent of the trustee by deed under the hands and seals of the said Sally Poole Mackenzie and the trustee to revoke all or any of the trusts declared by these presents of and concerning the trust funds or any part thereof and to declare any new or other trusts of or concerning the same."

The investment in question was made in pursuance of a written request signed by the settlor and addressed to the trustee, and it is urged on behalf of the trustee that although it was not an investment authorized by the settlement the written request operated as a defective execution of the power and should, according to the recognized principles of equity, be aided in favour of the trustee.

The Courts have gone a long way in aiding the defective execution of powers even where the result has been not as it will be in this case, merely to alter the manner of investing the fund, but to change the beneficial ownership of it, and have interposed not only where the persons in whose favour the power has been attempted to be executed is a purchaser for value, but even where they have merely natural or moral claims to the provision intended to be made for them: *Chapman* v. *Gibson*, 3 Bro. C. C. 229.

Judgment.

Meredith, C.J.

The principle on which the Court interposes in favour of purchasers is that it would be unjust not to give them the benefit of their contracts, and I do not see why the trustee in such a case as this has not an equal equity—he has altered his position on the faith of the intended alteration having been effectually made and it would be manifestly unjust that he should be liable to have his action treated as a breach of trust, and there was also as great a moral obligation on the part of the settlor to provide by the exercise of her power against the trustee being made liable for a breach of trust in using the trust funds for the purchase of the shares at her request, as there was a natural or moral obligation in the case dealt with in *Chapman* v. *Gibson*, or in any of the cases referred to in the judgment of the Master of the Rolls in that case. See also Farwell on Powers, 2nd ed., 329.

I am inclined to think that the case comes also within the principle on which *In re Mackenzie Trusts*, 23 Ch. D. 750, was decided—a case which was followed in *Re Tennant*, 40 Ch. D. 594, and approved by the Court of Appeal in *Re Kennedy Settled Estates*, [1891] 1 Ch. 399.

It was held in *Re Mackenzie Trusts* that money bequeathed to buy land and settle it, might be ordered to be invested at the instance of the person who would have been tenant for life of the land in a manner permitted by sec. 21 of the Settled Estates Act, 45 & 46 Vict. ch. 38, although that manner was not one permitted by the terms of the will, and in delivering judgment Mr. Justice Chitty said that it would be absurd to hold that that could not then be done which a tenant for life could do after an estate had been purchased by selling the estate and investing the money arising from the sale.

It seems to me that it would be unreasonable to hold in this case that the trustee is chargeable for a breach of trust for making an investment at the request of the settlor, which he might without question have made, if instead of the informal instrument which was executed, the settlor and he had, as they might have done, executed an instrument under seal, revoking *pro tanto* the trusts of the

settlement and resettling the fund so as to authorize an investment of it to be made in the shares in question.

Judgment. Meredith, C.J.

I do not see any difficulty in the way of holding that what was done amounted to a defective execution of the power. It ought not to be assumed or inferred that the intention was that a breach of trust should be committed and if that was not intended the only way in which such a result could be avoided was by altering the trusts so as to authorize such an investment as was proposed to be made, and it seems to me by no means a violent presumption or unreasonable inference that the instrument signed by the settlor was designed to accomplish that purpose though it was not effectual to do so: see *Carver* v. *Richards*, 27 Beav. 488.

I come to the conclusion, therefore, that the investment in question did not constitute a breach of trust and that the local Master was right in crediting the trustee with the amount paid by him for the shares.

It is not without satisfaction that I have come to the conclusion that I may, without violating any legal principle, refuse to give effect to the contention of the appellant. To have fixed the trustee with liability would have been most unjust to him. The investment was one which a prudent man would have made of his own moneys and it was made at the request of one who was practically the owner of the fund if she could obtain the consent of the trustee to join in her act of revocation; for the power of revocation enabled her, with his consent, to revoke all the trusts declared by the settlement and if that had been done the trust fund would have been her own absolutely.

The Official Guardian very properly, I think, felt it to be his duty to require that the view of the local Master should be supported by that of a Judge before being given effect to and his costs of the appeal—though it has been an unsuccessful one—should be paid out of the fund.

The appeal will be dismissed, and the costs of the official guardian and of the trustee will be paid out of the fund—the latter between solicitor and client.

G. A. B.

BUILDING AND LOAN ASSOCIATION v. MCKENZIE.

Mortgage—Leasehold—Acquisition of Reversion—Liability for Payment of Mortgage—Estoppel.

Where the assignee of a term, subject to a mortgage, becomes the owner of the fee by purchase, the reversion in the lands is bound in his hands for the payment of such mortgage, without repayment to him of the purchase money; and where he has obtained the conveyance of the reversion upon the representation that he is the assignee of the term, he is estopped from saying that he acquired it otherwise than as the conveyance to him shews.

Statement. ACTION by the plaintiffs, as assignees by way of mortgage from one Thompson of a term and leasehold premises, to recover from the defendant, the assignee, by various mesne assignments, of the interest of Thompson, certain sums due upon their mortgage, and for a declaration that the plaintiffs had a lien for the whole amount secured by or payable under the covenants and conditions set forth in the lease and the mortgage upon the fee simple acquired by the defendant in the lands, and for payment by the defendant of the same, and in default of payment for a sale of the lands. The facts are stated in the judgment.

The action was tried before MEREDITH, C. J., without a jury, at Toronto, on the 2nd November, 1896.

H. J. Scott, Q. C., for the plaintiffs.

Laidlaw, Q. C., and *D. W. Saunders*, for the defendant.

February 11, 1897. MEREDITH, C. J.:—

At the close of the argument I dismissed the plaintiffs' action, so far as it sought to have it adjudged that the defendant was personally liable for payment of their claim; and I found that the assignment of the lease, to which I shall afterwards refer, from Charles Joseph Smith to the defendant, though absolute in form, was in reality a mortgage; and I reserved judgment as to the other question raised upon the pleadings, which arises under the following circumstances.

Judgment.

Meredith, C.J.

By an indenture of lease dated 1st July, 1885, James Austin and William Arthurs demised to William Snowdon Thompson the lands in question for the term of twenty-one years from the 1st July, 1885, at an annual rental.

The lease contains a covenant by the lessors for renewal at an increased rent, to be fixed, in default of agreement, by arbitration, for a second term of twenty-one years, to begin immediately after the expiration of the first term, and provides that the renewal lease shall contain similar covenants, provisoes, and conditions to those contained in the lease, including the covenant for renewal; and the lease also provides that the lessee, his executors, administrators, or assigns, may at any time during the first ten years of the term thereby granted purchase, and that the lessors will sell to him or them at any time within the said term of ten years, the fee simple of the demised premises for $14,000, to be paid in cash at the time of purchase.

The lessee, Thompson, on the 10th November, 1885, borrowed from the plaintiffs $6,000, and, to secure the payment of the loan and interest, assigned the lease to them by deed dated that day, subject to a proviso for redemption on payment of the $6,000 and interest at the rate of seven per cent. per annum, payable in annual instalments.

The assignment contains, among other covenants on the part of Thompson, a covenant for further assurance.

Charles Joseph Smith subsequently became the assignee of the lease, subject to the plaintiffs' mortgage.

On the 31st January, 1891, Smith assigned the lease to the defendant, and covenanted for quiet enjoyment against all incumbrances except the plaintiffs' mortgage.

The assignment from Smith to the defendant is absolute in form, as I have already mentioned, but by an instrument dated 6th February, 1891, and signed by the parties to the assignment and one Coleman, it is declared that the assignment and certain other instruments mentioned in the instrument were merely mortgages to secure an advance of $30,000 made by the defendant upon the security of a

Judgment.

Meredith, C.J.

note of Smith and Coleman of that amount, with interest at eight per cent. per annum.

On the 21st June, 1895, Byron Moffatt Britton, who had in the meantime become the owner of the reversion, conveyed the fee simple of the demised premises to the defendant in consideration of $14,000.

The conveyance from Britton to the defendant contains a recital of the lease, and a recital that the lease and the benefits and all conditions therein contained have, by divers mesne assignments, become vested in the defendant, and that he desires to purchase the fee in the lands.

The question for decision turns upon the effect of the purchase by the defendant of the reversion, the plaintiffs contending that the effect of it is to make the fee simple in the lands subject to their mortgage, and to bind it in the defendant's hands for the payment of their claim for principal and interest in priority to the claim of the defendant under his mortgage, or as purchaser of the reversion.

Had the position of the defendant been that indicated on the face of the assignment to him—that of owner of the lease subject to the plaintiffs' mortgage—it is clear upon the authorities that the reversion in the lands would be bound in his hands for the payment of the plaintiffs' mortgage: Coote on Mortgages, 5th ed., 268.

In *Keech* v. *Sandford*, 2 Eq. Ca. Abr. 741, pl. 7,—which is the leading case on the principle on which the rule seems to be founded—a trustee for an infant who had obtained a lease to himself, the lessor having refused to grant a renewal for the infant's benefit, because, the lease being of the profits of a market, there could be no distress, but must "rest singly in covenant, which the infant cannot do," was required to assign the lease to the infant, and to account for the profits since the renewal, but it was ordered that he should be indemnified from the covenants in the lease.

In *Rakestraw* v. *Brewer*, 2 P. Wms. 510, the same rule was applied to the case of a mortgagee obtaining a renewal of the term which he held as mortgagee, although it was urged that the additional term of eleven years was granted

in pure personal favour and kindness to the mortgagee, the Court saying that the additional term came from the old root, and was of the same nature, subject to the same equity of redemption. Judgment. Meredith, C.J.

The rights and duties of the mortgagor and mortgagee of a lease, with respect to the renewal of the lease, seem to have been treated as governed by the same principles and standing on the same footing.

In *Leigh* v. *Burnett*, 29 Ch. D. 231, Mr. Justice Pearson so treats them, and, referring to what he says has always been the doctrine of the Court, that the mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage, speaks of *Rakestraw* v. *Brewer* as an illustration of that doctrine.

The first two cases referred to deal only with the question of a renewed term, but in *Leigh* v. *Burnett* the same principle was applied to the reversion acquired by the mortgagor, as Mr. Justice Pearson puts it in the course of the argument, apparently because the reversion took the place of a renewed lease; or, as put in Coote on Mortgages, at p. 268, because, by himself purchasing the reversion in fee, and so merging the lease, the mortgagor renders the renewal of the lease impossible.

In *Leigh* v. *Burnett* the claim of one who had advanced £300 to the mortgagor to enable him to acquire the reversion, upon an agreement that the sum was to be secured on the property when its acquisition had been completed, was held to stand on no higher footing than the claim of the mortgagor himself. Mr. Justice Pearson said on that point, "but he" (the mortgagor) "would not be entitled to say to the mortgagees of the lease, I bought the property for your benefit, and you can only have it on paying me the purchase money which I gave for it. I cannot understand how any one who claims through Newman" (the mortgagor) "can be in any better position than he would have been. It is impossible for the plaintiff to say that in respect of the purchase money paid by Newman, she is entitled to priority over the mortgagees of the lease:" p. 235.

Judgment.

Meredith, C.J.

It is true that in that case the right which the plaintiff sought to establish was for money which she had advanced to the mortgagor to enable him to purchase, and therefore that her right must have arisen, if at all, out of the purchase by the mortgagor, and could be in no better or higher position than the right from which it was derived; and that in this case the right of the defendant is not in the same sense derived from the mortgagor's right, because the mortgagor in this case did not purchase, but the defendant himself; but I am unable to find any distinction between the two cases which will justify a different result in this case, and the rule which is, I think, to be deduced from the cases is that neither the mortgagor nor any one claiming under him can acquire against the mortgagee of a lease the right to a renewed lease or to the reversion, where the renewed lease or the reversion is, as some of the cases put it, "a graft on the lease," or, as put in one of the cases I have referred to, "where it comes from the old root."

The rule established by these cases prevents as well the mortgagor or those claiming under him asserting a claim for the purchase money of the reversion against the mortgagee, as his asserting title to the reversion against the mortgagee.

Although I decided at the close of the argument that the position of the defendant was originally that of mortgagee only, the case is not so clear as to that being his position when the reversion was acquired by him; that he was not mortgagee, but assignee of the lease, is what the recitals in the conveyance from Mr. Britton to him state, and I am not sure that the proper inference of fact is not—in view of these recitals and the fact that the defendant was not called as a witness—that, although originally only mortgagee, he had subsequently acquired the equity of redemption of his mortgagor; and the opinion expressed by Spragge, V.-C., in *Kelly* v. *Macklem*, 14 Gr. at p. 30, as to the position of one making his interest in land the ground for his being allowed to purchase it, would seem to support a decision against the defendant,

upon the ground that, having obtained, as he did, from Mr. Britton the conveyance of the reversion upon the representation that he was the assignee of the lease, which was the only right he had to the conveyance of the reversion under the provisions of the lease, the plaintiffs, as assignees of the term, being the persons entitled to exercise the option to purchase, and a purchase by any one except the mortgagor being necessarily, if the defendant's contention as to the law were to prevail, prejudicial to the mortgagees, and a sale to the defendant under the terms of the lease being justifiable only because that purchase would enure to the benefit of the plaintiffs—the defendant cannot be heard to say that he acquired the reversion otherwise than as the conveyance of it to him shews that he acquired it. Judgment. Meredith, C.J.

Upon the whole, I am of opinion that the plaintiffs have established their right to a declaration that they are entitled to the benefit of the defendant's purchase of the reversion without repaying the purchase money paid by him or any part of it; but, as it may be that Smith is entitled to redeem both the plaintiffs and the defendant, no other judgment should, I think, be pronounced on the present record.

As the plaintiffs have succeeded in part and failed in part, there should be no costs of the action as against the defendant personally, but the plaintiffs may add their costs to their claim as mortgagees.

E. B. B.

FISHER & CO. v. ROBERT LINTON & CO.

Partnership—Individual Debt of Partner—Payment out of Partnership Funds—Authority—Action—Rule 317.

The defendants were indebted to the plaintiffs' firm, consisting of two partners, and one partner was individually indebted to the defendants. This partner wrote two letters to the defendants, one over his own signature and the other over the firm name, stating that he had paid certain sums due by him to the defendants by giving the defendants credit in the books of his firm. This was done without the authority of the other partner, but the entries were actually made in the books of the firm, to which the other partner had access, though he did not in fact know of the entries until after the firm had been dissolved. Accounts were afterwards rendered to the defendants without any claim being made in respect of the sums credited. This action was brought after the dissolution, in the name of the firm, for the price of goods sold :—

Held, that the defendants were not entitled to credit for the sums referred to.

Leverson v. *Lane*, 13 C. B. N. S. at p. 285, *In re Riches*, 4 DeG. J. & S. at p. 585, and *Kendal* v. *Wood*, L. R. 6 Ex. 243, applied and followed.

Held, also, that Rule 317 authorized the bringing and sustaining of the action in the name of the partnership existing at the time the goods were furnished to the defendants.

Statement. AN appeal by the defendants from the report of the Master at Barrie dated the 17th December, 1896.

The plaintiffs were woollen manufacturers carrying on business at the town of Alliston, in Ontario; the defendants were wholesale merchants carrying on business at the city of Montreal, Quebec.

The action was for the price of goods sold and delivered, the plaintiffs claiming $751.52 and interest.

The defendants alleged that they were indebted to the plaintiffs in the sum of $415 only, which sum they brought into Court.

On the 27th October, 1896, judgment was entered directing that all matters at issue between the plaintiffs and defendants should be referred for inquiry and report to the Master at Barrie, and reserving further directions and the question of costs till after report.

The evidence taken before the Master shewed that the firm of Fisher & Co. was composed of John Fisher and J. C. Hart; that the firm was dissolved in the summer or

Statement.

autumn of 1895; that both Fisher and Hart lived in Alliston, but Fisher left the management of the business largely to Hart; that Fisher & Co. supplied the defendants with goods from their woollen mill, while Hart, who carried on a separate business by himself as a storekeeper in Alliston, was supplied by the defendants with goods for his store; that in the books of Fisher & Co., which were kept in Hart's store by Hart's own bookkeeper, two items of $100 and $203 (which were the items in dispute) were credited to Linton & Co. as payments made by them, and were charged to Hart. Fisher was examined as a witness, and said that he knew nothing about these items until after the dissolution of the firm; that he had no knowledge of them at the time of the entries; that Hart had no authority from him to make payments in that way, and never spoke to him (Fisher) about the matter; that at the termination of the partnership Hart owed the firm about $8,000; that the defendants never notified him (Fisher) of these transfers or payments. Fisher admitted that the entries were in the books and that he had access to them. On the 7th August, 1894, Hart wrote to the defendants (over his own signature) regretting that a bill drawn upon him by the defendants had gone back without payment, and saying, "I have paid to-day on it, through Fisher & Co., $100." This related to the first of the items in dispute. On the 20th August, 1894, a letter was written to the defendants, signed "Fisher & Co.," but in the handwriting of Hart, saying: "Our Mr. Hart tells us he wishes us to pay his bill for $203 due to-morrow, and we of course comply with his request." This referred to the second of the items in dispute. The letter went on: "Now, we want particularly the funds due us per statement enclosed, after deducting the bill referred to, and we will esteem it a great favour if you permit us to draw." Robert Linton, a member of the defendants' firm, who was examined for discovery at Montreal, said that he paid the balance of the account referred to in the last letter, receiving credit for the $303 due to his firm by Hart, and never heard of any

Statement. claim to the contrary until just before this action was brought (24th February, 1896); that after making that payment he continued to do business with Fisher & Co. until June, 1895, and received from them statements of account from time to time, which he settled, but they never made any claim for the $303.

The Master found and reported that, in addition to the $415 paid into Court, there was due by the defendants to the plaintiffs the sum of $326 and interest from the 1st February, 1895, at six per cent., amounting in all to $362.76.

The appeal was heard by FERGUSON, J., in Court, on the 2nd March, 1897.

Gibbons, Q.C., for the defendants. The Master thought the case was governed by *Kendal* v. *Wood*, L. R. 6 Ex. 243; but I submit that case has no application to the facts of this. The action is by Fisher & Co., that is, Fisher and Hart, for goods sold and delivered, and cannot be sustained as to the items in dispute: *Wallace* v. *Kelsall*, 7 M. & W. 264; *Brownrigg* v. *Rae*, 5 Ex. 489; *Gordon* v. *Ellis*, 7 M. & G. 607. If any action would lie, it would be one by Fisher on the case. This action is brought apparently by virtue of the provisions of Rule 317: "Any two or more persons claiming * * as co-partners may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action." That cannot authorize the bringing of such an action as this in respect to the disputed items. The plaintiffs cannot recover in this form of action at all: *Creighton* v. *Halifax Banking*, 18 S. C. R. 140.

W. A. J. Bell, for the plaintiffs. The facts of this case come precisely within the decision of *Kendal* v. *Wood*, L. R. 6 Ex. 243. The principle is that if a creditor of one of two partners chooses to take from his debtor what he knows to be partnership securities or partnership funds, without ascertaining whether the debtor has the authority

of his partner as to this application of the partnership funds, he does so at his own peril. Express authority must be shewn. See also Lindley on Partnership, 6th ed., p. 140; *Williamson* v. *Barbour*, 9 Ch. D. at p. 535; *Leverson* v. *Lane*, 13 C. B. N. S. 278; *Skaife* v. *Jackson*, 3 B. & C. 421; *Farrar* v. *Hutchinson*, 9 A. & E. 641; *Sweeting* v. *Pearce*, 7 C. B. N. S. 449. *Creighton* v. *Halifax Banking Co.*, 18 S. C. R. 140, is also strongly in favour of the plaintiffs. As to the form of the action, see Lindley on Partnership, 6th ed., pp. 279, 280. Rule 324 provides that "no action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." Argument.

Gibbons, in reply.

March 5, 1897. FERGUSON, J.:—

Appeal from the report of the Master at Barrie. There was no dispute as to the facts. There were only two questions in respect to which there was any contention. One question was as to whether or not the law stated in *Leverson* v. *Lane*, 13 C. B. N. S. at p. 285, *In re Riches*, 4 DeG. J. & S. at p. 585, in *Kendal* v. *Wood*, L. R. 6 Ex. 243, in Smith's Mercantile Law, 10th ed., pp. 41 and 42, referred to in *Creighton* v. *Halifax Banking Co.*, 18 S. C. R. at p. 145, and in many other books, applies to the present case, and, after the best consideration I have been able to bestow upon the subject, I am of the opinion that it does apply.

The other question was as to whether or not the action could be properly sustained in the name of the partnership existing at the time the goods were furnished to the defendants. As to this, I am of the opinion that Rule 317 authorizes the bringing and sustaining of the action in this way.

It was said that the learned Master found himself unable to distinguish this case from *Kendal* v. *Wood*, above, and

Judgment. Ferguson, J.

followed it. In this I agree with him, and I think the report should be affirmed with costs. Report affirmed and appeal dismissed with costs.

Order accordingly.

E. B. B.

MAIL PRINTING COMPANY v. CLARKSON.

Bankruptcy and Insolvency—Right to Prove on Insolvent Estate—R. S. O. ch. 124, sec. 20, sub-sec. 4—Claim "not Accrued Due"—Construction of Contract.

Under an assignment for the benefit of creditors under R. S. O. ch. 124, a claim on a contract to pay, at a time which was subsequent to the assignment, a fixed sum for advertising space in a newspaper, whether occupied or not, may be proved as a claim "which has not accrued due," under sec. 20, sub-sec. 4, of the Act.

Statement.

THIS was an action brought against the defendant as assignee for the benefit of creditors of Samson, Kennedy, & Co.

The statement of claim alleged: (2) that Samson, Kennedy, & Co., entered into a written contract with the plaintiffs on 22nd July, 1895, whereby the former acquired the right to occupy 20,000 lines in the advertising columns of the daily or weekly "Mail and Empire," or in "Farm and Fireside," and agreed to advertise their regular business announcements therein for twelve months, and agreed to pay to the plaintiffs for such right $1,000; (3) that, in consideration of the plaintiffs agreeing to furnish the space at reduced rates, Samson, Kennedy, & Co. agreed that if they should not avail themselves of their right to occupy the space within the twelve months, such failure should not relieve them from the obligation to pay the plaintiffs the $1,000 at the expiration of that time; (4) that the plaintiffs had always been ready and willing to publish the advertisements of the firm in accordance with the contract, but the firm had not availed themselves of

such right, and the $1,000 remained unpaid; (5) that on the 9th December, 1895, the firm became in insolvent circumstances and made an assignment to the defendant under R. S. O. ch. 124; and the plaintiffs claimed a declaration that they had established a claim as creditors of the insolvent firm for $1,000, and that they were entitled to rank as such for that amount, with the creditors, upon the estate in the hands of the defendant as assignee, and payment of such amount as they should be found entitled to, with costs. Statement.

The defendant set up an understanding and agreement between the plaintiffs and the firm, alleged to have been made at the time the document was signed, that it should not come into effect until the firm had used all the space allotted to them by a previous contract, which event never happened, and also that the plaintiffs' claim was for damages for breach of contract, and the breach (if any) occurred after the date of the assignment, and hence the plaintiffs were not at the date of the assignment creditors of the firm, and had no right to rank on the estate.

The action was tried before BOYD, C., without a jury, at Toronto, on the 25th February, 1897.

C. J. Holman, for the plaintiffs.

D. E. Thomson, Q. C., for the defendant.

March 6, 1897. BOYD, C.:—

The plaintiffs' claim rests on the written agreement of 22nd July, 1895, in the following words:

MEMORANDUM OF AGREEMENT FOR ADVERTISING.

Agents are not allowed to make verbal undertakings or conditions not specified in this contract.

We, the undersigned, agree with the Mail Printing Company to advertise our regular business announcements for twelve months from this date, for the sum of $1,000, payable as used monthly, for which we are to have the right to occupy the space of 20,000 lines, agate, in the

Judgment.

Boyd, C.

advertising columns of the daily or weekly "Mail and Empire," or in "Farm and Fireside," upon the conditions specified below and on the back of this contract. In consideration of the Mail Printing Company agreeing to furnish them with space at the reduced rates above mentioned, they agree that, should they not avail themselves of the right to occupy the said space within the specified time, such failure shall not relieve them from the obligation to pay the Mail Printing Company, at the expiration of said time, the said $1,000, less such amounts as may have been previously paid on account of this contract.

SAMSON, KENNEDY, & CO.

Toronto, July 22, 1895.

Samson, Kennedy, & Co. became insolvent, and executed an assignment under the Act R. S. O. ch. 124, in December, 1895; and now the Mail Company seek to prove on the estate. Upon the issues raised in the pleadings, I think the plaintiffs succeed. The material clause is sec. 20, sub-sec. 4: "A person whose claim has not accrued due shall nevertheless be entitled to prove * * but in ascertaining the amount of any such claim a deduction for interest shall be made for the time which has to run till the claim becomes due."

The plaintiffs appear to me to be persons with "a claim which had not accrued due" at the time of the assignment, but which does accrue due by mere effluxion of time at the end of a year from the date of the contract.

The writing shews a present obligation to pay at a future day for space, even if not occupied. This claim accrued due, that is, I suppose, became payable, at the year's end. The case is not essentially different from that of a promissory note payable *in futuro*: *In re Moore* v. *Luce*, 18 C. P. 446; and see *In re Willis*, 4 Ex. 530.

Judgment for the plaintiffs with costs.

E. B. B.

[DIVISIONAL COURT.]

HUTCHINSON V. LAFORTUNE.

Will—Equal Division of Proceeds of Real Estate—"Between"—"And"—Half Share.

A testator by his will directed his real estate to be sold and the proceeds to be equally divided between his wife and his brother and sister:—*Held*, that the wife took a one-half share, and his brother and sister the other half share between them.

THIS was an action for the construction of the will of Rudolph Newman, and was tried before MEREDITH, J., at the Sittings at Simcoe, on the 7th of December, 1896. Statement.

The words of the will were: "I give, devise and bequeath all my real and personal estate, which I may die possessed of or interested in, in manner following, that is to say: My real estate, being composed of lot five in second concession; north quarter and the south quarter of lot five in the third concession, to be sold at the death of my mother, and the proceeds equally divided between my wife and my brother and sister; the chattels and household furniture to be sold and the proceeds divided between my wife and mother within two weeks after my demise."

The learned Judge was of opinion that the intention to be gathered from the clause was that the wife should have a one-half share, and the brother and sister were together to have the other one-half share of the proceeds of the real estate; and he directed judgment to be entered accordingly.

From this judgment the brother and sister appealed to a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.

On January 18th, 1897, the appeal was argued.

Argument.

W. A. Dowler, for the appellants. The only question is, whether under the terms of the devise, one-half was to go to the wife, and the other half to the brother and sister, or whether each was to get one-third. This depends on the construction to be placed on the word "between." The proper construction is that the property is to be equally divided between the wife and the brother and sister; that is, each is to get one-third. Unless it is so construed, the most technical construction must be given to the word "between." The words "equally divided," must also be given effect to, and this bears out the construction of an equal division: Murray's Dictionary, Tit. "between" sub-divisions 14 and 19; Imperial Dictionary, Tit. "between"; *Totten* v. *Totten*, 20 O. R. 505; *Rogers* v. *Carmichael*, 21 O. R. 658; Jarman on Wills, 4th ed., vol. 2, p. 259.

W. M. Douglas, contra. The proper construction of the words used by the testator, shews that one-half of the land was to go to the wife, and the other half to the brother and sister equally. In construing wills, words must be taken in the ordinary and grammatical sense unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the testator to be extracted from the whole, should follow from so reading it: *Abbott* v. *Middleton*, 7 H. L. C. 68. There is nothing in this will to deprive the words of their proper grammatical signification. The original and well established meaning of the word "between," refers to two persons or things, or two classes of persons or things: Standard Dictionary, Tit. "between"; Fernauld's English Synonyms, p. 42. The word "and" between the words "brother" and "sister," is merely a sub-copulative, and the word "and" following the word "wife," shews the division between the wife on the one part and the brother and sister on the other part: *Re Dixon, Byram* v. *Tull*, 42 Ch. D. 306, pp. 310-11. This view of the construction and of the force of the word "and," gives additional strength to the meaning of the word "between" as contended for by the appellants. Signifi-

cance is also to be attached to the use of the word "my" as qualifying the conjoined words "brother and sister." The case of *Haskell* v. *Sargent*, 113 Mass. 341, is very much in point. To carry out the intention of the appellants, you must give to the word "between," the meaning of the word "amongst," and must disregard the grammatical force of the words "and," and "my." There is nothing in the will to justify such a loose grammatical construction. The judgment of the learned Judge was, therefore, right and should not be interfered with. Argument.

January 18, 1897. The judgment of the Court was delivered by

ARMOUR, C. J. :—

My learned brothers agree that the appeal must be dismissed. The intention to be gathered from the clause is, that the wife was to have a one-half share and the brother and sister the other. I lay great stress on the use of the word "and." The use of it, coupled with the word "between," shews that there was to be one equal division between the wife on the one hand and the brother and sister on the other.

The appeal must, therefore, be dismissed with costs.

G. F. H.

RE HAY AND CORPORATION OF THE TOWN OF LISTOWEL.

Municipal Corporations—Debentures for Electric Light Works—Limitation to Twenty Years—Consolidated Municipal Act, 1892, sec. 340.

A by-law passed by the municipality of a town for the construction of water works and gas or electric light works made the debentures to be issued thereunder payable in thirty years from the date on which the by-law took effect :—

Held, that the by-law was invalid, for under sec. 340 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), the time for the payment of debentures for electric light works is limited to twenty years.

Statement. THIS was a motion made on behalf of John C. Hay, a ratepayer of the town of Listowel, to quash by-law No. 269 of the said town, entitled a "by-law to raise the sum of $15,000, for the purpose of acquiring and constructing a system of waterworks, and gas or electric light works for municipal or other purposes, in the said town of Listowel."

There were several grounds of objection taken to the validity of the by-law, all of which were argued, but the one upon which the decision of the Court was given was, that the by-law was void because the debentures proposed to be issued for the construction of the electric light plant, were by the by-law extended beyond the period of twenty years from the date upon which the by-law took effect.

On 19th January, 1897, *W. M. Douglas*, supported the motion. The power of the municipality to contract the debt in question, is governed by sec. 340 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.). Sub-section 2 of said section, controls the time for payment of debts incurred for the purposes mentioned in the by-law. This period is thirty years for water works and gas works, but only twenty years for electric light works. Electric works are not excepted from the twenty year obligations, unless they can be considered to be public works within the meaning of the sub-section, and they are not public works. More-

over, the exception as to public works, applies only where the debt has been contracted in accordance with the special provisions relating to such debt provided by the statute authorizing the public work. The words used in sec. 342, sub-sec. 1, are different, but the sub-section relates back to sec. 340, sub-sec. 2, and does not enlarge the time for the payment of the obligations provided in the latter sub-section. It is impossible to separate the electric light portion of the by-law from the water works and gas works portion thereof, and the by-law is therefore wholly invalid. Argument.

Aylesworth, Q.C., and *Walter Read*, contra. The electric light works are public works within the exception of sub-sec. 2, of sec. 340, and therefore, there is no limit of time for the payment of the debentures. Section 2 of the Municipal Light and Heat Act, R. S. O. ch. 191, sec. 480, sub-sec. 2 of the Consolidated Municipal Act, and secs. 54 and 55 of R. S. O. ch. 164, relating to water companies ought to be read together; and, if so read, place gas works and electric light works on the same footing. The Court has no power to quash the by-law as no certificate under the hand and seal of the clerk of the Weekly Court, stating that the motion to quash had been made, was registered within the period of three months. Under sec. 352, sub-sec. 1, where there is a non-compliance with this section, the power to quash under sec. 332, is abrogated.

Douglas in reply. Section 352, sub-sec. 1, does not apply. The by-law was not registered in accordance with sec. 351.

January 22, 1897. MEREDITH, J.:—

A further consideration of the case has confirmed my views, expressed during the argument, that the by-law must be quashed on the ground that it exceeded the power of the council in respect of the time limited for the payment of the obligations relating to the electric lighting works, proposed to be erected under it; this seems so plain to me that I have not thought it necessary to con-

Judgment.
Meredith, J.

sider any of the other objections to it, though I may say that I am still under the impression that some of them at least might, and probably would, prove fatal.

By force of section 340 of the Consolidated Municipal Act, 1892, the by-law is invalid unless in accordance with the "restrictions and conditions" of that section, "except in so far as is otherwise provided in the next two following sections."

Unless the proposed electric lighting works can be considered "public works, according to the statutes relating thereto," within the meaning of those words as used in sub-sec. 2 of sec. 340, and in sub-sec. 1 of sec. 341, the by-law is obviously invalid, being contrary to the provisions of sec. 340, in making the time for payment of the debt, thirty instead of twenty or less years. That subsection provides for certain debts, such as debts contracted for railways, harbour works or improvements, gas or water works, etc., which may be made payable in thirty years at furthest, but not including electrical works of any kind; and it also provides that if not contracted for such specified purposes, the debt shall be made payable in twenty years at furthest.

That they are not "public works" within the meaning of those sections, is apparent from the provisions as to "railways, harbour works, gas, and water works," etc., works which would be public works quite as much as, if not more so than, electric lighting works, and yet they are very plainly dealt with as if not such "public works." Moreover, I have found since the argument, that in the earlier Municipal Acts, the words were "for the purchase of public works, according to the statute relating thereto," instead of as now, for "the purpose of public works, according to the statutes relating thereto," apparently having reference to the purchase of public works, in their broader sense, from the Crown, by municipalities under legislation passed expressly authorizing and providing for such purchases, which legislation is now contained in secs. 349 and 350 of the Act: see, also, R. S. O. 1887, ch. 33, secs.

14, 15, 16: it seeming to have been intended to leave municipal councils unrestricted as to time of payment, and in other respects, in the case of such a purchase, though otherwise so carefully hedged in regarding the incurring of debts, extending beyond a year, otherwise. Judgment. Meredith, J.

The whole by-law must fall, because—assuming it to be in other respects good—there is no means of severing the bad from the good; it provides for the one debt for the three purposes.

The by-law being invalid for this reason, was not validated by sec. 352, by reason of no application or action to quash it or set it aside, nor the registration of a certificate that such application made or action brought within the time limited for such purposes in this section, because it appears on the face of the by-law that the provisions of sub-sec. 2 of sec. 340 were not complied with, and so is excepted from the effect of sec. 352, by its sixth subsection.

The by-law will, therefore, be quashed with costs.

G. F. H.

See now 60 Vict. ch. 45, sec. 3 (O.).

BUNNELL v. SHILLING ET AL.

Life Insurance—Policy—Change of Beneficiary—Vested Interest—Foreign Contract—Foreign Law.

By a contract between the insured and her husband, in consideration of his agreeing not to apportion amongst his children any part of the moneys to arise from an insurance policy upon his life, of which she was the named beneficiary, she agreed that a policy to be issued upon her life should be made payable to him as beneficiary. This agreement was carried out, and the husband for five years paid the premiums upon his wife's policy :—

Held, that a vested interest in the policy passed to him, and the beneficiary could not be changed without his consent, even where the policy had lapsed and a new policy been issued in lieu of it, by agreement between the insurers and the insured :—

Held, also, that although the application for insurance was made and the policy delivered in Ontario, the insured and the insurers having agreed that the place of contract should be in New York, and that the contract should be construed according to the law of that State, if the change in the beneficiary was validly made according to the law of that State, the husband was not entitled to the insurance moneys, notwithstanding that the insurers had not intervened and were raising no question as to whether the law of Ontario or that of New York should govern; but, applying the law of New York, that the change was not validly made.

Statement. ACTION for a declaration that the defendants the Trusts Corporation of Ontario, administrators of the estate of Harriet Dunham Bunnell, deceased, the wife of the plaintiff, held the sum of $3,000, derived from an insurance upon the life of the deceased in the Mutual Reserve Fund Life Association, as trustees for the plaintiff, who alleged that he was the true beneficiary under the insurance policy, and that such sum was no part of the estate of the deceased, and that the defendants Shilling and others, the brothers and sisters of the deceased, had no claim to or interest in the $3,000, and for payment of that sum to the plaintiff. The facts are stated in the judgment.

The action was tried before MACMAHON, J., without a jury, at Ottawa, on the 3rd January, 1897.

Watson, Q.C., and *Latchford*, for the plaintiff.

Wyld, for the defendants.

February 9, 1897. MACMAHON, J.:—

Judgment.

MacMahon, J.

I find that in 1884 the plaintiff procured on his life a policy from this same company (the Mutual Reserve Fund Life Association) for the sum of $3,000, in which his wife was made the sole beneficiary. In 1885, the plaintiff being ill, and intending to make an apportionment of a part of the insurance between two of his children, he informed his wife of such design. His wife then induced him to forego his intention, by agreeing to allow a policy to be issued on her life for his benefit, for an amount equal to the amount of the policy of which she was the beneficiary. The agreement so made was carried out by the issuing of the policy of the 20th August, 1885, the husband and wife both signing the application. The amount of the policy is made payable to William T. Bunnell, if living at the time of the death of his wife. I find that, although the receipts for the premiums were taken in the wife's name, the husband paid the premiums on that policy up to and inclusive of the year 1890, when he became bankrupt and made an assignment for the benefit of his creditors.

After her husband's insolvency the wife carried on a business in Ottawa, and the premiums were paid by her from 1890 up to the time of her death in 1895, out of her own moneys. In 1892, having failed to pay some premiums and mortuary calls, the policy had virtually lapsed; and the correspondence between Mr. Dewar, who, although the agent of the company at Ottawa, acted as Mrs. Bunnell's agent in the communications she was making to the life association, shews that she, as well as the life association, treated the policy as being a lapsed policy, subject to reinstatement on the required conditions being complied with.

Mrs. Bunnell was desirous of changing the beneficiary from her husband to the members of her own family; and in her communications with Mr. Dewar as her agent, she instructed him, as appears by his letters, that she did not intend to pay any more premiums in respect of that policy,

Judgment.

MacMahon, J.

unless the beneficiary was changed, and the officers of the association, after months of correspondence, suggested a method by which the beneficiary might possibly be legally changed. The form that it took was the issuing of a new policy on the 2nd May, 1893, under which the defendants Mary Shilling, Seth Dunham, Oliver Dunham, and Sophia Fax (the brothers and sisters of Mrs. Bunnell) claim to be entitled to the amount payable under that policy.

The questions to be considered are: (1) whether the new policy was issued as an independent contract, without reference to, or as resting upon, the application for the first policy issued in 1885; and (2) if not an absolute, independent contract, but a renewal of and continuation of the former contract, could the insurers and the insured legally change the beneficiary?

To reach a decision on the first question, it is necessary to consider the correspondence in order to know the position Mrs. Bunnell assumed when desiring to effect a change in the beneficiary, and the attitude of the Life Association on the claim for a change being made. In a letter from Mr. Dewar, dated 10th January, 1892, to W. J. McMurtry, the manager of the life association at Toronto, he says:—"I have just come in from seeing Mrs. Bunnell *re* policy 36,098. She will do nothing in the matter whatever, unless the association will reinstate policy 36,098, with the beneficiary changed from W. T. Bunnell to herself. * * She will not take out a new policy, as she will, according to her now age, get only $2,000 for what she is getting $3,000 for now, and will lose the benefit of her bond."

J. W. Stevenson, the secretary of the life association in New York, writing to Mr. McMurtry, on 18th October, 1892, said:—"We acknowledge receipt of yours of 7th, enclosing certificate of health of Mrs. H. D. Bunnell, to whom policy 36,098 was issued, and which she allowed to lapse. * * This health certificate, we notice, bears a clause inserted with a pen which makes the document read

as follows:—I, ..., do hereby, by reason of said expiry, make application to the Mutual Reserve Fund Life Association for the reinstatement of my membership, and of said policy, '*with the exception of beneficiary, which I request be made payable to myself.*' The words in quotation and underscored are what was inserted with the pen, and the health certificate cannot be approved. Said health certificate should make no reference to the change of beneficiary. If she desires the beneficiary in the policy changed, it will be necessary for her to give us formal authority for so doing * * duly consented to by her husband, the present beneficiary. * * If this party cannot secure the consent of her husband to the change of beneficiary as desired, why not let her have this policy remain lapsed, and take out a new one, coming in as a new member, and apply this $12.80" (a sum she had remitted them) "on a new policy?"

Judgment.

MacMahon, J.

On the 20th October McMurtry forwarded the above letter to Dewar.

On the 7th January, 1893, Mr. Stevenson wrote Mrs. Bunnell, saying:—"We do not know whether you still desire to have the policy reinstated or not, but if so, it will now be necessary, as so long a time has passed since the policy lapsed, for you to furnish us with a satisfactory re-examination by Dr. C. F. Dewar, and you will find enclosed herewith proper blank for the purpose of furnishing re-examination, and it will likewise be necessary for you to forward remittance of $14.94 to cover the two mortuary calls Nos. 64 and 65 which have been issued and become past due. If the re-examination, when accompanied by remittance as stated, prove satisfactory, your policy will be reinstated in good standing in the association, and after the same has been reinstated, if you will furnish us with proper authority for change of beneficiary, said change duly consented to by the existing beneficiary, and return your policy for the purpose of having it re-written, the matter of the change will receive our prompt attention. As nothing whatever can be done in

Judgment.
MacMahon, J.

regard to the policy until the same is reinstated under the rules of the association as above set forth, we trust you will give the matter your prompt attention, and let us hear from you by return mail."

On the 14th January, 1893, Stevenson writes McMurtry, saying that if Mrs. Bunnell cannot procure her husband's consent to change the beneficiary, she should first make application for reinstatement of the policy by paying past due assessments and forward the policy with the authority for change of beneficiary, with a statement that her husband has no vested rights in the policy, has never made any payments thereon, and she is in no way indebted to him; and "the request for change of beneficiary will be submitted to the proper department, and if the re-examination prove satisfactory and the policy is reinstated, and this change of beneficiary is approved by the proper officials, without the consent of the existing beneficiary, the policy will be changed as desired." This letter was, on the 16th January, forwarded by McMurtry to Dewar.

Stevenson, on the 4th February, 1893, wrote Mrs. Bunnell, acknowledging receipt of re-examination on application "for the reinstatement of your policy 36,098, also remittance for amounts past due, and examination has been approved and policy reinstated. We have likewise forwarded to Mr. McMurtry the proper document for you to sign and return to us with your present policy for the purpose of securing the re-issue of the same as desired by you."

On the 9th February McMurtry forwarded the application for change of beneficiary signed by Mrs. Bunnell, in which she stated that her husband had not lived with her for several years, and that they were not then living together; that he never made any payments on the policy, and had no vested rights therein. The old policy No. 36,098 accompanied the application. The sum of $1 was paid the association for re-writing the policy.

After the old policy was returned to the association, there was indorsed on the back thereof, "Cancelled for change of beneficiary. Re-issued on same number."

Judgment. MacMahon, J.

Mrs. Bunnell never intended to take and refused to accept a policy which was to be based on a new application, and therefore under a new contract. She assigns as the reason against doing so that at her then age she could only procure an insurance of $2,000 by paying the same premium as was paid under the old policy for an insurance of $3,000. The life association had for months insisted that no change of beneficiary could be effected without the consent of the existing beneficiaries, when at length it was suggested that the difficulty might be surmounted by Mrs. Bunnell making a declaration as is stated in the association's letter of the 14th January. The policy having lapsed, upon payment of all existing dues and assessments on that policy, it was reinstated. When that policy was cancelled, the new one was issued subsequent to such reinstatement, and therefore on the basis of the original application. It was, in fact, no new contract between the insurers and the insured, but the continuation of the original contract with a change in beneficiary. On the face of the policy this statement appears:—"This policy is issued in lieu of the policy of the same number, which was issued August 20th, 1885." It is clearly a policy substituted for the original policy with a change in the beneficiary.

Then, dealing with the second question. The policy of the 20th August, 1885, by which the plaintiff was the beneficiary, was subject to this condition contained in the body of the policy:—"The entire contract contained in this certificate and said application taken together shall be governed by, subject to, and construed only according to the constitution, by-laws, and regulations of said association, and the laws of the State of New York, the place of the contract being expressly agreed to, in the home office of the said association in the city of New York."

Although the application for insurance was made and the policy delivered in Canada, the insured and the insurers having agreed that the place of contract should be in New York, that the contract should be subject to and construed according to the laws of that State, if the change in the

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MacMahon, J.

beneficiary was validly made according to the law of that State, the plaintiff could not succeed, notwithstanding the life association has not intervened, and is raising no question as to whether the law of Ontario or that of the State of New York should govern. For, if by the law of the State of New York, the life association had validly contracted to pay Mrs. Bunnell's estate on her death $3,000, it must go to her estate. It mattered not whether the amount of the insurance was retained in New York, or was sent to an agent in Ontario of the life association, the contract must be construed according to the laws of New York. The judgment of the Common Pleas Division in *Hallendal* v. *Hillman** (not reported) in no manner conflicts

*HALLENDAL v. HILLMAN.

The judgment referred to was given upon an appeal by the defendant from the judgment of MEREDITH, J., who tried the action at Ottawa, in so far as it was adverse to the defendant. An issue was directed by an order in Chambers as to certain life insurance moneys paid into Court and claimed by the plaintiff, as administrator of the estate of Francis Hallendal, deceased, upon whose life the insurances were, and by the defendant, as assignee of the policies. MEREDITH, J., found that the policies were assigned absolutely, but held that, by reason of certain conditions, the defendant could recover only the amount of the advances made by him, and made a redemption decree. The defendant claimed to be entitled absolutely to the moneys paid into Court.

Watson, Q.C., and *Latchford*, for the defendant.

A. G. Browning, for the plaintiff.

The judgment of the Court was delivered on the 27th June, 1891.

ROSE, J.—The finding being that as between Hallendal, the insured, and Hillman, the assignee, the contract was one of absolute sale of Hallendal's interest and rights under the policies to Hillman, and the form of the assignment, as between these parties, being absolute, it is clear that unless some rule of law prevents the operation of the assignment, Hillman, having paid the consideration therefor, should be entitled to the benefit to be derived from the contract.

[The learned Judge then referred to and quoted from *Vezina* v. *New York Life Ins. Co.*, 6 S. C. R. 30; *Worthington* v. *Curtis*, 1 Ch. D. 419; and continued:]

In the light of these decisions the text of May on Insurance, 2nd ed., sec. 398, and Bliss on Life Insurance, 2nd ed., note to sec. 30, cannot be said to accurately state the law as governing our Courts. In the note to sec. 398 the *Vezina* case is referred to as decided by the Court of Queen's Bench for Lower Canada, the reversing of such decision not having then been noted.

with this view. In that case the insurance company declined raising any question as to its liability, and having paid the money into Court, an order was made striking the name of the company from the proceedings, and freeing it from further liability to be proceeded against by either of the parties. Had all that been done in the present case by the life association, the question would still have to be decided: was the contract between the insured and the insurer changing the beneficiary, a valid contract in the place in which it was entered into, namely, in the State of New York?

Judgment. MacMahon, J.

Mr. Riley, the American consul at Ottawa, and for many years a practising attorney in Plattsburgh, New York, was called to give evidence as to the law of that

On the facts of this case it is clear that the insured effected the insurances on his own life, and that, as between himself and the company, the contracts of insurance were valid; that he subsequently sold his interest in the policies to the defendant; and, nothing else appearing, that the defendant could have recovered the amount of the insurance from the company. It is said, however, that the assignment was subject to a condition imposed by the company which prevented the assignee, being a creditor, from recovering more than the amount which he had advanced to the insured, and that the representatives of the insured were entitled to the balance. The company has paid into Court the amount of the insurance, and declined to raise any question as to its liability, and does not seek to take the benefit of any contention which would free it from any responsibility, and an order has been made striking the name of the company from the proceedings and freeing it from further liability to be proceeded against by either of the parties. It has paid the money into Court and is discharged. It therefore comes to be a question simply between the rights of the insured and the assignee. The condition invoked provides that a legal insurable interest must be shewn by all claimants at the time of claim thereunder, and that claims by any creditor or assignee shall not exceed the amount of the actual *bonâ fide* indebtedness of the member to him, together with any payments made to the association under the certificate by such creditor, with interest at six per cent. This is the condition attached to the assignment of one of the certificates. When the defendant agreed to buy the other insurance, a new policy was issued to the defendant as creditor, and the condition, in addition to the words above set out, contained the provision "that this certificate or policy of insurance as to all amounts in excess thereof shall be void." If the company had chosen to assert its right to insist upon the condition and to set it up as a defence to the claim of the defendant, it would have been necessary to consider whether under it the defendant

Judgment. MacMahon, J.

State. He produced a copy of an enactment, ch. 175, sec. 18, of the Laws of the State of New York passed in 1883, which provides:—

"Section 18. Members in any corporation, association, or society transacting the business of life or casualty insurance, or both, upon the assessment or co-operative plan, shall give to any member thereof the right at any time, with the consent of such corporation, association, or society, to make a change in his payee or payees, beneficiary or beneficiaries, without requiring the consent of such payee or beneficiary."

Mr. Riley was unable to state the effect of the Act, as he was not aware of any interpretation having been given to the statute. The New York Court of Appeals considered the effect of the statute in *Smith* v. *National*

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or the representatives of the insured could have recovered more than the amount of the indebtedness, and to have considered that to be the meaning of the words "as to all amounts in excess thereof shall be void;" but I am clearly of the opinion that the question being solely between the representatives of the insured and the assignee, and the finding of fact having been, as I think it properly was, that there was an absolute sale by the insured to the defendant of all his interest in the policies, and the intention of the parties being that the defendant should obtain the full advantage to be derived from the contracts of insurance, as between the representatives of the insured and the defendant, the defendant is entitled to all the money.

It seems to me, on the authority of the above cases, that the conditions were available only at the instance of the company, and in no sense limited the contract or the effect thereof as between the parties thereto.

The learned Chief Justice on the argument referred to the case of *Dalby* v. *India and London Life Assurance Co.*, 15 C. B. 365, which overruled *Godsall* v. *Boldero*, 9 East 72, and decided that "where a policy effected by a creditor on the life of his debtor is valid at the time it is entered into, the circumstance of the interest of the assured in such life ceasing before the death does not invalidate it, by reason of the provisions of 14 Geo. III. ch. 48." The decision is very much in point, and the history of the case is of much interest.

I think the motion must be granted and judgment be entered for the defendant for the full amount claimed by him, with costs of the action and this motion.

GALT, C.J., and MACMAHON, J., concurred. The latter referred to *Ashley* v. *Ashley*, 3 Sim. 149; *St. John* v. *American Mutual Life Ins. Co.*, 13 N. Y. 31.

Benefit Society (decided in 1890), 123 N. Y. 85, the head-note to which is:—"The provision of the Act of 1883 (sec. 18, ch. 175, Laws of 1883), providing for the incorporation of co-operative life insurance societies, which declares that membership in such a society gives the member the right to make a change in his payee or beneficiary without the consent of such payee or beneficiary, applies simply when the original designation is in the nature of an inchoate or an unexecuted gift; it does not prevent a contract between the member and the payee by which a vested right passes to the latter, and in such case, without his consent, the payee may not be changed."

Judgment. MacMahon, J.

The Court in that case said (p. 88): "The statute does not prevent a contract between the parties by force of which a vested interest does pass."

By virtue of the contract between Mrs. Bunnell and her husband, by which, in consideration of his agreeing not to apportion any part of the insurance moneys amongst his children on the policy issued on his life, and of which the wife was the named beneficiary, she agreed that the original policy issued on her life should be payable to the husband as beneficiary, a vested interest in the policy passed to the husband, and the beneficiary could not be changed without his consent.

Like means to those employed in this case were adopted in *Packard* v. *Connecticut Mutual Life Ins. Co.*, 9 Missouri (App.) 469, to secure a change in the beneficiary, who was the wife of the insured, by the insured surrendering the policy, another being issued by the insurance company bearing the same number, date, and amount of premium, and being a reproduction of the first in all particulars excepting the names of the beneficiaries, who were the children of the insured. The Court held that the insured and the insurers could not so change the policy of life insurance as to destroy the interest of the beneficiary named therein, without his consent.

The general law is thus stated in Bliss on Insurance, sec. 318:—"We apprehend the general rule to be that

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a policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named." It was on the principle thus stated that *Fortescue* v. *Barnett*, 3 My. & K. 36, was decided. There J. B., having procured a policy on his own life, made a voluntary assignment thereof to trustees for the benefit of his sister and her children. No notice of the assignment was given to the insurance company. J. B. retained the policy in his possession, and afterwards surrendered it to the insurance company, and received the money. The plaintiff in that suit, claiming under the voluntary deed, filed a bill against the assignor, and Sir John Leach held the gift complete without delivery of the policy.

Lord Cottenham dissented from *Fortescue* v. *Barnett* in *Edwards* v. *Jones*, 1 My. & Cr. 226.

However, there being in the present case a contract between the insured and the husband, the beneficiary named in the original policy, I am not called upon to consider what might possibly prove an embarrassing question.

There must be judgment for the plaintiff for the amount of the insurance moneys in the hands of the defendants the Trusts Corporation.

There will be the usual order for the administration of the estate of Harriet Dunham Bunnell.

I will hear the parties on the question of costs.

February 23, 1897.

Having heard counsel on the question of costs, I think the proper order to make is that the costs of all the parties be paid out of the insurance moneys in the hands of the Trusts Corporation of Ontario.

E. B. B.

CHISHOLM

v.

THE LONDON AND WESTERN TRUSTS COMPANY.

Will—Alienation—Restriction against—Validity of.

A testator after devising two parcels of land respectively to his two sons, provided as follows: "I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of twenty-five years from the date of my decease. And, further, I will that the same parcels of land shall remain free from all encumbrances, and that no debts contracted by my sons W. C. & H. C., shall by any means encumber the same during twenty-five years from the date of my decease." One of the sons died about two years after his father, having devised his lot to his brother, the plaintiff, who within the period limited by his father's will, sought to mortgage it:—

Held, a valid restriction, so far as it was a restriction against the plaintiff selling and conveying the lands or encumbering them by way of mortgage within the period mentioned.

Statement.

THIS was a special case stated for the opinion of the Court in an action between Hugh Chisholm and The London and Western Trusts Company as to the validity in the will of one Donald Chisholm of a devise in restraint of alienation.

The case was argued in Court at London on February 23, 1897, before FERGUSON, J.

The facts and that portion of the will containing the clause in question, are set out in the judgment.

A. B. Cox, for the plaintiff. The restriction against alienation, even though limited as to time, is bad: *In re Rosher*, *Rosher* v. *Rosher*, 26 Ch. D. 801; Theobald on Wills, 4th ed., 504; *In re Dugdale*, *Dugdale* v. *Dugdale*, 38 Ch. D. 176, *per* Kay, J., at p. 179; Jarman on Wills, 5th ed., p. 860. There are Canadian cases the other way, but there has been no Canadian appellate decision since *In re Rosher*, and MACMAHON, J., in *Heddlestone* v. *Heddlestone*, 15 O. R. 280, expresses approval of *In re Rosher*. A total restriction against alienation even for one day is bad since it results in depriving an estate in fee of one of its inci-

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dents: *Dugdale* v. *Dugdale*. The word "disposal" used here includes "selling, mortgaging and devising": *Gallinger* v. *Farlinger*, 6 C. P. 512; *Re Watson & Woods*, 14 O. R. 48. There is no authority to shew that a restriction against devising is good. The restriction against incumbrances and debts is all one restriction, and the latter is clearly bad. I refer to *Renaud* v. *Tourangeau*, L. R. 2 P. C. 4, and *Earls* v. *McAlpine*, 6 A. R., *per* Patterson, J.A., at p. 151.

W. D. Frazer, contra. "Disposing," is a comprehensive word. There are three restrictions here, against disposing, against incumbering and against the effect of debts. The Canadian cases shew that a restriction confined to a certain time is good and valid. Here it is confined to twenty-five years, and is perfectly good. I refer to *Smith* v. *Faught*, 45 U. C. R. 484; *Earls* v. *McAlpine*, 27 Gr. 161, and 6 A. R. 145; *Re Weller*, 16 O. R. at p. 320; *Re Winstanley*, 6 O. R. 315.

Cox, in reply. If one part of a restriction is bad, the whole restriction is bad. There is an attempt here to tie up the land against creditors which is void as against public policy, and the restrictions are inseparable.

February 27, 1897. FERGUSON, J.:—

The case states that Donald Chisholm late of the township of Mosa, deceased, died on the 27th day of February, 1887; that he was at the time of his death seized in fee simple of the east half of the south half of lot number three in the eighth concession of the said township of Mosa; and that by his will which has been duly proved and registered, he devised the said lands to his son William Chisholm, by the following words:

"I give and bequeath to William Chisholm, my son, the east half of the south half of lot number three in the eighth concession of the township of Mosa. * * To Hugh Chisholm, my son, I give and bequeath the west half of the aforesaid lot, equally dividing the hundred

acres between them. I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of twenty-five years from the date of my decease. And further, I will that the said parcels of land shall remain free from all incumbrances, and that no debts contracted by my sons William Chisholm and Hugh Chisholm shall by any means incumber the same during twenty-five years from the date of my decease."

Judgment. Ferguson, J.

The case then states that the other clauses of the will relate solely to personal estate, and contain nothing which either directly or by implication affects the said devise or imposes any penalty or directs any gift over upon breach of the said conditions or either of them, nor does the will contain any residuary devise.

That the said William Chisholm, the devisee above named, died on the 30th day of July, 1889, without having attempted any disposition of the said lands other than by his will by which he devised the said lands unconditionally and absolutely to his brother, the plaintiff in this action; and that the said last mentioned will has been duly proved and registered.

The case then states that the plaintiff has applied to the defendants for a loan on the said property so devised to him, namely, the east half of the south half of lot number three in the eighth concession of the township of Mosa, and that the defendants have agreed in writing for a binding consideration to loan to the plaintiff the sum of $800 on the security of a first mortgage on the said land, provided that the plaintiff's title thereto is sufficient, and that on the investigation of the title to the said lands the defendants have objected to the plaintiff's said title on the ground that the conditions annexed to the devise to the said William Chisholm prevent the plaintiff from mortgaging or selling the said lands for a period of twenty-five years from the 27th day of February, 1887 (the date of the death of the said Donald Chisholm).

Then the agreement to submit the following questions for the opinion of the Court is stated:

Judgment.
Ferguson, J.

1. Whether the plaintiff can make a good title to a purchaser of the said lands (the east half of the south half of lot number three in the eighth concession of the township of Mosa) prior to the expiration of the period of twenty-five years from the 27th day of February, 1887.

2. Whether the plaintiff can before the expiration of the said period make a valid mortgage upon the said lands.

3. In the event of both questions, or either of them being answered in the negative; whether the plaintiff could do what he is declared incapable of, if all the next of kin of the said Donald Chisholm consented to such sale or mortgage.

The decided cases in our own Courts shew, as I think, that the restriction against alienation contained in this will, and mentioned and referred to in the special case is a good and valid restriction so far as it is a restriction against selling and conveying or incumbering the lands by way of mortgage.

The remaining part of the restriction I need not, as I think, offer any opinion upon for the purpose of answering the questions, so far as I think I am called upon to answer them: see *Earls* v. *McAlpine*, 27 Gr. 161, 6 A. R. 145; *Pennyman* v. *McGrogan*, 18 C. P. 132; *Smith* v. *Faught*, 45 U. C. R. 484; *Meyers* v. *The Hamilton Provident Loan Co.*, 19 O. R. 358; *Re Winstanley*, 6 O. R. 315; *Re Weller*, 16 O. R. 318; *Re Watson & Woods*, 14 O. R. 48; *O'Sullivan* v. *Phelan*, 17 O. R. 730; *Gallinger* v. *Farlinger*, 6 C. P. 512; and there are many others. These cases are not all in point here, but by a comparison of them, and the reasoning contained in the judgments of the learned Judges, I arrive at the opinion above stated.

I cannot say that the English cases are to the same effect, yet many of them do go to shew that a restriction against alienation for a particular period of time may be good and valid. See the remarks of Sir George Jessel, M. R., in *In re McLeay*, L. R. 20 Eq., at p. 189. I think, however, that I am bound to follow what I think is the true meaning of the cases in our own Courts.

Then assuming that the restriction against alienation in this will is a good and valid restriction to the extent that I have said it is, and the period of twenty-five years mentioned in it not having as yet more than half run, the questions 1 and 2 must be answered in the negative; that is to say, the plaintiff cannot make a good title to a purchaser of the lands, nor can the plaintiff make a valid mortgage of the lands. Judgment. Ferguson, J.

As to the third question submitted, I am of the opinion that I am not called upon to answer, and that I should not attempt to answer it. The question rests upon hypothesis and supposition, not upon reality, and it seems to me enough to apply or endeavour to apply the law to facts in existence, besides there would be difficulty and danger in speaking of the position or powers of the next of kin alluded to, or what right or title, if any, they at present possess.

I think the two answers given above must suffice.

Counsel said that I need say nothing about the costs, as there is an existing agreement as to these.

G. A. B.

REGINA EX REL. WATTERWORTH v. BUCHANAN AND CUTHBERT.

Municipal Elections—Deputy Returning Officer—Absence during Part of Polling-Day—Irregularity—Saving Clause—Consolidated Municipal Act, 1892, sec. 175.

At an election of county councillors one of the deputy returning officers for a town in the county was absent from his booth on three separate occasions during polling-day. The first and second absences were on account of illness; on the third occasion he went out to dinner and voted in another place. The first absence was for about ten minutes, during which the booth was locked up, with the poll-clerk and constable inside, in charge. The deputy swore that no voter came in till he returned. In his second and third absences the town clerk took his place. During the second no votes were cast, but during the third there were several. The town clerk placed the deputy's initials on the back of the ballots given to such voters, and the consequence was that these ballots were upon a judicial investigation identified and separated, and it appeared that during the third absence nine votes were cast for the relator and nine for the respondent. Upon the whole the respondent had two more votes than the relator, and by sec. 13 of the County Councils Act, 1896, there being two county councillors to be elected, a voter could give both his votes to one candidate. There was no suggestion of bad faith:—

Held, that the absences and what was done during the absences did not affect the result of the election, and, applying the saving provisions of sec. 175 of the Consolidated Municipal Act, 1892, that it should not be declared invalid.

Statement. A MOTION in the nature of a *quo warranto* under the provisions of the Consolidated Municipal Act, 1892, secs. 187-208, to remove the respondents from the offices of county councillors for division No. 2 of the county of Oxford, on the ground of irregularities in the conduct of the polling of the votes, and on other grounds. The facts are stated in the judgment of the referee.

The motion was argued before Mr. James S. Cartwright, an official referee, sitting for and at the request of the Master in Chambers, on the 25th February, 1897.

W. T. McMullen, for the relator, referred to *The East Simcoe Election Case*, 1 Elec. Cas. 291; *Regina ex rel. St. Louis* v. *Reaume*, 26 O. R. 460.

Aylesworth, Q. C., for the respondent Buchanan, cited *Jenkins* v. *Brecken*, 7 S. C. R. 247; *The Monck Election Case*, H. E. C. 725.

F. R. Ball, Q. C., for the respondent Cuthbert, relied on *Lynes* v. *Warren*, 14 Q. B. D. 548; *Regina, ex rel. Thornton* v. *Dewar*, 26 O. R. 512; *Parker* v. *Pittsburgh*, 8 C. P. 517; *The Welland Election Case*, 1 Elec. Cas. 383. Argument.

March 15, 1897. MR. CARTWRIGHT:—

Various objections were taken and set out in the notice of motion. At the argument none of them was pressed except the fact of the absence of the deputy returning officer of sub-division No. 6 from the polling booth while the election was in progress.

From the evidence taken before the County Judge, it appears that the deputy returning officer in question was ill on the day of the election, and told the town clerk, who is the *ex officio* returning officer for Ingersoll, that he would hardly be fit for duty, but the clerk told him that he could not get a man to relieve him. In spite of his illness, he attended, and was in his place at the opening of the poll, and remained the whole day, but went out once or twice in the morning, and once about noon.

On the first of these absences he was out a few minutes, locking the polling booth altogether, and leaving the constable and poll clerk in charge inside. He was absent about "ten minutes," he says. No voters were allowed in until he returned; but whether any voters came to vote during that time, and were unable to do so, does not appear on the evidence. There is certainly no evidence that this may not have been the case.

On the second occasion the town clerk was left in charge. There is no evidence whether any votes were tendered on that occasion or not.

On the third occasion, at the dinner hour, both the deputy returning officer and poll clerk were absent, and the town clerk was in sole charge. The deputy returning officer not only went to dinner at the hotel across the road, but also went and voted in his division, although sec. 141 of the Consolidated Municipal Act, 1892, has

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made express provision to meet this case, clearly shewing the intention to be that the deputy returning officer should be present during the whole time during which by law the poll is required to be kept open.

During this last absence the town clerk presided, and several voters came and were given ballots marked by the town clerk with the initials of the deputy returning officer. At the examination before the County Judge these ballots were identified and marked exhibits 7 to 17, both inclusive, making nine votes each for Watterworth and Buchanan, and two for Dunn.

At the close of the poll the votes were counted, and found in that sub-division to be:—

13 for Mr. Cuthbert.
99 for Mr. Buchanan.
87 for Mr. Watterworth.
2 for Mr. Dunn.
8 for Mr. Taylor.

And the result of the total of the votes cast was—

Cuthbert	883
Buchanan	693
Watterworth	691

It cannot be argued that the whole conduct of the deputy returning officer was not highly and seriously irregular. But it was argued that sec. 175* of the Consolidated Municipal Act, 1892, should be applied, it being contended that the admitted irregularities did not affect the result of the election.

As to Mr. Cuthbert that may be conceded. But is it clearly so as to Buchanan, who, on a total poll of nearly

* 175. No election shall be declared invalid by reason of a non-compliance with the rules contained in this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake or irregularity did not affect the result of the election.

700 votes, has only a majority of two votes given by one voter ?*

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Cartwright, Off. Ref.

Mr. Aylesworth argued that this should not enter into the consideration of the question, because the relator had applied for a recount, and so was estopped from saying that this was not a good election, citing *Jenkins* v. *Brecken*, 8 S. C. R. 247. From p. 263 of the judgment in that case it appears that Jenkins had actually taken his seat, and therefore was clearly estopped from saying there had been no valid election; nothing of the sort has occurred here. It appears from the evidence that the relator was not even represented at the sub-division in question during the polling, and had no notice or knowledge of the confessed irregularities until he found them out from the condition of the papers on seeking to have a recount.

I have referred to the numerous cases cited by counsel, and I have no hesitation in saying that if Mr. Buchanan had even half the majority which Mr. Cuthbert obtained, the election should stand. But how can I so hold in view of the majority for Buchanan being the smallest possible ? One more ballot paper, giving two votes to the relator, would have made him a tie with Buchanan, and we cannot say whom the returning officer would have seated. Now, taking even the first absence of the deputy returning officer, it appears from his own evidence that he was absent at least ten minutes; during all which period there was no possibility of any votes being cast; and there is nothing to shew that some voter (and one would be sufficient) was not prevented thereby from casting his vote, which vote might have been for the relator, and then there would have been a tie. In my view, this closing of the polling booth was in some respects the more serious irregularity of the three absences of the deputy.

On the other two occasions the poll was open and the

* By sec. 13 of the County Councils Act, 1896, a voter may, at his option, when there are two county councillors to be elected, give both of his votes to one candidate.

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town clerk was in charge; though so far as I can see he had no greater authority than other inhabitant of the town of Ingersoll or of the county of Oxford who had assumed to act as deputy returning officer. The occasion on which the ballots marked as exhibits were cast is in one aspect very serious. The whole policy of the Act is secret voting. This was admitted on the argument. Here, however, that principle was clearly violated in this way. When the town clerk was presiding, he initialled the ballots. These he was able to identify on the examination in this matter, and they are now actually before me as part of the material. By referring to the poll book it could very possibly be seen who these voters were; and in a close election it would be very easy to make a plan by which the votes of any persons could be identified if so desired. All that would be necessary would be for the deputy to retire and get some one else to act for him, who could, by marking the ballots with the initials of the deputy, be able to identify them on the re-counting, as was done here. While nothing of the sort is suggested in the present case, I am only concerned with shewing that such a violation of the principles of the Act being rendered possible by the admitted irregularity, the saving clause, sec. 175, is thereby displaced so far as that ground is concerned.

In view of all the facts, as between the relator and Buchanan, I do not think the election should be allowed to stand. I am not aware that I have any power to order a new election as to him only; so that the whole proceeding must be set aside. I have reached this conclusion not without a good deal of hesitation.

As the elected candidates were not in any way to blame, I do not think there should be costs against them; nor against the deputy returning officer either, as his absence was not wholly voluntary.

It would seem right that the Legislature should make some provision for such cases, if they are considered to be of sufficient frequency to render this desirable.

Statement.

The respondent Buchanan appealed from the decision of the referee, and his appeal was argued before ROSE, J., in Chambers, on the 29th March, 1897.

Aylesworth, Q. C., for the appellant.

W. T. McMullen, for the relator.

The respondent Cuthbert did not appeal, and was not represented.

March 30, 1897. ROSE, J.:—

I am unable to agree to the conclusion arrived at by the learned referee. It seems to me that the evidence shews that the absences complained of, and what was done during such absences, did not affect the result of the election. The deputy returning officer swears that during his first absence "no voter came in till I returned;" Mr. Smith swears that during the second absence "there were no votes cast;" and during the third absence eleven votes were polled, of which nine were for the relator and nine for Buchanan. Of course the result could not be affected whether such votes were counted or rejected as not regularly polled. Counsel could not suggest any other way in which the result was in fact affected. There is no suggestion of bad faith. If the fact of absence for a few moments through illness would of itself avoid the election, a fainting fit or other uncontrollable cause might be fatal. This could not be so where no harm had been done.

Permitting the returning officer to act during the second and third absences was a pure mistake, and a not unnatural one. The deputy might well think that his place might be supplied by the returning officer himself. The name "deputy" is probably misleading.

With every respect for the opinion of the learned referee, I think the election was not invalid, and the appeal must be allowed with costs.

E. B. B.

[DIVISIONAL COURT.]

MOORE v. GILLIES.

Landlord and Tenant—Overholding Tenants' Act—Dispute as to Nature of the Tenancy—Colour of Right—Jurisdiction—R. S. O. ch. 144—58 Vict. ch. 13, sec. 23 (O.).

Since the amendment of the Overholding Tenants' Act (R. S. O. ch. 144), by 58 Vict. ch. 13, sec. 23, striking out of the Act the words "without colour of right," the Judge of the County Court tries the right and finds whether the tenant wrongfully holds. And where the dispute was in reference to the tenancy, the landlord claiming it to be a monthly holding, and the tenant a yearly tenancy:—

Held, that the County Court Judge had jurisdiction.

Statement. THIS was an application under the Overholding Tenants Act, R. S. O. ch. 144. On February 8th, 1897, an order was granted by the Divisional Court, directing the Judge of the County Court of the county of Peel, to send up the proceedings under section 6 of the Act. It appeared from the proceedings in the County Court that the dispute was wholly in reference to the tenancy, the landlord claiming that it was a monthly holding, and the tenant that he held for a year or by the year. The landlord and his son swore that the contract was by the month at $14.50; and two other witnesses swore that the tenant had admitted to them that he "had the place by the month," and that he would leave "on a month's notice." The tenant swore that he rented at $175 a year, the rent being payable monthly.

The Judge of the County Court held that he had jurisdiction under 58 Vict. ch. 13, sec. 23, to determine the "right" of the landlord, and that the case came clearly within the meaning of section 2 of the Act.

The matter was argued on February 17th, 1897, before the Divisional Court, consisting of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

A. McKechnie, for the tenant. The Judge of the County Court has no jurisdiction where the whole question of the contract is in dispute. *Re Magann and Bonner*, 28 O.

R. 37, decides that where there is a *bond fide* dispute, the case is not within section 2. That was an important question of law, this is an important question of fact. Argument.

[ARMOUR, C. J.—I would have thought this was a question to be determined by the Judge under the amended Act.*]

There is no case in which the contract itself was in dispute in which the Judge was held to have jurisdiction. Where there is no dispute about the termination of the tenancy, and the whole question is, whether there is an overholding tenant, the Court may act: *Gilbert* v. *Doyle*, 24 C. P., at p. 70; *Re Magann and Bonner*, 28 O. R. 37; *Price* v. *Guinane*, 16 O. R. 264; *Bartlett* v. *Thompson*, 16 O. R. 716.

Justin, for the landlord, was not called on.

Per Curiam.—All questions of "colour of right" have been repealed by the amending statute, and the Judge of the County Court now tries the right, and finds whether the tenant wrongfully holds.

A. H. F. L.

* See 58 Vict. ch. 13, sec. 23 (O.), and 59 Vict. ch. 18, Sched.—REP.

[DIVISIONAL COURT.]

THE MERCHANTS BANK OF CANADA v. HENDERSON.

Bills of Exchange and Promissory Notes—Note Payable at Particular Place—Non-Presentment at Maturity—Duty of Maker.

A promissory note payable at a particular place need not be presented there at maturity in order to charge the maker, although there are funds to meet it, and the Bills of Exchange Act, 1890, has made no difference in this respect.

The duty of the maker of such a note is not only to have sufficient funds at the place of payment at maturity, but also to keep them there until presentment.

Semble per ARMOUR, C.J.—The only effect of nonpresentation before action, when sufficient funds have been kept at the place of payment, is to disentitle the plaintiff to costs.

Statement.

THIS was an appeal from a judgment of the First Division Court in the county of Frontenac, in an action on a promissory note.

The following facts are taken from the judgment of ARMOUR, C. J., in the Divisional Court.

This action was brought upon the following promissory note:

"KINGSTON, Ont., 17th July, 1895.

"$100.

"One month after date for value received, I promise to pay to the order of D. Fraser, at the office of Donald Fraser, banker, here, one hundred dollars.

"F. G. HENDERSON."

Having the following endorsement thereon:

"D. FRASER,"

"Protest waived."

"D. FRASER."

The defendant, the maker of this note, was a farmer and cheesemaker, residing at Pittsburg, about ten miles from Kingston, and the payee of the note was one Donald Fraser, a private banker at Kingston, at whose office the said note was made payable, and with whom the defendant kept a bank account, discounting notes and making deposits with him and with whom the defendant had arrangements by which he was to meet all his paper, whether he had funds or not.

Statement.

This note Fraser endorsed to the plaintiffs; and on the 20th day of August, 1895, the day the note fell due, Fraser called at the plaintiff's bank and made the endorsment thereon, "protest waived," "D. Fraser." He also at the same time waived protest on some other notes held by the plaintiffs on which he was endorser. The note was not presented for payment at the office of Donald Fraser on the day it fell due, nor until two or three days before suit.

On the 20th day of August, 1895, the day the note fell due, the defendant had at his credit with Fraser $122.41. On the 26th day of August, 1895, the amount at his credit was reduced to $72.41; on the 28th day of August, it was $122.41; on the 18th day of September, it was $72.41; on the 21st September, $43.46; on the 24th September, $152.46; and on the 25th day of September, $137.46, on which day Fraser made an assignment. Fraser swore that if the note had been presented at his office the day it fell due, it would have been paid, and that he only waived protest of it to preserve his liability therefor.

The cause was tried in the First Division Court of the county of Frontenac, and judgment was given for the plaintiffs, and from such judgment the defendant appealed on the following grounds:

I. That the judgment of the learned Judge is contrary to law and evidence and the weight of evidence.

II. That evidence was improperly admitted of a practice of Donald Fraser and the plaintiffs to allow said Donald Fraser to waive protest of notes maturing each day, a practice not known to the defendant, and not acquiesced in by him.

III. That no waiver of said Donald Fraser could affect the defendant without his knowledge or consent.

IV. And on the grounds:—

1. The plaintiffs contract was to pay said note at Donald Fraser's bank.

(*a*) At common law it was necessary to make presentation on the date of the maturity.

Statement.

(*b*) By 7 Wm. IV. ch. 5, sec. 1 (preserved until R. S. C. ch. 123, sec. 16), a note was payable generally, unless the words "only and not otherwise or elsewhere," were added after the place of payment.

(*c*) By "The Bills of Exchange Act, 1890," sec. 95, ch. 33, this latter Act was repealed, and the common law was restored. The penalty for neglect in so far as it affects the question of costs, is obviously not intended to imply that the consequences of neglect are to be limited merely to a question of costs, and that the provision of the Act requiring presentation for payment may be disregarded.

2. (*a*) Where a bill or note is made payable at a particular place, the acceptor or maker's position is analogous to the drawer of a cheque.

(*b*) Where a note or bill is made payable at a bank by its customer, it is authority to the bank to apply its customer's funds in payment of the bill. Here the plaintiffs with knowledge that Fraser had authority to pay the notes if he had funds, neglected not only to present it for payment, but lie by for upwards of a month with the dishonoured notes in their possession, without taking any steps to advise the defendant of the default.

(*c*) There was no default on defendant's part, and in the absence of the note, he had a right to assume the debt was paid.

(*d*) If one of two innocent parties must suffer by Fraser's default, it is more equitable the loss should fall upon the plaintiffs who were guilty of a breach of a statutory duty.

(*e*) The defendant was damnified by the plaintiff's default, and is liable to defendant for the loss.

The trial Judge found on the evidence that, although there were sufficient funds at the place named on the date the note matured, a few days after the defendant had by withdrawal reduced the amount to his credit in Fraser's hands to an amount less than the amount of the note, but subsequently increased it by deposits, so that

at the time of Fraser's assignment, he had more to his credit than would have paid the note if then presented, and held that it was not necessary to present the note at all in order to hold the defendant liable, and gave a judgment in favour of the plaintiff. Statement.

From this judgment the defendant appealed, and the appeal was argued on February 20th, 1897, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.

E. H. Smythe, Q. C., for the appeal. There was no proper presentment of the note. The presentment made to Fraser, was for the purpose of waiving protest only. It should have been presented at the place named, or to the defendant as maker: 53 Vict. ch. 33, secs. 45*d*, 46 (2), and 86 (D.). The defendant could not be prejudiced by Fraser's waiver; he was ignorant of the arrangement between Fraser and the plaintiffs. Fraser was really an agent of the plaintiffs investing their funds: *Nicholson* v. *Gouthit*, 2 H. Bl. 609. Want of presentment will exonerate the maker where there is a loss as here: *Lazier* v. *Horan*, 23 Alb. L. J. 150; Chalmers on Bills and Notes, 4th ed., 149. A waiver of protest does not necessarily waive presentment: *Nicholson* v. *Gouthit*, *supra*.

Britton, Q. C., contra. The maker of a note is liable whether it is presented or not, although to entitle the holder to the costs of an action, it should be presented before action brought: 53 Vict. ch. 33, sec. 52, sub-sec. 2 (D.). Even if presentment was necessary, there was a waiver by Fraser who was the maker's agent, and there was no negligence on the part of the plaintiffs. The evidence shews the defendant withdrew the larger part of the money which should have been left to meet the note, and to that extent, instead of being damnified was benefited. There was no privity: *Hill* v. *Royds*, L. R. 8 Eq. 290.

Smythe, Q. C., in reply. Section 73, 53 Vict. ch. 33 (D.), shews the measure of the defendant's damage.

Judgment. Armour, C.J.

March 1, 1897. ARMOUR, C. J.:—

In England prior to the passing of the Bills of Exchange Act, 1882, and in this Province prior to the passing of the Act 7 Will. IV. ch. 5, in an action upon a promissory note, such as the one in question here, payable at a particular place, it was necessary to allege and prove a presentment at such place: *Sanderson* v. *Bowes*, 14 East 500; *Spindler* v. *Grellett*, 1 Exch. 384; *Sands* v. *Clarke*, 8 C. B. 751; *François Vander Donckt* v. *Thellusson*, 8 C. B. 812; *Randall* v. *Thorn*, Weekly Notes, 1878, p. 150; *Ferrie* v. *Rykman*, Dra. 61.

And although in order to charge the endorser upon such a promissory note, it was necessary to present it at the particular place on the day it fell due: *Truscott* v. *Lagourge*, 5 O. S. 134; yet to charge the maker it was not necessary to present it at the particular place on the day it fell due, but it was sufficient if it were presented there at any time before action: *Rhodes* v. *Gent*, 5 B. & Ald. 244; *Smith* v. *Vertue*, 30 L. J. C. P. 56; *Henry* v. *McDonell*, H. T. 3 Vict. (R. & J. Dig. 493.)

And I do not think that the law in England in this regard, was altered by the Bills of Exchange Act, 1882, section 87 of which provides that "where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable;" and that it is still unnecessary in order to charge the maker to present such a note at the particular place on the day it falls due, but that it is still sufficient to present it there at any time before action.

By the Act of this Province, 7 Will. IV., ch. 5, a promissory note such as the present, made payable at a particular place without further expression in that respect, is to be deemed and taken to be a promise to pay generally, and this continued to be the law until the coming into force of the Bills of Exchange Act, 1890, 53 Vict. ch. 33 (D.), by section 86 of which it is provided that "Where a pro-

missory note is in the body of it made payable at a particular place, it must be presented for payment at that place. But the maker is not discharged by the omission to present the note for payment on the day that it matures. But if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court."

Judgment. Armour, C.J.

The effect of this provision seems to be that it is still necessary in order to charge the endorser that such a note should be presented for payment at the particular place on the day it falls due; but that to charge the maker, it is unnecessary that it should be so presented, but that it may be so presented at any time before action brought, and that an action may be brought upon it against the maker, even without any presentation at the particular place at the risk of the plaintiff being obliged to pay the costs of such action in case the maker shall shew that he had the money at the particular place to answer the note when the note fell due and thereafter; but it may be that the effect of this provision is that as far as the maker of such a promissory note is concerned, the promissory note is to be deemed and taken to be a promise by him to pay generally; but it is unnecessary to determine the effect of this provision in determining this case.

For I think that where a promissory note, such as the present, is made payable at a particular place, it is the duty of the maker to have the funds necessary to answer the note at such particular place, and to keep them there until they are called for by the holder of the note.

In *Rowe* v. *Young*, 2 B. & B., Best, J., in giving his opinion to the House of Lords said, at p. 184: "It has been asked at the bar, how long the acceptor is to leave the amount of the bill in the hands of his banker? I answer, that he is never to remove it. By his special acceptance, he has charged that money with the payment of the bill at his bankers, he has, therefore, no power over the amount left at his bankers to pay it; it belongs to the holder of the bill, who may take it when he pleases. Should he not call

Judgment.
Armour, C.J.

for it within the time allowed to the holder of a banker's check to present the check at the bankers, and should the banker fail, the holder of the bill must lose his money, he would lose his money if he took a check for his bill and did not present such check in due time. It is decided in the case of *Saunderson* v. *Judge*, 2 H. Bl. 509, that a *memorandum* that a note would be paid at the house of Saunderson & Co., was an undertaking, that there should be cash there to pay the note; and an order on Saunderson & Co., to pay it. Your Lordships also know that such an acceptance as is stated in your Lordships' question is treated by all bankers as a draft on them or order to pay the bill so accepted. A person who neglects to present such an acceptance on the day when it is due, must, therefore, subject himself to the same consequences as one who keeps any other draft or a banker's check, beyond the day after that on which it was delivered to him, when the banker fails."

Rhodes v. *Gent*, 5 B. & Ald. 244, was an action by the holders against the acceptor of a bill of exchange accepted payable when due at Messrs. P. and H., bankers, London, which was not presented for payment at Messrs. P. and H., till several days after it became due, and it was objected that on this ground the plaintiffs were not entitled to recover.

Abbott, C. J., said, at pp. 245 & 246: "The question, therefore, really is, whether a mere omission to present the bill at the bankers on the day when it is due, will discharge the acceptor; and, it seems to me, that if we were so to decide, it would produce most mischievous consequences. The case of *Rowe* v. *Young*, 2 B. & B. 165, goes the length of holding that a presentment is necessary at the particular place specified; and, perhaps, it may go further, and may exonerate the acceptor, in case, by the omission to present in time, he sustains any actual prejudice; but it cannot extend to a case like the present, where no such injury is proved to have arisen in consequence of the omission to present the bill for payment when due."

Judgment.
Armour, C.J.

Holroyd, J., said, p. 246: "This is an action against the acceptor, and, without saying what effect the proof of an actual loss sustained by him in consequence of an omission to present would have, I think he is clearly not exonerated in the present case, where no injury is proved to have arisen from what has occurred."

Best, J., said, p. 246: "If a bill be accepted, payable at a particular place, the acceptor undertakes to have the money there, and to leave it there till the bill is presented; and if he does so, and in consequence of that, by the failure of the banker, he receives an injury, I think he will be exonerated, if the bill has not been presented in due time." See also *Smith* v. *Vertue*, 30 L. J. C. P. 56; *Biggs* v. *Wood*, 2 Man. L. R. 272.

It was the duty, therefore, of the defendant, the maker of the note in question, to have the money to meet the note at the particular place where the note was made payable, and to keep it there to meet the said note when called for.

But although he had the money to meet the note in question at the particular place where it was made payable on the day it fell due, he did not keep it there, for on the 26th August, he had only $72.41 there, and on the 21st September, only $43.46 there, and not having kept the money there to meet the said note, he could not set up the failure of Fraser the banker, as exonerating him from the payment of the note.

In my opinion, therefore, the judgment appealed from is right, and should be affirmed, and the appeal should be dismissed with costs.

STREET, J.:—

In my opinion it was not necessary, in order to charge the maker of the note in question, that it should be presented on the day it became due at the place where it was made payable.

Judgment.

Street, J.

I think the omission to present it at its maturity, raises only a question of costs and not of defence to the action. The fact that the defendant did not retain at his credit the amount necessary to pay the note, and that he disputed his liability *in toto* disentitle him to costs.

The appeal should be dismissed with costs.

FALCONBRIDGE, J.:—

I also think that the appeal should be dismissed with costs.

G. A. B.

BRILLINGER v. AMBLER.

Landlord and Tenant—Distress for Rent—Set-off—Notice—Illegal Distress—Double Value—R. S. O. ch. 143, sec. 29—2 W. & M., sess. 1, ch. 5, sec. 5.

The service by the tenant, after distress but before sale, of a notice of set-off, pursuant to R. S. O. ch. 143, sec. 29, of an amount in excess of the rent, to which the tenant is entitled, does not make the distress illegal, and the landlord is not liable for "double value" for selling, under 2 W. & M., sess. 1, ch. 5, sec. 5, which requires both seizure and sale to be unlawful.

Statement.

MOTION by the plaintiff for judgment on further directions and costs.

The action was brought by a tenant against his landlord for illegal distress, and a claim for double value was made in the statement of claim.

By the judgment in the action pronounced on the 26th October, 1896, all matters at issue between the plaintiff and the defendant were referred for inquiry and report to the Master at Barrie, and further directions and costs were reserved.

The Master, by his report dated 29th January, 1897, found that the defendant on the 24th August, 1896, gave his bailiff a warrant directing him to distrain the plaintiff's goods for $188 alleged to be due by the plaintiff to

the defendant as arrears of rent due on 1st November, 1895; that the bailiff on the 26th August, 1896, pursuant to such warrant, seized and distrained the plaintiff's goods to the value of $242.17; that on the 27th August, 1896, the defendant and his bailiff, the latter being then in possession of the goods under the warrant, were each personally served by the plaintiff with a notice of set-off under sec. 29 of the Landlord and Tenant Act, R. S. O. ch. 143; that the defendant, by his bailiff, after receiving the notice of set-off, continued in possession of, and subsequently, and before this action was brought, sold the plaintiff's goods for $225.17; that the amount of rent due by the plaintiff to the defendant at the time of the seizure was $200, the defendant having given credit for $12, a part of the set-off claimed; that the plaintiff's claim in respect of the matters mentioned in the set-off amounted, at the time of the seizure and sale, to $211.85. Statement.

On the 8th March, 1897, judgment for the plaintiff for $23.75 and costs on the High Court scale was entered by consent, and by such judgment the question of statutory or double damage was reserved for a motion on further directions, and also the costs of such motion.

The statute under which the claim for double damage was made, 2 W. & M., sess. 1, ch. 5, sec. 5, provides that, "in case any such distress and sale as aforesaid shall be made, by virtue or colour of this present Act, for rent pretended to be arrear and due, where in truth no rent is arrear or due to the person or persons distraining * * then the owner of such goods or chattels distrained and sold as aforesaid * * shall and may by action of trespass or upon the case * * recover double of the value of the goods or chattels so distrained or sold, together with full costs of suit."

The enactment under which the set-off was claimed, R. S. O. ch. 143, sec. 29, is as follows:

"(1.) A tenant may set off against the rent due a debt due to him by the landlord.

Statement.

(2.) The set-off may be by a notice in the form or to the effect following, and may be given before or after the seizure:

Take notice, that I wish to set off against rent due by me to you, the debt which you owe to me on your promissory note for , dated (or for eight months' wages at $20 per month, $160,) (or as the case may be).

In case of such notice the landlord shall only be entitled to distrain for the balance of rent after deducting any debt justly due by him to the tenant."

The only questions arising upon the motion were as to the plaintiff's right to double damages and the costs of the motion.

The motion was heard by ROSE, J., in Court, on the 31st March, 1897.

Strathy, Q. C., for the plaintiff. The question is novel, in that it is claimed that rent is paid by virtue of a set-off of which notice was given under sec. 29. The notice was given within five days, and therefore it is immaterial whether there had been an impounding or not. I do not argue that the plaintiff is in the same position as if he had made a tender after distress. I contend that the plaintiff is in the position of a man who had paid his rent before distress. When notice of set-off is given, it reverts back. This would seem to be the true construction of our statute. The debt for which the set-off is claimed was a debt justly due before seizure. The tenant is not bound to claim the set-off, but, when he does so, he is in the same position as if he had paid the landlord so much rent before seizure. Under the statute of W. & M., the sale is the important point. A mere seizure would not give us the right to double damage. The effect of the sale is to make the landlord a trespasser *ab initio*. Where rent has been paid by a fiction of law, the landlord is liable if he distrains: *Chancellor* v. *Webster*, 9 Times L. R. 568; *Potter* v. *Bradley*, 10 Times L. R. 445. There is no statute like ours anywhere; and no cases, except those just cited by way of

analogy, would be of material assistance. Unless my view is right, the statute virtually loses its force. Argument.

Haughton Lennox, for the defendant. The statute of W. & M. is a penal provision enacted at a time when there was no possibility of a set-off being claimed, and on the fair construction of the Act this case does not come within its terms. The defendant was wrong in continuing the distress after notice of the set-off, according to the result as found by the Master. If there had been a tender, instead of a notice of set-off, the result would be the same. The defendant is a mere trespasser, and is not liable to be cast in double damage: Woodfall on Landlord and Tenant, 13th ed., p. 522. "Impounded" means seized and in possession of the bailiff. The notice here was not given till after the bailiff had been a day in possession.

ROSE, J. (at the conclusion of the argument):—

I have an opinion, which consideration is not likely to alter, and I shall, therefore, dispose of this motion at once. Prior to the passing of the enactment allowing a set-off to be claimed, the law was clear that a tenant, in order to stop the distress, must make a tender within a reasonable time, and five days was considered a reasonable time. Then, if the landlord continued in possession after tender, he became a trespasser. Prior to the statute there was no power to set off a debt against rent due. This statute enables payment to be made by set-off, either before seizure or after. If before seizure, then the rent is paid, and there can be no distress. If after seizure, the rent would also be paid, and proceedings must not be continued. But the difference is that in one case the seizure would be made with no rent due, and in the other with rent due. The landlord cannot force the tenant to claim a set-off. He may not claim it for reasons of his own. The statute provides that he may set off, and the form of notice in the statute is, "I wish to set off." The seizure here being regular and lawful, the landlord had the right to go on until he received

Judgment. Rose, J.

notice, but no right to go on afterwards; his doing so was illegal, and he became a trespasser. But the distress when made was not unlawful; and the statute of W. & M. could not in any case be invoked unless the seizure as well as the sale was unlawful, and therefore cannot here apply: Bullen and Leake's Precedents of Pleading, 2nd ed., pp. 277-281.

The motion is dismissed with costs; the costs may be set off *pro tanto* against the amount of the judgment already recovered by the plaintiff.

E. B. B.

RE SHANACY AND QUINLAN.

Will—Restraint on Alienation—Invalidity.

Devise of real estate to two grandchildren in fee, with a condition as follows: "and I further will and direct, and it is an express condition of this my will and testament, that none of the devisees herein * * that is to say neither my said grandchildren * * shall either sell or mortgage the lands hereby devised to them":—

Held, an absolute and unqualified restraint on alienation, and so invalid.

Semble, Had the condition been valid, the grandchildren being the testator's heirs-at-law, could have made title as such.

Statement.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 112.

The vendors were grandchildren of one William Daley, and took the property in question under his will in which was contained a condition in restraint of alienation.

The devise in the will was as follows: "I give, devise, and bequeath absolutely all my real estate (except the said 50 acres hereinafter bequeathed to Martha Smith), to my said grandchildren William Joseph Shanacy and Mary Ann Shanacy, their heirs and assigns forever, upon their each attaining the age of twenty-three years in the proportions * * *"

The condition in restraint of alienation, was as follows: "Fifthly. And I further will and direct, and it is an express condition of this my will and testament, that none

of the devisees herein * * that is to say, that neither my said grandchildren, their trustees nor the said Martha Smith shall either sell or mortgage the lands hereby devised to them." There was no devise over or residuary clause in the will. Statement.

The agreement for sale in question was made between the grandchildren and one William Quinlan.

The only children William Daley had, were a son who died without issue, and a daughter who was also dead, leaving the grandchildren in question her only issue; and the question was whether the restraint on alienation was valid, and if so, whether the grandchildren could make title as heirs-at-law.

The petition was argued on March 24th, 1897, before FALCONBRIDGE, J.

A. E. H. Creswicke, for the petitioners, the vendors. The vendors are absolutely entitled, and even if the restraint on alienation is valid, they are entitled as heirs-at-law, and so can make title: *Re Northcote*, 18 O. R. 107; *Earls* v. *McAlpine*, 6 A. R. 145. There is no provision in the will as to whom the land will vest in on breach of the condition, so the heirs will take: *Pennyman* v. *McGrogan*, 18 C. P. 132.

George A. Radenhurst, contra, for the purchaser. The restraint is valid, and the devisees are absolutely debarred from conveying: *Re Winstanley*, 6 O. R. 315. If the restraint does not offend against the rule as to perpetuities, it is valid. The rule is settled in Ontario, and our own cases must be followed in preference to English cases: *Re Weller*, 16 O. R. 318. This case is similar to *Re Northcote*, 18 O. R. 107. The power to devise is left with the owners, but the power to mortgage and sell, is taken away. This case is not like *Heddlestone* v. *Heddlestone*, 15 O. R. 280, where there was no substantial power to alienate at all. A deed from all the parties interested might sometimes be good: *Re Rathbone & White*, 22

Argument. O. R. 550; but this is not an analogous case. The vendors cannot convey as heirs when they are prevented doing so as devisees.

Creswicke, in reply. *Re Northcote*, 18 O. R. 107, and *Re Winstanley*, 6 O. R. 315, shew that the petitioners take an estate in fee, subject to be divested on breach of the condition, and then can convey as heirs-at-law.

March 31st, 1897. FALCONBRIDGE, J.:—

"The test is whether the condition takes away the whole power of alienation substantially," per Jessel, M.R., in *Re McLeay*, L. R. 20 Eq., at p. 189, cited in *Smith* v. *Faught*, 45 U. C. R. 484; *Re Northcote*, 18 O. R. 107.

In the following cases, viz.: *Earls* v. *McAlpine*, 6 A. R. 145; *Pennyman* v. *McGrogan*, 18 C. P. 132; *Re Winstanley*, 6 O. R. 315; *Re Weller*, 16 O. R. 318, the restraint on alienation was limited and therefore good. But here there is, as in *Re Watson & Woods*, 14 O. R. 48; *Heddlestone* v. *Heddlestone*, 15 O. R. 280, an absolute and unqualified restraint on alienation, which is invalid.

I further think that the petitioners could make title as heirs at law if the condition were not void.

The petitioners shew a good title to the lands agreed to be sold, which title the purchaser ought to accept.

No order as to costs.

G. A. B.

[DIVISIONAL COURT.]

GARDINER V. MUNRO.

Mortgage—Mortgagor and Mortgagee—Accounts—Speculative Securities—Bonuses and Commissions.

Where money is lent on securities of a speculative or unsatisfactory nature, bonuses or commissions deducted by the lender at the time of the advance, together with bonuses or commissions charged and agreed to for an extension of time, and which form part of the consideration of the mortgage security, are properly chargeable in an accounting between borrower and lender, provided they were made part of the contract.

Statement.

THIS was an appeal from the local Master at Cornwall. The action was brought by the plaintiff, as mortgagor in certain chattel mortgages, against the defendant, as the mortgagee, for an account of his dealings in connection therewith.

The evidence shewed a series of advances by the defendant to the plaintiff, the promissory notes, chattel mortgages and accounts in connection therewith extending over a period of several years.

The Master found from the defendant's books that plaintiff had paid over seven thousand dollars on account of his indebtedness, in different sums and at different times; that none of these payments had been appropriated by the plaintiff to any particular item, and he held that the defendant had the right to appropriate them to such of the bonuses as had been agreed on and regularly charged up. A bonus of $100 on a renewal of the last chattel mortgage, on which, although no money passed, the time for payment was extended, and which was not charged until four months after the last of the payments, was disallowed by him on the ground that a creditor's right to appropriate to a demand not collectable by action is confined to sums paid voluntarily by a debtor, and does not apply to collections made, as in this case, by a creditor under a chattel mortgage sale, and he gave judgment in favour of the plaintiff for the amount of that bonus.

Statement. From this judgment the plaintiff appealed, claiming to be allowed in addition to said last mentioned bonus, bonuses to the amount of several hundred dollars which the Master held were not deducted or retained from money advanced, and were unenforceable claims, on the ground that the Master erred in allowing the defendant to appropriate payments; and the defendant cross-appealed, claiming his right to retain the bonus disallowed to him, on the ground that the amount was agreed to be paid by the plaintiff to the defendant in consideration of the defendant extending the time for payment of the moneys secured by said mortgage; that the time was so extended, and that the said sum was secured by an instrument under seal, and formed part of the consideration therein mentioned.

The appeals were argued on April 27th, 1896, before a Divisional Court composed of MEREDITH, C. J., ROSE, and MACMAHON, JJ.

Leitch, Q. C., and *C. A. Myers*, for the plaintiff. The bonuses should not be allowed. They were not owed to the defendant. The chattel mortgages do not shew any bargain for them. The plaintiff did not agree to pay them and did not know they were charged and deducted. Unless they are paid at the time they cannot be charged: *Mainland* v. *Upjohn*, 41 Ch. D. 126.

Moss, Q.C., and *I. Hilliard*, for the defendant, were not called on.

The judgment of the Court was delivered at the close of the argument by

MEREDITH, C. J.:—

The Master has found upon the evidence that all the bonuses were agreed to be paid by the plaintiff, and formed part of the consideration of the mortgages and notes. He has not been shewn to be wrong on the evidence.

When a person agrees to pay a bonus, and it forms part of a mortgage transaction, we do not see how he can get rid of paying it. Judgment. Meredith, C.J.

Without, then, considering the second ground of plaintiff's appeal, namely, the appropriation of the payments, we hold all the bonuses chargeable against the plaintiff, and the plaintiff's appeal fails.

Moss, being called upon for the defendant's cross-appeal, pointed out that the judgment just delivered decided the plaintiff's appeal, claiming the bonus allowed to him on the last chattel mortgage, as the Master found it was agreed to be paid by the plaintiff and formed part of the consideration in said mortgage.

MEREDITH, C. J. :—

We cannot see any difference between this bonus and the others which we have just disposed of.

Defendant's appeal as to this item will be allowed, and the Master's judgment varied accordingly.

G. A. B.

WIGLE V. VILLAGE OF KINGSVILLE ET AL.

Municipal Corporations—Contract—Necessity for By-law—Resolution of Council—Consolidated Municipal Act, 1892, secs. 282, 288.

A by-law of a village corporation authorized the raising by way of loan of a certain sum for the purpose of mining and supplying the village with natural gas, and the issue of debentures therefor :—

Held, having regard to sec. 282 of the Consolidated Municipal Act, 1892, that a by-law was necessary to authorize the making of a contract for the mining work to be done, and that this by-law did not authorize it :—

Held, also, that a resolution of the council, though entered in the minute book and containing the contract at full length, and having the seal of the corporation attached to it, could not be considered a by-law because it was not signed as required by sec. 288.

Statement. THIS was an action brought by Solomon Wigle, on behalf of himself and all other ratepayers of the village of Kingsville, against the village corporation and W. A. Simpson, for an injunction and damages in respect of the matters set out in the judgment.

The action was tried before FERGUSON, J., without a jury, at Sandwich, on the 15th and 17th March, 1897.

E. S. Wigle, for the plaintiff, cited R. S. O. ch. 191, sec. 2 ; 58 Vict. ch. 46 (O.) ; the Consolidated Municipal Act, 1892, secs. 282, 288 ; *Corporation of New Westminster* v. *Brighouse*, 20 S. C. R. 520 ; *Waterous Engine Co.* v. *Town of Palmerston*, 21 S. C. R. 556 ; *Young* v. *Mayor etc., of Royal Leamington Spa*, 8 App. Cas. 517.

A. H. Clarke, for the defendants, referred to *Township of Pembroke* v. *Canada Central R. W. Co.*, 3 O. R. 503 ; *Pratt* v. *City of Stratford*, 16 A. R. 5.

April 2, 1897. FERGUSON, J. :—

The plaintiff, a ratepayer of the village of Kingsville, sues on behalf of himself and all other ratepayers of the same village. The defendants are the corporation of the village and W. A. Simpson. The complaint is that on or about the 15th day of December, 1896, the defendant municipality entered into a contract in writing under the

Judgment. Ferguson, J.

seal of the corporation with the defendant Simpson to drill and explore for natural gas on part of lot No. 7 in the first concession of the township of Gosfield South; that the defendant Simpson entered upon the work and drilled to a depth of about 300 feet, when the plaintiff, on the 26th day of January, 1897, obtained an interim injunction restraining the defendant from further operations, which injunction was continued till the trial; that this contract was not authorized by by-law of the council, and no provision had been made in the estimates to satisfy the obligations of the defendant corporation contained in the contract; that by the contract the defendant corporation not only agreed to pay the defendant Simpson, but also to pay him a liquidated amount in the nature of a penalty as damages in case he should be restrained in his operations; that the total expense to carry out the terms of the contract would amount to $1,700, for the payment of which no provision had been made; and that the defendant corporation intended to proceed with the work and pay the defendant Simpson, thereby damaging the plaintiff and the other ratepayers aforesaid. Amongst other things it is claimed that the injunction should be made perpetual.

The defendants say that the contract complained of was authorized by their by-law No. 141, passed on the 13th day of January, 1896, after having received the assent of the electors, and was further authorized by a resolution of the council prior to the entering into of the contract. They, the defendants, then refer to the contents of by-law No. 141, and say that it was inexpedient to let a contract for the whole of the work provided for in it, and to dispose of the debentures for that purpose, owing to the uncertainty as to the discovery of gas, and that the intention of the village council was first to sink a well to ascertain if gas could be found or procured before incurring further liabilities, etc. The defendants also say that subsequently to the granting of the injunction above referred to, the defendant corporation by a by-law No. 159, passed on the 10th day of January, 1897, provided for the

Judgment.
Ferguson, J.

construction of the works contemplated by by-law No. 141, and authorized the entering into a contract with the defendant Simpson for the sinking of a well, and provided for the sale of different debentures, authorized by by-law No. 141, to complete the contract; the letting of the contract for the remainder of the works being postponed till the completion of this gas well.

By-law No. 141, above referred to, is a by-law to raise by way of loan the sum of $18,290 for the purpose of mining, winning from the earth, and supplying the village of Kingsville with natural gas, and to authorize the issue of debentures therefor. This is the whole scope of this by-law. It does not on its face authorize the making of any particular contract.

Section 282 of the Consolidated Municipal Act of 1892 provides that the powers of the municipal council shall be exercised by by-law, when not otherwise authorized or provided for; and sec. 288 provides that any by-law shall be under the seal of the corporation, and shall be signed by the head of the corporation, or by the person presiding at the meeting at which the by-law has been passed, and by the clerk of the corporation.

There seems not to be anything providing for the exercising of the powers in question here, otherwise than by by-law. Nothing of this character was referred to, and I do not know of anything. The resolution of the council referred to, though entered in the minute book of the council and containing the contract at full length, and having the seal of the corporation attached to it, cannot be considered a by-law, because it is not signed as is positively required by sec. 288 above mentioned. It does not profess to be a by-law at all, and in my view it could not authorize the making of the contract, the making of which is complained of by the plaintiff.

The question then seems to be, was the making of this contract authorized by by-law No. 141, which provides only as above stated? and, after having perused the authorities referred to by counsel on the argument, I am

of the opinion that it was not. I think a by-law was necessary to authorize the making of the contract complained of, and that this contract was made by the defendant corporation without any proper authority so to do. Judgment. Ferguson, J.

I am of the opinion that the injunction should be made perpetual with costs.

The costs of both applications respecting the injunction seem to have been provided for by the order made by my brother Rose.

E. B. B.

[DIVISIONAL COURT.]

STRUTHERS V. MACKENZIE.

Company—Purchase of Goods on Credit—Statutory Inability to Buy on Credit—Acceptance of Draft in Name of Company—Implied Representation of Authority at Law—R. S. O. ch. 166, sec. 13.

The plaintiff sued the officers and directors of a co-operative association, incorporated under R. S. O. ch. 166, for the price of goods sold to it on credit, which, by the statute incorporating it, the association was forbidden to buy in that way:—

Held, that he could not recover, as no action could be maintained upon an implied representation or warranty of authority in law to do an act; and, moreover, the plaintiff must be taken to have known of the statutory inability:—

Held, also, that although the proceeds of a re-sale of the goods by the association were applied to relieve the defendants from a personal liability for other goods purchased by the association, they could not be said to have derived a personal benefit from the plaintiff's goods, and, therefore, the latter could not recover on this ground:—

Held, lastly, that although one of the defendants accepted, on behalf of the association, the plaintiff's drafts drawn on it for the goods, he was not liable upon an implied representation or warranty of authority in law of the association so to accept.

THIS was an action brought by R. C. Struthers & Co., against the manager and directors of the Wyoming Co-operative Association (Limited), to recover the price of goods sold under the circumstances set out in the judgment of ARMOUR, C. J. Statement.

Statement. The action was tried before BOYD, C., without a jury, at London, on January 13th, 1897, who dismissed the action with costs.*

The plaintiffs on February 16th, 1897, moved before the Divisional Court, consisting of ARMOUR, C. J., and FALCONBRIDGE, and STREET, JJ., by way of appeal from this judgment.

G. C. Gibbons, Q. C., for the plaintiff. The presumption of knowledge of the law does not apply, there being nothing against public policy or unusual in what we did. From the beginning the Act was wholly disregarded. *Primâ facie* the directors having bought for principals who could not buy, would be personally responsible: *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; Brice on Ultra Vires, 3rd ed., p. 666; Story's Equity Jurisprudence, 2nd Eng. ed., par. 138 f.; Green's Brice on Ultra Vires, at p. 720; *Confederate Life Association* v. *Howard*, 25 O. R. 197. As we have traced these particular goods into these defendants' hands who personally benefited thereby, they should not be able to perpetrate a fraud by setting up such a defence: *St. Louis* v. *Davidson*, 22 Amer. 764.

W. J. Hanna, for the defendants. There was no misrepresentation of fact by the directors: *Richardson* v. *Williamson*, L. R. 7 Ch. 801, is explained and commented on by Mellish,

*The learned Chancellor gave judgment as follows:—"I cannot see my way to your maintaining this action. We have no bankruptcy law, we have nothing decided. The statute says the transaction is inoperative. There is a contract, goods purchased by the company. Persons who dealt with it, Struthers and the others, knew and had means of knowing the condition of the company, as if it was put in the newspapers. They knew it was a legal entity; and they knew under what law or charter it stands incorporated; and they knew that they were dealing with a concern that could not deal in this way. The directors were not parties to the contract. They were going on in that illegal way also. But it turns out the concern has lost; the moneys they have received have gone to pay the indebtedness, and there is a shortage. There is nothing in their hands I can lay my hands on. I think it will have to be dismissed with costs."

L. J., in *Beattie* v. *Lord Ebury*, 7 Ch. at p. 801, L. R. 7 H. L. 102; Brice on Ultra Vires, 3rd. ed., p. 45; *Macgregor* v. *The Dover and Deal Railway*, 18 A. & E. 618; *Taylor* v. *Chichester and Midhurst R. W. Co.*, L. R. 2 Ex. 356, 378; *Miners' Ditch Co.* v. *Zellerbach*, 37 Cal. 543, 679, cited Brice *ibid.*, at p. 46; Maxwell's Interpretation of Statutes, 3rd ed., p. 554. Representing themselves as directors, is not making a representation of their corporate power: Lindley's Law of Companies, 5th ed., pp. 158, 168; Brice on Ultra Vires, 3rd. ed., p. 663; *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360. We are within *Beattie* v. *Lord Ebury*, being under a public Act, and not under a private Act as in *West London Commercial Bank* v. *Kitson*. I refer also to *Johnson* v. *Martin*, 19 A. R. 592. The wholesale dealers are as much to blame as the directors, and the loss should be left where it lies. Argument.

March 8th, 1897. The judgment of the Court was delivered by

ARMOUR, C. J. :—

The Wyoming Co-operative Association, (Limited), was incorporated under the provisions of R. S. O. ch. 166, entitled "An Act respecting Co-operative Associations," and the plaintiffs, merchants in London, sold goods to this association on credit to the amount of $220.50, for $41.16, part of which they, on April 1st, 1896, drew on the association at four months, and for $51.77, other part of which they on May 1st, 1896, drew on the said association at five months, which drafts were "accepted for the Co-operative Association," by George Hartley the treasurer thereof, under general instructions from the board of directors. Subsequently the stock in trade was sold by the association and the proceeds thereof together with the other assets of the association, were applied in payment to a bank of certain liabilities of the directors of the association, incurred by them for the purpose of raising money to pay for goods furnished to the associa-

Judgment. Armour, C.J.

tion. The plaintiffs being unable by reason of the provisions of R. S. O. ch. 166, to recover against the association, brought this action against Mackenzie the manager, Hartley the treasurer, and the other defendants, as directors of the association, charging that they were personally liable to the plaintiffs for the amount of their claim.

The cause was tried by the Chancellor on the 13th of January, 1897, who dismissed the action with costs, delivering the following judgment: [setting it out; *ante* p. 382:]

On February 16th, 1897, Gibbons, Q. C., moved to set aside the said judgment, and to enter judgment for the plaintiffs on the following, amongst other grounds: (1), That the judgment was against law, evidence, and the weight of evidence; (2) That the evidence shewed that the defendants wholly disregarded from the beginning the statutory injunction against buying or selling on credit; (3) That they bought all the goods they purchased after the commencement of their business upon credit, and in so doing, they incurred large liabilities personally for moneys advanced to pay for goods so purchased upon credit; (4) That the said defendants, as the evidence shewed, caused the goods bought from the plaintiffs, to be sold and the proceeds applied in payment of the indebtedness so incurred by them; (5) That the plaintiffs submitted that they were entitled to an account of the benefit derived by the defendants from the sale of the goods got from the plaintiffs and payment over of same.

Hanna, shewed cause.

The plaintiffs are precluded from recovering their claim, being for goods sold on credit to the Wyoming Co-operative Association (Limited), from that association, by reason of the provisions of R. S. O. ch. 166, under which that association was incorporated, that the business of the association should be a cash business exclusively, that no credit should be either given or taken, and that everything should be bought and sold for cash only: *Fitzgerald* v. *The London Co-operative Association (Limited)*, 27 U. C. R. 605.

No express representation or warranty of the authority

of the association to purchase the said goods from the plaintiffs on credit, was ever made or given by the defendants or any of them to the plaintiffs, but the plaintiffs contend that upon the purchase of the said goods from the plaintiffs on credit, there was an implied representation or warranty on the part of the defendants or of some of them, of the authority of the association to purchase the said goods on credit, and that upon this implied representation or warranty, they can maintain this action.

But no action can be maintained upon an implied representation or warranty of authority in law to do an act, but only upon an implied representation or warranty of authority in fact to do it: *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777.

"But the agent will not be liable in such cases unless the misrepresentation complained of be as to some matter of fact and a representation by the agent, founded on a mistaken view of the extent of his authority in point of law, will not render him liable to the person to whom such representation was made": Chitty on Contracts, 13th ed., 275.

And in this case the implied representation or warrant of authority was one of law not of fact, of the authority of the association to purchase goods on credit.

The plaintiffs were selling their goods to the Wyoming Co-operative Association (Limited), they must be taken to have known from its very name that it was a co-operative association, and that it was incorporated, and they must be taken to have known the Public Act, R. S. O. ch. 166, under which it must have been incorporated, and the provisions of that Act, and that it forbade the buying by the association of goods on credit.

The plaintiffs and the defendants having thus equal knowledge of the provision of the law forbidding the purchase by the association of goods on credit, I do not think that any implication of a representation or warranty of authority could arise, but if it could, an action could not be maintained upon it.

Judgment.

Armour, C.J.

It was contended that the defendants having been benefited by the purchase of these goods by the association, should be held liable to account for the value of them, but the defendants derived no personal benefit from these goods.

It is true that they had personally become liable to a bank for money obtained to pay for goods purchased by the association in a similar way, and that the proceeds of these goods with other goods, had gone to pay such liability.

But having obtained no personal benefit from the purchase of these goods, I do not see upon what principle they could be made to account for the value of them.

It was further contended that the defendant Hartley having accepted the drafts of the plaintiffs drawn upon the association for the association was liable upon the implied representation or warranty of authority in the association to accept such drafts.

But this also, if any thing was an implied representation or warranty of authority in point of law and not actionable: see *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Cherry* v. *Colonial Bank of Australasia*, L. R. 3 P. C. 24, as explained in *Beattie* v. *Lord Ebury*, L. R. 7 Ch. Ap. 777, at pp. 795-6; *Weeks* v. *Propert*, L. R. 8 C. P. 427; *West London Commercial Bank* v. *Kitson*, 12 Q. B. D. 157, 13 Q. B. D. 360; *Fairbank's Executors* v. *Humphreys*, 18 Q. B. D. 54; *Elkington & Co.* v. *Hürter*, [1892] 2 Ch. 452; *Rashdall* v. *Ford*, L. R. 2 Eq. 750; *Beattie* v. *Lord Ebury*, L. R. 7 H. L. 102.

The motion must be dismissed with costs.

A. H. F. L.

RE GOULDEN
AND
THE CORPORATION OF THE CITY OF OTTAWA.

Intoxicating Liquors—Liquor License Act, R. S. O. ch. 194, sec. 20—By-law—"Year"—Meaning of.

The words "in any year" in section 20 of the Liquor License Act mean "calendar year," and not "license year," and a by-law under that section, limiting the number of licenses for the ensuing or any future year must be passed in the months of January or February in any year.

Statement.

THIS was a motion by William R. Goulden to quash a by-law passed under sec. 20 of the Liquor License Act, R. S. O. ch. 194, by the corporation of the city of Ottawa, limiting the number of tavern licenses to be granted for that city for the years 1897 and 1898, to sixty-five.

Section 20 is as follows:

"20. The council of every city, town, village or township may, by by-law to be passed before the 1st day of March in any year, limit the number of tavern licenses to be issued therein for the then ensuing license year, beginning on the 1st day of May, or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by this Act."

The by-law in question was passed on the 4th day of May, 1896.

The motion was argued in Court on March 23rd, 1897, before FALCONBRIDGE, J.

Haverson, for the motion. The by-law is clearly bad, as not passed before the 1st day of March, under sec. 20 of the Liquor License Act, R. S. O. ch. 194. It should have been passed in either of the months of January or February. "In any year," does not mean any license year—it means the calendar year in which it was passed. No council could pass a by-law not to take effect during their year of office.

Herbert Mowat, contra. The by-law is perfectly valid. It was passed May 4th, 1896, and that is before March,

Argument.

1st, 1897, and therefore is within section 20. There is no authority to limit the word "year" in the section to calendar year. The word must receive a liberal construction. All parties' rights under the Liquor License Act, are in respect to a license year. In any event, the statute is directory, not mandatory: *Danaher* v. *Peters*, 17 S. C. R., at p. 44. I refer also to *In re Slavin* v. *The Corporation of the Village of Orillia*, 36 U. C. R. 159; *Grant* v. *Maddox*, 15 M. & W. 737; *The Lion*, L. R. 2 P. C. 530.

March 27, 1897. FALCONBRIDGE, J.:—

The Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec. 15, provides that the word "year," shall mean a calendar year.

In sec. 20 of R. S. O. ch. 194, the expression "license year" is twice used, and the words "before the first of March in any year," mean, therefore, in the months of January or February in any year.

It was, in my opinion, the plain intention of the enactment that the incoming, and not the outgoing or moribund council, should have the responsibility of this weighty legislation.

The by-law must be quashed with costs.

G. A. B.

[DIVISIONAL COURT.]

O'DONNELL V. GUINANE ET AL.

County Court Appeal—Order Setting aside Judgment on Terms—Finality of.

In a County Court action the defendant made a motion to set aside a judgment by default as irregular, but the Judge held it regular, and, while he set aside the judgment, he did so upon terms of the defendant paying costs. The defendant appealed from this order upon the ground that the judgment should have been set aside unconditionally:—

Held, that the order was not "in its nature final," within the meaning of sec. 42 of the County Courts Act, R. S. O. ch. 47, and the appeal did not lie.

Statement.

MOTION by the plaintiff to quash an appeal by the defendant John Guinane to a Divisional Court of the High Court of Justice from an order of the Judge of the County Court of York in an action in that Court to recover the value of work and labour, etc.

The order in question was made under the following circumstances. Final judgment was entered against the defendant John Guinane for default of appearance. He moved to set aside such judgment as irregular, upon the ground that the writ was not specially indorsed. The Judge of the County Court decided that the judgment was regular, but made an order setting it aside and allowing the applicant in to defend upon payment of costs. This was the order appealed against, the appeal being on the ground that the judgment should have been set aside unconditionally.

The motion to quash the appeal was argued before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 8th April, 1897.

W. J. Clark, for the plaintiff, contended that the order appealed against was not "in its nature final," but "merely interlocutory," and therefore not appealable under sec. 42 of the County Courts Act, R. S. O. ch. 47. He referred to *Salaman* v. *Warner*, [1891] 1 Q. B. 734.

Boland, for the defendant John Guinane, contended that, as he did not wish to accept the terms of the order, it was

Argument. in effect a dismissal of his motion, and was in its nature final. He cited *Bank of Minnesota* v. *Page*, 14 A. R. 347.

THE COURT held that the order was interlocutory and not final in its nature, and made an order quashing the appeal with costs.

E. B. B.

[DIVISIONAL COURT.]

IN RE HILL V. HICKS AND THOMPSON.

Prohibition—Motion to Transfer—Division Courts Act—Action against Bailiff for Wrongful Seizure—Joinder of Execution Creditor—R. S. O. ch. 51, secs. 81, 87, 89, 290.

Action brought against a Division Court bailiff in an adjoining county, pursuant to R. S. O. ch. 51, sec. 89, for wrongful seizure of a mare of the plaintiff's, the party however, on whose execution the seizure was made, being joined as a co-defendant. Neither of the defendants resided in the Division where action was brought:—

Held, *per* FERGUSON, J., on motion for prohibition, that the Court had no jurisdiction to entertain the action, notwithstanding R. S. O. ch. 51, sec. 81, although if the bailiff had been sued alone, the proceedings would have been regular:—

Held, on appeal, that whether sustainable against both the defendants in the Division where brought or not, the action could have been so brought in the county where the cause of action arose, and therefore a motion to transfer should have been made before moving to prohibit.

Appeal allowed.

Statement. THIS was a motion for a prohibition to the Judge and clerk of the Fourth Division Court of Leeds and Grenville, under the circumstances set out in the judgment of FERGUSON, J.

The motion was argued on January 11th, 1897, before FERGUSON, J.

W. H. Blake, for the defendants.
J. E. Jones, for the plaintiff.

February 16th, 1897. FERGUSON, J.:—

The application is for an order prohibiting the Judge and clerk of the above-named Court from further proceed-

Judgment.

Ferguson, J.

ing with the plaint above referred to, on the ground that the said Division Court has no jurisdiction to entertain the same, and upon other grounds said to be disclosed in papers and documents filed.

The defendant Thompson, on or about the 12th of August, 1896, recovered a judgment of the First Division Court in the county of Carleton against one Olmstead of the township of Marlborough, in the county of Carleton, for $165.54 and costs, and on or about the 28th of September, 1896, he caused a warrant of execution against the goods and chattels of Olmstead to be issued upon this judgment, and placed in the hands of the defendant Hicks, who was and is a bailiff of the First Division Court in Carleton, to be executed.

On or about the 1st of October, 1896, the defendant Hicks acting or professing to act under the authority of this warrant as such bailiff, seized at the residence of Olmstead a bay mare, and about the 8th of October, 1896, sold the mare at the village of Kars, in the township of North Gower, at auction to the highest bidder, after having duly advertised the property, etc., for the sum of $39.

The present plaintiff Hill, claimed to be the owner of the mare under and by virtue of a bill of sale from Olmstead, and as it is said duly notified the defendant Hicks, as such bailiff, of his claim immediately after the seizure and before the sale of the mare. The present defendant Hicks, as is stated, disregarded the claim thus made by the present plaintiff Hill, and proceeded to sell and did, as aforesaid, sell the mare.

The plaintiff Hill resides in the village of Kemptville, in the county of Grenville, and he brought this action in the said Fourth Division Court of Leeds and Grenville against the bailiff Hicks and Thompson who was plaintiff in the former suit. The particulars of the claim made are:—

"The plaintiff claims against the defendants the sum of fifty dollars damages for trespass committed by the defendants by the wrongful seizure and sale by them of a certain mare and a set of harness, the property of the plaintiff, and for the wrongful conversion thereof."

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The defendant Thompson disputes the plaintiff's claim in full, gives notice that he disputes the jurisdiction of the Court to entertain and try the cause, and gives notice that he pleads the Division Courts Act, R. S. O. ch. 51.

The defendant Hicks disputes the plaintiff's claim in full; pleads "not guilty by statute," referring to various sections of the Act, calling it "a public Act;" and also disputes the jurisdiction of the Court to entertain and try the cause.

On the argument before me it was agreed by counsel that there was and is no dispute as to the facts in respect of the jurisdiction. Both counsel stated the facts, in this respect in the same way, and there really can be no dispute about them or any of them. The question as to the existence of jurisdiction or not seems to be a matter of law only.

Section 89 of the Division Courts Act provides that notwithstanding anything in the Act contained, a clerk or bailiff of a Division Court may be sued in the Court of an adjoining county, the place of sitting whereof is nearest to the residence of the defendant without the county in which he holds his office as clerk or bailiff, and on the argument it was conceded and stated by both counsel that if the bailiff, the defendant Hicks, had been sued alone the suit could under the provisions of this section be maintained against him; that is to say, that the Court in which this plaint is now pending is a proper Court in which to sue him as such bailiff.

Section 81 of the same Act provides that any action cognizable in a Division Court may be entered and tried in the Court holden for the Division in which the cause of action arose, or in which the defendant or any one of several defendants resides or carries on business at the time the action is brought, notwithstanding that the defendant at such time resides in a county or Division different from the one in which the cause of action arose.

It will be observed that neither one of these two defendants resides in the county or Division in which this suit

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is brought, or did so reside at the time of its commencement, and the cause of action plainly did not arise in the county or Division.

Section 88 of the same Act provides that every clerk or bailiff may sue and be sued for any debt due to or by him, as the case may be, separately or jointly with another person in the Court of any next adjoining Division in the same county, in the same manner to all intents and purposes as if the cause of action had arisen within such next adjoining Division, or the defendant was resident therein, and no clerk or bailiff shall bring any action in the Division Court of which he is clerk or bailiff.

On the argument stress was laid upon this section, but I fail to perceive that the section has any bearing upon the case. It refers to bringing an action in an adjoining Division in the same county, a case entirely different from the present one. Again, the section has relation to an action for a debt. The present action is for an alleged tort and sounds in damages only. The plaintiff's claim stated, places this beyond doubt, and expressly precludes any idea of a waiver of the tort.

The contention to be dealt with is that inasmuch as the bailiff, the defendant Hicks, might, under the provisions of section 89, have been properly sued in the Division Court in which the suit is now pending, the cause of action not having arisen in the Division of which this is the Court, he, the defendant Hicks, is, for the purposes of the suit, to be considered as resident within this Division, and then, applying the provisions of section 81, it is argued that this is a case in which two defendants are sued, and one of them, the defendant Hicks, resided at the time the action was brought in this Division, and that both defendants are for these reasons properly sued in the Court in which the plaint is pending, although the other defendant Thompson resides at a distance from the Court, and from the Division in which the Court is, and in another county.

I am entirely unable to entertain this view, or to accede to this contention. The cause of action did not arise in the Division for which this Court is held, and neither of

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the defendants resides within that Division, or did so reside at the time the action was brought. I cannot so read or strain the words of the 89th section as to arrive at the conclusion that I am, for the purposes of this suit, to consider the defendant Hicks as resident in the Division when in fact he is not. This cannot, I think, be done without doing violence to the language of the statute.

Then, there does not appear to be any other contention —none was advanced—according to which the alleged jurisdiction of the Court can be made to appear.

I am, for reasons that I have endeavoured to give, of the opinion that the Court has not jurisdiction to entertain the action.

I have consulted the cases in our own Courts, *In re Thompson* v. *Hay*, 22 O. R. 583, 20 A. R. 379; *In re Brazill* v. *Johns*, 24 O. R. 209; *Re Olmstead* v. *Errington*, 11 P. R. 366, and some other cases, as well as the valuable work of Messrs. Bicknell & Seager, and the authorities referred to therein.

The order asked for will go with costs against the plaintiff Thomas A. Hill.

On April 5th and 6th, 1897, the plaintiff moved before the Divisional Court, consisting of ARMOUR, C.J., and FALCONBRIDGE, and STREET, JJ., by way of appeal from the above judgment.

J. E. Jones, for the plaintiff. No motion having been made under R. S. O. ch. 51, sec. 87, to transfer proceedings to the Division where defendants contend the action should be tried, this motion should be dismissed: *In re Watson* v. *Woolverton*, 22 O. R. 586, note; *In re Thompson* v. *Hay*, 20 A. R., at p. 384; *In re Brazill* v. *Johns*, 24 O. R. 209, is a different case, because there the order to transfer had been applied for and refused. *Re Olmstead* v. *Errington*, 11 P. R. 366, was decided before section 87 of the Division Courts Act was amended, and the language of it would not apply now to cases of territorial jurisdiction. Under sections 89 and 81 of the Division Courts Act the action was properly

brought. The right of action is against the two jointly: see Addison on Torts, 6th ed., p. 96. It is not proper to sue the bailiff in the only Division in which under a strict reading of section 81 action can be brought against his co-defendant. Thus by necessary intendment the provisions of section 89 must be extended to a bailiff's co-defendant, for the right to sue the defendants jointly would otherwise be taken away, and if sued separately judgment against one would be a bar to judgment against the other. Prohibition in any case cannot be directed as far as the action is against the bailiff. Argument.

W. H. Blake, for the defendants. [ARMOUR, C. J.—As the action could have been brought where the cause of action arose, where the bailiff belonged, against both him and the execution creditor, there should have been an order to transfer and not a prohibition: *In re Thompson* v. *Hay*, 20 A. R. 379.] Perhaps under section 290 the bailiff could have been so sued; but not under any other section. The remarks in *In re Thompson* v. *Hay* were only *obiter*. FERGUSON, J., followed *In re Brazill* v. *Johns*, 24 O. R. 209.

[ARMOUR, C. J.—I don't think that case shews a prohibition should be granted where there has been no application to transfer.]

In re Watson v. *Woolverton*, 22 O. R. 586, *n.*, referred to in *In re Thompson* v. *Hay*, is the only direct decision that there should be an application to transfer.

Per Curiam: We are not interfering with the judgment of the learned Judge. It may be he is quite right that it is only where the bailiff is sued alone that he can be sued in the nearest Division Court. But an application ought to have been made for a transfer of the suit to a proper Division Court, and until so made and refused no motion for prohibition will lie. The action might have been brought where the cause of action arose. There was jurisdiction to try it there, though the bailiff belonged to that Court.

Appeal allowed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

CANTELON v. THOMPSON ET AL.

County Court—Appeal to High Court from Order for New Trial—Law Courts Act, 1895—58 Vict. ch. 13, sec. 44 (O.).

Under sec. 44, sub-sec. 4, of the Law Courts Act of 1895, 58 Vict. ch. 13 (O.), where a new trial has been granted in a County Court action the opposite party may appeal from the order directing the new trial to a Divisional Court of the High Court of Justice.

Statement. THIS action was brought in the County Court of Middlesex, to recover damages for the wrongful dismissal of the plaintiff from the service of the defendants as a commercial traveller.

The jury found in favour of the plaintiff for $100 damages, and judgment was ordered to be entered for that amount; but the County Court, in term, upon the motion of the defendants upon the ground that the finding was against evidence, made an order setting aside the finding of the jury, and directing a new trial.

The plaintiff appealed from this order to a Divisional Court of the High Court, and his appeal came on for argument before ARMOUR, C. J., and FALCONBRIDGE, and STREET, JJ., on April 5th, 1897, when

Shepley, Q.C., for the defendants, objected that no appeal lay from the order in question, under sec. 44 of the Law Courts Act, 58 Vict. ch. 13 (O.), the material parts of which are as follows:—

44.—(1) The following is substituted for sec. 41 of the County Courts Act:—

1. Any party to an action in a County Court may appeal to a Divisional Court of the High Court of Justice from any judgment directed by a Judge of the County Court to be entered at or after the trial in any case tried by him either with or without a jury.

2. Instead of appealing to a Divisional Court of the High Court of Justice, either party may move before the County Court within the first two days of its next quar-

terly sittings for a new trial, or to set aside the judgment and enter any other judgment upon any ground. Argument.

* * * * * * * * * *

4. If a party moves before the County Court under clause 2 in a case in which he might have appealed to the High Court, he shall not be entitled to appeal from the judgment of the County Court to the High Court, but the opposite party shall be entitled to appeal therefrom to the High Court.

McEvoy, for the plaintiff, asked for time to answer the objection.

An adjournment was granted till April 7th, 1897, when *Douglas Armour*, for the plaintiff, contended that the word "judgment" in clause 4 was equivalent to "decision," and included an order such as was made here: Wharton's Law Lexicon, *sub voce*.

Shepley, Q.C., for the defendants, argued that, as "judgment" in clause 1 obviously did not include such an order as was made here, neither did "judgment" in clause 4 include such an order, but must be confined to a case where the County Court in term directed a different judgment to be entered from that entered at or after the trial; this was not such a judgment, but was merely an interlocutory order for a new trial. The legislative distinction between "judgment" and "decision" is emphasized by a comparison with the original statute giving an appeal, where "decision" is the word used: R. S. O. 1877, ch. 43, sec. 35.

The appeal was also argued on the merits subject to objection.

ARMOUR, C. J. (at the close of the argument):—

I think an appeal lies to this Court from the order of the County Court in term directing a new trial. The word "judgment" in clause 4 means the decision of the County Court in term, and I know of no reason why it

Judgment. Armour, C.J.

should not include an order for a new trial. On the merits, the appeal should be allowed.

STREET, J.:—

I agree.

FALCONBRIDGE, J.:—

I am inclined to the opinion that the appeal does not lie, but I think at all events that it should be dismissed. The discretion of the Court below in granting a new trial should not be lightly interfered with. The rule is clearly laid down in *Hunter* v. *Vanstone*, 6 A. R. 337; *Wilson* v. *Brown*, 7 A. R. 181.

Appeal allowed with costs.

A. H. F. L.

CITY OF KINGSTON V. KINGSTON, PORTSMOUTH, AND CATARAQUI ELECTRIC RAILWAY COMPANY.

Street Railways—Contract—Enforcement of—Municipal Corporations—Running Cars—Specific Performance—Mandamus—Action—Injunction—Declaration of Right.

The plaintiffs wished to force the defendants to keep their cars running over the whole of their line of railway, during the whole of each year, in accordance with the terms of the agreement between them set out in the schedule to 56 Vict. ch. 91 (O.):—

Held, that the agreement was one of which the Court would not decree specific performance, because such a decree would necessarily direct and enforce the working of the defendants' railway under the agreement in question, in all its minutiæ, for all time to come.

Bickford v. *Town of Chatham*, 16 S. C. R. 235, followed.

Fortescue v. *Lostwithiel and Fowey R. W. Co.*, [1894] 3 Ch. 621, not followed.

2. Nor would it be expedient to grant a judgment of mandamus for the performance of a long series of continual acts involving personal service and extending over an indefinite period.

3. The prerogative writ of mandamus is not obtainable by action, but only by motion.

Smith v. *Chorley District Council*, [1897] 1 Q. B. 532, followed.

4. To grant an injunction restraining the defendants from ceasing to operate the part of their line in question would be to grant a judgment for specific performance in an indirect form.

Davis v. *Foreman*, [1894] 3 Ch. 654, followed.

5. Nor was there any object in making a declaration of right under sec. 52, sub-sec. 5, of the Judicature Act, 1895, where the terms of the contract were plain and were confirmed by statute, and the only difficulty was that of enforcing them.

Statement.

THIS was an action brought by the municipal corporation of the city of Kingston against the defendants, a street railway company incorporated by 39 Vict. ch 74 (O.), and by supplementary Acts, 56 Vict. ch. 91 and 58 Vict. ch. 105.

By agreement dated 9th May, 1893, made between the plaintiffs and the defendants (the defendants being then designated the Kingston Street Railway Company), the defendants were authorized to construct and operate a single track iron or steel railway upon certain streets of the city of Kingston, subject to the terms and conditions particularly set forth in the agreement, which is contained in the schedule to 56 Vict. ch. 91.

The statement of claim alleged:

(4) That in the exercise of the powers conferred by the agreement, the defendants constructed a street railway

Statement.

along certain streets of the city, and, among others, from Alfred street along Princess street westward to the city limits, and the plaintiffs expended large sums of money in grading such streets and in preparing them for the tracks of the defendants' railway.

(7) That the defendants had for some years past, since the construction of their railway, been operating the same in part, and were at the time of the commencement of this action (17th February, 1897) operating their cars over a portion of their railway.

(11) That notwithstanding a demand made by the plaintiffs upon the defendants, the defendants neglected and refused to run their cars upon the portion of their railway extending along Princess street from Alfred street westward to the city limits, and the managing director of the defendants, after such demand, stated to officials and members of the council of the plaintiffs, that the defendants would not run either cars or sleighs upon such portion of the railway during the winter.

(12) That by reason of the defendants' failure to carry out their contract, the citizens of Kingston and others had suffered loss and been greatly inconvenienced.

The plaintiffs claimed an order for a mandamus commanding the defendants forthwith to commence and continue the running of the cars; or an order for the specific performance by the defendants of the agreement with respect to the portion of the railway in question; or an injunction restraining the defendants from ceasing to run their sleighs or cars over such portion of the railway, or restraining them from operating their railway or any part thereof within the city limits in violation of the agreement; or a declaration of the plaintiffs' rights under the agreement.

The statement of defence alleged:

(3) That the portion of the railway in question was very little used during the winter months, few people living along the line or adjacent to it, and it was very difficult to keep it free from snow and in good running order, owing

to the exposed situation of the same, and it was not expected or contemplated that it would or could be operated during such months, and it could not be so operated except at a great loss to the defendants. Statement.

(4) That the defendants did not run their cars along that portion of the railway during the winter of 1895 and 1896, for the reasons aforesaid, and the residents of Williamsville and the other citizens of Kingston and the plaintiffs acquiesced in the discontinuance of the cars for the reasons aforesaid.

(5) That the defendants ran their cars along the portion of the railway in question until early in January, and, for the reasons aforesaid, they then discontinued them, but they fully intended to run them again so soon as the weather should permit.

(6) That the plaintiffs should not be granted the relief asked, because of their acquiescence and delay in proceeding in the matter.

(7) That the citizens of Kingston and others had not suffered any loss or damage or been inconvenienced to any great extent, but the loss had been trivial.

(8) That the plaintiffs should not be granted the relief asked, because other and complete relief was offered to them by the agreement, sec. 20 of which provided that "should the said company neglect to run said cars on said railway or on any part thereof, * * the said corporation may, on giving notice, * * by resolution of the council thereof, declare that the said company has forfeited all privileges and rights which it may have acquired by this agreement, and may repeal the by-law connected therewith, and the said privileges and rights shall be forfeited accordingly and this agreement rescinded."

The action was tried before STREET, J., at the Kingston Assizes, on the 14th April, 1897, without a jury. No evidence was taken, and the case was argued upon the pleadings and admissions.

The defendants admitted that during the months of Jan-

Statement. uary, February, and March, 1897, they had not operated a portion of their line of railway, being that part of Princess street lying to the west of Alfred street, about thirteen hundred yards in length, although requested to do so; their reason being that the expense of keeping it clear of snow rendered it impossible to work, save at a loss. Before the action came on for trial, they had resumed running their cars regularly upon it.

John McIntyre, Q. C., for the plaintiffs.
Whiting, for the defendants.

April 21, 1897. STREET, J.:—

The plaintiffs wish to force the defendants to keep their cars running over the whole of their line of railway during the whole of each year, in accordance with the terms of the agreement between them, which is set out in full in the schedule to 56 Vict. ch. 91 (O.).

If the agreement is one of which the Court will grant specific performance, then the plaintiffs have a complete remedy by action for specific performance, and they have claimed that relief in the present action. They have also, in the alternative, claimed a right to have it enforced against the defendants, as a duty owed to the public, by mandamus.

The action for mandamus, as distinguished from the motion for the prerogative writ of mandamus, originated under the Common Law Procedure Act of 1856, and has been continued by the Judicature Act. When first introduced, it was said to be intended as a means of conferring upon Courts of law a limited jurisdiction by way of specific performance; and it has been abundantly established that it is not intended as a substitute for the prerogative writ, which must still be obtained upon motion, and not by writ. The exact limits of the jurisdiction to grant relief by way of mandamus in an action have not been clearly defined, but the rule, so well settled in applications for the

prerogative writ, that it will only be granted where there is no other adequate relief provided, seems equally applicable to the mandamus which may be obtained by action. Judgment. Street, J.

In the present case, if the plaintiffs are entitled to a judgment for specific performance of the defendants' contract with them, it will be unnecessary to consider the claim to a mandamus, for the relief under such a judgment will be complete.

I am of opinion, however, that I am precluded by the overwhelming preponderance of authority from pronouncing such a judgment in the present case, because I should have to direct, and enforce, the working of the defendants' railway under the agreement in question, in all its minutiæ, for all time to come; and, in the face of the line of authorities referred to in the judgment of Ritchie, C. J., in *Bickford* v. *Town of Chatham*, 16 S. C. R. 235, I think I must decline to do so.

It is true that in the case of *Fortescue* v. *Lostwithiel and Fowey R. W. Co.*, [1894] 3 Ch. 621, Mr. Justice Kekewich directed the entry of a judgment going a long distance towards justifying the order here asked for. He admits, however, that in doing so, he is going beyond the previous authorities. I do not feel justified in following him through the gap he has made in a wall hitherto treated as a boundary, and I hesitate to pronounce a judgment which so many Courts have considered inexpedient.

If it is inexpedient to grant the relief under the head of specific performance, upon what ground can it be held that it would be expedient to grant it under the head of mandamus? The enforcement of a judgment for the performance of a long series of continual acts, involving personal service, and extending over an indefinite period, would be equally difficult in either case: *Benson* v. *Paull*, 6 E. & B. 273; *Norris* v. *Irish Land Co.*, 8 E. & B. 512; *Bush* v. *Beavan*, 1 H. & C. 500; *Glossop* v. *Heston, etc., Board*, 12 Ch. D. 102, 122; *Baxter* v. *London County Council*, 63 L. T. N. S. 767.

I am not required to consider whether the plaintiffs are

Judgment.

Street, J.

entitled to the prerogative writ of mandamus here, because it has been established that that writ is not obtainable by action, but only by motion: *Smith* v. *Chorley District Council*, [1897] 1 Q. B. 532.

The plaintiffs further asked, in the alternative, for an injunction restraining the defendants from ceasing to operate the part of their line in question. To grant this would be plainly to grant a judgment for specific performance in an indirect form: *Davis* v. *Foreman*, [1894] 3 Ch. 654.

A declaration of right was also asked for under the 5th sub-section of the 52nd section of the Judicature Act, 1895, but I can see no object in making such a declaration in the present case, where the terms of the contract are plain and are confirmed by statute, and where the only difficulty is that of enforcing them.

No evidence was offered of any actual damage having been sustained by the plaintiffs upon which to found a reference.

I must dismiss the action with costs, but it must be without prejudice to any future action in respect of further breaches of the agreement in question, or any motion for mandamus in respect of past or future breaches.

E. B. B.

RE GEROW V. HOGLE.

Prohibition—Division Court—Procedure—Issue of Blank Summons—R.S.O. ch. 51, sec. 44.

The issue by the clerk of a Division Court of a summons with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions, though contrary to the provisions of sec. 44 of the Division Courts Act, R. S. O. ch. 51, does not affect the jurisdiction of the Division Court, nor afford ground for prohibition, but is a matter of practice or procedure to be dealt with by the Judge in the Division Court.

Statement.

MOTION by the primary debtor and the garnishee in a garnishing plaint in the 2nd Division Court in the county of Ontario for an order prohibiting the Judge and clerk from proceeding further in the plaint, upon the ground that the summons with which the plaint was begun was not filled up at the time of its issue with the name of the garnishee, a blank space being left therefor, which was afterwards filled up by the bailiff who served it, contrary to sec. 44 of the Division Courts Act, R. S. O. ch. 51, providing that "the clerk shall issue all summonses, which shall be by him filled up and shall be without blanks either in date or otherwise at the time of delivery for service."

The motion was argued before BOYD, C., in Chambers, on the 23rd April, 1897.

G. H. Stephenson, for the applicants, relied on sec. 44 above quoted, and contended that the omission deprived the Court of jurisdiction.

Du Vernet, for the primary creditor, contended that there was not even an irregularity, because the bailiff was deputed by the clerk to fill up the summons; but if there was an irregularity, it was in a matter of practice or procedure, which the Judge in the lower Court could deal with, and afforded no ground for prohibition: *Re Fee* v. *McIlhargey*, 9 P. R. 329; *Re McKay* v. *Palmer*, 12 P. R. 219; *Cox* v. *Lord Mayor of London*, 2 H. & C. 401; Bicknell & Seager's Division Courts Act, pp. 55-60.

Judgment.

Boyd, C.

April 24, 1897. BOYD, C. :—

The provisions of sec. 185 of the Division Courts Act, R. S. O. ch. 51, relating to garnishee proceedings before judgment are not so stringent as those in sec. 44 relating to the ordinary summons, but probably nothing turns on this. In either case the issue of the writ with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions—where, *e. g.*, there is uncertainty about the name—does not affect the jurisdiction of the Division Court, but is only a matter of procedure, which may or may not be irregular or justifiable according to circumstances. It may be so wrong as to warrant the setting aside of the process, or so pardonable as to be ratified or amended by the Judge, upon application to set aside or to cure. But in any aspect it is no more than a point of practice, not affording a foundation to move in the Superior Court by way of prohibition. The authorities are uniform on this: *Re Clarke*, 2 U. C. L. J. N. S. 266; *Re McLean* v. *McLeod*, 5 P. R. 467; *Re Fee* v. *McIlhargey*, 9 P. R. 329.

As put by Grove, J., in *Barker* v. *Palmer*: "Prohibition will not lie, because this is merely a matter of procedure,—the interpretation of a statute on a question of procedure;" the point there being as to the meaning and effect of a clause in the County Court Act: 30 W. R. 59; *S. C.*, but not so fully given, in 8 Q. B. D. 9, 11.

The motion is refused with costs.

E. B. B.

[DIVISIONAL COURT.]

REGINA V. ROBINSON.

Criminal Law—Evidence—Non-Support of Wife—Criminal Code, 1892, sec. 210, sub-sec. 2—Lawful Excuse—Agreement.

Upon an indictment of the prisoner under sec. 210, sub-sec. 2, of the Criminal Code, 1892, for omitting without lawful excuse to provide necessaries for his wife, evidence is admissible on behalf of the prisoner of an agreement between him and the person who became his wife, at the time of the marriage, that they were to live at their respective homes and be supported as before the marriage until the prisoner obtained a situation where he could earn sufficient for their maintenance; STREET, J., dissenting.

CROWN case reserved by FERGUSON, J., at the Sandwich Spring Assizes, 1897. Statement.

The prisoner was indicted and convicted under sec. 210, sub-sec. 2, of the Criminal Code, 1892, which is as follows: "Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting, without lawful excuse, so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured by such omission."

Evidence was offered on behalf of the prisoner that at the time the marriage took place it was agreed between the prisoner and the person who became his wife that they were to live at their respective homes in the city of Windsor and be supported as before the marriage until the prisoner obtained a situation where he could earn sufficient for their maintenance. This evidence was rejected. The question reserved was whether it should have been admitted.

The case was heard by ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 10th May, 1897.

F. C. Cooke, for the prisoner, contended that evidence of such an agreement was admissible, citing *Regina v. Nasmith*, 42 U. C. R. at p. 249.

J. R. Cartwright, Q. C., for the Crown, contended that, although such evidence might be given in answer to an action by the wife for alimony, it could not be given in

Argument. answer to an indictment of the prisoner for not performing his duty to the public. He cited *Regina* v. *Plummer*, 1 C. & K. 600; *Hunt* v. *DeBlaquière*, 5 Bing. 550.

ARMOUR, C. J. (at the close of the argument):—

The case reserved presents for our consideration the broad question whether, under any state of circumstances that might be shewn, or under any state of facts that might be proved, the evidence offered was admissible; and I think it undoubtedly was.

The evidence is not an absolute answer to the indictment, of course, but it is evidence to go to the jury of a lawful excuse; it is evidence which tends to shew a lawful excuse. It may not be decisive of the case, but it should have been admitted.

FALCONBRIDGE, J.:—

I quite agree. It is not necessary, to render a particular item of evidence admissible, that that particular item must of itself, if established, furnish a complete answer to the charge. Whether it does or does not of itself constitute a defence, or only a link in the chain of defence, or no defence at all, must depend on the circumstances; but I do not see how the evidence could be excluded in view of the judgment in *Regina* v. *Nasmith*, 42 U. C. R. 242.

STREET, J.:—

It is quite consistent with the evidence offered at the trial, as stated in the case submitted to us, that the prisoner may since his marriage have become possessed of ample means. It is, of course, a defence if the prisoner proves a present inability to support his wife; it is not a defence if he merely prove, as he proposed to do here, that at some former period, when he was not able to support her, they had agreed that he should not be called upon to

support her until he was able. The offence is a public one, and cannot be met by a mere agreement between the husband and wife. Judgment. Street, J.

I cannot see that the evidence is admissible in any view.

New trial directed under sec. 746 of the Code; STREET, J., dissenting.

E. B. B.

RE CLAGSTONE AND HAMMOND.

Land Titles Act—R. S. O. ch. 116, secs. 61, 131—Cautioner—"Interest"—Appointee of Purchaser—"Owner"—Implied Revocation of Appointment.

The provision of the Land Titles Act, R. S. O. ch. 116, permitting registration of cautions against registered dealings with lands, sec. 61, applies to "any person interested in any way" in the lands:—

Held, that, as the Land Titles Act relates mainly to conveyancing, whatever dealing gives a valid claim to call for or receive a conveyance of land is an "interest" within the scope of the statute; and an appointee or nominee in writing of the purchaser of an interest in lands has a *locus standi* as cautioner; and where such an appointee registered a caution as "owner," and there was no doubt of the substantial nature of his claim, his caution was supportable as against any objection in point of form, by virtue of sec. 131.

Held, also, that an action brought by the original purchaser, after the registration of her appointee's caution, and pending proceedings to set it aside, for specific performance of a contract to convey to her the interest in respect of which she had made the appointment, did not, under the circumstances in evidence, put an end to such appointment.

AN appeal by James Hammond from an order of the local Master of Titles at Rat Portage dismissing an application by the appellant for the termination of a caution filed by Paul Clagstone, of New York, covering parcels numbers 1073, 967, and 968 in the freehold register for the district of Rainy River, the appellant being the registered owner of such parcels, and the cautioner claiming to be the owner of an undivided one-third interest therein. The appeal was taken upon the ground that Clagstone had no right to register a caution in his own name, he having, as alleged, no interest in the lands in question Statement.

Statement. other than as agent for his mother, Mrs. Abbie C. Morrison, who had since the registration of the caution begun an action in her own name against the appellant to compel him to perform an agreement for a transfer to her of the same interest as that claimed by the cautioner. The facts are stated in the judgment.

The appeal was argued before BOYD, C., in Chambers, on the 23rd April, 1897.

George Ross, for the appellant, referred to secs. 61 and 62 of the Land Titles Act, R. S. O. ch 116; Rules 19, 21, 43, and form 3, in the schedule to the Act; *Maddison* v. *Alderson*, 8 App. Cas. 467; *Humphreys* v. *Green*, 10 Q. B. D. 148.

Moss, Q. C., for Clagstone, referred to sec. 57, sub-sec. 3, and secs. 61 and 131 of the Land Titles Act, R. S. O. ch. 116; Sweet's Law Dict., p. 442, "Interest."

Ross, in reply, referred to sec. 62, sub-secs. 1, 2, 3; *Taylor* v. *Town of Normal*, 88 Ill. 526.

April 27, 1897. BOYD, C.:—

The statute permitting registration of cautions against registered dealings with lands, R. S. O. ch. 116, sec. 61, applies "to any person interested in any way in any land." In the Rules the wording is rather more restricted in speaking of the cautioner's "interest in such land:" *ib.*, p. 1133, Rule 19. "Interested in any way in land" is of wider compass than the phrase "interest in land," and I think, in the case of any variance, the words of the Act should be used to expand the words of the Rules. The cautioner is to be a person interested in the lands; in what way interested does not matter, so long as the interest is one recognizable by law. Mere relationship to the owner would not be enough, but any claim upon, or derived from, the owner, or one who has an estate or interest in the land in respect of which legal or equitable relief could be given, would be sufficient.

Judgment.

Boyd, C.

Here the patentee Hammond had agreed to sell and convey one-third of the land to Mrs. Morrison, or to any one named by her (letter 2nd December, 1895); she had paid him, and had in writing directed that the conveyance should be made to her son (letter 26th August, 1896). The son appeared upon the scene and presented the deed for execution, which was refused by Hammond; and then, in September, he files the caution as one interested in the land. I think he was so, as being the nominee in writing of the purchaser, to whom it was the duty of Hammond to make the conveyance.

The caution was filed by Clagstone as owner. This was based upon the fact that the purchase was made for his benefit in the intention of his mother, and that she directed the deed to be made by him in August, 1896.

Pending proceedings to set aside the caution, an action was brought by Mrs. Morrison for specific performance, which in one way may have put an end to the appointment to her son; yet it is beyond doubt that a deed, if then made to her son, would have ended the litigation. There was no conflict between them, and it is not set up in the defence that any real embarrassment has arisen because of the finding of the local Master of Titles that Clagstone was entitled to have a conveyance of the one-third interest.

The evidence shews that Mrs. Morrison was buying for her son, and this is known all through. In one letter Hammond speaks of conveying to her in trust for her son (19th November, 1895).

In brief, the Land Titles Act is one relating mainly to conveyancing; whatever dealing gives a valid claim to call for or to receive a conveyance of land is an "interest" within the scope of the statute. As appointee or nominee of the purchaser of the one-third interest, the cautioner had, in my opinion, a *locus standi* under the Act.

The appeal is, therefore, dismissed with costs.

E. B. B.

LEWIS v. DOERLE ET AL.

Will—Charitable Bequest—Validity of—Lands in Ontario—Foreign Lands—Debts and Testamentary Expenses—Liability for—Realization.

A testator, domiciled in a foreign country, died in 1891, possessed of certain lands and personal estate in that country, and also of lands in Ontario. His personal estate was insufficient to pay his debts. By his will, after specific bequests and devises, he gave the residue of his estate, real, personal and mixed, wherever situated, to his trustees, to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights, or, in case of such trust becoming inoperative, to his heirs-at-law :—

Held, that the devise of lands, so far as Ontario was concerned, was void and inoperative.

2. That the trustees held the lands to the use of the heir-at-law until satisfaction should be made thereout for the charges thereon of debts and testamentary expenses, and the heir-at-law was entitled to a conveyance thereafter.

3. That the Ontario lands were liable to contribute *pari passu* with the other lands for the payment of debts and testamentary expenses.

4. That the proportion chargeable on Ontario lands might be raised by sale of an adequate part, or the rents might be applied therefor.

Statement. SPECIAL CASE. The action was brought by Louisa E. F. Lewis against the executors and trustees of and under the will of John D. Lewis.

For the purposes of the action the parties agreed upon a statement of facts, which may be summarized as follows :—

John D. Lewis, who was in his lifetime and at the time of his death a citizen of the United States of America, domiciled at the city of Philadelphia, in the State of Pennsylvania, one of the United States of America, being an attorney-at-law, departed this life on the 12th March, 1891, having first made and executed his last will and testament, bearing date the 29th May, 1889, which said will was in full force and effect at the time of his death, and the material portions of which were as follows :—

Now, as to my estate real, personal, and mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I devise, bequeath, and dispose thereof in the manner following :

Statement.

IMPRIMIS: I will and direct that my body be respectably buried in accordance with my station and profession in life and agreeable to the desire of my beloved wife, in case she survives me, and that my just debts and funeral expenses be paid according to the rule of the Orphans Court of said county.

ITEM: I give, devise, and bequeath to my beloved wife all my household furniture, etc., or in case she should die in my lifetime, then I bequeath the same to my children, their heirs and assigns, share and share alike, *per stirpes*.

ITEM: I devise my dwelling-house and lot of land (in Philadelphia), and where I now reside, to my beloved wife during her natural life, and from and after her death to all my children, their heirs and assigns, in equal shares, *per stirpes*.

ITEM: I give, devise, and bequeath to my son Richard H. Lewis all my wearing apparel, etc.

ITEM: I give and bequeath to my daughter Louisa E. F. Lewis all my diamonds and other stones, etc.

ITEM: I bequeath the sum of $500 to my brother William J. Lewis, of Toronto, Canada, or in case he should die in my lifetime, then I bequeath the same to his child or children living at my decease, and if more than one, in equal shares to each of them.

ITEM: All the rest, residue, and remainder of my estate, real, personal, and mixed, in the cities of Toronto, Canada, Boston and Commonwealth of Massachusetts, and Philadelphia, or wherever the same may be at the time of my decease, I give, devise, and bequeath unto my executors, hereinafter named, their (successors), heirs and assigns, forever, in trust for the following uses: I direct my said executors to put and keep in good tenantable repair all my rentable property or estate and to keep the same well rented; to collect all rents thereof; and to pay therefrom, as may be deemed necessary by my said executors, all liens, charges, and indebtedness on the said estate.

ITEM: I further bequeath to my beloved wife from the rents thereof, for her sole and separate use, an annuity of

Statement.

$500 per year during her natural life. All of the above named bequests to my beloved wife are to be in lieu of her dower at common law.

ITEM: I further bequeath to each of my children, Louisa and Richard, and any who may survive my present marriage life, from the said rents, an annuity of $400 each per year; and from and after each of their decease, with respect to the principal of each share, viz., an amount equal to $6,700 to each, for such person or persons and for such uses and purposes as each of my said children, by an instrument in writing in the nature of a last will and testament, may direct, and for want of such direction, then in trust to grant and convey the said amount or share of each who so fails to make such direction, to such person or persons as would have been entitled to the same in case he, she, or they had departed this life intestate, seized of said share or shares in fee, and for such estate or estates, and in such shares and proportions as such person or persons would in such cases be entitled to by the intestate laws of Pennsylvania.

And now, whereas it has been my lifelong experience and observation that much of the prosperity, enterprise, and progressiveness of the coloured race in America has been injured by reason of prejudice and discrimination against them, I, therefore, direct my said executors to make due provisions for the payment of all the foregoing bequests, liens, and indebtedness, as soon as may be conveniently done by them, from the said rents and income, or by a charge on the same.

ITEM: Then I bequeath all the rest, residue, and remainder of my estate, real, personal, and mixed, to my trustees hereinafter named, their heirs and assigns, in trust, for the following charitable uses, to wit: To promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights, as provided by the first section of the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Acts of Congress based thereupon, and so also of the Fifteenth

Amendment thereof; and such as are publicly accorded all other classes of American citizens. Statement.

ITEM: With this desire, I empower, authorize, and direct the said trustees hereinafter named (and their successors) to form and charter a charitable corporation under the laws of Pennsylvania, having its headquarters in the said city of Philadelphia, and to be named the "Lewis Protective Bureau of Civil Rights," its objects to be as aforesaid, to protect, aid, and secure to coloured citizens or coloured persons in the United States their civil rights as applicable to all other classes of American citizens, how and wherever the same may be denied one or more of them by reason of race, colour, or condition; with powers to employ all legal and moral means to destroy and prevent such discrimination, and to give substantial aid in money or otherwise, within the discretion of the said corporation, to any person or persons who seek redress from such discrimination, and who shall satisfy the said corporation that he, she, or they are entitled to such aid. It is my desire that the executive work of this corporation be principally applied to the prevention of discrimination by the well-known persons and places, viz., labour organizations, common carriers, hotels, business houses, schools, all places of moral amusement, cemeteries, and in defence of all other rights which any respectable citizen is entitled by moral right.

ITEM: In case the said trust last named cannot be executed substantially as herein set out, or if at any time it should become inoperative or impracticable by change of custom, process of law, or otherwise, then my will is that my trustees hereinafter named, their heirs, executors, administrators, or assigns, and their successors, shall grant, convey, and assign in fee all the said rest, residue, and remainder of my estate bequeathed in the last-named trust to said charity, real, personal, and mixed, whatsoever and wheresoever, to my heirs-at-law in such shares and proportion as they would be entitled to under the intestate laws of Pennsylvania.

Statement.

The will was proved in Philadelphia, and ancillary letters probate were afterwards granted in Ontario.

The testator at the time of his death, in addition to certain lands and personal estate, situated in the United States of America, was seized in fee simple of lands in the city of Toronto, in the Province of Ontario.

After the death of the testator, and upon the filing of the first account of his executors in the Orphans' Court of the county of Philadelphia, being the proper Court in that behalf which had jurisdiction in respect of the administration of the trusts of the will and in respect of the construction thereof, and before that Court a balance appearing for distribution, such balance was claimed by Richard H. Lewis and Louisa E. F. Lewis, who were the heirs-at-law of John D. Lewis, on the ground that the provision in the will devising the residue of the estate of the testator to "promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights" was invalid and void, but that Court in construing the will decreed that the trust was valid, and awarded the balance in accordance therewith, and such decree was on appeal confirmed by the Supreme Court of Pennsylvania: *Lewis's Estate*, 152 Pa. St. 477.

The testator left him surviving his widow, Mary Lizzie Lewis, and two children by a former wife, viz., Richard H. Lewis and Louisa E. F. Lewis, his sole heirs-at-law.

The estate of the testator, both in the Dominion of Canada and in the United States, was subject to dower and statutory interest in the nature thereof of his widow, she having elected not to take the provision for her benefit contained in the will.

The testator left some personal property, but not sufficient to pay all of his debts; and also left certain real estate in the city of Philadelphia.

The personal estate of the testator having proved insufficient to pay all his debts, and it having become necessary to resort to his real estate for payment of debts, the executors and trustees, under the authority of the Orphans'

Court, being the proper Court in that behalf, borrowed money to pay the remaining outstanding debts and obligations of the testator due at the time of his death, and mortgaged the lands in Philadelphia, and such mortgage still remained unpaid and a charge upon the lands and a liability of the executors and trustees. Statement.

The estate of the testator, both in the Dominion of Canada and in the United States, including the lands situate in the city of Toronto, was subject to the payment of the debts and obligations referred to.

Richard H. Lewis, son of the testator, died a bachelor, on the 8th January, 1896, domiciled in Boston, in the State of Massachusetts, one of the United States of America, having first duly made and executed his last will and testament, which was in full force at the time of his death, and by such will gave and devised all his property, both realty and personalty, to his sister Louisa E. F. Lewis.

The will of Richard H. Lewis was duly admitted to probate, and all debts and charges against his estate were paid and satisfied. Louisa E. F. Lewis, as one of the children and heirs-at-law of the said John D. Lewis, and as sole devisee and legatee under the will of Richard H. Lewis, was entitled to all the estate of John D. Lewis to which his heirs-at-law might be entitled.

It was contended by the plaintiff that under the laws in force in the Province of Ontario, the devise under the will of John D. Lewis of the residue of his estate to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights was a charitable gift, and was void for uncertainty and for other reasons apparent on the face of the will.

It was also contended on the part of the plaintiff that such devise, being a charitable gift, was in any event inoperative and void and contrary to the laws in force in the Province of Ontario, so far as it purported to affect the lands situate in the Province of Ontario, and that such lands were the property of the plaintiff.

Statement. The opinion of the Court was desired on the following questions:—

(1) Under the law or laws in force in the Province of Ontario, is the devise of the residue valid or void?

(2) Is the plaintiff entitled to a conveyance to her of the said lands, to be executed to her by the trustees in fee, for her own use and benefit?

(3) Are the said lands liable to bear a proportionate part of the mortgage debt created by the executors and trustees in order to raise money to pay and discharge the testator's debts, and, if so, what proportion?

(4) If the said lands are liable to bear a portion of the said mortgage debt, in what manner should such portion be raised out of the said lands:

(*a*) In case the said devise is valid;

(*b*) In case the said devise is void and the executors and trustees are required to convey the said lands to the plaintiff?

The case was heard by BOYD, C., in Court, on the 20th April, 1897.

W. Cassels, Q. C., for the plaintiff, referred to the fact that the testator died before the Mortmain and Charitable Uses Act, 55 Vict. ch. 20 (O.), and cited *Lewis's Estate*, 152 Pa. St. 477; *Re Doetsch*, [1896] 2 Ch. 836; *Re Kloebe*, 28 Ch. D. 175.

Moss, Q. C., for the defendants, referred to *Farewell* v. *Farewell*, 22 O. R. 573; *In re Hewit*, [1891] 3 Ch. 568; *Ker* v. *Ker*, Ir. R. 4 Eq. 15 (1869); *Wood* v. *Ordish*, 3 Sm. & Giff. 125; Seton on Judgments and Orders, 5th ed., p. 1406.

April 20, 1897. BOYD, C.:—

The special case puts questions which I answer thus:—

1. The devise of lands by the residuary clauses of the will, in so far as Ontario is concerned, is void and inoperative.

2. The trustees hold the lands to the use of the plaintiff until satisfaction is made thereout for the charges thereon of debts and testamentary expenses mentioned in the next answer, and thereafter the plaintiff is entitled to a conveyance of the same. Judgment. Boyd, C.

3. These lands are liable to contribute *pari passu* with the other lands of the testator in any of the United States, for the payment of his debts and testamentary expenses.

4. The ratable proportion chargeable on Ontario lands for this purpose may be raised by sale of an adequate part, or, if it is deemed more advisable by the trustees, the rents may be applied therefor till full payment is made.

E. B. B.

[DIVISIONAL COURT.]

WILSON V. MANES.

Municipal Elections—Returning Officer—Duties—Refusal to Deliver Ballot Paper to Voter—Wilful Act—Absence of Malice or Negligence—Liability—Consolidated Municipal Act, 1892, secs. 80, 168.

The plaintiff's name was properly entered on the last revised assessment roll of a municipality as a tenant of real property of the value entitling him to vote at a municipal election under Consolidated Municipal Act, 1892, sec. 80, and was entered on the voters' list, but after the final revision thereof, he ceased to be the tenant and to occupy the property, although he continued to reside in the municipality and was the owner of real property as a freeholder of the value entitling him to vote, and was such freeholder at the time of an election. At such election, he demanded a ballot paper and was willing to take the oath for freeholders, but the defendant, the returning officer, refused to furnish him with a ballot or to permit him to vote unless he took the oath required for tenants:—

Held, that the defendant's duties were merely ministerial, and that an action for a breach thereof was maintainable without any proof of malice or negligence; that the plaintiff was entitled to vote at such election, and that the defendant's refusal to allow him to vote constituted a breach of his duty, and rendered him liable to the penalty given by section 168, and also to damages at common law.

THIS was an appeal by the defendant from the judgment of ARMOUR, C.J., in an action tried by him without a jury, at London, at the Spring Assizes of 1896. Statement.

Statement. The action was brought against the defendant to recover the penalty of $400, imposed by section 168 of the Consolidated Municipal Act, for an alleged wilful refusal of the defendant, who was returning officer at a municipal election, held in the village of Parkhill, to furnish a ballot paper to the plaintiff, or to permit him to vote at the election, although entitled so to do, and although he had offered to take the proper oath to be administered to him according to the provisions of the Act. The statement of claim also contained allegations sufficient to support a cause of action as at common law against the defendant for his refusal to furnish the ballot paper, and to permit the plaintiff to vote, his refusal to do so, being alleged to have been malicious.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment:

May 25th, 1896. ARMOUR, C. J.:—

The plaintiff was upon the voters' list, and was, in my opinion, entitled to vote at the election and no question of his qualification should have been raised, except to ascertain whether he was the same person as was intended to be designated in the list of voters: Consolidated Municipal Act, 1892, sec. 82.

And the plaintiff was entitled to select for himself any one of the forms of oath contained in sections 102 to 105, both inclusive, whatever might have been the description either in the voters' list or assessment roll, as to the qualification or character in respect of which he was entered upon the list or roll: sec. 105*a*.

And the oath so selected, should have been administered by the defendant at the request of any candidate or his authorized agent, and no enquiries should have been made of the plaintiff, except with respect to the facts specified in such oath: sec. 106.

I find that the defendant in refusing, as I find he did,

to permit the plaintiff to vote at the said election, and in refusing, as I find he did, to administer the oath selected by the plaintiff, was guilty of a wilful misfeasance, and of a wilful act and omission in contravention of the said Act, and that the plaintiff is entitled to recover from the defendant the penalty imposed by the said Act of four hundred dollars. Judgment. Armour, C.J.

I also find that the plaintiff is entitled to recover damages from the defendant for the cause of action set forth in the seventh paragraph of the statement of claim, and I assess such damages at the sum of four hundred dollars.

The duties to be performed by the defendant as deputy returning officer for the breach of which he was sued in this action, were purely ministerial, and for the breach of such a duty, an action lies without malice: *Pickering* v. *James*, L. R. 8 C. P. 489.

The term "wilful," is used in the Consolidated Municipal Act of 1892, sec. 168, in the sense of "intentional," in my opinion, and that it was the intention of the defendant to refuse to allow the plaintiff to vote, there could be no doubt.

It may be that the defendant was not guilty of "wilful misfeasance," within the meaning of those words as interpreted by Boyd, C., in *Johnson* v. *Allen*, 26 O. R. 550, but he was certainly guilty of a wilful act and omission, and I think the true interpretation of the word "wilful" is that put upon it by Bowen, L. J., in *Re Young and Harston's Contract*, 31 Ch. D. 168, 174.

This provision of law would be of little use if it were necessary for the party aggrieved to prove that the person refusing his vote intended to do so contrary to his own conviction. *Walton* v. *Appjohn*, 5 O. R. 65, shews that notice of action was not necessary.

I have assessed the damages for the cause of action set forth in the seventh paragraph of the statement of claim, merely in order that there may be no technical difficulty in the way of the plaintiff recovering for one or other of the causes of action—that upon the statute or that upon

Judgment. Armour, C.J.

the common law; but it is not my intention that more than one sum of four hundred dollars shall be recovered in this action with costs of suit.

The learned Chief Justice made the following endorsement on the record.

"I direct that judgment be entered in this cause at the end of one month from this date for the plaintiff against the defendant for the sum of $400 damages, to be entered generally; or, if the ultimate judgment of the Court shall be that the plaintiff is entitled to recover either upon the statute only, or at common law only, then in respect of that, in respect of which it is determined that the plaintiff is entitled to recover, with full costs of suit."

From this judgment the defendant appealed to a Divisional Court, composed of MEREDITH, C. J., ROSE, and MACMAHON, JJ.

On October 26, 1896, the appeal was argued.

E. R. Cameron, supported the appeal.

Aylesworth, Q. C., contra.

The facts and arguments sufficiently appear in the judgments. The following authorities were referred to: *Johnson* v. *Allen*, 26 O. R. 550; *Walton* v. *Appjohn*, 5 O. R. 65, 81; *Lewis* v. *Great Western R. W. Co.*, 3 Q. B. D. 195; *Re Mayor of London and Tubbs*, [1894] 2 Ch. 524, 536; *Pryce* v. *Belcher*, 16 L. J. N. S. C. P. 264; *Regina ex rel. Wallis* v. *Bostwick*, 2 U. C. L. J. 166; *Election Case*, 8 U. C. L. J. 76; *Walsh* v. *Montague*, 15 S. C. R. 495; *Young* v. *Smith*, 4 S. C. R. 494.

March 1st, 1897. MEREDITH, C. J.:—

As long as the returning officer was treated as more than a ministerial officer in respect of his duties at the election, it was necessary in order to maintain an action against him by one who had been wrongly deprived of his

right to vote by his conduct to allege and prove malice, but we are, in my opinion, bound by the case of *Walton* v. *Apjohn*, 5 O. R. 65, to hold that the duties of the defendant in taking the votes at the polling place at which he was returning officer, were so far, at all events, as the matters with respect to which the plaintiff complains, merely ministerial, and being merely ministerial, an action lies for breach of them without malice or negligence: *Pickering* v. *James*, L. R. 8 C. P. 489. Judgment. Meredith, C.J.

The plaintiff is, therefore, entitled to recover on the second branch of his case, unless he had no right to vote, in which case he would not be entitled to recover either as a person aggrieved, under section 168, or at common law: *Pryce* v. *Belcher*, 4 C. B. 866, 880.

It was contended on the part of the defendant, that the plaintiff had not the right to vote.

The facts on this branch of the case are these: The plaintiff was properly entered upon the last revised assessment roll of the municipality, in respect of real property of the value required by section 80 of the Act; and his name appeared on the proper voters' list to be used at the election, as a person qualified to vote at municipal elections. He had, however, after the final revision of the voters' list, ceased to be tenant of and to occupy the property in respect of which his name was entered upon the assessment roll, though he continued to reside in the municipality, and he had become possessed of real property as a freeholder, and was a freeholder in his own right in the municipality at the time of the election.

This objection is, I think, not well founded.

Section 79 of the Act deals with the qualification of voters. Every one of the requisites of this section, the plaintiff possessed; he was of the full age of twenty-one years, and a British subject; he was rated to the amount required on the revised assessment roll of the municipality, upon which the voters' list used at the election, was based, for real property held in his own right; and he was at the date of the election in his

Judgment.

Meredith, C.J.

own right, a freeholder of the municipality; and there is nothing in the oath which may be required to be taken by a person claiming to vote in respect of a freehold (sec. 102) that prevented him, on the facts to which I have referred, from taking that oath. Why then was he not entitled to vote? As I understand the contention of the defendant, it is, that being assessed and entered on the voters' list as a tenant, the plaintiff could not properly vote as a freeholder unless the freehold were in respect of the same real property as that of which he had been tenant, and that he could not vote as a tenant because he had not been for one month next before the election, and was not at the date of the election, a tenant in the municipality: see clause 2, sub-sec. 1, sec. 79.

It is, I think, impossible to give effect to this contention of the defendant, without reading into the Act something which is not to be found there. I can see nothing in the Act that would warrant us in holding that the right of the plaintiff to vote was limited in the way contended for.

Section 105*a*, entitled the voter to select for himself any one of the four forms of oath prescribed by the Act: "Whatever may be the description either in the voters' list or assessment roll, as to the qualification or character in respect of which he is entered upon the list or roll."

The policy of recent legislation, has been to have all questions of qualification settled before or at the time of the revision of the voters' list, and to make the revised voters' list conclusive as to the right of every one named therein to vote, subject to his taking, if required to do so, the prescribed oath, and subject with regard to municipal elections, to the conditions and restrictions mentioned in section 79, having reference to matters subsequent to the revision of the voters' list.

The plaintiff's name was entered upon the proper voters' list. He had a right under section 105*a*, to select the form of oath for himself; he selected the freeholder's oath, and there was, as I have said, nothing in it which consistently with the facts of his case he could not truthfully depose

to; and it appears to me, therefore, that he had not only the right to require the returning officer to furnish him with a ballot, but the right to vote in the sense in which the right to vote is spoken of in *Pryce* v. *Belcher*. Judgment. Meredith, C.J.

The damages are large, if the defendant is to be treated as having acted, though mistakenly, in good faith, but it is to be borne in mind—that he undertook the duties of the office—that the direction of the statute is plain and explicit as to the right of the person claiming to vote to select any one of the four forms of oath prescribed, and that that direction was disregarded, and the plaintiff deprived of his right to exercise his franchise. I cannot, therefore, say that the learned Chief Justice erred in assessing the damages at the sum at which he assessed them.

In the view I have taken, it is unnecessary to consider whether the plaintiff was, at the date of the election, and had been for one month next before the election, a householder in the municipality within the meaning of clause 2 of sub-sec. 1 of sec. 79; nor is it necessary to determine whether the act of the defendant complained of, was wilful within the meaning of section 168, and I do not express any opinion on either point.

The result is, that the appeal must be dismissed and with costs; but having regard to the general importance of the questions raised, the defendant should have leave to appeal if so advised.

ROSE, J.:—

I agree that the plaintiff had a right to vote, and also that if required to take an oath he had the right to select for himself the form of oath. There is no finding of malice against the defendant.

There is no evidence that there was any request made by either of the candidates or his authorized agent that an oath should be administered to the plaintiff. If there was no such request, the plaintiff had a right to vote without taking an oath, and the discussion as to whether he could

Judgment.
Rose, J.

properly take the "owner's-oath," as it was called, or the "tenants' oath," was irrelevant, and the expression of opinion on the question by the defendant was immaterial.

The plaintiff said that after he went into the booth, the scrutineer on the "opposite side," objected to his vote on the ground that the plaintiff was not a tenant. The plaintiff admitted that he was not a tenant, but said he was an owner, and demanded a ballot and was prepared to take the owner's oath.

On this a discussion arose, the defendant saying that he could administer to the plaintiff no oath except the tenant's oath, and the plaintiff refusing to take the tenant's oath, then, according to the plaintiff's evidence, the defendant instructed his clerk to write opposite the plaintiff's name "refused to be sworn," when the plaintiff left the booth.

The entry was not "refused to be sworn," but "objected to take oath, refused to take tenants' oath." Had the entry been "refused to be sworn," the defendant could not have delivered the ballot paper to the plaintiff without violating the provisions of sub-sec. 5 of sec. 143, and subjecting himself to a penalty of $200. But as there had been no request to have an oath administered, and as there was no entry of "refused to be sworn," but only the special entry, it was then quite open for the defendant to have given the plaintiff a ballot if he had requested it. But all parties seemed to have acted, erroneously as I think, on the supposition that because a discussion had arisen as to the qualification of the plaintiff, and because the plaintiff had offered to take an oath, and there was a difference of opinion as to the form of oath he could properly take, therefore the plaintiff could not vote; and acting on such erroneous view, the plaintiff left the booth. Subsequently later in the day the plaintiff had delivered to the defendant a letter, the contents of which we have not in evidence, and afterwards went into the booth and asked the defendant "if he was still of the same mind," and being answered that he was, he again left the booth, after the

defendant had called a constable's attention to the fact of the plaintiff being in the room. Judgment. Rose, J.

Had the evidence rested here, I should, I think, have come to the conclusion that there was no evidence of any refusal by the defendant to deliver to the plaintiff a ballot, but upon cross-examination, the following questions and answers appear: "Q. That is the ground he refused to give you the ballot because you refused to take the tenants' oath. A. That is what he said."

It must, in view of this answer, be taken to be the fact that a ballot paper was demanded by the plaintiff and refused by the defendant on the ground that the plaintiff refused to take the tenants' oath; and that this was not a valid or legal ground of refusal.

As far as pointed out to us, there is no provision in the Municipal Act as in the Election Act (see *Walton* v. *Apjohn*, 5 O. R. 65, at p. 77), for the deputy-returning officer administering the oath at his own instance.

If there was no reason why the ballot paper should not have been delivered to the plaintiff, I cannot see how the non-delivery can be said to have been other than the breach of a merely ministerial duty; and following *Pickering* v. *James*, L. R. 8 C. P. 489, actionable without averment or proof of malice entirely apart from the statute. But if the finding is to rest on this ground, I think the damages assessed are much too large, and should be for reducing them to a very much less sum. If it should be held that what took place before the defendant as deputy-returning officer, amounted to a request to administer the oath, and that the entry on the roll was equivalent to an entry of "refusal to be sworn," then by such act of entry it would seem as if the defendant had put it out of his power to deliver a ballot paper, and the wrongful act, if any, was in refusing to administer the oath selected by the plaintiff.

Such a cause of action is not expressly set out; but if the pleadings ought to be considered as wide enough to cover it or an amendment should be permitted, the question would then arise as to the effect of the provision in

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section 106, viz.: "And no enquiries shall be made of any voter, except with respect to the facts specified in such oaths or affirmations." These words were introduced by I think, or at least may be found in, sub-sec. 8 of sec. 101 of the 29 & 30 Vict. ch 51 (C). The provision found in sec. 105*a* of the 55 Vict. was, as far as I am aware, first introduced by that Act.

If enquiries may be made, then for what purpose? Has the officer no discretion whatever? Can he not refuse to administer the oath where the enquiry reveals that the facts do not entitle the voter to take any one of the three oaths. Section 105*a* certainly says that the voter is not deprived of his right of selection by any description in the voters' list or assessment roll as to the qualification or character in respect of which he is entered upon the list or roll; but if the facts which may be enquired into shew that no one of the oaths would be true on the facts as stated in answer to the enquiries, must the deputy returning officer still administer the one of the three as selected by the voter? If anything of a judicial nature attaches to his office under such provision, then malice not being found there is no finding on which judgment could be rested apart from the provisions of section 168.

If the plaintiff's claim is based upon the provisions of section 168, then I would adopt the argument of the learned Chancellor in *Johnson* v. *Allen*, 26 O. R. 550, as to the meaning of the word "wilful," unless I am bound by *Walton* v. *Apjohn*, 5 O. R. 65, to hold the contrary—which question I do not find it necessary now to determine.

With considerable hesitation I agree that the judgment must be affirmed, except as to the amount of damages. These I think should be reduced to say $50, which would be a pretty heavy fine.

MacMahon, J.:—

Was the plaintiff a person entitled to vote at the election? If not, then he is not a "person aggrieved," and therefore, cannot maintain this action.

Judgment.

MacMahon, J.

The Consolidated Municipal Act provides (section 79) that amongst others entitled to vote at municipal elections (subject to the two following sub-sections), are men of the age of twenty-one years, subjects of Her Majesty, "being rated * * on the revised assessment roll, upon which the voters' list used at the election is based, of the municipality, for real property held in their own right, (or, in case of married men, held by their wives,") etc.

"Firstly—All persons, whether resident or not, who are, in their own right or whose wives are, at the date of the election, freeholders of the municipality;

"Secondly—All residents of the municipality, who have resided therein for one month next before the election, and who are, or whose wives are, at the date of the election, householders or tenants in the municipality."

The plaintiff was rated on the assessment roll, which was finally revised on the 28th of July, 1895, as the tenant of lots 11 and 12 Main street, Parkhill, built upon, and valued at $600. The entry on the voters' list followed the wording of the assessment roll.

The defendant having in the month of September, purchased a property in the same municipality and ward, as that in which he was assessed as a tenant (which property so purchased, he stated was assessed at $400), he moved from the property which he had occupied as a tenant, to that which he had purchased, about the 1st of October, 1895, and has continued to reside there ever since.

In the *Stormont Election—(Rupert's Case),—Hodgins' Election Cases*, at p. 39, where a tenant had surrendered his lease, and the lessor leased to a new tenant two days prior to the final revision of the roll, Richards, C. J., after considering the clause of the Ontario Election Act then in force, 32 Vict. ch. 21, sec. 5 (R. S. O., 1877, ch. 10, sec. 7), which is sufficiently near in its scope and language to sec. 79, sub-secs. 1, 2 and 3, of the present Act, as to make it an authority on the point now being considered, said: "I am of opinion that the party must have the interest that qualifies him at the time of the last final revision. If he has

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MacMahon, J.

it then, though not at the time of the election, he can properly vote if he were still a resident of the electoral division, but not unless he had the interest at the time of the revision of the roll."

The Act contemplated that the voters' list should be conclusive of the right of the persons named therein to vote, with this addition, in the case of a tenant, that he had been a resident of the municipality for one month before the election, and was, at the time of the election, a householder or tenant in the municipality. And in the case of a freeholder, that he was such at the date of the election.

The plaintiff was residing in his own house within the municipality at the time of the election; and was a freeholder, and therefore an "owner," in which character he offered to take the oath.

The oath or affirmation of a person claiming to vote as a tenant (sec. 103), is not, that he on the day of election is possessed as tenant of the real estate, in respect of which his name is entered on the list; but that on the day of the final revision of the assessment roll upon which the voters' list used at the election is based—namely, on the 28th of July, 1895—he was so possessed as tenant, etc. That he is a householder or tenant within the municipality. And that he had been a resident within the municipality for one month next before the election.

There could be no question as to the plaintiff's right to take that oath.

Being qualified as a tenant at the time of the revision of the assessment roll, and his name appearing on the voters' list, and being a resident of the municipality for one month prior to the election, and also freeholder therein at the time of the election, the plaintiff was clearly entitled to vote at such election on the 6th of January, 1896.

Section 82 of the Act, provides that "No question of qualification shall be raised at any election, except to ascertain whether the person tendering his vote is the same person as is intended to be designated in the list of voters."

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MacMahon, J.

And by section 105*a*, the voter claiming to vote is entitled to select for himself for such purpose, any one of the forms mentioned in the Act, sections 102 to 105, inclusive, "whatever may be the description either in the voters' list or assessment roll as to the qualification or character in respect of which he is entered upon the list or roll."

When the plaintiff desired to poll his vote, his right to vote was challenged by one of the scrutineers, on the ground that the plaintiff was not a tenant. There was no request made by a candidate or a scrutineer under section 106, on the plaintiff as deputy returning officer, requiring him to administer any oath to the plaintiff; and he (plaintiff) was therefore entitled to demand and receive a ballot paper without submitting to take any oath. The plaintiff, however, did offer to take the owner's oath, which the defendant refused to administer, and replied that he had no alternative but to administer the tenant's oath. That is, the defendant refused to administer the oath selected by the plaintiff, which would have entitled him to a ballot paper; and the defendant was thereby guilty of refusing to deliver to the plaintiff a ballot paper.

There was a time when deputy returning officers had cast upon them the performance of judicial as well as ministerial duties. But now, under the Consolidated Municipal Act, there is no judicial duty whatever for a deputy returning officer to perform. In fact, the sections of the Act relating to the duties of the deputy returning officer appear to have been framed with the design of depriving him of anything which might savor of judicial discretion in the performance of such duties.

The duties of the office are wholly ministerial. And it was held that under the Ballot Act of 1872, relating to Municipal Elections in England, that the duties of the presiding officer were purely ministerial, and for a breach of them an action lies by a party who had lost his election, without proof of malice or negligence: *Pickering* v. *James*, L. R. 8 C. P. 489.

Section 168 of the Consol. Municipal Act, provides that

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"Every officer and clerk who is guilty of any wilful misfeasance, or any wilful act or omission, * * shall, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act or omission, a penal sum of $400."

The case of *Pryce* v. *Belcher*, 4 C. B. 866, at p. 880, was relied on by Mr. Cameron, as shewing that it was necessary under the above section to prove that the defendant acted maliciously. That case was decided under the English Act, 6 & 7 Vict. ch. 18, and was before the Court on demurrer, in 3 C. B. 58; and after trial, in 4 C. B. 806, on motion to enter judgment for the plaintiff for the amount at which the jury had assessed the damages in his favour. The returning officer exceeded the limit of his duty, which by the 81st section of the Act, was confined to putting the question as to the indentity of the voter, and whether he had voted before at the election. Still, the judgment was in his favour, on the ground that under section 79 of the Act, the plaintiff, in consequence of non-residence, had lost his right to vote.

The editors of Smith's L. C. (9th edition), at p. 323, commenting on that case, say: "It appears to have been assumed that after the passing of this Act" (6 & 7 Vict. ch. 18), "the officer might be liable to an action for damages for refusing to receive a vote wilfully, though not maliciously. But it was not necessary in that case to consider the effect of the 97th section of the Act, which provides a particular remedy, namely, an action of debt for a penalty against the returning and other officers for every wilful misfeasance or wilful act of commission or omission contrary to the Act, but preserves any remedy against any returning officer, according to the law then in force."

Pryce v. *Belcher*, does not make in favour of the defendant.

The meaning to be attached to the word "wilful," was considered by Lord Justice Bowen, in *Re Young and Harston's Contract*, 31 Ch. D. 168, at p. 174, where he said: "Wilful * * is a word of familiar use in every branch

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of law, and although in some branches of law it may have a special meaning, it generally, as used in Courts of Law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done, arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."

In *The Commonwealth* v. *Kneeland*, 20 Pick. 206, at p. 245, Martin, J., in defining the meaning to be attached to the word "wilful," where a statute made it blasphemy to wilfully deny God with the intent to caluminate Him and impair and destroy the reverence due to Him, said: "To make 'wilful' imply both wrong and malice, is to give to it a force and effect beyond what it will bear, or what can be maintained, either in common acceptation or its legal import."

In *The State* v. *Clark*, 29 N. J. L. 96, the defendant was indicted and found guilty under an Act which made it a misdemeanour for any person to "wilfully open, break down, or destroy any fences, rails or enclosures, belonging to or in the possession of any other person."

The Supreme Court of New Jersey, on a motion for a new trial, in dealing with the statute, said, at p. 98: "In what sense is the term 'wilful' used? In common parlance, 'wilful' is used in the sense of 'intentional,' as distinguished from 'accidental' or 'involuntary.' Whatever one does intentionally he does wilfully. It is used in that sense in this Act."

By an Act of the State of Iowa, railway companies were required annually to fix their rates of fare for passengers and freight, etc.; and it was provided that each company "on the first day of October following, shall put up at all stations on its road, a printed copy of such fare, and freights, and cause the same to remain posted during the year. For wilfully neglecting so to do, or for receiving higher rates for fare, or freight, than those posted, the company shall forfeit not less than $100, nor more than $200, to any person injured thereby or suing therefor."

Judgment.

MacMahon, J.

In an action to recover for several cases of alleged overcharge upon merchandise transported, for the penalty imposed for wilful neglect to post copies of rates of fare, etc., the Court, on an appeal by the defendants from a judgment in favour of the plaintiff referring to the clause providing for the penalties, said: "It is intended, as all other penalties, to deter those who may come under the terms of the Act from violating its provisions, and it is in the nature of a forfeiture, for an illegal act done, to be recovered at the suit of the party injured. * * It is said by the defendant's counsel that the word 'wilfully,' implied the idea of malice of a mild kind, and evil intent without excuse. Such may be its meaning in indictments and criminal statutes. But it is not to be so understood here. The word means 'obstinately,' 'stubbornly'; 'with a design'; 'with a set purpose'; and this definition must be applied to it where it occurs in the statute under consideration. If defendant 'with design or with a set purpose,' and not through mistake or inadvertence, omitted to post the rates, liability thereon attaches for the omission. This is the plain meaning of the law. There was evidence tending to prove the omission to post the rates 'by design'; the fact was one for the jury and not for the Court, for it is an ingredient in the transaction—a fact which goes to establish defendant's liability": *Fuller* v. *Chicago and North-Western R. W. Co.*, 31 Iowa 187, at pp. 202, 204.

The decision in *Barnadiston* v. *Soame*, 7 St. Tr. 431, occasioned the passing of the statute 7 & 8 Wm. III., ch. 7, which gives an action against a returning officer for all false returns wilfully made, and for double returns falsely, wilfully and maliciously made. (See note to *Harman* v. *Tappenden*, 1 East 555, at p. 568.)

I have not been able to find any case decided on this statute. But the Legislature was distinguishing between the kinds of proof required in the two cases—one where it was only necessary to shew the wilful or intentional act, and the other where, in addition to the act being done wilfully, it must be shewn that the other ingredient—malice—actuated the returning officer.

Chief Justice Armour construed the term "wilful" in our Act, as meaning "intentional," and said there could be no doubt that the defendant intended to refuse to allow the plaintiff to vote. Judgment. MacMahon, J.

The proper interpretation has, in my opinion, been given to the word "wilful" in the judgment appealed against. And, as so forcibly put by the learned Chief Justice, "This provision of the law would be of little use if it were necessary for the party aggrieved to prove that the person refusing his vote intended to do so contrary to his own conviction."

The appeal, in my view, must be dismissed with costs.

G. F. H.

QUINN V. THE CORPORATION OF THE TOWN OF ORILLIA.

Municipal Corporations—Fire Limits—Erection of Buildings Within—By-law Therefor—Validity—Consolidated Municipal Act, 1892, sec. 496, sub-sec. 10.

Sub-section 10 of section 496, Consolidated Municipal Act, 1892, which empowers the corporation of a city, town or village to pass by-laws "for regulating the repair or alteration of roofs or external walls of existing buildings" within the fire limits, "so that the said buildings may be more nearly fire proof," does not empower the council to pass a by-law requiring "all buildings damaged by fire, if rebuilt or partially rebuilt," to be made fire proof, at the peril of such building being removed at the expense of the owner.

THIS was an action tried before STREET, J., at the non-jury Sittings at Barrie, on the 15th March, 1897, when *Pepler*, Q. C., appeared for the plaintiff, and *J. McCosh*, for the defendants. Statement.

The plaintiff was the owner of two small frame buildings connected together, and being within the limits set out in a by-law of the defendants' corporation, passed for the purpose of fixing fire limits, and regulating the erection of the buildings within those limits. A fire took place and one of the buildings was materially injured by

Argument.

it. The back part of the building was destroyed; the partitions on the ground floor were burned, and the roof dropped upon the upper story by reason of the ends of the timbers upon which it rested being weakened or destroyed. The plaintiff, after communicating his intention of doing so to the board of works committee of the defendants' council, and being warned not to do so, proceeded to replace with wood the portions of the building which had been destroyed. The defendants notified him of their intention to pull down the proposed new portions of the building for contravention of their by-law, and this action was brought to restrain them from doing so. The plaintiff alleged that the by-law was illegal and beyond the powers of the defendants.

The by-law upon which the defendants relied, was set out in the statement of defence, as follows:—

"By-law No. 287, for the purpose of regulating the erection of buildings within certain areas of the town of Orillia.

The corporation of the town of Orillia, by its council, enacts:—

1. That from and after the passing of this by-law, no wooden building or buildings, other than those built with main walls of brick, stone or ironbrick or ironclad (except as mentioned in clause 2), and roofing of incombustible material, shall be erected within the following limits of the town of Orillia, that is to say: [setting them out.]

2. That no brick veneered, or ironclad buildings shall be erected within one hundred feet south from the southerly boundary of Mississaga street, or north one hundred feet from the northerly boundary of said street, between Andrew street and the lake.

3. That no additions to buildings already erected in said areas shall be made, excepting they are built in accordance with sections one and two.

4. That all persons desiring to build within the areas mentioned in sections one and two shall, before doing so, make an application in writing to the chairman of the

board of works for a permit to do so; and shall file a plan and specifications of the building or buildings proposed to be erected, in duplicate, and shewing the lot and street on which the same is proposed to be erected; and shall not proceed with the building of same until such permit is issued by said chairman. Argument.

5. That no building not built in accordance with this by-law, shall be removed and placed within the limits defined in sections one and two; and no building now within the areas above defined, shall be removed and placed within said area in a different portion of same, if not built in accordance with said sections.

6. That all buildings damaged by fire, if rebuilt or partially rebuilt, shall be made fireproof, in accordance with sections one and two.

7. That any person or persons guilty of an infraction of this by-law, shall be liable to a fine of from one dollar to twenty dollars, in the discretion of the police magistrate, mayor, or justice of the peace, before whom the person so offending is convicted; and in default of payment of the fine so imposed, distress shall be made of the defendants' goods and chattels; in default of sufficient distress, the defendant shall be committed to gaol for a term not exceeding thirty days.

8. That the corporation of the town of Orillia are hereby authorized to instruct their proper official or officials to pull down and remove, at the expense of the owner or owners thereof, any building which may be constructed, rebuilt, placed, or in course of construction, in contravention of this by-law.

9. That the corporation of the said town are hereby authorized, in case of a contravention of this by-law, to proceed under either clause seven or eight of this by-law, or under both.

10. That all by-laws heretofore passed by the town of Orillia, defining fire limits in said town, are hereby repealed.

Judgment. April 10, 1897. STREET, J.:—

Street, J.

I think section 6 of the by-law is the one upon which, if at all, the defendants must rest their right to pull down the plaintiff's building under section 8. Section 6 of the by-law is evidently intended as an exercise of the right given by part of sub-sec. 10 of sec. 496 of the Consolidated Municipal Act of 1892, which gives the corporation of every city, town, or incorporated village, power to pass by-laws "for regulating the repairing or alteration of roofs or external walls of existing buildings" within the fire limits, "so that the said buildings may be made more nearly fire proof."

I do not think that this language is sufficient to justify a corporation in passing a by-law that no repair to or alteration in the roof or external wall of a building within the fire limits, however slight such repair or alteration might be, could be made without *ipso facto* entitling the corporation to require the whole roof and external walls to be made of new fire proof material. What are the exact limits of the jurisdiction intended by the Act it may not be an easy matter to ascertain; but where the result of an infringement of the by-law is that a summary destruction of the offending structure may be directed by the council, the by-law should certainly not exceed the limits imposed by the language of the Act on which it is founded.

The provision of this by-law is, "that all buildings damaged by fire, if rebuilt or partially rebuilt, shall be made fire proof, in accordance with sections one and two."

The question is, whether this section is in excess of the authority conferred by the statute; and I am of opinion that it is. The statute only authorizes the regulating of the repair or alteration of the roof or external walls, and a by-law under it could not provide that the repair or alteration of an interior wall should entitle the council to insist upon the exterior walls and roof being replaced by fire proof materials. The by-law here in question

in effect goes as far as this. If the interior portion only of a building were to be so injured by a fire as to require rebuilding, although the outer walls and roof should be untouched, the council, if this by-law were to prevail, might insist upon their being made fire proof in accordance with its earlier sections, that is upon their being rebuilt with fire proof materials upon pain of their being torn down. There is, therefore, in my opinion, no by-law applicable to the present case, which has a statutory foundation; the by-law which has been passed is in excess, so far as the 6th section is concerned, of the powers of the council, and cannot, therefore, be enforced. Judgment. Street, J.

Under these circumstances, it is unnecessary for me to consider the other objections taken to the validity of other portions of the by-law; and the plaintiff must be declared entitled to the relief asked for and to his costs of the action.

G. F. H.

BAKER V. STUART.

Will—Rule Against Perpetuity—Thellusson Act—52 Vict. ch. 10, sec. 2 (O.).

A testator directed his executors to lease and rent and invest his lands, money and mortgages for the term of 60 years, after which the property was to be divided as in his will provided:—
Held, that this infringed the rule against perpetuity, and 52 Vict. ch. 10, sec. 2 (O.), and was invalid.

THIS was an action brought by the executors of the last will and testament of James N. Stuart, deceased, for the construction of the will. The defendants were the widow, Margaret Stuart, and the heirs and heiresses at law and next of kin of the deceased. Statement.

The testator died on August 30th, 1896, and by the third clause of his will, dated September 17th, 1895, bequeathed to his wife all his personal property, and then proceeded as follows:—

Statement.

"Fourthly, I order my executors to lease and rent and invest from one to five years, from time to time, all lands, money, and mortgages that I may be possessed of at the time of my death, for the term of sixty years, and for to appoint their successors, and at the expiration of sixty years the property and funds shall be divided to those of my heirs that are members of the Presbyterian Church only, and that has been members of the said Church for at least ten years."

The defendant, Margaret Stuart, contended that the fourth clause of the will was void and of no effect, and that she was entitled to all the personal property of which the testator died possessed. The other defendants pleaded in like manner that the fourth clause was void, and that there was an intestacy as to all the property referred to in it, and also that Margaret Stuart was put to her election between the bequest to her and her dower, on the ground that the fourth clause shewed an intention that she should not have any interest in or control over the lands of the deceased. The action was tried before BOYD, C., at Cornwall, on March 16th, 1897.

D. B. Maclennan, Q.C., and *C. H. Cline*, for the plaintiffs.
James Leitch, Q.C., and *R. A. Pringle*, for the widow.
R. Smith, and *D. H. Maclean*, for the other defendants.

March 18th, 1897. BOYD, C.:—

At the hearing I declared that the fourth clause of the will of James N. Stuart was invalid. On referring to the cases it seems to be objectionable in every point of view as infringing the rules against perpetuity and being in contravention of the provisions of the Thellusson Act, 52 Vict. ch. 10, sec. 2 (O.). The attempt is made to accumulate lands, money, and mortgages for the term of sixty years from the time of the testator's death, and then to make the accumulated mass divisible among such of the testator's heirs as are, and have for ten years before the time of distribution, been members of the Presbyterian Church. Now,

under the rule as to perpetuity, property cannot be tied up longer than for a life in being and twenty-one years after; and the limit of sixty years may continue very much longer: *Curtis* v. *Lukin*, 5 Beav. 154. This period is shortened by the Thellusson Act, and no part of the accumulating clause can be shortened under that Act, for the whole is held in suspense till the sixty years have expired. The result is that in legal construction this clause of the will has to be expunged, leaving all the rest standing good according to the rule in *Eyre* v. *Marden*, 2 Kean 569; and *Couch* v. *Argles*, 34 Bea. 127, affirmed 2 DeG. J. & S. 657.

Judgment. Boyd, C.

Turning then to the will we find an absolute gift of all the personal property to the wife, which will now have its full operation without restriction from the expunged clause. She will take all the personalty, including the stock and mortgages, and will also have her dower out of the realty, which sum descends as upon an intestacy to the other defendant heirs-at-law of the testator, according to their several proportions.

Judgment will be in this form with costs out of estate, down to this judgment. The Master at Cornwall can settle the rights of the heirs-at-law *inter se*, and sell the land if that is desired; the costs of which will be borne personally by the parties interested.

A. H. F. L.

NEWSOME ET AL. V. COUNTY OF OXFORD.

Municipal Corporations—Equipment of Courts of Justice—Offices—"Furniture"—Stationery—Liability—Authority—County Council—R. S. O. ch. 184, secs. 466, 470.

By sec. 466 of the Municipal Act, R. S. O. ch. 184, it was enacted that the county council shall "provide proper offices, together with fuel, light, and furniture, for all officers connected with the Courts of Justice," etc.:—

Held, that "furniture" must include everything necessary for the furnishing of the offices referred to in the enactment for the purpose of transacting such business as might properly be done in such offices; and the word therefore included stationery and printed forms in use in the Courts.

Ex p. Turquand, 14 Q. B. D. 643, followed.

Held, also, upon the facts of this case, that a local officer of the Courts, who had ordered supplies of stationery and forms from the plaintiffs for his office, was duly authorized by the defendants' council to do so, pursuant to the provisions of sec. 470 of R. S. O. ch. 184.

Statement. THIS action was begun in the 1st Division Court in the county of Oxford, and was removed by order into the High Court. The plaintiffs, who were law stationers, claimed from the defendants, the corporation of the county of Oxford, $95.75, the balance of an account for writing paper, blotting paper, envelopes, and other articles of stationery, and Surrogate Court and County Court printed forms, supplied on the order of Mr. James Canfield, deputy clerk of the Crown, clerk of the County Court, and registrar of the Surrogate Court, of the county of Oxford, for use in his office. The defendants contested their liability for the price of the goods, and counterclaimed for $101.39, the price of similar articles supplied by the plaintiffs to Mr. Canfield in previous years, and paid for out of the corporation funds.

The trial was begun before ROSE, J., without a jury, at Woodstock, on the 26th April, 1892, and was concluded at Toronto on the 27th May, 1892.

Fullerton, Q. C., for the plaintiffs.

Osler, Q. C., for the defendants.

August 26, 1895. ROSE, J.:— Judgment. Rose, J.

I postponed the giving of judgment, hoping a suggested settlement might be carried out. But, as this has not been accomplished, I now express the opinion I have formed.

By sec. 466 of the Municipal Act, ch. 184, R. S. O. 1887, which was the Act in force at the dates of the transactions in question herein, the duty was cast upon the county council to "provide proper offices, together with fires, light, and furniture, for all officers connected with" the Courts of Justice, other than as excepted.

What is the "furniture" of an office such as is here referred to? *Fore* v. *Hibbard*, 63 Ala. 410, is cited in the Am. and Eng. Encyc. of Law, under the head "Furniture," where it is said: "The word relates ordinarily to movable personal chattels. It is very general both in meaning and application; and its meaning changes, so as to take the colour of, or be in accord with, the subject to which it is applied. Thus, we hear of the furniture of a parlour, of a bed-chamber, of a kitchen, of shops of various kinds, of a ship, of a horse, of a plantation, etc. The articles, utensils, implements, used in these various connections, as also those used in a drug or other store, as the furniture thereof, differ in kinds according to the purposes which they are intended to subserve; yet, being put and employed in their several places as the equipment thereof, for ornament, or to promote comfort, or to facilitate the business therein done, and being kept, or intended to be kept, for those or some or one of those purposes, they pertain to such places respectively, and collectively constitute the *furniture* thereof."

Ship's provisions are embraced in the term "furniture" in a policy of insurance: *Brough* v. *Whitmore*, 4 T. R. 206.

The "furniture of a ship" includes "everything with which a ship requires to be furnished or equipped to make her seaworthy:" *Weaver* v. *The S. G. Owens*, 6 Wall. Jr. (C. C.) 569.

Judgment. Rose, J.

Parol evidence is admissible to shew what is necessary for use and convenience, etc.: *Bell's Admx.* v. *Golding*, 27 Ind. 173.

"By the term household furniture in a will, all personal chattels will pass which may contribute to the use or convenience of the householder or the ornament of the house: as plate, linen, china (both useful and ornamental), and pictures: Bouvier's Law Dictionary, p. 702, where the authorities for the above proposition are collected.

In the Standard Dictionary of the English language "furnish" is defined as follows: "To equip or fit out; supply what is necessary or fitting * * to fit oneself out;" "furnished," "fitted with what is appropriate or necessary;" "furniture," "that with which anything is furnished or supplied; equipment or outfit. * * Naut. A ship's masts and rigging; also, her tackle and apparel, including her outfit of provisions."

In *Ex p. Turquand—In re Parker*, 14 Q. B. D. at p. 643, the Earl of Selborne, L. C., said that the word "furniture" was "a large word of description:" and at p. 645 Brett, M. R., discusses the meaning of the word as follows: "But it is said that the Courts have not yet declared what they understand by 'furniture.' It is obvious from the nature of the case, that 'furniture' must include everything which goes to the furnishing of an hotel for the purpose of using it as an hotel. It is said that the custom only applies to such things as sofas, chairs, and tables. I suppose it may at least be said to apply to bedsteads. But what is the use of a bedstead for the purpose of carrying on an hotel if you have not sheets and blankets and counterpanes? What is the use of an hotel if it has not wash-hand basins and wash-hand stands? You cannot carry on an hotel unless you have those things. Therefore linen and crockery must come within the custom. What is the use of attempting to carry on an hotel if you have not soup-tureens, wine glasses and tumblers? The very nature of the case shews at once that to attempt to split up furniture into different

classes with regard to some of which the custom applies, and with regard to others of which it does not, is as a matter of business ridiculous. 'Furniture' must include everything which is necessary for the furnishing of an hotel for the purpose of carrying it on as an hotel."

Judgment. Rose, J.

And so it may be said here that "furniture" must include everything which is necessary for the furnishing of such offices as are referred to in the statute for the purpose of transacting such business as may properly be done in such offices. Could the Judge or clerk perform, conveniently or properly, or at all, the duties of his office without pens, ink, and paper? The words of the statute are "provide * * furniture for all officers," not merely for the offices or rooms. And if, for the more convenient transaction of such business, forms are prepared and used, can it be said that it was improper to furnish such officers with forms? It was admitted, as I understood it, that it was proper to furnish the registrar with the book called a surrogate register. The principle thus admitted seems to me to apply to the other things charged for in the account sued for.

On the evidence, including the action of the council for many years past, I find as a fact that "furniture" includes the articles in the plaintiffs' claim.

But it was said that certain forms were purchased by the registrar for the convenience of solicitors who made use of them in preparing the necessary papers for obtaining probate or letters of administration, and that the defendant corporation was not liable to pay for such forms. Admit that the registrar was wrong in supplying such forms at the expense of the county, although he followed a custom of long standing. What then? Had he no right to procure such forms for his own use in any case, and if he had, could the plaintiffs be called upon to control him in their use? If an unnecessarily large supply had been procured, and subsequently a portion had been destroyed, could the plaintiffs

Judgment.
Rose, J.

be held responsible for the loss? Prior to the Surrogate Court Rules of 1892, the registrar was expressly permitted by Rule 40 to prepare the necessary papers in non-contentious business, and the prohibition contained in sec. 15 of the Surrogate Courts Act was only against for fee or reward drawing or advising upon any will or other testamentary paper, or upon any paper or document connected with the duties of his office for which a fee was not expressly allowed him by the tariff in that behalf; and by sec. 69, where the estate did not exceed in value $200, it was made the duty of the registrar to prepare the usual papers to lead a grant. By the Rules of 1892, No. 46, the limit of value was increased to $400, and the registrar was expressly prohibited from preparing papers in any other case.

The council for years permitted the registrar to procure such forms as he thought necessary for his office, and, in view of the above, it seems to me impossible to hold that he had no authority to order the forms in question, although he may have given some of them away to the solicitors instead of using them himself. Mr. Canfield in giving evidence said that at one time he did prepare such forms for use to lead a grant without the intervention of any solicitor.

I think the action of the council in paying similar accounts for so many years prevents it now asserting that Mr. Canfield was not, as far as the plaintiffs were concerned, invested with the discretion of selecting such stationery, including forms, as he thought would properly furnish the office. It would be most unfair at this date to allow the defendant to repudiate a liability it has for so many years assumed.

I think, finding the facts as I am required to do, I must find that Mr. Canfield was duly authorized to order the goods in question, pursuant to the provisions of sec. 470.

I should hesitate much before finding as a fact, on this evidence, that any payments heretofore made were made under any mistake of fact. If there was any mistake, it probably was one of law only.

Judgment.
Rose, J.

If the amended pleadings had been filed, the plaintiffs no doubt would answer the counterclaim by setting up the Statute of Limitations, as far as it would apply, and I should have given effect to it, if I had been in the defendant's favour.

I perhaps should have said that on the argument before me on the 27th of May, 1892, I allowed both parties to amend, setting up all such facts as would, by either claim, counterclaim, or answer or reply, raise the questions desired to be raised and decided in this action.

The result is that the plaintiffs' claim must be allowed with full costs, and the defendant's counterclaim dismissed with costs—the costs to be taxed on the High Court scale.

Section 466 has been amended, and in the Consolidated Municipal Act, 55 Vict. ch. 42, the word "stationery" appears in the part requiring the council to provide accommodation for the Courts of Justice, but has not been inserted in the direction to provide furniture for the officers. Possibly it would be better to have it inserted so as to prevent any question arising on the wording of the section as it now stands.

E. B. B.

TURNER v. DREW.

Settlement—Conveyance by Husband for Use of Wife and Children—Rights of Children.

A husband conveyed lands to trustees to receive the rents, and after payment of a mortgage, to pay the balance into the hands of his wife during her life, for her use and that of her children, to be at her separate disposal:—

Held, that the plaintiff, the sole surviving child, was entitled to half the yearly income.

THIS was an action brought by Sarah Elsey Turner against her mother Elizabeth Drew, for an account and a declaration of her rights under a certain trust deed, made by her father William Turner, deceased.

The action was tried at Toronto, on April 14th, 1897, before BOYD, C.

Statement. It appeared that William Turner, the then husband of the defendant, had, on July 27th, 1839, by deed, conveyed to trustees, certain real property, to receive the rents and profits and apply them in payment of a mortgage thereon, and the deed then provided as follows: "And the balance of the rents, issues and profits aforesaid (over and above what may be requisite to pay the said mortgage money), do and shall pay, apply and dispose of (during the life of the said party of the second part (the defendant)) into the hands of her the said party of the second part, or to such person or persons as she shall by any writing or writings under her hand, from time to time direct and appoint for the use of her the said party of the second part, and of William Turner the younger, Sarah Elsey Turner, and Ann Elizabeth Turner, children of the parties of the first and second parts, which said moneys shall be at the separate disposal of the said party of the second part not subject nor liable to the power or control of the party of the first part (husband) or to his debts, engagements or disposal."

Statement.

The defendant for many years received all the rents and applied them to her own use. The plaintiff, the only survivor of the three children, did not discover her rights until the year 1895, and being well up in years and unable to keep herself, demanded a share of rents which was refused.

T. Hislop, for the plaintiff. The defendant takes all the income in trust for herself and the children, and is an express trustee. The subsequent words giving the defendant the separate disposal of the moneys, are repugnant to a trust, if she has absolute control. I refer to Elphinstone, Norton and Clark, on the Interpretation of Deeds, 76; *In re Bywater, Bywater* v. *Clarke*, 18 Ch. D. 17, at pp. 24, 25; Jarman on Wills, 5th ed., pp. 369, 370; *Taylor* v. *Bacon*, 8 Sim. 100; *Jubber* v. *Jubber*, 9 Sim. 503; *In re Booth, Booth* v. *Booth*, [1894] 2 Ch. 282, at p. 285. As to the Statute of Limitations, I refer to *Rochefoucald* v. *Boustead*, [1897] 1 Ch. 196; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390; *Thomson* v. *Eastwood*, 2 App. Cas. 215.

Delamere, Q. C., for the defendant. The defendant is entitled to an absolute life interest, and has the right to deal with the income as she thinks best: *Lambe* v. *Eames*, L. R. 6 Ch. 597. Even if there is a trust, it is a trust for maintenance only. She has the disposal and can say how much is to be given for maintenance, and is not bound to divide equally between the children. I refer to Lewin on Trusts, Bl. ed., 225, 226; *Liddard* v. *Liddard*, 28 Beav. 266; *In re Adams and the Kensington Vestry*, 27 Ch. D. 394; *Morrin* v. *Morrin*, 19 L. R. Ir. 37; Jarman on Wills, 5th ed., 372; Lewin on Trusts, 8th ed., 138; *Byne* v. *Blackburn*, 26 Beav. 41.

April 29, 1897. BOYD, C.:—

The plaintiff's rights depend upon the proper construction of the provisions as found in the deed of trust of July, 1839, *i.e.*, the trustees are to collect the rents, etc., and after meeting claims on the mortgage, to apply the balance

Judgment.

Boyd, C.

thus; to pay the same into the hands of the defendant during her life, "for the use of her * * and of William Turner, Sarah Elsey Turner and Ann Elizabeth Turner, 'children of the grantor and the defendant,' which said moneys shall be at the separate disposal of the grantee, not subject nor liable to the power or control of him, or to his debts, engagements or disposal."

The last clause I take to be exhausted in giving the defendant—wife of the grantor—a separate property, the moneys derived from the lands granted by the trust deed, and do not read it as controlling or extending the first words quoted—which declare the use of the moneys to be for the mother and her three children during her life. Other dispositions are made of the property after the defendant's death.

The present action deals with the annual income from the property. One child Ann, died in early infancy; another, William, died in 1875, and the plaintiff is the sole surviving child. She claims maintenance, or rather a share, out of this yearly income, which is to be paid outright to the mother by the trustees.

The cases divide upon nice distinctions. In *Byne* v. *Blackburn*, 26 Beav. 41, money was given to the husband of the testator's daughter during his life; "nevertheless, to be by him applied for or towards the maintenance, etc.," of the daughter's children. It was held that the husband took all beneficially—mainly on the ground that trustees of the fund having been expressly appointed, the Court would not engraft a sub-trust upon the father. That view, Lewin says, appears not to be supported by earlier decisions: 8th ed., Trusts, p. 138.

But more like the present is *Scott* v. *Key*, 35 Beav. 291, in which two-thirds of the property was given to the wife for life, to be "at her sole and entire disposal for the maintenance of herself and such child or children as I may leave by her." The same Judge held that the wife had an absolute life interest in the fund, subject to providing for the necessary maintenance of the children, and that the interest of the children did not terminate at twenty-one.

Judgment.
Boyd, C.

So long as the children were maintained, the Court would not interfere, but if support was needed and not given to any child, then the Court would see that the child received maintenance. That is like this case on the facts—for a long time no claim was made for maintenance; now the plaintiff who is well up in years, is unable to keep herself, and asks aid out of this fund. Maintenance is not named in the deed at this point—the fund is for the use of the mother and three children named, two being dead, it is for the use of the two parties to this action, mother and child, and I should say that an equal division between them is called for by the terms of the deed. The account is to be carried back for six years if the plaintiff claims that against her mother; and is to be continued hereafter during the life of the defendant—who is now a very old woman.

It is not a case for interest, and as for the costs, the plaintiff should have them, and they may be set off against the costs of the former action, which she was directed to pay, as against the arrears of this fund.

I do not regard this as a case of express trust, or one of such a nature as that the Statute of Limitations may not be set up by the defendant effectively.

The following are also in point: *Armstrong* v. *Armstrong*, L. R. 7 Eq. 518; *Jubber* v. *Jubber*, 9 Sim. 503; *Crockett* v. *Crockett*, 2 Phil. 553 (with a slightly different context); *In re Booth, Booth* v. *Booth*, [1894] 2 Ch. 282.

G. A. B.

DAW V. ACKERILL ET AL.

Church — Incumbent's Salary — Liability of Churchwardens — Voluntary Contributions.

Where the free pew system has been adopted in an Anglican church, and the voluntary contributions of the congregation are the only means of meeting the expenses, no personal responsibility rests upon the churchwardens in respect of the incumbent's salary; the measure of their liability to him is the extent to which they receive moneys whereout to pay his salary.

Statement. THIS was an action by Samuel Daw, clerk in Holy Orders, against D. H. Ackerill and Robert Bateman, churchwardens of Christ church, Belleville, to recover arrears of stipend as incumbent.

The statement of claim alleged:

(1) That the defendants were a corporation duly constituted under the Church Temporalities Act.

(2) That the plaintiff in the month of June, 1887, was appointed incumbent of Christ church at a stipend of $1,000 a year, which was increased on the 1st April, 1892, to $1,200 a year, and continued at such sum until his resignation.

(3) That the plaintiff continued as such incumbent from the date of his appointment until the 15th October, 1894, when he resigned his position, and his resignation was duly accepted.

(4) That the defendants were indebted to the plaintiff in the sum of $600, balance of stipend for the year 1892, and $328, being his proportion of stipend from 1st April, 1894, to 15th October, 1894.

And the plaintiff claimed these sums and interest.

The defendants by their statement of defence:

(1) Denied the allegations of the statement of claim.

(2) Denied that they or their predecessors engaged or contracted with the plaintiff or agreed to pay him the stipend mentioned, or any sum.

(3) Alleged that if the plaintiff was appointed incumbent of the church, he was appointed by the bishop of the diocese, and not by the defendants.

(4) That if there was any contract between the plaintiff and the defendants, which they did not admit, it was a yearly contract, and the plaintiff broke it by abandoning his duties thereunder in the middle of the current year without the defendants' consent. Statement.

(5) That as to the item of $600 claimed, if there was any binding obligation upon the defendants to pay it, which they did not admit, the plaintiff, knowing that the defendants, as wardens, were in financial difficulty in the years 1892, 1893, and 1894, did, in consideration of their undertaking the management of the affairs of the church, or as a means of inducing them to undertake such management, for the year commencing in April, 1894, then give the said sum or claim to the defendants as wardens, and released them from all claim thereto.

(7) That as churchwardens the defendants were still in financial difficulties and had no means or assets under their control out of which they could discharge the plaintiff's claim, if they were found liable to pay it, the whole income of the church depending upon voluntary subscriptions only.

The action was tried before BOYD, C., at Belleville, on the 12th May, 1897.

John Williams and *W. S. Morden*, for the plaintiff.

S. Masson, for the defendants.

May 26, 1897. BOYD, C.:—

This is an action by the minister of Christ church, Belleville, for arrears of salary brought against the defendants as churchwardens. Various questions were raised as to the legality of his appointment and status as clergyman and rector, turning upon the observance or non-observance of certain ecclesiastical rules—as to which I do not decide, for I think there was such acceptance by the people of the plaintiff as pastor as would give him a right to payment out of funds available for that purpose.

Judgment.
Boyd, C.

No question was raised as to the status of the defendants to answer for arrears incurred in former years, as to which much might be said, owing to the church having passed from the system of renting pews into the free church stage, and it may be that there is no constituency whereout to elect and appoint wardens possessing a corporate character, and it may be that the Church Temporalities Act, 3 Vict. ch. 74, does not for this reason apply to this church.

But passing by all that, to dwell upon the merits of the claim, I think the plaintiff's main difficulty is that no funds are in the hands of the defendants applicable to the payment of his salary. The system of renting pews being discarded in 1892, there was no way of raising money to meet the expenses of the church (including the pastor's salary) except by means of voluntary contributions or the weekly envelope system. And this during the years of Mr. Daw's incumbency thereafter down to his resignation in October, 1894, resulted in financial shortage. Nor is it now proved that any moneys by way of surplus are in the hands of the defendants which may or can be applied to answer arrears of salary. Upon the legal aspect of the claim I have referred to the scanty law to be found upon this kind of liability, and my conclusion is that no personal responsibility was undertaken by or rests upon the wardens; the measure of their liability to the pastor is the extent to which they receive moneys whereout to meet his salary, and if they have nothing, he can get nothing. Pressure of law cannot produce the money unless the voluntary sources respond; for both parties knew that the supply was to come from that quarter, and from no other.

There is a balance fairly payable to the plaintiff, but not, I should say, more than $250, for I think the $57 collected and in dispute was paid for the purpose of reducing the arrears of his salary, and I think that the large item of $663, was at Easter, 1894, abandoned by him as a free-will offering to induce the people to give more

largely in the future as well as to secure the services of Dr. Ackerill as churchwarden, under the circumstances detailed in the evidence. Judgment. Boyd, C.

The action fails, but it is not a case for costs to any one.

Of cases may be noted: *Still* v. *Palfrey*, 2 Curt. 902, and more fully 1 No. Ca. Ecc. & M. Cts. 220; *Lloyd* v. *Burrup*, L. R. 4 Ex. 63, 71; *Veley* v. *Pertwee*, L. R. 5 Q. B. 573; *Anderson* v. *Worters*, 32 C. P. 659; and *Carry* v. *Wallace*, 12 C. P. 372.

E. B. B.

[DIVISIONAL COURT.]

HAMMOND ET AL. V. KEACHIE.

Husband and Wife—Contract of Wife—Separate Estate—Action after Husband's Death—Liability—R. S. O. ch. 132, sec. 3, sub-secs. (2), (3), (4)—Form of Judgment.

In 1894 a married woman, possessed of separate estate, entered into a covenant for payment of money. In an action against her upon the covenant, after the death of her husband, but before the passing of 60 Vict. ch. 22 (O.):—

Held, that under sec. 3, sub-secs. (2), (3), and (4), of the Married Women's Property Act, R. S. O. ch. 132, the liability which she undertook by her contract with the plaintiffs was expressly limited by the extent of her separate property then existing, and thereafter acquired during coverture; and that the judgment against her should be in the usual form, to be levied out of such property, so far as the same might not have been disposed of by her.

THE defendant, while under coverture, entered, along with her husband, into a covenant with the plaintiffs for payment of $3,000 and interest, being at the time possessed of separate estate. Afterwards her husband died, and the present action was brought against her upon the covenant. The writ of summons was issued on the 8th February, 1897. Upon a motion by the plaintiffs for summary judgment under Rule 739, the defendant contended that the judgment should be recoverable out of her separate estate only, while the plaintiffs insisted that it should be against her in the same form as if she had been Statement.

Statement. sole at the time of the contract. Mr. Cartwright, an official referee, sitting for and at the request of the Master in Chambers, ordered judgment to be entered for the plaintiffs, but in the form contended for by the defendant.

The plaintiffs appealed from the order, as to the form of the judgment, and their appeal coming in the first instance before FALCONBRIDGE, J., in Chambers, was by him enlarged to be heard before a Divisional Court, and was heard accordingly on the 12th May, 1897, before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

Aylesworth, Q.C., for the plaintiffs. The judgment should be unlimited. "Separate property" means property separate from the husband, and if there is no husband, there can be no separate property. The moment her husband died, this defendant's separate property became her absolute property. We sue her as a widow, a *feme sole*, and we are entitled to the same judgment as we could obtain against a man. If we are not entitled to an unrestricted judgment, we are not entitled to any judgment, because any separate property she had has now ceased to be separate property; she cannot have separate property now. I refer to *Moore* v. *Jackson*, 22 S. C. R. per Gwynne, J., at p. 235; *Holtby* v. *Hodgson*, 24 Q. B. D. 103. The dictum in *Re McLeod* v. *Emigh*, 12 P. R. 450, was not necessary to the decision of the case. The Married Women's Property Act has been amended by 60 Vict. ch. 22, sec. 1 (O.), but there is no inference that the law was otherwise before: see secs. 9 and 10 of 60 Vict. ch. 2 (O.).

F. C. Cooke, for the defendant, relied on *Scott* v. *Morley*, 20 Q. B. D. 120; *Pelton* v. *Harrison*, [1891] 2 Q. B. 422; *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Re McLeod* v. *Emigh*, 12 P. R. 450; Lush on Husband and Wife, 2nd ed., pp. 313, 314; *Gordon* v. *Warren*, 24 A. R. 44; *Trimble* v. *Hill*, 5 App. Cas. 342 (as to the authority of decisions of the Court of Appeal in England).

Aylesworth, in reply, referred to *Pelton* v. *Harrison* (No. 2), [1892] 1 Q. B. 118.

May 27, 1897. The judgment of the Court was delivered by

Judgment, Street, J.

STREET, J. :—

In order to determine the form in which judgment should be entered against the defendant it is necessary to ascertain the extent of her liability under the contract upon which she is sued, for it is clear that the judgment must be limited by the liability which she undertook.

The mortgage in which the defendant covenanted with the plaintiffs is dated 12th April, 1889, and the subsequent agreement in which she repeated her former covenant is dated 12th April, 1894. In each of these covenants her husband, who was then living, joined with her, and she was possessed of separate estate at the time each of them was executed. Her husband died before this action was begun.

The law was not altered between the dates of the two contracts sued on, and is contained in the Married Women's Property Act, R. S. O. ch. 132, sec. 3, sub-secs. (2), (3), and (4), in which the following provisions are found :

"(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in all respects as if she were a *feme sole* * * and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary is shewn.

(4) Every contract entered into by a married woman with respect to and to bind her separate property, shall bind, not only the separate property which she is possessed of or entitled to at the date of the contract, but

Judgment. Street, J.

also all separate property which she may thereafter acquire."

Under these sections the liability the defendant undertook by her contract with the plaintiffs was expressly limited by the extent of her separate property then existing, and of such separate property as she should afterwards acquire. The plaintiffs ask us to disregard this limitation and to extend her liability as if no such limitation had ever been imposed upon it. This I think we cannot do. The plaintiffs are entitled to a judgment for the amount of their claim and costs, in the usual form, against the defendant, to be levied out of her separate estate owned by her at the time of the contract or acquired or to be acquired by her at any time afterwards during coverture, so far as the same may not have been disposed of by her: *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Jay* v. *Robinson*, 25 Q. B. D. 467; *Pelton* v. *Harrison*, [1891] 2 Q. B. 422; *Hood-Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; *Re McLeod* v. *Emigh*, 12 P. R. 450.

This case is, of course, not affected by the Act of 1897.

The appeal must be dismissed with costs.

E. B. B.

FISHER v. FISHER.

Life Insurance—Construction of Policy—Beneficiary—Designation—Assignment of Policy—Security for Advances—Trust—Evidence.

By a policy of life insurance the insurers promised to pay the amount insured, upon the death of the insured person, to his wife, the plaintiff, or such other beneficiary or beneficiaries as he might in his lifetime have designated in writing indorsed on the policy, and in default of any such designation to his legal personal representatives. The application stated that the money was to be paid to the wife. The only indorsement upon the policy was an absolute assignment of it by the insured to the defendant, and notice of the assignment was given by him to the insurers, and all premiums were afterwards paid by him. The assignment was, however, shewn to have been made only as security for advances:—

Held, that, in the absence of an indorsement designating a beneficiary, the insurance moneys belonged to the legal personal representatives of the insured.

If, however, there was a trust of the policy in the plaintiff's favour, a right to revoke it was still reserved to the deceased, and no absolute and irrevocable trust such as is contemplated by the statute was ever created.

Held, also, upon the correspondence, that the defendant, believing he was entitled to a charge for all his advances, under conversations had with the insured, so stated the fact to the plaintiff, and she, desiring to pay her husband's debts and funeral expenses, ratified the action of the defendant in paying out certain sums on her husband's account, and assented to his retaining his own claim, so far as the money would go.

Statement.

THE plaintiff was the widow of James T. Fisher, deceased; the defendant was a brother of the deceased; and the action was brought to recover $835 received by the defendant upon a policy or certificate of insurance upon the life of the deceased issued 19th May, 1888, by the Commercial Travellers' Mutual Benefit Society.

By the policy the society promised to pay the amount insured, upon the death of the insured person, to "Mrs. Agnes E. E. Fisher, his wife, or such other beneficiary or beneficiaries as the said James T. Fisher may in his lifetime have designated in writing indorsed on this certificate, and in default of any such designation to his legal representatives."

The policy was founded upon an application signed by the insured in which, in answer to the printed direction "give full name and relationship of the person or persons to whom you desire your death loss paid," the deceased

Statement.

wrote "wife, Agnes E. E. Fisher." This application was dated 7th May, 1888; a few days before the date of the policy.

On 12th April, 1892, the deceased indorsed an absolute assignment of the policy to his brother, the defendant, R. G. Fisher, and notice of the assignment was given by him to the society, and all premiums were afterwards paid by the defendant.

This assignment, though absolute in form, was intended only as security for the payment of two notes for $75 each, with interest, made by the deceased in favour of the defendant, and at the time of the assignment the defendant wrote a letter to the deceased undertaking to transfer the policy back to him on payment of these two notes.

These notes were never paid; the defendant from time to time made additional advances to the deceased, but without any further written agreement that the policy should be held as security for these further advances. On 14th November, 1895, the deceased died, and on 18th January, 1896, the society paid to the defendant $835 as the amount due upon the policy.

On 23rd November, 1895, the defendant wrote to the plaintiff that the policy was payable to him; on 27th November, 1895, she wrote to him in reply that to carry out the wishes of the deceased she was anxious that the defendant should receive every cent of what was owing him, and that she would like to see his account against the deceased. On 31st January, 1896, the defendant wrote the plaintiff informing her that the society had paid him the $835, and that out of it he proposed to pay himself what deceased owed him and the funeral and other expenses, amounting to $225.73, a detailed statement of which he inclosed her. In the same letter he told her that the policy in question was assigned to him to pay what the deceased owed him, which was probably some $500. In reply she wrote on 2nd February, 1896: "It is my wish that you should be paid every cent that is owing you; Mr. Davis the same; and the balance, I think, should

be paid to me for Lily. This I consider is carrying out Jim's wishes." The Mr. Davis referred to was another creditor of her husband, with whom she wrote that she had been going over the debts due to the defendant by the deceased. On 7th February, 1896, the plaintiff wrote the defendant: "There are numerous accounts, and I wish you would leave all accounts other than funeral expenses to me save those at London referred to in your former letter." On 8th May, 1896, the defendant paid to Mr. Davis $100 on account of a claim he had of $400 against the deceased. Statement.

The only evidence of the advances subsequent to the assignment being a charge upon the policy in favour of the defendant for these further advances was the statement of the defendant at the trial that the deceased would say to him, when asking for advances, that he had sufficient security for them in the policy—that this was said at least twice, first in November, 1893, when he borrowed $100 when going to England, and the second time in 1894, when some $30 or $40 was advanced. The defendant, besides the $100 paid to Davis, paid certain funeral and other expenses, amounting to $212, and he swore at the trial that his own advances to the deceased in his lifetime amounted with interest to about $650.

The plaintiff made no claim upon the defendant until several months after the payment of the $100 to Davis. The present action was brought on 12th November, 1896, the plaintiff claiming to recover the whole of the $835 received by the defendant from the society, as money belonging to the plaintiff, which the defendant had no right to receive, and asserting that there was a trust of the policy in her favour which prevented the deceased from assigning it.

The action was tried by STREET, J., at Toronto, on the 20th April and 22nd May, 1897.

McCarthy, Q.C., for the plaintiff.

Aylesworth, Q.C., for the defendant.

Judgment.

Street, J.

May 29, 1897. STREET, J.:—

On the face of the certificate which constitutes the contract between the deceased James Thorburn Fisher and the society, the amount of the insurance is made payable upon his death "to Mrs. Agnes E. E. Fisher, his wife, or such other beneficiary or beneficiaries as the said James Thorburn Fisher may in his lifetime have designated in writing indorsed on this certificate, and in default of any such designation to his legal representatives."

The only indorsement upon the certificate is an absolute assignment to the defendant, Robert G. Fisher, which is shewn, however, by a contemporaneous writing signed by the defendant, to have been intended only as a security for an advance made to the deceased by him, for the defendant agrees to reassign the certificate to the deceased on repayment of the advance.

I think the language of the certificate admits of but one construction, which is, that, in the absence of an indorsement designating a beneficiary, the insurance money belongs to the legal personal representatives of the insured. There is no designation, either on the face of the certificate or elsewhere, constituting Mrs. Fisher a beneficiary, and she never, in my opinion, was entitled as a beneficiary to this money. Had it not been for the gift to the personal representatives in default of a designation indorsed upon the certificate, there would have been room for the construction that Mrs. Fisher was to have the money unless some other person were designated as beneficiary by indorsement, but the insertion of the gift over precludes such a construction.

I cannot view the statement in the application that the money was to be paid to the plaintiff as affecting the matter. There is no contract between the deceased and the plaintiff; nor between the plaintiff and the society. The contract was between the deceased and the society, and the plaintiff has no *locus standi* to ask for a rectification of the certificate. The deceased must be taken to have approved of the form in which the certificate issued; we

Judgment.
Street, J.

cannot say that he would have kept it in force had it issued in any other form. We must assume that he approved of the form which gave him a right to assign it, because he acted upon that right, rather than that he supposed it to be in a form which would not permit of his assigning it.

If it were possible to place upon the certificate the construction sought for by the plaintiff, it would still be plain that a right to revoke the trust in favour of the wife was reserved to the deceased in the certificate, and that no absolute and irrevocable trust such as is contemplated by the statute was ever created in her favour. The result would then be to give to the defendant a charge for the money advanced at the time of the assignment with interest, and he would have the premiums paid as paid by way of salvage.

In addition to this, however, I think upon the correspondence I should find that the defendant, believing he was entitled to a charge for all his advances under the conversations had with his brother, so stated the fact to the plaintiff, and that she, desiring to pay her husband's debts and funeral expenses, ratified the action of the defendant in paying out these sums on her husband's account, and assented to his retaining his own claim so far as the money would go. She appears to have done this after full consultation with Mr. Davis, and out of a desire to carry out what she considered to be her husband's wishes.

So that in either case I think the action should be dismissed with costs.

E. B. B.

RE PICKETT AND TOWNSHIP OF WAINFLEET.

Municipal Corporations—By-law—Submission to Electors — Omission to Post By-law and Notice—55 Vict. ch. 42, sec. 293 (O.)—Irregularities—Result of Voting—Saving Clause, sec. 175.

Upon a motion to quash a municipal by-law which required the assent of the electors and was voted upon by them and carried by a majority of 16 in a total vote of 550 out of an electorate of 941 :—

Held, that the unexplained omission of the council to put up a copy of the by-law with a notice stating, *inter alia*, the hour, day, and places for taking the votes, in four or more of the most public places in the municipality, as required by sec. 293 of the Municipal Act, 55 Vict. ch. 42 (O.), or at any place therein, was fatal to the by-law ; the evidence disclosing many other irregularities ; and the onus which was upon the council to shew, under sec. 175, that the proceedings were conducted in accordance with the principles laid down in the Act, and that the result was not affected by the mistakes and irregularities, not being satisfied.

Statement. THIS was a motion by one David Pickett, a ratepayer of the township of Wainfleet, to quash by-law No. 489 of that township, being a by-law to repeal a by-law to prohibit the sale of liquor in the township.

The prohibitory by-law was passed on the 15th January, 1894. The repealing by-law was voted on by the electors on the 23rd January, 1897, and, having been carried by a majority of sixteen votes, was finally passed by the council on the 27th January, 1897.

The number of electors in the municipality who were qualified to vote on the by-law was 941. The number who actually voted thereon was 550.

The facts and the arguments of counsel are sufficiently referred to in the judgment.

The motion was argued before OSLER, J. A., sitting in Court, for and at the request of BOYD, C., on the 22nd April, 1897.

J. J. Maclaren, Q.C., for the applicant.

DuVernet and *L. C. Raymond*, for the township corporation, referred to *Re Wycott and Township of Ernestown*, 38 U. C. R. 533 ; *Huson* v. *Township of South Norwich*, 21 S. C. R. 669 ; *Re Pounder and Village of Winchester*, 19 A. R. 684, 690.

June 1, 1897. OSLER, J. A. :—

Judgment.

Osler, J.A.

The objections to the by-law, as set forth in the notice, are seventeen in number. Many of them are of a trivial character, and some are disproved; others, however, are not so. Among these is the second, viz., that copies of the by-law and notice of the polling were not posted at four of the most public places in the township, as required by law; the third, that no copies of schedule L. of the Municipal Act, "directions for the guidance of voters in voting," were delivered by the clerk to any of the deputy returning officers at the polling on said by-law or posted at any of the polls at the voting in question; the seventh, that the clerk of the township acted as deputy returning officer at the poll of ward No. 1; the eighth and tenth, that the statutory declaration of secrecy required by sec. 322 to be made before the opening of the polls was not made at polls Nos. 1 and 3; and as to the clerk, who acted as deputy returning officer at poll No. 1, that he marked the ballot of an illiterate elector without observing the requirements of sec. 149.

The by-law, being one to repeal a former by-law which had been carried by the votes of the electors, and to which their assent was necessary, could only be carried in the same way, and equally with the former required the assent of the electors qualified to vote thereon before it could be properly passed.

Section 293, sub-sec. 1, of the Consolidated Municipal Act, 1892, enacts that in the case of such a by-law, the council shall, by the by-law, fix the day and hour for taking the votes of the electors, and such places as the council shall, in their discretion, deem best for the purpose, and where votes are to be taken at more than one place, shall name a deputy returning officer to take the votes at every such place. By sub-sec. 2, the council are required, besides publishing the by-law in a newspaper in the prescribed manner, to "put up a copy of the by-law at four or more of the most public places in the munici-

Judgment.
Osler, J.A.

pality." Sub-sec. 3: Appended to the copy so published and posted shall be a notice, signed by the clerk, stating *inter alia* the date of the first publication, and that at the hour, day and places fixed in the by-law for taking the votes of the electors, the polls will be held.

The by-law was published, not, apparently, in consequence of any resolution passed by the council as required by sub-sec. 2, but pursuant to some verbal direction communicated to the clerk, in two newspapers published in the county town, but it was not posted, as required by the same sub-section, at four or more of the most public places, or at all, at any place whatever in the municipality. No explanation was offered of this omission by any officer or member of the council. It was contended on behalf of those interested in supporting the by-law that the general interest taken in the subject, and the information given by posters distributed throughout the municipality, and meetings held therein, together with the publication in the newspapers, must have brought notice of the by-law and of the time and places of polling, home to every elector, and therefore that the omission to comply with the requirement of the section could not be said to have affected the result.

I am not of this opinion.

The vote, no doubt, was a substantial one, but the majority is very small—16 only—and there were at least two votes improperly polled from part III. of the voters' list, reducing it to 14, and there remained nearly 400 unpolled votes in the municipality. Had the majority been large, or had the posters calling the meetings specified the times and places at which the votes were to be taken, I might have arrived at a different conclusion. Everybody does not take a newspaper, and the posting of the by-law and notice is one of the methods specially required by the Legislature to be observed for giving notice to the electors. I think that the unexplained omission to comply with that requirement is one very difficult to excuse, and needs much more convincing evidence that it was harmless than the respondents have

adduced. I refer to *Re Coe and Township of Pickering*, 24 U. C. R. 439; *Re Miles and Township of Richmond*, 28 U. C. R. 333; *Re Mace and County of Frontenac*, 42 U. C. R. 70. Even if the direction I am considering is not imperative, as Armour C. J., seems to have thought in the latter case, it is clear that the onus of proving that the omission to comply with it has not affected the result is upon the respondents, and I am of opinion that they have failed to sustain it. Sections 175 and 306 of the Act were relied on, but they merely enable the Court to refrain from declaring the by-law invalid for want of compliance with forms or rules as to taking the poll, or counting the votes, or by reason of any irregularity, if it appears that the proceedings were conducted in accordance with the principles laid down in the Act, and that the non-compliance, mistake, or irregularity, did not affect the result. I am not satisfied with respect to the latter condition, while as to the former, there is evidence that at more than one of the polling places the voting was conducted with an entire disregard of some of the safeguards provided by the Act for ensuring the secrecy of voting: secs. 149, 170. At none of the polls was schedule L, "directions for the guidance of voters in voting," posted up inside and outside the polling place, or at all, as required by law: secs. 126, 127, 307.

Judgment. Osler, J.A.

The township clerk was the deputy returning officer at poll No. 1, which he ought not to have been. He performs the duties of a deputy returning officer only where the election is not to be by wards or polling sub-divisions: sec. 98. He is the returning officer for the whole municipality, and deputy returning officers make to him the returns for their wards or polling sub-divisions, from which he sums up the votes for and against the by-law, declares the result, and is then to certify to the council under his hand whether the majority of the electors voting upon it have approved or disapproved of the by-law. In this case it may be observed that the clerk wholly omitted to comply with this latter requirement of sec. 318.

Judgment.
Osler, J.A.

I do not mean to go through all the irregularities which took place during and after the polling. Everything was conducted in the loosest way and with a disregard of the plain directions of the Act which is surprising. Had there been nothing else, it is possible that the election might have been upheld under sec. 175, even as against those I have noted. But the very least that can be said of them is that they do not diminish the force of the objection on which I have held that the by-law must be quashed.

The motion is accordingly granted with the usual result as to costs.

E. B. B.

Re Birely and Toronto, Hamilton, and Buffalo Railway Company.

Railways—Lands Injuriously Affected—Arbitration and Award—51 Vict. ch. 29, secs. 90, 92, 144 (D.)—Compensation—Damages—Operation of Railway—Interest.

A claimant entitled under the Railway Act of Canada, 51 Vict. ch. 29, to compensation for injury to lands by reason of a railway, owing to alterations in the grades of streets and other structural alterations, is also, having regard to secs. 90, 92, and 144, entitled to an award of damages arising in respect of the operation of the railway, and to interest upon the amounts awarded, notwithstanding that no part of such lands has been taken for the railway.

Hammersmith, etc., R. W. Co. v. *Brand*, L. R. 4 H. L. 171, distinguished.

Statement.

An appeal of the railway company from part of an award of three arbitrators made under the Railway Act of Canada, 51 Vict. ch. 29. The arbitration was for the purpose of ascertaining the compensation to be paid by the railway company for damages which the land of Florence H. Birely, situated on the south-east corner of Charles and Hunter streets, in the city of Hamilton, having a frontage on Charles street of sixty-one feet and a depth on Hunter

street of one hundred feet, had suffered or might suffer from the alteration of the grade of Hunter and Charles streets and the erection thereon of retaining walls, and generally all the changes and alterations and operation of the railway of, in, and upon these streets. Statement.

The award was made on the 22nd April, 1897.

The arbitrators awarded and adjudged that the lands had suffered damage from such cause or causes to the extent of $1,700, and they awarded and adjudged interest on that sum from the 1st January, 1896, amounting to $66.58, making in all $1,766.58, which sum they stated in their award to be made up as follows:

Damages arising from the alterations in the grades and all other structural alterations of Hunter street and Charles street, $1,200; damages arising in respect of the operation of the railway, $500; interest, $66.58.

From the written opinion of one of the arbitrators it appeared that the interest was allowed from the time the work was completed and the powers exercised, and that, as money had been deposited by the company for this purpose in the bank during the time, interest was allowed at the rate of three per cent. per annum.

The appeal was upon two grounds: (1) That the arbitrators erred in awarding the sum of $500 as damages arising in respect of the operations of the railway, as no part of the lands of Florence H. Birely was taken by the company, and the arbitrators should have confined their award to damages to her lands arising from the alterations in the grades and all other structural alterations in Hunter and Charles streets. (2) That the damages awarded being in the nature of unliquidated damages, interest thereon should not have been allowed.

An action having been brought by the land-owner before the arbitration (as in *Hendrie* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 26 O. R. 667, 27 O. R. 46), the plaintiff therein, the land-owner, moved for judgment in the action for the amount found due by the award, and interest

Statement. thereon, and for the costs of the action and arbitration, and for an order for the taxation of the costs of the arbitration.

The appeal and motion for judgment were heard by ARMOUR, C. J., in Court, on the 27th May, 1897.

D'Arcy Tate, for the company, upon the question of the damages relied on *Hammersmith, etc., R. W. Co.* v. *Brand*, L. R. 4 H. L. 171, and *Attorney-General* v. *Metropolitan R. W. Co.*, 10 Times L. R. 134; and as to the question of interest, upon *Re Leak and City of Toronto*, 17 C. L. T. Occ. N. 191.

Aylesworth, Q. C., and *F. R. Waddell*, for the land-owner, cited *Corporation of Parkdale* v. *West*, 12 App. Cas. 602; *Hendrie* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 26 O. R. 667, 27 O. R. 46; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 Ex. 221; *Atlantic and North-West R. W. Co.* v. *Wood*, [1895] A. C. 257; *James* v. *Ontario and Quebec R. W. Co.*, 12 O. R. 624, 15 A. R. 1; *Re Taylor and Ontario and Quebec R. W. Co.*, 11 P. R. 371; *Re Philbrick and Ontario and Quebec R. W. Co.*, *ib.* 373.

ARMOUR, C. J., at the conclusion of the argument, dismissed the appeal as to the question of interest, holding that the arbitrators might in awarding compensation make an allowance in the nature of interest from the time when the right to compensation accrued. He reserved judgment upon the other question.

June 5, 1897. ARMOUR, C. J.:—

This appeal must be dismissed.

I disposed of that part of the appeal relating to the interest awarded on the argument, and there only remains the appeal against the $500 awarded "as damages arising in respect of the operation of the railway."

The case of *Hammersmith, etc., R. W. Co.* v. *Brand*, L. R. 4 H. L. 171, was relied upon by the appellants; but that

case is no authority upon the construction of the Railway Act 51 Vict. ch. 29 (D.), for it was decided upon the construction of the Imperial Act 8 Vict. ch. 20, which differs essentially from the Railway Act; and it is safe to say that, had the Imperial Act 8 Vict. ch. 20 been identical with the Railway Act, the decision would have been the other way. Judgment. Armour, C.J.

That case was determined upon the construction to be placed upon secs. 6 and 16 of the Imperial Act 8 Vict. ch. 20, and the words preceding the 6th section, which were also applicable to the 16th section, "and with respect to the construction of the railway and the works connected therewith," were a potent factor in the decision, and another potent factor was that the powers in the 16th section granted, and for the exercise of which compensation was by that section provided, did not include the use and employment of locomotive engines or other moving power, which power was granted by the 86th section.

In the Railway Act, under the heading "General Powers," the power is granted, among others, (sec. 90, *k*), to "make, complete, alter, and keep in repair the railway, with one or more sets of rails or tracks, to be worked by the force and power of steam or of electricity or of the atmosphere, or of animals, or by mechanical power, or by any combination of them;" and power is also granted (*q*) to "do all other acts necessary for working, maintaining, altering, or repairing, and using the railway;" and it is under these powers that "the use and employment of locomotive engines or other moving power" is permissible by the Railway Act.

And it is thereby provided (sec. 92), that "the company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all parties interested for all damage by them sustained by reason of the exercise of such powers."

Judgment.

Armour, C.J.

The right of the parties interested to damages is not, therefore, confined to the construction of the railway, but extends to its operation as well.

And sec. 144 of the Railway Act provides for application being made to persons interested in lands which may suffer damage from the exercise of any of the powers granted for the railway, and for the making of agreements with such persons for the damages, and in case of disagreement for the settlement thereof by arbitration as provided by the Act.

I refer to *Re Devlin and Hamilton and Lake Erie R. W. Co.*, 40 U. C. R. 160; *St. Catharines R. W. Co.* v. *Norris*, 17 O. R. 667; *Corporation of Parkdale* v. *West*, 12 App. Cas. 602; *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153; *North Shore R. W. Co.* v. *Pion*, *ib.* 612.

The appeal will be dismissed with costs, and judgment will be given for the plaintiff in the terms of her motion for judgment.

E. B. B.

[DIVISIONAL COURT.

PEGG V. HOWLETT ET AL.

Division Court — Jurisdiction — Ascertainment of Amount — Promissory Note—Interest—56 Vict. ch. 15, sec. 2 (O.)—Abandonment of Excess—Recovery on Note — Indorsers — Sureties — Parties — Substitution of Plaintiff.

In an action in a Division Court against the makers and indorsers of a promissory note expressed on its face to be for $200 and interest, judgment was given for the plaintiff for $210:—

Held, that the amount was ascertained by the signatures of the defendants, and the interest accumulated upon the note from the time the amount was so ascertained was not to be included in determining the question of jurisdiction, and might be recovered, in addition to the claim, under 56 Vict. ch. 15, sec. 2 (O.), notwithstanding that the interest and the amount of the claim so ascertained together exceeded $200:—

Held, also, that the Judge had power, under Revised Rule 7 of the Division Courts, to permit the abandonment of the excess caused by a claim for notarial fees:—

Held, also, that upon payment of the amount of the note by the plaintiff to the original holder, the plaintiff being liable as indorser to such holder, the plaintiff became entitled to the note and to enforce his rights against the other parties to it; and, as it appeared that two of the defendants had indorsed the notes as sureties to the plaintiff for the makers, he was entitled to recover against them, although the note was made payable to his order.

Wilkinson v. *Unwin*, 7 Q. B. D. 636, followed.

Held, lastly, that Revised Rules 211, 216, and 224 of the Division Courts authorized the Judge to substitute the name of the plaintiff for that of the original holder of the note as plaintiff in the action.

Statement.

THIS was an appeal by the defendants G. W. Howlett and R. Howlett from an order of the 4th Division Court in the county of York dismissing a motion to set aside the judgment for the plaintiff and for a new trial of an action upon a promissory note.

The facts were as follows:—

Thomas Flanagan on the 21st November, 1896, issued a summons in the above named Division Court to Thomas Howlett, Jane Howlett, Charles Howlett, G. W. Howlett, R. Howlett, and W. W. Pegg, claiming from them $210.70 in respect of a promissory note dated the 12th March, 1896, made by Thomas Howlett, Jane Howlett, and Charles Howlett, payable on the 1st November after date, to the order of W. W. Pegg, for $200 with interest at six per cent. per

Statement.

annum, and indorsed by G. W. Howlett, R. Howlett, and W. W. Pegg, and sold by W. W. Pegg to Thomas Flanagan, and claiming also in respect of the notarial fees thereon.

On the 8th December, 1896, Pegg paid to Flanagan the amount of his claim and costs, and Flanagan transferred, assigned, and set over to Pegg all his right, title, and interest in the action, and authorized and empowered him to use his name in the action for all purposes for the collection of the debt and costs therein.

The case came on for trial on the 21st December, 1896, when, objection being made to the jurisdiction, the Judge adjourned the case to permit the plaintiff to amend his claim.

This amended claim was then made: "The defendant W. W. Pegg, having paid the plaintiff the full claim herein, and having taken an assignment thereof from the plaintiff, asks to have the style of cause herein amended by striking out the name of the plaintiff, and substituting the defendant W. W. Pegg as plaintiff herein, and by striking out the name 'W. W. Pegg' from the defendants. The said W. W. Pegg then claims from the said defendants Howletts the sum of $210 for principal and interest due under a promissory note made by the defendants, Thomas Howlett, Jane Howlett, and Charles Howlett, to the said Pegg, and indorsed by the defendants G. W. Howlett and R. Howlett, and dated 12th March, 1896, and due on 1st November, 1896, with interest at six per cent. per annum, which said note was duly protested at maturity. The particulars are as follows:

Promissory note dated 12th March, 1896, and due 1st November, 1896, for	$200 00
Interest on same from the date thereof to 6th January, 1897, at 6 per cent. per annum	10 00
Total claim	$210 00

The said Pegg abandons the notarial fees, to bring the action within the jurisdiction of the Court."

The case came on again for trial on the 6th January,

1897, when the Judge allowed the claim as amended, and gave judgment for $210 against all the defendants, being $200, the amount of principal, and $10, interest thereon from the date of the note. He also amended the style of cause by striking out the name of Thomas Flanagan as plaintiff and substituting therefor the name of W. W. Pegg, and by striking out Pegg's name as a defendant. Statement.

It was agreed at the trial by counsel for Pegg and the defendants that no evidence was necessary to charge the defendants, so far as Flanagan was concerned, with such an amount as the Court had jurisdiction to entertain, and that if Pegg could, on the facts stated in the Judge's notes of evidence, be made a party plaintiff at the trial, he would be entitled to a judgment, if the Court had jurisdiction, on the facts, to try an issue between him and the defendants.

The appeal of the defendants G. W. Howlett and R. Howlett was upon the following amongst other grounds:—

1. That the Judge had no jurisdiction to give judgment for $210, for the note sued on was for $200 only, and was payable on the 4th November, 1896, with interest at six per cent., amounting when due to $207.50; the note was sued on the 21st November, 1896; no claim was made in the plaintiff's particulars of claim for interest from the date of the action until judgment; and the Judge had no power under 56 Vict. ch. 15 (O.) to give judgment for more than the amount of the note and accrued interest, when due, as any sum allowed for interest after the note was sued would be by way of damages, and would place the claim beyond the jurisdiction of the Court under sec. 70 of the Division Courts Act, R. S. O. ch. 51.

2. When Pegg paid Flanagan the amount of the note, after action brought and before judgment, Pegg simply became, if anything, the assignee of a cause of action against his co-defendants for money paid for their use and benefit, and the Division Court had no jurisdiction beyond $100; Flanagan could not transfer his property in the note by assignment (sec. 13 of R. S. O. ch. 122); but he could have withdrawn his suit and handed over the note to Pegg,

Statement. who might then have sued upon it; there was no judgment at the date of the assignment to Pegg, and therefore there was none for Flanagan to assign; the most he could do was to assign his interest in the money represented by the note.

3. The Judge had no power to allow Pegg to be substituted as plaintiff, because he had become interested in the claim after action brought.

The appeal was argued before a Divisional Court composed of ARMOUR, C.J., and STREET, J., on the 10th May, 1897.

S. W. Burns, for the appellants.

C. J. Holman, for the plaintiff.

Cleveland Press v. *Fleming*, 24 O. R. 335; *Re Elliott* v. *Biette*, 21 O. R. 595; and *McCracken* v. *Creswick*, 8 P. R. 501, were referred to.

May 21, 1897. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The Court below had, in my opinion, jurisdiction to give judgment for the amount for which judgment was given.

The note sued on was for $200 with interest; the amount was ascertained, that is, made certain, by the signatures of the defendants; and the interest accumulated upon the note from the time the amount was so ascertained by the signatures of the defendants is not to be included in determining the question of jurisdiction, but interest so accumulated may be recovered in a Division Court in addition to the claim notwithstanding the interest and the amount of the claim so ascertained together exceed the sum of $200: 56 Vict. ch. 15, sec. 2 (O.)

Rule 7 of the Revised Rules of the Division Courts provides that "where the excess is abandoned, it shall be done in the first instance, and in the claim. Where such has

not been done, the Judge may, upon such terms as he shall see fit at any time thereafter, but before judgment, permit such abandonment, in which case an entry thereof shall be made in the proceedings." So that the learned Judge had full power to permit the abandonment of the excess caused by the claim for notarial fees.

Judgment. Armour, C.J.

Upon payment by Pegg to Flanagan of the amount of the promissory note sued for, and upon which Pegg was liable to Flanagan as indorser, Pegg became entitled to the promissory note and to enforce his rights against the other parties to it.

And, as it appeared that the defendants G. W. Howlett and R. Howlett had indorsed the promissory note as sureties to Pegg for the makers, he was entitled to recover against them, although the note was made payable to his order: *Wilkinson* v. *Unwin*, 7 Q. B. D. 636.

I think that Rules 211, 216, and 224 of the Revised Rules of the Division Courts authorized the Judge to substitute the name of Pegg for that of Flanagan as plaintiff in the suit.

There is no appeal by Jane Howlett, and we cannot therefore interfere with the judgment against her.

The appeal will be dismissed with costs.

E. B. B.

RE DIAMOND V. WALDRON ET AL.

Division Court—Breach of Contract—Place of—Cause of Action—Mandamus.

Plaintiff gave an order in Ontario for goods to the traveller of the defendants, wholesale merchants in Montreal, "Ship *via* G. T. R." at a certain named date. The goods were not so shipped and a correspondence ensued, ending in the defendants refusing to supply the goods:—*Held*, that the breach was the non-shipment *via* Grand Trunk Railway at Montreal, and not the subsequent refusal by correspondence, and as the whole cause of action did not arise where the order was given, a mandamus to a Division Court Judge to try the action was refused.

Statement

THIS was an application for a mandamus to the Judge of the Eleventh Division Court in the united counties of Northumberland and Durham to hear and determine an action brought by one J. E. Diamond, a retail merchant, against the firm of Waldron, Drouin & Co.

The action was for damages amounting to $24 for the nonfulfilment of a contract to supply the plaintiff with six wombat coats, being the alleged difference between the price at which the defendants contracted to deliver the coats to him and the price at which he could have procured them on the 6th September, 1896, when they were to have been delivered.

The order for the goods was taken in Campbellford, in the county of Northumberland, in the Province of Ontario, by a traveller of the defendants who were a firm of wholesale merchants doing business in Montreal, in the Province of Quebec, and was worded as follows:—

"Order No. 11 Sold by H. McIntyre. May 5th, 189 6

WALDRON, DROUIN & Co., Montreal.
Successors to Mackean, Waldron & Co.

Please forward to J. E. Diamond

Town Campbellford.

Ship via G. T. R. When 1st September.

Terms: 15th Nov. 5%, 60 days, or 4 months.

2 Grey Robes, 44 x 60, ...	$ 4 50....	$9 00	Statement.
4 Grey Robes, 52 x 66, ...	5 25....	21 00	
2 Men's Wallaby Coats, $\frac{1}{44}$ $\frac{1}{46}$	13 50....	27 00	
4 Men's Wombat Coats, $\frac{1}{44}$ $\frac{2}{46}$ $\frac{1}{48}$	12 00....	48 00	
If to be had:—			
2 Men's Wombat Coats, $\frac{1}{44}$ $\frac{1}{48}$	10 50....	21 00	
		$126 00	

(Sd.) H. M. McINTYRE."

The first three items of the order were duly supplied but were subsequently returned by mutual agreement and a correspondence ensued in which the plaintiff requested delivery of the wombat coats. The defendants alleged they were only to be supplied "if to be had" under the terms of the order and that they could not procure them.

The coats not being supplied, the plaintiff on November 5th, 1896, brought his action in the Division Court at Campbellford, and the Judge of that Court after hearing the evidence as to where the goods were to be delivered found that the contract was that they were to be delivered to the Grand Trunk Railway Company in Montreal, and that being so the breach of the contract (the non-delivery of the coats) took place there, and as the whole cause of action did not arise in Campbellford he had no jurisdiction to try the action and dismissed it with costs.

On this judgment being given the plaintiff moved for a mandamus to the Judge to try the action and the motion was argued in the Weekly Court on March 25th, 1897, before FALCONBRIDGE, J.

W. R. Riddell, for the motion. Was the non-delivery to the railway in Montreal the breach? Clearly not. That may have been a term at first, but correspondence ensued and there was no breach until the defendants finally declined to supply the coats. That was by letter written in Montreal and received in Campbellford. Even that letter was not a complete breach until so treated by the

Argument.

party to whom it was sent. The breach was not where the letter was written: *Re Noble* v. *Cline*, 18 O. R. 33; *Newcomb* v. *DeRoos*, 2 El. & El. 271; *Cowan* v. *O'Connor*, 20 Q. B. D. 640. The letter must be received before a right of action accrues, for it might be revoked or not sent. The repudiation of the contract when acted on by the plaintiff is the breach: *Frost* v. *Knight*, L. R. 7 Ex. 111, at pp. 112, 113. The mere announcement of refusal to fulfil is not the breach, but the determination by the plaintiff to act thereon, and this was in Campbellford: *Johnston* v. *Milling*, 16 Q. B. D. at pp. 467, 473; *Roper* v. *Johnstone*, L. R. 8 C. P. at p. 177.

Geo. Kerr, contra. The defendants reside within the jurisdiction. The order taken by the traveller was only conditional on the approval of the employers. The coats were to be delivered in Montreal and the breach, if any, was the failure to deliver there. No letter refusing to deliver could change the place of the breach, and if it could it would not be necessary for the recipient to write accepting the breach. This action is for non-delivery in Montreal. The Judge has concluded upon the facts that he had no jurisdiction and this Court will not review that: *Kernot* v. *Bailey*, 2 U. C. L. J. 178. When there is any doubt as to jurisdiction no order will be made: *Trainor* v. *Holcombe*, 7 U. C. R. 548. I refer also to *In re Woods* v. *Rennet*, 12 U. C. R. 167; *Re Watt* v. *VanEvery*, 23 U. C. R. 196.

Riddell, in reply. The breach in Montreal, if any, was waived by the correspondence. The question of jurisdiction is concluded by *Regina* v. *The Judge of Southampton, etc.*, 65 L. T. N. S. 320, and an order will be made. See also *In re Burns* v. *Butterfield*, 12 U. C. R. 140.

May 7th, 1897. FALCONBRIDGE, J.:—

The jurisdiction by mandamus over inferior judicial tribunals is closely guarded and jealously exercised by the Courts (High, on Extraordinary Legal Remedies, 2nd ed., sec. 147) and should be exercised only in a clear case.

Judgment.

Falconbridge, J.

In *Kernot* v. *Bailey*, 4 W. R. 608; 2 U. C. L. J. O. S. 178, the Queen's Bench (Coleridge, Erle and Crompton, JJ.) held that where on the hearing of a plaint in a County Court, the Judge, having heard the evidence as to the jurisdiction, thinks that the cause of action did not arise within his jurisdiction, and nonsuits the plaintiff, he has heard the cause and no mandamus will issue to compel him to hear it.

But in *Regina* v. *The Judge of Southampton, etc.*, 65 L. T. N. S. 320, the Queen's Bench Division (Day and Lawrance, JJ.) held that where a County Court Judge, after hearing so much of a case as relates to the jurisdiction, declines to hear and determine it, erroneously believing that he has no jurisdiction, an order in the nature of a mandamus will lie to compel him to hear and determine it.

I think, however, that the learned Judge below came to the right conclusion on the question of jurisdiction both for the reasons given by him in his carefully considered judgment, and for the additional reason that the plaintiff's cause of action was complete by the failure to deliver the goods at Montreal according to the terms of the order on 1st September.

I fail to see the force of Mr. Riddell's argument that time was not of the essence of the contract. That question does not arise, for the defendants not only failed to deliver, but persisted in refusing to deliver the four wombat coats: and I also fail to see why the plaintiff's insisting on getting the goods, kept the matter open.

The breach then was the failure to deliver and not the writing of the letter of 24th September, and the learned Judge is right, and this motion must be dismissed with costs.

I have had occasion to consult the following, amongst other authorities, in disposing of this matter:

Frost v. *Knight*, L. R. 7 Ex. at p. 112; *Johnston* v. *Milling*, 16 Q. B. D. at p. 467; *Roper* v. *Johnstone*, L. R. 8 C. P. at p. 177; *Re Noble* v. *Cline*, 18 O. R. 33; *Newcomb*

Judgment.

Falconbridge, J.

v. *DeRoos*, 2 El. & El. 271; *Cowan* v. *O'Connor*, 20 Q. B. D. 640; *Kernot* v. *Bailey*, 2 U. C. L. J. O. S. 178; *Trainor* v. *Holcombe*, 7 U. C. R. 548; *Re Watt* v. *Van Every*, 23 U. C. R. 196; *Regina* v. *Judge of Southampton, etc.*, 65 L. T. N. S. 320; *Re The Judge of the County Court of Elgin*, 20 U. C. R. 588; *In re Burns* v. *Butterfield*, 12 U. C. R. 140; *In re Woods* v. *Rennet*, 12 U. C. R. 167; Leake on Contracts, 3rd ed., 752; Campbell's Ruling Cases, vol. vi., 636; *Wood* v. *Bernal*, 19 Ves. 220; *Webb* v. *Hughes*, L. R. 10 Eq. 281; *Oakden* v. *Pike*, 34 L. J. Ch. at p. 624; *Cutts* v. *Thodey*, 13 Sim. 206; *Upperton* v. *Nickolson*, L. R. 6 Ch. at p. 443; *Brown* v. *Moller*, L. R. 7 Ex. 319; *The Danube, etc., R. W. Co.* v. *Xenos*, 13 C. B. N. S. 825; *Thornhill* v. *Neats*, 8 C. B. N. S. 831; *Ex parte Milner*, 15 Jur. 1037.

G. A. B.

RE SINCLAIR V. BELL.

Division Courts—Prohibition—Court Nearest Defendant's Residence—Jurisdiction—R. S. O. ch. 51, sec. 82.

An action was brought in a Division Court against a firm consisting of two partners, which had been dissolved before action, one of the partners being resident out of Ontario and the other where the cause of action arose, being in a county other than that comprising the Division in which the action was brought, although such Division was nearest to where the firm had carried on business and the applicant resided. The Judge having overruled an objection to his jurisdiction and tried the case and pronounced judgment on the merits, prohibition was, under the circumstances, refused.

Semble. The Judge at the trial might have made an order permitting the plaintiff to proceed.

THIS was a motion by Cyrus Bell for a prohibition to the Judge of the Second Division Court in the county of Oxford, under the following circumstances:— Statement.

On the 26th December, 1896, a summons was issued out of that Court at the suit of the respondent, against the firm of Bell & Bell, of which the applicant had been a member, and which was dissolved before that time, the other partner not being a resident of Ontario.

The applicant's place of residence was in the county of Brant, and the cause of action arose in that county, but the place of sitting of the Second Division Court was the nearest to the residence of the applicant, and to the place where the firm carried on business.

The applicant attended the sittings of the Court on the 12th January, 1897, and by his agent objected to its jurisdiction, on the ground that he was sued in the wrong Division Court—"the contract having been made and the defendants both being residents outside of such jurisdiction."

The applicant had given notice that he disputed the jurisdiction of the Court in his notice disputing the plaintiff's claim.

The Judge overruled the objection to the jurisdiction, and held that the Second Division Court had, under section 82 of the Division Courts Act, jurisdiction to deal with the

Statement. claim.* The case was then heard on the merits, and the plaintiff had judgment for the amount of his claim, $17.25 and costs.

On May 17th, 1897, *W. H. Blake*, supported the motion. *Douglas Armour*, contra.

May 20th, 1897. MEREDITH, C. J.:—

Having regard to the amount of the plaintiff's claim, and the fact that merits are not sworn to, and that there has been a decision against the applicant on the merits, it is apparent that I ought not to interfere unless it is quite clear that there was not jurisdiction in the Second Division Court.

I agree with Mr. Blake that section 82 does not apply where there is more than one defendant, and the condition of the operation of the section as to residence does not apply to all of them.

In order to give to the section the meaning contended for by Mr. Armour, I must read into it after the word "defendant," the words "or one of them."

The object of the section was, as I understand it, to enable the plaintiff to bring the action in the Division Court which best suited his convenience, if the convenience of the defendant or defendants was also met, as it appears to have been contemplated it would be where the place of sitting of that Court was the nearest to his or their residence.

However, in the circumstances of this case, I think the plaintiff was entitled to sue in the Second Division Court. It is clear that had he sued the applicant alone, as he

*Sec. 82.—(1) "Such action may be entered and tried and determined in the Court the place of sitting whereof is the nearest to the residence of the defendant, and the action may be entered, tried and determined irrespective of the place where the cause of action arose, and notwithstanding that the defendant at the time resides in a county or division other than the county or division in which the Division Court is situate, and the action entered."

might have done, the other partner not being resident in Ontario, he might have sued in that Court.

Judgment.

Meredith, C.J.

As pointed out by Lord Justice Lindley, in *Western National Bank of the City of New York* v. *Perez Triana & Co.*, [1891] 1 Q. B. 304, at p. 314, "A plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he set out all their names"; and that being so, in my opinion, the other partner in this case, being out of Ontario, the action might well have been treated as one in which the partners were named individually in the summons, and, in such a case, I do not doubt that if it appeared at the trial that the defendant residing out of Ontario had not been served, his name would have been struck out of the summons and the action then treated as one against only the defendant within the jurisdiction who had been served. See sections 106 and 107.

It was further objected by counsel for the applicant that sec. 108, clause 4, does not apply to an action against a firm which has been dissolved; but the decisions under the corresponding provisions of the Consolidated Rules shew that it does: *Wilson* v. *Roger, McLay & Co.*, 10 P. R. 355, and cases there cited.

It was conceded by Mr. Blake that if the Judge at the trial had chosen to do so, he might have there and then made an order permitting the plaintiff to proceed with his action in the Second Division Court, and that if he had done so, the jurisdiction of that Court would have been complete for the trial of the action; but he relied on *Re Thompson* v. *Hay*, 20 A. R. 379, as an authority for the contention which he made that as the Judge had not done so, the applicant was entitled to prohibition. In *Re Thompson* v. *Hay*, no act which the Judge might have done would have given him jurisdiction to adjudicate on the claim, his only jurisdiction being to transfer the action to the proper Court; and it will be noticed that the prohibition there granted did not interfere with the right of the Judge to exercise that jurisdiction, but only with his adju-

Judgment.

Meredith, C. J.

dicating on the claim; and it seems to me that as in this case if prohibition were granted, the case would still remain subject to the power of the Judge of the Second Division Court to make the order which would admittedly give him jurisdiction, and as it has been tried on the merits, and there is no doubt that the Judge would exercise, and I think rightly exercise that power, I ought not to prohibit him as asked by the motion.

I therefore refuse the motion and I see no reason why the applicant should not pay the costs occasioned by it.

G. F. H.

THE QUEEN EX REL. FERRIS v. SPECK.

Municipal Corporations—Municipal Elections—Incorporated Village—Leasehold Qualification for Councillor—Consolidated Municipal Act, 1892, sec. 73.

The respondent was rated as lessee of land assessed for $800, which, with other land, worth at least $1,100, was mortgaged by the landlord for $800 in priority to the lease:—

Held, that the respondent was duly qualified as a candidate for the office of councillor of an incorporated village, as, under 55 Vict. ch. 42, sec. 73 (O.), the mortgage was not to be taken into account in diminution of the value, not being on his leasehold interest.

Semble, also, that, in qualifying, the respondent would be entitled to have the mortgage marshalled so that recourse should be first had to the other lands included in it, and that it should be apportioned according to the respective values of the different properties, and so the qualification was sufficient.

Statement.

THIS was an appeal from the judgment of the County Court Judge of Welland, on a motion by way of *quo warranto* under the circumstances mentioned in the judgment of MEREDITH, C. J.

The appeal was heard in Chambers on April 9th, 1897.

W. M. Douglas, for the relator.

DuVernet, for the respondent.

May 5th, 1897. MEREDITH, C. J.:—

Judgment.

Meredith, C.J.

Appeal by the relator from the judgment of the Judge of the County Court of the county of Welland, holding that the respondent possessed the necessary qualification to entitle him to be elected councillor for the village of Niagara Falls, and dismissing the motion to unseat him because of his alleged want of such qualification.

The respondent was duly rated upon the proper assessment roll as tenant of land, assessed thereon for $800. This land with other land owned by the same landlord, which it was admitted was of the value of at least $1,100, was encumbered by a mortgage for $800, having priority to the respondent's lease.

The question turns upon the meaning of section 73 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), which requires as to the property qualification so far as applicable to this case, that a person to be qualified to be elected, must have at the time of the election as proprietor or tenant, a legal or equitable freehold or leasehold, or partly freehold and partly leasehold, or partly legal and partly equitable, rated in his own name on the last revised assessment roll of the municipality, to at least the value thereafter mentioned, over and above all charges, liens and encumbrances affecting the same; such value being in the case of councillors of incorporated villages, freehold $200, or leasehold $400.

The learned Judge of the County Court was of opinion that the mortgage was not to be taken into account in ascertaining the value of the respondent's leasehold, as it was not a charge lien or encumbrance affecting it within the meaning of section 73, and after the best consideration I have been able to give to the matter, I am unable to say that his view is not the correct one.

The language of the section is by no means clear or unambiguous. The section seems to have been drawn under the notion that the assessment in cases where the property was leased was a separate one on the freehold

Judgment.

Meredith, C.J.

interest of the landlord, and the leasehold interest of the tenant, a view for which the Assessment Act affords no warrant.

It is true, that in a certain sense, the leasehold interest in this case is affected by the mortgage, but not, I think, in the sense in which the language of the section was intended to be understood. What was meant, I think, was that the leasehold interest itself should be the subject of the encumbrance, where the qualifying property was a leasehold interest, that is to say, an encumbrance created by the owner of the leasehold interest, or operating upon it *qua* leasehold.

The learned Judge was also of opinion that if the encumbrance was to be taken into account, the fact that it covers other property besides that of which the respondent was tenant, was to be considered, and in this I think he was right. I have no doubt that the respondent would be entitled to have the securities marshalled, so that recourse should be first had to the other land included in the mortgage, and so as to protect his leasehold interest, but even if that were not the case, the mortgage debt should, I think, be apportioned according to the respective values of the two properties included in it, and in either case the respondent would be sufficiently qualified even if the encumbrance be one within the provisions of section 73: see *Moore* v. *Overseers of Parish of Carisbrooke*, 12 C. B. 661; *Barrow* v. *Buckmaster*, 12 C. B. 664.

The appeal must be dismissed and with costs.

A. H. F. L.

REGINA v. BALLARD.

Criminal Law—Election to be tried by Jury—Re-election—Mandamus to Sheriff to bring Prisoner before County Judge—Criminal Code—55 & 56 Vict. ch. 29, secs. 766, 767 (C).

Where a prisoner is brought before a County Judge under section 766 of the Criminal Code, and elects to be tried by a jury and is thereupon remanded under section 767 to await such trial, although his election is made under a mistake or qualified by using the words "at present," there is no duty upon the sheriff to notify the Judge a second time under section 766, or to bring the prisoner again before him to enable the prisoner to re-elect to be tried by the Judge.

Statement.

THIS was an application for a writ of mandamus directed to the sheriff of the county of Dufferin to bring one David Ballard, a prisoner confined in the county gaol charged with arson, before the County Judge, under section 766 of the Criminal Code, to elect or re-elect whether he would be tried forthwith before the County Judge or demand a trial by jury.

The prisoner had been brought before the Judge and had elected to be tried before a jury and had been remanded to gaol to await his trial. Subsequently he desired to be tried before the Judge instead of by a jury, and he caused a notice to be served on the sheriff that he wished to elect or re-elect to be tried by the Judge, but the sheriff took no proceeding under the notice.

The motion was argued in Weekly Court on May 11th, 1897, before MOSS, J. A.

Rowell, for the motion. There are two questions arising on this application: (1) Has there been an election? (2) If there has can the prisoner re-elect? He may be tried before the County Judge: The Code, sec. 765. The sheriff must notify the Judge that he is confined, the nature of the charge, and cause the prisoner to be brought before him: section 766. The Judge should have the depositions. The evidence shews that he had none and that the prisoner's election was qualified by his using the words "for the present." His consent must be strictly construed: *Whalen*

Argument. v. *The Queen*, 28 U. C. R., at pp. 52, 154. He is entitled to re-elect: *Regina* v. *Prevost*, 4 Brit. C. R. 326. No wrong will be done to the Crown or any one.

John Cartwright, Q.C., Deputy Attorney-General, contra. The only use the depositions are to the Judge is to inform him of the charge, which he was aware of in this case, and no harm is done to the prisoner by their absence. If a prisoner can re-elect once he may any number of times. The law never intended a second election in a case like this, for where it was intended, careful provision is made as in section 769 of the Code. There was no sufficient notice to the sheriff and no request to bring the prisoner before the Judge. In any event there is no legal duty on the sheriff to do so: High on Extraordinary Legal Remedies, 2 ed., secs. 7, 9.

Rowell, in reply. The form of notice is not material. The rights of the prisoner must be considered: *Regina* v. *Burke*, 24 O. R. 64. As to a mandamus to the sheriff, see High, 2nd. ed., sec. 133.

May 13th, 1897. MOSS, J.A.:—

The applicant is confined in the common gaol at Orangeville, to which he was committed on the 29th January, 1897, under four warrants of commitment to stand his trial upon charges of arson preferred against him.

On the 2nd of February, being brought by the sheriff of the county before the Judge of the County Court, and being asked by the Judge to elect whether he would be tried summarily before him or before a jury, he answered (according to the statement in his affidavit) that "for the present" he elected to be tried before a jury, and he was thereupon remanded to gaol.

He says that, at the time, he was under the belief that he would be at liberty later to change his election and consent to be tried by the Judge without the intervention of a jury, if he was so disposed or advised.

He says he is now desirous of being tried by the Judge

Judgment.
Moss, J.A.

instead of by a jury, and on the 6th instant, he caused the sheriff of the county to be served with a notice that he desired to elect or re-elect to be tried by the County Judge, at his Criminal Court, on the charges for which he was committed for trial to the gaol. The notice contained no demand upon the sheriff to bring the applicant before the County Judge for the purpose stated in it, and it is not shewn to have been accompanied by any such demand.

Nothing having been done by the sheriff in response to this notice, the applicant now moves for an order directing the issue of a writ of mandamus to the sheriff, requiring him to bring the applicant before the County Judge, to give him an opportunity to elect or re-elect to be tried before the said Judge without a jury, or to be tried by a jury, and on the argument the right to the order was put upon two grounds: 1st, that there had been no election; 2nd, that if there was an election, the applicant is entitled to withdraw the election made, and now consent to be tried by the County Judge without the intervention of a jury.

The evidence does not make it clear when the applicant finally concluded to submit to be tried by the County Judge.

The delay between the 2nd of February and the 6th of May is attributed in part to the difficulty in procuring copies of the notes of the evidence taken at the investigation before the magistrate.

It was stated on the argument that although the investigation before the magistrate was concluded about the 29th of January last, copies of the notes of evidence which were taken by a stenographer were not procurable until the 4th instant.

Upon the argument, Mr. Rowell for the applicant, stated that notwithstanding anything alleged in the affidavits as to the cause of the delay in the extension and handing out of the stenographer's notes of the evidence, he was now satisfied it was not attributable to the Attorney-General's department.

Judgment.

Moss, J.A.

The application being for a mandamus against the sheriff, and being resisted on his behalf, as well as on behalf of the Crown, on the ground, among others, that there is no remedy in this case by way of mandamus, it is necessary, having regard to the office of a mandamus, and the circumstances under which it is ordered to issue, to see what duty, if any, the sheriff is bound to perform, which the applicant has a legal right to ask the Court to enforce performance of, for the existence of a legal right or obligation is said to be the foundation of every writ of mandamus. I will assume, for the present, that the service of the notice on the sheriff, on the 6th instant, was a sufficient demand, although, upon the authorities, I am inclined to the opposite opinion. I will also assume that the delay creates no difficulty. The applicant was, on the 29th of January last, committed by the magistrate to, and he has been ever since confined in, the common gaol of the county of Dufferin, at Orangeville.

It does not appear whether the sheriff, within twenty-four hours after the committal, notified the County Judge in writing as required by section 766 of the Criminal Code, or whether a longer period elapsed before the Judge was notified.

At all events, on the 2nd of February, the applicant was brought before the Judge, and, as stated in his affidavit, was asked "to elect whether I should be tried summarily before him or by a jury." I take this to amount to a statement that the Judge informed the applicant that he had the option to be forthwith tried before him without the intervention of a jury, or to remain in custody or under bail, to be tried in the ordinary way by the Court having criminal jurisdiction.

No record of the proceedings before the Judge has been produced or shewn on this application, but it is stated by Mr. McKay, the County Crown Attorney, who represented the Crown upon the occasion, that the applicant elected to be tried by a jury. It is clear he did not then consent to be tried by the Judge without a jury, and he appears to

have been remanded to gaol—the appropriate procedure where a prisoner demands a trial by jury.

Judgment.

Moss, J.A.

Upon the material before me I must conclude that the applicant being committed to gaol for trial and the sheriff having notified the County Judge in writing that the applicant was so confined, stating the nature of the charges against him, the County Judge caused the applicant to be brought before him, and that upon the matters set forth in section 767 of the Code being stated to him by the Judge the applicant demanded a jury and was thereupon remanded to gaol.

It is true he states in his affidavits that his statement to the Judge was that "for the present" he elected to be tried by a jury. I can only regard this as a demand for a jury and it was evidently so treated by the Judge.

It does not appear to me that a prisoner upon being brought before a Judge under these sections of the Code is driven to decide immediately as to what he shall do. I see nothing to hinder him from asking for delay or to prevent the Judge from granting it in a proper case. Here there was no request for delay to enable the applicant to decide how he should determine the option given him. The proceedings terminated in a remand to the gaol, evidently for the purpose of awaiting trial by a jury.

Under the circumstances I do not see my way to granting the relief sought on this application.

I do not see that there is any duty imposed upon the sheriff of again notifying the Judge with regard to the applicant or of taking any steps for bringing him again before the Judge in order that the latter may once more state to the applicant the matters set forth in section 767.

The sheriff's part was performed when he notified the Judge in the first instance. The Judge having pursuant to the notification caused the applicant to be brought before him, and having remanded him, the applicant must, if he is advised that he is still at liberty to withdraw his demand for a jury and elect to be tried before the County Judge, adopt some course other than that taken on this application.

Judgment.

Moss, J.A.

I am unable to conclude that the sheriff is under an obligation or duty, or that the applicant has a right upon request, or notice, to the sheriff to require him, to now bring the applicant before the County Judge for the purposes sought. And unless it is the sheriff's plain duty to do this without the agency of a mandamus, it should not be ordered to issue against him.

Mr. Rowell strongly contended that even admitting that the applicant had elected to be tried by a jury he was still entitled to abandon that election and consent to be tried by the County Judge without the intervention of a jury, and the case of *Regina* v. *Prevost*, 4 Brit. C. R. 326, was referred to. If I had to determine this question I should require further time to consider the matter. I am not at present convinced that a prisoner, who, being brought before the County Judge, demands a trial by jury and is thereupon remanded to gaol, is entitled as of right to afterwards drop the demand for a jury and insist upon being again brought before the County Judge in order that he may consent to be tried by him without the intervention of a jury. The applicant claims that his election was made under a misapprehension or mistake as to his position at the time. If there was any mistake it did not occur through the agency of the sheriff and he is not responsible for it. Relief from the effect of the election, if any is to be obtained, must, I think, be sought for in some other form of application. I do not at present determine anything as to these questions.

I decide this application upon the grounds above indicated. The application must be refused.

G. A. B.

THE QUEEN EX REL. JOANISSE v. MASON.

Municipal Corporations—Municipal Election—County Councillor—Property Qualification—"Actual Occupation"—Partnership—Consolidated Municipal Act, 1892—55 Vict. ch. 42, sec. 73.

Held, that "actual occupation" in section 73 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), which provides, with regard to the property qualification of candidates, that where there is actual occupation of a freehold rated at not less than $2,000 the value for the purpose of the statute is not to be affected by incumbrances, does not necessarily mean exclusive occupation; and that when two partners were in occupation of partnership property, each should be deemed in actual occupation of his interest in the property within the meaning of the above enactment.

Regina ex rel. Harding v. *Bennett*, 27 O. R. 314, followed as to the latter point.

Statement.

THIS was an appeal from the order of Mr. James S. Cartwright, Q. C., an official Referee, sitting for and at the request of the Master in Chambers, made on April 14th, 1897, upon a motion to unseat the respondent, who had been elected a member of the County Council for the county of Carleton, upon the ground that he had not the necessary property qualification.

By sec. 14 of the County Councils Act, 1896, 59 Vict. ch. 52, the qualification for a councillor is the same as that of reeve of a town.

By sec. 73 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42, qualification for reeve of a town is freehold to $600, or leasehold to $1,200, over and above incumbrances.

The facts shortly were as follows: Mason, the respondent, and his brother were in partnership, the two of them being jointly assessed as owners of a saw-mill property, a little over three acres in extent. They were assessed for $7,500, and the respondent therefore claimed that under section 86 of the Consolidated Municipal Act, 55 Vict. ch. 42, he must be taken to be assessed for one-half of the total assessment. The property was admittedly encumbered to an amount exceeding the total assessment, but the respondent claimed the benefit of the proviso to sub-sec. 1 of sec. 73 of the Act, alleging that he was in "actual occupation" of the property. The facts as to occupation were as follows: There was a mill upon the

Statement.

property owned by the partnership, two small houses occupied by tenants, another small house, unoccupied, and the respondent himself lived in a house upon the property, all being the property of the partnership. The partner of the respondent, though he did not live upon the property, used to work regularly at the mill, and was therefore as much in occupation of the mill, as the respondent. The two tenants were assessed as such for $200 each.

The official referee held (1) following *Regina ex rel. Harding* v. *Bennett*, 27 O. R. 314, that the respondent could qualify in respect to the partnership property; (2) that there was a substantial compliance with the requirements of the Act in respect to qualification, and that there was actual occupation within the meaning of the Act.

The relator appealed from this order, and the appeal was argued on May 3rd, 1897, before STREET, J.

W. H. P. Clement, for the relator, argued that exclusive occupation of the whole property in respect of the assessment of which the qualification was claimed, was meant by 55 Vict. ch. 42, sec. 73, (1), (O.); also that it was not to be assumed that the respondent had an equal share with his partner in the property.

D. L. McCarthy, for respondent, was not called on.

STREET, J., held that the assessment of the respondent and his brother must be taken to be an assessment, not of the whole property, but of the property less the two houses assessed to the actual tenants, otherwise taxes would be paid twice on the same property; that the English authorities as to what constitutes actual occupation under the Poor Law, viz., exclusive beneficial occupation, are not to be applied to the proviso in 55 Vict. ch. 42, sec. 73, (1); and that the respondent must be taken to be assessed for one-half of $7,500, and to be in actual occupation of his one-half interest in the partnership property. He followed his prior decision in *Regina ex rel. Harding* v. *Bennett*, 27 O. R. 314, that a presumption of equality arises from the assessment.

A. H. F. L

RIELLE ET AL. V. REID ET AL.

Fraudulent Conveyance—Transfer of Assets—Fictitious Joint Stock Company—Rights of Creditors.

A merchant in insolvent circumstances, formed a joint stock company, he and his wife subscribing for all the stock, except a few shares, which were allotted to employees of his, these forming the five directors. They, then, as directors and shareholders, appointed him manager for five years at a salary, and all his assets were assigned to the company :—

Held, that the company was the mere alias and agent of the assignor, and the assignment a fraud on his creditors, and must be set aside, subject, however, to the rights of the creditors of the company.

Salomon v. *Salomon*, [1897] A. C. 22, distinguished.

Statement.

THIS was an action brought by the executors of the last will of Thomas McLerie Thomson, late of Toronto, who died on September 20th, 1889, against John Bailey Reid, Minnie Reid his wife, and The Reid Company of Toronto, Limited, claiming, on behalf of themselves and all other creditors of John Bailey Reid, that the Reid Company of Toronto, be declared to be merely an alias or trustee of John Bailey Reid, and that its assets be declared to be liable for the payment of his debts; that all the transfers, grants, conveyances, or declarations of trust at any time made to or in favour of such company by the said John Bailey Reid, be set aside and be declared to be fraudulent and void as against his creditors; that in the event of the claims of the plaintiffs and other creditors not being paid forthwith, that the said company be wound up by the Court under the provisions of the Winding-up Act; that a receiver be appointed of the estates, rights, and credits of both John Bailey Reid, and the said company; and that an injunction issue against both of the said defendants to restrain them, their servants and agents from any dealings with their property to the prejudice of the plaintiffs, or any other creditors of him the said John Bailey Reid, whether by simple contract, specialty, judgment, or otherwise, howsoever; that the defendant Minnie Reid, be declared a trustee for the defendant John Bailey Reid of all such share or interest as she now holds in the said company, by virtue of the shares in the said company

Statement. standing in her name; and for all proper directions and further relief.

The action was tried at Toronto, before FALCONBRIDGE, J., on October 26th, 30th and 31st, 1896; and March 1st, 2nd and 3rd, 1897.

The facts as proved in the evidence are fully stated in the judgment and the footnotes thereto.

Moss, Q. C., for the plaintiffs.

McCarthy, Q. C., for the defendants J. B. Reid and the Reid Company of Toronto.

F. E. Hodgins, for the defendant Minnie Reid.

May 6th, 1897. FALCONBRIDGE, J.:—

I find on the evidence that J. B. Reid* was in 1894, largely indebted to the plaintiffs and others, principally the outcome of land transactions of a speculative character; that he was fully alive to the situation which was serious, and in fact desperate, unless some very quick and unexpected turn should take place with reference to the values of property in the districts in which he was interested. In August, 1894, the evidence shews that the margin in the properties had dwindled down to a point not appreciably distant from zero. For four years under his own management, the properties had not seemed to be capable of carrying themselves. There were heavy taxes both local and general as regards properties of this description; and in this and similar localities, there was no immediate prospect of improvement in prices or rentals. The situation had been aptly described by Messrs. McMurrich & Co., in their letter of December 6th, 1893, when they say, * * "The properties are not realizing nearly enough to pay

*J. B. Reid carried on business as a lumber merchant, and the Reid Company of Toronto, was incorporated under the Ontario Joint Stock Companies Act, for the purpose of trading in lumber, timber, coal, wood, etc. On September 1st, 1894, J. B. Reid conveyed to the company all his stock in trade, book-debts, good-will of his business, his business premises, and all other his real and personal estate.—REP.

the interest and taxes, so that the mortgagees will be losing money by taking possession of it. We have been carrying it so far in hopes of improvement."

Judgment. Falconbridge, J.

I do not see the force of the verbal evidence, and the argument thereon based, that the estate of George Reid, Jr., was to indemnify J. B. Reid against certain of these mortgages. That does not seem to be the effect of the writings, and at any rate there was no security for such indemnity except the mortgaged property itself; but J. B. Reid covenants to indemnify his brother's estate as to properties which are conveyed to him.

Therefore, at the time of the formation of the company, the business was all he had with which to pay his debts, and he had nothing but the business property to protect except some money and personal notes which he says he had in the safe.

About this time he had a conversation with Mr. Strathy, the manager of the bank with which he was then doing business. J. B. Reid told Strathy he was taking action to form a company. Strathy asked the object, and Reid said to get over the difficulty which might arise in connection with his personal covenants on mortgages given by him and George; that he wished to place himself in a position to avoid payment of them. The company was formed a short time after this conversation took place.

I have no hesitation in accepting Mr. Strathy's version of this conversation as being in substance true, and as throwing a side light on the whole transaction.

Mr. J. B. Reid denies Mr. Strathy's statement only in very faint and general terms. He thinks Mr. Strathy has misconstrued what he (Reid) said or is terribly mistaken, but his own account of what he said, viz., that he had been so worried and bothered in connection with his brother's estate * * owing to mortgages on real estate * * "that I did not want people coming after me to have the same trouble," is not very lucid or satisfactory.

The facts of the case, therefore, present no difficulty.

Judgment.

Falconbridge, J.

As to the law:

1. Plaintiffs are creditors. The property mortgaged is not sufficient to satisfy the debt. The mortgagees are creditors for the balance and it is not necessary to exhaust the security or to go into the Master's office to find this fact: *Crombie* v. *Young*, 26 O. R., at p. 202; May on Fraudulent Conveyances, 2nd ed., pp. 163-164.

2. The evidence discloses no satisfaction of the judgment for $4,697.39 alleged in the fifth paragraph of the statement of claim.* There was no such agreement arrived at or even stipulated for in the negotiations with the plaintiff Mr. T. C. Thomson or with Mr. H. J. Wright, solicitor for the plaintiffs.

It is a question of intention and consideration and agreement: *Cumber* v. *Wane*, Smith's L. C. 8th ed., vol. 1, p. 366; *Foakes* v. *Beer*, 9 App. Cas. 605; *Underwood* v. *Underwood*, [1894] P. 204. And our statute, 58 Vict. ch. 12, sec. 53, subsec. 7 (O.), contemplates an express acceptance (or an agreement for that purpose) of part performance of an obligation. In the same line are *Mason* v. *Johnston*, 20 A. R. 412; *Day* v. *McLea*, 22 Q. B. D. 610; and the plaintiffs have not altered their position to the detriment of the estate of George Reid: *Munson* v. *Hauss*, 22 Gr. 279.

As I understand their position the plaintiffs do not set up a case of preference but the intent to defeat, delay, etc., and it seems to me that the elaborate argument of defendants' counsel as to the difference between the Statutes of Elizabeth and the R. S. O. ch. 124, does not apply: 35 Vict. ch. 11, now R. S. O. ch. 96, sec. 5.

If it was necessary to prove the intent of J. B. Reid, that has been fully proved by the circumstances, and by the weak denial of J. B. Reid against the positive affirmation of Mr. Strathy.

As regards Mr. J. B. Reid and the defendant company the facts appeared to me to be so clear at the trial that I

*This was a judgment which the plaintiffs had recovered on January 11th, 1895, against J. B. Reid.—REP.

reserved judgment only for the purpose of considering Mr. McCarthy's strenuous and ingenious argument as to the effect of recent English decisions which he contended stood effectually in the way of the plaintiffs' recovery. Judgment. Falconbridge, J.

For as to the facts there was but one conclusion. The situation being as I have above stated, J. B. Reid proceeds to form his company. No outside assistance is invoked, no foreign capital invited. The husband and wife own all the stock but three shares, one of which is allotted to Mr. Loughead, book-keeper of J. B. Reid, another to Mr. Cherry, erstwhile yard foreman, and another to a solicitor of the former firm. They were all five directors.

On September 7th, 1894, at a meeting of directors it was moved by Mrs. Reid, seconded by Mr. Cherry, and carried, that Mr. Reid be engaged as manager of the company for five years at a salary of $2,000 payable weekly on his giving security, etc. * * *."

And at a meeting of the same five shareholders held on the same day this arrangement for Mr. Reid's engagement was solemnly confirmed.

At a meeting of directors held September 14th, 1894, by-laws were enacted, a call of 10% was made, the salary of Mr. Reid, the manager, was increased from $2,000 to $3,000 a year and a re-arrangement or manipulation of the stock was made.

At a meeting of shareholders held September 20th, 1894, there were confirmation and approval of all resolutions and transactions of the directors up to date except that on motion of Mrs. Reid, seconded by Mr. Cherry, Mr. Reid was not required in the security he was to give the company to include therein the shares held by Mrs. Reid "as she holds those shares in her own right and objects to put them in as such security."

So that J. B. Reid goes on managing the concern as before the incorporation, he is assured $3,000 a year, and the property, should the transaction be upheld, is effectually placed beyond the reach of creditors.

Judgment.

Falconbridge, J.

In re Carey, Ex parte Jeffreys, [1895] 2 Q. B. 624, seems to be quite in point, but Mr. McCarthy contended that this case was reversed in the judgment of the House of Lords in *Salomon* v. *Salomon*, [1897] A. C. 22. I do not think it touches it. In the latter case a solvent trader sold a solvent business to a limited company consisting of the vendor and six members of his family. The company became insolvent and went into liquidation and creditors sought to make the vendor liable. *In re Carey* is not referred to in the arguments or judgments.

In the present case the company was and is the mere alias and agent of J. B. Reid, and there was fraud on creditors, both of which propositions are negatived in *Salomon* v. *Salomon*.

As to the stock held by Mrs. Reid, notwithstanding the many suspicious circumstances attendant on the manipulation of the life policies, yet I conceive it to have been out of J. B. Reid's hands and now out of my power to interfere with the declaration in favour of his wife made by J. B. Reid, even though the endorsement evidencing the same may not have been made on the day it bears date. She will be, however, held to her counsel's offer to transfer her shares for $2,000 if plaintiffs so elect.

There will be judgment for the plaintiffs, declaring that the defendant company is the agent of defendant J. B. Reid, and that the several conveyances and transfers made by defendant J. B. Reid to defendant company of defendant J .B. Reid's freehold and leasehold estates and of his business assets, goods, chattels, book-debts, stock in trade, lumber, shingles, office furniture, plant and fixtures, and other property and effects, are as against the plaintiffs and the other creditors of the defendant J. B. Reid, fraudulent and void, and that the assets of the defendant company are part of the general assets of the defendant J. B. Reid, and are liable to be applied towards satisfaction of his debts, subject, however, to the rights of the creditors of the company, and that the said conveyances and transfers be set aside so far as necessary to give effect to the above

declaration; and for the appointment of a receiver with the directions usual in cases of this nature as to the duties of the receiver and as to the proceedings to be taken for proof of creditors' claims and realization of the property in default of payment, with full costs of suit to plaintiffs including costs of all the examinations for discovery.

Judgment

Falconbridge, J.

The receiver to be appointed shall deal with both classes of creditors as the law directs.

Declaration also that the judgment for $4,697.29 referred to in the fifth paragraph of the statement of claim has not been satisfied as alleged by defendants and that the issue as to this directed by an order in Chambers to be disposed of at the trial, is found in favour of the plaintiffs.

No costs as between plaintiffs and defendant Minnie Reid.

A. H. F. L.

[DIVISIONAL COURT.]

PETRIE v. MACHAN.

Division Court—"Sum in Dispute"—Right of Appeal—R. S. O. ch. 51, sec. 148.

Where the subject matter of the claim in a Division Court is one cause of action exceeding $100, and the amount recovered at the trial is under that sum, an appeal lies to a Divisional Court under section 148 of the Division Courts Act, "the sum in dispute upon the appeal" being the amount claimed, and not that amount less the sum recovered at the trial.

Statement. THIS was an appeal from the judgment in an action in the Tenth Division Court in the county of York under the following circumstances:—

The plaintiff caused a summons to be issued against the defendant out of the Tenth Division Court in the county of York, on the 23rd of October, 1896, for a claim of $100, which summons was served on the defendant on the 27th of October, 1896. On the 3rd of November, 1896, the defendant gave notice, disputing the plaintiff's claim and the jurisdiction of the Court to try such claim. On the 12th of November, 1896, the Judge of the said Division Court ordered all papers and proceedings in this cause to be transferred to the Second Division Court in the county of Perth, in pursuance of section 87 of the Division Courts Act, R. S. O. 1887. On the 8th of January, 1897, the plaintiff gave notice of a motion to the Judge at the trial for an order that the plaintiff's claim be amended to read as follows:

1895.			
March.	To amount of contract price for advertising, etc.		$100 00
	Interest thereon from 1st March, 1895, to this date at 6%.		10 50
			$110 50

Dated at Toronto, this 23rd day of December, 1896.

Statement.

The cause came on for trial at the said last mentioned Division Court, on the 8th of January, 1897, when the amendment was allowed by the Judge, and the plaintiff based his claim upon the following instrument:

September 12th, 1893.

H. W. PETRIE,
Machinist and General Machine Dealer,
Toronto, Ont.

Please enter for your descriptive catalogue of machinery for sale the undermentioned machinery, etc., as per agreement below.

Two saw mills with all parts as last running including all machines, etc., in both mills, one of which is at Moncton, the other Carmunnock, county of Perth and Huron, to net me $1,000.

I hereby authorize you or your agent to sell for cash or credit, or partly for cash and partly for credit, or exchange, the above machinery, etc., en bloc or in parcels, at a figure not less than the above amount, clear of all expense except cost of delivery to works, any surplus above said sum to go to you. In case you take note or notes in payment or part payment of above amount you to give me your own note or notes falling due at the same time or times respectively as the note or notes given you. I retain to myself the right of selling or of exchanging or of otherwise disposing of said goods in whole or in part without the assistance of H. W. Petrie or his agent, but agree in such case to pay you ten per cent. commission on the above amount to cover outlay for advertising, etc. I agree to notify you immediately upon my selling or otherwise disposing of said goods as aforesaid. I also agree to deliver my said machinery or any part of it when sold or exchanged as above mentioned to the nearest railroad station or dock within ten days after written instructions to do so. The above machinery remains at my risk. Same commission to apply in case of withdrawal of offer. Proceeds from sale of above machinery to be paid to

WILLIAM MACHAN.

Statement.

It was shewn that the defendant had sold the machinery for $350.

The learned Judge gave judgment for the plaintiff for $35 as ten per cent. commission upon the sum of $350 for which the defendant had sold the machinery, the plaintiff protesting that he was entitled to judgment for $100 and interest from the date of such sale. The learned Judge granted a new trial and upon such new trial gave the same judgment, and the plaintiff appealed to this Court.

The appeal was heard on April 8th, 1897, before ARMOUR, C.J., and FALCONBRIDGE and STREET, JJ.

R. McKay, for the plaintiff.
Aylesworth, Q.C., for the defendant.

May 10th, 1897, the judgment of the Court was delivered by ARMOUR, C. J.:—

Counsel for defendant objected that this case was not appealable because he contended that "the sum in dispute upon the appeal" did not exceed "$100 exclusive of costs" within the meaning of section 148 of The Division Courts Act, for he argued that although the sum claimed in the action and in dispute was one hundred dollars and interest, because the sum of thirty-five dollars had been recovered at the trial, that sum of thirty-five dollars was no longer in dispute, and that it was only therefore the difference between that sum so recovered and the sum claimed in the action of one hundred dollars and interest that could be said to be in dispute "upon the appeal." But this contention cannot in my opinion prevail.

The subject matter of the suit was one cause of action only—the breach by the defendant of an entire contract in respect of which the plaintiff claimed that he was entitled to receive one hundred dollars and interest.

The plaintiff is still claiming that sum upon appeal and is disputing the sum of thirty-five dollars as being the

Judgment.
Armour, C.J.

proper amount recoverable for the breach of the said contract, and I think, therefore, that the sum of thirty-five dollars is as much in dispute as the difference between that sum and the sum claimed by the plaintiff of one hundred dollars and interest.

And I think, therefore, that the sum in dispute upon this appeal exceeds the sum of one hundred dollars exclusive of costs, and that the appeal must be heard.

Had the subject matter of the suit been two causes of action one for thirty-five dollars and the other for sixty-five dollars and interest and the plaintiff had recovered in respect of one of them and failed as to the other, I should have thought that the sum in dispute upon the appeal was only the sum which he had failed to recover.

But the subject matter of this suit being but one cause of action, the breach by the defendant of an entire contract in respect of which the plaintiff claimed one hundred dollars and interest and still claims that sum upon this appeal, it cannot in my opinion be said that because he has recovered thirty-five dollars in respect of such breach which he disputes as being the true amount which he is entitled to recover, that that sum is no longer in dispute, but that only the difference between that sum and the amount claimed by him is the sum in dispute upon the appeal, and I think that the whole sum claimed by him is the sum in dispute upon the appeal.

A. H. F. L.

HARTLEY v. MAYCOCK ET AL.

Husband and Wife—Conveyance by Wife—Non-joinder of Husband—59 Vict. ch. 41 (O.)—Limitation of Actions—Visible Possession—Enclosed Lands—Unenclosed Lands—Sale of Timber—Trespass—Interval in Possession—Building Operations—Farm Work—Adverse Possession—Assertion of Right by True Owner—Equivocal Acts—Entry by one Tenant in Common—Residence out of Ontario—Possession of Unenclosed Lands—Colour of Right—Conveyance—Entry—Improvements under Mistake of Title.

1. The plaintiff claimed an undivided interest in the farm of his uncle, who died intestate and without issue in 1854, seized in fee simple and in possession. One of the links in the chain of title of the uncle was a conveyance made in 1846 by a married woman, whose husband did not join in the conveyance :—

Held, that the conveyance was wholly inoperative, and was not validated by 59 Vict. ch. 41 (O.), as the action was begun before the passing of the Act, and sec. 2 excepts pending litigation ; and this objection was fatal to the plaintiff's claim, for, although the uncle's possession was evidence of his seizin, the plaintiff's case disclosed his title and shewed that the true title was in the married woman.

2. Shortly after the uncle's death his widow returned to the farm, which she found in possession of a man put in by a person to whom her husband had contracted to sell, and she thereupon forcibly took possession, and continued to reside upon the farm till her death in 1877, with the exception of a short interval in 1874. During this whole period she tilled such part of the farm as was enclosed and under cultivation, and put such part as was enclosed and not under cultivation to the ordinary farm uses. In 1873 she made a conveyance of the whole farm to a neighbouring farmer, who worked it until 1879, and then rented it until 1881, after which he put his son, one of the defendants, into possession, and the latter then continued to work it up to the time this action was brought in 1895, though until 1889 he did not live in the house erected upon it. In 1885 the widow's grantee purchased the rights of the heirs-at-law of the person to whom the plaintiff's uncle had contracted to sell :—

Held, that the widow entered as a trespasser, and so, in order to extinguish the right and title of the heirs, her twenty years' possession must have been actual, visible, and continuous ; and the Statute of Limitations operated only as to the enclosed part, notwithstanding sales by her of timber from the unenclosed part, which must be treated as mere acts of trespass.

Harris v. *Mudie*, 7 A. R. 414, followed.

3. In April, 1874, the dwelling-house on the farm was destroyed by fire, and during a short period until it was rebuilt the widow did not actually live upon the farm, but stayed in the neighbourhood, and the work of the farm went on as usual :—

Held, that during this interval her possession was a visible one, by reason of the building operations and the farm work.

Agency Company v. *Short*, 13 App. Cas. 793, and *Coffin* v. *North American Land Company*, 21 O. R. 80, distinguished.

4. Another nephew of the deceased resided with the widow upon the land for about two years after her return to it, but at that time had no interest in it, his father being then alive ; and he made occasional visits

to it in subsequent years, and paid the taxes on it for 1872, but during all this time he made no claim to any interest in the land:—

Held, upon the evidence, that he did not go upon the land in the assertion of a right, as owner of an interest, to live upon it, but merely as the guest of his aunt, and in paying the taxes he did so on her behalf, and not as having or claiming an interest for himself or any one else; and therefore it could not be said that the possession was not hers, or that it was a possession by his license.

5. And, even if what happened amounted to an entry, that entry did not operate in favour of the plaintiff's co-tenants, for an entry by one tenant in common is not an entry by his co-tenant.
6. The fact that the heirs were resident out of Ontario entitled them to no longer time to bring their action than if they had been residents: 25 Vict. ch. 20.
7. Therefore, in 1874 the right and title of the heirs-at-law as to the enclosed part of the farm were extinguished.
8. The widow's grantee entered not as a mere trespasser, but, after the conveyance to him, or, at all events, after the expiration of twenty years from her entry, was in under colour of right, and his right was not confined to the portion of the land of which he was in pedal possession, but he and those claiming under him were in the actual and visible possession of the whole of the land included in his conveyance; and the right and title of the plaintiff were therefore extinguished; notwithstanding an entry made in 1878 by the plaintiff, who had not then any interest in the land or any authority from those interested in it.
9. But if not, the defendants were at least entitled to be paid for their lasting improvements since the purchase in 1885, with a set-off of the mesne profits since that date.

Statement.

THIS was an action of ejectment brought by T. W. Hartley, claiming to be entitled to one undivided one-eighteenth share or interest in the south half of the west half of lot 1 in the 8th concession of the township of Mersea, as one of the heirs-at-law of one James Hartley, who, the plaintiff alleged, died intestate and without issue in or about the month of November, 1854, seized in fee simple and in possession of the lands.

The defendants John J. Maycock and Lydia J. Maycock, after setting up that they were in possession of the land, pleaded the Statute of Limitations in bar of the plaintiff's claim, and they set up a claim to be allowed for their improvements as having been made under a *bonâ fide* mistake of title, in case the plaintiff should establish his title to the land.

The defendants the Building and Loan Association, who were mortgagees of the land by mortgage from one James Maycock, pleaded the Statute of Limitations as their defence to the action.

Statement. The trial was begun before MEREDITH, C. J., without a jury, at Sandwich, on the 27th April, 1897, and continued at Toronto on the 20th May, 1897.

E. D. Armour, Q.C., *J. L. Murphy*, and *Sale*, for the plaintiff.

A. H. Clarke, for the defendants John J. Maycock and Lydia J. Maycock.

Allan Cassels, for the defendants the Building and Loan Association.

May 26, 1897. MEREDITH, C. J.:—

The first question which arises is as to the proof of the title of James Hartley. A sufficient paper title was made out, if the conveyance from Eliza Simon to Alexander Shaw dated the 16th January, 1846, which forms one of the links in the chain of title, was effectual to pass the land which she professed to convey by it.

At the time of the conveyance by Eliza Simon she was a married woman, her husband, Christian Simon, being then living, and he did not join in the conveyance. The conveyance was therefore wholly inoperative, and is not validated by 59 Vict. ch. 41 (O.),* as sec. 2 expressly excepts from the operation of the Act litigation pending at the time when it was passed (7th April, 1896), and this action was then pending, having been begun on the 11th March, 1895.

This objection is fatal to the plaintiff's claim, though James Hartley died in possession; his possession would no

*1. Every conveyance before 29th March, 1873, executed by a married woman, of or affecting her real estate shall, notwithstanding her husband did not join therein, be taken and adjudged to be, and to have been valid and effectual to have passed the estate which such conveyance professed to pass, of such married woman in said real estate.

2. Nothing in the preceding section contained shall render valid any such conveyance as aforesaid to the prejudice of any title subsequently to the execution of such conveyance and before the passing of this Act, acquired from the married women by deed duly executed and certified as by law required, unless the actual possession or enjoyment of the real estate conveyed or intended to be conveyed by the prior conveyance

Judgment.

Meredith, C.J.

doubt have been evidence of his seizin, had not the plaintiff's case disclosed his title, and shewn that the true title was in Ellen Simon, and not in him.

Having come to that conclusion, it is unnecessary to decide the other questions raised, but I will state my findings of fact as to them and my view of the law as applicable to those findings.

James Hartley died in the year 1854, probably about September, intestate and without issue, having shortly before his death contracted to sell the land to Peter Hendershott, who paid $100 on account of his purchase money. An agreement as to the sale and purchase appears to have been executed, and Hartley went to the neighbourhood of Sarnia, leaving a man named Rider in charge of the farm, intending to return in the following spring, when, as it was arranged, Hendershott's purchase was to be completed.

Hartley died of cholera, as I have said, about September, 1854, and shortly after his death, and during the same autumn, his widow, Jane Hartley, returned to the farm, where she found a man named Toomey in possession, he having been put in possession by Hendershott after Hartley's crops of that year had been harvested, and she thereupon forcibly took possession, no one being actually living on the land.

The widow continued to reside on the farm down to 1877 (when she died) except for an interval—the exact duration of which was not shewn, but which was probably

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shall have been had at any time subsequent thereto by the grantee therein, or those claiming by, from, or under him, and he or they shall have been in such actual possession or enjoyment continuously for the period of three years before the passing of the Act, and he or they is or are at the time of the passing of this Act in the actual possession or enjoyment thereof; and nothing in this Act contained shall render valid any conveyance from the married women which was not executed in good faith or any conveyance of land of which the married woman or those claiming under her, is or are in the actual possession or enjoyment contrary to the terms of such conveyance, nor shall the Act affect any litigation now pending.

Judgment.

Meredith, C.J.

very short—during which, owing to the dwelling-house having been in the month of April, 1874, destroyed by fire, she stayed with James Maycock on a farm almost opposite to the one in question, where she remained until the house was rebuilt, when she returned to the land in question.

At the time Mrs. Hartley returned to the land after her husband's death, about eight or ten acres of it were cleared, or partly cleared, and fenced, a part being cultivated, and there was within that enclosure, besides the dwelling-house, a barn or stable.

During the whole period from the time of her return to the farm after her husband's death until her own death, Mrs. Hartley herself or her tenants under her or James Maycock as her grantee tilled so much of it as was within the fences and fit for cultivation and put the remainder of what was within the fences to those uses to which a farmer ordinarily puts his enclosed land; there was no interruption of that user during the whole period, and the occupation was visible as well as continuous.

The remainder of the land was unenclosed and uncultivated, but on two or three occasions Mrs. Hartley sold some of the trees which grew upon it, and the land remained substantially in the condition I have mentioned down to the time when James Maycock died, which was twelve years ago, and since then very considerable improvements of a lasting character have been made by the defendant John J. Maycock, in clearing, fencing, and otherwise.

George Hartley, who claims to be entitled as one of the heirs-at-law of James Hartley, and who was a nephew of the latter, resided with Mrs. Hartley on the land for about two years after her return to it, but at that time he had no interest in the land, his father being then alive, and he made occasional visits to the farm in subsequent years, and paid the taxes on it for the year 1872. During all this time he made no claim to any interest in the land, and in going there and visiting his aunt he did not do so with any

idea of having any right, as owner of an interest in the land, to live upon it, but merely as the guest of his aunt, and in paying the taxes he did so on her behalf and as an act of kindness, and not as having or claiming any interest in the land for himself or any one else.

On the 31st May, 1873, Mrs. Hartley made a conveyance of the land to James Maycock, assuming to convey it to him in fee simple, but, notwithstanding the conveyance, she continued to live in the house upon it down to the time of her death, and the fair inference is, I think, that she did so under some arrangement with Maycock entitling her to live there during her lifetime.

The plaintiff came to Canada in December, 1878, not having then any interest in the land, his father being then alive, or, so far as appears in evidence, any authority from those interested in it or any of them to represent them, and about that time made what would, had he had then any interest in the land, or had he represented any one who had an interest in it, have amounted to an entry by the owner upon it sufficient to stop the running of the Statute of Limitations, if the right of entry of the owner had not then been barred.

At this time a man named Smith Lane was living in the house on the land as tenant of the house under James Maycock, and it was asserted by the plaintiff that Lane then signed a writing acknowledging himself tenant to the heirs of James Hartley of the whole of the land. What purported to be a copy of this writing was produced by the plaintiff—the original being said to have been left for safe keeping with a man named Quine, who is dead, and not being produced. The evidence does not satisfy me that this writing was signed by Smith Lane—the proof of this allegation of fact depends entirely upon the evidence of the plaintiff, and it would not be safe to rely upon it, especially in view of the statement made by him on his examination for discovery that a bargain was not come to between him and Lane.

After Mrs. Hartley died James Maycock continued to

Judgment.

Meredith, C.J.

use the land as he had done during her lifetime until the 1st November, 1879, when it was rented by him to John A. Maycock for two years. John A. Maycock did not live in the dwelling-house, but worked the farm as James Maycock had done, and during his tenancy completed the clearing of about an acre in addition to what had been previously cleared. After John A. Maycock's tenancy terminated, the defendant John J. Maycock entered under some arrangement with James Maycock, who was his father, and has ever since used and worked the farm as it had been previously used and worked—though until the 29th December, 1889, he did not live in the dwelling-house, but he has ever since that date done so. While not living in the dwelling-house it was used by him as a store-house for farm implements, and during the winter as a work-shop for the purposes of the farm.

In October, 1885, a claim having been made to the land through Mr. S. M. Jarvis, acting on behalf of the widow and heir-at-law of Peter Hendershott, James Maycock became the purchaser from them for $1,000—$300 of which he paid in cash, and the balance of which was secured by mortgage of the land to Jarvis. This mortgage, after passing through several hands, has become vested in the defendants the Building and Loan Association, and a considerable part of the mortgage money has been paid by the defendant John J. Maycock.

James Maycock bought in good faith, and after this purchase honestly believed that he had become the true and absolute owner of the land, subject only to the mortgage to Jarvis; and the improvements made by him and those claiming under him after that purchase were made under a *bonâ fide* mistake of title, if he had not then a good title to the land.

Upon the facts as I have stated them, it is contended by the defendants that the right and title of the heirs of James Hartley, if they ever had any, are extinguished by force of the Statute of Limitations.

Mrs. Hartley must, in my opinion, be treated as having

entered in September, 1854, as a trespasser, having no title or colour of title to the land, and that being so, the twenty years' possession by her, in order to extinguish the right and title of the heirs, must have been actual, visible, and continuous; and in accordance with the law as laid down by the Court of Appeal in *Harris* v. *Mudie*, 7 A. R. 414, the statute operated, if at all, only as to the eight or ten acres which she had enclosed, and cannot extend to the uncleared and unenclosed land—notwithstanding the sales of timber from it, which must be treated as mere acts of trespass on her part.

It was objected by Mr. Armour that Mrs. Hartley's possession was not actual, visible, and continuous, even as to the part of the land which was enclosed; because, as he contended, for the period during which she did not reside on it owing to the destruction of the dwelling-house by fire, there was no possession by her, and at all events no actual and visible possession; and he cited for his contention, among other cases, *Agency Company* v. *Short*, 13 App. Cas. 793, and *Coffin* v. *North American Land Company*, 21 O. R. 80; but, in my opinion, neither of these cases supports it.

Agency Company v. *Short* goes no further than to decide that "where one enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place;" but in this case there was no "abandonment of possession," as I understand Lord Macnaghten (p. 798) to use that expression, by Mrs. Hartley. It is true that she did not during the interval referred to actually live upon the land, but the season of the year when the fire took place, the month of April, was one in which farming operations would be proceeding probably daily, and the work of rebuilding was doubtless promptly begun, and while it was proceeding the possession was undoubtedly a visible one by reason of the building operations, as also I think it was by reason of the farming work which was going on upon the land.

Judgment.

Meredith, C.J.

Nor is there anything decided in *Coffin* v. *North American Land Co.* inconsistent with that view; that decision proceeded on the ground that, although the plaintiff in that case cropped the land in summer, he during the winter did nothing to it but draw some loads of manure upon it, which he spread in the spring, and Mr. Justice Street points out that, excepting for this, the plaintiff during the winter absolutely withdrew to his own lot, and that acts of possession during the winter must be looked at by themselves and be separated from the acts during the summer, and I find nothing in his observations to lead to the conclusion that the summer occupation was not actual, visible, and continuous, but the contrary; and that being so, the circumstances to which I have referred of the season of the year at which the fire occurred and the rebuilding took place, make the case an authority for the position which, apart from authority, I should take to be the correct one, that the operations which were going on on the land amounted to an actual and visible possession by those who were doing them.

It was further contended by Mr. Armour that the circumstances which I have mentioned as to George Hartley's visits to the land and the payment of the taxes by him, to which I have referred, justify a finding that the possession was not that of Mrs. Hartley, or at all events a finding that possession by her was with the license and by the authority of George Hartley, and that at all events they amounted to an entry by George Hartley as one of several tenants in common so as to enure to the benefit of his co-tenants as well as of himself. As to the first of these positions, I have already indicated that my finding of fact is against Mr. Armour's contention; and as to the second, even if what happened amounted to an entry by George Hartley, which I think it did not, that entry could not operate in favour of George Hartley's co-tenants. It seems to me necessarily to follow from the provision of the Act that possession by one tenant in common is not the possession of his co-tenant, that an entry by one tenant in com-

mon is not an entry by his co-tenant; for what is an entry but the taking of possession? And that was the view expressed by the present Chief Justice of Ontario in *Harris* v. *Mudie*, 7 A. R. at p. 419. Judgment. Meredith, C.J.

The fact of James Hartley's heirs—all of them at least except George—being resident out of Ontario entitled them to no longer time to bring their action than if they were residents of Ontario: see 25 Vict. ch. 20.

I come, therefore, to the conclusion that in September, 1874, the right and title of the heirs-at-law of James Hartley as to the eight or ten acres enclosed were extinguished.

Different considerations apply on this branch of the case to the possession of James Maycock and those claiming under him. He entered not as a mere trespasser, and after the conveyance from Mrs. Hartley, or, at all events, after the expiration of twenty years from her entry, he was in under colour of right, and *Harris* v. *Mudie* recognizes it as law that the right of a person who so enters or is in possession is not confined to the portion of the land of which he is in pedal possession, and warrants a finding on the facts of this case that James Maycock and those claiming under him were in the actual and visible possession of the whole of the parcel of land which the deed of his grantor purported to convey to him, and that is the conclusion to which I come on this branch of the case, and if that be so, in any view of the case, the right and title of the plaintiff are extinguished.

If, however, the right and title of the plaintiff have not been extinguished, the defendants are, in my opinion, and upon my findings, entitled to be paid for the lasting improvements made by them and those under whom they claim since the purchase from the Hendershotts in 1885, but there should be set off against such an allowance the mesne profits since that date; the lien for these improvements upon the undivided share of the plaintiff should, however, be limited to a proportion of them equal to that which his undivided share bears to the whole number of undivided shares.

Judgment.

Meredith, C.J.

I have not considered the question as to the proof of the plaintiff's title to the undivided share which he claims, so far as his title depends upon the proof as to who are the heirs-at-law of James Hartley, because, as I intimated at the close of the argument, if the proof in this respect be insufficient, I would permit the plaintiff to adduce further evidence on that branch of the case.

The result is that upon the ground to which I have first referred, the plaintiff's action must be dismissed with costs.

E. B. B.

BELL V. THE OTTAWA TRUST AND DEPOSIT COMPANY.

Executors and Administrators—Insolvent Estate—Claims of Creditors—Valuing Securities—Accommodation Maker of Promissory Note—"Only Indirectly or Secondarily Liable"—59 Vict. ch. 22, sec. 1, sub-sec. 1.

A partner who has individually joined as a maker in a promissory note of his firm for their accommodation is not "indirectly or secondarily liable" for the firm to the holder within the meaning of 59 Vict. ch. 22, sec. 1, sub-sec. 1, but is primarily liable, and in claiming against his insolvent estate in administration the holder need not value his security in respect to the firm's liability.

Statement.

THIS was an appeal from the certificate of the Master at Ottawa, made in the course of the administration by the Court of the estate of Peter McRae, deceased. The Ottawa Trust and Deposit Company were the administrators of the estate.

The appeal, the facts in connection with which are fully set out in the judgment, was argued before MACMAHON, J., at Ottawa, on June 8th, 1897.

Travers Lewis, for the Union Bank of Canada, the appellants.

O'Gara, Q.C., and *G. T. Henderson*, for the different creditors, contra.

Re Jones, Ex parte Consolidated Bank, 2 A. R. 626; *Molsons Bank* v. *Cooper*, 26 S. C. R. 622; and *Macdonald* v. *Whitfield*, 8 App. Cas. 733, were cited.

June 18th, 1897. MACMAHON, J.:—

This is an appeal by the Union Bank of Canada from the certificate of the Master at Ottawa, finding that the security held by the bank for their claim filed against the estate of Peter McRae, is on the estate of a third person for whom the estate of the said Peter McRae is only indirectly, or secondarily liable, and that it must, therefore, be valued as provided by the statute.

Judgment.

MacMahon, J.

The bank filed a claim against Peter McRae's estate on two promissory notes as follows:—

"Ottawa, February 24th, 1896.

"On demand we jointly and severally promise to pay to the order of the Union Bank of Canada at their office in Ottawa, the sum of thirty thousand two hundred and seven $\frac{41}{100}$ dollars for value received.

"(Signed) McRae Bros. & Co.
"P. McRae.
"H. McRae."

"$30,000.00. Ottawa, May 1st, 1896.

"On demand we jointly and severally promise to pay to the Union Bank of Canada or order, at their office in Ottawa, the sum of thirty thousand dollars for value received.

"(Signed) F. W. Powell.
"Hector McRae.
"P. McRae.

"H. McRae,
"P. McRae, } Executors estate late John Nicholson.

"McRae Bros. & Co."

Certain timber limits, the property of the firm of McRae Bros. & Co., were assigned by them to the bank as collateral security for the payment of certain promissory notes and any renewals or part renewals thereof. The above are renewals, or renewals in part, of such notes.

The learned local Master in the well-considered reasons for his judgment, finds as to a note dated the 29th January, 1892, for $42,000 (of which one of the above is a part renewal), that it was made in order to raise money from the bank, with which to meet notes originally given for the purchase price of the limits now in question, and to pay current expenses in connection with the lumber business of McRae Bros. & Co.

I do not stop to consider if this is, on the evidence, a proper finding, for, granting that it is so, I think it cannot affect the question arising on this appeal.

Judgment.

MacMahon, J.

Peter McRae, when he individually signed the notes in question as one of the makers thereof, was a member of the firm of McRae Bros. & Co. And it was not questioned that, as to the estate of Peter McRae, the firm of McRae Bros. & Co., were third parties.

There is a deficiency of assets in the estate of Peter McRae to meet the claims of creditors, and the Act respecting the estates of insolvent deceased persons, 59 Vict. ch. 22, sec. 1, sub-sec. 1, provides: "On the administration of the estate of a deceased person, in case of a deficiency of assets, every creditor in proving his claim shall state whether he holds any security for his claim or any part thereof, and shall give full particulars of the same, and if such security is on the estate of the deceased debtor, or on the estate of a third party for whom the estate of the deceased debtor is only indirectly or secondarily liable, the creditor so proving his claim shall put a specified value on such security," etc.

It has been found that as between the individual partners and the firm of McRae Bros. & Co., of which Peter McRae was a member, that he was an accommodation maker of the notes, and on that ground the learned Master held that the estate of Peter McRae "is only indirectly or secondarily liable," and consequently the bank must value its security before ranking on the estate of the deceased. It has been by only regarding the position, rights, and liabilities of the makers of the notes *inter se* (*Reynolds* v. *Wheeler*, 10 C. B. N. S. 561; *Macdonald* v. *Whitfield*, 8 App. Cas. 733), that the confusion has arisen.

Peter McRae, as a maker to the promissory notes, became directly and primarily liable thereon to the bank. "The implied contract of a maker of a note is that he will duly pay it on its being presented to him; and he is *primarily liable* thereon and stands in that respect in the same situation as the acceptor of a bill": Chitty on Bills, 11th ed., p. 144; *per* Lord Mansfield, C. J., in *Heylyn* v. *Adamson*, 2 Burr. 669; "The maker or signer of a promissory note by signing and delivering it, becomes at once

Judgment. MacMahon, J.

under an absolute obligation to pay it according to its tenour, to any holder to whom it may be due at maturity; and such holder must look *to the maker in the first place* and demand it of him in the manner prescribed by law, before he can look to any other party:" Parsons on Notes and Bills, 2nd ed., vol. 1, p. 54; "We have already seen that the maker of a note and the acceptor of a bill have nearly the same rights and duties. Both are the *principal debtors* to be called on before any other parties can be made liable": *ibid.*, p. 229; "The position of the maker of a note is similar in most respects to that of the unconditional acceptor of a bill. He is the *primary debtor*, the endorsers being only secondarily liable until after dishonour and notice": Maclaren on Bills, 2nd ed., p. 417.

Peter McRae could not be directly or primarily liable, and also "indirectly or secondarily liable" to the Union Bank as a maker of the notes, and it is only where the estate is indirectly or secondarily liable *to the creditor*, that the creditor is compelled to value a security held by him on the estate of a third party.

Had Peter McRae, instead of being one of the makers of the notes in question, given a guarantee to the bank for the payment of the indebtedness of McRae Bros. & Co., his estate would then have been secondarily liable to the bank, which before ranking, must have valued any security obtained from McRae Bros. & Co. Where, however, the creditor is claiming on negotiable instruments—bills of exchange or promissory notes—legislative interpretation has been given to the term "indirectly or secondarily liable," as meaning an endorser or guarantor thereon, because the second sub-section of section 1 provides that: "If the claim of the creditor is based upon negotiable instruments upon which the estate of the deceased debtor is only indirectly or secondarily liable, and which are not mature or exigible, the creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof, but after the

maturity of such liability and its non-payment, he shall be entitled to amend and revalue his claim."

Judgment. MacMahon, J.

Peter McRae, as maker of the notes, being primarily liable to the creditor thereon, his estate does not come within the Act as being indirectly or secondarily liable, and the bank is, therefore, not obliged to value the securities held by it when filing its claim against the estate.

I have examined the following cases: *Re Jones, Ex parte Consolidated Bank*, 2 A. R. 626; *Rhodes* v. *Moxhay*, 10 W. R. 103; *Ex parte English and American Bank, In re Fraser, Trenholm & Co.*, L. R. 4 Ch. 49.

The appeal must be allowed, with costs out of the estate.

A. H. F. L.

REGINA EX REL. MCKENZIE

v.

MARTIN.

Voters' Lists—Finalty of—Qualification of Voter—Municipal Election.

Voters' lists are final as to the qualification to vote at a municipal election in the Province of Ontario.

Statement.

THIS was an appeal from a judgment of MR. CARTWRIGHT, an official Referee, sitting for the Master in Chambers on a motion in the nature of *quo warranto*.

The application was made to set aside the election of one Roland Martin, as a member of a municipal council, upon the ground that certain electors had voted for him who, although their names were on the voters' list, were not qualified to vote.

The statutes respecting voters' lists in force in Ontario affecting the question are 52 Vict. ch. 3, and 55 Vict. ch. 42.

Statement. The motion was argued in Chambers on March 30th, 1897.

Aylesworth, Q. C., for the motion.
H. M. Mowat, contra.

April 15, 1897. MR. CARTWRIGHT:—

This motion is made on behalf of the relator to set aside the election of the respondent as a member of the municipal council of the township of Oliver in the District of Thunder Bay.

The ground of the application is, that certain voters had voted who were not really qualified so to do, notwithstanding that their names appear upon the voters' list.

I think the motion should not succeed. According to the best opinion I can form on a point which does not seem wholly free from doubt, the voters' list is final, and cannot be called in question in the present proceedings.

To hold otherwise would seem to be contrary to the policy of the Act respecting Municipal Elections, as it is not desirable that any great expense should be incurred when the term of office is so brief that it might have expired before a scrutiny could be finally determined.

That the Act makes the list final seems to have been the view of the late Chief Justice Moss and of Sir Thomas Galt in the *South Wentworth Election Case*, reported in Hodgins' Election Cases, at p. 531.

It is true that the Supreme Court was apparently of a contrary opinion in the *Haldimand Election Case*, reported in Ontario Election Cases, p. 529.

In the present case I think I should follow the former decision, as it must be clearly shewn that the voters' list is not final for the purposes of municipal elections before it can be so ruled in this case. If the list is final in the case of controverted provincial elections, much more should it be held to be final for the purposes of controverted municipal elections.

The motion will, therefore, be dismissed with costs.

From this judgment the relator appealed, and the appeal was argued in Chambers on April 26, 1897, before ROSE, J. Statement.

The same counsel appeared.

June 29, 1897. ROSE, J.:—

I quite agree to the conclusion arrived at by the learned Referee, that the voters' list is final and cannot be called in question on the present proceedings and for the reasons given by him. I am supported in this view by the language of the learned Chancellor in *The Queen ex rel. St. Louis* v. *Reaume*, 26 O. R., at p. 462, where he says that "The whole system is based on the finality of the voters' list as settled and certified by the Judge." The inconvenience of holding to the contrary has been referred to by the learned Referee and is manifest.

This appeal must be dismissed with costs.

G. A. B.

[DIVISIONAL COURT.]

ALDIS V. CITY OF CHATHAM.

Municipal Corporations—Highway—Negligence—Accident—Notice of—55 Vict. ch. 42, sec. 531 (1)—57 Vict. ch. 50, sec. 13—59 Vict. ch. 51, sec. 20.

The latter part of the clause added to sec. 531 (1) of the Consolidated Municipal Act, 1892, by 57 Vict. ch. 50, sec. 13, as amended by 59 Vict. ch. 51, sec. 20, whereby it is provided that "no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has been served," applies to all cases of non-repair of highways, etc., and is not confined to cases where the non-repair is by reason of the corporation not removing snow or ice from the sidewalks.

Drennan v. *City of Kingston*, 23 A. R. 406, discussed.

AN appeal by the plaintiff from the judgment of the Judge of the County Court of Kent dismissing an action brought in that Court on behalf of Henrietta Aldis, an infant, by her next friend, to recover damages for an Statement.

Statement. injury sustained by her by falling upon a sidewalk in the city of Chatham, alleged to be out of repair, on the 7th November, 1896.

By sec. 531 (1) of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), it is provided that "every public road, street, bridge, and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained."

By sec. 13 of 57 Vict. ch. 50 (O.), as amended by sec. 20 of 59 Vict. ch. 51 (O.), the above sub-section was amended by adding at the end thereof the following proviso: "Provided, however, that no municipal corporation shall be liable for accidents arising from persons falling, owing to snow or ice upon the sidewalks unless in case of gross negligence by the corporation; and provided also that no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has been served upon or mailed through the post-office to the mayor, reeve, or other head of the corporation, or to the clerk of the municipality within thirty days after the happening of the accident when the action is against a township, and within seven days when the action is against a city, town, or incorporated village; and provided also that in case of the death of the person by whom the damages have been sustained the want of notice shall be no bar to the maintenance of the action."

Notice of the accident was not given, as required by the proviso.

The Judge of the County Court dismissed the action on the ground, among others, of the want of the notice.

The plaintiff's appeal was heard by a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 15th September, 1897.

Edwin Bell, for the plaintiff, contended that notice was not necessary, the accident not having arisen from snow or ice upon the sidewalk, and relied upon *Drennan* v. *City of Kingston*, 23 A. R. 406, affirmed, 27 S. C. R. 46. Argument.

William Douglas, Q. C., for the defendants, was not called upon.

ARMOUR, C. J. :—

The statute plainly requires that the notice therein mentioned shall be given in the case of every action brought against a municipal corporation by reason of its default in keeping in repair any public road, bridge, or highway, and if the Court of Appeal in *Drennan* v. *City of Kingston*, 23 A. R. 406, intended to decide that such notice was only required in cases where the non-repair was by reason of its not removing snow or ice from the sidewalks, the decision was in plain opposition to the statute, and, being the Court of last resort in this case, we must follow the statute, and dismiss the appeal.

FALCONBRIDGE, J. :—

I agree in this construction of the statute.

I do not think that the Court of Appeal decided in *Drennan* v. *City of Kingston* that notice was required only in cases of accident from snow or ice, although members of the Court seem to have been of that opinion.

STREET, J. :—

I concur in the opinion that the statute plainly requires notice to be given in cases of this nature. I do not consider that the decision in *Drennan* v. *City of Kingston* is necessarily opposed to this view.

Appeal dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

McLEOD v. NOBLE ET AL.

Parliamentary Elections—House of Commons Election—Recount by County Judge—High Court of Justice—Injunction—Invalidity of—Want of Jurisdiction—Disobedience of Injunction—Motion to Commit—Contempt.

The House of Commons of Canada alone has the right to determine all matters not relegated to the Courts concerning the election of its own members, and their right to sit and vote in Parliament.

The preliminary recount provided for by R. S. C. ch. 8, sec. 64, is a delegation *pro tanto* of parliamentary jurisdiction and the County Judge, as the presiding officer, is one designated by Parliament, and is responsible to the House for the right performance of his duties.

On an application to commit for contempt of Court a barrister, who had in argument, as agent of a candidate, urged a County Court Judge to disregard an injunction staying proceedings granted by the High Court of Justice for Ontario and to proceed with the recount, and a returning officer who had, under the direction of the County Judge, produced the ballots for the purpose of the recount, notwithstanding that the injunction prohibited him from so doing :—

Held, that the plaintiff, the defeated candidate, had no particular specified legal right as applicant for a recount which entitled him to claim a specified legal remedy in the courts :—

Held, also, that the High Court had no jurisdiction to enjoin the prosecution of proceedings connected with controverted elections of the Dominion, such as a recount under sec. 64, R. S. C. ch. 8 :—

Held, also, that a County Judge having jurisdiction, and having issued his appointment for a recount, the procuring of an injunction from the High Court was an unwarrantable attempt to interfere with the due course of the election :—

Held, lastly, that the injunction, being one the Court had no jurisdiction to grant, was extra judicial and void, and might properly be disobeyed.

Statement. THIS was a motion to commit George F. Bruce, a returning officer, and Dalton McCarthy, Q. C., who had acted at a recount of ballots as agent for a candidate for election as a member of the House of Commons.

The contempt alleged was disobedience of an injunction of the High Court of Justice issued under the circumstances set out in the judgment.

The action was brought by Angus McLeod, the unsuccessful candidate, against Robert M. Noble, Dalton McCarthy, by whom the application for the recount was made, George F. Bruce, the returning officer, and George T. Dartnell, a County Court Judge, who had issued an appointment for the recount.

The plaintiff had, immediately upon the declaration of the result of the election, applied to a different County Court

Judge, who had jurisdiction in the premises, and obtained from him an appointment requiring the returning officer to produce the ballot papers before him to be recounted. Statement.

The appointment granted by Judge Dartnell was returnable upon an earlier day than that named by the Judge to whom the plaintiff had applied, and thereupon the plaintiff brought this action, and obtained an injunction staying the proceedings before Judge Dartnell, and restraining the returning officer from producing to him the packages containing the ballots and from making his return to the clerk of the Crown in Chancery, until a day named.

Mr. McCarthy had argued and pressed upon Judge Dartnell the contention that the injunction need not be obeyed, but ought to be wholly disregarded as there was no jurisdiction in the Court to issue it, or to interfere with or control his action or any proceedings taken in respect to the recount, as he was a statutory parliamentary officer.

Judge Dartnell proceeded with the recount, and the returning officer, under his direction, produced the packages containing the ballots and delivered them to him, and on receipt of the certificate of the Judge as to the result of the recount, made his return to the clerk of the Crown in Chancery before the day named in the injunction.

The motion was argued on April 12th and 13th, 1897, before a Divisional Court composed of BOYD, C., MEREDITH, C. J., and MACMAHON, J.

Aylesworth, Q. C., for the motion. The evidence shews that all parties were aware that an injunction had been granted before the recount was entered upon, and copies of the order were in fact personally served. The injunction order was plain in its terms, and forbade the returning officer from attending with or delivering the parcels containing the ballots, and forbade all the defendants from proceeding with the recount. Mr. McCarthy was only entitled to be

Argument.

present as agent of a candidate under subsec. 3 of sec. 64, R. S. C. ch. 8, and was not appearing in the capacity of counsel. He not only incited the Judge to disregard the injunction, but told him if he obeyed it he would subject himself to a mandamus. Aiding and assisting the breach of an injunction and abetting in the disobedience is a contempt of Court: *Lord Wellesley* v. *The Earl of Mornington*, 11 Beav. 180, 181; *Seaward* v. *Paterson*, 13 Times L. R. 204.* Even though an injunction is *ultra vires* or invalid it must be obeyed until set aside: Kerr on Injunctions, 3rd ed., 640; Snow's Annual Practice (1897), p. 1214; *Lee* v. *Bude, etc., R. W. Co.*, L. R. 6 C. P. at p. 582; *Allen* v. *Edinburgh Life Ass. Co.*, 26 Gr. 192; Oswald on Contempt of Court, 1st ed., 61 and 62. The amendment to the Election Act in 1891, 54 & 55 Vict. ch. 18, sec. 11 (D.), subjects the County Judge in his conduct of the recount to the jurisdiction of the Court. The returning officer, though an officer of the Dominion Parliament, may still be controlled by the Court as such: *Re Simmons and Dalton*, 12 O. R. 505. The Court has unlimited jurisdiction, and although it might decline to exercise such jurisdiction as it did in *Re Centre Wellington Election*, 44 U. C. R. 132, because there was a remedy open by petition, still when it does exercise jurisdiction its orders must be obeyed. An elector has a right of action if deprived of his right to vote: *Ashby* v. *White*, 1 Sm. L. C., 10th ed., p. 231; and is entitled to an injunction to compel the officer to allow him to vote. An elector is entitled to a recount, and if deprived of such legal right is similarly entitled to an injunction.

E. D. Armour, Q.C., and *Leighton G. McCarthy*, for Dalton McCarthy, contra. We contend first, that there was no jurisdiction in the High Court to make the order, and the order being made without jurisdiction is, therefore, void and need not be obeyed. The whole proceedings from the issue of the writ for the election down to the final return,

* Since reported in [1897] 1 Ch. 545.—REP.

including the recount, are solely and exclusively proceedings of the House of Commons, and without the jurisdiction of the High Court: *Théberge* v. *Laudry*, 2 App. Cas., at p. 106; *Valin* v. *Langlois*, 5 App. Cas., at pp. 120, 121; *Re Centre Wellington Election*, 44 U. C. R. 132, approved by Fournier, J., in *Ellis* v. *The Queen*, 22 S. C. R. 7; *Re North Perth, Hessin* v. *Lloyd*, 21 O. R. 538, and all parties concerned were amenable to the jurisdiction of the House of Commons, and might have been committed by the House if they had not obeyed its writ rather than the injunction of the High Court: See also *Re Tyrone Election Petition, McCartney* v. *Corry*, Ir. Rep. 7 C. L., at p. 246 (1873); *Bradlaugh* v. *Gosset*, 12 Q. B. D. 271. The order being made without jurisdiction is null and void, and need not be obeyed: *Sparks* v. *Martyn*, Vent. 1; *Macfarlane* v. *Leclaire*, 15 Moo. P. C., at p. 185. If there is no jurisdiction there is no contempt. The High Court will prohibit an inferior Court which is proceeding to punish for disobedience of an order which it had no jurisdiction to make: *The Queen* v. *Lefroy*, L. R. 8 Q. B. 134. And when the High Court, *per incuriam*, issues an order which it had no jurisdiction to make, it should not commit for disobedience, where in a similar case it would prohibit an inferior Court from so acting. Committal for contempt is a punishment for interfering with or obstructing the course of justice, and it is no obstruction to justice to refuse to obey an order which cannot be enforced for want of jurisdiction: *Willis* v. *McLaughlin*, 1 Ex. D., at p. 385; *Re de Souza*, Oswald on Contempt of Court, 2nd ed., at p. 63; Oswald, at p. 1; *Re Special Reference from the Bahama Islands*, A. C. [1893] 138, at p. 148; *Ex p. Jose Luis Fernandez*, 10 C. B. N. S., at p. 25, where it is said that the Court was a "competent tribunal in respect of a matter within its jurisdiction:" See also *The King* v. *Clement*, 4 B. & Ald. 218, at p. 232, also *Partington* v. *Booth*, 3 Mer. 148. The American authorities agree with this: *The People* v. *O'Neil*, 47 Cal. 109; *Brown* v. *Moore*, 61 Cal. 432; *Re John Morton*, 10 Mich. 208; *Sol*

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Bear v. *P. Cohen*, 65 N. C. 511; *Evans* v. *Pick*, 3 Am. & Eng. Enc., 1st ed., p. 788 (notes). The essence of the offence of contempt is that it is against the public, and the procedure is by indictment: *Helmore* v. *Smith*, 35 Ch. D., at p. 455; *The Queen* v. *Payne and Cooper*, [1896] 1 Q. B. 577; *Metropolitan Music Hall* v. *Lake*, 60 L. T., at p. 751; *Re Fernandez*, Oswald, p. 12. Even if the order had been valid, the offence must be so serious as to amount to an obstruction of justice: *Hunt* v. *Clarke*, *In re O'Malley*, 37 W. R. 724; and the application may be largely influenced by the conduct of the parties: *Vernon* v. *Vernon*, 40 L. J. Ch. 118. Committal is the last resort: *Re Maria Annie Davies*, 21 Q. B. D. 236. The complaint is not that a recount was prevented, but that it took place before one Judge rather than another. The dates of the appointments shew that if the recount in question had not proceeded no valid recount would have been had. Both Judges had jurisdiction to hold a recount, the electoral district touching each of the counties where they were Judges. Judge Mahaffey's appointment was returnable a day after the statutory limit for holding the recount. Judge Dartnell's appointment was returnable within the proper time. Hence, if the latter had not been proceeded with, the statutory time for holding a recount would have elapsed; and in any event the parties concerned were right in obeying the appointment first in point of time. The result is that instead of impeding the course of justice the respondents have furthered it by enabling a valid recount to be held. The successful candidate who applied for the recount in question is entitled to one. If elected on a small majority, a recount might shew such a large majority that his seat would not be attacked. The Act does not exclude him from asking and he falls within its words. A barrister cannot be committed for arguing before a competent tribunal that an order of the High Court is void, and should not be obeyed. Judge Dartnell constituted a tribunal exercising judicial functions, and was free from

outside interference: 1 Sm. L. Cas., 10th ed., p. 285. He was answerable only to the House of Commons: *Bradlaugh* v. *Gossett*, 12 Q. B. D., at p. 285; *Burdett* v. *Abbot*, 14 East., at p. 159; *Pickering* v. *James*, L. R. 8 C. P. 489. The charge against Mr. McCarthy is that he did "knowingly counsel, aid, abet and assist the above named Dartnell to enter then upon and proceed then with a recount, etc.," and did "similarly counsel, etc., the defendant Bruce, etc." The business of a counsellor is to counsel, of a barrister to advise and argue in support of his advice. Mr. McCarthy did not go beyond the limits of argument in endeavouring to convince Judge Dartnell, who constituted a competent tribunal acting within his jurisdiction, that the injunction order was null and void, and need not be obeyed as being beyond jurisdiction. Judge Dartnell having so ruled, in accordance with such decisions of the High Court as *Re Centre Wellington*, *supra*, the recount was proceeded with. If Judge Dartnell could not be proceeded against for deciding as he did, a barrister who argued the matter for decision could not be committed. In any event Mr. McCarthy only induced Judge Dartnell to follow certain decisions of the High Court (already cited) as correct; and it would be absurd for the High Court to commit any one for advising and insisting that its own decisions were correct, and should be obeyed.* Argument.

Wm. Macdonald and *R. A. Grant*, for the returning officer George F. Bruce. There are two senses in which the term "no jurisdiction" may be used—one that the case made for the injunction does not bring the application within the rules prescribed by the Court for the exercise of its jurdisdiction. Courts of equity have often in such cases said there was "no jurisdiction," meaning only that a proper case had not been made. An injunction made on insufficient or improper material admittedly must be obeyed while in force. The contention here, however, is much wider, viz., that

*See *Blair* v. *Assets Co.*, *per* Lord Halsbury, at p. 420; *per* Lord Watson, at p. 421; *per* Lord Herschell, at p. 426.—REP.

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the Court had no power to deal with the subject matter of litigation at all. The counting or re-counting of the votes for the purpose of making a return is clearly a part of the election, and is subject to the jurisdiction and control of Parliament and not to the jurisdiction or control of the Courts: Hallam's Constitutional History of England, vol. 1, p. 275; and the privileges of Parliament have in Canada statutory sanction: R.S.C. ch. 11, secs. 3 & 4. The whole purpose of a recount is to secure before an officer of judicial habit and experience who is made a parliamentary officer for the purpose, a revision of the count made by a large number of deputy returning officers at the close of the poll: *Queen's County Case*, vol. 23, Can. Hansard; *Ellis* v. *The Queen*, 22 S. C. R. 7. The returns to Parliament are to be made speedily and not to be subject to ordinary delays of litigation, otherwise there might be prolonged litigation expressly to prevent the return of members so as to change the political complexion of the Commons. The Courts have no authority except statutory and as there is no statutory authority here, there is none at all. The jurisdiction of the Court only arises after a return has been made and an election petition filed. The argument is fallacious that the Courts have the plenary jurisdiction of the Crown. This jurisdiction of controlling elections has not like the jurisdiction of the Courts been derived from the Crown but has always been jealously claimed by the Commons in independence of the Crown, and has often been asserted in opposition to the Crown and Judges; *Barnardiston* v. *Soame*, 6 St. T. 1063, is a recognition by the Courts of the rights of the Commons and of the position of the returning officers as subject only to their jurisdiction. This privilege of Parliament has never been questioned. *Ashby* v. *White*, 1 Sm. L. C., 10th ed., 284, is quite consistent with this. The right to vote is a right of property, is a part of one's "freehold" and therefore an action lies if this right is infringed. No right of the plaintiff is infringed here; he had a right to a recount, there has been a recount before a qualified officer. If anything it is *damnum absque injuria*.

Moreover, the returning officer had nothing to do with any alleged scheme to deprive plaintiff of an alleged legal right to a recount before one officer, rather than another. Argument.

The returning officer, before the injunction, attended with the ballots before Judge Dartnell, whose appointment and order was first returnable. He was bound to obey the order. The ballots were then in the custody of Judge Dartnell. The returning officer in afterwards making the return was only completing, as required by law, proceedings which were initiated and carried on by Judge Dartnell before the injunction issued.

Even if there was a technical breach there was no deliberate, wilful contempt. The returning officer was placed in a position of great difficulty and embarrassment by the opposing orders of the County Judges and of this Court, all of which it was impossible to obey. There should be no punishment in any event.

Aylesworth, Q.C., in reply. The issue of the first appointment vested the jurisdiction in the Judge who made it. Any proceedings under a subsequent appointment before another Judge were not judicial and were therefore the subject of injunction. He also referred to *Re Lincoln Election*, 2 A. R. 353.

June 30th, 1897. The judgment of the Court was delivered by

BOYD, C.:—

This is a motion to commit for contempt of Court the defendant Bruce for disobedience to the order herein dated 15th February, 1897, and also to commit Mr. Dalton McCarthy for counselling and aiding the defendants in disobedience thereto.

The cause of action arises in the course of proceedings upon a recount of votes cast in a controverted election of a member to serve in the House of Commons for the

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electoral district of the north riding of the county of Ontario.

The plaintiff Angus McLeod and one Duncan Graham were the candidates. The defendant Bruce was the returning officer, and upon the summation of ballots at the close of the poll, on 11th February, he declared Graham elected by a majority of thirty-nine votes.

On the same day the defeated candidate McLeod made application for a recount to Judge Mahaffy, who appointed Tuesday, the 16th February, to proceed therewith.

On the 12th February application was made for a recount to Judge Dartnell, who thereupon appointed Monday, the 15th February, to proceed therewith. It was suggested that this application was made by the defendant Noble at the instance of the successful candidate, who objected to the recount being before Judge Mahaffy. Owing to the fact that this electoral district embraces territory which is partly in the county of Ontario and partly in the judicial district of Muskoka, it was competent for the Judge of either locality to act under section 64 of the Dominion Elections Act, R. S. C. ch. 8.

Then the writ was issued in this action on the 15th February, and an order was obtained *ex parte* enjoining the defendants till the 18th February from entering upon or proceeding with the recount before Judge Dartnell, and from opening the sealed ballot parcels and from making any return to the Clerk of the Crown in Chancery.

The motion is to commit for violation of the order by proceeding with the recount and making the return thereupon to that officer of Parliament.

The broad ground of defence is that the order was *ultra vires*, made in an action wherein the Court had no jurisdiction, and in which the plaintiff had no ground of complaint, cognizable in Courts of Law or Equity.

The plaintiff's cause of action (as argued) was that he was denied the right to have a recount; and it was likened to the injury of one denied the right to vote, in which case there is a legal wrong and a valid cause of action.

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Now, the right to vote is put upon this ground in *Ashby* v. *White*, 1 Sm. L. C., 6th Am. ed., 353, 354, that it is an original right, incident to and inseparable from the freehold; that it is a several and particular right in each man in his private capacity; an English right to deprive one of which is an actionable wrong.

None of these considerations apply to this statutory permission to have a recount by way of preliminary to the petition under the Dominion Controverted Elections Act (R. S. C. ch. 9). Though this plaintiff is the minority candidate, yet he has not any status as such to ask for a recount. It is not even restricted to electors by the terms of the section (64), R. S. C. c. 8, but is initiated upon the "affidavit of any credible witness." The applicant is no more aggrieved by the non-prosecution of the recount than any other reputable inhabitant, and even if the grievance were one of a general actionable character affecting the body of the electorate, no special or particular injury can be attributed to the person who makes the affidavit. If not, he cannot maintain an action: see *Ashby* v. *White*, 14 St. Tr., at p. 796 (Howell's ed.); *Calcraft* v. *West*, 8 Ir. Eq. R. 74; *Glossop* v. *Heston and Isleworth Local Board*, 12 Ch. D. at p. 116.

It is obvious, too, that here there was no denial of the right to recount under section 64: it was a question as to the carriage of the proceedings. The recount was to go on but under the supervision of a competent officer, though other than the one sought by the plaintiff. Then, again, it is obvious that there was no finality in this recount—it was a mere interlocutory step; the process could be repeated before the Clerk of the Crown in Chancery, under section 72 R. S. C. ch. 8, and it might be again proceeded with as a part of the investigation under the petition complaining of the return. No such consequences follow from the failure of the first applicant to procure a recount before the Judge selected by him, as result from the rejection of a vote or the refusal of a ballot-paper.

Again, it is a grave question whether the action of Judge

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Mahaffy was not a futile proceeding. The complaint in the affidavit was lodged with him on the 11th February; his statutory duty is prescribed and that is to appoint a time within four days thereafter to proceed with the recount: but his appointment was for the fifth day and so failed to comply with the time limit which was observed by Judge Dartnell. It is not necessary to decide upon this, but is a point upon which the returning officer may well have been in doubt, and as to which his obedience to the regular summons of Judge Dartnell would be unimpeachable: see *The Bellechasse Election Case*, 17 Que. Law R. 294; *Neild* v. *Batty*, L. R. 9 C. P. 104.

Though the second application for recount may have been at the instance of the successful candidate, good reason for such course may exist. There was at first but a small majority, and if by a recount this could be turned into a more substantial one, it might be that the contest would then and there have ended. The defeated candidate might have accepted the situation as adverse to his pretensions and have forborne to proceed further by petition. There was, therefore, to my mind, no want of competence in the application for a recount, even if it was in the interests of the majority candidate, and, so far as that goes, I think Judge Dartnell was seized of the matter with jurisdiction to prosecute the recount under the Act.

The underlying question of whether or not the Court was seized of the case in view of its parliamentary character is that of chief moment.

It is common knowledge that the House of Commons of Canada is clothed with the like privileges, immunities and powers as were at the date of Confederation (1867) held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom—R. S. C. ch. 11, secs. 3 & 4, and Imp. Stat. 38-39 Vict. ch. 38; and that the House of Commons enjoyed from early times the right of determining all matters concerning the election of its own members and their right to sit and vote in Parliament.

These rights in matters electoral have been abridged in

so far as legislation has taken place in England and in Canada with respect to controverted elections, and the proceedings pertinent thereto; but in all matters not otherwise provided for by statute, the ancient jurisdiction remains intact. In all matters not relegated to the Court or to special functionaries, the House retains and exercises its jurisdiction; and in all matters delegated by statute, the provisions of the written law form the Code of procedure as well as supply the measure of the delegated jurisdiction.

Thus, aforetime, controverted elections were disposed of by special or select committees of the House and sometimes by the House as a whole. After the returning officer made his official return, the whole affair was in the hands of the House, who would deal with the votes or ballots by scrutiny or recount, and thereafter, if necessary, amend the return.

The provisions as to a recount before a county or district Judge as *persona designata* in our statute appear to be peculiar to Canada and are not found in English legislation. There, the work of recount is now either at the trial of the petition, or prior to it (by Judge's order) when the doubtful ballots are reserved for the consideration of the Court: *Stepney Case*, 4 O'M. & H. at p. 49, and Rogers' Election Law (17th ed.), vol. ii., at pp. 207, 208. The miscount of ballot papers may be the sole ground for an election petition as in the *Halifax Case*, 4 O'M. & H. 203, and *Renfrew Case*, 2 *ib.* 213.

Formerly a parliamentary committee would have covered the same ground by examination of the poll-books: *The College and University of Dublin*, 1 Peckwell (E. C.) 19; *Bedford Case*, F. & F. (E. C.) 429.

Hence we reach this result: that the preliminary recount provided for by section 64 is a delegation *pro tanto* of parliamentary jurisdiction, and that the presiding officer is one designated by Parliament responsible to the House for the right performance of his duties. But no provision is made for such a case as the present, where there is an apparent jarring between the functions of alternative officers in

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respect of the recount. The omission of such a provision is very significant when the supplementary legislation of 1891 is regarded. There, by section 11, the original recount section is amended by providing for a summary remedy by application to a superior Judge in case of any omission, neglect or refusal of the county or district Judge to observe the statutory directions or to proceed with the recount: 54 & 55 Vict. ch. 19, sec. 11 (D.). The summary relief there given is of a special character and repels the conclusion that the ordinary action of the Courts is to be invoked, and it strongly implies that the case in hand is to be remedied, not by injunction, but by ulterior proceedings under the Controverted Elections Act, or by direct application to the original jurisdiction possessed by the House of Commons.

The limits between curial and parliamentary jurisdiction in elections are clearly marked by Holt, L. C. J. His dissentient judgment in *Ashby* v. *White* in the Court below, was the one which prevailed in the ultimate appeal to the House of Lords. As reported in 6 Mod., at p. 56, he says: "Though the House of Commons have the right to determine elections * * * yet where an election does not come in debate * * they have nothing to do." Again, as in 1 Sm. L. C., 10th ed., p. 254, he says: "This matter can never come in question in parliament. * * * Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament undoubtedly would say, 'Take your remedy at law.' It is not like the case of determining the right of election between the candidates."

Thus early marked was the distinction between the right of the elector to vote and the right of the candidate to the seat. As to the former it was for the Courts to investigate; as to the latter, it was for the Parliament. And involved in the right of the candidate was the power to deal with the votes (or ballots), the conduct of the election officers and all other matters arising out of the contested election, with a view to determine its legality and affirm or amend the return of the duly elected candidate.

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It is interesting to note the chronological review of the situation given in constitutional authorities. Thus, in Taswell-Langmead it is set forth that in 1603-4 James's first Parliament took up as its first business the vindication of the exclusive right of the Commons to determine contested elections against the attempt of the King to transfer the decision of such cases to his Court of Chancery. The case of *Goodwin* v. *Fortescue* is discussed at length, which, at its ending, though in form a compromise, was, in effect, a decided victory for the Commons. The right of the House to decide upon the legality of returns and the conduct of returning officers was thenceforth regularly claimed and exercised.

"It was fully recognized as their exclusive right by the Court of Exchequer Chamber in *Barnardiston* v. *Soame*, 6 How. St. Tr. 1092 (in 1674); by the House of Lords in the same case in 1689 (p. 1119); also by the Courts of Law in *Onslow's* Case, 2 Vent. 37, in 1680, and in 1702 in *Prideaux* v. *Morris*, 2 Salk. 502. Their right was further recognized by the Act 7 Wm. III., ch. 7, which declared that 'the last determination of the House of Commons concerning the right of elections is to be pursued:'" Taswell-Langmead's Cons. History, 3rd ed., p. 341.

The claim of the Commons to determine, not merely the legality of elections, but the rights of the *electors* as well, gave rise, in 1702, to a memorable contest between the Lords and the Commons, as given at length in the report of *Ashby* v. *White*, in the State Trials: *Ib.*, p. 341.

The present action looks like the reappearance of an ancient controversy in new soil, and it may now be right to dwell somewhat on the details of this particular application.

Under the Act respecting Elections of Members of the House of Commons (R. S. C. ch. 8), the returning officer is the chief administrative functionary appointed by the Queen's writ (secs. 3 & 6). He is commanded by the writ to cause election to be made according to law and to cause the name of the member to be certified to the Clerk

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of the Crown in Chancery as by law directed (R. S. C., p. 128, as in the writ). The law here referred to is the statute law of Canada in that behalf, and covers the series of acts to be done from beginning to end of the election process. The returning officer is also one who by his oath of office undertakes to act faithfully in that capacity,—that is, among other things, to observe punctually all the directions of the statute law governing his action (R. S. C., pp. 128 & 129 in the oath). His appointment, it is to be further noted, is by the Queen in her sovereign relation to the Dominion of Canada.

One of the duties of this officer is to obey the command of the Judge in case he appoints time and place for a recount within four days after the receipt of the necessary affidavit to ground such an application. Section 64 is very emphatic that in such case the Judge "shall summon and command the returning officer and his election clerk to attend then and there with the parcels containing the ballots"—which command they shall obey.

In the case in hand this electoral district embraced parts of two judicial districts of which Judge Mahaffy and Judge Dartnell were respectively Judges, and either of them might direct a recount. Judge Mahaffy issued the first summons to the returning officer, which was returnable after the period of four days limited by the Act: sec. 64, sub-sec. 1. Judge Dartnell issued the second summons to the returning officer, returnable within the statutory period. The officer could not take upon himself to decide which was regular and attended with the ballots upon the summons first returnable before Judge Dartnell within the four days.

But at this point, he, as well as Graham and his professional agent and the Judge, are notified of an *ex parte* injunction issued by a Judge of the High Court of Justice of Ontario, inhibiting any action upon the recount for some days, obtained by the applicant seeking a recount before Judge Mahaffy.

The legal aspect of the case was discussed by Mr.

McCarthy, Q.C., before Judge Dartnell, and he finally decided after some consideration to proceed with the recount. The returning officer also obtained advice, and he concluded that his proper course was to produce the ballots upon the order of Judge Dartnell. The agent of the successful candidate who appeared on the recount, Mr. McCarthy, Q.C., took part in the matter as professional counsel might do, and argued, it may be with vehemence, that the injunction was not operative to interfere with the action of these Dominion officers, the County Judge *pro hac vice* and the returning officer. Judgment. Boyd, C.

In the conflict of affidavit evidence and bearing in mind that the application to attach for contempt is of a criminal character (where the onus rests on the applicant), the proper conclusion is that the agent did not transcend the limits of professional privilege, or, indeed, of impassioned argument, in so far as his interference is complained of. So that in substance the case resolves itself into this—whether there has been punishable contempt of the order of the High Court by disobedience thereto in the conduct of the returning officer and the agent of the candidate, upon this recount.

Now the order of the High Court which takes the place of the formal writ of injunction, stands for the mandate of the Queen, speaking as the representative of the public of the Province—not of the Dominion. It cannot be that conflict shall exist between the royal command issuing from the Dominion authorities and the royal command issuing from the Provincial.

The solution of the apparent collision rests in this, that no jurisdiction is committed to the Provincial Courts as such to interfere with the functions and statutory duties of Dominion election officers. Probably the same result would follow in the case of Provincial election officers, but that is a matter not now under consideration. Unless provision is made by the Dominion for regulating or dealing with the contradictory commands upon the returning officer in this case, he must be left to do the best he can to

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observe his oath and the direction of the statute—leaving it to the House of Commons to rectify any error or miscarriage that may arise—if no redress is sought by election petition to the Judges.

The straits of the situation or the over zeal of partisans (if such there be) cannot confer jurisdiction upon Provincial Courts to interfere with the Dominion officers, acting under powers delegated to them by the Parliament of Canada. Omitted matters must be remedied by the body that has power and jurisdiction to remedy the omission and are not to be supplied by Courts dealing with civil rights. For, conformable to the views set forth in the *North Perth Case*, 21 O. R. 538, it does not appear to me that the right to a recount and the proceedings connected therewith can be classed under the category of "civil rights." They are rights of a political character in the Dominion, in the assertion of which the individual applicant does not act for himself so much as for the body of the electorate. It is different from the right to cast a vote which, being wrongfully denied, creates a personal and individual grievance that is actionable in the ordinary Courts; but the right to recount is of wider compass, affecting the applicant therefore only as representative of a larger body. Besides, here the right to recount was not denied—it was merely, at the highest, transferred in its details from one Judge to another and no irreparable injury could result to anyone; for, back of all, there was the right forthwith to overhaul everything by the usual election petition.

We are dealing, therefore, with part of the machinery or organization by which the system of representative government is carried on in Canada. In the selection of members the Dominion statutes provide for the determination of election controversies by recount and petition in a simple, speedy and adequate manner; much more convenient and expeditious, and much more likely to produce impartial results than the superseded methods of the Parliamentary Committee. Now, any interference by way of injunction

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with the time limits fixed for the recount (for example) would disarrange the whole scheme of the Act. It would mean the introduction of the rules of practice and procedure and the consequent delays of civil litigation which are inapt when applied to political officers acting under statutory powers within prescribed limits of time.

In the last analysis the question to be faced is this: Could the Court enjoin the proceedings of the Committee of Parliament on a recount? Because the recounting officer who was seized of this enquiry was an intermediary statutory substitute for that body. The question has been passed upon in England where a mandamus was moved against special commissioners appointed to investigate wrongful practices at a parliamentary election. They had refused to grant a certificate of protection to a witness examined before them, and in giving judgment, Lord Esher said, if a mandamus would lie it would be because the witness has a legal right to such a certificate and an action will lie; but, he continued, "Is it conceivable that such an action could lie against a Committee of the House of Commons or their Commissioners; * * Is that conceivable? I cannot suppose for a moment that it is": *Regina* v. *Holl*, 7 Q. B. D. 582, 583. This case is the more notable because the decision disregarded the earlier judgment of a very strong Court in *The Queen* v. *Price*, L. R. 6 Q. B. 411.

In another aspect the tribunal designated by the Dominion acting upon the recount is not subordinate to the High Court of Justice for Ontario, and is not answerable to its jurisdiction. The official act of a political body is not to be brought under the surveillance of the Court of Chancery because each organ of government should be allowed to work in its own proper administrative area. For analogous cases refer to *Stannard* v. *Vestry of St. Giles*, 20 Ch. D. at p. 196; *Kerr* v. *The Corporation of Preston*, 46 L. J. Ch. 409; 25 W. R. 265; and *Preece* v. *Harding*, 24 Q. B. D. 110.

In American law, the authorities seem to be uniform in the same direction, namely, that an injunction in Chancery is not the proper method of seeking to correct frauds, error

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or mistakes which may occur in the process of ascertaining and declaring the public will as expressed through the ballot boxes, when the Legislature provides a remedy speedy, appropriate and adequate by way of election contest: *Peck* v. *Weddell*, 17 Ohio St. 271 (1867); *Reid* v. *Moulton*, 51 Ala. 255, reversed in 54 Ala. 320 (1875); *Hulseman* v. *Rems*, 41 Pa. St. 396 (1861); *Weil* v. *Calhoun*, 25 Fed. Rep. 865 (1885).

There is no doubt that the County Judge when entering upon and proceeding with a recount is a quasi judicial officer: see *per* Hawkins, J., in *In re Thornbury Election Petition, Ackers* v. *Howard*, 16 Q. B. D. at p. 751; *per* King, J., in *Ex p. Baird*, 29 N. B. Rep. at p. 196; *Regina* v. *Owens*, 2 Ell. & Ell. 86; and *Pritchard* v. *The Mayor, etc., of Bangor*, 13 App. Cas. 241.

The general question as to the jurisdiction to interfere with election officers was decided adversely to the power of ordinary courts in *Re Centre Wellington Election*, 44 U.C.R. 132, a decision that was passed over by the Supreme Court of New Brunswick in *Regina* v. *Ellis, Ex p. Baird*, 28 N. B. R. 535, 536. That judgment was chiefly, if not exclusively, based upon the effect of the decision in *The Queen* v. *Price*, L. R. 6 Q. B. 411, which, as we have seen, was in its turn disregarded in *The Queen* v. *Holl*, 7 Q. B. D. 575. The legal principles set forth in the *Centre Wellington* case, however, are upheld in the judgment of Mr. Justice Fournier in the Supreme Court of Canada on appeal from the New Brunswick judgment in *Ellis* v. *The Queen*, 22 S. C. R. 7. The appeal was quashed as not competent because it was of a criminal matter, but the judgment of Mr. Justice Fournier deals with the merits of the controversy and is vigorously adverse to the decision in appeal.

In a later phase of the same controversy in New Brunswick, as reported in *Ex p. Baird*, 29 N. B. R. 162, Mr. Justice King feels pressed with the difficulty as to jurisdiction in the Court, so as to justify any interference with the recount. After stating the objection that the matter is within the exclusive jurisdiction of the House

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of Commons, he proceeds: at p. 197, "I am not confident that there is a complete answer to this objection," but he deals with it thus: at p. 198, "the only answer I feel capable of making is that the matter is to be judged of by the fact. If the authority sought to be prohibited has jurisdiction, then the prohibition proceedings are an unwarrantable interference with the course of the election. If, however, the authority sought to be prohibited is without jurisdiction, then what is done is merely to prevent an illegal obstruction from getting in the way. In such case the proceedings upon prohibition are collateral to the election proceedings."

The distinction made by Mr. Justice King is not in accord with the view of the Court in the *Centre Wellington Case*, nor with the conclusions reached by Mr. Justice Fournier. The latter adverts to the exposition of law contained in the judgment of Lord Cairns in *Théberge* v. *Laudry*, 2 App. Cas., pp. 106 and 107 and, arrives at the result that the special jurisdiction in election matters granted by the Dominion is exclusive of the interference of the ordinary civil courts. The whole scheme of legislation is to avoid the interruptions and prolongations which would result from recourse to prohibition and other methods of civil procedure: *Ellis* v. *The Queen*, 22 S. C. R., at pp. 20, 21. The special tribunal created by the Legislature is to be left to itself to work out the relief formerly administered by Parliament through its committees.

I am satisfied to adopt the principle of the judgment of Mr. Justice Fournier, and to apply to this case the reasoning of the full Court in the *Centre Wellington Case*. For these involve not only abstinence from all interference with the judicial officer; but by necessary consequence affirm that there is no jurisdiction to interfere at all with those interested in the prosecution of election contests. See, also, *Moses* v. *Parker*, [1896] A. C., at pp. 248, 249.

Legally speaking, contempt of court is not proved in this case. An old author writes that "attachments for

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Boyd, C.

contempt are established to enforce obedience to the commands of courts of justice—instituted for the benefit of the subject and founded in necessity—for if courts of justice were not possessed of such power, their proceedings would be oftentimes vague and nugatory": An Inquiry into Attachments (1769), p. 14. But here the proceedings were inherently nugatory and the action could not result for the benefit of the subject. Before contempt arises for disobedience to an order, it must be as to a matter which is legally and jurisdictionally *coram curia*, that is, the tribunal must be competent and must act within its jurisdiction: *Ex p. Jose Luis Fernandez*, 10 C. B. N. S. 3, at pp. 25, 37.

The conclusion of the whole matter may be briefly summarized as follows:

1. The plaintiff has no particular specific legal right as applicant for a recount which entitled him to claim a specific legal remedy in the Courts.

2. The Provincial Court has no jurisdiction to enjoin the prosecution of proceedings connected with controverted elections of the Dominion, such as a recount under section 64 of R. S. C. ch. 8, which, though it appears in the Election Act, is *in pari materiâ* with chapter 9 relating to controverted elections.

3. The County Judge having issued his appointment and summons, and having jurisdiction in the premises, the procuring of the order of the High Court by way of injunction was an unwarrantable attempt to interfere with the due course of the election.

4. The order by way of injunction being made without jurisdiction was extra judicial and void—a thing of naught which could not be disobeyed.

5. The motion to commit is without foundation, and the order being absolutely without jurisdiction might be treated as a nullity: *DeGeneve* v. *Hannam*, 1 R. & M. 494.

It remains only to dispose of the costs of the application, and I see no good ground for refusing to give costs to the successful parties.

The motion was pressed, perhaps with warmth—as the recount may have been pressed with equal warmth—but, legally speaking, the right is entirely on the side of those to whom costs are given. Judgment. Boyd, C.

G. A. B.

REGINA V. MURRAY.

Criminal Law—Procedure—Commitment for Trial—Dies non Juridicus—Subsequent Trial—Validity—Court of Record—Habeas Corpus—Writ of Error.

The prisoner was on a statutory holiday committed for trial by a magistrate upon a charge of attempting to steal from the person, and on being brought before the County Court Judge, in compliance with sec. 766 of the Criminal Code, 1892, consented to be tried by the Judge without a jury, and, being so tried, was convicted and sentenced to a term of imprisonment :—

Held, upon the return to a writ of *habeas corpus*, that the fact that the prisoner was committed for trial and confined in gaol on a warrant that was a nullity could not affect the validity of the trial before the Judge under the Speedy Trials Act.

[Upon appeal the Court of Appeal held that the County Court Judge's Criminal Court being a Court of record, its proceedings were not reviewable upon *habeas corpus*, but only upon writ of error.]

MOTION on behalf of the prisoner, upon the return of writs of *habeas corpus* and *certiorari* in aid, for an order for his discharge from custody, under the circumstances appearing in the judgment. Statement.

The motion was heard by MACMAHON, J., in Chambers, on the 19th August, 1897.

D. O'Connell, for the prisoner.

A. M. Dymond, for the Crown.

August 24, 1897. MACMAHON, J. :—

A writ of *habeas corpus* was obtained, directed to the sheriff of the county of Peterborough, to produce the body of the prisoner together with the cause of his detention.

Judgment.

MacMahon, J.

A consent was indorsed by counsel on the writ dispensing with the production of the body of the prisoner.

A writ of *certiorari* was issued in aid of the *habeas corpus*.

Upon the return of the writs Mr. O'Connell moved for the discharge of the prisoner on the ground that the preliminary investigation resulting in the commitment of the prisoner for trial took place on the 1st July—Dominion day—which, by R. S. C. ch. 1, sec. 7 (26), is a "holiday," and therefore a *dies non juridicus*.

From the return to the *certiorari* it appears that the prisoner was on the 1st day of July, 1897, brought before Robert S. Davidson, a justice of the peace for the county of Peterborough, acting for and in the absence of and at the request of D. W. Dumble, Esquire, the police magistrate for the town of Peterborough, charged with an attempt to steal certain goods and money from the person of Martha A. Trew, and, after hearing the evidence of the witnesses, the magistrate committed the prisoner to the common gaol at Peterborough for trial on the said charge.

The offence charged against the prisoner being one triable at the General Sessions of the Peace, the sheriff, in compliance with the requirements of sec. 766 of the Civil Code, notified the Judge that the prisoner was confined in gaol on said charge, and, according to the record of the proceedings, the prisoner was brought before the Judge of the County Court on the 2nd July, and was asked if he consented to be tried by the Judge without the intervention of a jury, and the prisoner thereupon consented to be so tried, and upon the evidence adduced was by said Judge convicted of the offence of attempting to commit a theft, and was on the 28th July sentenced to imprisonment in the county gaol for a period of three months.

On the writ of *certiorari* the learned County Court Judge has indorsed a certificate to the effect that at the trial counsel for the prisoner objected that the preliminary investigation before the magistrate took place on the 1st

July, 1897, and that the prisoner could not be validly tried, but he (the Judge) overruled the objection and proceeded with the trial. Judgment. MacMahon, J.

A writ returnable on a Sunday or other *dies non* is a nullity: Chitty's Archbold's Practice, 12th ed., p. 160; *Morrison* v. *Manley*, 1 Dowl. N. S. 773; *Kenworthy* v. *Peppiat*, 4 B. & Ald. 288; *Swann* v. *Broome*, 3 Bur. 1595. And a judgment signed on a *dies non* is a nullity: *Harrison* v. *Smith*, 9 B. & C. 243. Littledale, J., in that case said: "There are certain days, as well as Sundays, which are *dies non juridici*. On those days the Court cannot do any judicial Act." And in *Lampe* v. *Manning*, 38 Wis. 673, where an action was tried before a justice of the peace on a day which by a statute of the State was made a "holiday," the judgment was moved against because the day of the trial was a legal holiday. In delivering the judgment of the Supreme Court of Wisconsin, Lyon, J., said: "The day on which the cause was tried and judgment rendered was a legal holiday, and hence was, as the term *holiday* imports, *dies non juridicus*. Such being the case, the Court had no authority to hear the case and render judgment on that day." See also *Baxter* v. *The People*, 3 Gilman (Ill.) 368; *Chapman* v. *The State*, 5 Blackford (Ind.) 111.

So that, had the trial and conviction of the prisoner taken place on Dominion day, which by the Act is a "holiday," and therefore a *dies non*, he must have been discharged from custody. But the prisoner was not tried on that day, nor is he now confined in gaol by virtue of any warrant of commitment respecting the judicial act performed on that day. The preliminary investigation on that day was a nullity, and the warrant of commitment was a nullity, and had a motion been made for his discharge while in custody under such warrant he must have been discharged. But such discharge would have been of little avail, as, having only been committed for trial, and not having been tried, he could be re-arrested, and after another and valid preliminary investigation put upon his trial. It is not as if the magistrate had tried and con-

Judgment.

MacMahon, J.

victed him for an offence under the Summary Convictions Act on a *dies non*; for in such case, if the prisoner were discharged because of the judicial act being a nullity, he could not be re-arrested, as he had once been tried and convicted of the offence charged. But the illegality of the preliminary investigation, or the fact that the prisoner was committed for trial and confined in gaol on a warrant that was a nullity, cannot affect the trial before the Judge under the Speedy Trials Act. When the prisoner was brought before the Judge he elected to be tried by him without the intervention of a jury, and on his being arraigned on the charge for which he was committed for trial, he pleaded "not guilty," so that all the requirements of the Criminal Code were complied with at the time the prisoner was placed on his trial. He was tried on the charge and convicted of the offence by the Judge, who sentenced him to imprisonment for three months, and he is now serving out the sentence so imposed.

The motion to discharge the prisoner must be refused, and the writ of *habeas corpus* superseded.

E. B. B.

[An appeal from this decision was heard by the Court of Appeal, BURTON, C.J.O., and OSLER, MACLENNAN, and MOSS, JJ.A., on the 14th September, 1897. Judgment was delivered on the 17th September, 1897, dismissing the appeal upon the ground that the County Court Judge's Criminal Court was a Court of record, and, after a conviction by such a Court having general jurisdiction over the offence charged, the proceedings are reviewable only under a writ of error and cannot be the subject of investigation under a writ of *habeas corpus*.]

GOFF V. STROHM.

Will—Legacy—Vested Interest—Period of Payment.

Where a testator gives a legatee an absolute vested interest in a defined fund, the Court will order payment on his attaining twenty-one, notwithstanding that by the terms of the will payment is postponed to a subsequent period.

Rocke v. *Rocke*, 9 Beav. 66, followed.

Statement.

AN application for payment out of Court to Mary Ethel Goff of her share of moneys paid in by the executors of the will of Joseph Goff, deceased, representing the amount of a legacy given to her by the will, in the following words:—

"I give, devise, and bequeath to Mary Ethel Goff, daughter of George Goff, two hundred dollars and interest, to be paid on her twenty-fourth birthday, said amount to be placed in the Bank of Commerce, Simcoe."

The applicant at the time of the application had recently attained the age of twenty-one years.

The motion was heard by ROSE, J., in Chambers, on the 1st October, 1897.

H. M. Mowat, for the applicant. Although she has not attained the age of twenty-four, the applicant is entitled to the money in Court. "Where a testator gives a legatee an absolute vested interest in a defined fund, so that, according to the ordinary rule, he would be entitled to receive it on attaining twenty-one, but by the terms of the will payment is postponed to a subsequent period, *e.g.*, till the legatee attains the age of twenty-five, the Court will, nevertheless, order payment on his attaining twenty-one; for at that age he has the power of charging or selling, or assigning it, and the Court will not subject him to the disadvantage of raising money by these means, when the thing is absolutely his own:" Williams on Executors, 9th ed., p. 1254. The authorities cited, viz., *Curtis* v. *Lukin*, 5 Beav. 147, *Rocke* v. *Rocke*, 9 Beav. 66, and *Re Young's Settlement*, 18

Argument. Beav. 199, bear out the statement. Here the applicant has an absolute vested interest, and is entitled to immediate payment.

October 6, 1897. ROSE, J.:—

The applicant is entitled to payment out of Court of her share, she having attained the age of twenty-one years, and having an absolute vested interest in the legacy. The statement quoted from Williams on Executors is supported by the cases cited, and *Rocke* v. *Rocke*, 9 Beav. 66, is particularly applicable. In that case it appeared that the testator gave his residuary estate to his son, adding, "but it is my especial desire that the residue of my property be not delivered over to him until the completion of his twenty-fifth year." The son attained the age of twenty-one in June, 1845, and in July applied for payment of the residue, which was in Court. Lord Langdale, M.R., said: "I will look at the terms of the will, and see if the order can be made. If I should be satisfied that there is an absolute gift, with a direction to pay at twenty-five, then, as he has an absolute right at twenty-one, and can sell and mortgage his interest, I shall order payment." In August of the same year he made the order for the immediate payment of the residue to the applicant.

Let the order go for payment out of the fund.

E. B. B.

[See *Re Wartman*, 22 O. R. 601.]

[DIVISIONAL COURT.]

IN RE GRANGER AND THE CHILDREN'S AID SOCIETY OF KINGSTON.

Infants—Act for Prevention of Cruelty to Children—Order of Justices—Appeal to General Sessions—Jurisdiction—56 Vict. ch. 45 (O.)—58 Vict. ch. 52, sec. 2 (O.).

There is no appeal to the General Sessions from an order for the custody and care of children under section 13 and subsequent sections of 56 Vict. ch. 45 (O.), "*An Act for the Prevention of cruelty to and better Protection of Children*," made by two justices of the peace sitting under section 2 of 58 Vict. ch. 52 (O.), amending the former Act.

Statement. THIS was a motion on behalf of the Rev. James R. Black, agent of the Children's Aid Society at Kingston, for an order in the nature of a writ of prohibition prohibiting the chairman and members of the Court of General Sessions of the county of Frontenac, and one David Granger, from taking any further proceedings in the matter of an appeal by David Granger against an order dated January 19th, 1897, made by Robert F. Elliott and Edward Ryan, aldermen and justices of the peace, whereby the six children of David Granger were ordered to be committed to the care of the Children's Aid Society at Kingston.

The motion was resisted by David Granger, their father, who, previous to the making of the order complained of, had the custody of the said children.

The motion was argued on June 18th, 1897, before Moss, J. A., sitting for and at the request of the Chancellor.

T. D. Delamere, Q. C., for David Granger.

Herbert M. Mowat, for the magistrates and the Reverend J. R. Black.

July 6th, 1897. Moss, J. A.:—

The order was made under the provisions of the 13th, 14th, and following sections of the Act for the Prevention of Cruelty to and better Protection of Children, 56 Vict.

Judgment.

Moss, J.A.

ch. 45 (O.), as amended by 58 Vict. ch. 52 (O.), Messrs. Elliott and Ryan, acting together, constituting "the Judge," before whom the children were brought. It was suggested that it appeared from the depositions that Messrs. Elliott and Ryan proceeded under section 2 of the 56 Vict. ch. 45. But it is clear the reference in the depositions to section 2 is to section 2 of the Act, 58 Vict. ch. 52, by which two justices of the peace acting together, were for the first time added to the list of persons included in the meaning of the word "Judge" as used in the Act 56 Vict. ch. 45.

The order recites that on the 19th day of January, 1897, "the above neglected children have been brought before us on information made before us on oath by the Rev. John R. Black, who in our opinion is acting *bonâ fide* in the interest of the said children in order that we might determine if the said children, be dependent and neglected children within the meaning of the statute in such cases made and provided."

The information charges that the children, at the said city of Kingston, on the 13th day of January, were found in a destitute condition, growing up without proper parental control, and in circumstances exposing them to physical and moral peril.

And the order following the directions of section 14 finds and states that the children are dependent and neglected children within the meaning of the Act for the Prevention of Cruelty to and the better Protection of Children.

It also states the age of the children, and the name, religion and occupation of their father, that their mother is dead, and that their father has abandoned them.

While it may be said that the order does not specify with great clearness the exact description of neglected children, under which these children come, it shews that the proceeding was undoubtedly under section 13 and the following sections, and not under section 2.

David Granger was, on the 18th of January, served with a summons signed by the mayor to appear on the 19th of Jan-

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Moss, J.A.

uary before him at the Police Court to answer to the information already referred to, and appeared and was examined on oath before Messrs. Elliott and Ryan, with reference to his children. The proceedings were partly taken on the 18th, and Granger complains that he was not duly notified.

The order directs that the children be delivered into the care and custody of the Children's Aid Society of Kingston, and be taken to its temporary home or shelter at Kingston, to be there kept until placed in an approved foster home, pursuant to the provisions of the Act.

David Granger has given notice of his intention to enter and prosecute an appeal at the General Sessions of the Peace in and for the county of Frontenac, on the ground that the children were not found in a destitute condition or growing up without parental control, or in circumstances exposing them to physical and moral peril; that the prosecution was conducted without any notice to him; that Messrs. Elliott and Ryan had no jurisdiction to adjudicate upon the matters in question; and that the order is informal, illegal, and insufficient.

The motion for prohibition is based upon the ground that no appeal lies from an order made by "a Judge" under the sections referred to, and that the chairman and members of the General Sessions of the Peace, have no jurisdiction to entertain an appeal, and that there was no proper notice of the appeal given to or by any party to the proceedings.

The argument before me, was directed almost exclusively to the question of jurisdiction, and the question is whether an appeal lies from the order to the General Sessions under the provisions of R. S. O., (1887) ch. 74, sec. 4, and sec. 879 *et seq.* of the Criminal Code, 1892

The Act under which the order was made, is the outcome of an endeavour to blend and adapt the provisions of several Imperial and some Provincial Acts, each of which deals with one part or branch of the general subject of the care and protection of children, into one enactment, and

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to make applicable to the whole, some provisions which, in their original places, were applicable only to one set of circumstances. Recourse has been had to the provisions of the following Imperial Acts: The Industrial Schools Act, 1866, 29 & 30 Vict. ch. 118, The Industrial Schools Amendment Act, 1880, 43 & 44 Vict. ch. 15, The Prevention of Cruelty to and Protection of Children Act, 1889, 52 & 53 Vict. ch. 44, since superseded by the 57 & 58 Vict. ch. 41 (1894), The Custody of Children Act, 1891, 54 Vict. ch. 3, and to the provisions of the Industrial Schools Act, R. S. O., (1887) ch. 234, and other Provincial Acts, with the result that there is produced, a comprehensive set of enactments dealing with at least three branches of the subject of the care and protection of children. These appear to be:—

1. The prevention or punishment of cruelty to children by adults or persons above the age of sixteen years.

2. The rescue and care of children under fourteen or sixteen, according to sex, who have not yet been guilty of any legal offence, but who from their circumstances and surroundings, are in special danger of being ruined unless promptly rescued.

3. The reclamation and care of certain classes of juvenile offenders.

It was, I think, intended that adults and persons above sixteen years of age, falling within the first class of cases as persons charged with acts of cruelty or wrong to children under the Act, should be dealt with by a different tribunal to that which was created for the purpose of dealing with the cases falling under the second class of cases dealt with by the Act.

The cases of persons falling under the first class, seem assigned to police magistrates or justices of the peace, or to the Court of Summary Jurisdiction (which as defined by the Act, means and includes any police or stipendiary magistrate, or two justices of the peace acting together), with perhaps the single exception occurring under sub-sec. 2 of sec. 7, where, possibly through inadvertence, a Judge

Judgment.

Moss, J.A.

as defined by the Act, is substituted for a Court of Summary Jurisdiction.

Sections 2, 3, 4, 5, 7 and 8 of the Act deal with the first class of cases. Their provisions are similar to those of secs. 1, 2, 3, 4, 6, and 8 of the Imperial Act, 52-53 Vict. ch. 44. Section 6 of our Act is the counterpart of section 5 of the Imperial Act. Section 10 of the latter Act gives an appeal to the Quarter Sessions in the case of any application under section 5, to any party thinking himself aggrieved by any order or decision of the Court. Our Act contains no similar provision. Sections 9, 14 and 15 of the Imperial Act are found as sections 25, 26 and 27 of our Act.

All the cases falling under the second class, appear to be assigned to a "Judge," who as defined by the Act as amended, may be a Judge of the High Court of Justice or a Judge of the County Court, or a retired Judge of the High Court or County or District Court, or a stipendiary magistrate, or a justice of the peace, specially appointed as a commissioner for the trial of juvenile offenders, or two justices of the peace acting together.

In these cases no convictions are made by the Judge, and the orders he may make, are chiefly in relation to the custody and care of children, though in one or two instances, he may make orders in respect to their maintenance.

The case of the juvenile offender is left to be dealt with in the first instance by the magistrate or justice before whom he has been brought for trial.

The children in this case come within the second class of cases dealt with by the Acts.

Sections 13 and 14 are based upon the somewhat similar provisions of section 14 and other sections of the Imperial Industrial Schools Act, 1866, as amended by the Industrial Schools Amendment Act, 1880. These Acts contain no express provision giving the right to appeal in any case, and the Imperial Summary Jurisdiction Act, 1879, 42-43 Vict. ch. 49 (sec. 19), gives the power of appeal only in cases where imprisonment has been ordered, and does not give an appeal in cases where a fine only has been

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Moss, J.A.

imposed; or against a custody order, a maintenance order, or a decision in reference to a child's religion. No doubt it was thought not desirable to give any appeal against orders or decisions made or given under provisions, the objects of which are not punitive or penal. Our Legislature has not seen fit even to continue in its legislation an enactment with regard to appeals in cases under section 6 similar to that contained in the Imperial Act 52-53 Vict. ch. 44.

Speaking of the Industrial Schools Acts, 1866, Lord Russell of Killowen, C. J., says in *The Queen* v. *Jennings*, [1896] 1 Q. B. 64, at p. 66: "The scheme of the Industrial Schools Act shews that it is not a code of criminal procedure, and is not punitive in its character; it is on the contrary, benevolent in its aims and operation, and is intended to protect those children who come within its protection."

I do not think the provisions of sec. 4 of R. S. O. ch. 74, or of the code, can apply to orders made by a "Judge" with respect to the care, custody, or maintenance of children under the provisions of the 56 Vict. ch. 45, as amended by the 58 Vict. ch. 52; and I am satisfied that no appeal lies to the General Sessions from the order made in this matter.

It happens that the order was made by two justices of the peace, but they were not sitting or acting in their usual capacity of justices. They were performing a special duty as a Judge, to whom such duty is assigned by the Acts in question, and their order should not be appealable to the General Sessions any more than should be a similar order made by a Judge of the High Court acting under the provisions of these Acts.

I direct that an order for prohibition do issue in the usual form.

The father, David Granger, appealed to the Divisional Court, and the appeal was heard on October 4th, 1897, before BOYD, C., FERGUSON and MEREDITH, JJ.

T. D. Delamere, Q. C., for the motion. As to two justices of the peace: Paley on Convictions, 7th ed., pp. 21 and 22. It means two justices having jurisdiction in the place. Our right to appeal rests entirely on R. S. O. 1887, ch. 74, sec. 4. Archbold's Quarter Sessions, 4th ed., 635-40 discusses the English Acts to which the learned Judge refers. An appeal given by statute cannot be taken away by implication: Archbold, *ibid.* pp. 635-37. As to who is a party aggrieved: see *Verdin* v. *Wray*, 2 Q. B. D. 608. Among the people having authority to sit are certain persons named, and where an authority is exercised under a statute of Ontario, the right of appeal is given. Argument.

H. M. Mowat, contra. I refer to *Boulter* v. *The Justices of Kent*, 13 Times L. R. 538. There is ample protection to a father in the provision as to *habeas corpus*. This Act is a benevolent Act The proceedings are private. Section 879 of the Criminal Code, 55-56 Vict. ch. 29 (D.), shews what is meant by a party aggrieved. The two justices were meant to constitute a Judge: *Manders* v. *Manders*, [1897] 1 Q. B. 474. This Children's Aid Society Act is identical with Imperial 52-53 Vict. ch. 44, until it comes to section 10, which gives an appeal. The Ontario Legislature have expressly excluded that section.

Delamere, in reply. *Boulter* v. *The Justices of Kent*, illustrates that the whole question under the English Act is whether the Court is a Court of summary jurisdiction. The only appeal to the English Quarter Sessions is an appeal from a Court of summary jurisdiction, but that is not so under our Act. That is why section 10 is left out, because there was no general provision for an appeal in England as there is here.

The judgment of the Court was delivered on October 5th, 1897, by

BOYD, C.:—

The method of legislation demonstrates that no appeal lies to the Quarter Sessions in this matter.

Judgment.

Boyd, C.

The order is made under the special powers of 56 Vict. ch. 45 (1893), enacted for the protection of children. No appeal is given or contemplated by that Act from an order of "the Judge." The enquiry is of a private character (section 30), and any direction given for the removal or well-being of the child is subject to reconsideration by the Judge under section 17 (2).

The order in this case was made by "two justices of the peace acting together" under the amendment introduced in 1895, 58 Vict. ch. 52, sec. 2. The effect of this was to enlarge the number of judicial officers empowered to act as Judges under the former Act, but it did not otherwise change the character of the earlier statute.

But it is argued that this amendment empowering two justices to act introduced the provisions of the Revised Statutes of 1887, ch. 74, sec. 4, by which an appeal is given to the Quarter Sessions in case of a conviction or order made by a justice of the peace. So to read the Revised Statute would be to bring in an appeal totally repugnant to the special legislation, and inconsistent with the whole machinery devised to promote the well-being of neglected children.

In brief, I think it plain that the "two justices acting together" constitute the legislative Judge provided by the Children's Protection Act from which functionary there is no appeal to the Quarter Sessions or indeed to any other Court.

I would, therefore, affirm the judgment, but as a new case, and otherwise, it should be without costs.

A. H. F. L.

IN RE MILLS, NEWCOMBE V. MILLS.

Life Insurance—Insurance for Benefit of Child—Satisfaction—Evidence—Oral Declarations of Insured.

In the course of proceedings for the administration of an intestate's estate, the amount of a life policy taken out by deceased, under the Act to secure to wives and children the benefit of life insurance, in favour of his daughter absolutely, and which had been paid to her guardian, was set up as satisfaction of a claim made on behalf of the daughter and of the personal representative of her mother against the estate, and certain oral declarations of the deceased made before effecting the insurance were proved to shew such to have been his intention :—

Held, that if the evidence was admissible at all, which was doubtful, there should at least be something in writing evidencing the obligation to accept the amount in satisfaction of the claim as formal as the Act requires in the case of changes in the description of, or apportionment among, the beneficiaries.

Statement.

THIS was an appeal from the certificate of the Master at St. Thomas in certain proceedings for the administration of the estate of James H. Mills, who died intestate on July 25th, 1896.

The intestate, it appeared, was twice married. Eva Mills, his first wife, and the mother of Ula Belle L. Mills, a party defendant to these proceedings, died intestate on April 8th, 1891, and at the time of her death was possessed of a mortgage made to her by her brother, Calvin Russ, for $1,500, and of some other personal property of no great value, and Ula, who was the only child of the marriage, and her father, were the only persons entitled to the property.

On April 11th, 1892, James H. Mills was appointed administrator of his deceased wife's personal estate. Before he obtained the letters, Calvin Russ had paid him $90 interest upon the mortgage to his wife, and on April 13th, 1892, he assigned the mortgage to the Atlas Loan Company, receiving therefor the sum of $1,590, making altogether $1,680, which came to his hands in respect of this mortgage, and for which, as administrator of his deceased wife's estate he was bound to account.

On June 1st, 1892, he married the defendant Mary E. Mills, and the defendants Norman D. Mills and James V. Mills, were the children of that marriage.

Statement.

After his death his estate was found to be in an embarrassed condition, and the present administration proceedings resulted, and a claim was brought in before the Master on behalf of Ula Mills to prove against her father's estate for the amount of the mortgage money received by him as administrator of her mother's estate.

Subsequently the claim was amended, and as amended was by the administrator *de bonis non* of Ula Mills' mother as well as on behalf of Ula Mills herself.

It was alleged and there appeared to be no doubt of the fact that James H. Mills in his lifetime appropriated the mortgage moneys to his own use, and they were not forthcoming; but it was set up that by reason of certain transactions with regard to the policy of insurance referred to in the judgment, any claim that Ula Mills or the estate of her mother ever had against the estate of James H. Mills had been put an end to. The Master disallowed the claim and from this decision the present appeal was brought.

The appeal was argued on June 11th, 1897, before MOSS, J.A., sitting for and at the request of FALCONBRIDGE, J.

J. M. Glenn, and *W. L. Wickett*, for the appellants.

Maxwell, for the plaintiffs and the defendants David H. Gooding and Mary E. Mills, as administratrix of the estate of James H. Mills, deceased, and in her own right.

F. W. Harcourt, for the infant defendants Norman D. Mills and James V. Mills.

July 20th, 1897. MOSS, J.A. [after stating the facts] :—

The claim made and which has been disallowed by the Master is for an account of the dealings of James H. Mills with the estate of Eva Mills, come to his hands as administrator of her estate, and to rank upon his estate for the amount (if any) that may be established.

Not long after obtaining letters of administration to his

deceased wife's estate, James H. Mills made application for membership in Sparta Circle, No. 31, of the Order of Canadian Home Circles, a friendly society now registered under the Insurance Corporations Act, 1892. Judgment. Moss, J.A.

The date of the application appears to have been the 16th of April, 1892, but apparently it was not until July, 1892, that he received his membership and became entitled to a beneficiary certificate.

In July, 1892, he received a certificate issued by the authority of the Supreme Court of the Order under date of July 9th, and sealed by the Sparta Circle under date of July 25th, declaring him entitled to a sum not exceeding $2,000, and setting forth that he directed that at his death the said sum of $2,000, less all payments made under the total disability and old age clauses of the by-laws of the Order, be paid to Ula B. L. Mills, his daughter.

James H. Mills retained his membership until his death, and after that event the Order paid the $2,000 to Arthur Smith, the guardian of Ula Mills, and he received and holds it for her benefit.

It is contended by the parties to this proceeding interested in opposing the claim made on behalf of Eva Mills' estate, that the insurance was effected as a trust for the payment to Ula Mills of the share of her mother's estate, received and misapplied by James H. Mills, and that the receipt by her guardian of the $2,000 was a payment in full of her share of her mother's estate.

The Master has adopted this view, being of opinion that it was established that the insurance was a trust created for the purpose of securing the amount coming to Ula Mills from her mother's estate.

The evidence upon which this conclusion is based consists of oral declarations made by James H. Mills at different periods; some were made a considerable time before he made his application for membership and insurance, some at or about the time of the application, and some after the date of the issue of the certificate. There was nothing from him in writing other than the application

Judgment. Moss, J.A.

and there is in it nothing to indicate any special purpose in naming his daughter as the beneficiary.

These declarations were not communicated to Ula Mills before the death of her father, nor did she—even if capable of giving an assent—assent to any trust with regard to the insurance moneys.

The provisions of the Act to secure to wives and children the benefit of life insurance apply to this contract of insurance, and the certificate expresses on its face that it is for the benefit of Ula Mills. It may well be questioned whether it is open to any person, after the death of the insured, to shew upon evidence of expressions of intention, understandings or bargains made or come to before effecting the insurance and to which the beneficiary was no party, that the money secured to the beneficiary by the certificate or policy was, when paid to her or a trustee for her, not to be held for her absolute benefit but was subject to be used for the purpose of indemnifying her father's estate or, in other words, to pay and satisfy to the estate of Eva Mills the debt which James H. Mills owed it, in the event of her estate making and establishing the claim; or that its receipt by her or a trustee for her was to be a satisfaction of the claim against her father's estate: *Crichton* v. *Crichton*, [1896] 1 Ch. 870.

These would appear to be applications of the insurance moneys in ways foreign to the purposes and intention of the Act, and it is questionable whether an attempt so to divert the fund ought to be aided.

Assume (as was urged) that at common law, if a person insures his life, making the amount of the policy payable to a stranger and there is no consideration, a trust results for the insured, and that if he makes the amount payable to his wife, child, or other person for whom he is under an obligation to provide, there is a presumption of advancement capable of being rebutted, this does not advance the respondent's case.

When an insurance is created on a person's life to which the provisions of the Act to secure to wives and children

the benefit of life insurance apply, something more potent is effected. The words of the Act are stronger than a mere presumption of advancement. They exclude all notion of a beneficial interest on the part of the insured in the insurance moneys save such as is expressly reserved to him by the Act. Judgment. Moss, J.A.

And inasmuch as against a statute a resulting trust cannot arise by implication, neither should it be open to parties to shew facts tending to thwart its policy and intention.

But if they may be shewn I think it should only be by means of some writing, and effect should not be given to evidence of parol statements or declarations said to have been made by the insured before the issue of the certificate or policy of insurance, for the purpose of altering or modifying the express words of the Act, which declare that such a certificate as the one in question shall enure to and be deemed a trust for the benefit of the beneficiary named in it.

The words of the certificate as well as of the Act entitle Ula Mills, or her guardian for her to receive the $2,000 absolutely and unconditionally.

If there is to be engrafted upon this apparent right a trust, or fastened upon it an obligation to elect to accept the amount in satisfaction of a claim owing by the insured either directly or indirectly to Ula Mills, there should at least be something evidencing the trust or obligation as formal as the Act requires in the cases of changes in designation of, or apportionment among, beneficiaries.

I think the declarations made, even if receivable, not sufficient to countervail the Act or to convert Ula Mills into a trustee or to place her in the position of one who was bound to receive the $2,000 as a satisfaction of a legal claim.

If Mrs. Goodwin's account is correct, James H. Mills was not speaking the truth to her, for he told her when he was seeking to get her husband to become his bondsman that he had his life insured to pay Ula her mother's

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Moss, J.A.

claim in case anything happened to him, that he insured for $2,000 to pay the $1,500 and some things that were in the house, whereas he had not then received the $1,500 nor had he even applied for membership and insurance in the order. Or it may be that she entirely misapprehended the words actually spoken.

The other declarations deposed to are not inconsistent with an intention that Ula Mills was to have the full benefit of the insurance moneys, and they do not raise a case calling for election by her—even if as an infant she could make an election. It would be most unsafe to convert her into a trustee or deprive her of the full benefit of the insurance upon the testimony given. There is even less ground for holding the present administrator of Eva Mills' estate bound by what has been shewn. It is true that whatever he may recover from James H. Mills' estate in this proceeding may go to Ula Mills. But as administrator he does not represent her. It does not appear whether Eva Mills owed any debts at the time of her death which are yet unpaid, but whether or not, whatever may come to the hands of the administrator does not immediately vest in or belong to Ula Mills. His claim to make the representatives of James H. Mills account for what came to his hands as administrator of Eva Mills, cannot be affected by the receipt by Ula Mills, or her trustee, of these insurance moneys which never were and never could be part of Eva Mills' estate.

I think the appeal must be allowed. The costs of the appellants and the administrators of James H. Mills may be paid out of his estate. No costs to the other parties.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

REGINA V. MCRAE.

Justice of the Peace—Jurisdiction—Associate Justices—Request.

Where a party charged comes or is brought before a magistrate in obedience to a summons or warrant, no other magistrate can interfere in the investigation of or adjudication upon the charge, except at his request.

Statement.

ON the 1st March, 1897, a rule *nisi* was granted by the Court to quash the summary conviction of the defendant, made by J. B. Horrell, mayor of the town of Midland, and *ex officio* a justice of the peace for the county of Simcoe, for an assault, upon the following grounds:—

1. That other justices of the peace for the county of Simcoe, who desired to take part in the hearing of the charge against the defendant, upon the return of the summons issued by Mr. Horrell, had a legal right to take part in the hearing of and adjudicate upon and determine the charge, and Mr. Horrell had no jurisdiction to hear and determine the charge to the exclusion of other justices of the peace for the county of Simcoe who desired to take part in hearing and determining the charge.

2. That three other justices of the peace for the county of Simcoe, duly qualified to hear and determine the charge, and who had jurisdiction in the matter, actually heard and determined the charge along with Mr. Horrell, and gave their judgments dismissing the charge, and gave the defendant a certificate of dismissal in respect of such charge.

3. That the conviction by Mr. Horrell was not a conviction supported by the majority of the justices of the peace who heard and determined such charge, and was illegal by reason thereof.

4. That the justices of the peace who heard such charge disagreed, and no conviction could be made.

It appeared that a summons was issued by Mr. Horrell calling upon the defendant to appear and answer the charge, and that the defendant did appear before Mr. Horrell pursuant thereto, and pleaded "not guilty," whereupon three

Statement. other magistrates, without the request or consent of Mr. Horrell, appeared and heard the evidence adduced, and gave judgment dismissing the complaint; but Mr. Horrell gave judgment convicting the defendant of the assault charged, and made a formal conviction under his hand and seal. There was evidence, also, that the other magistrates were present at the request of the defendant.

On the 14th May, 1897, *McCarthy*, Q. C., and *D. O. Cameron* supported the rule *nisi*, before a Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., and referred to sec. 839 *et seq.* of the Criminal Code, 1892; *Regina* v. *Milne*, 25 C. P. 94; *Rex* v. *Sainsbury*, 4 T. R. 451; *Brown* v. *Nicholson*, 5 C. B. N. S. 468; *Tarry* v. *Newman*, 15 M. & W. 645; *Ex p. Carignan*, 5 L. C. R. 479; *Regina* v. *Riley*, 12 P. R. 98.

Aylesworth, Q. C., for the prosecutor, shewed cause and referred to the Consolidated Municipal Act, 1892, sec. 432; Dickinson's Quarter Sessions, 6th ed., p. 11; Archbold's Quarter Sessions, 4th ed., p. 112.

ARMOUR, C. J. (at the close of the argument):—

We think there is no difficulty about the case. Mr. Horrell issued the summons, and the defendant appeared before him and pleaded not guilty. Mr. Horrell was then seized of the case, and no other magistrate had a right to sit with him or to adjudicate or interfere in any way, unless at his request. It is not to be tolerated that the accused should bring with him when he comes up for trial partisan justices who insist upon his acquittal. Look at the consequences. Suppose a man were charged with murder and brought before a magistrate, he might, no matter what the evidence, be discharged upon the preliminary hearing by packing the bench with friendly justices. All the justices in each county are equal in authority, but, as it would be contrary to the public interest as well as indecent that there should be a contest

between different justices, we must lay down the rule that when a party charged comes or is brought before a magistrate in obedience to a summons or warrant, no other magistrate shall interfere in the investigation of or adjudication upon the charge, except at his request. Judgment. Armour, C.J.

Rule nisi discharged with costs.

E. B. B.

ATTORNEY-GENERAL v. CAMERON.

Revenue—Succession Duty Act, 55 Vict. ch. 6 (O.)—Capital—Final Distribution—Duty Payable.

Held, in addition to the findings reported in this case in 27 O. R. 380, that under the Succession Duty Act, 55 Vict. ch. 6 (O.), the duty payable on the capital was deferred until the final distribution thereof, which was the time when the moneys under the directions of the will reached the hands of the persons who should become entitled thereto, and that the duty then payable would be on the amount then actually distributed, whether increased by accumulations, or by the rise in value of lands or securities, or decreased by loss.

A SPECIAL case was stated for the opinion of the Court in this action for the purpose of ascertaining the amount of succession duty payable under the Act 55 Vict. ch. 6 (O.), by the estate of Alexander Cameron. Statement.

The testator died on 15th May, 1893, and his will and a codicil thereto bore date the 12th of May of that year. The purport of the will, so far as material, is stated in the report of the decision (27 O. R. 380), and the case was subsequently amended as set out in the following judgment of ROSE, J., before whom the amended case was argued on the 15th day of October, A.D. 1897.

John R. Cartwright, Q.C., for the Attorney-General.
E. D. Armour, Q.C., for the defendants.

Judgment.

Rose, J.

September 25, 1897. ROSE, J.:—

Since giving my judgment herein, the special case was amended so as to obtain a further opinion upon a point thought not to have been covered by the previous case. The amendment reads as follows:—

"12. The plaintiff further alleges that if the Court should be of opinion that payment of duty on the capital sum and legacies should be deferred until distribution and payment thereof respectively, the duty should be computed and payment made as follows:—On the legacies which are payable before the final distribution, on the amount of each legacy as it is paid; and as to the capital that duty should be computed and paid upon the amount of capital actually distributed at the final distribution, whether the same may have been increased by accumulations or by rise in value of lands or securities, or should have been diminished; while the defendants, while they agree with the plaintiff as to duty on pecuniary legacies, allege that, as to payment of duty on the capital, the same should be computed as follows:—On ascertaining the present value (at the time of the death of the said late Alexander Cameron) of the actual sum at which the estate was sworn (less testamentary expenses, legacies and succession duty now payable, and less the duty on the annuities) which is payable in twenty-one years if all annuitants are then deceased, but if any are alive the amount of capital to produce the annuities to be deducted, and the present value, as aforesaid, to be ascertained of such capital payable after the expectation of life of the annuitants at that time, and that the duty so ascertained shall be payable as and when the distribution shall be made."

"Question 5. How should the duty be computed, upon what sum or sums, and when paid on the capital sum of the estate?"

I think I have in effect already answered the questions now submitted to me. The parties agree, as appears from the paragraph quoted, that the duty on the legacies which

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Rose, J.

are payable before the final distribution is to be computed on the amount of each legacy as it is paid. This is, as I understand it, in accordance with the principle of the judgment already given. As to the capital, I think the duty to be computed and paid is to be upon the amount of capital actually distributed upon the final distribution, whether the same may have been increased by accumulations or by rise in values of lands and securities, or have been diminished. It occurs to me in this way: Assume that a parcel of land was directed to be sold when the period of distribution should arrive, and the proceeds distributed. The value of such parcel of land would be either the same as at the time of the death of the testator or greater or less, according to the then market value. If in addition to the proceeds of the land the rents were directed to be accumulated and divided at such period of distribution, such rents, it seems to me, should bear their portion of the succession duty in the hands of the person to whom they were directed to be paid. And so if a sum of money was directed to be put out at interest and the interest accumulated and divided with the principal, it would appear reasonably clear that the sum distributed pursuant to such direction would be the principal plus the interest, unless the sum had been lessened by loss, for the person receiving is the one to pay the duty.

I am also of the opinion that the period of distribution is not necessarily the end of the twenty-one years referred to in the paragraph. At page 387 in the reported judgment, I said: "The principle of that section seems by itself clear enough, namely, that the succession duty is to be paid by the person who takes the estate, but not until he is entitled to possession or actual enjoyment."

I think, therefore, that until the parties are entitled to possession or to actual enjoyment of the moneys directed to be paid to them, the duty is not payable and the amount of such duty cannot be ascertained until such time arrives. I imagine the difficulty has arisen with reference to the meaning of the words "final distribution."

Judgment.
Rose, J.

As I understand it, there is a final distribution of the estate when under the directions of the will the moneys reach the hands of the persons entitled thereto.

G. F. H.

MUNRO ET AL. v. WALLER. (No. 2.)

Damages—Measure of—Breach of Covenant not to Assign Lease—Evidence—Varying Report.

Upon breach of a covenant in a lease not to assign without leave, the lessors are entitled to recover as damages such sum of money as will put them in the same position as if the covenant had not been broken and they had retained the liability of the defendant instead of an inferior liability, but in estimating the value of the defendant's liability allowance must be made for the vicissitudes of business and the uncertainty of life and health.

Upon appeal from a referee's report the damages were reduced from $3,897.62 to $500.

Williams v. *Earle*, L. R. 3 Q. B. 739, followed.

Statement.

THIS was an appeal by the defendant from the report of Mr. Cartwright, an official referee, dated 18th December, 1896, assessing the damages of the plaintiffs at $3,897.62.

The action was brought by the plaintiffs, as lessors, against the defendant, as assignee of the lessee, to recover, in the alternative, the arrears of rent due under the lease and certain taxes and insurance premiums, or damages for breach of the covenant not to assign without leave, the defendant having set up as a defence to the action for the recovery of the arrears of rent, taxes, and insurance premiums, that he had on the 28th December, 1894, and before they became due, assigned the lease and the unexpired term of it to one William Patterson.

By the judgment pronounced and entered after the trial of the action, it was declared that the defendant had broken the covenant not to assign without leave, and it was referred to Mr. Cartwright to ascertain the damage (if any), past and future, to which the plaintiffs were

Statement.

entitled by reason of the defendant's breach of the covenant not to assign without leave: see 28 O. R. 290.

The report appealed from was made under this reference. The referee found, upon the evidence, that the defendant, at the time he assigned the lease, was solvent and able to pay the rent as it would become due, and to perform the other covenants which were subsequently broken by the non-payment of the taxes and the insurance premiums, and that the assignee Patterson was at that time insolvent and "without means, without business, and without credit." The amount allowed for past damages (*i.e.*, damages up to the date of the report) was $1,551.62, and for future damages, $2,346.

The past damages were made up of the rent and taxes in arrear, and $400 for past breaches of the covenant to repair; and the future damages by capitalizing all the accruing instalments of rent down to the expiration of the lease, the future insurance premiums to the same date; and the $2,346 represented the value, at the date of the report, of those sums so capitalized.

No allowance was made for future taxes or repairs, the referee having come to the conclusion that there was no basis on which he could "attempt to estimate" them.

The appeal was heard by MEREDITH, C.J., in Court, on the 28th January, 1897.

D. Urquhart, for the defendant, contended (1) that the referee had improperly allowed damages for the alleged substitution of a man of inferior responsibility for the defendant; (2) that it was the duty of the plaintiffs to do something to diminish their loss by reletting the premises; and (3) that the $400 was improperly allowed for injuries to the buildings. He cited *Williams* v. *Earle*, L. R. 3 Q. B. 739; *Cullerton* v. *Miller*, 26 O. R. 36, 44; *Lepla* v. *Rogers*, [1893] 1 Q. B. 31, 37; *Rae* v. *McDonald*, 13 O. R. 352.

C. Millar, for the plaintiffs, referred to *Patching* v. *Smith*, 28 O. R. 201; *Lilley* v. *Doubleday*, 7 Q. B. D. 510; *McMahon* v. *Field*, *ib.* 591.

Judgment.

Meredith, C.J.

October 22, 1897. MEREDITH, C.J. (after stating the facts as above):—

The referee proceeded in assessing the damages upon the rule laid down in *Williams* v. *Earle*, L. R. 3 Q. B. at p. 751, that the damages which the plaintiffs were entitled to recover were the sums of money which would put them in the same position as they would have been in if the covenant not to assign the lease had not been broken, and the plaintiffs had retained the liability of the defendant instead of an inferior liability.

If the report is to stand, the result will be that the plaintiffs will have a judgment against the defendant for all the arrears and for a sum representing the cash value of all the future instalments of rent and all of the insurance premiums down to the end of the lease, besides the right to re-enter for breach of the covenants, and so to repossess themselves of the demised premises, as well as the liability of Patterson for all the rent, taxes, insurance premiums, and other sums which he has or may become liable to pay under the lease.

On the argument of the appeal, the unfairness of such a result struck me and led me to doubt the correctness of the decision which leads to it, and further consideration has not changed that view, but has brought me to the conclusion that, whatever may be the proper sum to be allowed, the amount which has been awarded to the plaintiffs is very much in excess of the damages which they have sustained, measured according to the rule laid down in *Williams* v. *Earle*.

I cannot agree with the conclusion of the referee upon the evidence as to the respective values of the liability of the defendant and of Patterson. Although I do not differ from him as to the measure of Patterson's present liability to pay, I am unable to agree with him as to the value of the defendant's obligation to perform the covenants of the lease by which he was bound. The evidence shewed, in my opinion, that the defendant was not at the date of the

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Meredith, C.J.

assignment of the lease to Patterson possessed of means enough to pay his liabilities if he had been pressed for payment of them; and, although he had up to that time been able to pay his rent under the lease, and had, since he left the demised premises and up to the time when judgment was signed in this action, paid his rent for the hotel to which he moved, it by no means follows that, had he retained the lease, he would have been able to continue to pay the rent and perform the covenants of the lease; and, indeed, I think the evidence leads to the conclusion that he could not have done it. He had not been able to pay his rent punctually, and the business was deteriorating, and must soon, I think, have become, if it was not then, an unprofitable one to carry on. This element has, I think, not had the importance attached to it to which it was entitled, and the damages, even if it were absent, would, in my opinion, have been excessive. No allowance has been made for the vicissitudes of business, and that of the defendant was a most uncertain one, or the uncertainty of life and health. Though these chances would have had to be run by the plaintiffs, had no breach of the covenant been committed, they are entirely relieved from them as to the rent and insurance premiums by the mode of calculating the damages adopted by the referee.

It is, no doubt, as was pointed out in *Williams* v. *Earle*, extremely difficult to measure the damages in such cases as this, and it is hard to give a reason for my assessing them at the sum to which I purpose, so far as my decision may be able to effect it, to reduce them, but I think that, under all the circumstances, $500 is a sum ample to cover them, and quite as much as, if not more than, the liability of the defendant on the covenants, if it had been offered for sale, would have realized.

In the view I have taken it is unnecessary to determine whether the decision in *Patching* v. *Smith*, 28 O. R. 201, would require me to hold that the value of the right of the plaintiffs to re-enter could not be taken into consideration in assessing the damages, though it might have been neces-

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sary had I been of opinion that the referee's view as to the value of the defendant's liability was the correct one.

In my opinion, the report should be varied by reducing the damages to $500, and there should be no costs of the appeal to either party.

E. B. B.

[DIVISIONAL COURT.]

STRATFORD TURF ASSOCIATION v. FITCH ET AL.

Gaming—Sale of Betting Privileges on Race Course—Illegality—Criminal Code, sec. 204—Unincorporated Association.

The object of the Legislature in enacting the latter part of sub-sec. 2 of sec. 204 of the Criminal Code apparently was to reserve the race courses of incorporated associations as places where bets might be made during the actual progress of a race meeting, without the bettors being subject to the penalties of that section.

An agreement for the sale of betting and gaming privileges at a race meeting by an unincorporated association, who are the lessees of an incorporated association, the owners of the race course, is not illegal.

Statement. AN appeal by the defendants from an order of the Judge of the County Court of Wentworth dismissing a motion made by the defendants to set aside the judgment for the plaintiffs and for a new trial of an action in the 9th Division Court in the county of Wentworth, in which the plaintiffs (an unincorporated association) claimed $101 and interest from the 27th August, 1896, the balance alleged to be due to them under the following agreement:—

"The said Turf Association doth hereby grant to the said Fitch and Stroud the exclusive betting and gaming privileges at the race meeting to take place on the track of the above named association on the 25th and 26th days of August, A.D. 1896, * * and the said Fitch and Stroud do hereby agree to pay to the said Turf Association the sum of $607 for the said exclusive betting and gaming privileges * * ."

The Judge in the Court below, in dismissing the motion for a new trial, gave the following judgment:—

It appears that this race meeting was held within the strict wording of sec. 204* of the Criminal Code, "on the

* 204. Every one is guilty of an indictable offence, and liable to one year's imprisonment, and to a fine not exceeding one thousand dollars, who—

(a) uses or knowingly allows any part of any premises under his control to be used for the purpose of recording or registering any bet or wager, or selling any pool; or

Statement. race course of an incorporated association during the actual progress of a race meeting." I do not see why I should add to this section the further condition that the association which owns the track must be in direct charge and management of the races being held on their course, nor that the plaintiff must be such association. No objection was taken at the trial to the constitution of the action; if objection had been taken, any proper amendment as to parties would have been allowed. I dismiss this motion for a new trial.

The grounds of appeal were: (1) that the judgment was contrary to law and evidence and the weight of evidence; (2) that there should have been a non-suit; (3) that the plaintiffs were an unincorporated association, and could not bring an action in their own name; (4) that the contract, being one for the granting of the privilege of gambling, was unenforceable; (5) that the evidence shewed that the plaintiffs were not an incorporated association, and also that the contract was a gambling transaction, and therefore the onus of shewing that the contract was not illegal was upon the plaintiffs; (6) that the defendants were entitled to judgment on the merits, the plaintiffs not having conformed with their programme and contract.

(*b*) keeps, exhibits, or employs, or knowingly allows to be kept, exhibited, or employed, in any part of any premises under his control, any device or apparatus for the purpose of recording any bet or wager or selling any pool; or

(*c*) becomes the custodian or depositary of any money, property, or valuable thing staked, wagered, or pledged; or

(*d*) records or registers any bet or wager, or sells any pool, upon the result—

(i.) of any political or municipal election;

(ii.) of any race;

(iii.) of any contest or trial of skill or endurance of man or beast.

2. The provisions of this section shall not extend to any person by reason of his becoming the custodian or depositary of any money, property, or valuable thing staked, to be paid to the winner of any lawful race, sport, game, or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals or made on the race course of an incorporated association during the actual progress of a race meeting.

Argument.

The appeal was argued before a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 12th May, 1897.

Wallace Nesbitt, for the defendants, contended that the sec. 204 of the Code was intended to protect only the association owning the race course, and was not intended to protect persons to whom the right to hold the races might be farmed out. He referred to secs. 197 and 204 of the Criminal Code; *Cowan* v. *Milbourn*, L. R. 2 Ex. 230; *Smith* v. *White*, L. R. 1 Eq. 626; *Hawke* v. *Dunn*, 13 Times L. R. 281; *Carney* v. *Plimmer*, *ib.* 317.

Teetzel, Q.C., for the plaintiffs.

October 25, 1897. The judgment of the Court was delivered by

ARMOUR, C.J.:—

The agreement sued on and made between the plaintiffs and the defendants gave to the defendants "the exclusive betting and gaming privileges at the race meeting to take place on the track of the above named association on the 25th and 26th days of August, 1896."

The plaintiffs were not incorporated, but no objection was taken at the trial to the want of incorporation, and, if taken then, the learned Judge might have amended by adding the names of the individuals composing the plaintiff association.

The plaintiffs were the lessees of "The Stratford Athletic Company, Limited," an incorporated association, who owned the race course upon which the race meeting referred to in the said agreement took place, and were such lessees thereof for the year 1896.

No evidence was adduced to shew that illegal betting or gaming was in the contemplation of the parties to this agreement at the time it was made, nor would the betting or gaming to be carried on under this agreement be necessarily illegal under sec. 204 of the Criminal Code; for the

Judgment. Armour, C.J.

provisions of that section are not to extend to bets "made on the race course of an incorporated association during the actual progress of a race meeting;" nor would it be necessarily illegal apart from this section of the Criminal Code.

The betting and gaming contemplated by the agreement were betting and gaming to be made on the race course of which the plaintiffs were the lessees, during the actual progress of a race meeting, and this race course was the race course of an incorporated association, being the race course of "The Stratford Athletic Company, Limited," and it was not the less so, in my opinion, within the meaning of sec. 204, by reason of the lease thereof to the plaintiffs.

The object of the Legislature apparently was to reserve the race courses of incorporated associations as places where betting might be made during the actual progress of a race meeting, without the bettors being subject to the penalties of that section.

In my opinion, the appeal should be dismissed with costs.

E.B.B.

[DIVISIONAL COURT.]

REGINA V. WILLIAMS.

Criminal Law—Coroner's Inquest—Evidence Voluntarily Given—Admissibility at Subsequent Criminal Trial—56 Vict: ch. 31, sec. 5 (D.).

The depositions of a witness taken at a coroner's inquest without objection by him that his answers may tend to criminate him, and who is subsequently charged with an offence are receivable in evidence against him at the trial.

Regina v. *Hendershott and Welter*, 26 O. R. 678, overruled.

Statement.

CASE RESERVED. One Everett Williams was tried for manslaughter at the Court of Oyer and Terminer for the county of Lennox and Addington, before ROBERTSON, J., at Napanee, on the 10th day of May, 1897, and following days.

Upon the trial, the counsel for the Crown proposed to give in evidence the depositions of the said Everett Williams taken at the inquest.

The trial Judge, following *Regina* v. *Hendershott and Welter*, 26 O. R. 678, rejected the evidence. The prisoner was acquitted. The Judge, at the request of the counsel for the Crown, reserved this case, with the question, "Was such evidence properly rejected?"

The case was argued on October 11th, 1897, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.

[ARMOUR, C. J.—The Court would not under the circumstances order a new trial, so the argument may be confined to the admissibility of the evidence.]

J. R. Cartwright, Q.C., Deputy Attorney-General, for the Crown. Williams appeared as a witness before the coroner. His evidence was voluntarily given, in the sense that he claimed no privilege and did not decline or even object to answer any question. If he had objected to

Argument. answer he might have claimed the protection of the statute 56 Vict. ch. 31, sec. 5 (D.). It is true in *Regina* v. *Hendershott and Welter*, 26 O. R. 678, it was held the depositions were not admissible, but that was a decision of a single Judge and the question has been passed upon in *Regina* v. *Madden and Bowerman*, 14 C. L. T. (Occ. N.) 505, by a full Court the other way. In the former case it was held, p. 681, that where the Legislature intended the privilege to be claimed it said so plainly as in sec. 39 of R. S. C. ch. 9 (The Controverted Elections Act); but it may be more properly argued that when the Legislature intended to exclude evidence it has used apt words, as in R. S. C. ch. 153, sec. 8, "His evidence shall not be used against him," and R. S. C. ch. 164, sec. 97, sub-sec. 3, "But no answer * * shall be admissible." In this case the words are "No evidence *so* given," that is, given under compulsion. Expressions and remarks made by a prisoner may be used against him, much more so should evidence he volunteers to give as a witness.

Clute, Q. C., for the defendant. The case stated does not disclose whether the defendant objected to give evidence or claimed any privilege. As the law formerly stood he could decline to answer. Now, the statute renders the objection unnecessary; in other words, it says to the witness, "It is no use declining, you must answer and you will be protected." I rely upon the reasoning and judgment in the *Hendershott* case.

Cartwright, Q. C., in reply. The statute says "No one shall be excused," implying he has asked to be excused.

October 27th, 1897. ARMOUR, C.J.:—

The defendant was indicted for manslaughter, and upon his trial it was proposed by the counsel for the Crown to put in evidence the depositions of the defendant taken by the coroner on an inquest held by him on the body of the person for causing whose death the defendant was indicted.

Judgment. Armour, C.J.

The learned Judge, following the decision in *Regina* v. *Hendershott and Welter*, 26 O. R. 678, refused to admit them as evidence against the defendant, but reserved the question of their admissibility for the opinion of this Court.

Is is quite plain that prior to the passing of the Act 56 Vict. ch. 31 (D.), these depositions would have been admissible.

The Judicial Committee of the Privy Council in *The Queen* v. *Coote*, L. R. 4 P. C. 599, after referring to numerous cases on the subject, said, at p. 607: "From these cases, to which others might be added, it results, in their Lordships' opinion, that the depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle '*Nemo tenetur seipsum accusare*,' but does not apply to answers given without objection, which are to be deemed voluntary."

The Act 56 Vict. ch. 31 (D.), provides by section 5 thereof, that "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person; Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence."

In *Regina* v. *Madden and Bowerman*, 30 C. L. J. 765; 14 C. L. T. (Occ. N.) 505, substantially the same question was raised as is raised in this case, and we there held the deposition to be admissible.

The reason for so doing was that we were of the opinion that the intention of the Legislature as expressed in the section was not to exclude evidence tending to criminate

Judgment.

Armour, C.J.

voluntarily given, but only such evidence when given under compulsion—that evidence is to be deemed to be given voluntarily when the party giving it may object to giving it and does not do so, and that the words "no evidence so given," used in the section, meant answers to questions tending to criminate which the witness objected to answer and was not excused from answering, but was compelled to answer.

We have read with the greatest care the decision of the Chief Justice of the Common Pleas in *Regina* v. *Hendershott and Welter*, but see nothing in it to at all shake the opinion we expressed in *Regina* v. *Madden and Bowerman*.

I may add that I do not think that the Imperial Statute, 26 Vict. ch. 29, sec. 7, upon which the case of *Regina* v. *Buttle*, L. R. 1 C. C. R. 248, referred to by the Chief Justice, was decided bears any analogy to the section of 56 Vict. ch. 31 (D.), under discussion here, for the provision there was "that no statement made by any person in answer to any question put by or before such election committee or commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal."

We think, therefore, that the depositions, proposed to be given in evidence, were admissible and should not have been rejected.

FALCONBRIDGE, J. :—

The question involved in this case was decided in *Regina* v. *Madden and Bowerman*, by a Divisional Court composed of the Chief Justice of the Queen's Bench and my brother Street, on 27th November, 1894, in favour of the Crown. The judgment of the Court was delivered *ore tenus* at the conclusion of the argument; and while a note of it appears in the December, 1894, number of the Canada Law Journal, vol. 30, p. 765, and Canadian Law Times, vol. 14, p. 505, it did not find its way into the regular

reports, and it does not seem to have been cited to the Chief Justice of the Common Pleas, who decided *Regina* v. *Hendershott and Welter*, 26 O. R. 678. Judgment. Falconbridge, J.

I think with great deference to the last named learned Chief Justice, that the words "so given," in sec. 5 of 56 Vict. ch. 31 (D.), apply only to evidence given by a person who has claimed to be excused from answering upon the ground that his answer may tend to criminate him, etc., and not to evidence volunteered, or given without such claim or privilege. I cannot in any other way give weight or significance to the word "so." If the statute had read, "Provided, however, that no evidence given by any such person shall be used * * ," it might be different.

Compare the language of R. S. C. ch. 153, sec. 8 (An Act respecting Prize Fighting), "Every person offending * * shall be competent and compellable to give evidence, * * and no person examined as a witness shall be excused from answering any question on the ground that his answer will tend to criminate him; but his evidence shall not be used against him in any proceeding * * ."

And R. S. C. ch. 164, sec. 97, sub-sec. 3, contains a like clear and unmistakable provision against the admissibility of the evidence.

I think *Regina* v. *Madden and Bowerman*, if not binding on us, was well decided, and that our judgment should be for the Crown.

STREET, J., concurred.

G. A. B.

[DIVISIONAL COURT.]

NEVILLS v. BALLARD.

Criminal Law—Aggravated Assault—Summary Trial—Effect of Conviction—Release from Further Criminal Proceedings Only—Criminal Code 55-56 Vict. ch. 29 (D.), sec. 262, Part 55, secs. 786, 799.

Where a charge under section 262 of the Criminal Code, 55-56 Vict. ch. 29 (D.), of assault causing actual bodily harm is brought under Part 55 of the Code, by the election of the defendant under section 786, to be tried summarily, a conviction releases, under section 799 from further criminal proceedings, but does not bar civil proceedings.
Flick v. *Brisbin*, 26 O. R. 423, distinguished.

Statement. THIS was a motion to the Divisional Court by way of appeal from the judgment of ARMOUR, C.J., delivered on April 27th, 1897, directing judgment to be entered for the plaintiffs for $250 and costs, in this action, which was brought by father and son for damages for an assault alleged to have been committed on the latter.

The main ground for appeal was that the evidence shewed that the plaintiffs preferred a complaint against the defendant charging him with having assaulted the son, and after hearing the complaint the police magistrate convicted the defendant and he was fined $20 and $17 costs, which he paid, and that this payment released the defendant from all further or other proceedings, civil or criminal, under section 866 of the Criminal Code.

The conviction before the police magistrate, before whom the defendant had consented to be summarily tried, was "for that the said George Ballard," the defendant, "on February 6th, 1895, at and in the said city of Hamilton, did unlawfully assault Richard Neville and thereby occasion him actual bodily harm."

The motion was argued on October 6th, 1897, before BOYD, C., FERGUSON and MEREDITH, JJ.

Riddell, for the defendant. The sole point is, does an action for assault lie under the Code. It is *Flick* v. *Brisbin*, 26 O. R. 423, over again. The magistrate can

try summarily unless the complainant objects. R. S. C. ch. 178, sec. 73, gives the old law which is changed by section 864 of the Criminal Code, 55-56 Vict. ch. 29 (D.). Argument.

Mulvey, for the plaintiff. This was a complaint for an aggravated assault under section 262 of the Criminal Code. It was tried under the summary trial section by consent of the accused, and was not a case of common assault. That may be disposed of by indictment or summarily by a justice of the peace. A summary conviction can only be had where specially provided for, which it is not in this case: section 840. The certificate here does not debar us from suing for damages: section 799 in Summary Trial of Indictable Offences, part 55. It was under sections 782-805 that the Judge in our case had jurisdiction.

[*Riddell*. There was no certificate here. The conviction is sufficient.]

The conviction is not covered by section 856; but section 799 is what applies here. *Marchessault* v. *Gregoire*, 4 Rev. Leg. 541, is almost on all fours. I refer also to *Holden* v. *King*, 46 L. J. (Q. B.) N. S. 75; *The Queen* v. *Miles*, 24 Q. B. D. 423; *Emerson* v. *Niagara Navigation Co.*, 2 O. R. 528.

Riddell, in reply. If neither party objects, why should not a magistrate have the right to try even an aggravated assault? Section 864, sub-sec. 2, of the Criminal Code, 55-56 Vict. ch. 29, directs the magistrate to abstain when he thinks it proper that the proceeding should be by indictment. Under the present statute he can proceed even though the assault be accompanied by an attempt to commit a felony. Nothing in part 55 affects the jurisdiction of a magistrate acting under another part of the statute. Here he may have been acting under section 864.

October 7th, 1897. BOYD, C.:—

Flick v. *Brisbin*, 26 O. R. 423, was argued upon the constitutionality of sections 865 and 866 of the Criminal

Judgment.

Boyd, C.

Code, 55-56 Vict. ch. 29 (D.). It was assumed that the conviction for assault, though with aggravating circumstances, proceeded by way of summary jurisdiction under section 864. The point now raised (if it was tenable there) was not presented for adjudication, viz., that the assault was one under section 262, causing actual bodily harm, and not susceptible of being tried summarily under part 58 of the Criminal Code. It appears that the complaint in this case was for an indictable offence, which was brought under part 55 of the Code by the election of the person charged, who, under section 786, consented to be tried summarily. The effect of a conviction under this part is that the person convicted is released from all further or other criminal proceedings for the same cause: section 799 of the Criminal Code. But it does not go as far as the conviction under sections 864-866, which bars further civil as well as criminal proceedings.

The point in the present appeal, therefore, is not governed by the decision in *Flick* v. *Brisbin*, and that case was rightly distinguished by the learned Chief Justice at the trial, and his judgment should be affirmed with costs.

FERGUSON, and MEREDITH, JJ., concurred.

A. H. F. L.

[DIVISIONAL COURT.]

CULL v. ROBERTS.

Sale of Goods—Conditional Sale—Pleading—Warranty—Breach of.

In an action between vendor and purchaser for the price of a machine sold under a conditional sale, the defendant may shew that the machine was not as warranted and so reduce the claim by the difference between the value of the machine as warranted and its actual value.

Tomlinson v. *Morris*, 12 O. R. 311, specially referred to.

Statement. THIS was a motion by the defendants to the Divisional Court by way of appeal from the judgment in the Second Division Court in the county of Perth of the Judge of that county, whereby, on May 31st, 1897, he granted a new trial, and set aside the judgment entered for the defendants at the trial on May 7th, 1897.

The plaintiff's claim was for $140.45 principal and interest due under the following note :—

"$116.66. MITCHELL, CANADA, 7th Aug., 1894.

"On or before the first day of January, 1897, for value received, I promise to pay to J. W. Cull, or order, at the Merchants Bank, the sum of one hundred and sixteen $\frac{66}{100}$ dollars with interest at seven per cent. per annum till due, and ten per cent. per annum after due till paid.

"I also promise and agree to furnish further security, satisfactory to you, at any time, if required. If I fail to furnish such security when demanded, or if I make any default in payment of this note or any other note in your favour, or should I dispose or attempt to dispose of my land or any part thereof, or of my personal property, you may then declare this note due and payable even before other maturity of the same, and suit therefor may be immediately entered, tried, and finally disposed of in the Court having jurisdiction where the office of J. W. Cull is located, and you may retake possession of the machinery or property so sold to me, for which this note is given, without process of law, and at any time thereafter, without notice to me, may sell the same at public auction or private sale, the

Statement.

proceeds thereof, less proper charges of retaking possession and sale, to be applied on account of the amount of the purchase price and interest then unpaid; such sale or right to sell shall in no way affect or limit my liability for the amount hereof, and for the full purchase price, or your right to sue for and recover from me the amount hereof and the said full purchase price and interest, except that in the event of such sale, I shall receive credit on account as before provided, and shall thereafter be liable to pay the balance only. Upon such sale, if any, my right to possession and delivery before and after full payment and all my other rights and claims thereto shall forever cease. Subject to these provisions, I am to have possession and use of the machinery, etc., for which this note is given, at my own risk of damage or destruction from any cause whatever; but the title thereto is not in any event to pass to me until full payment of the purchase price and interest or any obligations or renewals thereof given therefor.

"(Signed) GEORGE H. ROBERTS.
"WILLIAM ROBERTS."

The property for which the note was given was described in the margin of it as a Waterhouse 12 H. P. chain-power engine.

The defendants disputed the claim and claimed by way of set-off and counter-claim damages for the breach by the plaintiff of his warranty upon the sale in question, the plaintiff having, as alleged in the dispute note, guaranteed and warranted the engine to be capable of performing the work required thereof by the defendants, and that he would set up the engine in such condition that the same would run properly and do and perform the work required thereof by the defendants, and the purchase having been made upon the plaintiff's representations that the same was capable of doing the work required thereof by the defendants, and that he would pay for all necessary repairs connected with the same and required to put the same in such condition to do the said work; and they further

claimed to set-off by way of counter-claim all damages incurred by them by reason of the plaintiff's misrepresentations. Statement.

The action was tried with a jury who found a verdict for the defendants. In granting a new trial, the learned County Court Judge said:—

"*Tomlinson* v. *Morris*, 12 O. R. 311, following *Frye* v. *Milligan*, 10 O. R. 509, seems to be clear authority that an action will not lie for breach of warranty where the property in the machine has not passed to the plaintiff, at any rate until the property has passed. I think now that I ought to have ruled against the counter-claim at the trial, allowing the defendants to withdraw it, so that if so advised they might pay the plaintiff's claim which would pass the property, and then sue on the alleged warranty."

The defendants appealed to the Divisional Court, and the motion was argued on October 7th, 1897, before BOYD, C., MOSS, J.A., and FERGUSON, J.

J. P. Mabee, for the defendants. *Tomlinson* v. *Morris*, 12 O. R. 311, and *Frye* v. *Milligan*, 10 O. R. 509, 514, decide quite the contrary to that for which the learned Judge relies upon them. He would not let us give in evidence the breach of warranty in reduction of the price of the machine.

J. H. Moss, for the plaintiff. The above cases support the Judge's view. The case is not simply one of pleading.

[BOYD, C.—Surely when the original vendor sues, the defect can be given in evidence in reduction of the price?]

That is not the effect of *Frye* v. *Milligan*. I refer, also, to *Church* v. *Abell*, 26 C. P. 338, 1 S. C. R. 442. The point here seems a new one. *Church* v. *Abell*, was, however, a straight sale, not a conditional sale. At 1 S. C. R., at p. 471, the Chief Justice points out the growth of the practice of letting a defendant set up this defence in reduction of the price, in place of driving him to his

Argument. cross-action. It is pointed out to be a mere matter of procedure. In case of a conditional sale, property does not pass till price paid, and till then no right of action vests in the vendee; he is not damnified, there having been no breach.

[BOYD, C.—Why should the man be obliged to pay the whole price and then, perhaps next day, bring his action?]

He can't complain until the time of giving the machine has arrived.

[BOYD, C.—He has paid two payments, and in equity has an interest in the machine.]

As to the alleged warranty: Benjamin on Sale, 3rd Am. ed., at p. 627.

Mabee, in reply.

The judgment of the Court was delivered on October 8th, 1897, by

BOYD, C.:—

Tomlinson v. *Morris*, 12 O. R. 311, is not opposed but rather favourable to the view that in case of conditional sale of a machine, if the price is sued for, the defendant may shew that the machine was not as warranted and so reduce the claim by the difference between the value of the machine as warranted and its actual value in fact: *per* Cameron, C.J., at p. 328, and so Rose, J., at p. 330. The observations there made apply to the present action for the balance of the price to which the defence is made that there is a diminution in value because the article was not as represented.

This defence appears to me to be competent and has been proved to the satisfaction of the jury and the result embodied in their verdict should not be disturbed.

The direction of the learned County Judge for a new trial should be set aside and the verdict affirmed, with costs of appeal to the defendant: see *Copeland* v. *Hamilton*, 9 Man. R. 143, which reflects upon the Ontario decision above cited.

A. H. F. L.

[DIVISIONAL COURT.]

FISKEN V. IFE.

Partition or Sale—Tenant for Life—Locus Standi—R. S. O. ch. 104.

A sole tenant for life of an estate has no *locus standi* under the Partition Act, R. S. O. ch. 104, to apply for sale of the estate. In the nature of things no partition is possible as regards the life tenancy.

Statement.

THIS was an appeal to the Divisional Court from an order of ARMOUR, C. J., dismissing a motion made on behalf of Maria Fisken, for partition or sale of certain lands in the city of Toronto.

The petitioner was owner of a life estate in the whole of the lands in question, by virtue of sundry mesne conveyances from one Bentley, life tenant of the same under a will. She was also entitled by assignment to a share in the reversion in the same lands after the life estate.

The appeal was argued on October 4th, 1897, before BOYD, C., FERGUSON, and MEREDITH, JJ.

E. D. Armour, Q. C., for the appellant. Here there is no trust for sale as in *Re Dennis, Downey* v. *Dennis*, 14 O. R. 267. There are no conditions attached to the life estate. The English cases referred to in *Re Dennis*, proceed to some extent upon the English statutes. *Murcar* v. *Boulton*, 5 O. R. 164, decided that there is no power to compel a sale or partition as against a tenant for life; but there is no case deciding that a tenant for life cannot apply for partition or sale. The present Act is quite different to C. S. U. C. ch. 86, sec. 4. It was only quite recently that a doweress was introduced into the Partition Act; it seems clear she can apply under the Act if she likes. In *Hobson* v. *Sherwood*, 4 Beav. 184, a tenant for life enforced partition against his co-tenants for life.

[BOYD, C.—Is the Act applicable to a case when there cannot possibly be a partition? Here there must be sale if anything.]

Argument.

Is it possible to partition between a mortgagor and mortgagee, or an execution creditor and an owner? This property costs more than it is worth to carry. In *Lalor* v. *Lalor*, 9 P. R. 455, it was held a tenant for life was entitled to apply.

[BOYD, C.—She was only tenant for life of a share.]

For the English cases, I refer to *Gaskell* v. *Gaskell*, 6 Sim. 643; *Pemberton* v. *Barnes*, L. R. 6 Ch. 685; *Biggs* v. *Peacock*, 22 Ch. D. 284. We have a reversionary interest as well as a tenancy for life, and if we had applied on the ground of our reversionary interest there could have been no effectual answer. See, also, *Devereux* v. *Kearns*, 11 P. R. 452; *Fram* v. *Fram*, 12 P. R. 185.

F. Arnoldi, Q. C., contra. Section 5 of the Partition Act, R. S. O. ch. 104, includes life tenants in general. Section 8 carries on the same meaning, and must refer to the same class of persons as are mentioned in section 5. Sections 39 and 40, expressly provide that the interest of a life tenant is not to be affected. The tenant for life undertook the burden of the estate, and cannot take all the emoluments during the good years, and then having let it run down and bad times coming, apply to have it sold and throw the loss on the reversioners. *Downey* v. *Dennis*, 14 O. R. 219, was a case where it was sought to get the Court to interfere with trustees, and the Court said they could not interfere with the discretion of the trustees under the will. Nor will they wipe out the provisions of the will here, under which the gift in remainder is to take effect after the death of the life tenant.

Armour, in reply.

The judgment of the Court was delivered on October 5th, 1897.

BOYD, C.:—

The jurisdiction in partition matters given by the Revised Statute, was not intended to be exercised at the instance of a tenant for life of the whole estate as against any rever-

sioners who object to the sale of the life estate. This position is really involved in the decision of the Court in *Murcar* v. *Boulton*, 5 O. R. 164, a case in which the direct holding was that a sale could not be ordered as against the will of the life tenant of the whole property. The converse holds true for a like reason that the reversioners are not required to submit to a change in the character of the property so as to have it converted during the currency of the life estate in the whole. Here no partition is needed, or is possible so far as the estate in possession is concerned, for that is all vested in the petitioner; she is also part owner of a share in the reversion, but does not desire partition in so far as that interest is concerned. The whole object of the application is to convert the entire property so as to get rid of the burdens imposed on the tenant for life by the terms of the will under which he holds. But he has undertaken this burden voluntarily, and the changed circumstances of the property cannot be invoked to convert the land into personalty at the expense or against the reasonable opposition of the reversioners.

Judgment. Boyd, C.

I would affirm the judgment of the Chief Justice with costs.

A. H. F. L.

RICE v. CORPORATION OF THE TOWN OF WHITBY.

Municipal Corporations—Highways—Obstruction—Liability—Relief Over.

Where an object is left over night on the highway unlighted and unguarded (in this case, a building in process of removal) which is calculated to frighten horses, and by which a horse is frightened, and an accident results, and where the municipality, though having notice, have taken no precautions to warn travellers, the municipality is liable, in the absence of contributory negligence; but is entitled to be indemnified by the person who placed the obstruction on the highway.

Statement. THIS was an action for damages by Thomas Rice against the corporation of the town of Whitby, for permitting on August 24th, 1897, Dundas street, a public road in the town, to become out of repair, and at a certain point to be negligently and unlawfully obstructed by a building, of which obstruction they had full notice and knowledge, or had the means of notice and knowledge, and negligently remained ignorant. And the plaintiff alleged in his statement of claim that on August 24th, 1897, he was driving on the road in question and his horses took fright at the obstruction, and the vehicle was overturned, and the plaintiff injured.

The defendants denied the plaintiff's allegations and claimed indemnity from Thomas Deverell, who was made a third party, on the ground that if the street was obstructed as alleged, the obstruction was placed, left, and maintained there through his wrongful and negligent act.

The nature of the obstruction is stated in the judgment.

The action was tried before BOYD, C., at Whitby, on October 18th and 19th, 1897.

W. R. Riddell and *C. A. Jones*, for the plaintiff.

J. E. Farewell, Q.C., for the defendants.

C. J. Holman and *G. Y. Smith*, for the third party.

October 21st, 1897. BOYD, C.:—

It is difficult to reconcile the various decisions and dicta as to the liability of the municipality in cases like the present—where an object is left on the highway which is

Judgment.

Boyd, C.

calculated to frighten horses, and by which in this particular case, a horse is frightened, and an accident results. But after weighing authorities and reasons for and against, my opinion favours upholding the conclusion I stated at the close of trial.

I find upon the evidence that the plaintiff was not proved to have contributed to the injury by his own negligence.

I find that the greater part of the travelled road was obstructed by the paint shop placed upon it, so that but a narrow passage was left to the north at the place where the plaintiff attempted to pass.

I find that there was such shady gloom or darkness at this part of the road that the obstacle created by the building was not obvious to the ordinary eye so that the plaintiff and those with him came upon it unawares and unwarned by ordinary observation during the night.

I find that no proper precaution was taken to obviate danger by placing light on the building or stationing signalmen to warn travellers.

I find that the defendants, the corporation, through its officers had notice of the intention to remove the building along the street and sanctioned its being placed and left where and as it was before six o'clock of the night of the accident.

I find that the evidence of the witness McCeogh, called by the corporation, gives perhaps the most satisfactory account of the situation on the street and in his view the place was dangerous and it was a piece of carelessness to leave the building as it was.

The cases cited by Mr. Farewell shew that the corporation is entitled to be indemnified by the owner of the house whose agent placed the building on the highway and left it unguarded and unlighted.

Judgment will be entered for $175 damages and costs of County Court in favour of the plaintiff against the corporation defendant.

As between the corporation and the added third party Deverell, the judgment will be that Deverell pays to the

Judgment.

Boyd, C.

corporation the amount of judgment and costs paid by them to the plaintiff and also the corporation's costs of defence on the lower scale.

I may note that the divergence in judicial opinion arises from the long standing controversy between strict and liberal construction. Are the words of the statute "keep in repair" to be read with the most limited meaning or should "a fair, large and liberal construction" be given [R. S. O. ch. 1, sec. 8 (39)]?

The Massachusetts decisions much cited in our cases, proceed upon the strict method of interpretation (see *Brown* v. *City of Boston*, 155 Mass. 344, 352), whereas other States adopt the other method: see *Morse* v. *Town of Richmond*, 8 Am. Law Reg. N. S. 81, and note by Redfield, J., where most of the important American authorities are discussed.

A case very like the present is *Bloor* v. *Town of Delafield*, 69 Wisc. 273.

A. H. F. L.

[DIVISIONAL COURT.]

IN RE JONES V. JULIAN.

Division Courts—Jury Trial—Submitting Questions—Acquiescence—Prohibition.

In a Division Court action for the price of goods sold, the Judge without objection taken, submitted questions to the jury and on their answers entered a verdict and judgment for the plaintiff after the defendant had, however, put in a written argument in his own favour:—

Held, on motion for prohibition, on the ground that the defendant was entitled to a general verdict of the jury, and that the Judge had no right to submit questions and enter a verdict on them, that however this might be, the defendant had so acquiesced in the course taken as to debar him from obtaining prohibition.

Statement.

THIS was an appeal from an order of MEREDITH, C. J., of September 13th, 1897, dismissing a motion for a prohibition to the Third Division Court in the county of Essex, on the ground that the Judge presiding therein, wrongfully and without jurisdiction deprived the defendant in this action, which was brought for the price of goods sold, of his right to a trial by jury of all the questions arising in the action, and of his right to a general verdict.

The Judge, without objection taken at the time, left certain questions to the jury, and upon their findings entered a verdict for the plaintiff.

MEREDITH, C. J., held, upon the evidence, that all the facts really in dispute had been submitted to the jury, and that the Judge had the power to enter a verdict upon the answers of the jury to the questions, submitted as they had been without objection. He, held, also that under sec. 304 of the Division Courts Act, R. S. O. ch. 51, the practice of the High Court was applicable, and that placed the matter beyond doubt.

The defendant, on October 4th, 1897, moved before the Divisional Court, consisting of BOYD, C., FERGUSON, and MEREDITH, JJ., against this order.

Argument.

W. M. Douglas, for the defendant. We say that under the Division Courts Act, R. S. O. ch. 51, there is no power to submit questions to the jury. If there is no jurisdiction for the Judge to try the case after a jury is summoned, there is no jurisdiction for him to submit questions to the jury and enter judgment on them: *Gordon* v. *Denison*, 22 A. R. 315. [BOYD, C.—But you acquiesced and put in a written argument and endeavoured to get the benefit of the jury trial.] The Division Court Act provides for a jury. [BOYD, C.—You should have said, "It is impossible for your Honour now to give any satisfactory judgment. The case has not been properly tried." But you put in a written argument seeking judgment in your own favour.] *Gordon* v. *Denison*, seems to express that no acquiescence affects us: see 22 A. R. at p. 318. [BOYD, C.—The Judge was not speaking of prohibition: see *Gower* v. *Lusse*, 16 O. R. 88. You intervened in getting a decision in your favour,—in getting the benefit of what the jury had done.] [MEREDITH, J.—Why should not the jury answer questions? The Act does not say they shall not. A jury might always give a special verdict.] The Act says they shall give a verdict: *Re Lewis* v. *Old*, 17 O. R. 610. [MEREDITH, J.—That is their verdict.]

Douglas Armour, for the plaintiff, was not called on.

BOYD, C.—We are all agreed that we should not interfere. It may be the defendant might have got some relief by way of appeal, but that is no ground for our interference by way of prohibition. All the proceedings indicate that the defendant was struggling to get the decision in his favour. There was no objection. The defendant acquiesced so far as conduct goes, and it is not a case in which to prohibit.

FERGUSON, J.—I agree.

MEREDITH, J.—The matter is not one of jurisdiction but of procedure, and the irregularity of procedure, if any, was waived.

A. H. F. L.

REGINA V. MCINTOSH.

Criminal Law—Summary Conviction—Appeal—County Judge—Costs—Sessions—52 Vict. ch. 43 (D.)—Criminal Code, secs. 879, 880—High Court—Prohibition.

On an appeal to a County Judge from a summary conviction under the Act to provide against frauds in the supplying of milk to cheese, butter and condensed milk factories (52 Vict. ch. 43, sec. 9), the Judge has the same powers to award costs as the Sessions of the Peace under sections 879-880 of the Criminal Code (55-56 Vict. ch. 29 (D.)).

Under the Criminal Code, section 880, the Court may, on appeal, award such costs, including solicitor's fee, as it may deem proper, and there is no power in the High Court to review such discretion.

Statement.

THIS was a motion for a writ of prohibition to the County Judge of the county of Middlesex, the clerk of the peace of that county, and a private prosecutor, to restrain them from proceeding to enforce an order dismissing with costs an appeal under sec. 9 of 52 Vict. ch. 43 (D.), against a conviction.

The applicant, one Donald J. McIntosh, had been convicted under the above Act before two justices of the peace of sending deteriorated milk to a cheese factory.

From this conviction he appealed to the County Judge, who dismissed the appeal with costs after holding that the conviction was made under 52 Vict. ch. 43 (D.), and that therefore there was the right of appeal.

After judgment was given it was contended before the County Judge, on the question of costs, (1) that there was no power under sec. 9 of 52 Vict. ch. 43 (D.), to award costs; (2) that if there was such power they must be confined to disbursements, and (3) if solicitor's fees were to be allowed they must be limited to the tariff of fees adopted by the General Sessions of Middlesex.

The Judge referred the bill of costs to the clerk of the County Court, who taxed it according to the County Court tariff, and upon the receipt of his report the Judge reconsidered the taxation, made some alterations, and finally fixed the costs at the sum of $66.89 in his final order upon the appeal.

Argument.

This motion was then made, and was argued in Chambers on April 25th, 1897, before ROSE, J.

Aylesworth, Q.C., for the motion, contended that there was no jurisdiction under sec. 9 of 52 Vict. ch. 43 (D), to award costs, as the Summary Convictions Act was only to be applied as far as "procedure" was concerned, citing *Regina* v. *Lennon*, 44 U. C. R. 456, and *Re Burnham*, 16 P. R. 390.

Shepley, Q.C., contra, contended that it was immaterial whether the power to award costs was "procedure" or not, as the provisions of sections 879 and 880 of the Code applied unless there was a provision to the contrary in the special Act.

Subsequently the parties were directed to further argue the question of the power of the Sessions to award costs, and, by permission, the following memorandum was handed in by the counsel for the respondent:—

"The power to award costs is not incident to the Sessions, nor does it exist at common law, and costs can only be awarded by virtue of the statute under which the justices are sitting. By the practice at many sessions forty shillings costs are allowed to the successful party: Dickenson's Guide to the Quarter Sessions, 658; *Ex p. Holloway*, 1 Dowl. P. C. 26; Archbold, Q. S. Prac., 4th ed., 160.

Under the Criminal Code, 55 & 56 Vict. ch. 29 (D.), an appellant is required to give a recognizance, conditioned *inter alia*, "to pay such costs as are awarded by the Court": sec. 880, sub-sec. (*c*); and the Court is empowered to "determine the matter of appeal and make such order therein with or without costs to either party, including the costs of the Court below, as seems meet to the Court: sec. 880, sub-sec. (*e*). The Court is empowered to make an order as to costs when the appeal is not duly prosecuted: sec. 884. The costs may be paid to the clerk of the peace to be paid over to the person entitled at the proper time: sec. 897.

Argument.

The English statutes under which it has been held there is power to award solicitor's fees are as follows: The justices * * shall "award and order" * * "such costs and charges in the law as by the said justices in their discretion shall be thought most reasonable and just": 8 & 9 Wm. III., ch. 30, sec. 3. The justices may "award and order to the party for whom such appeal shall be determined reasonable costs" in the same manner as under 8 & 9 Wm. III. ch. 30: 17 Geo. II. ch. 38, sec. 4. The Court may, if it think fit, "order and direct the party or parties against whom the same (appeal) shall be decided to pay the other party or parties such costs and charges as may to the Court appear just and reasonable," such costs to be realized under the provisions of 11 & 12 Vict. ch. 43, sec. 27: Archbold's Q. S. Prac., 4th ed., 684, 12 & 13 Vict. ch. 45. Costs when ordered shall be directed to be paid to the clerk of the peace. The General Sessions have power to award such sum in each case as they may think fit, and any tariff framed by the justices was a mere guide for the exercise of their judicial discretion in ascertaining the amount to be allowed."

September 23rd, 1897. ROSE, J.:—

Upon the argument I was inclined to agree to the contention of the defendant, that the language of sec. 9, chap. 43, Vict. 52 (D), did not introduce the provisions of the Summary Convictions Act except with reference to the procedure upon the appeal and gave by itself no power to award costs.

Section 879 of the Criminal Code, 1892, provides as follows: "Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice, * * any person who thinks himself aggrieved may appeal". Section 880 provides: "Every right of appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following, that is to say."

Judgment.

Rose, J.

It seems to me, therefore, that sections 879 and 880 contain all the provisions governing this appeal save such as are found in sec. 9 of 52 Vict. ch. 43; *i.e.*, the provisions of section 9 are provisions of a special Act and must be read into 879 and 880.

We, therefore may, I think, look to section 880 for the jurisdiction to award costs, and looking at the provisions of that section, it seems clear that the costs to be awarded are to be such as appear right in the discretion of the Court. Such sum might be awarded in gross. The discretion of the Court fixes the amount.

No reference is made to any tariff, and as none is provided, one may be adopted by the Judge to aid his discretion; but a reference to any tariff for the purpose of aiding such discretion does not, I think, introduce the tariff into the result. In other words, the Judge fixes the amount which seems to him to be reasonable. He may think because proceedings were before him as a Judge of the County Court that the tariff of the County Court will be a reasonable guide. He may think that some other tariff will be a reasonable guide. By whatever means he is led to his conclusion, the result must be such as in his discretion he thinks proper.

I, therefore, am unable to agree to the contention of the defendant that the costs should have been taxed and allowed by the clerk of the peace under any rules of Court. I think the clerk had no power to tax the costs, although the Judge might have had a taxation by the clerk for the purpose of assisting him in fixing an amount.

Whatever sum the clerk might have certified to him as allowable under any tariff, the Judge might adopt as reasonable or he might not. He might name a sum in excess of or less than the sum so reported to him by the clerk of the peace. As I said before, the amount to be named is to be determined in the discretion of the Judge before whom the appeal is to be had under sec. 9 of 52 Vict., and I have no jurisdiction vested in me to review his discretion, at least, as far as I am able to make out, from

the statutes to which I have been referred or any others which I have read. Judgment. Rose, J.

The result is that the motion will be dismissed with costs.

G. A. B.

[DIVISIONAL COURT.]

OWEN V. SPRUNG.

Division Courts—Appeal—Filing Case—Extension of Time—Delay of Clerk—Jurisdiction of Divisional Court—58 Vict. ch. 13, sec. 47 (O.).

Where, through the delay of the clerk in furnishing a certified copy of the proceedings, the appellant in a Division Court action was unable to file the same within the two weeks prescribed by 58 Vict. ch. 13, sec. 47 (4), while the junior County Court Judge refused to make an order allowing any other period for so doing:—

Held, that this Court had no jurisdiction to grant relief; but application might be made to the senior County Judge.

THIS was a motion to strike off the list an appeal from the judgment of Judge DOYLE, the Judge of the Third Division Court in the county of Huron, refusing a new trial in this action, which was for services rendered. Judgment for the defendant in the action was given on April 10th, 1897, and judgment refusing a new trial on May 31st, 1897. Statement

Aylesworth, Q. C., for the defendant, moved on October 6th, 1897, before BOYD, C., FERGUSON and MEREDITH, JJ., to strike the appeal off the list as out of time.

An affidavit of the plaintiff's solicitor was read in answer to the motion, shewing as follows:—That previous to May 31st, a post card was written by the deponent to the Division Court Clerk at Clinton, urging him to let him have the certified copy of all the proceedings for the purpose of an appeal as follows: "We shall want a certified copy of all the proceedings under the Act for the purpose

Argument.

of an appeal, and as the Judge will no doubt refuse a new trial, you will see that we have them promptly after his decision is given," and on June 7th following, in answer to a letter from the clerk enquiring what papers were wanted, the deponent wrote to him, stating what he believed was necessary, and asking him to let him have them at once; that, notwithstanding the deponent's efforts, a certified copy of the papers was not received until June 21st, and then the exhibits which formed an important part of the case, had not been copied or certified; that the deponent immediately wrote back to the clerk and received the exhibits on or about June 28th, 1897, on which day they were filed; that the fact that the papers were not filed by June 14th, which was the time for filing them under the statute, was not the fault of the plaintiff nor of his solicitor, but of the clerk at Clinton in not certifying the papers and sending them promptly to the latter; that on or about June 25th, 1897, application was made to Judge Doyle to fix a time, which on August 28th, he refused for the reason as expressed in his written note, that the plaintiff was asking for an indulgence to enable him to do an injustice to the defendant as the case presented itself to him, and that in his judgment on the trial, he thought that in equity and good conscience, the plaintiff could not succeed, and he therefore refused the indulgence asked; that the plaintiff had in the deponent's judgment a good cause of action on the merits.

Aylesworth, for the defendant, contended that this Court had no jurisdiction to entertain the appeal, the provisions of sec. 47 of the Law Courts Act, 1895, 58 Vict. ch. 13 (O.), not having been complied with, citing the *North Ontario Election case, Wheeler* v. *Gibbs*, 3 S. C. R. 374.

Frank Hodgins, for the plaintiff. 58 Vict. ch. 13, sec. 47 (4), by way of substitution for sec. 152 of the Division Courts Act, R. S. O. ch. 51, enacts: "The appellant shall within two weeks after the date of the decision complained of, or at such other time as the Judge of the said County Court may by order in that behalf provide, file the said

certified copy, with the proper officer of the High Court, and shall thereupon forthwith set down the cause for argument at the first sittings of a Divisional Court which commences, etc." From the fault of the Court below there was a failure to comply with the terms of the statute. The plaintiff ought not to be prevented from appealing: *Waterton* v. *Baker*, L. R. 3 Q. B. 173; *Sullivan* v. *Francis*, 18 A. R. 121. The words are not imperative, but directory: *In re Ronald and The Village of Brussels*, 9 P. R. 232; *Simpson* v. *Chase*, 14 P. R. 280. I also refer to *Park Gate Iron Co.* v. *Coates*, L. R. 5 C. P. 634; and *Irving* v. *Askew*, L. R. 5 Q. B. 208. Argument.

Per curiam—The appeal must be struck out, without prejudice, however, to the case being reinstated if the senior County Judge, or His Honour Judge DOYLE should fix a time under the statute for filing the case. We have no jurisdiction to interfere.

A. H. F. L.

RE MCCAULEY.

Will—Charitable Use—"The Mortmain and Charitable Uses Act, 1892," 55 Vict. ch. 20 (O.).

A devise of real estate to a Bishop in trust for the use of his diocese is not a devise "to or for the benefit of any charitable use" within the meaning of sections 4 & 5 of "The Mortmain and Charitable Uses Act, 1892," 55 Vict. ch. 20 (O.).

Statement. THIS was a petition to carry out a sale of property devised to a Bishop in trust for the use of his diocese, and not sold within the period of two years limited by section 4 of "The Mortmain and Charitable Uses Act of 1892," 55 Vict. ch. 20 (O.), under the following statement of facts which is taken from the judgment:—

The testator by his will devised certain lands in the county of Perth, in this Province, to the Roman Catholic Bishop of the Diocese of London, Ontario, in the following words: "To Denis O'Connor, of London, Ontario, his successors and heirs, and in trust for the use of the Catholic Diocese of London, Ontario, I give and devise my real estate in Stratford, Canada, consisting of a tract of land of about 9¼th acres, and I request the said Bishop and his successors to remember me in prayer at the Altar of the Cathedral of said Diocese."

The will is dated 3rd August, 1894, and the testator died in September, 1894.

By the 4th section of "The Mortmain and Charitable Uses Act, 1892," 55 Vict. ch. 20 (O.), land devised "to or for the benefit of any charitable use," is required to be sold within two years from the death of the testator, and in default of sale within that period is vested by the 5th section of the Act in the accountant of the Supreme Court of Judicature for Ontario, and is to be sold under the direction of the High Court for the benefit of the charity.

This land not having been sold within two years the devisee, the Bishop of the Diocese of London, now pre-

sented a petition to the High Court asking to have a contract of sale which he had made carried out by the Court. Statement.

The petition was heard at the Weekly Sittings of the High Court at London, on 22nd October, 1897, before STREET, J.

P. Mulkern, for the petitioner.

November 1st, 1897. STREET, J.:—

The 4th and 5th sections of "The Mortmain and Charitable Uses Act, 1892," vest in the accountant only lands devised "to or for the benefit of any charitable use," and I am clear that a devise to a Bishop in trust simply for his diocese is not a devise to a "charitable use" within the decisions defining that term.

A devise direct to the diocese would certainly not be a devise to a charitable use, and a devise to the Bishop in trust for the diocese does not help the matter.

There must be a direction or trust in the devise for the application of the proceeds to some one or more of the numerous objects which come within the definition of charities as settled by the decisions. Many, but not all of the objects to which the funds of a diocese are usually devoted may be charitable within the meaning of the Act, but there is nothing in this devise requiring the gift to be devoted to any particular one or more of those objects, and so it is not a gift to a charitable use, and I must refuse the prayer of the petition.

G. A. B.

RADAM v. SHAW.

Trade Mark—"Microbe Killer"—Validity of—Injunction.

The words "Microbe Killer," regularly registered, constitute a valid trade mark. Injunction restraining its use granted. *Davis* v. *Kennedy*, 13 Gr. 523, followed.

Statement. THIS was an action by the owner of a registered trade mark of the words "Microbe Killer," claiming an injunction to restrain the defendant from using such trade mark.

The action was tried at Toronto on October 26th and 27th, 1897, before BOYD, C., without a jury.

Wallace Nesbitt, for the plaintiff. The term "Microbe Killer" is regularly registered, and is a valid trade mark. The plaintiff is the owner, and his use has given the trade name a reputation. The evidence shews the defendant's use, and he should be restrained: *Saxlehner* v. *Apollinaris Co.*, [1897] 1 Ch. 893; *Reddaway* v. *Banham*, [1896] A. C. 199; *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57; *Powell* v. *Birmingham Vinegar Brewing Co.*, [1896] 2 Ch. 54; *Rockingham R. W. Co.* v. *Allen*, 12 Times L. R. 345.

L. V. McBrady, for the defendant. The term "Microbe Killer" does not constitute a legal or valid trade mark, as it is not in general use and has no popular meaning, and the plaintiff has no right to its exclusive use. The evidence does not shew any deception or fraud: *Alff* v. *Radam*, 77 Texas 530; *Perry Davis* v. *Harbord*, 7 Pat. Cas. 336; *In re Hudson's Trade Marks*, 32 Ch. D. 311; *Radam* v. *Capital Microbe Destroyer Co.*, 81 Texas 122; Sebastian on Trade Marks, 3rd ed., pp. 15, 41, 44, 61, 62; *Re Atkin's Trade Mark*, 3 Pat. Cas. 164; *Partlo* v. *Todd*, 17 S. C. R. 196; *Robinson* v. *Bogle*, 18 O. R. 387; *The Singer Manufacturing Co.* v. *Loog*, 8 App. Cas., at p. 27; *Rugby Portland Cement Co.* v. *The Rugby and Newbold Portland Cement Co.*, 9 Pat. Cas. 46; *Re Harden Star, etc., Co.*, 3 Pat. Cas. 132.

Nesbitt, in reply. The English Patents, Designs and Trade Marks Act of 1883, 46 & 47 Vict. ch. 57, sec. 64, is more restricted than our statute, R. S. C. ch. 63, sec. 3: *Smith* v. *Fair*, 14 O. R. 732, 733. The mere threat of an intention to do business is sufficient to warrant the Court's interference by way of injunction, without any act of infringement being proved. I refer also to *Attorney-General* v. *Acton Local Board*, 22 Ch. D. 221; *Cooper* v. *Whittingham*, 15 Ch. D. 501; *Tipping* v. *Eckersley*, 2 K. & J. 264; *Hext* v. *Gill*, L. R. 7 Ch. 699; 56 L. J. N. S. 735, 736. Argument

November 1st, 1897. BOYD, C.:—

A specific trade mark when duly registered under R. S. C. ch. 63, holds good for twenty-five years (sec. 14), and the proprietor may maintain suit against any one who uses it without his permission (sec. 18).

The term "Microbe Killer" was registered by the plaintiff as a trade mark in February, 1888, in connection with the sale of medical compounds as specified in the application to the Crown, and it is still in force for the plaintiff's benefit. It has been in use more or less ever since in this country in the way of designating and promoting the sale of his mixture by his agents and licensees, and I find no reason in law or fact for holding that its efficacy has ceased as a trade mark.

This trade mark the defendant has used and threatens to continue to use against the will of the plaintiff.

Upon the argument it was urged that the term "Microbe Killer" has not the properties of a valid trade mark. The case of *Perry Davis & Son* v. *Harbord*, reported in the Patent Cases of 1890 (vol. 7), and also in L. R. 15 App. Cas. 316, was relied on to support this view. No doubt in that report the Lord Chancellor Halsbury and Lord Morris give opinion that the words "Pain Killer" were not special and distinctive words within the meaning of sec. 10 of the Imperial Trades Mark Registration Act, 1875, there being

Judgment.

Boyd, C.

nothing to distinguish goods manufactured by Perry Davis & Son, the appellants, from goods manufactured by other persons. It is also worthy of notice that two other Law Lords, Lord Herschell and Lord Macnaghten, markedly abstain from committing themselves to such an opinion, and reserve the right to deal with that point when presented for decision.

Now, in Ontario this matter has been decided by Spragge, V.-C., in *Davis* v. *Kennedy*, 13 Gr. 523. He held that the term "Pain Killer," though suggestive of the use of the medicine, was within the class of fancy names used to distinguish one article from another by the maker or inventor. It is my duty to follow that decision as good law in this case, so as to support the like term "Microbe Killer" as a valid trade mark. *Davis* v. *Kennedy*, is in accord with such cases as *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57.

The opinion of the English Judges was based upon the words "special and distinctive" used in the Imperial Statute, but it is noted by Proudfoot, J., in *Smith* v. *Fair*, 14 O. R. 732-33, that our trade mark statute is not couched in such restricted terms.

The judgment I pronounce is also supported on the further ground that the words "Microbe Killer" were first used by the plaintiff in connection with his medical compound, and that the same was extensively sold under that name, and would in common use be referable to the commodity put up by him or with his label on, and the evidence justifies the conclusion that the defendant's use of these words in connection with his trade is calculated to deceive the public, and prejudice the plaintiff. See *In re Hopkinson's Trade Marks*, [1892] 2 Ch. 120-2; *Powell* v. *Birmingham Vinegar Brewing Co.*, [1896] 2 Ch. 54; *Reddaway* v. *Banham*, [1896] A. C. 199; *Saxlehner* v. *Apollinaris Co.*, [1897] 1 Ch. 893.

This suffices to dispose of the case adversely to the defendant. The injunction should be granted as prayed with costs.

G. A. B.

BARBER v. CRATHERN.

Bankruptcy and Insolvency—Assignment and Preferences—Action by Creditors—Right of Attacked Creditor to Share in Proceeds.

When proceedings are taken under sec. 7, sub-sec. (2) of R. S. O. ch. 124, by a creditor, on behalf of himself and all those who, within a limited time, should come in and contribute to the risk and expense of an action to set aside a security held by another creditor, the latter may, while defending his security, join with the attacking creditor in indemnifying the assignee, so that in the event of his failing to retain his security, he may participate in the fruits of the litigation.

Statement.

THIS was a petition by the James Smart Manufacturing Co. and the McClary Manufacturing Co., two creditors of the firm of Laing & Meharry, to set aside a judgment obtained under the following circumstances:—

Laing & Meharry made an assignment for the benefit of creditors to one Henry Barber, the plaintiff herein, as assignee, and at a meeting of creditors the assignee was authorized to take proceedings to set aside a chattel mortgage made by the insolvents to James Crathern, the defendant herein, as fraudulent and void.

Subsequently, at a meeting of the inspectors of the insolvents' estate, it was decided to discontinue the proceedings by the assignee, and a resolution was passed in these words: "That the inspectors of the estate authorize the assignee to decline to take further proceedings in the pending action of *Barber* v. *Crathern*, so as to enable the creditors who desire to contest Mr. Crathern's claim to obtain an order, under section 7, chapter 124,* enabling them to do so for their own benefit upon giving indemnity to the assignee, and excluding all creditors who decline to join in contributing to the expenses of such litigation."

Upon the application of Solomon White and the Western Bank of Canada, two creditors, on behalf of themselves and all other creditors who might come in

*R. S. O. ch. 124.

Statement.

under its provisions, an order was obtained in the following terms:—

"It is ordered that the applicants may and they are hereby authorized to take and continue proceedings heretofore commenced * * for the purpose of attacking certain assignments and chattel mortgages, the securities held by the said Crathern, at their own expense and risk, upon giving indemnity to the assignee to his satisfaction against the costs of such proceedings.

"And this Court doth further order that all benefit derived from the proceedings aforesaid shall belong exclusively to the applicants and such other creditors as may, within four days after notice to them of this order, agree to contribute to the expense and risk of such litigation and shall in writing signify such agreement * *."

The defendant, while defending his chattel mortgage, joined with the attacking creditors in giving the indemnity to the assignee, and claimed the right, if he failed in the proceedings to retain the security, to participate with them in the fruits of the litigation.

The litigation resulted in a consent judgment by which the defendant retained a certain portion of the mortgaged chattels; but the mortgage was set aside as to the greater portion of them, and the assignee was directed to sell the latter and, after payment of costs, etc., to divide the proceeds among the creditors upon whose responsibility the litigation was carried on, including the defendant.

The petition to set aside that judgment upon the ground that the defendant could not be both plaintiff and defendant in the litigation, as well as upon other grounds, such as bad faith, etc., was argued in Court on November 2, 1897, before FALCONBRIDGE, J.

E. Saunders, for the petitioners.
Shepley, Q.C., for the plaintiff.
William Macdonald, for the defendant.

November 26, 1897. FALCONBRIDGE, J. (after finding against the petitioners on the other grounds raised by the petition, proceeded as follows):— Judgment. Falconbridge, J.

The settlement being made, as I find, in good faith and being apparently a reasonable one, it only remains to consider the objection to the status of the defendant or his firms, raised in the ingenious and forcible argument of Mr. Saunders.

None of the authorities cited on the argument appear particularly apposite. I suppose there are no cases quite in point. *The Bank of Upper Canada* v. *Thomas*, 2 E. & A. 502, to which Mr. Middleton has referred me since the argument, seems to be the nearest in application.

The defendant is none the less a creditor because his securities were attacked, even conceding his identity with his firms. Had the assignee been suing in the ordinary course and not under sec. 7 R. S. O. ch. 124, there could be no manner of doubt that defendant would be entitled to share in the fruits of a successful action.

In this action the assignee is the plaintiff—true only a nominal plaintiff—but still the sole plaintiff. Then why may not the defendant say, "I will defend my security, but if it be successfully attacked I claim my right as a creditor to my dividend?" I think he had a right so to say if he thought, as Macaulay says about Godolphin's attitude respecting the Revolution, "that he had betted too deep * * and that it was time to hedge": History of England, vol. iv. ch. 17, p. 57.*

When, under such circumstances, any case of fraud or collusion shall arise, the Court will be able to deal with it.

The point is new and some elements of the case seemed, until explained, to invite attack, and so, while I dismiss the petition, I do so without costs.

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* The edition published by Longman, Brown, Green & Longman's, London, 1855.

G. A. B.

ARMOUR v. KILMER.

Barrister—Solicitor and Client—Counsel Fees—Right of Action for.

In this Province a counsel's right of action for his fees for services in the nature of advocacy, is against the client of the solicitor retaining him, and not against the solicitor, unless by special agreement, or when there is evidence of credit having been given to the solicitor alone, or of money in the solicitor's hands to answer the claim; and a solicitor so employing counsel has implied authority to pledge his client's credit for the payment of counsel fees.

Statement. THIS was an action brought by a firm of barristers and solicitors practising in partnership in Toronto, against another firm, also barristers and solicitors practising in partnership in the same place, to recover $375, the balance claimed as due to Mr. E. D. Armour, Q. C., a member of the plaintiffs' firm, for fees for drawing a factum and arguing an appeal in the Supreme Court at Ottawa.

The defendants in the statement of defence admitted that at their request as solicitors and agents for their client, one Philip Jamieson, Mr. Armour had acted as counsel in the action wherein the appeal referred to was brought, but alleged that they at no time had had any dealings with the plaintiffs, as a firm, in the matter of the said action, and that in all they had done they had acted merely as agents for Jamieson, as the said Armour well knew. They further denied that Mr. Armour had any right of action in respect of the counsel fees claimed.

The remaining facts of the case are sufficiently stated in the judgment.

The action was tried before BOYD, C., at Toronto, on October 29th, 1897.

H. Mickle, for the plaintiffs.

G. G. S. Lindsey, for the defendants.

Both sides put in written arguments. The plaintiffs, on the point that a person employing counsel is liable for his fees, referred to *Baldwin* v. *Montgomery*, 1 U. C. R.

283; *Leslie* v. *Ball*, 22 U. C. R., at p. 518 *et seq.*; *McDougall* v. *Campbell*, 41 U. C. R., at p. 349 *et seq.*, 14 C. L. J. N. S. 213. They contended that a solicitor employing a barrister was as much his client as a layman, and was therefore liable to him; that the practice and law in Ontario being that a barrister may recover fees, whenever he is employed in his professional capacity he is entitled to recover although the matter may not be in the provincial Courts, and thus in *McDougall* v. *Campbell*, 41 U. C. R. 332, the fees recovered were for work done before the Senate of Canada; that if the matter was not to be decided on the law and practice of the particular Province in which the barrister practises, then the law is that a skilled person employed to do any work is entitled to recover his fees, and the Supreme Court had allowed the recovery of fees earned for work done in that Court as between the advocate and the person employing him, the tariff of the Court, however, being between party and party only: *Paradis* v. *Bossé*, 21 S. C. R. 419; *Boak* v. *The Merchants' Union Insurance Co.*, Cass. Dig., p. 677, No. 45; Cassels' Manual of Supreme Court Practice, p. 148. Argument.

The defendants contended that counsel cannot sue for any fees, and certainly not for any other counsel fees than are allowed by statute: *Baldwin* v. *Montgomery*, 1 U. C. R. 283; and that at any rate, the action should be against Jamieson, the principal, and not against themselves: *Miller* v. *McCarthy*, 27 C. P. 147; *Robins* v. *Bridge*, 3 M. & W. 114; that no one but the principal could have sued Mr. Armour in an action for negligence: *Leslie* v. *Ball*, 22 U. C. R., at p. 518; that this action was for compensation for services on a basis of *quantum meruit*, and Jamieson alone received the services.

November 8th, 1897. BOYD, C.:—

This action is to recover counsel fees and is brought by the counsel against the solicitors who retained the plaintiff. The retainer was in respect of the prosecution of an appeal

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Boyd, C.

to the Supreme Court of Canada and on behalf of Jamieson the appellant. Important questions of law arise which are barren of precedents, inasmuch as the right of counsel to sue for fees was only settled some twenty years ago in Ontario, and the precise point in this case has not since been determined.

In England the law was declared in *Kennedy* v. *Brown*, 13 C. B. N. S. 676, to this effect, that the relation of advocate and client involves incapacity to make a contract for professional services, and that counsel fees are *honoraria* not recoverable by legal process.

Again, in England, the etiquette of the bar prescribes that all litigious business must come to the advocate through the medium of a solicitor who "instructs counsel" on behalf of his client. This is not a rule of law but of professional usage: *Doe d. Bennett* v. *Hale*, 15 Q. B. 171. As a consequence the solicitor pays the counsel fees and receives them from the client as a part of the disbursements necessarily made.

And still further, the law in England is that a solicitor has no implied authority to pledge the client's credit for the payment of the fees so as to give a right of action for them against his principal: *Mostyn* v. *Mostyn*, L. R. 5 Ch. 457.

Hence the broad result in England that no right of action exists for fees by the advocate against either solicitor or client.

In Ontario, however, a different system obtains in the organization of the legal profession. The same person may be and usually is both solicitor and barrister and the fees payable to counsel are as a general thing regulated by legislation, tariffs, and rules of Court even between solicitor and client, so that altogether a radical change has been wrought in the relations of counsel, solicitor, and client: *McDougall* v. *Campbell*, 41 U. C. R., at p. 349. This case marks the point of departure in Ontario from the English doctrine of the honorary nature of counsel fees, as expounded in *Kennedy* v. *Brown*.

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Boyd, C.

The effect of *Kennedy* v. *Brown*, as a decision, has been greatly circumscribed by the observations of the Judicial Committee in *The Queen* v. *Doutre*, 9 App. Cas. 745. Lord Watson speaking for the Law Lords says the "decision may be supported by usage and the peculiar constitution of the English bar, without attempting to rest it upon general considerations of public policy": p. 751. This in substance accords with the opinion of Mr. Justice Strong on the *Kennedy* case when the *Doutre* case was before the Supreme Court at Ottawa: 6 S. C. R., at p. 390. The general result of *The Queen* v. *Doutre* is to affirm the decision of the *puisne* judge in *McDougall* v. *Campbell*, 41 U. C. R. 332, as against the dissenting opinion of Chief Justice Harrison. So that the present law of Ontario, in contrast with that of England, permits counsel to sue client for the value of professional services.

The costs claimed in this case are for proceedings in the Supreme Court—fee on drawing factum and fee at argument of the appeal.

Now there is no provision in the procedure of the Supreme Court for the ascertainment of costs between solicitor and client. In *Boak* v. *Merchants Union Insurance Co.*, decided in June, 1879, (Cass. S.C. Dig., p. 677, No. 45), the Chief Justice refused an order directing the Registrar to tax costs between solicitor and client, and stated that the question had been considered by the Judges at the organization of the Court, and it was deemed advisable not to regulate costs between solicitor and client. Accordingly the rule passed provides for costs between party and party only, and the tariff of fees is framed on that footing: Rule S. C. 57; and *Tariff*, Cassels' S. C. Prac., p. 148.

As a necessary consequence of this omission the counsel seeking to enforce recovery of fees for proceedings in the Supreme Court must resort to an action for compensation. The claim rests on a *quantum meruit*, supported by appropriate evidence: *Paradis* v. *Bossé*, 21 S. C. R. 419; *Poucher* v. *Norman*, 3 B. & C. 744.

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Boyd, C.

The case in hand presents a new aspect of this liability, for the claim is not against the client but against the firm of solicitors by whom the plaintiff was retained.

The solicitor retained the plaintiff in the interests of the client to prosecute the appeal before the Supreme Court. This was with the direct knowledge and sanction of the client, with whom the counsel had interviews touching the appeal. There is no evidence of any agreement beyond what arises from implication, and there is no evidence of any money being in the hands of the solicitors to answer this claim.

Contrary again to the English rule it appears necessary now to hold in Ontario that solicitors who employ counsel have implied authority to pledge the client's credit for the payment of counsel fees, and that legal privity exists between client and counsel though a solicitor has intervened in the usual way. This should be the rule, I think, because of the general authority which the retainer from client to solicitor imports to do all that needs to be done for the proper and effective conduct of litigation. It is a part of the solicitor's duty to instruct counsel in conducting litigation, as is very well stated in *Hobart* v. *Butler*, 9 Ir. Com. L. Rep., at pp. 165-66. The services of counsel as such in the Courts are services that cannot be rendered by the solicitor as such. There is, therefore, in retaining counsel by the solicitor, no delegation of duty which the solicitor could himself perform, and no benefit accrues to the solicitor by the employment of counsel. That marks the line of distinction between cases where the client is held responsible through the agency of his solicitor and those where the solicitor has been made to answer in person for work he directs to be done for the client. Where one attorney is employed by another to do attorney's work, though it be for the benefit of a client, the intendment is that credit is given to the attorney who employs the other, as in *Scrace* v. *Whittington*, 2 B. & C. 11. *Quoad* such work the attorney who orders it is the principal. But where witnesses are subpœnaed by a solici-

tor or surveys and plans made at the direction of the solicitor for the benefit of clients, then the latter is *primâ facie* liable: *Robins* v. *Bridge*, 3 M. & W. 114; *Lee* v. *Everest*, 2 H. & N. 285. The like rule should prevail where the services rendered are in the nature of advocacy; as to these the client is the principal and the solicitor is merely the agent who intervenes according to usage. It is evident that the benefits derived from the aid of the advocate accrue directly to the client, and on a *quantum meruit* the value of these services falls to be ascertained with reference to that client. The client, therefore, is for such services *primâ facie* the proper and only person to be sued. This should be the legal conclusion, I think, unless a bargain is made that the solicitor shall be liable or there is evidence to shew by a course of dealing or otherwise that credit was given to the solicitor and not to the client: *Johnson* v. *Ogilvy*, 3 P. Wm. 277; and *Brigham* v. *Foster*, 11 Allen (Mass.) 419.

It is said in *Miller* v. *McCarthy*, 27 C. P. 147, that if the client has given the attorney money to pay the fees, he may be sued by counsel, and it is intimated by Armour, J., in *Gordon* v. *Adams*, 43 U. C. R. 207-8, that there would be difficulty in holding a solicitor liable in a case like the present.

I place my judgment on this ground that there is no personal liability brought home to the defendants to pay these fees.

I would say further that there is no evidence of any agreement or understanding as to the amount of the fee being as now claimed. Looking at the transaction as involving liability to pay as between solicitor and counsel that should be limited, I think (in the absence of evidence), to the amount of fees taxed in the appeal. If more is expected by counsel, he should stipulate for this, and have it settled at the outset. This will enable the solicitor to communicate with his client, and advise him in the manner pointed out in *In re Broad and Broad*, 15 Q. B. D. 420. The client assenting to the larger amount, this will fix

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liability on him, and make it safe for the solicitors to pay the sum stipulated. Here the full amount taxed ($200) has been paid to the plaintiff, and that (upon the facts in evidence) should absolve the solicitors from further liability if any originally existed.

Besides I do not find sufficient evidence to lead to any safe conclusions as to what should be the measure of compensation. It is not a case for reference to the taxing officer, for we are outside of tariffs, and seeking rather the evidence of skilled witnesses, particularly as it appears that application made for increased fees was refused by the Registrar of the Supreme Court.

The plaintiff was given to understand that his services called for larger fees than what were taxed against the defeated party; and though the client afterwards objected to pay more, this is an element which may be considered in dealing with the costs of action. Having regard to this and the fact that the questions involved are new and of some difficulty, I now dismiss the action, but without costs.

A. H. F. L.

RAINVILLE v. GRAND TRUNK RAILWAY COMPANY.

Railways—Negligence—Fire Caused by Sparks from Engine—Circumstantial Evidence.

In an action against a railway company for negligently causing fire by sparks from their engine, the cause of the fire may be proved by circumstantial evidence.

Statement.

THIS was an action for negligence against the railway company for setting fire to the plaintiff's property by sparks from their engine, and was tried at Sandwich on March 15th and 16th, 1897, before FERGUSON, J., and a jury.

At the close of his evidence the plaintiff moved for a nonsuit, which was renewed at the close of the evidence and now on October 9th, 1897, came on for argument.

The facts stated in the judgment may be supplemented as follows:—

During the year 1895, which was a very dry season, the defendants permitted the dry grass and weeds to grow on their right of way without being cut. On October 25th, 1895, a woman was walking along the track, and turned into a neighbour's house on the south side almost immediately opposite the spot where the fire afterwards commenced. At the moment she left the railway track a train was in sight, and passed the spot, within a minute, or at most two minutes after, travelling westward. A minute or two after the train had passed fire commenced and was observed on the north side of the track. The wind was blowing from the south-west. The spark lit in the tall weeds and dry grass and was carried by the wind across the railway company's fence into a haystack and barn situate a few feet from the fence. There was no inflammable material on the ground between the company's fence and the building and haystack. The ground at the point where the fire took place was somewhat low and during the spring and fall freshets would be submerged. The railway company acknowledged that they cut the

Statement.

grass and bushes over the top of the ice in winter and burned them up, and the contention of the plaintiff was that it being green it would not all burn, and in the freshets this stuff would naturally be washed down into the low places along the track, and he contended and produced evidence to the effect that dry grass was washed up against the fence that had grown on the track a year or so before. It was not contended at the trial that the engine was improperly constructed or improperly worked.

M. K. Cowan, for the plaintiff.
B. B. Osler, Q. C., for the defendants.

The following cases were referred to:—*McCallum* v. *Grand Trunk R. W. Co.*, 31 U. C. R. 527; *Jaffrey* v. *The Toronto, Grey and Bruce R. W. Co.*, 23 C. P. 553; *Holmes* v. *The Midland R. W. Co.*, 35 U. C. R. 253; *Flannigan* v. *Canadian Pacific R. W. Co.*, 17 O. R. 6; *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; *Smith* v. *London and South Western R. W. Co.*, L. R. 5 C. P. 98; *Sénésac* v. *Central Vermont R. W. Co.*, 26 S. C. R. 641.

October 18th, 1897. FERGUSON, J.:—

This action was tried at Sandwich. The jury rendered a verdict for the plaintiff and assessed damages.

The motion to have a nonsuit entered made at the close of the plaintiff's case and renewed at close of the evidence stood by agreement to be argued and disposed of in Toronto.

The argument now takes place.

Counsel concede the two propositions, (1) that when the engine of the railway company is in good order, is a good engine, and is properly run at the time, and sparks or cinders fly from it upon and set fire to the property of an owner adjoining the railway, the loss must be borne by such owner, (2) but if the sparks or cinders fall upon the property (the land) of the railway company, and by reason of dry and inflammable material being there the

fire runs or makes its way to such adjoining property and occasions loss, the railway company are responsible for such loss, if the dry and inflammable material is on the property of the company by reason of negligence of the company. The concession does not, however, go or extend further than this.

There was evidence to go to the jury shewing or tending to shew that there was dry and inflammable material on the property of the defendant company, and that sparks or cinders from the engine might have fallen upon this and ignited it, and that the fire may have so spread or run to the plaintiff's property, and caused the conflagration. This inflammable material was according to such evidence, dry grass, rushes, etc., which had grown upon the defendants' land, as an annual growth, and not material that had been left there by the defendants in clearing their land for the purposes of their road, as in some of the decided cases.

There was, as I think, evidence to be left to the jury, tending to shew that the fire did spread or run from the defendants' land to the plaintiff's property adjoining the same, and that the conflagration happened in this way.

There was also evidence tending to shew the contrary of this.

For the defence it was contended that when the engine is good and in proper order (which must be now taken to be the case here) there is no presumption that the fire (sparks or cinders) came from it, and that there is no evidence that the fire did really come from the defendants' engine. It was part of the plaintiff's case to prove that the fire was communicated by sparks or cinders from the defendants' engine, and it is sometimes said that this must be done by a "preponderance of evidence."

The decision in the case *Piggot* v. *The Eastern Counties R. W. Co.*, 3 C. B. 229, and the language employed by the learned Judges there, seem to me to shew that such proof may be by circumstantial evidence. At page 241, Mr. Justice Coleman is reported to have said, "It appears to

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Ferguson, J.

me that the jury might reasonably infer that the fire was occasioned by sparks from the engine," etc., etc.

I do not think that the decision in the case *Senésac* v. *The Central Vermont R. W. Co.*, 26 S. C. R. 641, is really against this view. There it was alleged that the fire was caused by sparks falling from a passing train, and through the carelessness of the train crew in neglecting to extinguish the fire in the respondent's woodshed. The case rested (as to this part of it) on circumstantial evidence, and it was argued that from the facts proved there was an irresistible conclusion that the fire was caused either by sparks from the engine or a hot-box on one of the cars. The Court below considered that there was no proof that the fire was caused by the act, imprudence, neglect or want of skill of the defendants, and dismissed the plaintiff's action. Both the Superior Court and the Court of Review were of the opinion that the origin of the fire was still a mystery. The Supreme Court declined to interfere with the judgment, saying, that the jurisprudence of the Privy Council and of that Court was not to disturb judgments appealed from upon mere questions of fact unless clearly wrong or erroneous.

This, as it appears to me, is far from deciding that the proof to which I have been alluding cannot be by circumstantial evidence, and in the present case I think there were relevant circumstances given in evidence fit to be submitted to the jury on the question.

As to the argument on behalf of the defendants resting on the character of the inflammable material said to have been on the railway land, I am, after a perusal of the case *Flannigan* v. *The Canadian Pacific R. W. Co.*, 17 O. R. 6, unable to say that there was not evidence of negligence of the defendants in this respect fit to be submitted to the jury.

On the whole case I am of the opinion that this motion should be refused and, I suppose with any additional costs there may be.

Motion refused with costs as above.

A. H. F. L.

CONN V. SMITH ET AL.

Bankruptcy and Insolvency—Advances by Bank to Insolvent—Pledge of Goods as Security—Invalidity of—Banking Act—Creditors' Claims—58 Vict. ch. 23, sec. 1 (O.)—"Invalid against Creditors"—Retroactivity of Statute—Warehouse Receipts—Exchange of Securities—53 Vict. ch. 31, sec. 75, sub-sec. 2 (D.)—Collateral Security—Mortgage—Declaration—Parties.

The plaintiff, a creditor of an insolvent, alleged that in regard to certain pledges made by the latter to a bank, there had been no contemporaneous advances, and that the pledges were invalid under sec. 75 of the Banking Act, 53 Vict. ch. 31 (D.), and claimed to be entitled to obtain moneys received through disposal of the pledges and to apply them in payment of creditors' claims, by virtue of the provisions of sec. 1 of 58 Vict. ch. 23 (O.):—

Held, that the words "invalid against creditors" should be treated as limited to transactions invalid against creditors, *qua* creditors, and not as extending to transactions declared invalid for reasons other than those designed to protect creditors:—

Held, also, that the last named Act did not apply, because the money had been received by the bank before it was passed, and it was not retrospective.

The insolvent had been in the habit of buying hops from time to time, and giving the bank his own warehouse receipts or direct pledges for the purpose of raising money to pay for them. Then, at the request of the bank, he constituted his bookkeeper his warehouseman, and the latter issued warehouse receipts to the bank in substitution for the securities or receipts theretofore held, there being no further advance made when the new securities were given:—

Held, that this exchange of securities should be treated as authorized under sub-sec. 2 of sec. 75 of the Banking Act.

The plaintiff asked for a declaration that advances made by the bank upon a mortgage by the insolvent to a third person, and by him assigned to the bank, were contrary to the Banking Act, and that the property was free from the mortgage:—

Held, that no such declaration should be made in the absence of the mortgagee, who was liable to the bank as indorser of a promissory note of the insolvent, collateral to the mortgage.

Statement.

THIS was an action by a simple contract creditor of the defendant Smith to recover judgment for a debt, and on behalf of all creditors of Smith to recover from the defendants the Merchants' Bank of Canada, certain moneys and property of the defendant Smith alleged to have come to their hands by means of breaches of the Banking Act. The facts are stated in the judgment.

The action was tried by STREET, J., without a jury, at Brockville, on the 16th and 17th November, 1897.

Aylesworth, Q. C., for the plaintiff.

McCarthy, Q. C., for the defendants.

Judgment. November 27, 1897. STREET, J.:—

Street, J.

In all, thirteen transactions between the bank and Smith are attacked by the pleadings and particulars delivered in the action, besides a small item of interest which was not gone into. Eleven out of these thirteen transactions related to pledges of hay and grain made by the defendant Smith to the bank, in or prior to the year 1893, to secure advances made by the bank to him. It was alleged by the plaintiff that there had in these transactions been no contemporaneous advance, and that the pledge, whether in the form of a bill of lading or a warehouse receipt or a direct pledge, was invalid under the 75th section of the Banking Act, 53 Vict. ch. 31 (D.) It was not disputed that the bank had long prior to the commencement of this action disposed of the hay and grain pledged to them, and had received the proceeds, and had applied them as received in satisfying moneys advanced to the defendant Smith, and maturing from day to day. The greater part, if not the whole, of these moneys was so received by the bank during the course of constant daily transactions with the defendant Smith, who carried on a large business in buying and selling produce, and were taken into account in daily or other frequent settlements with him.

The plaintiff claimed, as one of the creditors of Smith, who had ceased before the commencement of this action to meet his liabilities, to be entitled to obtain the moneys so received by the bank, and to apply them in payment of creditors' claims under sec. 1 of ch. 23 of the Ontario Statutes of 1895, entitled "An Act to make further provision respecting Assignments for the Benefit of Creditors," which is as follows:—

"In case of a gift, conveyance, assignment, or transfer of any property, real or personal, which in law is invalid against creditors, if the person to whom the gift * * was made shall have sold or disposed of the property or any part thereof, the money or other proceeds realized therefor by such person may be seized or received in any

Judgment. Street, J.

action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift * * was made, and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the said debtor, but shall exist in favour of all creditors of such debtor, in case there is no such assignment."

It appears to me to be unnecessary to inquire whether the defendant Smith was or was not insolvent at the time of these transactions, because it is plain that there was sufficient pressure used by the bank (supposing the plaintiff's view of their nature to be correct) to exclude the intent of a fraudulent preference. They were, therefore, not "invalid against creditors" by virtue of anything contained in the Act respecting assignments and preferences by insolvent persons, ch. 124, R. S. O., or in any Act *in pari materiâ*.

In interpreting the clause of ch. 23 of the Ontario Act of 1895, above quoted, regard must be had to the context and to the specific objects of the legislation of which it forms part. These are the prevention of frauds upon creditors, and the prevention of unjust preferences of one creditor over another by insolvent persons. Transfers of property under certain circumstances are by these enactments declared invalid against creditors, and by the section of the Act of 1895, above quoted, where the property transferred has been sold by the transferee so that it cannot be seized in specie, an action to obtain from him the proceeds is given to the creditors of the transferor.

The provisions of these Acts, it will be observed, are directed against the acts of persons in insolvent circumstances who may be endeavouring to prevent the proper and equal distribution of their assets amongst their creditors. The plaintiff, however, seeks to treat the section of the Act of 1895 as applicable to transfers of property which are invalid or voidable for reasons in whch the rights of creditors as such are not in any degree involved. If the eleven transactions between the bank and the defendant

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Smith were invalid, it is not because they interfered with the rights of creditors, but because they were contrary to the limitations imposed by Parliament upon the banks in their dealings with personal property. The considerations applicable to money received in the course of such transactions as these, seem very different from those applicable to money received by means of the transfers declared void as against creditors: and where the effect of giving to the Act of 1895 the extended application contended for by the plaintiff would be so far reaching, I think the safe course is to treat the words "invalid against creditors" as limited to transactions invalid against creditors *qua* creditors, and not as extending to transactions declared invalid for reasons other than those designed to protect creditors.

There is another reason which I think is fatal to the contention of the plaintiff that this Act of 1895 should be applied to the transactions in question, and that is, that the money sought to be recovered had been received by the bank before the passing of the Act. It was argued that the remedy given, being in the nature, as it was said, of a new form of execution, was a mere matter of procedure, and that therefore the presumption against the retrospective operation of the Act did not arise. I cannot accede to this argument. The money arising from the sale of the hay and grain having come to the hands of the bank long before the passing of the Act, and having been recognized and acknowledged to be their money by the defendant Smith in the repeated settlements which took place between them, and being free from any right of recovery on the part of any other person under any existing law, had become their money. It could not have been recovered from them by the defendant Smith, even assuming that the goods of which it was the proceeds might, because he had willingly taken credit from day to day for it in his accounts with the bank. Such being the position of the bank, it seems plain that a statute giving to creditors an action to recover these proceeds goes far beyond a mere alteration in procedure, and confers a right which had no

previous existence. The language of the section does not necessarily include past transactions, and, in accordance with the established rule of construction, it must not be construed as including them. Judgment. Street, J.

I do not desire to be understood as determining the question as to the right of the bank to have held these goods against any and every person. In the view I have taken of the other objections to the plaintiff's right to recover, it becomes unnecessary to do so.

A different state of facts is disclosed by the evidence bearing upon the claim of the plaintiff to a quantity of hops still remaining unsold, which were held for the bank in a warehouse under a receipt given by one Hiscox, the lessee of the warehouse. The defendant Smith says that he was in the habit of buying hops from time to time and giving the bank his own warehouse receipts or direct pledges for the purpose of raising money to pay for them. Then, at the request of the bank, he constituted his book-keeper, Hiscox, his warehouseman, and Hiscox issued warehouse receipts to the bank in substitution for the securities or receipts theretofore held by the bank, there being no further advance made when the new securities were given. The 2nd sub-section of the 75th section of the Banking Act enables the bank, on receipt of the goods, to store them and take a warehouse receipt for them without forfeiting any existing right, and I think this exchange of securities may be treated as being authorized under that sub-section.

The question as to these hops comes down entirely to one of costs, as it appears to be agreed that they are utterly worthless, and the bank in fact have abandoned any claim they might have to them.

The remaining question relates to the rights of the bank under a mortgage upon a block of brick buildings made by Smith to one Steele, and assigned to the bank.

The facts shortly stated appear to be as follows:—At the time of the giving of the mortgage, the bank held notes, amounting in all to $5,700, made by Smith and indorsed

Judgment.

Street, J.

by Steele; a new note for $8,000 was made, bearing the same date as the mortgage signed by Smith and indorsed by Steele, into which the existing notes for $5,700 were to merge as they matured. Steele was only an accommodation indorser on all these notes, and the mortgage was taken nominally to indemnify him, but really with the idea that he should pay the notes to the bank and take the property. On 12th January, 1895, he assigned the mortgage to the bank, and it was then agreed that the bank should later on advance the balance of the $8,000 and apply it upon Smith's other debts to them, they releasing certain other securities held by them for a part of the debt. There appears, therefore, to have been an agreement, contemporaneous with the mortgage, for what was nominally, if not really, a further advance of the balance of the $8,000 note, this further advance being secured to the bank both by Steele's indorsement and by the mortgage upon the brick block made to him and assigned to the bank. This mortgage was subject to two prior mortgages to third persons, and after the commencement of the present action the property was sold under the power of sale in one of the prior mortgages, and was purchased by Steele at a price which paid off the prior mortgages and the greater part of the bank mortgage. The statement of claim asks for a declaration that the advances by the bank upon this mortgage, or some part thereof, are contrary to the Banking Act, and that the property may be declared free from the mortgage, or that the amount received under it may be paid into Court and applied in payment of the claims of the creditors of Smith. It is evident, however, that no such declaration should be made in the absence of Steele, who is liable to the bank as indorser upon the $8,000 note, and who should be allowed an opportunity of shewing that the mortgage was a valid security, and that the proceeds derived from it should go towards extinguishing his liability as indorser. I have a further objection to making such a declaration, even so far as the bank is concerned, in the present case, because the proceeds of the alleged

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Street, J.

new advance were not traced in the evidence sufficiently to enable me to satisfy myself that they did not go merely towards the extinguishing of existing debts due to the bank by Smith; and also because the facts connected with the sale of the property and the application of the proceeds, having happened after action brought, and without having been referred to in the pleadings, were not fully gone into.

I think the mortgage transaction should have been made the subject of a separate action, and that Steele should have been made a party to it.

If the plaintiff desires it, he may take judgment in the present action against Smith for the amount of his claim, with costs of an undefended action upon a specially indorsed writ, and judgment dismissing as against the bank with costs all claims save that with regard to the mortgage, and proceed in the present action for that claim, adding Steele as a defendant, and proceeding anew to trial. Unless he elects to do this, and takes the necessary proceedings within three weeks, there will be judgment for the plaintiff against Smith for his claim and costs as above, and the action will be dismissed as against the bank with costs without prejudice to the plaintiff's right to proceed within two months from the entry of judgment for the bank in the present action, with a new action against the bank and such other persons as he may be advised, and either for himself or for all creditors, to set aside in whole or in part the claim of the defendants or any of them to the property covered by the mortgage, or the proceeds derived from it, or to have the same applied towards payment of creditors' claims.

E. B. B.

RE NORRIS ET AL.

Assessment and Taxes—Court of Revision—Petition—Remission of Taxes—By-law—Mandamus.

The Court of Revision of a municipality is obliged to receive and decide upon a petition for remission of taxes, presented under sec. 67 of 55 Vict. ch. 48 (O.), notwithstanding that the municipality has not passed any by-law on the subject.

A mandamus granted.

Statement. THIS was a motion, on behalf of the estate of James Norris and of the Canadian Bank of Commerce, for an order in the nature of a mandamus to the Court of Revision for the city of St. Catharines to entertain and hear a petition of the applicants. The applicants were the owners of two separate properties in the city of St. Catharines, called "Mill A." and "Mill B.," which properties were assessed under their names respectively. Mill A. had been vacant and unused for three years, and was assessed at the value of $25,000. Nothing was asked in respect of Mill B. The petitioners by their petition asked that the taxes, or a substantial part thereof, on Mill A. for 1897 should be remitted.

By sec. 67 of the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.), "the Court shall also, before or after the 1st day of July, and with or without notice, receive and decide upon the petition from any person assessed for a tenement which has remained vacant during more than three months in the year for which the assessment has been made * * and the Court may, subject to the provisions of any by-law in this behalf, remit or reduce the taxes due by any such person, or reject the petition; and the council of any local municipality may, from time to time, make such by-laws, and repeal or amend the same."

The objection of the Court of Revision was that no by-law had been passed on the subject, and, in their opinion, they could not act under the section until a

by-law had been passed. There was to be another session of the Court for the year 1897. Statement.

The motion was heard by FERGUSON, J., on the 29th November, 1897.

D. L. McCarthy, for the applicants.

No one appeared to shew cause, although all the members of the Court of Revision and the clerk of the municipality of the city of St. Catharines were served with notice of the application.

FERGUSON, J. (at the close of the argument):—

Mill A. is a tenement and has been unoccupied more than three months of the year 1897. I am of the opinion that the Court of Revision is obliged to receive and decide upon the petition, and that the fact that the municipality has not passed any by-law on the subject does not relieve the Court from the performance of this duty. If a by-law on the subject existed, the action of the Court would be subject to the provisions of it; but when there is no such by-law, the action of the Court will simply be independent of any such provisions; their duty is to receive and decide upon the petition. The Court of Revision stands in a position such as that of a public officer having a public duty to perform, and the petitioners are citizens having an interest in the performance of that duty. I am of the opinion that the affidavit of Mr. Collier, the solicitor for the applicants, which is unanswered, shews a sufficient demand and refusal. I think the order for the mandamus should go.

E. B. B.

[DIVISIONAL COURT.]

RE SHERLOCK.

Will—Bequest of Specific Sum—Debt Larger than Amount Named.

A testatrix to whom a debt of £2,900 was owing by the E. estate, by her will bequeathed as follows: "The two hundred and ninety pounds due from the E. estate * * and moneys in * * to be used by my executors in payment of debts * * the balance thereof to be equally divided among the daughters of * * *":—

Held, that only the sum of money mentioned in the will and not the whole amount due by the E. estate passed by the clause in question.

Decision of MEREDITH, C. J., reversed.

Statement. THIS was an appeal from a judgment of MEREDITH, C. J., on an application by the executors of the will of one Mary Haig Sherlock for the opinion of the Court under R. S. O. ch. 110, sec. 37, as to the construction to be put upon a clause in the will.

The facts are set out in the judgments and the clause in question in the judgment of STREET, J.

The motion was argued in Court on September 17th, 1897, before MEREDITH, C. J.

W. S. McBrayne appeared for the executors and the daughters of Samuel Langford Sherlock.

Samuel Price, for the residuary devisees.

October 9th, 1897. MEREDITH, C.J.:—

The question for decision depends upon what is the proper construction to be placed upon one of the bequests contained in the will of the testatrix which is contained in these words:—

"The two hundred and ninety pounds due from the Edwards' Estate in England and * * to be equally divided among the daughters of the said Samuel Langford Sherlock."

The testatrix at the date of making her will had a claim against her former solicitor in England, a Mr. Edwards,

Judgment.

Meredith, C.J.

who had become insolvent, and she had shortly before received a letter from her then solicitors in England, stating that the amount due her was about £2,900, the last figure was somewhat blurred, probably in the copying of the letter, and a casual reader of the letter might mistake the figures as being intended to mean £290.

The contention of the legatees is that the whole of the money due by Edwards passed by the bequest, and I am of opinion that that is the correct view.

It is, I think, reasonably certain that it was the money due to her by Edwards and the whole of it that the testatrix had in her mind and intended to dispose of it, and that the statement of the amount of it may be properly rejected under the rule "*falsa demonstratio non nocet.*"

I think that I do no violence to the language of the testatrix in reading the paragraph of the will in question as if she had said the money due to me from the Edwards' estate in England amounting to £290, etc.; and if that be so, it is clear that the erroneous statement of the amount of the debt should be rejected.

As the difficulty has arisen from the way in which the testatrix has expressed her wishes, the costs should come out of the fund.

There will be judgment declaring that the bequest in question operated upon and passed the whole of the Edwards' debt, and the costs will be paid out of the fund.

From this judgment the residuary devisees appealed, and the appeal was argued before a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE*, and STREET, JJ.

McBrayne raised the preliminary objection that no appeal lay from the opinion of a Judge under the Act, and cited Lewin on Trusts, 8th ed., p. 619; *Re Mockett's Will*, Johnston 628.

Price, referred to Con. Rule 777.

* FALCONBRIDGE, J., only heard part of the argument and took no part in the judgment.—REP.

Argument. [The Court, however, without giving any decision on the objection, directed the argument on the merits to proceed.]

Price, for the appeal. The Chief Justice seems to have considered that the testatrix misread the letter she received from England. That letter should not be considered: the question is controlled by the will alone. If she did not misread the letter she did not know or even think she knew what the amount was, yet she deliberately fixed the amount devised at £290: *Smith* v. *Fitzgerald*, 3 V. & B. 2; *Horwood* v. *Griffith*, 4 D. M. & G. 700; *Hotham* v. *Sutton*, 15 Ves. 319; *Loring* v. *Loring*, 12 Gr. 374; Williams on Executors, 9th ed., p. 1025, note *k*. The leading and most important words in the clause should be ascertained: Theobald on Wills, 4th ed., 108, 110; Leake on Contracts, 3rd ed., 190. The words "two hundred and ninety pounds" limit the gift as a restrictive limitation.

McBrayne, contra. The obvious intention of the testatrix was to give the whole debt. In the English cases funds were specified out of which certain amounts were to be paid. A specific description of a bond passes principal *and interest*: *Hawley* v. *Cutts*, 2 Freeman 24. I refer to *In re Bridle*, 4 C. P. D. 336; *Harcourt* v. *Morgan*, 2 Keen 274.

Price, in reply. If the testatrix had intended any considerable excess to pass she would have appointed the legatees her residuary legatees instead of those she did appoint.

November 2nd, 1897. The judgment of the Court was delivered by

STREET, J.:—

I regret that I find myself unable to concur in the judgment appealed against.

The words of the bequest are as follows: "The two hundred and ninety pounds due from the Edwards' estate in England and moneys in Post Office Savings Bank and

Bank of Hamilton at Grimsby, to be used by my executors in payment of debts and expenses after my decease and in winding up my estate: the balance thereof to be equally divided among the daughters of the said Samuel Langford Sherlock."

Judgment.

Street, J.

At the time the will was made, and at the time of the death of the testatrix, the amount due from the Edwards' estate was £2,900, instead of £290, and the question is whether the whole £2,900 or only £290 of it passed.

In my opinion there is no gift here which can properly be treated as a gift of the debt due from the Edwards' estate irrespective of its amount. I quite agree that if the testatrix had said "I give the debt due from the Edwards' estate," the whole amount of the debt would have passed, and that an erroneous recital or statement of the amount of the debt would probably not have reduced the gift to one of a sum out of the debt.

Here she has not in terms given the debt but a specific sum of money, describing it as being the particular sum due from the Edwards' estate. If this had been a gift of stock, and the testatrix had said "I give the £290 stock I own in the A. company," when she had £2,900 stock in that company, it would not be contended, I think, that the whole passed.

It would be unsafe, in my opinion, and contrary to rule, to speculate as to what the testatrix would have done had she known the true amount due her to be ten times what she supposed it to be, and as she has not given the debt in terms, but only a sum of money in terms, we are bound to read the will as giving only the sum of money named, and not the whole debt of which it formed part: *Smith* v. *Fitzgerald*, 3 V. & B. 2; *Hotham* v. *Sutton*, 15 Ves. 319; *Horwood* v. *Griffith*, 4 D. M. & G. 700; *Loring* v. *Loring*, 12 Gr. 374.

The appeal, in my opinion, should be allowed, and the costs of the appeal should be paid out of the estate under the circumstances.

G. A. B.

[DIVISIONAL COURT.]

PETRIE v. MACHAN.

Division Courts—Jurisdiction—Commission on Sale.

The defendant, by an instrument signed by him, authorized the plaintiff to dispose of the goods mentioned therein for the sum of $1,000 net to defendant, the latter reserving to himself the right to dispose of the goods without plaintiff's assistance, and agreeing in such case to pay the plaintiff a commission of ten per cent. on the above mentioned sum. The defendant, unassisted by plaintiff, afterwards disposed of the goods for $350, and the plaintiff then claimed ten per cent. commission on $1,000, and interest:—

Held, that he was entitled to recover the amount, and that the claim was within the jurisdiction of the Division Court, the original amount thereof being ascertained by the signature of defendant.

Judgment of the Second Division Court in the county of Perth reversed.

Statement. THIS was an appeal by the plaintiff from the Second Division Court in the county of Perth.

The facts and the agreement in question are set out in a former report upon the hearing of the argument of an objection that the "sum in dispute upon the appeal" did not exceed "$100 exclusive of costs" within the meaning of section 148 of the Division Courts Act, R. S. O. ch. 51: *Petrie* v. *Machan*, *ante* p. 504.

The learned Judge gave judgment for the plaintiff for $35 as ten per cent. commission upon the sum of $350 for which the defendant had sold the machinery, the plaintiff contending that he was entitled to judgment for $100 and interest from the date of such sale. The learned Judge granted a new trial and upon such new trial gave the same judgment, and the plaintiff appealed to this Court.

The appeal was argued on October 15, 1897, before a Divisional Court, composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.

R. McKay, for the appeal, contended that the amount of the plaintiff's claim was fixed and ascertained at $100, being ten per cent. on $1,000, by the signature of the

defendant; that the Division Court had jurisdiction, and the addition of interest did not oust such jurisdiction, and the plaintiff was entitled to judgment for a commission on the $1,000 mentioned in the contract and should not be limited to a commission on the $350 for which the defendant had seen fit to sell the machinery, as had been decided by the trial Judge, and referred to *Re Graham* v. *Tomlinson*, [1888] 12 P. R. 367; *McDermid* v. *McDermid*, [1888] 15 A. R. 287; *Vogt* v. *Boyle*, [1880] 8 P. R. 249; *Ostrom* v. *Benjamin*, [1894] 21 A. R. 467, practically overruling *Robb* v. *Murray*, [1889] 16 A. R. 503; *Re McKay* v. *Martin*, [1890] 21 O. R. 104; *In re Wallace* v. *Virtue*, [1894] 24 O. R. 558. As to liquidated damages, *McBean* v. *Kinnear*, [1892] 23 O. R. 313; *McNamara* v. *Skain*, [1892] 23 O. R. 103; *Grant* v. *Armour*, [1894] 25 O. R. 7. Argument.

Aylesworth, Q.C., contra, contended there was no certainty in the contract, which was one to pay in any one of three events which might have happened, and no unequivocal promise to pay at all; that the additional claim of interest was an independent claim for damages, and the Division Court had no jurisdiction. Even though *Re Graham* v. *Tomlinson*, [1888] 12 P.R. 367, is apparently in favour of the Division Court having jurisdiction, the great weight of authority is the other way: *Wiltsie* v. *Ward*, [1883] 8 A. R. 549; *Forfar* v. *Climie*, [1883] 10 P. R. 90; *Moses* v. *Moses*, [1889] 13 P. R. 12 and 144. He also referred to *Insley* v. *Jones*, [1878] 4 Exch. D. 16.

McKay, in reply.

October 25, 1887. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The claim sued for in this case and the contract out of which such claim arose are set out in the report of this case in 28 O. R. 504.

Judgment.

Armour, C.J.

Such claim was, I think, plainly within the jurisdiction of the Division Court, for the original amount of it was ascertained by the signature of the defendant.

The plaintiff was entitled, under the contract, to a commission of ten per cent. on the sum of one thousand dollars, no more and no less, upon the defendant selling, exchanging, or otherwise disposing of the goods mentioned therein, in whole or in part, without the assistance of the plaintiff or his agent, or upon his withdrawing the offer, and this was the only claim under the contract for which the plaintiff could sue the defendant.

The defendant disposed of the goods mentioned in the contract without the assistance of the plaintiff or his agent, and so the plaintiff became entitled to the agreed commission, the amount of which was ascertained, as I have said, by the signature of the defendant to the contract, and I do not see how upon any principle we could construe the contract otherwise than as entitling the plaintiff to the full amount of the said commission.

It is optional with us to allow or to disallow interest on the claim, and we do not think that the case is one calling for the allowance of interest.

We therefore allow the appeal with costs, and direct judgment to be entered in the Court below for $100 and costs.

G. A. B.

[DIVISIONAL COURT.]

GILLARD ET AL. V. MILLIGAN.

Bankruptcy and Insolvency—Execution—Costs—Lien—Assignments and Preferences—Loss of Lien—Ranking on Estate.

The lien of a plaintiff for costs by virtue of sec. 9 R. S. O. ch. 124, under an execution in the sheriff's hands, against an insolvent, at the time of an assignment by him for the benefit of creditors under that statute, is not superseded by such assignment, and the sheriff is entitled to proceed and sell for the amount of such costs. If he does not do so, and the plaintiff loses his lien,

Per ARMOUR, C. J., he is not entitled to rank on the insolvent's estate as a preferential creditor.

Per STREET, J.—Even if so entitled it could only be on the net funds available after payment of the proper charges incurred in the management of the estate.

Statement.

THIS was an appeal from the County Court of the county of Wentworth.

The following facts are taken from the judgment of STREET, J.

On 1st December, 1894, the plaintiffs recovered a judgment against a firm of Vansycle Bros. for $392.34 debt and $55.97 costs, and on the following day placed in the hands of the sheriff of the county of Elgin an execution to levy these amounts. Their execution was the first one in the sheriff's hands against Vansycle Bros.

On the 11th December, 1894, whilst this execution was in full force, Vansycle Bros. made an assignment to the defendant Milligan, for the benefit of their creditors, under the provisions of R. S. O. ch. 124.

The defendant Milligan, as such assignee, then brought an action against Sutherland, Innes & Co. to recover a boiler and engine and other property in the county of Elgin claimed by the assignee as belonging to the estate, and claimed adversely by Sutherland, Innes & Co., who had obtained possession of them.

The defendant Crothers conducted this action as solicitor for the defendant Milligan. The action was tried before Mr. Justice ROSE, who gave judgment in Milligan's favour

Statement. for a part only of the goods claimed and refused him costs. Milligan appealed to the Divisional Court and succeeded in having the judgment set aside and a reference ordered. Sutherland, Innes & Co., then appealed to the Court of Appeal, and pending the appeal a settlement was arrived at in accordance with which they paid to Milligan $345 in full of his claim to the goods and of all costs. This amount was not sufficient to cover the assignee's charges for administering the estate and the costs of the defendant Crothers as his solicitor, and was divided between them. There were no other assets of the estate. The plaintiffs had filed with the assignee, in December, 1894, an affidavit setting forth their debt as an ordinary claim, and claiming $63.97, being the amount of their costs taxed and the cost of the execution, as a preferred claim.

On 19th August, 1896, the plaintiffs brought this action against Milligan, the assignee, and Crothers, his solicitor, alleging that they had received the $345: that it was a trust fund out of which, as they knew, the plaintiffs were entitled to receive the amount of their costs as above: that they had refused to pay it: and praying that they might be ordered to pay it. The defendants, in answer, set up the facts of the case as above shortly described, and contended that the plaintiffs had shewn no cause of action against them.

The cause was tried before Colin G. Snider, Esq., Judge of the County Court of Wentworth, and judgment was given by him on 28th June, 1897, for $61.32 and costs against both defendants.

From this judgment the defendants appealed and the appeal was argued on October 12th, 1897, before a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.

J. M. Glenn, for the appeal. There was no seizure by the sheriff so there is no lien for the costs. There can be

Argument

no lien without possession. The property which was the subject of the litigation was never in the possession of the assignee. The assignee is entitled to remuneration: R. S. O. ch. 124, sec. 11. The solicitor is entitled to the whole costs of the proceedings: *Ryan* v. *Clarkson*, 16 A. R. 311. What was paid was not a trust fund, and it was exhausted by the assignee's and solicitor's claims. See also *Smith* v. *Antipitsky*, 10 C. L. T. Occ. N. 368.

J. J. Scott, contra. The plaintiffs had a lien at the time of the assignment and have done nothing to forfeit it. The judgment debtors' interest in the property in litigation was attached by the execution and lien. The fund realized by the assignee was the proceeds of a settlement by which property of the estate was given up. The estate had a judgment for its recovery, and the plaintiffs here should have had an opportunity to pay the solicitor his costs and hold the judgment in appeal. A solicitor has no lien against a trust estate, although he may have against the trustee. The settlement was not made in good faith, and the trial Judge was right in holding that the fund should pay the plaintiffs' lien for costs. I refer to *Genge* v. *Freeman*, 14 P. R., at p. 334.

Glenn, in reply.

October 25th, 1897. ARMOUR, C. J.:—

At the time of the assignment by Vansycle Bros. to the defendant Milligan, the plaintiffs had recovered a judgment against Vansycle Bros. for the sum of $392.34 debt and $55.97 costs, and an execution to levy these sums was then in the hands of the sheriff.

This assignment, by the terms of the statute R. S. O. ch. 124, sec. 9, took precedence of the said judgment and of the said execution, except as to and subject to the lien of the plaintiffs for their costs.

The assignment, therefore, did not stand in the way of the sheriff proceeding to seize and sell under the execution the property assigned for these costs, and this was the course that ought to have been pursued.

Judgment.
Armour, C.J.

This course not having been taken, and the plaintiffs having lost their lien under their execution, the only course left to them was to claim for these costs against the estate as ordinary, and not as preferential, creditors; and they had no right of action against the defendants, or either of them for these costs.

FALCONBRIDGE, J.:—

I agree that the appeal should be allowed with costs and the action dismissed with costs.

STREET, J.:—

In my opinion the judgment appealed from cannot be sustained against either of the defendants. The plaintiffs' counsel sought to support it upon the ground that the $345 received for the settlement with Sutherland, Innes & Co., was a fund charged with a trust in favour of the plaintiffs to the extent of their costs. I can see nothing to support this contention.

The 9th sec. of ch. 124 R. S. O., preserves to the first execution creditor the lien, so called, created by the delivery to the sheriff of his execution, to the extent of his taxed costs and the cost of issuing his execution, and there is nothing in the Act which supersedes the execution for these costs, or which forbids the execution creditor from realizing them out of the debtor's goods notwithstanding the assignment. In this respect the Act differs from the Insolvent Acts formerly in force in this country, under which the creditor was forbidden to proceed with a seizure under execution after the property under seizure had become subject to the provisions of the Act: see for example, 29 Vict. ch. 18, sec. 16 (C.). The plaintiffs might, therefore, had they chosen to do so, have directed the sheriff to proceed under their execution to realize the costs which they now claim; but instead of doing so, they took no active steps to enforce their execution, and filed a claim to

rank as preferred creditors upon the estate for these costs. Assuming that they were entitled to take this position, it certainly gave them no right to treat the whole assets of the estate as subject to a trust in their favour prior to any other charge. They were in no better position than that of other creditors who had proved claims, excepting that of being entitled to payment in full out of such funds of the estate as were available for division amongst the creditors, instead of being obliged to rank rateably with such creditors.

Judgment. Street, J.

The funds available for division are not the gross funds collected, but only such as remain after payment of the costs properly incurred in their collection and the proper charges of the assignee. In the present case there was no balance of the $345 available for division so far as appears, because it has all been swallowed up by the charge of the assignee and his solicitor. Even if there were any surplus, the plaintiffs would have no right to recover it in an action against the assignee until the claim had become entitled to rank upon the estate under the provisions of the Act.

In my opinion the appeal should be allowed with costs and the action dismissed with costs.

G. A. B.

McCann v. The Corporation of the City of Toronto.

Municipal Corporations—Accident—Liability—Contractors—Relief Over.

Before a building which was being erected by competent contractors for the municipal corporation of a city had been taken over, a trap door in the roof, through the want of fastenings, was blown off, injuring a person on the street below. The trap door was a necessary part of the contract, which required all work to be done in a good and workmanlike manner, and imposed responsibility on the contractors for all accidents which might have been prevented by them. Damages were recovered against the corporation on the findings of the jury that there was negligence on its part, and that the specifications did not stipulate for fastenings, and the corporation, on the same evidence, sought to recover over from the contractors, brought in as third party defendants, on the terms that the findings in the action should be binding on them only as to the amount of damages, and that the question of their liability should be afterwards tried:—

Held, that, under the circumstances, the corporation could not recover over against the contractors.

Statement. THE plaintiff recovered judgment against the corporation of the city of Toronto for $600, for damages sustained by her owing to their negligence in not having fastened a trap door in the roof of the tower of the fire hall. The trap door was in no way secured to the roof, and it was blown off as the plaintiff was passing along the highway, and striking her on the head inflicted the injuries of which she complained.

The contractors, Messrs. Phillips, were brought in by the corporation of the city as third parties to the litigation under the Municipal Act, and the Rules of Court, in order that recourse might be had over against them. At the trial they appeared by counsel, and it was agreed that as between them and the city the verdict of the jury should not be binding except as to the amount of damages, and that the question of their liability to the city should be tried afterwards.

The jury found that the plaintiff had been injured by the negligence of the corporation in not properly securing the trap door. They further found in answer to questions put to them, at the request of the counsel for the corporation (who disputed the liability of the corporation for acts of negligence on the part of the contractors, they having

undertaken to erect and complete the building), that the specifications were satisfied without the placing of fastenings upon the trap door. Statement.

The corporation having satisfied the plaintiff's judgment against them now claimed the amount over from the contractors, and the question of the liability of the latter was argued by consent upon the evidence taken at the trial.

The building had not been taken over from the contractors at the time the accident happened.

The specifications required the contractors to have a trap door in the tower of the building, and to "provide trap and flag pole."

The contract embodied the specifications by reference, and required the contractors to "find and provide such good, proper and sufficient materials of all kinds whatsoever as shall be proper and sufficient for completing and furnishing all the above mentioned works of said building shewn on the said plans and mentioned in said specifications, and to finish and perform all the work called for in a good and workmanlike manner." There was also a stipulation that the corporation "will not in any manner be answerable or accountable * * for injury to any person or persons, either workmen or the public, * * from any cause which might have been prevented by the contractors * * against all which injuries and damages * * the contractors must properly guard and make good all damage from whatever cause, * * and be strictly responsible for the same."

The plan referred to in the contract shewed that the trap door referred to was to be placed upon a steep slope in the roof of the tower.

The question was argued before STREET, J., on the 2nd November, 1897.

Fullerton, Q. C., for the corporation of the city of Toronto.

James Jones, for the contractors.

Judgment.

Street, J.

November 20th, 1897. STREET, J.:—

Under the express agreement at the trial I am not bound by the findings of the jury excepting as to the amount of damages.

If it were necessary to determine the question I should find upon the evidence that the contractors did not comply with their contract to complete and finish their work when they left the trap door unsecured. It was as much a part of the roof as were the shingles, and it was as necessary to secure it properly as it was to put sufficient nails into the shingles.

The result of this finding is, that the corporation were not negligent, and that the contractors were. The jury found the converse, and upon their finding that the corporation had not stipulated for the securing of the trap door they were held liable, and judgment was recovered against them.

I think the result of the cases is that they would not have been liable if the negligence which caused the accident had been that of the contractors. They were landowners, it is true, and the accident happened to one of the public upon the public highway adjoining their land, and arose in the course of the construction of a building being erected for them. But the corporation, having employed competent contractors to do the work, and having stipulated for its being properly done, the work itself being a lawful one and not intrinsically dangerous to any one, and not being in the nature of a nuisance, were not liable for an accident arising from the negligence of the contractors in carrying out their contract: *Reedie* v. *London and North Western R. W. Co.*, 4 Ex. 244.

The corporation have been made liable to pay damages because the jury have found that they did not stipulate that the work should be done in a safe manner. In now seeking to recover these damages over from the contractors they appear from every point of view to be confronted by a dilemma from which there seems no escape. If the find-

ing of the jury was right, then the corporation cannot ask that the result of its own negligence should be visited upon the innocent contractors. If, on the other hand, the finding of the jury was wrong (as I think it was) and the accident was due to the negligence of the contractors, then I must hold that the corporation never was liable to the plaintiff at all, that the contractors alone are liable, and therefore that the corporation cannot recover over from them.

Judgment.

Street, J.

I do not see that the covenant of the contractors contained in their contract with the corporation helps the latter out of this dilemma. It is an agreement by the contractors that they and not the corporation shall be responsible to third persons for injuries arising from causes which the contractor might have prevented, and does not add anything to the liability of the contractors existing without such a stipulation, at all events so far as the present case is concerned. There has been no breach of it, for the contractors have never been asked by any third person to pay any damages, and they still remain technically liable to any third person who has been injured by their negligence.

I think for these reasons that the claim of the corporation over against the contractors must be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

DAVIS v. THE OTTAWA ELECTRIC RAILWAY COMPANY.

Street Railways—Ejecting Passenger—Placing Feet on Cushion—Assault.

A passenger on a street railway having refused when requested by the conductor of the car to remove his feet from the cushion of the opposite seat, and used strong language to the conductor, was ejected from the car :—

Held, that the conductor had a right so to do.

Statement. THIS was an appeal by the defendants from the judgment of the Junior Judge of the county of Carleton, of December 9th, 1896, whereby he directed judgment to be entered for the plaintiff for $200 damages, the amount awarded by the jury.

The action was for damages, the statement of claim alleging that the conductor of a car on the defendants' street railway violently and without just cause assaulted the plaintiff, and ejected him by force from the car in question.

The defendants alleged in their statement of defence that the plaintiff, while on the car, misconducted himself by placing his muddy boots upon the cushions of the seat of the car, and on being told by the conductor to remove his feet therefrom, or that he would have to leave the car, violently abused and assaulted the conductor, who then, without using unnecessary force, stopped the car and removed the plaintiff.

The action was tried in the County Court sittings at Ottawa, on the above mentioned date, before Judge MOSGROVE and a jury.

The evidence shewed that the plaintiff had put his feet on an unoccupied seat in the car in which he was a passenger, and had refused to remove them when requested by the conductor, who, on his refusal to leave the car, ejected him therefrom.

Statement.

The learned trial Judge strongly charged the jury that the plaintiff had the right to put his feet on the seat, doing no damage to the property of the company and not interfering with other passengers, and that the conductor was not justified, under the circumstances, in requesting him to remove them and in ejecting him on his refusal to leave the car.

The defendants appealed to the Divisional Court, composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., upon the ground, among others, as stated in their notice, that the learned Judge should have charged the jury that the defendants had the right to remove or eject the plaintiff from the car in question upon his refusal to comply with the reasonable request of the conductor to remove his feet from the cushions, and that the right of the plaintiff to be carried was subject to the right of the company to put an end to the journey of the plaintiff, and upon the plaintiff refusing to leave the car, to eject the plaintiff because of his refusal to comply with or conform to the reasonable rules of the company and the reasonable request of the officers of the company in charge of the car.

The motion was argued on April 5th, 1897.

W. M. Douglas, for the defendants.

Aylesworth, Q. C., for the plaintiff.

The following authorities were referred to:—*Butler* v. *The Manchester, Sheffield and Lincolnshire R. W. Co.*, 21 Q. B. D. 207; Wood on Railroads, 2nd ed., p. 1672, sec. 361.

Per curiam.—The conductor had, upon the undisputed facts, a right to eject the plaintiff for the misconduct stated; the case should not have been allowed to go to the jury; and the appeal should be allowed, and the action dismissed with costs.

A. H. F. L.

PALMER

v.

THE MAIL PRINTING COMPANY.

Landlord and Tenant—Provision as to Vacancy—Breach of Condition—Avoidance of Lease.

The defendants leased to the plaintiff certain premises, the lease containing the following clause: "In case the said premises * * become and remain vacant and unoccupied for the period of ten days * * without the written consent of the lessors this lease shall cease and be void and the term hereby created expire and be at an end * * and the lessor may re-enter and take possession of the premises" as in the case of a holding over. The plaintiff entered and occupied for about two years when he moved out and left the premises vacant for over ten days and claimed that the lease was at an end:—

Held, that the agreement embodied in the lease was a subsequent condition, a breach of which could only avoid the lease at the instance of the lessors, and that the vacancy created by the lessee did not put an end to the term.

Statement. THIS was an action to have declared void a certain lease made by the defendants to the plaintiff, or for its cancellation or rectification.

The lease was for the period of five years from the first day of February, 1895, at a rental of seventy dollars a month, of certain premises in the "The Mail Building," in the city of Toronto, was executed on behalf of the company by W. J. Douglas, as Secretary and Treasurer, attested by the corporate seal of the company, and contained the following clause:—

"In case the said premises or any part thereof become and remain vacant and unoccupied for the period of ten days or be used by any other person or persons or for any other purpose than as above provided without the written consent of the lessors this lease shall cease and be void and the term hereby created expire and be an end (*sic*) anything hereinbefore to the contrary notwithstanding and the proportionate part of the current rent shall thereupon become immediately due and payable and the lessor may re-enter and take possession of the premises as though

the lessee or other occupant or occupants of the said premises was or were holding over after the expiration of the term." Statement.

The action was tried at Toronto, on October 27th and 28th, 1897, before BOYD, C., without a jury.

It appeared that the plaintiff entered into possession and occupied the premises until about the middle of the month of February, 1897, when he moved out, leaving the premises vacant, and, as the defendant company refused to take them off his hands, he returned the keys, and on or about the 5th of March after they had been vacated, sent a cheque for the rent due up to the 2nd of March, with a letter claiming that the term was at an end under the provision in the lease, as the premises had been vacant for ten days.

E. B. Ryckman, for the plaintiff. There was no binding lease executed by the Mail Printing Co. The signature of the secretary-treasurer was not sufficient without that of the managing director, in addition to the seal of the company, and statutory formalities cannot be dispensed with: 43 Vict. ch. 74, sec. 16 (D.); R. S. O. ch. 100, sec. 8; *D'Arcy* v. *The Tamar, etc., R. W. Co.*, [1867] L. R. 2 Exch. 158; Brice on *Ultra Vires*, 3rd ed., 538, 539; *In re Barneds Banking Co., Ex p. The Contract Corporation*, [1867] L. R. 3 Ch. 105; *The Ecclesiastical Commissioners* v. *Merrall*, [1869] L. R. 4 Exch. 162; *Hobbs* v. *The Ontario Loan and Debenture Co.*, [1890] 18 S. C. R. 483, at p. 527 *et seq.*; Redmond & Lyons, Law of Landlord and Tenant, 4th ed., 44; *Dickenson* v. *Glennie*, [1858] 27 Conn. at p. 111. The document is not an agreement for a lease of which specific performance should be granted. There was no *consensus* between the parties, and specific performance would be unjust to the plaintiff, who reasonably understood the words in a different sense from that relied on by the company, which latter is merely technical: *Wycombe R. W. Co.* v. *Donning-*

Argument.

ton Hospital,[1866] L.R. 1 Ch. 268; *Canedy* v. *Marcy*,[1859] 13 Grey (Mass.) 373, at p. 377; *Mackenzie* v. *Coulson*,[1869] L. R. 8 Eq. 368, at p. 375. The lease terminated and the term ended at the expiration of ten days' vacancy: *Doe d. Lockwood* v. *Clarke*, [1807] 8 East 185; *Estelle* v. *Dinsbeer*, [1894] 61 N. Y. St. R. 97, at p. 98. This is not a forfeiture clause where a party bound by a condition seeks to take advantage of his own breach of it to annul the contract, and no covenant has been broken by the tenant: *Doe d. Spencer* v. *Godwin*, [1815] 4 M. & S. 265. The cases culminating in *Davenport* v. *The Queen*, [1877] 3 App. Cas., at pp. 127, 128, are not apposite. The lease should be construed most beneficially for the lessee: *Dann* v. *Spurrier*, [1803] 3 B. & P. 399, at p. 403. The words of the clause must get their natural meaning: *Fowell* v. *Tranter*, [1864] 3 H. & C., at p. 461. The plaintiff has the option of terminating the lease: *Doe d. Webb* v. *Dixon*, [1807] 9 East 15. If only the company has such right then the plaintiff executed it under mistake: *Garrard* v. *Frankel*, [1862] 30 Beav. 445; *Cooper* v. *Phibbs*, [1867] L. R. 2 H. L. 149; *Paget* v. *Marshall*, [1884] 28 Ch. D. 255; Pollock's Law of Fraud, pp. 119, 120; *Powell* v. *Smith*, [1872] L. R. 14 Eq. 85.

J. B. Clarke, Q.C., for the defendant company. The lease was properly and sufficiently executed by affixing the seal. Sections 15 and 16 of 43 Vict. ch. 73 (D.), are merely directory provisions. They do not contain any nullifying words or words of positive prohibition: Brice on *Ultra Vires*, 3rd ed., pp. 538, 603; *Collins* v. *Blantern*, 1 Sm. L. C., 10th ed., at p. 381; *Cole* v. *Green*, [1843] 6 M. & G. 872; *Aggs* v. *Nicholson*, [1856] 1 H. & N. 165. Previous authority of the Board was not necessary: *The Prince of Wales Life Co.* v. *Harding*, [1857] E. B. & E. 183, at p. 216; *County of Gloucester Bank* v. *Rudry Merthyr, etc., Co.*, [1895] 1 Ch. 629; *Mahony* v. *The Liquidator of the East Holyford Mining Co.*, [1875] L. R. 7 H. L. 869; *Agar* v. *The Official Manager of The Athenæum Life Assurance Society*, [1858] 3 C. B. N. S. 725. Apart from the statute, the seal of the company alone is sufficient: *Cherry* v. *Heming*, [1849]

4 Exch. 631; *Aveline* v. *Wilson*, [1842] 4 M. & G. 801. The provision in the lease is not a limitation, but a mere condition which may be taken advantage of at the option of the lessors only. *Doe d. Lockwood* v. *Clarke*, [1807] 8 East 185, is distinguishable from this case,—there the *habendum* was "if the lessees shall so long occupy,—here there is a fixed term of years: *Doe d. Bryan* v. *Bancks*, [1821] 4 B. & Ald., at p. 406, per Bayley, J.; *Roberts* v. *Davey*, [1833] 4 B. & Ad. 664. The right to re-enter was reserved to the lessors, which would not be necessary if the lease was voidable by the lessee: *Arnsby* v. *Woodward*, [1827] 6 B. & C. 519; *Rede* v. *Farr*, [1817] 6 M. & S., at p. 124; *Dumpor's Case*, 1 Sm. L. C., 10th ed., at p. 38. There was no mistake, the plaintiff knew the terms of the lease, but says he did not know their effect. That is not mistake in law and affords no ground of relief: *Powell* v. *Smith*, [1872] L. R. 14 Eq. 85. I also refer to Kerr on Fraud, 2nd ed., 471; *Lowther* v. *Heaver*, [1888] 41 Ch. D. 248; *Doe d. Rigge* v. *Bell*, 2 Sm. L. C., 10th ed., 116, 117, 121; *Swain* v. *Ayres*, [1888] 21 Q. B. D. 289; *Foster* v. *Reeves*, [1892] 2 Q. B. 255. Argument.

Ryckman in reply. The by-laws of the company give the management of the premises to the managing director, who has not executed the lease. In the cases relied on by the defendants the lessees broke their covenants and sought to take advantage of their own wrongful acts. Here there is no covenant to occupy and consequently no breach by vacating. I refer also to *Bernadin* v. *The Municipality of North Dufferin*, [1891] 19 S. C. R., at p. 613; *Harris* v. *Robinson*, [1892] 21 S. C. R. 390; *Bascomb* v. *Beckwith*, [1869] L. R. 8 Eq. 100.

November 1, 1897. BOYD, C.:—

The main thing in this case is to determine the meaning and effect of the clause: "In case the premises * * become and remain vacant."

It is obvious that the Mail Company, the lessors, wished

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Boyd, C.

to have the place they rented occupied, and that by the plaintiff or other acceptable tenant. If the place was left vacant, or was used by another than the plaintiff (without written consent), then the lease was to be void and the lessors might re-enter.

The authorities cited diverge on the lines of limitation and condition. The distinction is a nice one in many cases, but, broadly speaking, the difference is this: if the term is so confined by the words of its creation that it cannot last longer than till the happening of the event mentioned, that is a limitation whereby the term then and thereupon ends absolutely; but if the term is to cease subject to contingency, the happening of that contingency need not end the term unless advantage thereof be taken to make an entry and avoid the lease. *Doe d. Lockwood* v. *Clarke*, [1807] 8 East 185, is a typical instance of the conditional limitation, and *Arnsby* v. *Woodward*, [1827] 6 B. & C. 519, of a condition subsequent.

Now the agreement embodied in the lease in this case is not that the plaintiff shall be tenant so long as he occupies the premises; but it is a condition that the premises are not vacated by him, or another let into possession, without the landlord's assent. I read it therefore as an example, not of conditional limitation, but of subsequent condition—a breach of which can only avoid the lease at the instance of the lessors.

The modern method of construction in such cases is that however strong the words of condition, the Court will not construe the lease to be void and the term at end unless the lessor elects to take advantage of the forfeiture: *Hughes* v. *Palmer*, [1865] 19 C. B. N. S. 393; *Reid* v. *Parsons*, [1817] 2 Chit. 247; *In re Tickle, Ex p. Leather Sellers Co.*, [1886] 3 Morrell B. C. 126; *Davenport* v. *The Queen*, [1877] 3 App. Cas. 115, at pp. 128, 129.

My strong impression is that the lease is valid as a lease, and that the non-observance of all the formalities of execution by the company is practically immaterial, so long as the corporate seal is affixed by the proper custodian.

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But it is not necessary so to decide, as the doctrine in such cases as *The Ecclesiastical Commissioners* v. *Merrall*, [1869] L. R. 4 Exch. 162, applies to make the plaintiff liable for the current year's rent, he having entered upon the third year before vacating the premises. This will entitle the defendants to recover for the rent as fixed by the lease from April, 1897, till the end of the year in any event. But all that is counterclaimed is for two months, April and May, and for this, amounting to $135.33, judgment should go against plaintiff.

The action is dismissed with costs and judgment for this amount with costs on the counterclaim.

The other matters I disposed of at the trial. No case is made out on the evidence for rectification or annulment of the lease.

Notice of appeal was given, but a settlement was subsequently arrived at between the parties.—REP.

G. A. B.

[DIVISIONAL COURT.]

RE SAWYER MASSEY CO. (LIMITED) AND PARKIN.

Division Courts—Jurisdiction—Agreement for Sale of Machine—Ascertainment of Amount Claimed.

Under a written agreement for the sale of a machine signed by defendant, he was to send to the plaintiffs, within ten days after the machine was started, a promissory note, with approved security, for $125, the price thereof; and in default the price was to become forthwith due and payable. The machine, which was by the agreement to be delivered by plaintiffs f. o. b. cars, addressed to defendant to an outside railway station, was received and used by him, and shortly after was returned to plaintiffs. In an action on the agreement:—

Held, *per* ROBERTSON, J., that there was no jurisdiction in the Division Court to entertain an action for the price of the machine, as the amount was not "ascertained by the signature of the defendant" under sec. 70, sub-sec. (O.) of R. S. O. (1887) ch. 51, for in addition to proof of the signature, evidence was necessary to shew that the terms of the agreement had been performed by the plaintiffs.

On appeal to the Divisional Court the decision of ROBERTSON, J., was reversed, and a mandamus ordered to issue. *Petrie* v. *Machan*, *ante* p. 642, followed.

Statement. THIS was a motion made on behalf of the plaintiffs in the above matter for an order of mandamus directed to the Judge of the County Court of the county of Dufferin to determine a plaint heard by him in the Fourth Division Court, in the county of Dufferin, at "Mono Mills" on 1st May, 1887.

The motion was argued in Chambers, on 8th October, 1897, before ROBERTSON, J.

Kirwan Martin, for the plaintiffs.

W. L. Walsh, for the defendant.

The facts appear in the judgment.

October 26th, 1897. ROBERTSON, J.:—

The action is brought by the Sawyer Massey Co. (Limited), against Robert Parkin to recover $125, being the price of a two-horse tread power, which the plaintiffs agreed to sell and which the defendant agreed to buy under the terms of an agreement in writing made between

them and signed by the defendant, dated 10th December, 1896, which tread power was delivered by the plaintiffs to the defendant and received by him on or about the 22nd December, 1896, and which the defendant after using, returned to the plaintiffs on the 20th January, 1897, and refuses to pay for same. Judgment. Robertson, J.

The action was commenced about 20th February, 1897.

The agreement sets forth that defendant is to give his promissory note (with approved security) for $125, payable on 1st November, 1897; the note to be signed by defendant and sent to the plaintiffs at Hamilton within ten days after machine started; and in default of this latter, the contract price to become due and payable forthwith. The plaintiffs to deliver the machine f. o. b. cars at Hamilton, addressed to Shelbourne Station, Canadian Pacific railway, on or about 12th December, 1896, or as soon after as the same is finished and car obtained. The sale was made subject to certain other conditions expressed in the agreement, which are not material on this motion.

The action came on for trial before the learned County Judge, the parties being represented by counsel. At the opening of the matter counsel for defendant objected to the jurisdiction, that there was no ascertainment of the amount of the plaintiffs' claim, within the meaning of the Division Court Act, R. S. O. (1887) ch. 51, sec. 7, sub-sec. (*c*). The learned Judge by consent heard all the evidence pro and con, subject to the objection. There was no dispute as to the price of the machine. The plaintiffs proved the signature of the defendant to the agreement and the delivery of the machine; but after consideration, the learned Judge came to the conclusion that he had not jurisdiction in the matter and declined and still declines to determine the case—hence this application.

The 70th section of the Division Courts Act declares that "(1) The Division Courts shall have jurisdiction in the following cases:—(*c*) All claims for the recovery of a debt or money demand, the amount or balance of which

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does not exceed $200 and the amount of original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents."

The cases on this provision, decided by Divisional Courts shew that the learned County Judge was right in the conclusion come to by him, and I need only refer to *Moses* v. *Moses*, (1889) 13 P. R. 144, where it was determined that inasmuch as plaintiff "had to show a consideration for the promise" and "to give other evidence than mere proof of signature," the Division Court had not jurisdiction. Mr. Justice Proudfoot, at p. 145, says: "But we need not speculate further upon this, for the plaintiff having to establish the consideration outside the paper, the debt is not ascertained by proving the signature alone;" and in this Mr. Justice Ferguson entirely concurred. That case was decided on 12th June, 1889.

Now this case, it is contended, is in conflict with a previous decision of the Queen's Bench Division, *Re Graham* v. *Tomlinson*, (1888) 12 P. R. 367, inasmuch as the latter expressly overrules *Kinsey* v. *Roche*, (1881) 8 P. R. 515, the facts of which were that plaintiff and defendant were the joint makers of a promissory note for $169, payable to Goldie & McCulloch. The defendant contended that it was a partnership transaction; but the learned Judge found as a fact that plaintiff had signed it as a surety only. After it became due plaintiff paid it in full, and suit was brought to recover from defendant the amount so paid. It was objected that the Division Court had no jurisdiction, because the amount of the original amount of the claim was not ascertained by the signature of the defendant. Prohibition was applied for and granted by Osler, J., who says in his judgment, at p. 516: "The plaintiff sues, not on a note or upon any instrument which admits a liability to him on the defendant's part, but for money paid at the request of the defendant. How is the amount or original amount of that claim ascertained by the signature of the defen-

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defendant? Not by the note, for that does not necessarily import, whether you look at the legal or equitable position of the parties, any liability from the one to the other. There was no debt or claim until the plaintiff had paid the note or part of it. It was not ascertained when the note was made. It is said that the note proves the request, but it does not. The request is proved by evidence extrinsic to, and in contradiction of, the contract apparent on the face of the note."

Armour, C. J., in giving judgment in *Graham* v. *Tomlinson*, says, at p. 369: "All that is necessary under this section" (43 Vict. ch. 8, sec. 2 (O.), now R. S. O. (1887) ch. 51, sec. 70, sub-sec. (c), "to give the Division Court jurisdiction over all claims for the recovery of a debt or money demand, the amount or balance of which does not exceed $200, is, that the amount or original amount of the claim be ascertained by the signature of the defendant," etc.; and further, "The signature ascertaining the amount or original amount of the claim required by the statute, is not confined by the statute to an instrument upon which the claim is made, or which gives the cause of action; for the claim may be made and the cause of action may arise irrespective of any instrument, but it is quite sufficient if the signature required by the statute is to any writing which may be adduced in evidence, shewing the amount or original amount of the claim;" and the learned Chief Justice gives the following—"For example, if there had been money transactions between A. and B. without writing, out of which A. became indebted to B. in $150, and B. wrote to A. demanding that sum, and A. replied referring to B.'s letter, and asking for further time for payment, and thereafter B. sued A. for the $150, the letters so written could be adduced in evidence, and would shew that the amount of the original claim sued for was ascertained by the signature of A. and would so bring the case within the jurisdiction of the Division Court." That case was decided in February, 1888.

Then we have *McDermid* v. *McDermid*, in the Court of

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Appeal, 15 A. R. 287, decided in June, 1888, in which special reference is made to *Graham* v. *Tomlinson* and *Kinsey* v. *Roche*, approving of the latter and disapproving of the former; and in *Moses* v. *Moses*, which was first decided by me, and is to be found at p. 12 of 13 P. R., I particularly refer to both of these cases in these words at the bottom of p. 13: "And I refer to the late case of *McDermid* v. *McDermid*, 15 A. R. 287, as being exactly in point, as settling the question, which was somewhat disturbed by the case of *Graham* v. *Tomlinson*, 12 P. R. 367." So that we have *Kinsey* v. *Roche* restored and *Graham* v. *Tomlinson*, if not overruled, disapproved; and *Moses* v. *Moses* must be held to be a proper disposition of the question, unless the later case of *Ostrom* v. *Benjamin*, (1894) 21 A. R. 467, unsettles the question. This case was decided 30th June, 1894, and settles the jurisdiction of the County Court, and is not, therefore, in point, as I will shew hereafter. But before discussing it I wish to refer to *In re Wallace* v. *Virtue*, 24 O. R. 558, decided on 2nd March, 1894, by Street, J., in which he says, at p. 560, after referring to *McDermid* v. *McDermid*, "I understand the cases to go to the full length of deciding, that where a promise to pay is made in writing which is either expressly or impliedly subject to a condition, the performance of which the plaintiff must prove before he can recover, the claim cannot be considered as having been ascertained by the signature of the defendant; because there the account must be ascertained, not only by the signature, but by proof of the performance of the condition."

And the Chancellor in *Re Shepherd* v. *Cooper*, 25 O. R. 274 (June 4th, 1894), says, at p. 275, "Sec. 70, sub-sec. (*c*) of R. S. O." (1887) "ch. 51, has been much discussed and is followed with decisions not all in the same lines. But the great weight of opinion is against entertaining jurisdiction even though the contract be signed by the defendant if evidence *ultra* has to be given in the way of shewing that everything was furnished according to contract in order to entitle plaintiff to recover. Evidence must be given here

of the consideration passing to the defendant—that the building was used, and that it was furnished according to stipulation before payment can be called for."

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Now that is exactly what was required in the case *en delibre*. The plaintiffs, before they could recover for the price of the machine sued for, were obliged to give evidence that the condition precedent on their part was performed, and that was "evidence *ultra*," of the amount of the claim. But Mr. Kirwan Martin, in a very able argument on behalf of the plaintiffs refers to *Ostrom* v. *Benjamin*, before mentioned. That case was on R. S. O. (1887) ch. 47 (The County Courts Act), sec. 19, which declares that "subject to the exceptions contained in the last preceding section, the County Courts shall have jurisdiction":

Sub-sec. 2, "In all causes and actions relating to debt, covenant and contract, to $400, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant."

The action was brought in the High Court to recover $237.50 for services rendered as pension agent against the defendant who represented to the plaintiff that he was engaged in pressing a United States pension for one Mary Sweet, and that he, the defendant, was to receive from her $500 if he succeeded; and, in consideration that the plaintiff would give his professional services, in endeavouring to procure it, the defendant agreed to pay plaintiff $250, half of the said $500; that the plaintiff did give such services and the pension was obtained, but the defendant did not pay. The defendant denied any such agreement. The jury found in favour of the plaintiff. There was no order or certificate for costs, and the Master in taxation allowed them on the County Court scale. From this there was an appeal, first to a Judge in Chambers, who reversed the taxing officer, second to the Divisional Court, who restored the finding of that officer, and third, to the Court of Appeal, who affirmed the Divisional Court. Hagarty, C. J. O., says, at p. 468: "I am of opinion, whenever a sum of $400 is agreed on by the parties as the remunera-

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tion for services to be rendered, or for the price of a horse or goods sold, etc., if the services be performed, or the article or goods delivered in pursuance of the bargain, that the amount can be recovered in the County Court. * * Therefore the amount was, as I understand, liquidated and ascertained by the act of the parties." Again, at p. 469, "The fact of the liquidation is proved by the verdict. It is an amount ascertained by the act of the parties." And Maclennan, J. A., at p. 471, says: "What is meant by the amount? Obviously, I think the amount which the plaintiff is entitled to recover; that is the only thing to which these words can reasonably be held to apply, and therefore wherever the amount to be recovered is $400 or less and is so ascertained and liquidated, if it be a cause of action relating to debt, covenant, or contract, the County Court has jurisdiction."

The distinction between the two jurisdictions is this: In the County Court "the acts of the parties" is sufficient; or "the signature of the defendant." In the Division Court "the signature" only of the defendant gives the jurisdiction to the extent of $200, so that the County Court has jurisdiction in all causes and actions relating to debt, covenant and contract to $400, where the amount is either liquidated or ascertained by the act of the parties or by the signature of the defendant, whereas the Division Courts have only jurisdiction when the amount or balance does not exceed $200 and the amount or original amount is ascertained by the signature of the defendant.

I think the intention of the Legislature is plain; there are three distinct classes of jurisdiction expressed in the 70th section: (1) In all actions where the amount claimed does not exceed $60; (2) In all claims, etc., of debt, account or breach of contract or covenant or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100; (3) All claims for the recovery of a debt or money demand the amount or balance of which does not exceed $200 and the amount or original amount of the claim is ascertained by the signature of the defendant.

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Robertson, J

Now how can it be said that the plaintiffs' claim here is ascertained by the signature of the defendant? The signature of the defendant only proves one-half of that which goes to make the plaintiffs' case, and the proof of which is only one of several steps in the plaintiffs' case. The defendant agreed under his signature to pay $125 in consideration that the plaintiffs would place f. o. b. on cars a certain machine. If the plaintiffs could recover by proving the signature of the defendant only, the machine might never have been delivered and the defendant would be obliged to prove that the plaintiffs did not place it on board the cars at all, if that was the fact; so that the amount which plaintiffs seek to recover would not be ascertained by the signature of the defendant. In the case of a promissory note it is different; that is an agreement to pay a certain sum on a certain day before action brought, and there is an ascertainment expressed on it by the signature of the defendant, that he has received value for the amount which he promises to pay, and it is in such like cases only that the Division Court has jurisdiction up to $200; but whenever the plaintiff has to prove something more than the signature of the defendant to enable him to make out a case in the Division Court for the recovery of a debt, the Court has no jurisdiction to hear him, if the amount claimed is more than $100.

If it had been intended to give the extended jurisdiction, as contended for before me, it was not necessary to enact sub-section (*c*) of the 70th section, because sub-section (*b*) would have answered the purpose by increasing the amount to $200. The fact is that, if this contention was allowed, every action which is described in sub-section (*b*) could be maintained in the Division Court, notwithstanding the amount exceeded $100, so long as it did not exceed $200 which was clearly not the intention of the Legislature when this increased jurisdiction was conferred on the Division Courts. Up to the time of passing 43 Vict. ch. 8 (O.), the largest sum that could be sued for in the Division Courts was $100, which was not required to be

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ascertained either by the act of the parties or by the signature of the defendant, but was regulated by R. S. O. (1877) ch. 47, sec. 54, sub-sec. 2, which was in these words: "(2) All claims for debt or for any sum payable under or upon any contract for the payment of money, or for payment in labour, or in any kind of goods or commodities or in any other manner than in money, where the amount or balance claimed does not exceed $100." There is nothing here about the amount being ascertained by the act of the parties or by the signature of the defendant, so that no matter how great the original amount was, or how it had been reduced, if the balance claimed did not exceed $100 the Division Courts had jurisdiction. This provision afterwards, by 41 Vict. ch. 8, sec. 6 (O.), was struck out. Sub-sec. (*c*) of sec. 70 of ch. 51 of R. S. O. (1887), was substituted therefor.

Then "The Division Courts Act, 1880," was passed for the purpose *inter alia* of extending the jurisdiction, and what is now sub-sec. (*c*) of sec. 70 of R. S. O. (1887) was passed extending the jurisdiction to $200, under the circumstances set forth in that sub-section; so that it appears clear that the $100 jurisdiction was not intended to extend to claims such as were specified in sub-section (*b*) otherwise all that would have been necessary was to increase the amount from $100 to $200.

In my judgment, therefore, it is clear that *Ostrom* v. *Benjamin*, so much relied on by Mr. Martin, does not in the least disturb *Moses* v. *Moses* and the other cases referred to which have arisen under the Division Courts Act, except, of course, *Graham* v. *Tomlinson*.

Under the Division Courts Act the "amount or original amount of the claim" must be "ascertained by the signature of the defendant." "The acts of the parties" do not affect the case, unless the amount is ascertained by the signature of the defendant; and that is the only "act" that is to be taken into consideration. In the County Court the signature of the defendant is not a necessary factor, so to speak, in ascertaining whether the Court has jurisdiction.

Judgment.
Robertson, J.

Now, in the case before me the plaintiffs were obliged to prove more than the signature of the defendant; they had to prove something beyond that, viz., the performance of the condition precedent on their part. Had it been in the County Court, that would be an act of the parties which could be proven, and which, if the amount claimed did not exceed $400, would not oust the County Court of its jurisdiction. If that had been done, then the signature of the defendant would not have been a necessary factor; but if plaintiff brought himself within the requirements of sub-section (*b*) the Court would have jurisdiction, and the case now under consideration would have been properly brought in the Division Court.

I have not overlooked sub-sec. 39 of sec. 8 of the Interpretation Act, R. S. O. ch. 1, in the construction that I feel bound to put on the section of the Division Courts Act involved in this motion; and that is to give it "such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof" and not "a frittering away of the proper effect of a very useful and beneficial provision," as was said by the learned Chief Justice of the Queen's Bench Division in *Re Graham* v. *Tomlinson*, was the case in *Re Mead* v. *Creary*, decided by the Court of Common Pleas, 32 C. P. 1, in restricting the operation of the 14th section of the Division Courts Act, (1880), to cases within the general jurisdiction of the Division Courts Act.

I am, therefore, of opinion that the learned Judge of the County Court was right and the motion for mandamus must fail, and I think the applicants should pay the costs of the motion.

The plaintiffs appealed from the order of ROBERTSON, J., to the Divisional Court, composed of ARMOUR, C. J., and FALCONBRIDGE, J.

Statement. The appeal was argued on the 6th December, 1897.

Kirwan Martin, for the plaintiffs.

No one appeared for the defendants.

The Court allowed the appeal; reversing the order with costs, and granted the mandamus asked for by the plaintiffs following their own decision in *Petrie* v. *Machan*, *ante* p. 642.

G. F. H.

END OF VOL. XXVIII.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

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See COUNTY COURTS, 2, 3—CRIMINAL LAW, 8—DAMAGES, 3—DIVISION COURTS, 5, 7—INFANT—RAILWAYS AND RAILWAY COMPANIES, 1, 4.

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ASSESSMENT AND TAXES.

Court of Revision—Petition—Remission of Taxes—By-Law—Mandamus.]—The Court of Revision of a municipality is obliged to receive and decide upon a petition for remission of taxes, presented under sec. 67 of 55 Vict. ch. 48 (O.), notwithstanding that the municipality has not passed any by-law on the subject.

A mandamus granted. *Re Norris et al.*, 636.

See EXECUTORS AND ADMINISTRATORS, 1 — WATER AND WATERCOURSES, 2.

ASSIGNMENT OF LEASE.

See LANDLORD AND TENANT, 1, 5.

ASSIGNMENTS AND PREFERENCES.

See BANKRUPTCY AND INSOLVENCY.

AUCTIONEER.

Conversion of Goods — Chattel Mortgagee.]—An auctioneer who, at the instance and on the premises of the mortgagor, sells at auction in the ordinary course the goods in a chattel mortgage, valid and in full force as regards the parties to it, and delivers possession of the goods to the purchaser, is liable to the mortgagee for conversion of the goods, although the mortgage may be void as regards creditors of the mortgagor or subsequent purchasers for value.

Cochrane v. *Rymill*, 27 W. R. 776, 40 L. T. N. S. 744, followed.

National Bank v. *Rymill*, 44 L. T. N. S. 767, and *Barker* v. *Furlong*, [1891] 2 Ch. 172, distinguished. *Johnston* v. *Henderson et al.*, 25.

BANKRUPTCY AND INSOLVENCY.

1. *Assignment for Benefit of Creditors—Composition Arrangement—Distinction—R. S. O. 1887 ch. 124, sec. 13—Penalty.*]—An instrument in writing whereby a debtor transfers all his assets to an assignee for the purpose of paying a fixed sum on the dollar to the creditors, and of securing to the debtor the enjoyment of the residue, is an arrangement by way of composition, and not an absolute assignment under R. S. O. 1887 ch. 124, although stated in the instrument to be under that Act; and an action for penalties against the assignee for not advertising and registering such an instrument, pursuant to that Act, will not lie. *Gundry* v. *Johnston*, 147.

2. *R. S. O. 1887 ch. 124, sec. 7—Creditor—Right of Action—Fraudulent Sale of Assets of Estate—Assignee.*]—Section 7 of the Assignments Act, R. S. O. 1887 ch. 124, applies only to transactions made or entered into by the insolvent; and

a creditor of the insolvent has a right of action in his own name against the assignee to set aside a sale by the latter of the assets of the estate, as fraudulent.

Reid v. *Sharpe*, 28 O. R. 156 *n.*, followed. *Hargrave* v. *Elliot et al.*, 152.

3. *Right to Prove on Insolvent Estate—R. S. O. 1887 ch. 124, sec. 20, sub-sec. 4—Claim "not Accrued Due"—Construction of Contract.*]—Under an assignment for the benefit of creditors under R. S. O. 1887 ch. 124, a claim on a contract to pay, at a time which was subsequent to the assignment, a fixed sum for advertising space in a newspaper, whether occupied or not, may be proved as a claim "which has not accrued due," under sec. 20, sub-sec. 4, of the Act. *Mail Printing Company* v. *Clarkson*, 326.

[Reversed by the Court of Appeal, 11th January, 1898.]

4. *Assignments and Preferences—Action by Creditors—Right of Attacked Creditor to Share in Proceeds.*]—When proceedings are taken under sec. 7, sub-sec. (2), of R. S. O. 1887 ch. 124, by a creditor, on behalf of himself and all those who, within a limited time, should come in and contribute to the risk and expense of an action to set aside a security held by another creditor, the latter may, while defending his security, join with the attacking creditor in indemnifying the assignee, so that, in the event of his failing to retain his security, he may participate in the fruits of the litigation. *Barber* v. *Crathern*, 615.

5. *Advances by Bank to Insolvent —Pledge of Goods as Security—Invalidity of—Banking Act—Creditors' Claims—58 Vict. ch. 23, sec. 1 (O.) —"Invalid against Creditors"—Retroactivity of Statute—Warehouse Receipts—Exchange of Securities—53 Vict. ch. 31, sec. 75, sub-sec. 2 (D.)—Collateral Security—Mortgage—Declaration—Parties.*]—The plaintiff, a creditor of an insolvent, alleged that in regard to certain pledges made by the latter to a bank, there had been no contemporaneous advances, and that the pledges were invalid under sec. 75 of the Banking Act, 53 Vict. ch. 31 (D.), and claimed to be entitled to obtain moneys received through disposal of the pledges and to apply them in payment of creditors' claims, by virtue of the provisions of sec. 1 of 58 Vict. ch. 23 (O.):—

Held, that the words "invalid against creditors" should be treated as limited to transactions invalid against creditors, *qua* creditors, and not as extending to transactions declared invalid for reasons other than those designed to protect creditors:—

Held, also, that the last named Act did not apply, because the money had been received by the bank before it was passed, and it was not retrospective.

The insolvent had been in the habit of buying hops from time to time, and giving the bank his own warehouse receipts or direct pledges for the purpose of raising money to pay for them. Then, at the request of the bank, he constituted his bookkeeper his warehouseman, and the latter issued warehouse receipts to the bank in substitution for the securities or receipts theretofore held, there being no further advance made when the new securities were given:—

Held, that this exchange of securities should be treated as authorized

under sub-sec. 2 of sec. 75 of the Banking Act.

The plaintiff asked for a declaration that advances made by the bank upon a mortgage by the insolvent to a third person, and by him assigned to the bank, were contrary to the Banking Act, and that the property was free from the mortgage :—

Held, that no such declaration should be made in the absence of the mortgagee, who was liable to the bank as indorser of a promissory note of the insolvent, collateral to the mortgage. *Conn* v. *Smith et al.*, 629.

6. *Execution — Costs — Lien — Assignments and Preferences—Loss of Lien—Ranking on Estate.*]—The lien of a plaintiff for costs by virtue of sec. 9 of R. S. O. 1887 ch. 124, under an execution in the sheriff's hands, against an insolvent, at the time of an assignment by him for the benefit of creditors under that statute, is not superseded by such assignment, and the sheriff is entitled to proceed and sell for the amount of such costs. If he does not do so, and the plaintiff loses his lien :—

Held, *per* ARMOUR, C.J., that he is not entitled to rank on the insolvent's estate as a preferential creditor.

Per STREET, J.—That even if so entitled, it could only be on the net funds available after payment of the proper charges incurred in the management of the estate. *Gillard et al.* v. *Milligan*, 645.

See EXECUTORS AND ADMINISTRATORS, 2—FRAUDULENT CONVEYANCE.

BANKS AND BANKING.

See BANKRUPTCY AND INSOLVENCY, 5—BROKER.

BARRISTER.

Counsel Fees—Right of Action for—Solicitor and Client.]—In this Province a counsel's right of action for his fees for services in the nature of advocacy, is against the client of the solicitor retaining him, and not against the solicitor, unless by special agreement, or when there is evidence of credit having been given to the solicitor alone, or of money in the solicitor's hands to answer the claim ; and a solicitor so employing counsel has implied authority to pledge his client's credit for the payment of counsel fees. *Armour* v. *Kilmer*, 618.

BENEVOLENT SOCIETY.

Rules and Regulations—Alterations in—Amount of Sick Benefit—Reduction of.]—The plaintiff became a member of an Oddfellows' Lodge by subscription that he had examined the general laws and by-laws, and was ready and willing to yield obedience thereto. At that time there was a by-law in force fixing the amount of the weekly sick benefit payable to members, and also another by-law by which the society could repeal, suspend, or amend existing by-laws by a by-law passed by a two-thirds vote. Subsequently a by-law was passed reducing the amount of the sick benefit, whereupon the plaintiff availed himself of the various appeals permitted by the constitution, and on his failing thereon, brought an action seeking a declaration that the action of the lodge was contrary to natural justice and that he was entitled to payment of the amount fixed when he became a member :—

Held, that this was a matter within the competence of the society, and

therefore the Court could not interfere. *Baker* v. *Forest City Lodge, Independent Order of Oddfellows. Parkhouse* v. *Dominion Lodge, Independent Order of Oddfellows*, 238.

[Affirmed, 24 A. R. 585.]

See INSURANCE.

BETTING.

See GAMING, 2.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Independent Contemporaneous Agreement—Parol Evidence—Admissibility.*]—It is a good defence to an action by the personal representatives of the payee against the maker of a promissory note for value received, that at the time of the making of the note an oral agreement was entered into between the payee and the maker which has been fully performed, that if the latter would pay interest on the note, and, although not liable to do so, would support for life a relative of the former, the note should be considered paid; and evidence to the above effect was held admissible in an action on the note brought after the complete performance of the agreement by the defendant.

Judgment of the County Court of Perth reversed. *McQuarrie et al.* v. *Brand*, 69.

2. *Alteration after Maturity—Signature by New Maker—Release — Time— Presentment — Delay — Prejudice—Continuing Security.*]—A promissory note, payable one year after date, was made by two persons, one signing for the accommodation of the other. After maturity the note was signed by a third person, with the object of giving additional security to the holder:—

Held, that the third person was to be regarded as an indorser, and his signature did not constitute an alteration in the note such as would discharge the original accommodation maker; and, upon the evidence, that there was no agreement to give time for payment which would discharge him, if regarded as a surety.

Ex p. Yates, 2 DeG. & Jo. 191, followed.

Kinnard v. *Tewsley*, 27 O. R. 398, distinguished.

2. *Held*, that, treating the last signer as an indorser on a note payable on demand, it was not shewn that he had been prejudiced by non-presentment for payment prior to this action, the instrument having been dealt with as a continuing security, and there having been no unreasonable delay in presentment. *Carrique* v. *Beaty et al.*, 175.

[Reversed, 24 A. R. 302.]

3. *Note Payable at Particular Place—Non-Presentment at Maturity—Duty of Maker.*]—A promissory note payable at a particular place need not be presented there at maturity in order to charge the maker, although there are funds to meet it, and the Bills of Exchange Act, 1890, has made no difference in this respect.

The duty of the maker of such a note is not only to have sufficient funds at the place of payment at maturity, but also to keep them there until presentment.

Semble per ARMOUR, C.J.—The only effect of nonpresentation before action, when sufficient funds have

been kept at the place of payment, is to disentitle the plaintiff to costs. *Merchants Bank of Canada* v. *Henderson*, 360.

See BANKRUPTCY AND INSOLVENCY, 5—COMPANY—DIVISION COURTS, 2 — EXECUTORS AND ADMINISTRATORS, 2.

BILLS OF SALE AND CHATTEL MORTGAGES.

See AUCTIONEER.

BONUS.

See MORTGAGE, 2.

BROKER.

Sale of Shares—Undisclosed Principal — Marginal Transfer — Indemnity—Assignment of Right to —Statute of Limitations—Former Judgment—By-laws of Stock Exchange—Arbitration.] —The plaintiff sold and transferred his shares in a bank to C., a broker, who sold them on the Stock Exchange to the defendant, also a broker, in ignorance that the latter was acting for a customer. The transfer in the bank books from C. was effected by leaving the transferee's name blank, and marking the shares in the margin of the transfer as subject to the order of the defendant, who similarly marked them subject to the order of his principal, whose name was filled in as transferee, and who duly accepted the transfer.

Within a month from the sale by the plaintiff, the bank was ordered to be wound up, and in the liquidation the plaintiff was compelled, as a contributory, to pay the double liability under secs. 70 and 77 of the Banking Act, R. S. C. ch. 120. The plaintiff recovered judgment against C. for the amount he had paid, and afterwards took an assignment from C. of his right to indemnity against the defendant.

In an action to enforce this right :—

Held, (*a*) that the obligation to indemnify arose from the purchase, and not from the transfer; that a broker acting in his own name, for an undisclosed principal, assumes the liability of the latter, and the fact that the transfer was executed in a form intended to enable the defendant to pass the shares to the ultimate purchaser did not relieve the defendant from his liability.

(*b*) That, although C. had not satisfied the judgment, he was entitled to indemnity from the defendant, and, after judgment, to assign his rights to the plaintiff, who could enforce them :—

Held, also, that the mere existence of a liability to indemnify the plaintiff gave no right of action to C., and that the Statute of Limitations did not begin to run in favour of the defendant until the recovery of judgment against C.

Sutherland v. *Webster*, 21 A. R. 228, and *Eddowes* v. *Argentine Loan Co.*, 63 L. T. N. S. 364, followed.

Held, further, that the plaintiff's right against C. first accrued when the liquidators became entitled to immediate payment.

Before this action, the plaintiff sued the defendant and C. on an assignment to him of C.'s claim against the defendant, made before the plaintiff's judgment against C., which action was dismissed against the defendant, on the ground that C. had

no tbefore judgment been damnified, and the defendant sought herein to set up that dismissal in bar of this action :—

Held, no defence to this action.

A by-law of the Stock Exchange, not authorized by their Act of incorporation, provided that all disputes between members, arising out of transactions on the Exchange, should be referred to arbitrators :—

Held, that they had no right to pass such a by-law ousting members from their right to resort to the Courts of the Province.

Essery v. *Court Pride of the Dominion*, 2 O. R. 596, considered.

Judgment of Meredith, J., at the trial reversed. *Boultbee* v. *Gzowski et al.*, 285.

[Reversed, 24 A. R. 502.]

BY-LAWS.

See BROKER—INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS, 2, 4, 5, 6, 8.

CARRIERS.

Express Company—Profession of Carrying—Discrimination in Customers — Charges.] — An express company is not bound to carry except according to its profession, and is entitled to discriminate as to its customers, and is not confined by any rule or regulation as to the charges it may make, providing they are reasonable.

An action by a rival company which collected together small parcels for the carriage of which it charged a rate much smaller than the defendant, an express company, did for similar parcels, packed them together in one large parcel, and sought to compel the defendant, at great loss, to carry such parcel by size and weight rate, was dismissed. *Johnson et al.* v. *Dominion Express Company*, 203.

CASES.

Agency Co. v. *Short*, 13 App. Cas. 793, distinguished, 508.]—*See* HUSBAND AND WIFE, 3.

Attwood v. *Taylor*, 1 M. & G. 307, commented on, 212.]—*See* DIVISION COURTS, 1.

Barker v. *Furlong*, [1891] 2 Ch. 172, distinguished, 25.]—*See* AUCTIONEER.

Bickford v. *Town of Chatham*, 16 S. C. R. 235, followed, 399.]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

Bristol, Corporation of, v. *Westcott*, 12 Ch. D. 461, referred to, 29.]—*See* LANDLORD AND TENANT, 1.

Clark v. *Barber*, *In re*, 26 O. R. 47, followed but commented on, 212.]—*See* DIVISION COURTS, 1.

Cochrane v. *Rymill*, 27 W. R. 776, 40 L. T. N. S. 744, followed, 25.]—*See* AUCTIONEER.

Coffin v. *North American Land Co.*, 21 O. R. 80, distinguished, 508.]—*See* HUSBAND AND WIFE, 3.

Cornish, *Re*, 6 O. R. 259, not now applicable, 215.]—*See* LIEN.

Cossette v. *Dun*, 18 S. C. R. 222, discussed, 21.]—*See* DEFAMATION, 1.

Cowley v. *Newmarket Local Board*, [1892] A. C. 345, followed, 1.]—*See* CROWN.

Davis v. *Foreman*, [1894] 3 Ch. 654, followed, 399.]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

Davis v. *Kennedy*, 13 Gr. 523, followed, 612.]—*See* TRADE-MARK.

Dickenson v. *Harrison*, 4 Pri. 282, commented on, 212.]—*See* DIVISION COURTS, 1.

Drennan v. *City of Kingston*, 23 A. R. 406, discussed, 525.]—*See* MUNICIPAL CORPORATIONS, 11.

Eddowes v. *Argentine Loan Co.*, 63 L. T. N. S. 364, followed, 285.]—*See* BROKER.

Essery v. *Court Pride of the Dominion*, 2 O. R. 596, considered, 285.]—*See* BROKER.

Ford v. *Metropolitan R. W. Co.*, 17 Q. B. D. 12, distinguished as to "structural damages," but followed as to damages for personal inconvenience, 14.]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

Fortescue v. *Lostwithiel and Fowey R. W. Co.*, [1894] 3 Ch. 621, not followed, 399.]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

Flick v. *Brisbin*, 26 O. R. 423, distinguished, 588.]—*See* CRIMINAL LAW, 7.

Gibson v. *Mayor of Preston*, L. R. 5 Q. B. 218, followed, 1.]—*See* CROWN.

Gilbert v. *Corporation of Trinity House*, 17 Q. B. D. 795, distinguished, 2.]—*See* CROWN.

Goddard v. *Coulson*, 10 A. R. 1, not now applicable, 215.]—*See* LIEN.

Hammersmith, etc., R. W. Co. v. *Brand*, L. R. 4 H. L. 171, distinguished, 468.]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

Harris v. *Mudie*, 7 A. R. 414, followed, 508.]—*See* HUSBAND AND WIFE, 3.

Ivay v. *Hedges*, 9 Q. B. D. 80, followed, 1.]—*See* CROWN.

Keachie v. *Corporation of Toronto*, 22 A. R. 371, distinguished, 229.]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

Kendal v. *Wood*, L. R. 6 Ex. 243, applied and followed, 322.]—*See* PARTNERSHIP.

Kimball v. *Smith*, 5 U. C. R. 32, followed, 140.]—*See* SEDUCTION.

Kinnard v. *Tewsley*, 27 O. R. 398, distinguished, 175.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

L'Esperance v. *Duchene*, 7 U. C. R. 146, followed, 140.]—*See* SEDUCTION.

Leverson v. *Lane*, 13 C. B. N. S. at p. 285, applied and followed, 322.]—*See* PARTNERSHIP.

McCormick v. *Stowell*, 138 Mass. 431, not followed, 29.]—*See* LANDLORD AND TENANT, 1.

Mackenzie Trusts, In re, 23 Ch. D. 750, principle of decision applied, 312.]—*See* TRUSTS AND TRUSTEES, 2.

Mersey Docks Co. v. *Gibbs*, L. R. 1 H. L. 93, distinguished, 2.]—*See* CROWN.

Moore v. *City of Toronto*, 26 O. R. 59*n*, followed, 1.]—*See* CROWN.

National Bank v. *Rymill*, 44 L. T. N. S. 767, distinguished, 25.]—*See* AUCTIONEER.

Petrie v. *Machan*, 28 O. R. 642, followed, 662.]–*See* DIVISION COURTS, 9.

Picton, Municipality of, v. *Geldert*, [1893] A. C. 524, followed, 1.]—*See* CROWN.

Regina v. *Hendershott and Welter*, 26 O. R. 678, overruled, 583.]—*See* CRIMINAL LAW, 6.

Regina v. *Williams*, 9 App. Cas. 418, distinguished, 2.]—*See* CROWN.

Regina ex rel. Harding v. *Bennett*, 27 O. R. 314, followed on one point, 495.]–*See* MUNICIPAL CORPORATIONS, 10.

Reid v. *Sharpe*, 28 O. R. 156 *note*, followed, 152.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

Riches, In re, 4 De. G. J. & S. at p. 585, applied and followed, 322.]—*See* PARTNERSHIP.

Rocke v. *Rocke*, 9 Beav. 66, followed, 553.]—*See* WILL, 6.

Salomon v. *Salomon*, [1897] A. C. 22, distinguished, 497.]–*See* FRAUDULENT CONVEYANCE.

Sanitary Commissioners of Gibraltar v. *Orfila*, 15 App. Cas. 400, followed, 1.]—*See* CROWN.

Schmidt v. *Town of Berlin*, 26 O. R. 54, followed, 1.]—*See* CROWN.

Sear and Woods, Re, 23 O. R. 474, not now applicable, 215.]—*See* LIEN.

Smith v. *Chorley District Council*, [1897] 1 Q. B. 532, followed, 399.]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

Southcote v. *Stanley*, 1 H. & N. 247, followed, 1.]—*See* CROWN.

Sutherland v. *Webster*, 21 A. R. 228, followed, 285.]—*See* BROKER.

Sydney, Municipal Council of, v. *Booth*, [1895] A. C. 433, followed, 1.]—*See* CROWN.

Todd v. *Dun*, 15 A. R. 85, followed, 21.]—*See* DEFAMATION, 1.

Tomlinson v. *Morris*, 12 O. R. 311, specially referred to, 591.]—*See* SALE OF GOODS, 2.

Turquand, Ex p., 14 Q. B. D. 643, followed, 442.]—*See* MUNICIPAL CORPORATIONS, 7.

Varley v. *Coppard*, L. R. 7 C. P. 505, referred to, 29.]—*See* LANDLORD AND TENANT, 1.

Wilkinson v. *Unwin*, 7 Q. B. D. 636, followed, 473.]—*See* DIVISION COURTS, 2.

Williams v. *Earle*, L. R. 3 Q. B. 739, followed, 574.]—*See* DAMAGES, 3.

Yates, Ex p., 2 DeG. & Jo. 191, followed, 175.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

CAUSE OF ACTION.

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CAUTIONER.

See LAND TITLES ACT.

CHARITABLE BEQUEST.

See WILL, 4.

CHARITABLE USE.

See WILL, 7.

CHATTEL MORTGAGE.

See AUCTIONEER.

CHURCH.

1. *Mortgage of Site—R. S. O. 1887 ch. 237—Trustees—Covenant—Personal Liability.*]—Land for the purpose of a site for a church was conveyed to certain persons, their successors and assigns, as trustees therefor, and a mortgage for the balance of the purchase money was given by them to the vendor, who was aware of the nature of the whole transaction, in which, in addition to giving their individual descriptions, the mortgagors were stated to be "trustees under R. S. O. 1887 ch. 237" of the designated church. The mortgage contained the usual covenants, including a covenant by the mortgagors for payment of principal and interest, and was executed by the mortgagors individually with their own seals, there being no corporate seal:—

Held, that they were not personally liable on the mortgage. *Beaty* v. *Gregory*, 60.

[Affirmed, 24 A. R. 325.]

2. *Incumbent's Salary—Liability of Churchwardens—Voluntary Contributions.*]—Where the free pew system has been adopted in an Anglican church, and the voluntary contributions of the congregation are the only means of meeting the expenses, no personal responsibility rests upon the churchwardens in respect of the incumbent's salary; the measure of their liability to him is the extent to which they receive moneys whereout to pay his salary. *Daw* v. *Ackerill et al.*, 452.

[Affirmed by the Court of Appeal, 11th January, 1898.]

CIVIL PROCEEDINGS.

See CRIMINAL LAW, 7.

COLLATERAL SECURITIES.

See BANKRUPTCY AND INSOLVENCY, 5—PRINCIPAL AND SURETY.

COLLECTOR'S ROLL.

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COLOUR OF RIGHT.

See HUSBAND AND WIFE, 3—LANDLORD AND TENANT, 6.

COMMON CARRIERS.

See CARRIERS.

COMMISSION

See MORTGAGE, 2.

COMPANY.

Purchase of Goods on Credit—Statutory Inability to Buy on Credit—Acceptance of Draft in Name of Company—Implied Representation of Authority at Law—R. S. O. 1887 ch. 166, sec. 13.]—The plaintiff sued the officers and directors of a co-operative association, incorporated under R. S. O. 1887 ch. 166, for the price of goods sold to it on credit, which, by the statute incorporating it, the association was forbidden to buy in that way:—

Held, that he could not recover, as no action could be maintained upon an implied representation or warranty of authority in law to do an act; and, moreover, the plaintiff must be taken to have known of the statutory inability:—

Held, also, that, although the proceeds of a re-sale of the goods by the association were applied to relieve the defendants from a personal liability for other goods purchased by the association, they could not be said to have derived a personal benefit from the plaintiff's goods, and, therefore, the latter could not recover on this ground:—

Held, lastly, that, although one of the defendants accepted, on behalf of the association, the plaintiff's drafts drawn on it for the goods, he was not liable upon an implied representation or warranty of authority in law of the association so to accept. *Struthers* v. *Mackenzie*, 381.

See BROKER—FRAUDULENT CONVEYANCE—GAMING, 2.

COMPENSATION.

See RAILWAYS AND RAILWAY COMPANIES, 4—TRUSTS AND TRUSTEES, 1.

CONDITION IN LEASE.

See LANDLORD AND TENANT, 8.

CONDITIONAL SALE.

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CONTEMPT OF COURT.

See PARLIAMENTARY ELECTIONS.

CONTRACT.

See DIVISION COURTS, 3—GAMING, 2—HUSBAND AND WIFE, 2—INSURANCE, 2—MORTGAGE, 2—MUNICIPAL CORPORATIONS, 5, 13 — RAILWAYS AND RAILWAY COMPANIES, 3—SALE OF GOODS, 1.

CONTRACTOR.

See MUNICIPAL CORPORATIONS, 13.

CONTRIBUTION.

See PRINCIPAL AND SURETY.

CONVERSION OF GOODS.

See AUCTIONEER.

CONVICTION.

See CRIMINAL LAW, 7, 8—JUSTICE OF THE PEACE.

CO-OPERATIVE ASSOCIATION.

See COMPANY.

CORONER.

See CRIMINAL LAW, 6.

CORPORATION.

See BROKER — COMPANY — DEFAMATION, 2.

COSTS.

See BANKRUPTCY AND INSOLVENCY, 6—BARRISTER—BILLS OF EXCHANGE AND PROMISSORY NOTES, 3—CRIMINAL LAW, 8.

COUNSEL FEES.

See BARRISTER.

COUNTY COURTS.

1. *Jurisdiction — Legacy under $200 Charged on Land—59 Vict. ch. 19, sec. 3, sub-sec. 13 (O.).*]—A County Court has jurisdiction under sub-sec. 13 of sec. 3 of 59 Vict. ch. 19 (O.), in an action brought by the legatee against the devisee of land, to recover a legacy of $5 charged on the land, as involving equitable relief in respect of a matter under $200.

The subject-matter involved in such an action is the amount of the legacy and not the value of the land.

Judgment of the County Court of York varied. *Rustin* v. *Bradley*, 119.

2. *Appeal to High Court from Order for New Trial—Law Courts Act, 1895, 58 Vict. ch. 13, sec. 44 (O.).*]—Under sec. 44, sub-sec. 4, of the Law Courts Act of 1895, 58 Vict. ch. 13 (O.), where a new trial has been granted in a County Court action, the opposite party may appeal from the order directing the new trial to a Divisional Court of the High Court of Justice. *Cantelon* v. *Thompson et al.*, 396.

3. *County Court Appeal—Order Setting aside Judgment on Terms—Finality of.*]—In a County Court action the defendant made a motion to set aside a judgment by default as irregular, but the Judge held it regular, and, while he set aside the judgment, he did so upon terms of the defendant paying costs. The defendant appealed from this order upon the ground that the judgment should have been set aside unconditionally :—

Held, that the order was not "in its nature final," within the meaning of sec. 42 of the County Courts Act, R. S. O. 1887 ch. 47, and the appeal did not lie. *O'Donnell* v. *Guinane et al.*, 389.

COUNTY COURT JUDGE.

See CRIMINAL LAW, 4, 5, 8—DIVISION COURTS, 2, 6, 7—LANDLORD AND TENANT, 2, 6—PARLIAMENTARY ELECTIONS—SURROGATE COURTS.

COURT OF REVISION.

See ASSESSMENT AND TAXES.

COVENANT AGAINST INCUMBRANCES.

See DAMAGES, 2.

COVENANT BY TRUSTEES.

See CHURCH, 1.

COVENANT NOT TO ASSIGN.

See DAMAGES, 3—LANDLORD AND TENANT, 1, 5.

COVENANT TO REPAIR.

See LANDLORD AND TENANT, 4.

CRIMINAL LAW.

1. *Procedure—Provincial Criminal Law—Criminal Code—Special Case under sec. 900—Right of Magistrate to State—R. S. O. 1887 ch. 74.*]—A magistrate has no power to state a case under sec. 900 of the Criminal Code, for an alleged offence against an Ontario statute, not involving the constitutionality of the statute, the procedure by way of appeal to the Sessions provided for by Ontario legislation applying in such a case. *Regina ex rel. Brown* v. *The Robert Simpson Company (Limited)*, 231.

2. *Manslaughter—Pagan Indian—Evil Spirit—Delusion.*]—A pagan Indian who, believing in an evil spirit in human shape called a Wendigo, shot and killed another Indian under the impression that he was the Wendigo, was held properly convicted of manslaughter. *Regina* v. *Machekequonabe*, 309.

3. *Evidence — Non-Support of Wife—Criminal Code, 1892, sec. 210, sub-sec. 2—Lawful Excuse—Agreement.*]—Upon an indictment of the prisoner under sec. 210, sub-sec. 2, of the Criminal Code, 1892, for omitting without lawful excuse to provide necessaries for his wife, evidence is admissible on behalf of the prisoner of an agreement between him and the person who became his wife, at the time of the marriage, that they were to live at their respective homes and be supported as before the marriage until the prisoner obtained a situation where he could earn sufficient for their maintenance; STREET, J., dissenting. *Regina* v. *Robinson*, 407.

4. *Election to be tried by Jury—Re-election—Mandamus to Sheriff to bring Prisoner before County Judge—Criminal Code, 1892, secs. 766, 767.*]—Where a prisoner is brought before a County Court Judge under sec. 766 of the Criminal Code, and elects to be tried by a jury, and is thereupon remanded under sec. 767 to await such trial, although his election is made under a mistake or qualified by using the words "at present," there is no duty upon the sheriff to notify the Judge a second time under sec. 766, or to bring the prisoner again before him to enable the prisoner to re-elect to be tried by the Judge. *Regina* v. *Ballard*, 489.

5. *Procedure — Commitment for Trial—Dies non Juridicus—Subsequent Trial—Validity—Court of Record—Habeas Corpus—Writ of Error.*]—The prisoner was on a statutory holiday committed for trial by a magistrate upon a charge of attempting to steal from the person, and on being brought before the County Court Judge, in compliance with sec. 766 of the Criminal Code, 1892, consented to be tried by the Judge without a jury, and, being so tried, was convicted and sentenced to a term of imprisonment:—

Held, upon the return to a writ of *habeas corpus*, that the fact that the prisoner was committed for trial and confined in gaol on a warrant that was a nullity could not affect the

validity of the trial before the Judge under the Speedy Trials Act.

[Upon appeal the Court of Appeal held that the County Court Judge's Criminal Court being a Court of record, its proceedings were not reviewable upon *habeas corpus*, but only upon writ of error.] *Regina* v. *Murray*, 549.

6. *Coroner's Inquest — Evidence Voluntarily Given—Admissibility at Subsequent Criminal Trial — 56 Vict. ch. 31, sec. 5 (D.)*]—The depositions of a witness taken at a coroner's inquest without objection by him that his answers may tend to criminate him, and who is subsequently charged with an offence, are receivable in evidence against him at the trial.

Regina v. *Hendershott and Welter*, 26 O. R. 678, overruled. *Regina* v. *Williams*, 583.

7. *Aggravated Assault—Summary Trial—Effect of Conviction—Action —Bar—Release from Further Criminal Proceedings only — Criminal Code, 1892, sec. 262, Part 55, secs. 786, 799.*]—Where a charge under sec. 262 of the Criminal Code, 1892, of assault causing actual bodily harm is brought under Part 55 of the Code, by the election of the defendant under sec. 786 to be tried summarily, a conviction releases, under sec. 799, from further criminal proceedings, but does not bar civil proceedings.

Flick v. *Brisbin*, 26 O. R. 423, distinguished. *Nevills* v. *Ballard*, 588.

8. *Summary Conviction—Appeal —County Court Judge—Costs—Sessions—52 Vict. ch. 43 (D.)—Criminal Code, 1892, secs. 879, 880— High Court—Prohibition.*]—On an appeal to a County Court Judge from a summary conviction under the Act to provide against frauds in the supplying of milk to cheese, butter, and condensed milk factories (52 Vict. ch. 43, sec. 9), the Judge has the same powers to award costs as the Sessions of the Peace under secs. 879-880 of the Criminal Code, 1892.

Under the Criminal Code, sec. 880, the Court may, on appeal, award such costs, including solicitor's fee, as it may deem proper, and there is no power in the High Court to review such discretion. *Regina* v. *McIntosh*, 603.

See GAMING — INFANT — JUSTICE OF THE PEACE—MASTER AND SERVANT—MUNICIPAL CORPORATIONS, 2.

CROWN.

Negligence—Niagara Falls Park Commissioners—50 Vict. ch. 13, secs. 3, 4, 10 (O.)—Obligation to Maintain Fences—Highways—Visitors to Park—Status of Commissioners — Liability of Crown.]—There is no liability on the part of the commissioners for the park to the public using the highways in the Queen Victoria Niagara Falls Park by reason of the absence or insufficiency of a fence, railing, or barrier on the edge of the cliff, there being no statutory obligation in that behalf imposed on them.

Gibson v. *Mayor of Preston*, L. R. 5 Q. B. 218; *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Municipality of Pictou* v. *Geldert*, [1893] A. C. 524; *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433, followed.

Nor are the commissioners liable for an accident happening under the above circumstances to a person while resorting to the park, who, paying nothing for the privilege, is in the position of a bare licensee, to whom no duty would be owing, unless the accident occurred by reason of some unusual danger known to the commissioners, and unknown to the person injured

Southcote v. *Stanley*, 1 H. & N. 247; *Ivay* v. *Hedges*, 9 Q. B. D. 80; *Schmidt* v. *Town of Berlin*, 26 O. R. 54; and *Moore* v. *City of Toronto*, *ib.* 59*n*, followed.

The commissioners, under the provisions of the statutes in that behalf, under any circumstances, act in the discharge of their various duties as "an emanation from the Crown" or as agent of the Crown, which is not liable for the acts of the subordinate servants of the commissioners. *Graham* v. *Commissioners for Queen Victoria Niagara Falls Park*, 1.

DAMAGES.

1. *Liquidated or Penalty—Equitable Relief—Ontario Judicature Act, sec. 52, sub-sec. 3.*]—Under a covenant contained in a lease granting a right of way over certain lands to a railway company for the purpose of a switch to a gravel pit, the lessees on default in removing the tracks and ties from the land within fifteen days from the termination of the lease, were to forfeit and pay to the lessor $5 a day as liquidated damages, and not as a penalty, for each day after the said time that the lands and premises should remain in any way obstructed:—

Held, that such damages were liquidated:—

Held, however, that, under the circumstances set out in the judgment, this was a proper case in which to grant relief under sec. 52, sub-sec. 3, of the Ontario Judicature Act, 1895, by awarding actual damages estimated on a liberal scale. *Townsend* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 195.

2. *Covenant against Incumbrances—Sale of Land—Breach—Measure of Damages.*]—Where the vendee of lands, who had himself after purchasing mortgaged the property, brought action for breach of covenant against incumbrances; and the mortgage, constituting the breach, covered other lands as well as his, and was for an amount much greater than the present value of the land, and it was impossible to apportion it:—

Held, MEREDITH, J., dissenting, that the measure of damages was the whole amount due on the mortgage, which should be paid into Court, to insure its reaching its proper destination. *McGillivray* v. *Mimico Real Estate Security Company (Limited)*, 265.

3. *Measure of—Breach of Covenant not to Assign Lease—Evidence—Varying Report.*]—Upon breach of a covenant in a lease not to assign without leave, the lessors are entitled to recover as damages such sum of money as will put them in the same position as if the covenant had not been broken and they had retained the liability of the defendant instead of an inferior liability, but in estimating the value of the defendant's liability allowance must be made for the vicissitudes of business and the uncertainty of life and health.

Upon appeal from a referee's report the damages were reduced from $3,897.62 to $500.

Williams v. *Earle*, L. R. 3 Q. B. 739, followed. *Munro et al.* v. *Waller* (No. 2), 574.

See LANDLORD AND TENANT, 5—MUNICIPAL ELECTIONS, 2—RAILWAYS AND RAILWAY COMPANIES, 1, 2, 4.

DEBENTURES.

See MUNICIPAL CORPORATIONS, 3, 4—TRUSTS AND TRUSTEES, 1.

DECLARATION OF RIGHT.

See BANKRUPTCY AND INSOLVENCY, 5—RAILWAYS AND RAILWAY COMPANIES, 3.

DEFAMATION.

1. *Libel — Mercantile Agency — Confidential Report — Privilege — Reasonable Care.*]—In an action of libel brought by a trader against the conductors of a mercantile agency, it appeared that the libellous matter was sent to a few subscribers on their personal application. The information on which the statement complained of was founded in reality related to another trader of the same surname as the plaintiff:—

Held, that the publishing of the information was a matter of qualified privilege, but that the want of reasonable care in collecting the information was evidence of malice which destroyed the privilege.

Todd v. *Dun*, 15 A. R. 85, followed.

Cossette v. *Dun*, 18 S. C. R. 222, discussed. *Robinson* v. *Dun et al.*, 21.

[Reversed, 24 A. R. 287.]

2. *Slander — Corporation.*] — An action for slander will not lie against a corporation. *Marshall* v. *Central Ontario R. W. Co.*, 241.

DISTRESS.

See LANDLORD AND TENANT, 7.

DITCHES AND WATERCOURSES ACT.

See WATER AND WATERCOURSES, 2.

DIVISION COURTS.

1. *Prohibition — Interest — Splitting Demand—R. S. O. 1887 ch. 51, sec. 77.*]—Where the plaintiff sued in a Division Court for $100 interest upon moneys deposited with the defendants, and it appeared that she had treated the deposit receipt in her hands as one upon which the whole sum was past due and collectable:—

Held, that the action came within sec. 77 of the Division Courts Act, R. S. O. 1887 ch. 51, whereby the splitting of causes of action is forbidden; and prohibition was granted.

In re Clark v. *Barber*, 26 O. R. 47, followed, but commented on as irreconcilable with such cases as *Dickenson* v. *Harrison*, 4 Pri. 282, approved in *Attwood* v. *Taylor*, 1 M. & G. 307. *Re McDonald* v. *Dowdall et al.*, 212.

2. *Jurisdiction—Ascertainment of Amount—Promissory Note—Interest — 56 Vict. ch. 15, sec. 2 (O.) — Abandonment of Excess—Recovery on Note—Indorsers—Sureties—Parties —Substitution of Plaintiff.*]—In an action in a Division Court against the makers and indorsers of a pro-

missory note expressed on its face to be for $200 and interest, judgment was given for the plaintiff for $210 :—

Held, that the amount was ascertained by the signatures of the defendants, and the interest accumulated upon the note from the time the amount was so ascertained was not to be included in determining the question of jurisdiction, and might be recovered, in addition to the claim, under 56 Vict. ch. 15, sec. 2 (O.), notwithstanding that the interest and the amount of the claim so ascertained together exceeded $200 :—

Held, also, that the Judge had power, under Revised Rule 7 of the Division Courts, to permit the abandonment of the excess caused by a claim for notarial fees :—

Held, also, that upon payment of the amount of the note by the plaintiff to the original holder, the plaintiff being liable as indorser to such holder, the plaintiff became entitled to the note and to enforce his rights against the other parties to it; and, as it appeared that two of the defendants had indorsed the notes as sureties to the plaintiff for the makers, he was entitled to recover against them, although the note was made payable to his order.

Wilkinson v. *Unwin*, 7 Q. B. D. 636, followed.

Held, lastly, that Revised Rules 211, 216, and 224 of the Division Courts authorized the Judge to substitute the name of the plaintiff for that of the original holder of the note as plaintiff in the action. *Pegg* v. *Howlett et al.*, 473.

3. *Breach of Contract—Place of —Cause of Action—Mandamus.*]—The plaintiff gave an order in Ontario for goods to the traveller of the defendants, wholesale merchants in Montreal "Ship *via* G. T. R." at a certain named date. The goods were not so shipped, and a correspondence ensued, ending in the defendants refusing to supply the goods :—

Held, that the breach was the non-shipment *via* Grand Trunk Railway at Montreal, and not the subsequent refusal by correspondence, and, as the whole cause of action did not arise where the order was given, a mandamus to a Division Court Judge to try the action was refused. *Re Diamond* v. *Waldron et al*, 478.

4. *Prohibition — Court Nearest Defendant's Residence—Jurisdiction —R. S. O. 1887 ch. 51, sec. 82.*]—An action was brought in a Division Court against a firm consisting of two partners, which had been dissolved before action, one of the partners being resident out of Ontario, and the other where the cause of action arose, being in a county other than that comprising the division in which the action was brought, although such division was nearest to where the firm had carried on business and the applicant resided. The Judge having overruled an objection to his jurisdiction and tried the case and pronounced judgment on the merits, prohibition was, under the circumstances, refused.

Semble. The Judge at the trial might have made an order permitting the plaintiff to proceed. *Re Sinclair* v. *Bell*, 483.

5. *"Sum in Dispute"—Right of Appeal—R. S. O. 1887 ch. 51, sec. 148.*]—Where the subject-matter of the claim in a Division Court is one cause of action exceeding $100, and the amount recovered at the trial is under that sum, an appeal lies to a Divisional Court under sec. 148

of the Division Courts Act, "the sum in dispute upon the appeal" being the amount claimed, and not that amount less the sum recovered at the trial. *Petrie* v. *Machan*, 504.

6. *Jury Trial—Submitting Questions — Acquiescence —Prohibition.*]—In a Division Court action for the price of goods sold, the Judge, without objection taken, submitted questions to the jury and on their answers entered a verdict and judgment for the plaintiff after the defendant had, however, put in a written argument in his own favour:—

Held, on motion for prohibition, on the ground that the defendant was entitled to a general verdict of the jury, and that the Judge had no right to submit questions and enter a verdict on them, that, however this might be, the defendant had so acquiesced in the course taken as to debar him from obtaining prohibition. *In re Jones* v. *Julian*, 601.

7. *Appeal—Filing Case—Extension of Time—Delay of Clerk—Jurisdiction of Divisional Court—58 Vict. ch. 13, sec. 47 (O.)*]—Where, through the delay of the clerk in furnishing a certified copy of the proceedings, the appellant in a Division Court action was unable to file the same within the two weeks prescribed by 58 Vict. ch. 13, sec. 47 (4), while the junior County Court Judge refused to make an order allowing any other period for so doing;—

Held, that this Court had no jurisdiction to grant relief; but application might be made to the senior County Court Judge. *Owen* v. *Sprung*, 607.

8. *Jurisdiction—Commission on Sale.*]—The defendant, by an instrument signed by him, authorized the plaintiff to dispose of the goods mentioned therein for the sum of $1,000 net to the defendant, the latter reserving to himself the right to dispose of the goods without the plaintiff's assistance, and agreeing in such case to pay the plaintiff a commission of ten per cent. on the above mentioned sum. The defendant, unassisted by the plaintiff, afterwards disposed of the goods for $350, and the plaintiff then claimed ten per cent. commission on $1,000, and interest:—

Held, that he was entitled to recover the amount, and that the claim was within the jurisdiction of the Division Court, the original amount thereof being ascertained by the signature of the defendant.

Judgment of the 2nd Division Court in the county of Perth reversed. *Petrie* v. *Machan*, 642.

9. *Jurisdiction — Agreement for Sale of Machine—Ascertainment of Amount Claimed.*]—Under a written agreement for the sale of a machine signed by the defendant, he was to send to the plaintiffs, within ten days after the machine was started, a promissory note, with approved security, for $125, the price thereof; and in default the price was to become forthwith due and payable. The machine, which was by the agreement to be delivered by the plaintiffs f. o. b. cars addressed to the defendant to an outside railway station, was received and used by him, and shortly after was returned to the plaintiffs. In an action on the agreement:—

Held, *per* ROBERTSON, J., that there was no jurisdiction in the Division Court to entertain an action for the price of the machine, as the amount was not "ascertained by the

signature of the defendant" under sec. 70, sub-sec. (c), of R. S. O. 1887 ch. 51, for, in addition to proof of the signature, evidence was necessary to shew that the terms of the agreement had been performed by the plaintiffs.

On appeal to a Divisional Court, the decision of ROBERTSON, J., was reversed, and a mandamus ordered to issue. *Petrie* v. *Machan*, *supra*, No. 8, followed. *Re Sawyer-Massey Co.* (*Limited*) *and Parkin*, 662.

10. *Prohibition — Procedure — Issue of Blank Summons—R. S. O. 1887 ch. 51, sec. 44.*]—The issue by the clerk of a Division Court of a summons with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions, though contrary to the provisions of sec. 44 of the Division Courts Act, R. S. O. 1887 ch. 51, does not affect the jurisdiction of the Division Court, nor afford ground for prohibition, but is a matter of practice or procedure to be dealt with by the Judge in the Division Court. *Re Gerow* v. *Hogle*, 405.

DIVISIONAL COURT, JURISDICTION OF.

See DIVISION COURTS, 7.

ELECTION TO BE TRIED BY JURY.

See CRIMINAL LAW, 4, 7.

ELECTIONS.

See MUNICIPAL CORPORATIONS, 9, 10, 14, 15, 16 — PARLIAMENTARY ELECTIONS.

ENGINEER.

See WATER AND WATERCOURSES, 2.

ENTRY.

See HUSBAND AND WIFE, 3—LIMITATION OF ACTIONS.

ESTOPPEL.

See MORTGAGE, 1.

EVIDENCE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—CRIMINAL LAW, 3, 6—DAMAGES, 3—INSURANCE, 3, 4 — NEGLIGENCE — RAILWAYS AND RAILWAY COMPANIES, 5—SALE OF GOODS, 2.

EXECUTORS AND ADMINISTRATORS.

1. *Administrator Ad Litem—Tax Sale—Action to Set Aside—Locus Standi of Plaintiff—Rule 311.*]—The plaintiff was appointed under Rule 311 administrator *ad litem* of a deceased person's estate in a summary administration matter more than twelve months after the death:—

Held, that he had no *locus standi* to maintain an action to set aside a tax sale of land belonging at the time of death to the estate of the deceased. *Rodger* v. *Moran*, 275.

2. *Insolvent Estate—Claims of Creditors—Valuing Securities—Accommodation Maker of Promissory Note—"Only Indirectly or Secondarily Liable"—59 Vict. ch. 22, sec.*

1, sub-sec. 1.]—A partner who has individually joined as a maker in a promissory note of his firm for their accommodation is not "indirectly or secondarily liable" for the firm to the holder within the meaning of 59 Vict. ch. 22, sec. 1, sub-sec. 1, but is primarily liable, and in claiming against his insolvent estate in administration the holder need not value his security in respect to the firm's liability. *Bell* v. *Ottawa Trust and Deposit Company*, 519.

EXPRESS COMPANY.

See CARRIERS.

FENCES.

See CROWN.

FIRE.

See LANDLORD AND TENANT, 4—RAILWAYS AND RAILWAY COMPANIES, 5.

FIRE LIMITS.

See MUNICIPAL CORPORATIONS, 6.

FIXTURES.

See LANDLORD AND TENANT, 3.

FOREIGN CONTRACT.

See INSURANCE, 2.

FOREIGN LANDS.

See WILL, 4.

FRAUDULENT CONVEYANCE.

Transfer of Assets — Fictitious Joint Stock Company—Rights of Creditors.]—A merchant in insolvent circumstances formed a joint stock company, he and his wife subscribing for all the stock, except a few shares, which were allotted to employees of his, these forming the five directors. They, then, as directors and shareholders, appointed him manager for five years at a salary, and all his assets were assigned to the company :—

Held, that the company was the mere alias and agent of the assignor, and the assignment a fraud on his creditors, and must be set aside, subject, however, to the rights of the creditors of the company.

Salomon v. *Salomon*, [1897] A. C. 22, distinguished. *Rielle et al.* v. *Reid et al.*, 497.

See BANKRUPTCY AND INSOLVENCY, 2, 4, 5.

GAMING.

1. *Lottery — Art Association — Pictures—Part Value in Money—Criminal Code, 1892, sec. 205, sub-sec. 1 (b), sub-sec. 6 (c).*]—The defendant, an agent of an incorporated art society, was convicted by a police magistrate for that he did "unlawfully sell and barter a certain card and ticket for advancing, selling, and otherwise disposing of certain property, to wit, pictures, or one-half the stated value of each picture in money, by lots, tickets, and modes of chance :"—

Held, that "property" in sub-sec. 1 (*b*) of sec. 205 of the Code is not necessarily to be read "*specific* property," the essence of the enactment

being in the disposal of *any* property by any mode of chance :—

Held, also, there being evidence of an option reserved to the society to give money instead of pictures to the winning tickets, that this destroyed the privilege in favour of works of art under sub-sec. 6 (*c*) of the Code.

Conviction affirmed. *Regina* v. *Lorrain*, 123.

2. *Sale of Betting Privileges on Race Course — Illegality—Criminal Code, sec. 204—Unincorporated Association.*]—The object of the Legislature in enacting the latter part of sub-sec. 2 of sec. 204 of the Criminal Code apparently was to reserve the race courses of incorporated associations as places where bets might be made during the actual progress of a race meeting, without the bettors being subject to the penalties of that section.

An agreement for the sale of betting and gaming privileges at a race meeting by an unincorporated association, who are the lessees of an incorporated association, the owners of the race course, is not illegal. *Stratford Turf Association* v. *Fitch et al.*, 579.

GUARDIAN.

See PUBLIC SCHOOLS.

HABEAS CORPUS.

See CRIMINAL LAW, 5.

HIGH COURT OF JUSTICE.

See CRIMINAL LAW, 8—PARLIAMENTARY ELECTIONS.

HIGHWAYS.

See CROWN—MUNICIPAL CORPORATIONS, 11, 12—RAILWAYS AND RAILWAY COMPANIES, 1, 2, 4—WAY.

HUSBAND AND WIFE.

1. *Separate Estate—Property Received from Husband during Coverture—R. S. O. 1887 ch. 132, sec. 4, sub-sec. 4.*]—Where the only property possessed by a married woman, without a settlement, consisted of an interest in personal property given by her husband to her during coverture :—

Held, that this was separate estate liable for her debts.

Judgment of the County Court of Bruce reversed. *Trusts Corporation of Ontario* v. *Clue et al.*, 116.

2. *Contract of Wife—Separate Estate—Action after Husband's Death—Liability—R. S. O. 1887 ch. 132, sec. 3, sub-secs. (2), (3), (4)—Form of Judgment.*] — In 1894 a married woman, possessed of separate estate, entered into a covenant for payment of money. In an action against her upon the covenant, after the death of her husband, but before the passing of 60 Vict. ch. 22 (O.) :—

Held, that under sec. 3, sub-secs. (2), (3), and (4), of the Married Women's Property Act, R. S. O. 1887 ch. 132, the liability which she undertook by her contract with the plaintiffs was expressly limited by the extent of her separate property then existing, and thereafter acquired during coverture ; and that the judgment against her should be in the usual form, to be levied out of such property, so far as the same might not have been disposed of by her. *Hammond et al.* v. *Keachie*, 455.

3. *Conveyance by Wife — Non-joinder of Husband—59 Vict. ch. 41 (O.)—Limitation of Actions—Visible Possession—Enclosed Lands—Unenclosed Lands—Sale of Timber—Trespass—Interval in Possession—Building Operations—Farm Work—Adverse Possession—Assertion of Right by True Owner—Equivocal Acts—Entry by one Tenant in Common—Residence out of Ontario—Possession of Unenclosed Lands—Colour of Right — Conveyance — Entry—Improvements under Mistake of Title.*]—1. The plaintiff claimed an undivided interest in the farm of his uncle, who died intestate and without issue in 1854, seized in fee simple and in possession. One of the links in the chain of title of the uncle was a conveyance made in 1846 by a married woman, whose husband did not join in the conveyance :—

Held, that the conveyance was wholly inoperative, and was not validated by 59 Vict. ch. 41 (O.), as the action was begun before the passing of the Act, and sec. 2 excepts pending litigation ; and this objection was fatal to the plaintiff's claim, for, although the uncle's possession was evidence of his seizin, the plaintiff's case disclosed his title and shewed that the true title was in the married woman.

2. Shortly after the uncle's death his widow returned to the farm, which she found in possession of a man put in by a person to whom her husband had contracted to sell, and she thereupon forcibly took possession, and continued to reside upon the farm till her death in 1877, with the exception of a short interval in 1874. During this whole period she tilled such part of the farm as was enclosed and under cultivation, and put such part as was enclosed and not under cultivation to the ordinary farm uses. In 1873 she made a conveyance of the whole farm to a neighbouring farmer, who worked it until 1879, and then rented it until 1881, after which he put his son, one of the defendants, into possession, and the latter then continued to work it up to the time this action was brought in 1895, though until 1889 he did not live in the house erected upon it. In 1885 the widow's grantee purchased the rights of the heirs-at-law of the person to whom the plaintiff's uncle had contracted to sell :—

Held, that the widow entered as a trespasser, and so, in order to extinguish the right and title of the heirs, her twenty years' possession must have been actual, visible, and continuous ; and the Statute of Limitations operated only as to the enclosed part, notwithstanding sales by her of timber from the unenclosed part, which must be treated as mere acts of trespass.

Harris v. *Mudie*, 7 A. R. 414, followed.

3. In April, 1874, the dwelling-house on the farm was destroyed by fire, and during a short period until it was rebuilt the widow did not actually live upon the farm, but stayed in the neighbourhood, and the work of the farm went on as usual :—

Held, that during this interval her possession was a visible one, by reason of the building operations and the farm work.

Agency Company v. *Short*, 13 App. Cas. 793, and *Coffin* v. *North American Land Company*, 21 O. R. 80, distinguished.

4. Another nephew of the deceased resided with the widow upon the land for about two years after her return to it, but at that time had

no interest in it, his father being then alive; and he made occasional visits to it in subsequent years, and paid the taxes on it for 1872, but during all this time he made no claim to any interest in the land:—

Held, upon the evidence, that he did not go upon the land in the assertion of a right, as owner of an interest, to live upon it, but merely as the guest of his aunt, and in paying the taxes he did so on her behalf, and not as having or claiming an interest for himself or any one else; and therefore it could not be said that the possession was not hers, or that it was a possession by his license.

5. And, even if what happened amounted to an entry, that entry did not operate in favour of the plaintiff's co-tenants, for an entry by one tenant in common is not an entry by his co-tenant.

6. The fact that the heirs were resident out of Ontario entitled them to no longer time to bring their action than if they had been residents: 25 Vict. ch. 20.

7. Therefore, in 1874 the right and title of the heirs-at-law as to the enclosed part of the farm were extinguished.

8. The widow's grantee entered not as a mere trespasser, but, after the conveyance to him, or, at all events, after the expiration of twenty years from her entry, was in under colour of right, and his right was not confined to the portion of the land of which he was in pedal possession, but he and those claiming under him were in the actual and visible possession of the whole of the land included in his conveyance; and the right and title of the plaintiff were therefore extinguished; notwithstanding an entry made in 1878 by the plaintiff, who had not then any interest in the land or any authority from those interested in it.

9. But if not, the defendants were at least entitled to be paid for their lasting improvements since the purchase in 1885, with a set-off of the mesne profits since that date. *Hartley* v. *Maycock et al.*, 508.

See CRIMINAL LAW, 3.

IMPROVEMENTS UNDER MISTAKE OF TITLE.

See HUSBAND AND WIFE, 3.

INCUMBRANCES.

See DAMAGES, 2.

INDEMNITY.

See BROKER—MUNICIPAL CORPORATIONS, 12, 13.

INDIANS.

See CRIMINAL LAW, 2.

INFANT.

Act for Prevention of Cruelty to Children—Order of Justices—Appeal to General Sessions—Prohibition—Jurisdiction—56 Vict. ch. 45 (O.)—58 Vict. ch. 52, sec. 2 (O.)]—There is no appeal to the General Sessions from an order for the custody and care of children under sec. 13 and subsequent sections of 56 Vict. ch. 45 (O.), "*An Act for the Prevention of cruelty to and better Protection of Children*," made by two justices of

the peace sitting under sec. 2 of 58 Vict. ch. 52 (O.), amending the former Act. *In re Granger and The Children's Aid Society of Kingston*, 555.

See PUBLIC SCHOOLS — SETTLED ESTATES ACT.

INJUNCTION.

See PARLIAMENTARY ELECTIONS—RAILWAYS AND RAILWAY COMPANIES, 3.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE.

1. *Life—Benefit Society—Misrepresentation as to Age—Good Faith—52 Vict. ch. 32, sec. 6 (O.)*]—The Ontario Insurance Amendment Act, 1889, 52 Vict. ch. 32, applies to benefit societies; and where a person was admitted to the defendants' order on the strength of a representation as to age, which was false, but made in good faith, and without any intention to deceive:—

Held, that by virtue of sec. 6 of the above Act, the contract of insurance was not avoided thereby.

If the true age of the deceased had been stated, he could not have been admitted to the Order, nor could he have effected any insurance:—

Held, nevertheless, he being a member in good standing at the time of his death, and his membership not having been attacked in his lifetime, his certificate of insurance was not avoided by this fact. *Cerri* v. *Ancient Order of Foresters*, 111.

[Reversed by the Court of Appeal, 11th January, 1893.]

2. *Life—Policy—Change of Beneficiary—Vested Interest — Foreign Contract—Foreign Law.*]—By a contract between the insured and her husband, in consideration of his agreeing not to approtion amongst his children any part of the moneys to arise from an insurance policy upon his life, of which she was the named beneficiary, she agreed that a policy to be issued upon her life should be made payable to him as beneficiary. This agreement was carried out, and the husband for five years paid the premiums upon his wife's policy:—

Held, that a vested interest in the policy passed on him, and the beneficiary could not be changed without his consent, even where the policy had lapsed and a new policy been issued in lieu of it, by agreement between the insurers and the insured:—

Held, also, that although the application for insurance was made and the policy delivered in Ontario, the insured and the insurers having agreed that the place of contract should be in New York, and that the contract should be construed according to the law of that State, if the change in the beneficiary was validly made according to the law of that State, the husband was not entitled to the insurance moneys, notwithstanding that the insurers had not intervened and were raising no question as to whether the law of Ontario or that of New York should govern; but, applying the law of New York, that the change was not validly made. *Bunnell* v. *Shilling et al.*, 336.

3. *Life—Construction of Policy—Beneficiary — Designation — Assignment of Policy—Security for Advances—Trust—Evidence.*]—By a policy of life insurance the insurers promised

to pay the amount insured, upon the death of the insured person, to his wife, the plaintiff, or such other beneficiary or beneficiaries as he might in his lifetime have designated in writing indorsed on the policy, and in default of any such designation to his legal personal representatives. The application stated that the money was to be paid to the wife. The only indorsement upon the policy was an absolute assignment of it by the insured to the defendant, and notice of the assignment was given by him to the insurers, and all premiums were afterwards paid by him. The assignment was, however, shewn to have been made only as security for advances:—

Held, that, in the absence of an indorsement designating a beneficiary, the insurance moneys belonged to the legal personal representatives of the insured.

If, however, there was a trust of the policy in the plaintiff's favour, a right to revoke it was still reserved to the deceased, and no absolute and irrevocable trust such as is contemplated by the statute was ever created.

Held, also, upon the correspondence, that the defendant, believing he was entitled to a charge for all his advances, under conversations had with the insured, so stated the fact to the plaintiff, and she, desiring to pay her husband's debts and funeral expenses, ratified the action of the defendant in paying out certain sums on her husband's account, and assented to his retaining his own claim, so far as the money would go. *Fisher* v. *Fisher*, 459.

[Reversed by the Court of Appeal, 15th March, 1898.]

4. *Life—Insurance for Benefit of Child — Satisfaction — Evidence — Oral Declarations of Insured.*]—In the course of proceedings for the administration of an intestate's estate, the amount of a life policy taken out by deceased, under the Act to secure to wives and children the benefit of life insurance, in favour of his daughter absolutely, and which had been paid to her guardian, was set up as satisfaction of a claim made on behalf of the daughter and of the personal representative of her mother against the estate, and certain oral declarations of the deceased made before effecting the insurance were proved to shew such to have been his intention:—

Held, that if the evidence was admissible at all, which was doubtful, there should at least be something in writing, evidencing the obligation to accept the amount in satisfaction of the claim, as formal as the Act requires in the case of changes in the description of, or apportionment among, the beneficiaries. *In re Mills, Newcombe* v. *Mills*, 563.

See BENEVOLENT SOCIETY.

INTEREST.

See DIVISION COURTS, 1, 2—RAILWAYS AND RAILWAY COMPANIES, 4.

INTERLOCUTORY ORDER.

See COUNTY COURTS, 3.

INTOXICATING LIQUORS.

Liquor License Act, R. S. O. 1887 ch. 194, sec. 20—By-law—"Year"—Meaning of.]—The words "in any year" in sec. 20 of the Liquor License Act mean "calendar year,"

and not "license year," and a by-law under that section, limiting the number of licenses for the ensuing or any future year, must be passed in the months of January or February in any year. *Re Goulden and City of Ottawa*, 387.

See MASTER AND SERVANT.

IRREGULARITY.

See MUNICIPAL CORPORATIONS, 8, 14.

JOINT STOCK COMPANY.

See FRAUDULENT CONVEYANCE.

JUDGMENT.

See COUNTY COURTS, 2 — HUSBAND AND WIFE, 2.

JURISDICTION.

See COUNTY COURTS, 1—CRIMINAL LAW, 8—INFANT—JUSTICE OF THE PEACE — LANDLORD AND TENANT, 2, 6—PARLIAMENTARY ELECTIONS—SURROGATE COURTS.

JURY.

See DIVISION COURTS, 6.

JUSTICE OF THE PEACE.

1. *Adjudication — Adjournment Sine Die—Conviction.*]—A justice of the peace in summary proceedings before him cannot adjourn *sine die* for the purpose of considering his judgment.

Conviction quashed. *Regina* v. *Quinn*, 224.

2. *Jurisdiction — Associate Justices— Request.*] — Where a party charged comes or is brought before a magistrate in obedience to a summons or warrant, no other magistrate can interfere in the investigation of or adjudication upon the charge, except at his request. *Regina* v. *McRae*, 569.

See INFANT — MUNICIPAL CORPORATIONS, 1.

LANDLORD AND TENANT.

1. *Assignment with Leave—Re-assignment without Leave—"Any Person" —R. S. O. 1887 ch. 106.*]—The words "any person or persons" in the long form of the covenant not to assign or sublet without leave in the Act respecting Short Forms of Leases, R.S.O. 1887 ch. 106, include the original lessee, and where an assignment by him has been made with consent, a reassignment to him without a fresh consent is a breach of the covenant.

McCormick v. *Stowell*, 138 Mass. 431, not followed.

Varley v. *Coppard*, L. R. 7 C. P. 505, and *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461, referred to.

Judgment of STREET, J., affirmed. *Munro et al.* v. *Waller*, 29.

2. *Overholding Tenants Act, R.S.O. 1887 ch. 144—Sufficiency of Notice to Quit—Jurisdiction of County Court Judge.*]—The questions whether a three months' notice to determine a tenancy required by a lease should be lunar or calendar months, and

whether a notice given by the lessor after conveyance of the reversion is sufficient, should not, when there is any doubt in the matter, be decided by a County Court Judge on an application under the Overholding Tenants Act and amendments. *Re Magann and Bonner*, 37.

3. "*Buildings and Erections*" *— Payment for — Fixtures and Machinery.*]—A covenant in a lease to pay for "buildings and erections" on the demised premises covers and includes fixtures and machinery which would have been fixtures but for 58 Vict. ch. 26, sec. 2, sub-sec. (*c*) (O.).

Judgment of FALCONBRIDGE, J., affirmed. *Re Brantford Electric and Power Company and Draper*, 40.

[Affirmed, 24 A. R. 301.]

4. *Receipt for Rent—Lease or Agreement—Implied Covenant—Fire —Waste.*]—An informal document which acknowledges the receipt of rent of premises for a future definite term, and under which possession is taken by the person paying the rent, is a contract of letting and hiring and not merely an agreement for a lease.

In the absence, in a lease, of an express covenant to repair by the lessee, he is not liable for permissive waste, and an accidental fire, by which the leased premises are burnt, is permissive not voluntary waste.

Judgment of FALCONBRIDGE, J., at the trial, affirmed. *Wolfe* v. *McGuire*, 45.

5. *Rent Payable in Advance— Breach of Covenant not to Assign without Leave—Damages.*]—Where, a few days prior to the accruing due of a quarter's rent payable in advance, the lessee assigned without the lessor's leave, in breach of a covenant contained in the lease, the lessor was held entitled to recover, as damages for such breach, the rent so payable in advance without any deduction for rents realized during the said quarter under new leases created by the lessor, who, finding the property vacant, had taken possession. *Patching* v. *Smith*, 201.

6. *Overholding Tenants' Act — Dispute as to Nature of the Tenancy —Colour of Right—Jurisdiction— R. S. O. 1887 ch. 144—58 Vict. ch. 13, sec. 23 (O.).*]—Since the amendment of the Overholding Tenants' Act, R. S. O. 1887 ch. 144, by 58 Vict. ch. 13, sec. 23, striking out of the Act the words "without colour of right," the Judge of the County Court tries the right and finds whether the tenant wrongfully holds. And where the dispute was in reference to the tenancy, the landlord claiming it to be a monthly holding, and the tenant a yearly tenancy :—

Held, that the County Court Judge had jurisdiction. *Moore* v. *Gillies*, 358.

7. *Distress for Rent—Set-off— Notice — Illegal Distress — Double Value—R. S. O. 1887 ch. 143, sec. 29 —2 W. & M., sess. 1, ch. 5, sec. 5.*]—The service by the tenant, after distress but before sale, of a notice of set-off, pursuant to R. S. O. 1887 ch. 143, sec. 29, of an amount in excess of the rent, to which the tenant is entitled, does not make the distress illegal, and the landlord is not liable for "double value" for selling, under 2 W. & M., sess. 1, ch. 5, sec. 5, which requires both seizure and sale to be unlawful. *Brillinger* v. *Ambler*, 368.

8. *Provision as to Vacancy — Breach of Condition—Avoidance of Lease.*]—The defendants leased to the plaintiff certain premises, the lease containing the following clause: "In case the said premises * * become and remain vacant and unoccupied for the period of ten days * * without the written consent of the lessors, this lease shall cease and be void and the term hereby created expire and be at an end * * and the lessor may re-enter and take possession of the premises" as in the case of a holding over. The plaintiff entered and occupied for about two years, when he moved out and left the premises vacant for over ten days, and claimed that the lease was at an end:—

Held, that the agreement embodied in the lease was a subsequent condition, a breach of which could only avoid the lease at the instance of the lessors, and that the vacancy created by the lessee did not put an end to the term. *Palmer* v. *Mail Printing Company*, 656.

LAND TITLES ACT.

R. S. O. 1887 ch. 116, secs. 61, 131 — Cautioner — "Interest" — Appointee of Purchaser—"Owner"—Implied Revocation of Appointment.]—The provision of the Land Titles Act, R. S. O. 1887 ch. 116, permitting registration of cautions against registered dealings with lands, sec. 61, applies to "any person interested in any way" in the lands:—

Held, that, as the Land Titles Act relates mainly to conveyancing, whatever dealing gives a valid claim to call for or receive a conveyance of land is an "interest" within the scope of the statute; and an appointee or nominee in writing of the purchaser of an interest in lands has a *locus standi* as cautioner; and where such an appointee registered a caution as "owner," and there was no doubt of the substantial nature of his claim, his caution was supportable as against any objection in point of form, by virtue of sec. 131.

Held, also, that an action brought by the original purchaser, after the registration of her appointee's caution, and pending proceedings to set it aside, for specific performance of a contract to convey to her the interest in respect of which she had made the appointment, did not, under the circumstances in evidence, put an end to such appointment. *Re Clagstone and Hammond*, 409.

LANDS INJURIOUSLY AFFECTED.

See RAILWAYS AND RAILWAY COMPANIES, 1, 4.

LEASE.

See LANDLORD AND TENANT — MORTGAGE, 1—MUNICIPAL CORPORATIONS, 9—WAY.

LEGACY

See WILL, 6

LIBEL.

See DEFAMATION, 1.

LICENSEE

See CROWN

LIEN.

Mechanic's Lien — Materials — Drawback—59 Vict. ch. 35, sec. 10 (O.)]—Under sec. 10 of the Mechanics and Wage-Earners' Lien Act, 59 Vict. ch. 35 (O.), it is the duty of the owner to retain out of the payments to be made to the contractor, as the work progresses, twenty per cent. of the value of the work done and materials provided, to form a fund for the payment of the lien-holders, not subject to be affected by the failure of the contractor to perform his contract.

Goddard v. *Coulson*, 10 A. R. 1, *Re Cornish*, 6 O. R. 259, and *Re Sear and Woods*, 23 O. R. 474, are not now applicable. *Russell* v. *French et al.*, 215.

See BANKRUPTCY AND INSOLVENCY, 6.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

Payment of Purchase Money by Instalments—Possession—Accrual of Right of Entry.]—Where a purchaser is in possession of land either under a written contract of sale, or with the assent of the vendor, the purchase money being payable by instalments, the vendor's right of entry does not first accrue until default occurs in payment of an instalment. *Irvine* v. *Macaulay et al.* *McLellan* v. *Macaulay et al.*, 92.

[Affirmed, 24 A. R. 446.]

See BROKER—HUSBAND AND WIFE, 3.

LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS.

LOTTERY.

See GAMING, 1.

MACHINERY.

See LANDLORD AND TENANT, 3.

MAGISTRATE.

See JUSTICE OF THE PEACE—MUNICIPAL CORPORATIONS, 1.

MAINTENANCE.

See SETTLED ESTATES ACT.

MALICE.

See DEFAMATION, 1.

MANDAMUS.

See ASSESSMENT AND TAXES — CRIMINAL LAW, 4—DIVISION COURTS, 3, 9—RAILWAYS AND RAILWAY COMPANIES, 3.

MANSLAUGHTER.

See CRIMINAL LAW, 2.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

Railway Company — Employee Drinking on Duty—Summary Dismissal—Railway Act, 51 Vict. ch. 29 (D.)]—It is good cause for the summary dismissal by a railway company of one of its employees that he was proved while on duty to have drunk intoxicating liquor with other employees; and, although only a recipient of the intoxicating liquor, such conduct constitutes a participation in a criminal offence under sec. 293 of the Railway Act, 51 Vict. ch. 29 (D.), which prohibits anyone selling, giving, or bartering spirits or intoxicating liquor while on duty. *Marshall* v. *Central Ontario R. W. Co.*, 241.

See NEGLIGENCE.

MEASURE OF DAMAGES.

See DAMAGES, 2.

MECHANIC'S LIEN.

See LIEN.

MISTAKE.

Over-credit by Bank—Change of Position — Repayment — Notice.]—The plaintiffs, under telegraphic instructions from one of their branches, telephoned from the head office to one of their sub-agencies to credit the defendant with $2,000. The sub-agency, however, by some misunderstanding, credited him with $3,000, which he drew out. The $2,000 had been paid into the branch bank in the first instance by way of an advance on the shipping bills of certain cattle bought from the defendant for about $2,800, but of this the plaintiffs had no notice. The defendant, however, refused to repay the difference between the $2,000 and the price of the cattle, on the ground that in faith of the payment to him he had allowed them to be shipped abroad, which by his agreement for sale was not to be done till payment of the price in full:—

Held, that the defendant was bound to repay the excess over the $2,000. *Bank of Toronto* v. *Hamilton*, 51.

See HUSBAND AND WIFE, 3.

MORTGAGE.

1. *Leasehold—Acquisition of Reversion—Liability for Payment of Mortgage—Estoppel.*]—Where the assignee of a term, subject to a mortgage, becomes the owner of the fee by purchase, the reversion in the lands is bound in his hands for the payment of such mortgage, without repayment to him of the purchase money; and where he has obtained the conveyance of the reversion upon the representation that he is the assignee of the term, he is estopped from saying that he acquired it otherwise than as the conveyance to him shews. *Building and Loan Association* v. *McKenzie*, 316.

[Affirmed, 24 A. R. 599.]

2. *Mortgagor and Mortgagee — Accounts—Speculative Securities—Bonuses and Commissions.*]—Where money is lent on securities of a speculative or unsatisfactory nature, bonuses or commissions deducted by the lender at the time of the advance, together with bonuses or commissions

charged and agreed to for an extension of time, and which form part of the consideration of the mortgage security, are properly chargeable in an accounting between borrower and lender, provided they were made part of the contract. *Gardiner* v. *Munro*, 375.

See BANKRUPTCY AND INSOLVENCY, 5—CHURCH, 1.

MUNICIPAL CORPORATIONS.

1. *Police Magistrate — Salary — Reduction of—R. S. O. 1887 ch. 72, secs. 5, 28.*]—In 1892 the plaintiff was appointed by the provincial government, of its own motion, police magistrate, without salary, under R. S. O. 1887 ch. 72, sec. 5, of a town whose population exceeded 5,000. The plaintiff then demanded a salary of $800 as his right under sec. 2 (*b*), which was for a time conceded, but, in 1894, reduced to $400, and by resolution in 1896 withdrawn altogether by the council:—

Held, that the council had a right so to do, and R. S. O. 1887 ch. 72, sec. 28, did not apply. *Ellis* v. *Town of Toronto Junction*, 55.

[Affirmed, 24 A. R. 192.]

2. *Early Closing By-law—Excepted Times—Uncertainty.*]—A by-law providing for the closing of shops for the sale of watches and jewellery at a certain time every day, "excepting * * the days during which the Central Canada Exhibition Association is being held, * * ," such days being fixed by by-law of the association pursuant to statute, is not invalid for uncertainty. *Regina* v. *McMillan*, 172.

3. *Limitation of Annual Rate—"School Rate"—Debentures for School House—Con. Mun. Act, 1892, 55 Vict. ch. 42 (O.)*]—The annual amount required to pay for debentures issued under a by-law passed for the purchase of a school site and the erection of a school house thereon, comes within the term "school rates," and is excluded from the two cents to which, by sec. 357 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), the annual rate permitted to be levied by municipalities is limited. *Foster* v. *Village of Hintonburg*, 221.

4. *Debentures for Electric Light Works—Limitation to Twenty Years—Consolidated Municipal Act, 1892, sec. 340.*]—A by-law passed by the municipality of a town for the construction of water works and gas or electric light works made the debentures to be issued thereunder payable in thirty years from the date on which the by-law took effect:—

Held, that the by-law was invalid, for under sec. 340 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), the time for the payment of debentures for electric light works is limited to twenty years. *Re Hay and Town of Listowel*, 332.

5. *Contract—Necessity for By-law—Resolution of Council—Consolidated Municipal Act, 1892, secs. 282, 283.*]—A by-law of a village corporation authorized the raising by way of loan of a certain sum for the purpose of mining and supplying the village with natural gas, and the issue of debentures therefor:—

Held, having regard to sec. 282 of the Consolidated Municipal Act, 1892, that a by-law was necessary to authorize the making of a contract for the mining work to be done, and

that this by-law did not authorize it:—

Held, also, that a resolution of the council, though entered in the minute book and containing the contract at full length, and having the seal of the corporation attached to it, could not be considered a by-law because it was not signed as required by sec. 288. *Wigle* v. *Village of Kingsville et al.*, 378.

6. *Fire Limits—Erection of Buildings Within — By-law therefor — Validity —Consolidated Municipal Act, 1892, sec. 496, sub-sec. 10.*]—Sub-section 10 of sec. 496, Consolidated Municipal Act, 1892, which empowers the corporation of a city, town, or village to pass by-laws "for regulating the repair or alteration of roofs or external walls of existing buildings" within the fire limits, "so that the said buildings may be more nearly fire proof," does not empower the council to pass a by-law requiring "all buildings damaged by fire, if rebuilt or partially rebuilt," to be made fire proof, at the peril of such building being removed at the expense of the owner. *Quinn* v. *Town of Orillia*, 435.

7. *Equipment of Courts of Justice —Offices —"Furniture" — Stationery—Liability— Authority—County Council—R. S. O. 1887 ch. 184, secs. 466, 470.*]—By sec. 466 of the Municipal Act, R. S. O. 1887 ch. 184, it was enacted that the county council shall "provide proper offices, together with fuel, light, and furniture, for all officers connected with the Courts of Justice," etc.:—

Held, that "furniture" must include everything necessary for the furnishing of the offices referred to in the enactment for the purpose of transacting such business as might properly be done in such offices; and the word therefore included stationery and printed forms in use in the Courts.

Ex p. Turquand, 14 Q. B. D. 643, followed.

Held, also, upon the facts of this case, that a local officer of the Courts, who had ordered supplies of stationery and forms from the plaintiffs for his office, was duly authorized by the defendants' council to do so, pursuant to the provisions of sec. 470 of R. S. O. 1887 ch. 184. *Newsome et al.* v. *County of Oxford*, 442.

8. *By-law—Submission to Electors —Omission to Post By-Law and Notice—55 Vict. ch. 42, sec. 293 (O.) —Irregularities—Result of Voting —Saving Clause, sec. 175.*]—Upon a motion to quash a municipal by-law which required the assent of the electors and was voted upon by them and carried by a majority of 16 in a total vote of 550 out of an electorate of 941:—

Held, that the unexplained omission of the council to put up a copy of the by-law with a notice stating, *inter alia*, the hour, day, and places for taking the votes, in four or more of the most public places in the municipality, as required by sec. 293 of the Municipal Act, 55 Vict. ch. 42 (O.), or at any place therein, was fatal to the by-law; the evidence disclosing many other irregularities; and the onus which was upon the council to shew, under sec. 175, that the proceedings were conducted in accordance with the principles laid down in the Act, and that the result was not affected by the mistakes and irregularities, not being satisfied. *Re Pickett and Township of Wainfleet*, 464.

9. *Municipal Elections — Incorporated Village—Leasehold Qualification for Councillor—Consolidated Municipal Act, 1892, sec. 73.*]—The respondent was rated as lessee of land assessed for $800, which, with other land, worth at least $1,100, was mortgaged by the landlord for $800 in priority to the lease:—

Held, that the respondent was duly qualified as a candidate for the office of councillor of an incorporated village, as, under 55 Vict. ch. 42, sec. 73 (O.), the mortgage was not to be taken into account in diminution of the value, not being on his leasehold interest.

Semble, also, that, in qualifying, the respondent would be entitled to have the mortgage marshalled so that recourse should be first had to the other lands included in it, and that it should be apportioned according to the respective values of the different properties, and so the qualification was sufficient. *The Queen ex rel. Ferris* v. *Speck*, 486.

10. *Municipal Elections—County Councillor—Property Qualification —"Actual Occupation"—Partnership—Consolidated Municipal Act, 1892, 55 Vict. ch. 42, sec. 73.*]—*Held*, that "actual occupation" in sec. 73 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), which provides, with regard to the property qualification of candidates, that where there is actual occupation of a freehold rated at not less than $2,000 the value for the purpose of the statute is not to be affected by incumbrances, does not necessarily mean exclusive occupation; and that when two partners were in occupation of partnership property, each should be deemed in actual occupation of his interest in the property within the meaning of the above enactment.

Regina ex rel. Harding v. *Bennett*, 27 O. R. 314, followed as to the latter point. *The Queen ex rel. Joanisse* v. *Mason*, 495.

11. *Highway—Negligence —Accident—Notice of—55 Vict. ch. 42, sec. 531 (1)—57 Vict. ch. 50, sec. 13 —59 Vict. ch. 51, sec. 20.*]—The latter part of the clause added to sec. 531 (1) of the Consolidated Municipal Act, 1892, by 57 Vict. ch. 50, sec. 13, as amended by 59 Vict. ch. 51, sec. 20, whereby it is provided that "no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has been served," applies to all cases of non-repair of highways, etc., and is not confined to cases where the non-repair is by reason of the corporation not removing snow or ice from the sidewalks.

Drennan v. *City of Kingston*, 23 A. R. 406, discussed. *Aldis* v. *City of Chatham*, 525.

12. *Highway — Obstruction — Liability—Relief Over.*]—Where an object is left over night on the highway unlighted and unguarded (in this case, a building in process of removal) which is calculated to frighten horses, and by which a horse is frightened, and an accident results, and where the municipality, though having notice, have taken no precautions to warn travellers, the municipality is liable, in the absence of contributory negligence; but is entitled to be indemnified by the person who placed the obstruction on the highway. *Rice* v. *Town of Whitby*, 598.

13. *Accident — Liability — Contractors—Relief Over.*]—Before a building which was being erected by competent contractors for the municipal corporation of a city had been taken over, a trap door in the roof, through the want of fastenings, was blown off, injuring a person in the street below. The trap door was a necessary part of the contract, which required all work to be done in a good and workmanlike manner, and imposed responsibility on the contractors for all accidents which might have been prevented by them. Damages were recovered against the corporation on the findings of the jury that there was negligence on its part, and that the specifications did not stipulate for fastenings, and the corporation, on the same evidence, sought to recover over from the contractors, brought in as third party defendants, on the terms that the findings in the action should be binding on them only as to the amount of damages, and that the question of their liability should be afterwards tried :—

Held, that, under the circumstances, the corporation could not recover over against the contractors. *McCann* v. *City of Toronto*, 650.

14. *Municipal Elections—Deputy Returning Officer—Absence during Part of Polling-Day — Irregularity — Saving Clause — Consolidated Municipal Act, 1892, sec. 175.*]—At an election of county councillors one of the deputy returning officers for a town in the county was absent from his booth on three separate occasions during polling-day. The first and second absences were on account of illness; on the third occasion he went out to dinner and voted in another place. The first absence was for about ten minutes, during which the booth was locked up, with the poll-clerk and constable inside, in charge. The deputy swore that no voter came in till he returned. In his second and third absences the town clerk took his place. During the second no votes were cast, but during the third there were several. The town clerk placed the deputy's initials on the back of the ballots given to such voters, and the consequence was that these ballots were upon a judicial investigation identified and separated, and it appeared that during the third absence nine votes were cast for the relator and nine for the respondent. Upon the whole the respondent had two more votes than the relator, and by sec. 13 of the County Councils Act, 1896, there being two county councillors to be elected, a voter could give both his votes to one candidate. There was no suggestion of bad faith :—

Held, that the absences and what was done during the absences did not affect the result of the election, and, applying the saving provisions of sec. 175 of the Consolidated Municipal Act, 1892, that it should not be declared invalid. *Regina ex rel. Watterworth* v. *Buchanan and Cuthbert*, 352.

15. *Municipal Elections—Returning Officer — Duties — Refusal to Deliver Ballot Paper to Voter—Wilful Act—Absence of Malice or Negligence—Liability—Penalty—Damages —Consolidated Municipal Act, 1892, secs. 80, 168.*]—The plaintiff's name was properly entered on the last revised assessment roll of a municipality as a tenant of real property of the value entitling him to a vote at a municipal election under Consolidated Municipal Act, 1892, sec. 80, and was entered on the voters' list,

but after the final revision thereof, he ceased to be the tenant and to occupy the property, although he continued to reside in the municipality and was the owner of real property as a freeholder of the value entitling him to vote, and was such freeholder at the time of an election. At such election he demanded a ballot paper, and was willing to take the oath for freeholders, but the defendant, the returning officer, refused to furnish him with a ballot or to permit him to vote unless he took the oath required for tenants:—

Held, that the defendant's duties were merely ministerial, and that an action for a breach thereof was maintainable without any proof of malice or negligence; that the plaintiff was entitled to vote at such election, and that the defendant's refusal to allow him to vote constituted a breach of his duty, and rendered him liable to the penalty given by sec. 168, and also to damages at common law. *Wilson* v. *Manes*, 419.

16. *Municipal Elections—Voters' Lists—Finality of—Qualification of Voter.*]—Voters' lists are final as to the qualification to vote at a municipal election in the Province of Ontario. *Regina ex rel. McKenzie* v. *Martin*, 523.

See RAILWAYS AND RAILWAY COMPANIES, 3—WATER AND WATERCOURSES, 2—WAY.

NEGLIGENCE.

Master and Servant—Cause of Accident—Evidence.]—In an action for damages for negligence causing the death of an employee, the evidence shewed that in the defendants' factory two large wheels 45 feet apart had been placed partly in a trench in the floor of the basement for the purpose of driving a wide belt with great rapidity. The deceased was employed to oil the bearings and to see that they did not heat. His dead body was found much injured close to one of the wheels; but there was no evidence as to how he had met with his death. The wheels were not guarded by fencing; but there was evidence that deceased had on previous occasions crossed the trench on two planks placed over it between the upper and lower moving belt, and there was evidence that he had been cautioned against doing so, and that the planks, although removed by the superintendent, were there at the time of the accident:—

Held, MEREDITH, J., dissenting, that there was evidence proper to be submitted to the jury that the accident was caused by the negligence of the defendants. *Kervin et al.* v. *Canadian Coloured Cotton Mills Co.*, 73.

[Appeal from this decision dismissed by Court of Appeal by reason of a division of opinion, 11th January, 1898.]

See CROWN — MUNICIPAL CORPORATIONS, 11, 12, 13, 15—RAILWAYS AND RAILWAY COMPANIES, 2, 5.

NIAGARA FALLS PARK COMMISSIONERS.

See CROWN.

NOTICE.

See MISTAKE — MUNICIPAL CORPORATIONS, 11.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 2.

OVERHOLDING TENANT.

See LANDLORD AND TENANT, 2, 6.

PARLIAMENTARY ELECTIONS.

House of Commons Election — Recount by County Judge—High Court of Justice — Injunction — Invalidity of—Want of Jurisdiction — Disobedience of Injunction — Motion to Commit—Contempt.]—The House of Commons of Canada alone has the right to determine all matters not regulated to the Courts concerning the election of its own members, and their right to sit and vote in Parliament.

The preliminary recount provided for by R. S. C. ch. 8, sec. 64, is a delegation *pro tanto* of parliamentary jurisdiction, and the County Court Judge, as the presiding officer, is one designated by Parliament, and is responsible to the House for the right performance of his duties.

On an application to commit for contempt of Court a barrister who had in argument, as agent of a candidate, urged a County Court Judge to disregard an injunction staying proceedings granted by the High Court of Justice, for Ontario and to proceed with the recount, and a returning officer who had, under the direction of the County Judge, produced the ballots for the purpose of the recount, notwithstanding that the injunction prohibited him from so doing :—

Held, that the plaintiff, the defeated candidate, had no particular specified legal right as applicant for a recount which entitled him to claim a specified legal remedy in the courts :—

Held, also, that the High Court had no jurisdiction to enjoin the prosecution of proceedings connected with controverted elections of the Dominion, such as a recount under sec. 64, R. S. C. ch. 8 :—

Held, also, that a County Court Judge having jurisdiction, and having issued his appointment for a recount, the procuring of an injunction from the High Court was an unwarrantable attempt to interfere with the due course of the election :—

Held, lastly, that the injunction, being one the Court had no jurisdiction to grant, was extra-judicial and void, and might properly be disobeyed. *McLeod* v. *Noble et al.*, 528.

[*See*, also, *S. C.*, 24 A. R. 459.]

PAROL EVIDENCE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

PARTIES.

See BANKRUPTCY AND INSOLVENCY, 5—DIVISION COURTS, 2—EXECUTORS AND ADMINISTRATORS, 1.

PARTITION.

Tenant for Life—Locus Standi—R. S. O. 1887 ch. 104.]—A sole tenant for life of an estate has no *locus standi* under the Partition Act, R. S. O. 1887 ch. 104, to apply for sale of the estate. In the nature of things no partition is possible as regards the life tenancy. *Fisken* v. *Ife*, 595.

PARTNERSHIP.

Individual Debt of Partner—Payment out of Partnership Funds—Authority—Action — Rule 317.]—The defendants were indebted to the plaintiffs' firm, consisting of two partners, and one partner was individually indebted to the defendants. This partner wrote two letters to the defendants, one over his own signature and the other over the firm name, stating that he had paid certain sums due by him to the defendants by giving the defendants credit in the books of his firm. This was done without the authority of the other partner, but the entries were actually made in the books of the firm, to which the other partner had access, though he did not in fact know of the entries until after the firm had been dissolved. Accounts were afterwards rendered to the defendants without any claim being made in respect of the sums credited. This action was brought after the dissolution, in the name of the firm, for the price of goods sold:—

Held, that the defendants were not entitled to credit for the sums referred to.

Leverson v. *Lane*, 13 C. B. N. S. at p. 285, *In re Riches*, 4 DeG. J. & S. at p. 585, and *Kendal* v. *Wood*, L. R. 6 Ex. 243, applied and followed.

Held, also, that Rule 317 authorized the bringing and sustaining of the action in the name of the partnership existing at the time the goods were furnished to the defendants. *Fisher & Co.* v. *Robert Linton & Co.*, 322.

See DIVISION COURTS, 4—EXECUTORS AND ADMINISTRATORS, 2—MUNICIPAL CORPORATIONS, 10.

PASSENGER.

See RAILWAYS AND RAILWAY COMPANIES, 6.

PAYMENT INTO AND OUT OF COURT.

See DAMAGES, 2—WILL, 6.

PENALTY.

See BANKRUPTCY AND INSOLVENCY, 1—DAMAGES, 1—MUNICIPAL CORPORATIONS, 15.

PERPETUITY.

See WILL, 5.

PERSONAL LIABILITY.

See CHURCH, 1.

PLEADING.

See SALE OF GOODS, 2.

PLEDGE.

See BANKRUPTCY AND INSOLVENCY, 5.

POLICE MAGISTRATE.

See JUSTICE OF THE PEACE—MUNICIPAL CORPORATIONS, 1.

POSSESSION.

See HUSBAND AND WIFE, 3—LIMITATION OF ACTIONS—SALE OF GOODS, 1.

PRACTICE.

See COUNTY COURTS — CRIMINAL LAW, 1. 4, 5, 8—DIVISION COURTS—EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE, 2—PARTNERSHIP.

PREFERENCES.

See BANKRUPTCY AND INSOLVENCY.

PRINCIPAL AND AGENT.

See BROKER.

PRINCIPAL AND SURETY.

Contribution between Co-sureties —Refusal to Enforce Security—Depreciation.]—A surety who holds collateral security from the debtor on behalf of himself and co-surety, and who has paid more than his share of the principal debt, is not obliged before enforcing contribution to take proceedings on the collateral security at the request of the co-surety, and the latter is not discharged from liability by reason of depreciation of the security occurring subsequently to a refusal to take such proceedings, and not arising from any act of the surety. *Moorhouse* v. *Kidd*, 35.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2—DIVISION COURTS, 2—EXECUTORS AND ADMINISTRATORS, 2.

PRIVILEGE.

See DEFAMATION, 1.

PROHIBITION.

See CRIMINAL LAW, 8—DIVISION COURTS, 1, 4, 6, 10—INFANT.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC SCHOOLS.

Guardian — Infant "Boarded Out" — Right to Compel Public School to Receive—54 Vict. ch. 55, sec. 40, sub-sec. 3 (O.)]—The word "guardian" in sec. 40, sub-sec. 3, of 54 Vict. ch. 55 (O.), the *Public Schools Act, 1891*, is used therein in its strict legal sense, and does not include a person resident in a school section, with whom and under whose care a boy under fourteen years of age has been placed by a benevolent association under a written "boarding-out undertaking" to clothe, maintain, and educate him, and such person cannot compel the trustees of the school section to provide accommodation for and allow the boy to attend school as a pupil. *Hall* v. *Board of Public School Trustees for United School Section No. 2 of the Township of Stisted*, 127.

[Affirmed, 24 A. R. 476.]

See MUNICIPAL CORPORATIONS, 3.

RAILWAYS AND RAILWAY COMPANIES.

1. *Legislative Authority—Alteration of Grade of Street—Arbitration and Award — Appeal — Dominion Railway Act, 1888, sec. 161, sub-sec. 2—Damages—"Structural Damages"*

— "*Personal Inconvenience.*"] — *Held*, that the railway company, though incorporated by 47 Vict. ch. 75 (O.), was, by 54 & 55 Vict. ch. 86 (D.), subject to the legislative authority of the Parliament of Canada, and its power to do the work of altering the grade of a street, in the doing of which the damages claimed by a landowner arose, was under sec. 90 of the Dominion Railway Act, 1888; and the rights of the parties in an arbitration to ascertain such damages were governed by the provisions of that Act.

And where the arbitrator awarded that the landowner had suffered no damage :—

Held, that, having regard to the provisions of sec. 161, sub-sec. 2, no appeal lay from the award :—

Held, also, that the arbitrator had no power to allow the landowner "structural damages" caused to his buildings, or damages for "personal inconvenience" by reason of his means of access being interfered with.

Ford v. *Metropolitan R. W. Co.*, 17 Q. B. D. 12, distinguished as to the former kind of damages, and followed as to the latter. *Re Toronto, Hamilton, and Buffalo R. W. Co. and Kerner*, 14.

2. *Highway Crossing—Accident—Damages.*]—Where a highway in a city was crossed by a railway, the rails being raised some two feet above the sidewalk, the part between the rails being filled in with broken tiles, over which loose boards were placed, and the plaintiff, in attempting to get over the crossing to reach her destination at a point beyond the tracks,—the street in question being the only mode of access thereto—slipped, and was injured, the railway company were held liable therefor.

Keachie v. *Corporation of Toronto*, 22 A. R. 371, distinguished. *Atkin* v. *City of Hamilton et al.*, 229.

[Reversed, 24 A. R. 389, *sub nom. Atkin* v. *City of Hamilton.*]

3. *Street Railways — Contract — Enforcement of—Municipal Corporations—Running Cars—Specific Performance — Mandamus — Action — Injunction—Declaration of Right.*]—The plaintiffs wished to force the defendants to keep their cars running over the whole of their line of railway, during the whole of each year, in accordance with the terms of the agreement between them set out in the schedule to 56 Vict. ch. 91 (O.) :—

Held, that the agreement was one of which the Court would not decree specific performance, because such a decree would necessarily direct and enforce the working of the defendants' railway under the agreement in question, in all its minutiæ, for all time to come.

Bickford v. *Town of Chatham*, 16 S. C. R. 235, followed.

Fortescue v. *Lostwithiel and Fowey R. W. Co.*, [1894] 3 Ch. 621, not followed.

2. Nor would it be expedient to grant a judgment of mandamus for the performance of a long series of continual acts involving personal service and extending over an indefinite period.

3. The prerogative writ of mandamus is not obtainable by action, but only by motion.

Smith v. *Chorley District Council*, [1897] 1 Q. B. 532, followed.

4. To grant an injunction restraining the defendants from ceasing to operate the part of their line in question would be to grant a judg-

ment for specific performance in an indirect form.

Davis v. *Foreman*, [1894] 3 Ch. 654, followed.

5. Nor was there any object in making a declaration of right under sec. 52, sub-sec. 5, of the Judicature Act, 1895, where the terms of the contract were plain and were confirmed by statute, and the only difficulty was that of enforcing them. *City of Kingston* v. *Kingston, Portsmouth, and Cataraqui Electric R. W. Co.*, 399.

4. *Lands Injuriously Affected — Arbitration and Award—51 Vict. ch. 29, secs. 90, 92, 144 (D.)—Compensation — Damages — Operation of Railway — Interest.*]—A claimant entitled under the Railway Act of Canada, 51 Vict. ch. 29, to compensation for injury to lands by reason of a railway, owing to alterations in the grades of streets and other structural alterations, is also, having regard to secs. 90, 92, and 144, entitled to an award of damages arising in respect of the operation of the railway, and to interest upon the amounts awarded, notwithstanding that no part of such lands has been taken for the railway.

Hammersmith, etc., R. W. Co. v. *Brand*, L. R. 4 H. L. 171, distinguished. *Re Birely and Toronto, Hamilton, and Buffalo R. W. Co.*, 468.

[Appeal from this decision quashed by the Court of Appeal, 15th March, 1898.]

5. *Negligence — Fire Caused by Sparks from Engine—Circumstantial Evidence.*]—In an action against a railway company for negligently causing fire by sparks from their engine, the cause of the fire may be proved by circumstantial evidence. *Rainville* v. *Grand Trunk R. W. Co.*, 625.

6. *Street Railways—Ejecting Passenger—Placing Feet on Cushion—Assault.*]—A passenger on a street railway having refused when requested by the conductor of the car to remove his feet from the cushion of the opposite seat, and used strong language to the conductor, was ejected from the car :—

Held, that the conductor had a right to eject him. *Davis* v. *Ottawa Electric R. W. Co.*, 654.

See MASTER AND SERVANT — TRUSTS AND TRUSTEES, 1.

REPORT.

See DAMAGES, 3.

RESOLUTION OF MUNICIPAL COUNCIL.

See MUNICIPAL CORPORATIONS, 5.

RETURNING OFFICER.

See MUNICIPAL CORPORATIONS, 14, 15—PARLIAMENTARY ELECTIONS.

REVENUE.

Succession Duty Act, 55 Vict. ch. 6 (O.) — Capital — Final Distribution—Duty Payable.]—*Held*, in addition to the findings reported in this case in 27 O. R. 380, that under the Succession Duty Act, 55 Vict. ch. 6 (O.), the duty payable on the capital was deferred until the final distribution thereof, which was the time when the moneys under the directions of the will reached the hands of the persons who should become entitled thereto, and that

the duty then payable would be on the amount then actually distributed, whether increased by accumulations, or by the rise in value of lands or securities, or decreased by loss. *Attorney-General* v. *Cameron*, 571.

REVERSION.

See MORTGAGE, 1.

REVOCATION, POWER OF.

See TRUSTS AND TRUSTEES, 2.

RIPARIAN PROPRIETOR.

See WATER AND WATERCOURSES, 1.

SALE OF GOODS.

1. *Executory Contract—Possession—Nonpayment of Price—Loss of Goods—Liability.*]—Where goods, the subject of an executory contract of sale, have passed into the possession of the vendee, without payment therefor being made, and have while in such possession been lost or destroyed, through no fault of the vendor, the vendee is liable for the price, notwithstanding that the property in the goods had not, by the terms of the contract, passed to the vendee, and notwithstanding that no negligence on his part is shewn. *Hesselbacher* v. *Ballantyne*, 182.

[Affirmed by the Court of Appeal, on different grounds, 11th January, 1898.]

2. *Conditional Sale—Pleading—Warranty—Breach of.*]—In an action between vendor and purchaser for the price of a machine sold under a conditional sale, the defendant may shew that the machine was not as warranted and so reduce the claim by the difference between the value of the machine as warranted and its actual value.

Tomlinson v. *Morris*, 12 O. R. 311, specially referred to. *Cull* v. *Roberts*, 591.

See DIVISION COURTS, 8, 9.

SALE OF LAND.

See SETTLED ESTATES ACT.

SCHOOLS.

See PUBLIC SCHOOLS.

SEAL.

See CHURCH, 1—MUNICIPAL CORPORATIONS, 5.

SEDUCTION.

Right of Action—Service—Pregnancy.]—In an action for seduction, it appeared that the connection took place while the plaintiff's daughter resided at service with the defendant. There was no evidence of any possible loss of service by the father, and, although a slight illness occurred subsequent to the connection, there was neither birth of a child nor pregnancy:—

Held, that the father had no right of action, either at common law or under the Act respecting seduction, R. S. O. 1887 ch. 58.

Kimball v. *Smith*, 5 U. C. R. 32, and *L'Esperance* v. *Duchene*, 7 U. C. R. 146, followed. *Harrison* v. *Prentice*, 140.

[Affirmed, 24 A. R. 677.]

SEPARATE ESTATE.

See HUSBAND AND WIFE, 1, 2.

SESSIONS.

See CRIMINAL LAW, 1, 8—INFANT.

SET-OFF.

See HUSBAND AND WIFE, 3—LANDLORD AND TENANT, 7.

SETTLED ESTATES ACT.

Sale of Vacant Land—Life Tenant—Income—Taxes—Infant—Maintenance.]—The Settled Estates Act was intended to enable the Court to authorize such powers to be exercised as were ordinarily inserted in a well drawn settlement, and ought accordingly to receive a liberal construction.

Where the widow of the settlor was entitled to the whole income of the estate for her life, not charged with the support and maintenance of the children, who were the remaindermen, an order was made, upon the petition of the widow and adult children and with the approval of the official guardian, authorizing the sale, in the widow's lifetime, of vacant and unproductive land forming part of the estate, notwithstanding that the effect would be to relieve the widow of the annual charge upon such land for taxes, to add to her income the profit to be derived from the investment of the proceeds of the sale, and to deprive the remaindermen of the benefit of any increase in the value of the land; the price offered being the best obtainable at the time or likely to be obtained in the near future; the Court deeming the sale in the best interests of all parties; and the widow agreeing to charge her income from the settled estates with the obligation of maintaining the infant remainderman. *Re Hooper*, 179.

SETTLEMENT.

Conveyance by Husband for Use of Wife and Children—Rights of Children.]—A husband conveyed lands to trustees to receive the rents, and, after payment of a mortgage, to pay the balance into the hands of his wife during her life, for her use and that of her children, to be at her separate disposal:—

Held, that the plaintiff, the sole surviving child, was entitled to half the yearly income. *Turner* v. *Drew*, 448.

See TRUSTS AND TRUSTEES, 2.

SHARES.

See BROKER.

SLANDER.

See DEFAMATION, 2

SOLICITOR.

See BARRISTER.

SPLITTING DEMAND.

See DIVISION COURTS, 1.

STATUTES.

2 *W. & M., sess.* 1, *ch.* 5, *sec.* 5 368
See LANDLORD AND TENANT, 7.

12 *Vict. ch.* 5 157
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13 & 14 *Vict. ch.* 14 157
See WAY.

25 *Vict. ch.* 20 (*O.*)..... 508
See HUSBAND AND WIFE, 3.

47 *Vict. ch.* 75 (*O.*)..... 14
See RAILWAYS AND RAILWAY COMPANIES, 1.

50 *Vict. ch.* 13, *secs.* 3, 4, 10 (*O.*) ... 1
See CROWN.

52 *Vict. ch.* 10, *sec.* 2 (*O.*)..... 439
See WILL, 5.

52 *Vict. ch.* 32, *sec.* 6 (*O.*)..... 111
See INSURANCE, 1.

54 *Vict. ch.* 55, *sec.* 40, *sub-sec.* 3 (*O.*). 127
See PUBLIC SCHOOLS.

55 *Vict. ch.* 6 (*O.*) 571
See REVENUE.

55 *Vict. ch.* 20, *secs.* 4, 5 (*O.*) (The Mortmain and Charitable Uses Act) 610
See WILL, 7.

55 *Vict. ch.* 42 (Municipal Act), *sec.* 73 (*O.*) 486, 495
See MUNICIPAL CORPORATIONS, 9, 10.

55 *Vict. ch.* 42, *secs.* 80, 168 (*O.*) ... 419
See MUNICIPAL CORPORATIONS, 15.

55 *Vict. ch.* 42, *sec.* 175 (*O.*)....352, 464
See MUNICIPAL CORPORATIONS, 8, 14.

55 *Vict. ch.* 42, *secs.* 282, 288 (*O.*)... 378
See MUNICIPAL CORPORATIONS, 5.

55 *Vict. ch.* 42, *sec.* 293 (*O.*)..... 464
See MUNICIPAL CORPORATIONS, 8.

55 *Vict. ch.* 42, *sec.* 340 (*O.*)..... 332
See MUNICIPAL CORPORATIONS, 4.

55 *Vict. ch.* 42, *sec.* 357 (*O.*)..... 221
See MUNICIPAL CORPORATIONS, 3.

55 *Vict. ch.* 42, *sec.* 496, *sub-sec.* 10 (*O.*)..... 435
See MUNICIPAL CORPORATIONS, 6.

55 *Vict. ch.* 42, *sec.* 531 (1) 525
See MUNICIPAL CORPORATIONS, 11.

55 *Vict. ch.* 48, *sec.* 67 (O.) 636
See ASSESSMENT AND TAXES.

56 *Vict. ch.* 15, *sec.* 2 (O.)..... 473
See DIVISION COURTS, 2.

56 *Vict. ch.* 45, *secs.* 13 *et seq.* (*O.*).. 555
See INFANT.

56 *Vict. ch.* 91 (*O.*) 399
See RAILWAYS AND RAILWAY COMPANIES, 3.

57 *Vict. ch.* 50, *sec.* 13 (*O.*) 525
See MUNICIPAL CORPORATIONS, 11.

57 *Vict. ch.* 55, *secs.* 28, 30 (*O.*) 245
See WATER AND WATERCOURSES, 2.

58 *Vict. ch.* 12 (O. J. A., 1895), *sec.* 52, *sub-sec.* 3..... 195
See DAMAGES, 1.

58 *Vict. ch.* 13, *sec.* 23 (*O.*) 358
See LANDLORD AND TENANT, 6.

58 *Vict. ch.* 13, *sec.* 44, *sub-sec.* 4 (*O.*). 396
See COUNTY COURTS, 2.

58 *Vict. ch.* 13, *sec.* 47 (4), (*O.*) 607
See DIVISION COURTS, 7.

58 *Vict. ch.* 23, *sec.* 1 (*O.*)..... 629
See BANKRUPTCY AND INSOLVENCY, 5.

58 *Vict. ch.* 26, *sec.* 2, *sub-sec.* (c), (*O.*). 40
See LANDLORD AND TENANT, 3.

58 *Vict. ch.* 52, *sec.* 2 (*O.*)..... 545
See INFANT.

58 *Vict. ch.* 113 (*O.*) 106
See TRUSTS AND TRUSTEES, 1.

59 *Vict. ch.* 19, *sec.* 3, *sub-sec.* 13 (*O.*) 119
See COUNTY COURTS, 1.

59 *Vict. ch.* 35, *sec.* 10 (O.) 215
See LIEN.

59 *Vict. ch.* 41, *sec.* 2 (*O.*)..... 508
See HUSBAND AND WIFE, 3.

59 *Vict. ch.* 51, *sec.* 20 (*O.*) 525
See MUNICIPAL CORPORATIONS, 11.

60 *Vict. ch.* 22 (*O.*)..... 455
See HUSBAND AND WIFE, 2.

51 *Vict. ch.* 29 (*D.*) (Railway Act, 1888), *sec.* 90..... 14
See RAILWAYS AND RAILWAY COMPANIES, 1.

51 *Vict. ch.* 29, *secs.* 90, 92, 144 (*D.*) 468
See RAILWAYS AND RAILWAY COMPANIES, 4.

51 *Vict. ch.* 29 (*D.*), *sec.* 161, *sub-sec.* 2. 14
See RAILWAYS AND RAILWAY COMPANIES, 1.

51 *Vict. ch.* 29, *sec.* 293 (*D.*) 241
See MASTER AND SERVANT.

52 *Vict. ch.* 43, *sec.* 9 (*D.*) 603
See CRIMINAL LAW, 8.

53 *Vict. ch.* 31 (Banking Act), *sec.* 75, *sub-sec.* 2 (*D.*)..... 629
See BANKRUPTCY AND INSOLVENCY, 5.

53 *Vict. ch.* 33 (*D.*) (Bills of Exchange Act, 1890)..... 360
See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

54 & 55 *Vict. ch.* 86 (*D.*)..... 14
See RAILWAYS AND RAILWAY COMPANIES, 1.

55 & 56 *Vict. ch.* 29 (Criminal Code), *sec.* 204, *sub-sec.* 2..... 579
See GAMING, 2.

55 & 56 *Vict. ch.* 29, *sec.* 205 123
See GAMING, 1.

55 & 56 *Vict. ch.* 29, *sec.* 210, *sub-sec.* 2 407
See CRIMINAL LAW, 3.

55 & 56 *Vict. ch.* 29, *secs.* 766, 767 (*D.*)..... 489, 549
See CRIMINAL LAW, 4, 5.

55 & 56 *Vict. ch.* 29, *secs.* 262, 786, 799 (*D.*)..... 588
See CRIMINAL LAW, 7.

55 & 56 *Vict. ch.* 29, *secs.* 879-80 (*D.*) 603
See CRIMINAL LAW, 8.

55 & 56 *Vict. ch.* 29, *sec.* 900 231
See CRIMINAL LAW, 1.

56 *Vict. ch.* 31, *sec.* 5 (*D.*) 583
See CRIMINAL LAW, 6.

59 *Vict. ch.* 22, *sec.* 1, *sub-sec.* 1 (*D.*). 519
See EXECUTORS AND ADMINISTRATORS, 2.

R. S. C. ch. 8, *sec.* 64..... 528
See PARLIAMENTARY ELECTIONS.

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SURROGATE COURTS.

Vacant Senior Judgeship—Junior Judge — Jurisdiction — Subsequent Appointment of Senior Judge.]—A junior County Court Judge who has heard the evidence and tried an issue in a Surrogate Court, while the office of senior County Court Judge is vacant, has the right to deliver judg-

ment in such case after a new senior Judge has been appointed. *Speers et al.* v. *Speers et al.*, 188.

TAX SALE.

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TOLLS.

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TRADE-MARK.

"Microbe Killer"—Validity of—Injunction.]—The words "Microbe Killer," regularly registered, constitute a valid trade-mark. Injunction restraining its use granted.

Davis v. *Kennedy*, 13 Gr. 523, followed. *Radam* v. *Shaw*, 612.

TRESPASS.

See HUSBAND AND WIFE, 3.

TRIAL.

See CRIMINAL LAW, 4, 5, 6, 7—DIVISION COURTS, 2, 4, 6.

TRUSTS AND TRUSTEES.

1. *Compensation—Railway Company—Trustee of Bonus Debentures—R. S. O. 1887 ch. 110—58 Vict. ch. 113 (O.)*]—A person into whose custody debentures of municipalities in aid of a railway company are delivered in trust to be transferred to the company upon the completion of the railway as provided for in the by-laws of the municipalities is a trustee under the Trustee Act, R. S. O. 1887 ch. 110, and as such is entitled to remuneration under that Act before delivering over the debentures.

So held with reference to the trust created by by-laws of municipalities confirmed by 58 Vict. ch. 113 (O.) *In re Ermatinger, Trustee*, 106.

[Affirmed, but amount of compensation reduced, 24 A. R. 378, *sub nom. In re Tilsonburgh, Lake Erie, and Pacific R. W. Co.*]

2. *Settlement—Power of Revocation—Defective Execution of—Direction to Trustee—Breach of Trust.*]—A settlement in which the trustee was authorized to invest the funds in "Dominion, Provincial, and Municipal bonds and debentures, or first mortgages upon real estate," contained a power of revocation by deed in favour of the settlor, with the consent of the trustee.

The latter invested some of the trust moneys in the stock of a loan company, under instructions by letter from the settlor:—

Held, that there was no breach of trust, and that what was done amounted to a defective execution of the power, which the Court would aid.

The principle on which *In re Mackenzie Trusts*, 23 Ch. D. 750, was decided, applied. *Re Mackenzie Trusts*, 312.

See CHURCH, 1—INSURANCE, 3—SETTLEMENT.

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WATER AND WATERCOURSES.

1. *Water Privilege—Owner of—Riparian Proprietor — Use and Improvement of Privilege.*]—The owner of land abutting on the chain reserved by the Crown for a public highway along the Kaministiquia river, who is also the licensee of the interest of the Crown in such reserve, is a riparian proprietor; and, as such, he is the owner, within R. S. O. 1887 ch. 119, of a water privilege which adjoins that part of the reserve lying between his land and the river :—

Held, however, that, proposing to place a dam at the upper end of such water privilege, such a riparian proprietor, not being the owner or legal occupant of any water privilege above it, was not a person desiring to use or improve his water privilege, and was, therefore, not entitled to an order to exercise the powers mentioned in the Act. *Re Jenison*, 136.

2. *Ditches and Watercourses Act—Completion of Work by Engineer—Time for Engineer to take Action—Municipal Corporations—Placing Amount for which Owners Liable on the Collector's Roll—Reeve—Corporate Act—R. S. O. 1887 ch. 220, secs. 15, 18—57 Vict. ch. 55, secs. 28, 30 (O.)*]—By sec. 28 of 57 Vict. ch. 55 (R. S. O. 1887 ch. 220, sec. 15), the Ditches and Watercourses Act, it is provided that "the engineer, at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same, if required in writing so to do by any of the owners interested, * * and may let the work * * to the lowest bidder," etc. :—

Held, that even the lapse of two years did not debar the engineer from acting under the above section, where it was plainly made to appear that the drain was not made, within the time or after the time, of the proper dimensions, by the person who had the first option to do the work :—

Held, also, that the amount the several owners are liable for may be placed upon the collector's roll under 57 Vict. ch. 55, sec. 30 (R. S. O. 1887 ch. 220, sec. 18), on the authorization of the reeve of the municipality.

MEREDITH, J., dissenting. *Ross v. Village of Morrisburg*, 245.

WAY.

Public Road — Tolls — Municipal Corporation — Power to Lease to Private Person.]—Prior to the 13th May, 1851, the London and Port Stanley road belonged to the Government of Canada, as one of the public works of that Province. On that day the Government, by an order-in-council or proclamation, issued under the authority of 12 Vict. ch. 5 and 13 & 14 Vict. ch. 14, granted the road, for valuable consideration, to the county of Middlesex. The part of the road lying within the limits of the county of Elgin afterwards fell into the hands of the corporation of that municipality, who, on the 16th February, 1857, leased it to the defendants' predecessor or assignor for the term of 199 years:—

Held, that the county corporation had the power to sell or lease the road to any grantee or lessee, being a local authority or company, mentioned in the above statutes, and the further power to let to farm the tolls on the road, but had not the power to lease or sell the road, or any part of it, to a private person; and therefore the defendants had no title to the road, and were not justified in obstructing it by bars and exacting tolls upon it. *Payne* v. *Caughell et al.*, 157.

[Reversed, 24 A. R. 556.]

See MUNICIPAL CORPORATIONS, 11, 12.

WILL.

1. *Equal Division of Proceeds of Real Estate — "Between"—"And" —Half Share.*]—A testator by his will directed his real estate to be sold and the proceeds to be equally divided between his wife and his brother and sister:—

Held, that the wife took a one-half share, and his brother and sister the other half share between them. *Hutchinson* v. *LaFortune*, 329.

2. *Alienation—Restriction against —Validity of.*]—A testator, after devising two parcels of land respectively to his two sons, provided as follows: "I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of twenty-five years from the date of my decease. And, further, I will that the same parcels of land shall remain free from all incumbrances, and that no debts contracted by my sons W. C. and H. C. shall by any means incumber the same during twenty-five years from the date of my decease."

One of the sons died about two years after his father, having devised his lot to his brother, the plaintiff, who, within the period limited by his father's will, sought to mortgage it:—

Held, a valid restriction, so far as it was a restriction against the plaintiff selling and conveying the lands or incumbering them by way of mortgage within the period mentioned. *Chisholm* v. *London and Western Trusts Company*, 347.

3. *Restraint on Alienation—Invalidity.*]—Devise of real estate to two grandchildren in fee, with a condition as follows: "and I further will and direct, and it is an express condition of this my will and testament, that none of the devisees herein * * that is to say neither my said grandchildren * * shall either sell or mortgage the lands hereby devised to them:"—

Held, an absolute and unqualified restraint on alienation, and so invalid.

Semble. Had the condition been valid, the grandchildren, being the

testator's heirs-at-law, could have made title as such. *Re Shanacy and Quinlan*, 372.

4. *Charitable Bequest — Validity of — Lands in Ontario — Foreign Lands — Debts and Testamentary Expenses — Liability for — Realization.*]—A testator, domiciled in a foreign country, died in 1891, possessed of certain lands and personal estate in that country, and also of lands in Ontario. His personal estate was insufficient to pay his debts. By his will, after specific bequests and devises, he gave the residue of his estate, real, personal, and mixed, wherever situated, to his trustees, to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights, or, in case of such trust becoming inoperative, to his heirs-at-law :—

Held, that the devise of lands, so far as Ontario was concerned, was void and inoperative.

2. That the trustees held the lands to the use of the heir-at-law until satisfaction should be made thereout for the charges thereon of debts and testamentary expenses, and the heir-at-law was entitled to a conveyance thereafter.

3. That the Ontario lands were liable to contribute *pari passu* with the other lands for the payment of debts and testamentary expenses.

4. That the proportion chargeable on Ontario lands might be raised by sale of an adequate part, or the rents might be applied therefor. *Lewis* v. *Doerle et al.*, 412.

5. *Rule against Perpetuity — Thellusson Act — 52 Vict. ch. 10, sec. 2 (O.)*] — A testator directed his executors to lease and rent and invest his lands, money, and mortgages for the term of 60 years, after which the property was to be divided as in his will provided :—

Held, that this infringed the rule against perpetuity, and 52 Vict. ch. 10, sec. 2 (O.), and was invalid. *Baker* v. *Stuart*, 439.

6. *Legacy — Vested Interest — Period of Payment.*]—Where a testator gives a legatee an absolute vested interest in a defined fund, the Court will order payment on his attaining twenty-one, notwithstanding that by the terms of the will payment is postponed to a subsequent period.

Rocke v. *Rocke*, 9 Beav. 66, followed. *Goff* v. *Strohm*, 553.

7. *Charitable Use — The Mortmain and Charitable Uses Act, 1892, 55 Vict. ch. 20 (O.)*]—A devise of real estate to a bishop in trust for the use of his diocese is not a devise "to or for the benefit of any charitable use," within the meaning of secs. 4 and 5 of the Mortmain and Charitable Uses Act, 1892, 55 Vict. ch. 20 (O.) *Re McCauley*, 610.

8. *Bequest of Specific Sum — Debt Larger than Amount Named.*]—A testatrix to whom a debt of £2,900 was owing by the E. estate, by her will bequeathed as follows: "The two hundred and ninety pounds due from the E. estate * * and moneys in * * to be used by my executors in payment of debts * * the balance thereof to be equally divided among the daughters of * * :"—

Held, that only the sum of money mentioned in the will and not the whole amount due by the E. estate passed by the clause in question.

Decision of MEREDITH, C.J., reversed. *Re Sherlock*, 638.

See REVENUE.

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"*Actual Occupation*," in 55 Vict. ch. 42, sec. 73 (O.)....495.]—*See* MUNICIPAL CORPORATIONS, 10.

"*And*"....329.]—*See* WILL, 1.

"*Any Person or Persons*," in R. S. O. 1887 ch. 106....29.] — *See* LANDLORD AND TENANT, 1.

"*Ascertained by the Signature of the Defendant*," in R. S. O. 1887 ch. 51, sec. 70, sub-sec. (*c*)....662.]—*See* DIVISION COURTS, 9.

"*At Present*"....489.]—*See* CRIMINAL LAW, 4.

"*Between*"....329.]—*See* WILL, 1.

"*Buildings and Erections*," in covenant in a lease....40.] — *See* LANDLORD AND TENANT, 3.

"*Claim which has not Accrued Due*," in R. S. O. 1887 ch. 124, sec. 20, sub-sec. 4....326.]—*See* BANKRUPTCY AND INSOLVENCY, 3.

"*Damages for Personal Inconvenience*"....14.]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

"*Double Value*," in 2 W. & M., sess. 1, ch. 5, sec. 5....368.]—*See* LANDLORD AND TENANT, 7.

"*Furniture*," in R. S. O. 1887 ch. 184, sec. 466....442.]—*See* MUNICIPAL CORPORATIONS, 7.

"*Guardian*," in 54 Vict. ch. 55, sec. 40, sub-sec. 3 (O.)....127.]—*See* PUBLIC SCHOOLS.

"*Indirectly or Secondarily Liable*," in 59 Vict. ch. 22, sec. 1, sub-sec. 1 (O.)....519.]—*See* EXECUTORS AND ADMINISTRATORS, 2.

"*In any Year*," in R. S. O. 1887 ch. 124, sec. 20....387.]—*See* INTOXICATING LIQUORS.

"*Interest*" *in lands*, in R. S. O. 1887 ch. 116, sec. 61....409.]—*See* LAND TITLES ACT.

"*Invalid against Creditors*," in 53 Vict. ch. 31, sec. 75 (D.) (Banking Act)....629.] — *See* BANKRUPTCY AND INSOLVENCY, 5.

"*Order in its Nature Final*," in R. S. O. 1887 ch. 47, sec. 42....389.]—*See* COUNTY COURTS, 3.

"*Property*," in sub-sec. 1 (*b*) of sec. 205, Criminal Code....123.]—*See* GAMING, 1.

"*School Rates*," in 55 Vict. ch. 22 (O.)....221.]—*See* MUNICIPAL CORPORATIONS, 3.

"*Structural Damages*," in Dominion Railway Act, 1888....14.] —*See* RAILWAYS AND RAILWAY COMPANIES, 1.

"*Sum in Dispute upon the Appeal*," in R. S. O. 1887 ch. 51, sec. 148....504.]—*See* DIVISION COURTS, 5.

"*To or for the Benefit of any Charitable Use*," in 55 Vict. ch. 20, secs. 4 and 5 (O.) (Mortmain and Charitable Uses Act)....610.]—*See* WILL, 7.

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