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APPELLATE DIVISION.

JUNE 15TH, 1914.

LAIRD v. TAXICABS LIMITED.

Trial—Jury—Irrelevant Evidence—Misleading Observations—General Verdict—Prejudice—New Trial.

Appeal by the defendant company from the judgment of LATCHFORD, J., upon the verdict of a jury, in favour of the plaintiff for the recovery of $1,750, in an action for damages for injury to the plaintiff's automobile resulting from a collision with a taxicab of the defendant company in High Park, shortly after midnight of the 25th September, 1913.

The verdict was a general one, no questions having been submitted to the jury.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and LEITCH, JJ.

J. P. MacGregor, for the appellant company.

T. N. Phelan, for the plaintiff, respondent.

The judgment of the Court was delivered by MULOCK, C.J. Ex.:— . . . A careful perusal of the evidence leaves me in great doubt as to which, if either party alone, caused the accident. In a case like the present, it would have been preferable to submit questions to the jury. They might have served the useful purpose of not only directing the jury's attention to the determining issues of fact, but also that of reducing the danger of the jury being unconsciously swayed by considerations foreign to the issue. . . .

The defendant company's counsel complains that undue prominence was given and unfair reference made throughout the trial to certain circumstances which may have prejudiced the jury against the defendant company, and that in consequence it did not have a fair trial. . . .

[References to the evidence and the trial Judge's charge.]

The issue was not whether the defendant company carried on the business of letting taxicabs for immoral purposes, but whether its chauffeur, when in charge of one of its taxicabs, had by negligence caused the accident. Much of the evidence . . . was not pertinent to the issue. To intimate to a jury that the defendant company hired out its taxicabs for immoral purposes as "travelling brothels" would in all probability create a prejudice in their minds against the defendant company; and, considering the prominence given to the supposed character of the women and the object of the parties in the two vehicles, I doubt if that prejudice was removed by the learned Judge's instructions to them not to consider the suggested purposes of the defendant company in letting out its taxicabs.

Further, while perhaps all the women in the car and the taxicab may have belonged to the same unfortunate class, still the jury (and juries are not always logical), with their attention frequently and pointedly called to the apparently immoral purposes of the two parties in those vehicles, may have been more prejudiced against the defendant company, whose taxicab was in use with its consent, than against the plaintiff, whose car was being used without his consent. In the weighing of the conflicting evidence, the prejudice thus aroused may have been thrown into the scale and turned it against the defendant company.

Under the circumstances, it appears to me that the trial has not been satisfactory, and that the defendant company has reasonable grounds for questioning its fairness; and, therefore, the Court, in the exercise of its discretion, should set aside the judgment and direct a new trial.

The costs of the former trial and of this appeal to be costs in the cause.

JUNE 15TH, 1914.

*WILLSON v. THOMSON.

Mortgage—Action to Enforce by Foreclosure—Covenant for Payment—Part of Mortgage-moneys not Payable till Majority of Person Interested in Land—Effect as to Remedies of Mortgagee—Provisoes—Construction.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., 5 O.W.N. 815.

*To be reported in the Ontario Law Reports.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and LEITCH, JJ.

S. H. Bradford, K.C., and T. Hislop, for the appellants.

The judgment of the Court was delivered by MULOCK, C.J. Ex. (after setting out the facts, and referring to the Short Forms of Mortgages Act, 10 Edw. VII. ch. 55, sec. 3, proviso as to consequences of default):—Reading together the two provisoes, one that the defendant may retain the $1,000 until a certain time, namely, until after he shall have received a conveyance from U. E. Willson, and the other that, on default of payment of interest, the whole and every part of the principal shall become due, it is clear that the latter proviso qualifies the former, and that the right of retainer of the $1,000 is not absolute, but conditional on there being no default in payment of interest, and that on that condition being broken the right to retain it ceased. . . .

[Reference to Burrowes v. Molloy, 2 Jo. & Lat. 521, distinguishing it.]

Here the agreement not to call in the $1,000 does not override the terms of the mortgage, but is made subject to the proviso in the mortgage that, if the mortgagor makes default in payment of interest, then the whole principal money and every part thereof shall forthwith be due and payable. Default having been made in payment of interest, the mortgagee is thus, by the express agreement between the parties, entitled to call in the whole principal, which includes the $1,000 in question.

I, therefore, think that the learned Chief Justice rightly disposed of the case, and that this appeal should be dismissed with costs.

JUNE 15TH, 1914.

*RE LLOYD.

Infant—Moneys of, in Hands of Administrator of Estate of Deceased Person—Application by Mother for Payment to her as Guardian Appointed by Foreign Court—Refusal—Past Maintenance of Infants—Future Maintenance.

Appeal by Hattie E. Lloyd from the decision and order of LATCHFORD, J., 5 O.W.N. 974.

*To be reported in the Ontario Law Reports.

The appeal was heard by MULOCK, C.J.Ex., HODGINS, J.A., RIDDELL and LEITCH, JJ.

R. U. McPherson, for the appellant.

J. R. Meredith, for the Official Guardian.

The judgment of the Court was delivered by LEITCH, J.:— The fund . . . amounts to about $5,500, and is invested in mortgages in Ontario, and realises about 5½ per cent. per annum. William Lloyd, the husband of Hattie E. Lloyd and father of the infant children, died in 1904, leaving property in Texas worth not more than $350. Hattie E. Lloyd, since her husband's death, has supported the children by her own labour, at a cost of about $10 a month each, up to the death of one in May, 1910, and at a like monthly amount since for the four surviving children.

Mr. Justice Latchford was asked to direct as a matter of right the payment over to a guardian, domiciled in the State of Texas, of money not derived from the foreign State, but realised and invested and held by a trust company in Ontario in trust for the infants entitled. The learned Judge declined to do so; hence this appeal.

There was no question raised as to the safety of the fund in the hands of the trust company in Ontario, and it was not disputed that it would be forthcoming for the infants when they attained their majority. . . .

It appeared to the Court that the application was not so much for the benefit of the infants as of the mother. Her claim for past maintenance exceeds by $900 the whole fund in the hands of the trust company. The learned Judge held that the good faith of the applicant was open to question by reason of the exaggerated amount of her claim. Her sureties in the State of Texas make no affidavits of justification. . . .

[Reference to In re Chatard's Settlement, [1899] 1 Ch. 712; Mitchell v. Richey, 13 Gr. 445; Stileman v. Campbell, 13 Gr. 454; Flanders v. D'Evelyn, 4 O.R. 704; Huggins v. Law, 14 A.R. 383; Re Mathers, 18 Pr. 13; Campbell v. Dunn, 22 O.R. 98; Hanrahan v. Hanrahan, 19 O.R. 396.]

I do not think that a case has been made which will justify this Court in handing over the funds that are now safe and permitting them to be administered beyond the jurisdiction of this Court, without security or any guarantee that they will be wisely and well expended. It is open to Mrs. Lloyd to make an application for an order for future maintenance, and she

can supplement her case by such further and other evidence as she may be able to adduce.

The order is refused and the appeal dismissed. The costs of the trust company and the Official Guardian should be paid out of the fund.

JUNE 15TH, 1914.

*WATSON v. JACKSON.

Water and Watercourses—Lands Bordering on Stream—Bonâ Fide Purchaser of, without Notice of Existence of Old Dam Upstream—Protection of Registry Act—Contemplated Erection by Land-owners on their own Land of New Dam on Site of Old—Creation of Pond—Diminution of Flow of Water—Loss by Evaporation and Seepage—Prescription—Lost Grant—Unlawful Use of Dam—"Sensible Injury"—Injunction—Restriction—Form of Judgment—Variation on Appeal.

Appeal by the defendants from the judgment of MIDDLETON, J., 5 O.W.N. 845.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

H. H. Dewart, K.C., and J. W. McCullough, for the appellants.

I. F. Hellmuth, K.C., and N. Sinclair, for the plaintiff, the respondent.

CLUTE, J. (after stating the facts at length):—The evidence shews that there are now four ponds used for power, and two ponds not so used, on this stream above the dam in question, and a pond below the plaintiff's property used for running a mill, and at one time there was a mill-pond and mill on the defendants' property.

The defendants cannot avail themselves of the statute R.S.O. 1914 ch. 75, secs. 35 and 36, as the foundation for a prescriptive right; for the period therein mentioned refers to the period next before some action wherein the claim or matter to which such period relates was or is brought into question. It is plain here

*To be reported in the Ontario Law Reports.

that the water was not in fact penned back since 1878, except for a few days on the occasions of the rebuilding of the dam in 1887 and 1897, so that the defendant was not able to say that his user was brought down within the period required by the statute before action brought: Colls v. Home and Colonial Stores Limited, [1904] A.C. 178; Nott v. Nott (1897), 27 S.C.R. 644; Hymen v. Van den Bergh, [1908] 1 Ch. 167, 173.

The construction of this statute and the cases bearing upon it are referred to in Halsbury's Laws of England, vol. 11, p. 272, sec. 542. Although the Act apparently renders the right indefeasible after 20 years' user, the combined operation of these two provisions renders it necessary for a person seeking to establish a prescriptive claim under the statute to prove uninterrupted enjoyment for a period of 20 years immediately previous to and terminating in some action or suit in which the right is called into question: Parker v. Mitchell (1840), 11 A. & E. 788, and other cases referred to.

The period is not necessarily a period before the pending action. It may be a period before any action in which the right was brought into question: Cooper v. Hubbuck (1862), 12 C.B. N.S. 456.

No actual user would seem to be sufficient to satisfy the statute; unless during the whole statutory period the user is enough to carry to the mind of a reasonable person in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted: Hollins v. Verney, 13 Q.B.D. 304, 315; Halsbury, loc. cit., sec. 541.

Where the doctrine of lost grant applies, non-user not amounting to abandonment does not destroy it: Re Cockburn, 27 O.R. 467. See Gale's Law of Easements, 8th ed., pp. 556, 557. Lord Coke appears to have been of opinion that when title by prescription was once acquired it could only be lost by non-user during a period equal to that required for its acquisition: Coke's Littleton, 114b; and Justice Littledale in Moore v. Rawson (1824), 3 B. & C. 332: "Speaking generally, there must be an intention to relinquish the right." . . .

[Reference to Hall v. Swift (1836), 6 Scott 167; Gale's Law of Easements, p. 562; Lovell v. Smith, 3 C.B.N.S. 127; Regina v. Chorley, 12 Q.B. 518; Goddard on Easements, 7th ed., p. 562.]

In the present case I do not think from the evidence that there was any intention to abandon the rights (if any) which the defendants' predecessor in title could claim, from the mere non-user on account of the dams being carried away by flood. On

the contrary, the rebuilding of the dams from time to time evidences a contrary intention.

As to the defendants' claim by lost grant. The evidence of user sufficient to raise the presumption of a lost modern grant depends upon the circumstances of each particular case: Halsbury, vol. 11, sec. 531; Tilbury v. Silva (1890), 45 Ch. D. 98. The general doctrine is stated in Goddard's Law of Easements, 7th ed., p. 167. . . .

The doctrine of lost grant was not superseded by the Prescription Act, although it received "a severe shock" in Angus v. Dalton, 6 Q.B.D. 85, 6 App. Cas. 740. . . .

[Reference to Blewett v. Tregonning, 3 A. & E. at p. 585; Goddard, p. 173; Bass v. Gregory, 25 Q.B.D. 481; Hunter v. Richards, 26 O.L.R. 458, 28 O.L.R. 267; Halsbury, vol. 11, sec. 533; Goodman v. Saltash Corporation (1882), 7 App. Cas. 648; Bryant v. Foot (1867), L.R. 2 Q.B. 161, 181; Mounsey v. Ismay (1865), 3 H. & C. 486, 496; Gardner v. Hodgson's Kingston Brewery, [1893] A.C. 240; Solomon v. Vintners' Co. (1859), 4 H. & N. 585, 602; Halsbury, vol. 11, sec. 531; Attorney-General v. Simpson, [1901] 2 Ch. 671, 698, [1904] A.C. 476; Gale on Easements, 6th ed., p. 174; Campbell v. Wilson (1803), 3 East 294; Mason v. Shrewsbury and Hereford R.W. Co. (1871), L.R. 6 Q.B. 578; Simpson v. Godmanchester Corporation, [1897] A.C. 696.]

Before the doctrine of lost grant can be applied, it must be affirmatively established by the party claiming it that a burden was imposed on the servient tenement of the right claimed. For all that appears in the present case, and having regard to the greater supply of water in the early settlement of the township, there may have been sufficient water for the use of the mills on the defendants' property during the 40 years prior to 1878, using it strictly within the rights of a riparian proprietor and imposing no extra burden on the riparian proprietor below, and so raising no presumption of user under a lost grant.

The result is, that all claim to prescriptive right, whether under the statute or by lost grant, must be excluded in this case. It is unnecessary to consider whether the Registry Act applies to a lost grant. See Haigh v. West, [1893] 2 Q.B. 19 (C.A.), as to enrollment.

It remains to consider the natural right which the defendants have as riparian proprietors to use the stream in question, as distinguished from that of an easement. . . .

[Reference to McCartney v. Londonderry and Lough Swilly R.W. Co., [1904] A.C. 301; Swindon Waterworks Co. v. Wilts

and Berks Canal Navigation Co., L.R. 7 H.L. 705; Halsbury, vol. 11, sec. 608; Roberts v. Gwyrfai District Council, [1899] 1 Ch. 583, [1899] 2 Ch. 608.]

The application of the law as above indicated clearly precludes the defendants from supplying water to be used otherwhere than on the defendants' property, whether it be for supplying Thornhill, the sanitarium on Langstaff's property, or otherwise consuming the water off the premises of the defendants. . . .

Having regard to the original option and to the claim of the plaintiff under his deed, I think the plaintiff, respondent, is entitled to a declaration that the defendants are not entitled to use the water of the stream for the purpose of supplying either Thornhill and the surrounding country or the Langstaff sanitarium with water, and to an injunction restraining the defendants from so doing.

With this restriction, there remains to be considered what is a reasonable use of the water by the defendants, having regard to their rights. . . .

[Reference to Dickson v. Carnegie, 1 O.R. 110; Ellis v. Clemens, 21 O.R. 227.]

I am not prepared to say that there may not be in certain seasons of the year such a flow of water as would entitle the defendants to enclose the water in a pond and use the same for power or mill purposes upon the premises. No doubt, the conditions have changed, as is shewn by the evidence. The lands have been cleared, thus causing a rapid and heavy flow of water at certain seasons, causing freshets, and creating a scarcity at other times, and the rights of the defendants are affected by such changes and must be exercised having regard thereto.

One mode of enjoying land covered with water is to row boats upon it, and the owner has the exclusive right: Nuttal v. Bracewell, L.R. 2 Ex. 11. In Hill v. Tupper, 3 H. & C. 300, it was held competent for the grantors in that case to grant to the plaintiff a right of rowing boats in the canal. Of course, this implies that a party must first have the right to have the land covered with water.

A great deal of evidence, expert and otherwise, was given on the question of evaporation and seepage, and the learned trial Judge found that "the loss due to evaporation can be ascertained with some certainty, and, standing alone, would not amount to any very serious diminution of the flow in the stream." With this I agree.

The seepage from the pond, if any, would be chiefly through the dam, and from the nature of the soil and the lay of the land would, I think, find its way to the stream before it reaches the plaintiff's land. Nor am I able to say in advance that the combined loss attributable to evaporation and seepage is such as to preclude the defendants from creating a pond on their own land. See Embrey v. Owen, 6 Ex. 353; Bailey v. Clarke, [1892] 1 Ch. 649, 664; Kensit v. Great Eastern R.W. Co., 23 Ch. D. 569.

The result of my examination of the authorities as applicable to the facts in this case is, that the defendants fail to make good their claim to an easement either under the statute or by way of lost grant, and that they are limited in their claim to their right to use the water as riparian proprietors; while, upon the other hand, the plaintiff's claim for relief is too wide, and the form of the judgment, while not giving all that the plaintiff asked, might imperil the rights of the defendants to the reasonable use of the stream as riparian proprietors. The form of the judgment below should follow as nearly as may be the order made in Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co., L.R. 7 H.L. 715. It should declare that the plaintiff, as owner of the lower tenement, being part of lot 31 in the 1st concession of Markham, east of Yonge street, is entitled to the waters of the stream called in his claim the Don river, to flow down to his tenement, subject to the ordinary and reasonable use of the said stream and waters by the defendants as riparian owners higher up upon the said stream, and that the threatened use of the said waters to supply water to Thornhill and the surrounding country, and to the sanitarium north of the defendants' premises, is not within such ordinary and reasonable use, and that the said defendants be restrained from so doing.

On the question of costs, also, I think the Swindon case must govern. I entertain no doubt that the defendants' purpose was to use the water in a manner to which they were not entitled, by diverting it to purposes of use beyond the premises of the defendants. The defendants have failed upon the main issue; and, while the above variation should be made in the decree, the respondent is entitled, as was said in the Swindon case, in substance to succeed, and to have his costs of appeal.

SUTHERLAND and LEITCH, JJ., concurred.

RIDDELL, J., for reasons stated in writing, agreed that the appeal should be dismissed with costs, subject to a slight variation in the judgment below.

Order accordingly.

JUNE 15TH, 1914.

*CORNISH v. BOLES.

Landlord and Tenant—Lease—Option of Purchase of Demised Premises—Covenant not to Assign without Leave—Proviso—Leave Wilfully and Arbitrarily Withheld—Finding of Fact of Trial Judge—Declarations—Damages—Possession—Costs.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 5 O.W.N. 799.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

R. R. Waddell, for the plaintiffs, the respondents.

SUTHERLAND, J.:—This action arises out of a lease, in writing and under seal, dated the 15th January, 1912, for a term to run for three years from the 1st February in that year. It contains, among other covenants, the following: "That the lessee will not assign or sublet without leave, but said leave shall not be wilfully or arbitrarily withheld." "It is understood and agreed that the said lessee, his executors, administrators, assigns or nominees, shall have the right to purchase the said lands and premises hereby demised at any time during the said term of three years, at the rate of $28 per foot frontage on Murray street, payable in cash on closing. Should the lessee decide to purchase the said property, he shall give to the lessor a written notice of his intention to purchase, addressed to the lessor at 60 Garnett avenue, Toronto, or delivered to him personally . . . This agreement shall be binding upon the heirs, executors, administrators, and assigns of the parties hereto."

The tenant, one of the plaintiffs, William McNeil, entered into possession towards the end of January, 1912, and regularly paid the rent in advance during that year and for January, 1913. A real estate agent, named White, brought McNeil and his co-plaintiff Cornish in touch, and on the 3rd February, 1912, the former gave to the latter a written option, not under seal, of "his lease of part of lot 26, plan 423, composed of the 2

*To be reported in the Ontario Law Reports.

south acres and dwelling in the said township of York in the county of York'' (the property in question) ''for the sum of $8,000, the said option to expire at twelve o'clock midnight on Monday the 12th inst.''

On or before the 7th February, Cornish had apparently agreed with McNeil to take up the option, and the matter of closing the transaction was intrusted to a solicitor, Mr. Waddell. McNeil testified that he requested White to see the defendant to ask his consent to the arrangement. Waddell, who was also acting for Cornish and White, went to the defendant for both parties. McNeil says that he was himself ill at the time. There can be no doubt upon the evidence that White saw the defendant on the 7th February, and asked him to sign a written consent in the following terms: ''I, Charles Boles, of the city of Toronto, the lessor named in a certain lease to one William McNeil, dated the 1st January, 1912, of the south half of lot 26, plan 423, on Lauder avenue, in the county of York, hereby consent to the assignment of the said lease to J. W. Cornish, of the said city of Toronto.'' The defendant refused to sign the consent, and in fact denies that it was shewn to him by White. One can well understand from a perusal of his evidence why the trial Judge preferred to credit the testimony of the plaintiffs and their witnesses.

The defendant had heard of the sale to Cornish. No satisfactory reason is disclosed in his evidence for withholding his consent. I think that he ''wilfully and arbitrarily'' withheld it, as the trial Judge found. It appears that, even when advised by a competent solicitor to consent, he continued obdurate.

In this action he takes the position that, in consequence of the plaintiff McNeil making an assignment of the lease without his consent, a forfeiture was created. The lease is one required to be in writing and under seal, as also any assignment thereof: R.S.O. 1897 ch. 119, sec. 7; ch. 338, sec. 3.

There was, up to the time the consent of the defendant to the assignment from McNeil to Cornish was sought, no valid assignment, but merely an agreement to assign.

A valid assignment was necessary to work a forfeiture: Friary Holroyd & Healey's Breweries Limited v. Singleton, [1899] 2 Ch. 261, at p. 263.

The defendant having, on the 7th February, withheld his consent, in violation of the agreement, McNeil was thereafter at liberty to assign his lease and option without the lessor's consent:

Woodfall's Landlord and Tenant, 19th ed. (1912), p. 776; Goodwin v. Saterley (1900), 16 Times L.R. 437.

On the 8th February, 1913, a formal assignment of the lease and option under seal was executed by him in favour of Cornish. Even if the result of what McNeil had done prior to the 8th February, 1913, had been to enable the defendant to declare the lease forfeited, the latter's subsequent conduct in receiving rent from him amounted to a waiver: Woodfall, p. 376, and cases there cited. His receipt is in evidence dated the 1st March, 1913, acknowledging to have been paid by McNeil $26 for the rent for the months of March and April of that year.

The agreement between the plaintiffs of the 8th February by which the lease and option were assigned by McNeil to Cornish was carried out, by the latter paying to the former the consideration therein named. The plaintiffs Cornish and McNeil had at the time some talk about the latter continuing as tenant of the former, though no actual agreement had been come to.

McNeil continued in possession, and at first paid the rent to Cornish. When, however, the latter offered it to the defendant, he would not receive it. Thereupon McNeil and Cornish went to him and endeavoured to persuade him to do so. On his still declining, and stating that he would receive it from nobody but McNeil, Cornish handed $26 to McNeil, who in turn paid it to the defendant, from whom he received the receipt already mentioned. Cornish, having thus found that the defendant was not disposed to recognise the assignment of the lease from McNeil to him, did not complete any arrangement with the latter about renting the property.

On the 8th March, 1913, an agreement for sale of the lease and option was entered into between the plaintiff Cornish and the Allen Edwards Spiers Realty Company Limited, and thereafter the plaintiff Cornish and one Edwards, representing that company, on several occasions sought to induce the defendant to recognise the assignment to Cornish and the further assignment from Cornish to the company, but without effect.

On the 19th April, 1913, the writ herein was issued. The plaintiffs in their statement of claim asked for an order directing the defendant to execute such instrument or instruments in writing as were necessary to give the proper consents of the defendant to the assignment of the lease and option from the plaintiff McNeil to the plaintiff Cornish and from the latter

to the realty company, and also a declaration that, in the circumstances, the plaintiff McNeil was entitled to assign to Cornish and Cornish to the realty company, each without the written consent of the defendant. They also asked for damages for the refusal or neglect of the defendant to give the consents.

Subsequent to the commencement of this action, the realty company, owing to the failure of the plaintiff Cornish to obtain the defendant's consent to the assignment of the option from him to it, abandoned its contract to purchase. The plaintiff McNeil went out of possession on or soon after the 1st May, 1913, and thereupon the defendant assumed to retake possession of the property and to rent it.

Before trial, the plaintiffs gave notice of an application, to be made before the presiding Judge thereat, to amend their statement of claim so as to set up that the defendant had, forcibly and wrongfully and without having given any notice of forfeiture and without colour of right, entered into possession of the premises, thus depriving the plaintiffs and each of them of their rightful possession thereof, and that he had re-rented the premises to other tenants, and by adding also a claim for damages in consequence of the rescinding of the agreement to purchase by the realty company and for possession of the premises. The amendment was allowed, and there is a finding of the trial Judge to the effect that the defendant did enter and take possession without colour of right. His judgment also declares that the plaintiff McNeil was entitled to assign the lease and option to the plaintiff Cornish, and that the plaintiff Cornish was entitled to assign the same to the Allen Edwards Spiers Realty Company Limited, without the consent, written or otherwise, of the defendant. The note of judgment endorsed on the record includes a declaration that the plaintiffs are entitled to possession, though this is not carried into the formal judgment as settled.

There can, I think, be no doubt that the plaintiffs were entitled, as found by the trial Judge, to a declaration that McNeil was justified in assigning the lease to the plaintiff Cornish without the consent of the defendant. This is, perhaps, all that he would have been entitled to, but for the defence set up by the latter. At the date of the issue of the writ, no question of possession was involved so far as the plaintiffs were then concerned. They had possession. At that time, there was, however, also in question the refusal on the part of the defend-

ant to recognise the assignment from McNeil to Cornish and from Cornish to the realty company.

It was apparently not brought to the attention of the trial Judge, when considering the question of the amendment already referred to, that the abandonment of the contract by the realty company was subsequent to the date of the issue of the writ, and therefore no claim for damages with respect thereto could properly be dealt with in this action. The remedy, if any, of the plaintiff Cornish must be sought in another action.

The defendant further sets up in his statement of defence that the plaintiff McNeil committed a breach of the covenants contained in the lease by not repairing the premises and not leaving the premises in good repair and by abandoning the premises and assigning the lease without the written consent of the defendant, whereby the lease became and was void, and the defendant had re-entered the said premises as of his former right.

The defendant pretended to lay much stress upon a tenant occupying the premises, but such evidence as there was indicates plainly that the house on the property was not in good repair, and that he could not have been much concerned about this. The trial Judge says: "The pretension that there could be any personal element in the choice of a tenant, or that the tenant should live on the property, is, having regard to the nature and condition of the land, and the dilapidated building thereon, utterly untenable and absurd."

At the time the defendant took possession of the property, early in May, no rent was in arrear, and the lease was still a valid and subsisting one. The defendant was not justified in taking possession, and, having set up the claim he did in his statement of defence as an answer to the plaintiffs' action, the plaintiffs are entitled to a declaration that the lease is still a subsisting one and to an order for the possession of the property. They were, in any event, entitled to bring their action for a declaration that, under the circumstances, they were relieved from obtaining the consent of the defendant to the assignment of the lease and for costs: West v. Gwynne, [1911] 2 Ch. 1.

The defendant seeks to attack the judgment appealed from, on the ground that no request was made for his consent to the assignment before it was made on the 8th February, 1913, and that, even if such request was proved to have been made, he was entitled, without being unreasonable or arbitrary, to refuse such consent because the plaintiff Cornish was not such a person as

he need accept as a tenant, and indeed had no intention to occupy the house on the property; also, on the further ground that the assignment from Cornish to the realty company was made without his consent, and that the plaintiff McNeil abandoned the premises, surrendering the lease, and thus justified the defendant in re-entering.

I am of opinion that he has failed upon all grounds. The judgment, however, should be varied so as simply to declare that the plaintiff McNeil was justified in assigning the lease to the plaintiff Cornish; that the lease is a valid and subsisting one; and that the plaintiffs are entitled to the possession of the property in question.

The plaintiffs should also have the costs of this appeal. They have succeeded in holding the judgment on the matters of real importance and about which there was the chief contest at the trial.

MULOCK, C.J.Ex., CLUTE and LEITCH, JJ., concurred.

RIDDELL, J., also agreed in the result, for reasons stated in writing.

Judgment below varied.

JUNE 15TH, 1914.

*MILLARD v. TORONTO R.W. CO.

Damages—Negligence—Street Railway Company—Injury to Property—Moneys Received from Insurance Company—Evidence.

Appeal by the defendants from the judgment of DENTON, Jun. Co.C.J., in favour of the plaintiff, in an action in the County Court of the County of York.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

D. L. McCarthy, K.C., for the appellants.

J. P. MacGregor, for the plaintiff, the respondent.

*To be reported in the Ontario Law Reports.

The judgment of the Court was delivered by RIDDELL, J.:— The plaintiff's motor car was run into and damaged by the defendants' street car. It became on the trial a question of "how much?" The defendants' counsel asked the plaintiff if he had received some money from an insurance company for the damage to his motor. On objection by the plaintiff's counsel, the learned County Court Judge refused to allow the question. We are asked to grant a new trial.

The question whether a wrongdoer who had caused damage by a collision was entitled to have advantage of an insurance effected by the complainant and money paid thereunder to him came up squarely many years ago in Yates v. Whyte (1838), 4 Bing. N.C. 272. There the plaintiff sued the defendant for damaging his ship by collision. He had been paid a sum of money by an insurance company, but it was held by the full Court of Common Pleas that the wrongdoer could not have any advantage therefrom. . . . This case has never been questioned, much less overruled, though not infrequently referred to.

[Reference to Dickenson v. Jardine (1868), L.R. 3 C.P. 639, 644; Stringer v. English, etc., Insurance Co. (1869), L.R. 4 Q.B. 676, 692; Jebsen v. East and West India Dock Co. (1875), L.R. 10 C.P. 300, 305; Simpson v. Thomson (1877), 3 App. Cas. 279, 284 sqq.; Midland Insurance Co. v. Smith (1881), 6 Q.B.D. 561, at p. 567; Bradburn v. Great Western R.W. Co. (1874), L.R. 10 Ex. 1; Dalby v. India and London Life Assurance Co. (1854), 15 C.B. 365; Hicks v. Newport, etc., R.W. Co. (1857), 4 B. & S. 403 (note); The Marpessa, [1891] P. 403, 409; Misner v. Toronto and York Radial R.W. Co. (1908), 11 O.W.R. 1064, 1069.]

Cases under Lord Campbell's Act have no application: see per Osler, J.A., giving the judgment of the Court of Appeal, at p. 1069 in the case last-named. . . .

[Reference to Hicks v. Newport, etc., R.W. Co., 4 B. & S. 403 (note); Bradburn v. Great Western R.W. Co., L.R. 10 Ex. 1, 2, 3; Franklin v. South Eastern R.W. Co. (1858), 3 H. & N. 211; Pym v. Great Northern R.W. Co. (1862-3), 2 B. & S. 759, 4 B. & S. 396; Jennings v. Grand Trunk R.W. Co. (1887), 15 A.R. 477; Beckett v. Grand Trunk R.W. Co. (1886), 13 A.R. 174; Grand Trunk R.W. Co. v. Jennings (1888), 13 App. Cas. 800, 804, 805.]

But none of that doctrine (which depends on the fact that all that can be recovered under Lord Campbell's Act is the actual

pecuniary loss) has or can have any application to the case of a person himself suing for injury either to his person or his property. He has two distinct causes of action: the one on the contract with the insurance company which has insured him against accident, that they shall, on the occurrence of an accident, pay him a sum of money, not certain, perhaps, but which the accident makes certain. That contract he has paid money for and is entitled to enforce, even if he lets the wrongdoers go. The other cause of action he has is in tort against the wrongdoer for damages, which he may enforce even if he lets the insurance company go. There is no reason why both cannot be enforced.

If now he sues the wrongdoer, he is entitled to the full amount for himself if the insurance company have not paid him; if they have paid him, the insurance company have rights which we need not go into here; they are indicated in the cases cited. But with the rights of the plaintiff and the insurance company inter se, the wrongdoer has no concern. Mayne on Damages, pp. 495 sqq. of the 8th ed., may be consulted.

The ruling at the trial was right, and this motion must be dismissed with costs.

JUNE 15TH, 1914.

WHITE v. NATIONAL PAPER CO.

Principal and Agent—Agent's Commission on Sale of Goods—Commission-agreement—Construction—"Commission on all Accepted Orders"—Evidence.

Appeal by the defendants from the judgment of MIDDLETON, J., ante 83.

The appeal was heard by MULOCK, C.J.Ex., HODGINS, J.A., RIDDELL and LEITCH, JJ.

C. A. Masten, K.C., and G. Cooper, for the appellants.

Hamilton Cassels, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The liability, if any, for the commission, sued for under the contract, arises under two letters exchanged between the parties and dated the 15th and 19th January, 1912, under which the re-

spondent accepted the selling agency of the appellants' goods for Ontario (except Ottawa).

The material terms of the agreement are as follows:—

1. We (the appellants) shall pay you (the respondent) a commission of five per cent. on all accepted orders.

2. This commission shall be payable immediately the order is shipped, and, failing the customer paying the account, we shall deduct from the first settlement with you the commission paid on said orders.

3. You shall have the exclusive agency for the Province of Ontario, with the above exception, and at any time this agreement should cease, we shall pay you on all accepted orders up to the termination of this agreement.

4. Lastly, we agree to pay you said commissions whether or not the order is sent by you direct or whether by any party within your district. We . . . shall forward you at the end of each week a statement of all commissions due on orders received. We shall forward you a copy of each invoice as sent to the customer. We shall also keep you advised with any information in respect to all orders and send you copies of any letters we write to customers. If either of us wish to terminate this agreement, we can do so by giving one month's written notice to either party. All commissions to be paid at the end of each month."

From the above it will appear, as was the opinion of the learned trial Judge, that the provision for payment of commission "on all accepted orders" is the dominating and controlling clause.

The question is what the word "orders" means under this contract. The judgment in appeal construes it as meaning or including "contracts," whereas the appellants contend that its import is more limited, i.e., orders for particular goods given either under a contract previously made or sent in in the form of a request for a specific quantity of named paper.

I think the latter is the correct interpretation.

The appellants in fact apply the coating to paper, and in that sense are manufacturers of enamel book, lithographic, and coated label papers. The agency is not restricted to any special kind of paper, but extends to all kinds manufactured by the appellants.

The claim in the present case is for commission amounting to $1,491.36, being five per cent. on $35,000 worth of paper, the order for which is said to have been accepted by the appellants

by virtue of a contract made by them with the Buntin-Reid Company dated the 4th June, 1912, less what was in fact supplied, on which the commission was admitted and paid to the respondent.

In construing the words used by the parties, it is well to remember the principle stated by Lord Esher, M.R., in Hart v. Standard Marine Insurance Co. (1889), 22 Q.B.D. 499, at p. 501: "If the words are capable of two meanings, you may look to the object with which they are inserted, in order to see which meaning business men would attach to them."

The situation of the parties, their respective occupations, what they were contracting about, and the way in which they contemplated the business was to be done, are all legitimate factors in this determination. But in this case the question is really narrowed down to ascertaining whether the contract with the Buntin-Reid Company in itself is an "accepted order," within the meaning of the principal agreement.

The Buntin-Reid Company contract contains a consent to purchase "certain papers" known as "Reliance coated book, coated either one or two sides." The appellants, in consideration of the agreement of the Buntin-Reid Company to purchase "goods of the Reliance grade amounting to not less than the sum of $35,000," were to supply "such coated papers known under the trade name of Reliance Coated Book, or Reliance Coated Litho., at a price of $6.50 per 100 lbs." There is a further provision that this price of $6.50 per 100 lbs. shall include delivery free of all charges to such points as Toronto, Hamilton, etc., and a guarantee "that the quality in all particulars is fully up to standard of samples submitted."

Under this contract the grade is specified, the trade names designated, and the quality is referred to certain samples, but the quantities, sizes, and thickness of paper, within these limits, is apparently left to be determined by the requirements of the Buntin-Reid Company, and the delivery is to be made at various named points.

If no further action were taken by the Buntin-Reid Company in the way of designating just what they wanted from time to time, it may be that an action would lie against that company. If it did, the action would be for damages, for it is not a contract which could be ordered to be specifically performed. But, if they asked for certain shipments to be made of designated sizes, etc., and these were not responded to, or, when furnished, failed to come up to the grade and quality demanded, then the

liability would be the other way. Clearly something further was to be done before the appellants became in default. This illustrates the course of dealing that might naturally arise under the agreement sued on; and, as the respondent took part in the consummation of the Buntin-Reid contract, it is not unreasonable to consider it as throwing light upon the construction of his contract. It is an example of a state of affairs which might occur and with regard to which his contention may well be tested.

Dealing first with the main agreement, the words "accepted orders" imply that all orders may not be accepted, and that there was a right in the appellants to accept or reject. Under clause 2 shipment is to fix the time of payment, and the customer's default in payment is to absolve the appellants from liability for the commission on the particular shipment, and entitles them to charge it back to the respondent.

Under clause 4, the order may be sent by the respondent or by the customer. Weekly statements of commissions on order received were to be sent by the appellants, as well as a copy of the invoice sent each customer.

It is obvious that the provisions of clauses 2 and 4 contemplate a definite requisition for certain kinds of paper from customers, procured either by the respondent's direct intervention or originating in his territory without it, and shipment pursuant to direction, to certain points, as well as payment by such customer.

These provisions fit in well with the course of dealing intended by the Buntin-Reid Company contract, and are inapplicable if that contract is to be deemed an "accepted order," because there can be no shipment and no copy of an invoice unless and until directions are received as to the former, and specifications are forwarded as to the exact paper required.

The judgment in appeal minimises these preliminaries, which, in my opinion, are essential, on the ground that, as the shipments might be either immediate or future, the appellants could not free themselves from liability to pay commission by breach of contract. But there could be no breach of contract until the appellants were put in default by neglecting or refusing to fill the order, which they could not do till they knew what was required.

That the parties contemplated that both would perform their obligations, and that the Buntin-Reid Company were of good financial standing and answerable in damages, is true, but good faith and solvency are not equivalent to the performance of acts

necessary to bring into play the provisions of the contract and required to be complied with before it can effectually be executed. The agreement is not that, if a contract is made under which orders may be, but are not, given, then the appellants will pay commissions upon the orders intended to be given, nor is it to pay commission upon damages for default in not carrying out the agreement. It is to pay on orders given and accepted.

If the Buntin-Reid Company, being dissatisfied with the mode in which the orders they gave were being complied with, desisted from sending in any more, or if they for other reasons ceased to require further shipments, then a question might arise as to whether they or the appellants were liable inter se for non-performance of the contract existing between them.

But I am unable to persuade myself that the respondent can treat default in the same way as performance, and require payment on orders not given and not accepted, unless he has specially provided for that contingency in his contract. In the case cited of Lockwood v. Levick (1860), 8 C.B.N.S. 603, the recovery is expressly put by Erle, C.J., on the ground that the defendant had the option of delivering the goods and so making a profit, and that, having accepted an order—in that case for a specified amount of web—which he should have performed, he could not contend that he was not liable to pay a commission as upon the "goods bought." If the order had in this case been given by the Buntin-Reid Company, and, after their acceptance, the appellants had refused or neglected to fill them, the respondent might be entitled to recover.

The question of responsibility as between the appellants and the Buntin-Reid Company is one thing, and the rights of the respondent against the appellants is quite another.

The respondent has failed to shew that there were any orders given which were accepted, and on which commission has not been paid.

The Buntin-Reid Company contract establishes a relationship which, if acted upon, would have benefited the respondent, and is in that respect very similar to the agreement in Field v. Manlove (1889), 5 Times L.R. 614, in which it was held that the plaintiff could not recover commission upon the full market-price of the twenty-seven engines which were not taken by Messrs. Bath & Son, to whom the defendants had given a monopoly of sale in Canada on condition that they would take thirty engines.

I think that the respondent must be confined to the actual

result as between the parties to it, as was the case in Field v. Manlove, ante; and if, by their lack of action, nothing was done to create a state of affairs such as is required to make a basis of liability under his contract, he cannot, in my judgment, recover.

I have not referred to the subsequent correspondence between the parties and the Buntin-Reid Company as illustrating what the word "orders" meant or the evidence upon that point, the admissibility of which is doubtful. See North Eastern R.W. Co. v. Hastings, [1900] A.C. 260. But, if it is read and if the cases I have already mentioned are considered, there will not, I think, be much difficulty in concluding that the word "order" in a commercial contract is a well-understood word, and that it was used in its usual signification in the contract in this case.

The appeal should be allowed and the action dismissed with costs.

JUNE 15TH, 1914.

*VANSICKLER v. McKNIGHT CONSTRUCTION CO.

Vendor and Purchaser—Agreement for Sale of Land—Action by Purchaser for Specific Performance—Evidence to Vary Written Agreement—Delay—Time of Essence—Forfeiture—Penalty—Relief against—Return of Deposit—Company—Agreement not under Seal — Trading Corporation — Powers of Officers—Furtherance of Objects of Corporation—Ontario Companies Act, sec. 139.

Appeal by the defendants, the vendors, from the judgment of RIDDELL, J., at the trial, in favour of the plaintiffs, the purchasers, in an action for specific performance of an agreement for the sale and purchase of land.

The appeal was heard by MULOCK, C.J.Ex., MACLAREN, J.A., CLUTE and LEITCH, JJ.

R. S. Robertson, for the appellants.

R. McKay, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by CLUTE, J.:—The agreement in question was prepared by the defendant Doug-

*To be reported in the Ontario Law Reports.

las, secretary-treasurer of the defendant company, and was enclosed in a letter sent by him to the plaintiffs, dated the 21st February, 1913. The agreement provides that the offer is to be accepted on the following day, otherwise void; $100 was to be paid in cash as a deposit and "$1,400 on the completion of the sale," and the balance to be secured by mortgage payable by instalments, and "sale to be completed on or before the 10th March, 1913. Possession of the said premises April 16th, 1913." The letter draws attention to the clause as to possession, and mentions that, "as I told you, Mr. McKnight is out of town, and will not be back till late in April, so that we will not be able to get his signature until then, but that need not make any difference in the transfer as far as you are concerned. It can go ahead, and he can sign the necessary papers when he returns."

Upon the conflict of testimony the trial Judge expressly accepts the evidence of the plaintiffs, without imputing ill-intent to the defendants, upon whose recollection he cannot rely.

The agreement was duly executed on the day named, and the $100 paid. The $1,400 was deposited by the plaintiffs in the hands of their solicitor prior to the 10th March, and on that day the plaintiffs' solicitor wrote to the defendants' solicitor advising him that they had the money and desired to close the matter as soon as possible. On the 17th, Douglas, secretary-treasurer of the defendant company, replied, stating that McKnight would not be back, probably, before the end of May; and the plaintiffs' solicitor then suggested that the deeds might be sent to McKnight for execution. On the 19th March, the defendants' solicitor suggests that his clients are willing to withdraw from the sale and allow the matter to drop. The result of the correspondence was, that the defendants insisted that the $1,400 should be paid in cash and the deeds might be signed when McKnight returned. The plaintiffs denied any arrangement by which the money was to be paid before the transaction was completed. On the 20th May, the defendants enclosed a cheque for $100 and declared the contract cancelled. On the 21st, this was returned, and, while insisting that the payment was not to be made until the transaction was closed, the plaintiffs' solicitors offered as a matter of convenience to make the cash payment on receiving an undertaking that the deed would come when McKnight returned. In the meantime the mortgage had been approved and executed on the 10th March.

On the 22nd May, the defendants' solicitor writes a further

letter, stating that there is no binding contract, and that they are under no obligation to complete the transaction, and so return the $100 deposit. Subsequently the $1,400 was tendered with the mortgage, and a deed demanded, which was refused.

The trial Judge finds that McKnight and Douglas had the management of the company and had power to deal for the company in this transaction, and that Mr. Douglas was authorised to enter into a contract of this kind by the general methods of business pursued by the company, and finds that the document which he drew was precisely what had been arranged between the parties; and, upon the evidence, holds that there was no misunderstanding; that the plaintiffs dealt with the company in good faith; that they signed the offer carrying out the terms which they had made with McKnight previously; that they received the letter enclosing the offer and asking for a cheque for $100, and signed the document; that the company accepted the $100, which they had no right to unless this acceptance of the offer for the company by Douglas had been justified; that they kept that money a long time even after the dispute arose; that the sale was to be completed on the 10th March, 1913; and that, on completion of the sale, the $1,400 was to be paid, and the balance was to remain on mortgage.

A careful perusal of the evidence satisfies me, having regard to the credit given by the trial Judge to the plaintiff and his witnesses, that these findings are fully supported by the evidence.

The two points argued by Mr. Robertson were: (1) that parol evidence was admissible to shew that the written document did not contain the true agreement of the parties, and that this was evidenced further by the letter of the 21st February; (2) that the agreement was invalid, not having the corporate seal.

The first point, having regard to the findings of the trial Judge, is, I think, wholly untenable. What is described in the oral evidence relied on took place before the agreement was signed; and, according to the plaintiffs' evidence, the agreement conforms to that understanding, and the trial Judge so finds. The letter from Douglas of the 21st February, although signed by Vansickler after the execution of the agreement, does not add any new term. It simply draws attention to the fact that they are not to give up possession until the 16th April, and that McKnight will be back late in April. It does not state that the $1,400 is to be paid before the completion of the sale,

as provided by the agreement; so that, as to the merits, the plaintiffs were always ready and willing and offered to complete the contract on their part and to pay the $1,400 on the day named. It was owing to the defendants' inability to perform their part of the contract that the whole trouble arose.

I find it impossible, in reading the evidence, to come to any other conclusion than this: that both parties intended to carry out the sale, and that the delay was owing to the absence of McKnight; that it was an afterthought on the part of the defendants to repudiate the company's liability under the contract. According to the true construction of the agreement and of its terms, the $1,400 was to be paid on the completion of the sale. This the plaintiffs were always ready to do.

I do not think that any forfeiture took place under the clause in the contract providing that time should be of its essence; but, if it did, the condition of forfeiture was in the nature of a penalty, from which the respondents were entitled to be relieved, on payment of the purchase-money due: Kilmer v. British Columbia Orchard Lands Limited, [1913] A.C. 319; Boyd v. Richards (1913), 29 O.L.R. 119. . . .

In the Kilmer case the first instalment had been paid, and default was made in the second instalment. The Court was of opinion that the circumstances of the case brought it entirely within the ruling of In re Dagenham (Thames) Dock Co. (1873), L.R. 8 Ch. 1022. It is unnecessary here to decide whether the Kilmer case would apply if express provision was made for a return of the deposit. In the present case nothing is said as to return of the deposit; and "in such case the Court will decline to order the deposit to be returned to a defaulting purchaser:" Fry on Specific Performance, 5th (Can.) ed., p. 579; Dunn v. Veer, 19 W.R. 151; Howe v. Smith, 27 Ch. D. at pp. 97-101; and it can make no difference, I think, to the parties' rights that in the present case the defendants offered to return the deposit. The agreement provides that, in case of failure to make a good title, the agreement shall be null and void, and the deposit-money returned to the purchaser. There is no provision for a return of the deposit-money in case the plaintiffs make default. The defendants were not obliged to return the deposit, and, having done so, they could have claimed the forfeiture if the plaintiffs had made default, which brings the case within the principle laid down in the Kilmer case.

I am unable to give effect to the contention of Mr. Robertson that the contract is void for want of a seal. The by-laws

provide that the president and secretary-treasurer may make all contracts and engagements on behalf of the company. McKnight, the president, and Douglas, the secretary-treasurer, appear from the evidence to have had the entire management of the business, and both concurred in the agreement to sell the property, and it was left for Douglas, as secretary-treasurer, to sign the contract.

The rule that a contract by a corporation must generally be under the common seal is subject to important exceptions, one of which is that the rule does not apply to contracts of a trading corporation, having regard to the trade which they are constituted to carry on. . . .

[Reference to Holmes v. Trench, [1891] 1 I.R. 319, 333; Fry, p. 319.]

It was admitted in the present case at bar that the defendant corporation is a trading corporation, but the contention was that the contract was not one which the company was incorporated to carry on. It appears, however, from the evidence, that the sale of the land in question was with the view of enabling the company to purchase other lands to carry on their business, so that the contract was in furtherance of the object of the corporation. See, also, Lindley's Law of Companies, 6th ed., p. 277; Wilson v. West Hartlepool R.W. Co., 34 Beav. 187, 2 DeG. J. & S. 475; Beer v. London and Paris Hotel Co., L.R. 20 Eq. 412.

Independently of statutory provision, a corporation constituted for the purpose of trading may for such purpose enter into a contract which is not under seal: South of Ireland Colliery Co. v. Waddle (1869), L.R. 4 C.P. 617 (Ex. Ch.). A director's signature to a resolution referring to a draft agreement may be sufficient to satisfy the Statute of Frauds: Jones v. Victoria Graving Dock Co. (1877), 2 Q.B.D. 314 (C.A.); Halsbury's Laws of England, vol. 5, para. 491.

Apart from the general rule of law as above indicated, the present case, having regard to the by-laws giving authority to the president and secretary-treasurer to make contracts and engagements on behalf of the company, falls within sec. 139 of the Ontario Companies Act, which provides that a document or proceeding requiring authentication by a corporation may be signed by any director, manager, or other authorised officer of the corporation, and need not be under its seal. I do not think it can be doubted that in the present case the secretary-treasurer had authority to sign the agreement in question. See

Royal Bank v. Turquand, 6 E. & B. 327; Mahoney v. East Holyford Mining Co., L.R. 7 H.L. 869; Premier Industrial Bank v. Charleton Manufacturing Co., [1909] 1 K.B. at p. 114.

Both under the statute and independently of the statute, I entertain no doubt that the agreement in question was sufficiently signed without the corporate seal, so as to bind the company.

The appeal should be dismissed with costs.

JUNE 15TH, 1914.

BOLTON v. SMITH.

Way—Lane—Easement—Prescription—Evidence.

Appeal by the defendants from the judgment of LATCHFORD, J., in favour of the plaintiff.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. E. Jones, for the appellants.

William Proudfoot, K.C., and M. Grant, for the plaintiff, the respondent.

LEITCH, J.:—The plaintiff is the owner of part of park lot number 19 in the 1st concession from the bay, now known as lot number 202 on Bathurst street, in the city of Toronto, having a frontage of 80 feet on Bathurst street by a depth of 108 feet.

The defendants are the owners of lot number 204 on Bathurst street, having a frontage of 20 feet 8 inches, adjoining a lot immediately to the north of lot 202.

The plaintiff alleges that, not only the westerly ten feet of his own lot 202, but also the defendants' lot 204 and lot 200, have been used as a right of way by the owners of the said three lots as a means of gaining access to the yards in rear and for the use of the plaintiff and all other persons requiring to use the lane and for their horses and waggons and other vehicles.

The plaintiff claims the said easement or right of way by possession, and does not pretend to have any paper title, nor does she claim to own the land occupied by the lane. No ques-

tion is raised—in fact it is admitted—that the defendants are the owners of lot 204.

The defendants allege that they have become the purchasers of lot 204 without any notice or knowledge that the plaintiff or her predecessors in title have acquired any right or title to a right of way over lot 204. The defendants also plead that, before they purchased lot 204, they caused a search to be made in the registry office, and found that there had been no registered conveyance of any kind giving the plaintiff or her predecessors in title any right of way or easement over lot 204, and that there is no reference to any conveyance under which the plaintiff holds, of any kind, to any right of way or easement over the defendants' lands, or to any inchoate right to use the said lands or any part thereof.

The plaintiff has no paper title of any kind to the right of way in question. The title which the plaintiff sets up is a possessory one, and that only. The right of way or lane in question was not shewn on any map or plan of the subdivision which includes lot 204. The right of way did not arise from necessity. A perusal of the evidence satisfies me that the plaintiff did not acquire a right to use the lane by prescription. No doubt, at different times, persons used the lane, for a short time and on isolated occasions, for various purposes, such as bringing in coal, taking out ashes and garbage; but the evidence satisfies me, and I think it is abundantly clear, that none of these persons used the lane with the intention of gaining a title to an easement or the right to deposit garbage in the lane or to use it for the carriage of coal or other commodities. The user was only occasional and on isolated occasions, and was not continuous and with the knowledge of the true owner. The acts of user were mere occasional acts of trespass done without any intention of acquiring title, and without the knowledge, consent, or acquiescence of the defendants.

I do not think it was practical (so far as the garbage is concerned, and that seems to be about all that was removed from this lane) to have it removed regularly or at stated intervals but only occasionally by carrying the garbage can out to the street. It was not the practice to drive horses and carts into the lane or to use it for the passage of carts or waggons for the purpose of removing garbage. It was a case of occasionally carrying the garbage cans out of the lane to the carts in the street.

See Ballard v. Dyson (1808), 1 Taunt. 279; Langley v.

Hammond (1868), L.R. 3 Ex. 161; Bradburn v. Morris (1876), 3 Ch. D. 812; Foster v. Richmond (1910), 9 Local Government Reports 65.

The witness Devins, who occupied lot 202 for about two and a half years, beginning in the year 1900, and lot 200 for three years prior thereto, swears that he was told by Mr. Armstrong, who occupied lot 204, that he had no right to use the lane, but that he might put his garbage out, provided that he would keep his part of the lane clear, and Matthews, who bought 202 in 1892, but did not live there for 7 or 8 years thereafter, told Devins the same thing. Although Matthews was called by the plaintiff, he was not recalled, nor was this evidence contradicted in any way.

The evidence for the plaintiff falls far short of that required to create an easement for a right of way over the defendants' property.

I think the appeal should be allowed and the plaintiff's action should be dismissed with costs.

MULOCK, C.J.Ex., and CLUTE and SUTHERLAND, JJ., concurred.

RIDDELL, J., agreed in the result.

Appeal allowed.

JUNE 15TH, 1914.

RAINY RIVER NAVIGATION CO. v. ONTARIO AND MINNESOTA POWER CO.

Water and Watercourses—Navigable River—Power Companies' Dam—Decrease in Supply of Water for Navigation—Injury to Steamboat Business—Nuisance—Special Injury to Plaintiffs—Findings of Fact of Trial Judge—Appeal—Damages—Increase—Loss of Trade—Expenses — Possible Decrease—Reference.

Appeal by the plaintiffs from the judgment of BRITTON, J., 4 O.W.N. 1591.

The appellants sought to increase the damages allowed by the trial Judge against the two defendant companies, the Ontario and Minnesota Power Company and the Minnesota and Ontario Power Company.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

I. F. Hellmuth, K.C., and A. R. Bartlet, for the appellants.

A. W. Anglin, K.C., and Glyn Osler, for the defendants, the respondents.

The judgment of the Court was delivered by MULOCK, C.J.Ex.: —This is an action for damages because of the defendant companies penning back water from the Rainy river to such an extent as to interfere materially with the operation of the plaintiffs' steamboat called the "Aguinda" plying between the town of Fort Frances, situated at the easterly end of the river, and the village of Rainy River, which is at its mouth, for the period extending from about the 28th June, 1911, until the 5th August, 1911.

Mr. Justice Britton, without a jury, tried the case and directed judgment for the plaintiff for $540 and costs. The plaintiffs complain that this sum is inadequate and appeal in order to have it increased. The defendants in resisting the appeal contend that the plaintiffs are not entitled to maintain the action. . . .

The Rainy river is an international boundary between Canada and the United States: Rainy Lake River Boom Corporation v. Rainy River Lumber Co. (1912), 4 O.W.N. 5, 27 O. L.R. 131.

The north part of the dam is within Canadian territory, the southerly within that of the United States. Thus no one corporation could be empowered to build such an international work; hence the two companies, for the common purpose, erected it as one work.

For the defence it was contended that the injury complained of by the plaintiffs was not different from that suffered by all persons navigating the river; that, consequently, the conduct of the defendants, at most, constituted a public nuisance only; and that the plaintiffs were not entitled to maintain this action. The defendants' counsel also urged that, as there was no physical injury to the plaintiffs' property, but at most merely an injurious interference with their business, they were not entitled to damages for loss of trade, and Ricket v. Metropolitan R.W. Co. (1867), L.R. 2 H.L. 175, was relied upon in support of this latter contention. . . .

[Reference also to Metropolitan Board of Works v. McCarthy (1874), L.R. 7 H.L. 243, at p. 256.]

These cases do not decide that the measure of damages recoverable at common law is limited to what would be recoverable by way of compensation for lands injuriously affected when a claim is made under these Acts, nor do they decide whether at common law an action would or would not in any particular case lie for injury to trade. Any such expressions of opinion as to the rights of parties at common law which may be found in either of those cases were obiter—the sole question involved in each of them being, what compensation was intended by the Land Clauses Act and the Railway Clauses Act. . . .

[Reference to Greasley v. Codling (1824), 2 Bing. 263.]

The facts of the present case shew that for some years the plaintiffs had been engaged in the carrying trade throughout the whole length of the river, and for the purposes of such trade owned or were interested in wharves or other properties along the river, and were actually engaged in prosecuting the business for the season of 1911, when on the 29th June the "Aguinda," which had with difficulty reached Fort Frances, owing to shallow water, was compelled to lie up there from that day until the 5th August, because the river had ceased to be navigable in consequence of the penning back of the water by the defendants.

The general principle is that a private action may be maintained in respect of a common nuisance where the complaining party has sustained some special damage not common to the general public, and thus in each case it becomes a question of fact whether the injury complained of specially affects the plaintiff or a limited few, the plaintiff being of the number: Bell v. Corporation of Quebec (1879), 5 App. Cas. 84. . . .

[Reference to Rose v. Miles (1815), 4 M. & S. 101; Drake v. Sault Ste. Marie Pulp and Paper Co. (1898), 25 A.R. 251; Ireson v. Holt Timber Co. (1913), 30 O.L.R. 209; Winterbottom v. Lord Derby (1867), L.R. 3 Ex. 316, 322; Page v. Mille Lacs Lumber Co. (1893), 53 Minn. 492.]

Dealing then with the facts of this case, the question is, whether the defendants by their works so interfered with the navigability of the river as to occasion special damage to the plaintiffs. The evidence shews that the dam above the falls so prevented water escaping as to render the river non-navigable for the plaintiffs' vessel the "Aguinda" from the 29th June, 1911, until the 5th August, a period of five weeks. During this time she was tied up at Fort Frances, daily expenses being incurred. In addition, this serious interruption of about five

weeks, a very substantial portion of the vessel's whole summer season, which ended on the 15th September, must have injured the goodwill of the route and prejudicially affected the company's earnings throughout the remainder of the season.

If running duirng those five weeks, the vessel would have earned money for carrying the mails, passengers, and freight. This the defendants, by their unlawful and highhanded conduct, prevented; and, in my opinion, they are liable for the loss thus occasioned. The plaintiffs had a subsidy from the Dominion Government for carrying the mails between Kenora and Fort Frances, which, estimated on a mileage basis, amounted to about $66.75 per round trip between Fort Frances and Rainy River. But for the defendants' interference with the water, the vessel would have been able during the five weeks to make 15 round trips, thereby earning at least $1,000 of this subsidy.

From the examination of the trip reports, I think it reasonable to assume that the vessel's receipts from other sources for the five weeks would have amounted to $600. Against these earnings would have to be charged the difference between the expenses incurred when the vessel was tied up and the probable expense if operated. I find no satisfactory evidence enabling me to fix this amount. The plaintiffs should furnish the Court with a statement, and if it is not satisfactory to the defendants then there should be a reference to ascertain the amount of such difference, and the parties may speak to the question of costs of the reference.

If no inquiry as to such expenses is desired, the plaintiffs will be entitled to the two sums of $1,000 and $600, without any deduction.

The plaintiffs also claim damages for the interruption of their business. They had been at expense in advertising and otherwise making it known, and there is evidence to warrant the inference that the plaintiffs' business was materially prejudiced by the five weeks' interruption, and for this interference I would give them $360, being at the rate of $20 per trip for 18 trips between the 5th August and the close of navigation.

The judgment appealed from will be amended by increasing the damages to $1,960, subject to the reference, if any. If it be found that the cost of operating the vessel during the five weeks would have exceeded the actual cost incurred in keeping her in commission when she was tied up, then such excess should be deducted from the sum of $1,960.

The plaintiffs are entitled to the costs of the appeal.

JUNE 15TH, 1914.

RAINY RIVER NAVIGATION CO. v. WATROUS ISLAND BOOM CO.

Water and Watercourses—Navigable River — Obstruction by Saw-logs—Delay in Navigating Vessel—Injury to Business —Evidence—Findings of Fact of Trial Judge—Appeal— Damages.

Appeal by the plaintiffs from the judgment of BRITTON, J., 4 O.W.N. 1593, dismissing the action.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

I. F. Hellmuth, K.C., and A. R. Bartlet, for the appellants.

A. W. Anglin, K.C., and Glynn Osler, for the defendants, respondents.

The judgment of the Court was delivered by MULOCK, C.J. Ex. (after setting out the facts):—It is clear from the evidence that the defendants unlawfully interfered with the plaintiffs' rights in the river. It was, however, contended that the plaintiffs, not having shewn what pecuniary loss they had sustained, were not entitled to recover. But such a contention is no answer to the plaintiffs' claim. Where there is invasion of a right the law infers damage: Ashby v. White (1703), 2 Ld. Raym. 938. As said by Parke, B., in Embrey v. Owen (1851), 6 Ex. 353, 368: "Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage."

The river is a public highway, and the citizens of both countries are entitled to free use thereof. The defendants had no right to erect and maintain therein piers and booms and thereby exclude the plaintiffs from the enjoyment of their rights of navigation. The difficulty, risk, trouble, and delay caused to the plaintiffs on several occasions establish not a mere accidental but a high-handed intentional interference by the defendants with the plaintiffs' rights.

For the reasons which appear in my judgment in Rainy River Navigation Co. v. Ontario and Minnesota Power Co., ante, I am of opinion that the plaintiffs are entitled to main-

tain this action for damages, and that the amount thereof should not be limited to nominal damages. If the case had been tried with a jury, it would have been proper for them, although the plaintiffs were unable to shew the extent of their damage, to award more than nominal damages if they found on the evidence that the wrongful conduct of the defendants had been deliberate, persistent, and high-handed, and productive of substantial inconvenience and delay to the plaintiffs: Bell v. Midland R.W. Co. (1861), 10 C.B.N.S. 287.

It is impossible to believe that the defendants could have considered themselves entitled to take exclusive possession of a portion of a great international river, to prevent or seriously obstruct its navigation by the plaintiffs' steamer when engaged in carrying passengers, mails, and goods, and to dislocate and injure their business with impunity.

All these circumstances are proper elements for consideration in assessing the plaintiffs' damages, and it is no answer to say that the difficulty in determining the amount with precision disentitles the plaintiffs to substantial damages. On this point the reasoning adopted in Chaplin v. Hicks, [1911] 2 K.B. 786, 791, which was an action for breach of contract, is equally applicable where the action is in tort.

With respect, I think that the plaintiffs are entitled to substantial damages for the wrongs inflicted upon them by the defendants, and that the learned trial Judge should have awarded to the plaintiffs damages to the extent of at least $500, with costs; and, therefore, the judgment appealed from should be set aside and judgment entered for the plaintiffs for that sum, with costs of the action and of this appeal.

JUNE 15TH, 1914.

TOWNSHIP OF SANDWICH SOUTH v. TOWNSHIP OF MAIDSTONE.

Municipal Corporations—Drainage — Insufficiency of Drain—Improvement and Extension—Report of Engineer—Cost of Improvement—Assessment against Adjoining Townships—Costs and Damages in Action against one Township—"Surface Water"—Cut-off—Municipal Drainage Act, R.S.O. 1914 *ch.* 198, *sec.* 3, *sub-sec.* 6—*Spreading Excavated Earth on Township Line Road.*

Appeal by the plaintiffs and cross-appeal by the defendants from a judgment of the Drainage Referee.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and Leitch, JJ.

J. G. Kerr, for the plaintiffs.

J. H. Rodd, for the defendants.

The judgment of the Court was delivered by MULOCK, C.J. Ex:—This is an appeal from the decision of the Drainage Referee, and we are asked to set aside the report and assessment of James S. Laird, engineer of the township of Maidstone, in respect of a proposed improvement of the west town line and Mooney Creek drain.

The townships of Maidstone and Sandwich South adjoin each other, and originally portions thereof, which may be referred to as the drainage area, were a swampy swale. Southerly, easterly, and westerly of this area were higher lands, from which surface water flowed in a northerly direction towards this swampy swale, thereby contributing to its swampy character, the water partly escaping therefrom by certain natural watercourses into Big Pike creek. Nevertheless, the drainage area remained in a condition calling for artificial drainage, and work of this character has for many years been carried on under the provisions of the drainage laws.

Amongst such works was the construction of a drain on the town line which runs northerly and southerly between the two townships. The Michigan Central Railway crosses this town line, and it was necessary to have a sufficient passage for water along this drain, including the point where it was crossed by the railway. Accordingly at this point a culvert was put in as forming part of the town line drain construction work. This culvert was not in accordance with the engineer's report, and proved insufficient.

Complaints as to the insufficiency continued for some years without bearing fruit. The waters, obstructed by the insufficient culvert, . . . injured the lands of one Deehan, who brought an action under the Drainage Act against the Corporation of the Township of Maidstone, and recovered a verdict of $200 and costs.

In his judgment the Drainage Referee says: "The culvert crossing the Michigan Central Railway is admittedly insufficient for the purpose intended, not being the culvert which was intended by the engineer who made the report under which the town line drain was constructed. As a result of the insufficiency of the culvert, the water brought down by the west town line

drain to that point has been in part blocked, and thus, as I find upon the evidence, caused to overflow on to the lands of Graves and from these on to the lands of the plaintiff. . . . In the event of the municipality deeming it necessary, in order to prevent a continuation of damage, to improve, extend, or alter the town line drain work, it may add the damage and costs incurred in this action to the engineer's estimates of the cost of such improvements, extensions, or alteration."

In consequence of this judgment, the Corporation of the Township of Maidstone, under the Drainage Act, instructed their engineer to report the scheme for remedying the defective condition of the west town line drain and for assessment of the cost. Thereupon the engineer made his report, whereby he recommended that the town line drain be cleaned out and improved for a distance of 300 rods northerly of the railway, at an estimated cost of $1,467.87, this sum to include the sum of $80, the cost of spreading on the road earth to be taken from the drain, and he also added to the cost of the work the sum of $958.78, being the damages and costs in the Deehan case, making the total cost $2,426.65. This sum he recommended to be assessed as follows: Against Maidstone, because of benefit to roads, $442.80; because of outlet for water from roads, $186.55; lots for improvement, $23,65; lots for benefit from outlet, $1,-024.40; making a total assessment against Maidstone and lots in Maidstone of $1,677.40. Against Sandwich South, because of benefit to roads, $358.85; because of outlet for water from roads, $67.50; lots for improvement, $229.65; lots benefited by outlet, $93.25; making the total assessment against Sandwich South and lots in Sandwich South, $749.25.

From this report Sandwich South appealed to the learned Drainage Referee and . . . he gave judgment refusing to disturb the engineer's recommendations except as to the disposition of the amount of the judgment and costs in the case of Deehan v. Township of Maidstone. As to those items, he ordered that the amount awarded for costs should be "chargeable against the lands and roads in the township of Maidstone alone."

From the Referee's judgment Sandwich South appeals, on the general ground that the report and assessment are illegal, unjust, and excessive. Maidstone cross-appeals because of the costs in the Deehan case being assessed exclusively against the lands and roads in Maidstone.

As to that part of the plaintiffs' appeal respecting the assess-

ment of the cost of the work, Mr. Kerr very ably argued that in fixing the assessment the engineer should have taken into account the assessment in connection with the Tooney outlet and other assessments for other works in respect of the same drainage area, and contended that the lands in Sandwich South, having already been assessed for cut-off purposes, were no longer assessable in respect of new works of a like nature.

The evidence shews that in about the year 1881 drainage works were begun; the first attack on natural conditions being to improve Tooney creek, which was the natural outlet for the swale district. Then followed the construction on the east side of the town line of a drain which intercepted some water from the higher level on its way down to the swale, thereby furnishing an artificial outlet northerly to Pike creek. This work, so far as it was effective, operated as a cut-off in respect of the lands on the west side of the town line drain, and to that extent relieved the Tooney creek drain. From time to time other drains were constructed whereby surface water was conducted to the town line drain. These various side drains diverted into the town line drain waters from higher levels, which but for the town line drain would have flowed into the swale and upon the lands on the north-westerly side of the town line.

Further, these various side drains accelerated the flow of water into the town line drain; and, silt having there accumulated, it was deemed advisable to clean out and deepen the town line drain; otherwise it might prove insufficient to take care of all the water, in which event there might be an overflow across the town line and upon the lands of lower level.

Accordingly the work in question was undertaken. It consisted of cleaning out the west town line drain for a distance of 300 rods and deepening and otherwise improving it in order to benefit the drainage area in question.

Mr. Kerr strongly contended that the improvement in question took care of the artificial flow only, and not as a cut-off of surface water, within the meaning of sub-sec. 6 of sec. 3 of the Municipal Drainage Act, R.S.O. 1914 ch. 198. . . . I do not think that surface water has ceased to be "surface water" within the meaning of this section the moment it reaches a drain which is but one part of a system of drains constructed for the purpose of taking care of such surface water. If any part of such system proves insufficient, the water not so taken care of continues to be surface water within the meaning of the subsection.

That is the position here. The evidence justifies the improvement of the town line drain as a necessary work in order to cut off the surface water, and thereby prevent it overflowing upon the lands in Sandwich South.

Therefore, the work, in my opinion, serves as a cut-off of surface water, within the meaning of the sub-section, and the cost is properly assessable against the lands thereby protected.

Mr. Kerr attacked the item of $80 for spreading on the town line the earth excavated from the drain in connection with its improvement. For all that appears, the spreading of the earth upon the road is the cheapest way of getting rid of it. Further, its utilisation in that manner improved the road by raising the grade upon the water level in the drain, and by widening it, whereby it is less dangerous. Thus it constitutes a necessary and proper part of the cost of the work, and the item is properly included in such cost. The facts respecting the item did not bring it within sec. 11 of the Drainage Act.

I have carefully studied the evidence and the report of the engineer, and am unable to see wherein that officer has disregarded the requirements of the statute in respect of his assessment of the sum of $1,467.87, being the estimated actual cost of the work.

The remaining question is in regard to the costs and damages in the Deehan case.

That action was against Maidstone alone, and in his judgment the learned Referee said: "In the event of the municipality deeming it necessary, in order to prevent a continuance of damage, to improve, extend, or alter the town line drainage work, it may add the damages and costs incurred in this action to the engineer's estimate of the cost of such improvements, extension, or alteration. I assume that any engineer instructed will not overlook the fact that these damages and costs have been occasioned by reason of the insufficiency of the outlet of a drainage work provided for the benefit of lands higher upstream than those of the plaintiff."

It further appears from that judgment that two conflicting views then existed as to the proper remedy for the condition then complained of, the Municipal Council of Maidstone taking the view that the improvement of the culvert under the railway crossing would meet the requirements of the case, whilst the plaintiffs' engineer and others thought that the improvement of the drain northerly from the railway was necessary. The council was at that time negotiating with the railway company

to improve the culvert, and the learned Referee approved of their efforts, and for that reason did not see fit to penalise Maidstone with the costs of that action, but disposed of them in the manner set forth in the foregoing extract from his judgment.

The council appears to have reached the conclusion that, in order to prevent a continuance of the damage, it was necessary to adopt the alternative plan of cleaning out and enlarging the town line drain, and in reaching that decision they had before them the judgment of the learned Referee that the costs and damages might be added to the cost of the work.

Sandwich South was not a party to that action, and may properly be held not bound by the disposition there proposed to be made of the damages and costs, and the whole matter is now before us and must be dealt with as res integra.

Nevertheless I feel that the proper disposition to make of these damages and costs is in accordance with the view expressed by the Referee . . . by permitting Maidstone to have them added to the engineer's estimated cost of the work.

It is obvious that the cleaning and enlargement of the town line drain was necessary in order to bring about a satisfactory solution of the question in issue, and that Maidstone was no more responsible than was Sandwich South for its proving insufficient to take care of all the water.

For these reasons, the appeal should be dismissed with costs, and the cross-appeal allowed with costs.

JUNE 15TH, 1914.

JORDAN v. JORDAN.

Husband and Wife—Claim for Alimony—Settlement—Repudiation—Claims by Wife against Husband—Statute of Limitations—Evidence—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of MIDDLETON, J., of the 12th December, 1913, dismissing an action brought by Kate M. Jordan to set aside a settlement of a former claim against the defendant, her husband, for alimony, and upon several other causes of action.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

The appellant, in person.

Shirley Denison, K.C., for the defendant.

The judgment of the Court was delivered by LEITCH, J.:—

. . . The plaintiff and defendant were married in the year 1879 . . . and immediately after their marriage went to the defendant's home at Rosseau, where the defendant was carrying on business as a general merchant, and lived there until the year 1891, when the business was sold and the defendant moved his family to Toronto, where they lived until the autumn of 1894.

The plaintiff and defendant did not live happily. The wife brought an action for alimony against the defendant in 1896. The plaintiff, the wife, was represented in the action by eminent counsel who is now an occupant of the bench. The action came on for trial in October, 1896; and, on the advice of counsel, a settlement was effected on the 27th. The settlement was eminently proper, and, considering the circumstances of the defendant, was advantageous to the plaintiff. The defendant, the husband, was not in opulent circumstances. The settlement was not carried out with undue haste, but after discussion before the trial Judge and with the full knowledge on the part of the plaintiff, the wife, of the position and circumstances of the defendant. Everything was fair and above-board. There was no misrepresentation on the part of any one; in fact the wife, who had been taking an active interest in his business for a considerable time, was well aware of his circumstances and of his financial position. No fault was found with the settlement. Mrs. Jordan thoroughly understood it and what she was doing, and did not seek to repudiate what she had done for several years—until she brought this action. The husband carried out the settlement on his part, and Mrs. Jordan was paid the amount of the notes he gave at the time or shortly after the settlement.

The husband has not increased his estate, and has not become a rich man. He is now in no better position to pay a large amount of alimony than he was at the time of the settlement. The benefits which the plaintiff received under the settlement she has made no effort to return.

The plaintiff admits that she procured a divorce in the United States after the settlement; and that she was the plaintiff in an action for breach of promise in the Courts of that country. The plaintiff claims damages for various grievances, but she has not established any cause of action; and, if she had, the Statute of Limitations would be a complete bar.

A perusal of the evidence satisfies me that the trial Judge allowed the plaintiff every latitude in the trial of the action.

She was treated with every possible consideration; the trial was most fair; the Judge was most patient. The evidence, which I have spent several days in perusing, satisfies me that there was no ground for any suspicion that she had been in any way wronged. She thoroughly undertood the position of her husband at the time of the settlement; there was no concealment; no misrepresentation.

The trial Judge has found that many of the statements made by the plaintiff are untrue and that she is absolutely unreliable and unscrupulous. It is not necessary for me to comment on the evidence given in this case in detail. I have spent several days in its perusal, and I agree with the trial Judge. . . . He has made no mistake either in law or the facts.

I need say nothing about the vicious attacks made by the plaintiff upon the defendant, her husband, except to observe that the charges she levelled at him, as found by the trial Judge, were without foundation.

The plaintiff's case has no merits that I can discover, after a careful perusal of the evidence; and this appeal is dismissed with costs.

JUNE 15TH, 1914.

HEUGHAN v. SHORT AND BINDER.

Promissory Note—Action against Endorser—Absence of Presentment and Notice of Dishonour—Waiver—Conduct—Note Made by Company—Evidence—Assignment by Company for Benefit of Creditors—Relation of Endorser to Company.

Appeal by the plaintiff from the judgment of MACBETH, Co. C.J., dismissing an action upon a promissory note, brought in the County Court of the County of Middlesex.

The appeal was heard by MULOCK, C.J.Ex., MAGEE, J.A., SUTHERLAND and LEITCH, JJ.

P. H. Bartlett and T. W. Scandrett, for the appellants.

R. G. Fisher, for the defendant Binder, the respondent.

MULOCK, C.J.Ex.:—The action was brought by the plaintiff, a holder in due course of a promissory note, dated at London,

the 25th March, 1913, payable 30 days after date, to the order of George D. Binder, for $355, "at our office, rear Richmond street," made by the Dominion Chicle Company Limited, and endorsed by the defendants, Binder and Short.

When due, the note was not presented for payment, nor was notice of the dishonour given; and, in consequence, the trial Judge dismissed the action; hence this appeal.

The plaintiff alleges waiver of presentment and notice of dishonour, and this is the only question with which we have to deal.

The determining facts, which are not in dispute, are as follows. On the 29th March, 1913, the company made an assignment of its assets for the benefit of its creditors to the Canada Trust Company, which latter company thereupon took possession of the company's place of business and assets, and in the course of a month or thereabouts sold the same, possession of the premises also passing to the purchaser.

So far as appears from the evidence, this sale may not have taken place until after the maturity of the note, and it does not appear whether or not in the meantime the premises were occupied, or whether on the day of the maturity of the note they were locked up. The defendant Binder was a creditor of the company and also its president. In the latter capacity, and by virtue of his position as creditor, he executed the assignment, and subsequently was appointed one of the inspectors.

As endorser he claims to have been discharged because of the plaintiff's failure to present the note for payment or give notice of dishonour. The plaintiff, however, contends that the conduct and relations of the defendant to the debtor company constituted a waiver of the plaintiff's duty to present the note for payment or give notice of dishonour.

It was argued for the plaintiff that—all the assets of the company having passed to the assignee—the note, if presented, would certainly have been dishonoured, and that, therefore, presentment would have been a mere idle form. I do not think that the assignment warrants that inference. Solvent companies may assign for the benefit of creditors, and an assignee may find himself in a position to meet the assignor's liabilities as they fall due; but, even if the holder of a note has reason to believe that it will be dishonoured on presentation, he must nevertheless present it in order to hold the endorser liable.

As said by Lord Ellenborough, C.J., in Esdaile v. Sorrerby, 11 East 117: "It is too late now to contend that the insolvency

of the drawer or the acceptor dispenses with the necessity of a demand for payment or of notice of dishonour." Neither knowledge nor the probability, however strong, that a note will be dishonoured, excuses failure to present for payment or to give notice of dishonour: Caunt v. Thompson, 7 C.B. 400; Tindal v. Brown, 1 T.R. 167.

But the plaintiff says that the defendant has, by his conduct as a creditor and his position as former president, brought the case within Hill v. Heap, Dowl. & Ry. 57. In that case the drawer of a bill had given orders to the drawee not to pay it if presented, and communicated these orders to the plaintiffs, which was interpreted by the Court in effect as saying to the plaintiffs, "You need not trouble yourselves to present that bill for payment, for it will not be paid if you do;" and the Court held that the defendant's conduct had rendered the act of presentment useless. But in the present case the trial Judge has not, nor could he properly have, drawn any such inference from the conduct or position of the defendant Binder. He swore that when, five days before the assignment, he was asked by Short to endorse the note in question, the latter assured him that the note would be met at maturity; that, relying on this assurance, he endorsed it, and was not aware of its non-payment until some time after its maturity.

Further, he made no representation to the plaintiff indicating any intention to waive his rights in regard either to presentment or notice of dishonour. The general principle is, that acts done before maturity in order to constitute waiver must have been such acts as were calculated to mislead the holder and to induce him to forgo taking the usual steps to charge the endorser: Parsons on Notes and Bills, 2nd ed., p. 592. There are no such acts in this case.

The mere assignment of a debtor's estate does not relieve the holder of a note of the duty of presentment for payment in order to hold prior endorsers; and I fail to see how the added circumstance of the assignment being caused by a person who, being endorser, is a creditor, and also president of the debtor company, can be construed as evidencing an implied waiver of such person's rights as endorser. It had no relation to his position as endorser, and cannot be regarded as evidence of an intention of waiver.

Adopting the plaintiff's contention, the only effect of the defendant's action was to transfer the company's estate to the assignee and put it out of the power of the company itself to

pay the note at maturity. Nevertheless, the assignee, as representing the company, or Short, might have paid it, and the mere strong probability (which for argument's sake may be admitted) that, under the circumstance of the assignment brought about by the defendant, the note would not be paid when presented, did not excuse non-presentment.

By sec. 85 of the Bills of Exchange Act, presentment was necessary unless dispensed with as provided under sec. 92.

Waiver is the only ground relied on, and the onus was on the plaintiff to establish it. This she has failed to do; and I, therefore, think that the appeal should be dismissed with costs.

MAGEE, J.A., and SUTHERLAND, J., concurred.

LEITCH, J., also concurred, for reasons stated in writing.

Appeal dismissed.

JUNE 15TH, 1914.

McNALLY v. HALTON BRICK CO.

Master and Servant—Death of Servant—Defective Condition of Plant of Brick-works—Negligence—Liability at Common Law—Knowledge of Superintendent—Omission of Precaution—Liability under Workmen's Compensation for Injuries Act—Findings of Jury—Damages.

Appeal by the defendants from the judgment of KELLY, J., 5 O.W.N. 693.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

E. E. A. DuVernet, K.C., for the appellants.

H. Guthrie, K.C., and W. I. Dick, for the plaintiff, respondent.

The judgment of the Court was delivered by RIDDELL, J.:—It cannot be said that the findings of the jury are not amply justified by the evidence. It may be that, had the "setters" not removed the strut, the bricks would not have fallen, but this was done in the regular course of their trade in order that they might go on with their work, and without knowledge of danger; and,

had the floor been in proper condition, the accident would not have happened. The accident was caused by the unevenness of the floor some time after the removal of the strut; and, though the accident might perhaps have been prevented by leaving the strut in place, the unevenness of the floor was, none the less, a true *causa causans*, and not merely *causa sine quâ non*.

There can be no doubt of the liability of the defendants under the Workmen's Compensation for Injuries Act, and that is not seriously disputed; indeed, were the finding that the accident was due to the negligence of the "setters," the defendants would probably be liable under Markle v. Donaldson (1904), 7 O.L.R. 376, 8 O.L.R. 682; Story v. Stratford Mill Building Co. (1913), 5 O.W.N. 611, 30 O.L.R. 271.

But it is contended that the defendants are not liable at common law. This is the real dispute.

I think the case is concluded so far as this Court is concerned, by two cases in the Supreme Court of Canada. . . .

[References to and quotations from Grant v. Acadia Coal Co. (1902), 32 S.C.R. 427, 434, 440, 441; Canada Woollen Mills v. Traplin (1904), 35 S.C.R. 424, 430, 431, 433, 435, 451.]

These decisions fix the liability of the company at the common law.

The appeal should, therefore, be dismissed with costs.

JUNE 15TH, 1914.

*REX v. BOOTH.

Criminal Law—Keeping Common Betting House—Conviction by Police Magistrate—Sentence—Excessive Fine—Motion to Court of Appeal to Reduce—Criminal Code, sec. 1016(2)—Application of—Interpretation of Code and Amendments.

Application on behalf of the defendant, under sec. 1016(2) of the Criminal Code, to reduce the amount of the fine which the defendant was ordered to pay, on his conviction by R. E. Kingsford, Esquire, Police Magistrate for the City of Toronto, for keeping a disorderly house or common betting house, from $600 to $200, the latter sum being the maximum provided by the Code as amended, the attention of the Police Magistrate not having been called to the amendment.

*To be reported in the Ontario Law Reports.

The application was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

A. G. Ross, for the defendant.

No one appeared for the prosecutor.

CLUTE, J.:—The information charges that the accused, Albert Booth, in the months of October and November, 1913, did, contrary to law, "Keep a disorderly house or common betting house at number 371 Danforth avenue, contrary to the form of the statute. Neither the information nor the conviction shews under which section of the statute the information was laid. Counsel stated that the accused was not asked to consent; and as, by sec. 774 of the Code, the jurisdiction of the magistrate is absolute and does not depend upon consent of the person charged, nor shall he be asked whether he consents to be so tried, I assume from the form of the charge and what took place that the information was intended to be laid and tried under secs. 773(f) and 774 and 781(f). Under these sections the magistrate had a right to try the accused without his consent.

Section 781, as amended by 3 & 4 Geo. V. ch. 13, sec. 27, declares that where there is a conviction under sec. 773 the penalty of six months' imprisonment and a fine not exceeding with the costs in the case $200 or both fine and imprisonment not exceeding the said sum and term may be imposed.

The fine of $600 imposed by the magistrate is clearly in excess of what he lawfully might impose under these sections.

The defendant pleaded "guilty," and it is said, that being so, that he has a right to apply to this Court, under sec. 1016, without leave, and ask the Court to pass a proper sentence.

I think that sub-sec. 2 of sec. 1016 refers to appeals under sec. 1013. The appeal under Part XIX., which has reference to "procedure by indictment," is to the Court of Appeal, by sec. 1013, sub-sec. 1 of which reads: "An appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases, or of a magistrate proceeding under section 777 on the trial of any person for an indictable offence, shall lie, upon the application of such person, if convicted, to the Court of Appeal, in the cases hereinafter provided for, and in no others." The cases thereinafter provided for are where, under sec. 1014, the Court has reserved a question of law, and a case is stated. Section 1015 provides that, if the Court refuses to reserve the question, the Court of Appeal may grant or refuse leave for a stated case. Section 1016, sub-sec. 1, then provides

that, if leave to appeal is granted, a case shall be stated for the Court of Appeal as if the question had been reserved. Sub-section 2: "If the sentence is alleged to be one which could not by law be passed, either party may, without leave, upon giving notice of motion to the other side, move the Court of Appeal to pass a proper sentence." This, with secs. 1014 and 1015, obviously refers to appeals under sec. 1013, which provides for an appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases. The present case does not fall under that clause. It also covers an appeal from the decision of a magistrate proceeding under sec. 777; but sub-sec. 3 of the last-named section expressly excludes cases arising under secs. 780 and 781.

The result is, that, by sec. 1013, an appeal lies for all the cases under sec. 777 which might be tried at the General Sessions (for jurisdiction of Sessions, see secs. 582 and 583), or by consent before a magistrate, except the class of cases arising under secs. 780 and 781, under which last section, clause (f), this case falls.

There is, therefore, in my opinion, no right given under secs. 1013 and 1016 for a stated case with or without leave or under sub-sec. 2 of sec. 1016 without leave, where the sentence is alleged to be one which could not by law be passed.

The amendments to secs. 227, 228, 773, 774, 777, and 778, by 8 & 9 Edw. VII. ch. 9, schedule, and to secs. 227 and 235, by 9 & 10 Edw. VII. ch. 10, do not affect the question of appeal in this case.

Formerly an appeal would lie in all cases tried under clause (a) or clause (f) of sec. 773; but, by 3 & 4 Geo. V. ch. 13, sec. 28, such appeal is now limited to trials before two Justices. Sub-section 2 of sec. 797, as amended, provides, however, that sec. 1124 shall apply to convictions or orders made under provisions of this Part, i.e., Part XVI.; and, as secs. 773 and 781(f) are within Part XVI., it covers this case. . . .

[Reference to sec. 1124 of the Code; Rex v. Honan (1912), 26 O.L.R. 484; Rex v. Helliwell (1914), 5 O.W.N. 936.]

Although there is no appeal to this Court in the present case, the former practice of a motion to quash, upon removal by certiorari, is preserved by sec. 599 of the Code; and sec. 1124 indicates the remedy, on security being given as provided by sec. 1126.

It is to be hoped, however, that it may not be necessary to seek this remedy in order to obtain a return of the fine, in so far as it exceeds the sum of $200.

MULOCK, C.J.Ex., SUTHERLAND and LEITCH, JJ., concurred.

RIDDELL, J. was of opinion for reasons stated in writing, that sub-sec. 2 of sec. 1016 was not intended to give the right to apply to the Court to pass a proper sentence simpliciter, but only to give to either side, on leave to appeal being granted, the right to ask the Court to pass such sentence. He was of opinion, however, that the application should be turned into a motion for leave to appeal, and that motion granted, and the case dealt with as if a case had been stated, as in Rex v. Blythe (1909), 19 O.L.R. 386, and the sentence reduced.

Application refused; RIDDELL, J., *dissenting.*

JUNE 15TH, 1914.

BINGEMAN v. KLIPPERT.

Assignments and Preferences—Assignment of Policy of Life Insurance—Consideration—Bona Fides—Absence of Notice or Knowledge of Claim of Creditor—Interpleader Issue between Assignee and Execution Creditor—Finding of Trial Judge against Fraud—Appeal.

Appeal by the plaintiff from the judgment of LENNOX, J., ante 85.

The appeal was heard by MULOCK, C.J., RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. H. Gregory, for the appellant.

E. P. Clement, K.C., for the defendant, respondent.

The judgment of the Court was delivered by RIDDELL, J.:—Mrs. Klippert and Mrs. Boehmer were sisters. Mrs. Boehmer was in need of money and applied to her sister for a loan; her sister had previously lent her money which had not been returned, and said she would not lend without security. Mrs. Boehmer had an insurance policy in a life company due, and it was arranged that Mrs. Klippert should lend her $1,000 and take an assignment of the policy for security. She gave a cheque for $1,000 to Mrs. Boehmer, who drew the money and deposited

it in a bank, and gave Mrs. Klippert a cheque on that account for $750, which Mrs. Klippert deposited to her own credit.

An attaching order, at the instance of the plaintiff, was served on the insurance company shortly after notice of the assignment to Mrs. Klippert.

An interpleader was taken, and the money paid into Court: thereafter Mrs. Klippert paid to her sister the $750.

The interpleader issue was tried before Lennox, J., who gave judgment in favour of Mrs. Klippert, the defendant in the issue.

The whole case depends upon the transaction between the two sisters. Their story is, that the loan was really $1,000, and not $250; that the sum of $750 was given by Mrs. Boehmer to her sister, the defendant, to keep for her until she required it.

There are a number of very suspicious circumstances in the case, but one and all are consistent with honesty. The question is purely one of fact, and the learned trial Judge might well have found the other way; but he saw the witnesses and gave credit to the account of the defendant, and was "satisfied that the defendant gave honest testimony as to this transaction."

That being so, I think we cannot interfere with the finding, respecting, as we must, the well-established rule as to appellate Courts.

The cases are uniform: Bishop v. Bishop (1907), 10 O.W.R. 177.

JUNE 15TH, 1914.

*McGREGOR v. WHALEN.

Contract—Sale of Standing Timber—Construction of Agreement—Executed Contract—Immediate Sale—Ascertained Chattels upon Severance—Removal of Timber and Payment of Price—Property Passing—Possession—Vendor's Lien—Right to Detain—No Right to Sell—Subsequent Sale—Notice—Action of Trover—Conversion—Bona Fide Purchaser for Value without Notice—Claim of Defendants against Third Party.

Appeal by the plaintiff from the judgment of BRITTON, J., 5 O.W.N. 680.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

*To be reported in the Ontario Law Reports.

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

Casey Wood, for the defendant Whalen, the respondent.

H. E. Rose, K.C., for Niemi, a third party.

MULOCK, C.J.Ex. (after setting out the facts):—The first question to determine is, what interest the plaintiff acquired, under the agreement, in the 91 piles. It reads, "I hereby agree to sell," etc. Is this an executory or an executed contract? It is open to either interpretation; and, therefore, the situation of the parties, the subject-matter of the contract, and other surrounding circumstances, may be taken into consideration in order to ascertain the intention of the parties. From them it seems that the purchaser was to have the right at once to cut the piles, and on payment thereof to ship them and those already cut. Nothing remained for the seller to do. These circumstances indicate that the agreement was for an immediate and not a prospective sale: Tarling v. Baxter (1827), 6 B. & C. 360.

So far as appears from the evidence, there were not more than 350 piles cut and uncut in the woods. Thus the contract entitled the plaintiff to cut all those then standing, being the only ones to which the contract could apply: Swanwick v. Sothern (1839), 9 A. & E. 895; and as soon as severed from the freehold, if not before, they became chattels: McGregor v. McNeil (1882), 32 U.C.C.P. 538; thus what were sold were either ascertained chattels at the time of the contract or became such immediately upon severance.

In Tarling v. Baxter, supra, the contract arose out of two written memoranda, one signed by the vendor, the other by the purchaser. The vendor's memorandum of sale was as follows: "I have this day agreed to sell to James Tarling a stack of hay standing in Cannonbury field, at the sum of £145, the same to be paid on the 4th of February next, and to be allowed to stand on the premises until the 1st of May next." The purchaser's memorandum added the term, "the same hay not to be cut till paid for:" and Bayley, J., said: "Where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee."

So in Wood v. Bell (1856), 5 E. & B. 772, 791, 792, per Lord Campbell, C.J.: "Where a bargain is made for the purchase of an existing ascertained chattel, the general rule, in the . . . absence of opposing circumstances, is, that the property passes immediately to the vendee;" and in Sweeting v. Turner (1871),

L.R. 7 Q.B. 310, 313, Blackburn, J., says: "It is thoroughly established . . . that by the English law, where a bargain and sale is completed with respect to goods, and everything to be done on the part of the vendor before the property should pass has been performed, then the property vests in the purchaser, although the vendor still retains his lien, the price of the goods not having been paid."

The fact that the plaintiff was obliged to cut the uncut piles and remove them, and also those cut at the time of the contract, from the vendor's premises, within a reasonable time, does not prevent the property passing: Turley v. Bates (1863), 2 H. & C. 200.

The circumstances of the present case might support a finding that the purchaser took actual possession, and that the vendor's only remaining control over the piles was the right to prevent their being loaded or shipped before payment of the purchase-money, and in that case not only the property, but also the actual possession passed to the purchaser.

In Cooper v. Bill (1865), 3 H. & C. 722, 729, which was an action of detinue for timber sold on credit, Pollock, C.B., says: "The vendors allowed him (the vendee) to measure the timber, mark it with his initials, and expend money in having it squared. I think these acts are evidence of a taking actual possession."

But, adopting the view most favourable to the defendants here, namely, that the vendor retained his lien, which implies that he also retained possession, his position was that he was in possession of the purchaser's property with the right to retain it until his lien was discharged. The piles when cut had become the property of the plaintiff, subject at most to the vendor's lien, and delay in their removal did not divest him of the ownership, nor was he in default in payment of the purchase-money. By the terms of the contract, the purchase-money was not payable until the plaintiff sought to load or ship the piles. He was entitled to remove them from off the vendor's land and leave them where he liked, and as long as he wished, without payment, provided he did not attempt to load or ship them.

The vendor had a mere passive right to detention, no right to sell: Thames Iron Works Co. v. Patent Derrick Co. (1860), 1 J. & H. 93; Halsbury's Laws of England, vol. 19, p. 25.

Thus the vendor was guilty of an actionable wrong in selling the plaintiff's property, and is liable in damages.

It was further contended before us that the defendant Whalen was a bonâ fide purchaser for value without notice. On

the facts such defence fails. The jury, upon ample evidence, found notice to Whalen; and he is liable to the plaintiff for $819, the value of the timber. His co-defendants having paid that amount into Court to abide the result, the plaintiff is entitled to have his judgment satisfied out of that fund.

If the original vendor's lien still existed, there should be deducted from the $819 the sum of $182, the amount of the original lien, but that lien was lost by reason of Niemi's wrongful sale. By that act he lost possession and with it his right of lien: Mulliner v. Florence (1878), 3 Q.B.D. 484, 491. So far as appears, however, the plaintiff is still indebted to Niemi in the sum of $182; and, if Niemi consents to treat as payment the retention of $182 in Court to abide the issue between him and the co-defendants, then that amount can be so disposed of. Otherwise, the plaintiff will be entitled to the full amount of $819, and Niemi will be left with his claim against the plaintiff for unpaid purchase-money.

The merits of the issue between the third party and the defendants were not argued before us. If both parties consent to that issue being disposed of on the present pleadings and evidence, the case may be again set down for argument of that issue. If not so set down within 15 days, the claim of the defendants against the third party is dismissed, without prejudice to any action they may see fit to bring.

The plaintiff is entitled to his costs throughout against the defendants; no costs between the defendants and the third party.

CLUTE, SUTHERLAND, and LEITCH, JJ., concurred.

RIDDELL, J., agreed in the result, for reasons stated in writing.

Appeal allowed.

JUNE 15TH, 1914.

McCALLUM v. PROCTOR.

ARMSTRONG v. PROCTOR.

Fraud and Misrepresentation—Purchase of Land on Faith of False Representations of Agent of Vendor—Other Possible Contributing Causes—Action against Agent—Finding of Fact of Trial Judge—Appeal—Damages—Measure of—Interest.

Appeal by the defendant from the judgment of LENNOX, J., 5 O.W.N. 692.

The appeal was heard by MULOCK, C.J.Ex., MACLAREN, J.A., CLUTE and LEITCH, JJ.

R. S. Robertson, for the appellant.

R. McKay, K.C., and R. T. Harding, for the plaintiffs, the respondents.

The judgment of the Court was delivered by MULOCK, C.J. Ex. (after stating the facts) :—A careful examination of the evidence satisfies me that the land was not as represented by the defendant to either the plaintiff Armstrong or the plaintiff McCallum, but that it was broken up with numerous sloughs and other bodies of water, including a lake of some 70 or 80 acres, bluffs, patches of stone, gravel, and holes, including a gorge of from 100 to 150 feet in depth, which ran through one section, and that a very substantial portion of the whole area, estimated by some witnesses as high as 75 per cent., was waste land.

I am also convinced by the evidence that the land fit for agriculture consisted only of small patches of a few acres each, scattered amongst the bluffs, sloughs, etc.; and that even these patches are of questionable value as arable land, because of the expense in conducting farming operations on such small and scattered pieces of land.

The evidence abundantly supports the view that, in order to induce the plaintiffs to make the respective purchases in question, the defendant made to them material statements as to the character of the land which were in fact untrue. He represented himself as speaking from actual knowledge derived from a personal inspection of the whole property. If he made such an inspection, then his misstatements must have been intentionally untrue. If he did not make an inspection, it is clear that he made the misstatements recklessly, and not caring whether they were true or false, in order to induce the plaintiffs to purchase.

The defendant did not give evidence in his own behalf, and his counsel was warned by each of the Judges who took part in the trial to the effect that his failure to testify might expose him to inferences unfavourable to his innocence. Nevertheless, he chose to offer no explanation as to his misstatements; and the inference is, that they admit of no explanation consistent with innocence on the defendant's part; and I think the learned trial Judge was fully justified in finding that the defendant knowingly made the false statements in question, to the prejudice of the plaintiffs, in order to induce them to purchase; and the case comes within Derry v. Peek (1889), 14 App. Cas. 337.

Some slight attempt was made to shew that the defendant's statements were not the only inducements to the plaintiffs entering into their purchases; but the point was not strongly pressed.

If the false statements of the defendant materially contributed towards inducing the plaintiffs to purchase, they have a cause of action against the defendant, even though there may have been also other contributing causes to their action: Clarke v. Dickson (1859), 6 C.B.N.S. 453.

In Edgington v. Fitzmaurice (1885), 29 Ch.D. 459, the plaintiff said: "I had two inducements, one my own mistake, the other the false statement of the defendants; the two together induced me to advance the money;" and Fry, L.J., said: "But, in my opinion, if the false statement of fact influenced the plaintiff, the defendants are liable, even though the plaintiff may have been also influenced by other motives."

The remaining question to consider is that of damages. The price of the lands purchased by each of the plaintiffs was $13,338.66, or $10.25 per acre. Witnesses for the plaintiffs estimated the land as worth some of it as low as $3 an acre, some worth $5 an acre. The defendant's witnesses put a value on the land as between $10 and $11 per acre. Bearing in mind the large proportion of waste land, the learned trial Judge, I think, if he has erred at all, has erred in fixing the damages at too low a figure. The judgment in this case was entered in January, 1914, some seven years after the transaction in question.

In fixing the amount of damages, the time that has elapsed since the transaction may be considered.

In Lamont v. Wenger (1911), 2 O.W.N. 519, 22 O.L.R. 642, which was an action for damages because of fraud in the sale of land, the Master allowed to the plaintiffs as part of their damages interest on the difference between the purchase-price and the actual value from the time of sale until his report, and his decision was sustained on appeal by Sir William Meredith, C.J.C.P.

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

JUNE 15TH, 1914.

PARKER v. DYMENT-BAKER LUMBER CO.

Negligence—Death of Person from Injury Received on Defendants' Premises—Action by Widow under Fatal Accidents Act—Deceased in Position of Licensee or Invitee—Duty of Owner of Premises—Failure of Plaintiff to Shew Trap or Hidden Danger—Nonsuit—Contributory Negligence—Admission of Deceased.

Appeal by the plaintiff from the judgment of KELLY, J., dismissing the action.

The appeal was heard by MULOCK, C.J.Ex., MAGEE, J.A., SUTHERLAND and LEITCH, JJ.

P. H. Bartlett and J. F. Faulds, for the appellant.

G. S. Gibbons, for the defendants, the respondents.

The judgment of the Court was delivered by SUTHERLAND, J.:—The plaintiff's husband, a teamster, had come upon the defendants' premises with a horse and waggon for laths, and, after loading, with the assistance of one of their employees, proceeded to drive out. In doing so it was necessary to go along a passage or roadway through a building of the defendants which had an archway at either end, that which he entered first, the westerly, being 9 ft. $8\frac{3}{4}$ inches in height and 10 ft. 10 inches in width at the bottom where cement blocks had been inserted at each side to prevent the wheels of vehicles from coming in contact with the brick walls, and 12 ft. 5 inches in width above these; the other, the easterly, being 9 ft. 1 inch in the highest place and 8 ft. $11\frac{3}{4}$ inches in the lowest, and somewhat narrower than the other, the width above the cement blocks being 10 ft. $6\frac{1}{2}$ inches.

The deceased mounted the load and drove safely through the westerly archway, but, on coming to the easterly one, was struck on the upper part of the chest by the top of the archway and so crushed that death subsequently ensued.

His widow brings this action, and claims to recover on account of the negligence of the defendants, stating in her pleading such negligence to consist in the fact that the archway was not of sufficient height and width.

At the trial it was further contended that the act of the de-

fendants in erecting and maintaining the archways of irregular heights was also negligence.

The action was tried before Kelly, J., and a jury at London, and at the conclusion of the plaintiff's case counsel for the defendants asked for a dismissal, on the ground that no evidence of negligence on the part of the defendants had been shewn which could properly be submitted to a jury. Effect was given to this contention.

There was evidence that the deceased had driven through the archway two or three times before. There was no evidence as to whether on these occasions his waggon was or was not loaded. The trial Judge found as follows: "I shall have to grant a nonsuit because the evidence submitted by the plaintiff herself is, that this man was in the habit of going there. The measurements do not by themselves constitute a danger. There is no evidence of any change between the times that he had gone before and the time he met with this unfortunate accident which caused his death. There is the uncontradicted evidence of his own admission to the yard-foreman that he was the author of his own trouble—that it was his own fault. Added to that is the evidence of his change of position from what might have been a safe position to an unsafe one, and the absence of evidence of the difference in height between the two arches at the time the accident occurred, so far as that is material."

After some discussion it was admitted by the defendants' counsel that the archways were of the same height at the time of the accident as when measured by the witness who testified to the measurements at the trial. The trial Judge thereupon dismissed the action.

It is from this judgment the appeal is taken. Three points were argued: first, that the archways were not high enough; second, that the difference in height between the archways was a trap; and, third, that the evidence of the deceased's admission was either not receivable at all, or in any event was matter referable to contributory negligence, and should have been submitted to the jury.

The deceased was lawfully upon the premises of the defendants for a purpose of common interest, namely, to obtain a load of laths purchased by his employer from them. The duty of the owner of the premises under such circumstances "is to take reasonable care to prevent injury" to the invitee "from unusual dangers which are more or less hidden, of whose existence the occupier is aware, or ought to be aware, or, in other words, to

have his premises reasonably safe for the use that is to be made of them:'' Halsbury's Laws of England, vol. 21, p. 388; Thomas v. Quartermaine (1887), 18 Q.B.D. 685, 697. . . .

[Reference to Indermaur v. Dames (1866), L.R. 1 C.P. 274, at p. 288; Lowery v. Walker, [1910] 1 K.B. 173, 183, [1911] A.C. 10.]

In the present case there was no defective construction or want of repair in archways or roadway suggested or proved. The accident occurred in broad daylight. I do not see how it can be said, upon the evidence, that there was any trap or any unusual or hidden danger. Everything was open to the view of a careful man. I do not see how it can be said that the archways were not reasonably safe for the purpose intended.

I agree with the trial Judge that there was no evidence of negligence which could properly be submitted to the jury.

I refer also to Lucy v. Bawden (1913), 30 Times L.R. 321; Norman v. Great Western R.W. Co. (1913), 30 Times L.R. 241. . . .

Counsel for the appellant relied much on the case of Bliss v. Boeckh (1885), 8 O.R. 451; but there the obstruction causing the injury was a beam improperly erected above a public highway, from which was hung a gate, another gate being put up across the street a few feet further south, the two gates not being opposite each other. The evidence of the injured man was, that, being obliged to drive along the road in a slanting direction to avoid these gates, his attention was diverted from the beam.

Here there was nothing so far as the evidence discloses, to divert in any way the attention of the deceased from the archway and the necessity on his part to avoid coming in contact with it. Upon the undisputed evidence. if he had continued to retain the place on the load where he was sitting when he came through the first archway, he would have come through the second in safety.

If there was no negligence to submit to the jury the question of contributory negligence becomes of no importance. But, if it were, I think the language of Lord FitzGerald in Wakelin v. London and South Western R.W. Co. (1887), 12 App. Cas. 41, at p. 52, is appropriate: ''It has been truly said that the propositions of negligence and contributory negligence are in such cases as that now before your Lordships so interwoven as that contributory negligence, if any, is generally brought out and established on the evidence of the plaintiffs' witnesses. In such a case, if there is no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a verdict for the

defendant, or if there is conflict or doubt as to the proper inference to be deduced from the facts in proof, then it is for the jury to decide.''

In the present case there is no conflict of evidence in so far as the admission of the deceased is concerned that the accident occurred by reason of his own negligence and want of care.

I would dismiss the appeal with costs.

JUNE 15TH, 1914.

CAIRNS v. CANADA REFINING AND SMELTING CO.

Nuisance—Vapour and Dust from Smelter—Poisonous Deposit—Special Injury to Plaintiff—Bringing Injurious Substance on Land—Right of Action—Damages—Evidence—Injunction.

Appeal by the plaintiff from the judgment of BOYD, C., 5 O.W.N. 423.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

A. E. H. Creswicke, K.C., for the appellant.

D. W. Saunders, K.C., for the defendants, the respondents.

The judgment of the Court was delivered by MULOCK, C.J. Ex.:—In this action the defendants are charged with carrying on near to the plaintiff's lands a smelting business that gives off noxious gases which have seriously affected the health of the plaintiff and other occupants of his lands and injured his property, and the plaintiff asks for damages arising from the death of a cow, and injury to his land, and for an injunction.

The case was tried by the Chancellor, who found that the death of the cow was caused by arsenic from the defendants' smelter which had reached the plaintiff's lands, and he awarded the plaintiff $80 damages therefor and costs on the County Court scale; in other respects the action was dismissed.

The plaintiff's appeal is for damages for injury to his lands and for an injunction restraining the defendants from carrying on the business in a manner injurious to his lands and to the plaintiff in the occupation thereof.

The smelter is situate in the town of Orillia, and was erected in about the year 1910. The plaintiff owns certain lands on Moffat street, in Orillia, situate within about 1,200 feet of the smelter, and has erected thereon a residence, which he and his wife have occupied continuously since some time in the year 1912.

The business carried on by the smelter is that of smelting Cobalt ores, which produce silver, nickel, and arsenic. The first operation is to roast the ore in the blast furnace for the purpose of gaining the silver. This process gives off arsenic fumes, which pass from the blast furnace through flues to the crude arsenic bag-house, also called in the evidence, the large-bag-house. As the fumes cool, dust in the condition of crude arsenic is deposited. The flues run under the floor of the bag-room and enter the bag-room through openings in this floor. There are 288 of these openings, each having a diameter of about 20 inches. Set in these openings are metal thimbles. From iron rods running across the rafters are suspended 288 woollen bags, each about 30 feet long, the mouth of each bag being fastened over one of these thimbles. The object of the bag arrangement is to separate the arsenic from the gaseous fluid as it passes through the material of the woollen bags, when it is permitted to escape through the ventilator into the atmosphere.

The evidence shews that clouds of fumes of a dirty white colour pass out of the ventilator and deposit particles of crude arsenic on the surrounding country.

There was evidence that, since the advent of the smelter, trees and other vegetation in its vicinity had been killed or injured, and that some domestic animals had died of some irritant. . . .

In the winter of 1912-13, the defendants made some changes in their plant with a view to preventing the escape of arsenic into the atmosphere, but it is a question whether throughout the year 1913 the improvements proved effective, for the sample of water taken by Dr. Rogers out of the rain barrel in November, 1913, shewed the presence of two millegrams of arsenic in sixteen ounces.

The plaintiff gave evidence to the effect that the selling value of his property had been greatly depreciated owing to the matters complained of in this action.

From the evidence it appears that the defendants so conducted their business as to permit the escape from their premises into the atmosphere of clouds of fumes carrying arsenic, which settled upon the house and grounds of the plaintiff in such

quantities as to affect injuriously his and his wife's health and comfort, which destroyed or injured vegetation, and caused the death of a cow because of its grazing upon his lands; that in the month of May, 1913, and again in the month of November, 1913, rain-water which had flowed from the roof of the plaintiff's house into the barrel was found to contain arsenic in such quantities that when on one occasion his wife washed her face and hands with water taken from this barrel, her face broke out in sores which did not heal for a week. And it further appears from the evidence that soil taken in the month of November, 1913, from the plaintiff's land shewed the presence of arsenic in appreciable quantities; and that, in consequence of the arsenic on his property, the same was greatly depreciated in value.

With all deference, I find myself unable to agree with the learned Chancellor that the plaintiff, in respect of these matters, is not entitled to maintain in his own name and for his own benefit an action for damages. It may be that the defendants' conduct in allowing these poisonous fumes to escape into the atmosphere constitute a public nuisance, but if it inflicts upon the plaintiff, in his character as owner of certain lands, special injury other than that inflicted upon the general public, it is an actionable wrong at his instance.

His rights are two-fold, namely, rights in respect of his property and rights as one of the general public.

The injuries complained of on this appeal are in respect of the invasion of the plaintiff's rights as an individual owner and occupant of certain property; and, if the defendants caused the injuries sustained by him or any number of individuals, each one in respect of his lands suffers special injury, and is entitled to compensation in damages, but such injury does not affect the general public; and, therefore, they are not entitled to maintain any action in respect of such private wrong for the plaintiff's exclusive benefit. In such a case the individual sufferer alone can maintain such an action.

Depositing arsenic on the plaintiff's lands does not affect the rights enjoyed by citizens generally, but merely those of the owner of the land. It is not necessary to cite authority in support of the proposition that no one is entitled to cause to be deposited on the property of another arsenic or any other thing which injures such other's rights as owner.

Though the facts are different, the principle involved in the

present case does not differ from that in Rylands v. Fletcher (1868), L.R. 3 H.L. 330.

For these reasons, I think that the plaintiff is entitled to damages in respect of the injury occasioned to him by arsenic coming from the defendants' smelter and falling on his property; and that there should be a reference to the Master to fix the amount of such damages; the plaintiff to be paid the costs of the reference.

As to the prayer for an injunction, the defendants say that in the winter of 1912-13 they adopted effective means to prevent the escape of arsenic from the smelter. The finding of arsenic in the rain-water barrel in November, 1913, would go to shew that, notwithstanding these means, arsenic escaped. The defendants have no right to permit so dangerous a material as arsenic to escape from their premises into the atmosphere, and thence be carried by the wind upon the land of the plaintiff and others; and the plaintiff is entitled to an injunction restraining the defendants from continuing and repeating the nuisance complained of in such a manner as to affect injuriously the plaintiff's said lands or the plaintiff in his ownership and occupation thereof.

The plaintiff is entitled to full costs of the action and of the appeal.

JUNE 15TH, 1914.

*McNALLY v. ANDERSON.

Dower—Sum in Gross in Lieu of—Principle of Computation—Dower Act, 9 Edw. VII. ch. 39, sec. 23—Alienation of Land by Husband Subject to Dower—Damage or Yearly Value at Time of Alienation or Death—Improvements—Increase or Decrease in Value — Rental Value — Waste — Removal of Buildings.

Appeal by the defendant from the order of MIDDLETON, J., in the Weekly Court, 5 O.W.N. 751, varying the report of the Local Master at St. Thomas, upon a reference directed by the trial Judge (4 O.W.N. 901) to ascertain the amount due to the plaintiff in respect of her claim to dower in certain lands of her deceased husband.

*To be reported in the Ontario Law Reports.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and LEITCH, JJ.

E. D. Armour, K.C., for the appellant.

W. R. Meredith, for the plaintiff, respondent.

The judgment of the Court was delivered by CLUTE, J., who, after setting out the facts, referred to 24 Vict. ch. 40, secs. 5(2), (3), 17; 32 Vict. ch. 7, secs. 21, 31; Williams v. Thomas, [1909] 1 Ch. 720; Halsbury's Laws of England, vol. 24, paras. 366, 374, 380, 381; Bishop v. Bishop, 10 L.J. Ch. 302; Doe dem. Riddell v. Gwinnell (1841), 1 Q.B. 682; Norton v. Smith (1860), 20 U.C.R. at p. 216; Wallace v. Moore, 18 Gr. 560; Robinet v. Pickering, 44 U.C.R. 337; and proceeded:—

Having regard to the law as it stood before 32 Vict. ch. 7, sec. 21, was passed, and the object of that section being to modify the law as to permanent improvements made after the alienation or death of the husband so that such improvements should not be taken into account, and having regard to the disjunctive form of sec. 21 (now 23), I think the words "but such damage or yearly value shall be estimated upon the state of the property at the time of alienation or death" (i.e., so far as improvements are concerned), refer to the condition of the property so as to exclude improvements, and not to its rental value, nor to "yearly rents" which may be given where dower cannot be assigned, which is provided for by sec. 29, sub-sec. 2. Section 21 (now 23) was passed for the purpose of preventing the widow getting the value arising from permanent improvements, and is not to be taken as indicating that she was entitled at all events to one-third of the rental value at the time of alienation or death. If such were the case, it might happen that, instead of permanent improvements being made upon the property, it might decrease in value by decay, so that its rental value might be wiped out at the date of the death of the husband. It seems to me that it would defeat the object of the statute to hold that the rental value at the time of alienation, or even at the death, is the criterion by which the amount allowed her in lieu of an assignment of dower is to be ascertained. The object of the statute was, in my opinion, to place her as nearly as possible, as to the amount that she should receive, in the same position as she would have been were it possible to make an assignment by metes and bounds. And, while she is not entitled, I think, to fix the rental value at the time of alienation as the basis of her claim, so neither will that claim be defeated, although at the time of alienation or

death of the husband the property may have had no rental value.

Then, as to the right of the widow to any allowance on account of the mill premises having been allowed partly to go to waste and then having been totally removed and sold. Her life interest does not become vested until her dower is assigned. In the present case the mill, machinery, and plant were all removed after alienation and before the husband's death; that is, before she had a life estate vested in any part of the premises. It would appear that the mill had remained idle for some time, and its value had very much decreased; that would probably, at most, be regarded as permissive waste, for which Courts of Equity do not readily interfere; and, in the present case, the waste having occurred before the widow's right accrued, she would have no locus standi to have in any way prevented it. Nor has she, I think, any right to complain of the removal of the mill, etc., at common law. Where land has been assigned for dower on which is an open mine, she can work it for her benefit: Stoughton v. Leigh, 1 Taunt. 402. The dowress is in the same position as a life-tenant, and is entitled to the interest of one-third of the proceeds of the sale of timber: Bishop v. Bishop, 10 L.J. Ch. 302; Dickin v. Hamer (1860), 1 Dr. & Sm. 284. After the husband's death the widow has the ordinary profits of a tenant for life: Bewes, Law of Waste, pp. 108, 202, 270. I have not been able to find any case which gives her any right at common law to an interest in the proceeds of the sale of property removed before her husband's death. Until such time her right is inchoate. By the death of her husband she becomes dowable, and from that time equity will give her a portion of the rent and one-third of the interest upon the proceeds of the sale of timber or mines since her husband's death. Her life estate, however, only becomes vested after assignment; and, as she has no right to come to the Court to stay waste before she becomes dowable, so, in my opinion, she has no right to any interest in the proceeds resulting from such waste, unless, it be given her by sec. 23 of the statute.

For the reasons above indicated, while she is not entitled, in my opinion, to call for one-third of the rental at the time of alienation, so neither is she entitled to ask for an account of the value of the property sold; the section in question is a provision to prevent her receiving the benefit of improvements, and was not intended to, and does not, in my opinion, enlarge her right in respect to dower. She is not entitled, I think, to any claim in

respect of the mill property removed prior to her husband's death.

The improvements made were all of a permanent character. While these improvements ought not to be taken into account in fixing her dower, yet, as is pointed out by the Chancellor in Wallace v. Moore, the rent arises not alone from the houses, but from the buildings and the land, and the widow is entitled, in my opinion, to have that one-third portion of the rent, as far as it may be ascertained, which arises from the land, given to her in lieu of dower.

While, upon the one hand, I am unable to agree in the construction of the statute by my brother Middleton, upon the other hand I do not think that the method adopted by the Master proceeded upon the right principle. He took simply the value of the land, plus the value of the old buildings, and made his calculation by a percentage upon that. What he should have done, in my opinion, was to ascertain what would be the reasonable portion of the rent referable to the land, and allow one-third of that, having regard to the age of the widow, capitalised. Whether it would amount to more than the Master has allowed, I am unable to say from the data before me. If the plaintiff is not willing to accept that sum, there should be a reference back to the Master to ascertain the amount to which the plaintiff is entitled upon the principle above indicated.

This is not a case for costs.

JUNE 15TH, 1914.

*ST. CATHARINES IMPROVEMENT CO. LIMITED v. RUTHERFORD.

Contract—Removal of Buildings—Default and Delay—Provision for Liquidated Damages—Construction—Actual Damage—Proof of—Finding of Fact of Trial Judge—Appeal—Third Party—Indemnity—Costs.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., ante 87.

The defendant, in writing, agreed with the plaintiffs to remove the barn, sheds, silo, pig-pen, and all other structures, except the dwelling-house, on the Merritt farm, in consideration

*To be reported in the Ontario Law Reports.

of the material therein; and to have the same, including all foundations, entirely removed from the premises on or before the 1st May, 1913, and, in default, agreed to pay the sum of $25 for each day that any of said material remained on the said premises after the 1st May, as liquidated damages, and not as a penalty.

The defendant did not remove the buildings, but sold out to Riley, the third party, who proceeded to tear down and remove the buildings, but the work was not completed until the 4th June or later.

This action was brought to recover $1,200 damages for breach of the defendant's agreement.

The trial Judge, FALCONBRIDGE, C.J.K.B., allowed the plaintiffs $5 with costs on the appropriate scale and the usual set-off to the defendant, and gave the defendant certain relief in respect of costs against the third party.

The plaintiffs' appeal from this judgment was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

G. F. Peterson, for the defendant, the respondent.

M. Brennan, for the third party.

The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts at length) :—In view of the defendant's statement of defence, and the very positive evidence of the third party, I would come to the conclusion that the hen-house was in fact reserved from the sale by the defendant to the third party. . . . There is no evidence given by the defendant in support of his plea that the hen-house was left at the request of the plaintiffs; and the evidence of the third party does not establish such a state of facts, but only a desire on the part of the plaintiffs that, if he did remove it, he would be careful not to injure the grass.

Even if we consider that the plaintiffs waived the removal of the hen-house, there is ample evidence that not till June was the material removed so that the land could be used as both the plaintiffs and defendant contemplated it should be used, at latest, immediately after the 1st May.

The learned Chief Justice proceeds on the ground that the contract is for the removal of several different structures of different degrees of importance. That the structures are of different sizes is true; but, in view of the object of the removal,

i.e., the laying out as though the land had never been farm land, making it look like a new "subdivision," I can find no evidence to support the statement as to relative importance. The contract is one entire contract—"remove all the buildings and we will give you the materials in the buildings"—the defendant could not claim the materials of the barn for removing the barn, etc. Then the "liquidated damages" clause is separate: "I hereby agree to have the same, including all foundations, entirely removed from the said premises on or before the 1st day of May, 1913; and, in default of my so doing, I hereby agree to pay the sum of $25 for each day that any of the said material remains on the said premises. . . ."

The scheme of the contract is obvious. All the material into which the buildings must be reduced before they could be removed was to be away by the 1st May, so that the lots could be laid out, the land graded and levelled up, and seeded down to look like a new suburb, and not an old farm. There was one and only one thing provided for: the clearing away of all material, foundations, etc., to leave the land clear for what all parties contemplated. No doubt, a trifling amount left could not be considered a breach of the agreement. De minimis non curat lex. What is called for is a substantial compliance with the agreement: e.g., no one would say that a barrowful of rubbish which might be burnt, buried, or otherwise disposed of, at a merely trifling expense, would bring about the consequences of a breach of contract.

The rules for determining whether a provision of this kind is a penalty or liquidated damages are laid down from textbooks of authority and with ample quotations of cases in Townsend v. Rumball (1909), 19 O.L.R. 435, and McManus v. Rothschild (1911), 25 O.L.R. 138. In deciding this question, the Judge must take into consideration the intention of the parties, as evidenced by their language, and the circumstances of the case taken as a whole and viewed as at the time the contract was made.

The language being looked at, the words "as liquidated damages and not as a penalty" are not "to be left out of account altogether . . . they must go somewhat to shew that the parties intended that these sums should be liquidated damages and not penalties:" per Lord Esher, M.R., in Law v. Local Board of Redditch, [1892] 1 Q.B. 127, at p. 131. And it is "no doubt a very serious interference with the terms of a contract to say that, though the parties had expressly stipulated that a sum was to be paid as liquidated damages, the Court would not

construe the words to have their ordinary effect, but would treat the sum as a penalty:'' per Kay, L.J., at p. 135. . . .

The case of Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda, [1905] A.C. 6, shews that often liquidated damages are provided for from the difficulty of proving damage, though actual damage may accrue (p. 11.) ''It is obvious on the face of it that the very thing intended to be provided against by this pactional amount of damages is to avoid that kind of minute and somewhat difficult and complex system of examination which would be necessary if you were to attempt to prove the damage.''

It seems to me that that has some bearing on the present case. The learned Chief Justice finds that no damage has yet accrued. I do not think the evidence warrants that conclusion. The manager says: ''I suffered damage which it is difficult to put an amount to, by having them there after the 1st May, when we started selling the property.'' ''It would have a sentimental effect on anybody going over there and looking at the property.'' Special damage was not indeed proved; but it is just because of the difficulty of proving special damages that liquidated damages often are stipulated for; and the present is peculiarly the case for such a stipulation.

The plaintiffs have proved a continuance until the 1st June; all after that is indefinite, except as to the hen-house, which seems not to be made much of. I would accordingly reverse the judgment and give the plaintiffs $775 (31 x $25) damages, and costs here and below.

The defendant did not appeal against the third party (even conditionally). We allowed him to appeal nunc pro tunc, but only to the extent of indemnity against the claim of the plaintiffs and the results of such a claim. He is, therefore, in the same position as though he had brought an action against the third party for an indemnity. He would then be entitled to receive from the third party the amount he should be obliged to pay the plaintiffs, with such costs as a reasonable man would incur. The learned Chief Justice having found that there was a defence to practically all the claim, it cannot be said that defending the action was not reasonable.

I think, therefore, that the third party should be ordered to pay not only the amount of the plaintiffs' judgment and costs, but also the costs of the defendant which he must pay his solicitor. Had anything turned on the hen-house only not being removed, the case would be different; the non-removal is admitted by the defendant and justified by him.

JUNE 15TH, 1914.

*BILTON v. MACKENZIE.

Negligence — Death of Workman Injured while at Work on Building for Contractor — Action by Widow under Fatal Accidents Act—Negligence of Servant of another Contractor —Defective Planks—Findings of Jury—Knowledge of Intention of Deceased to Use Plank—Absence of Contractual Relations—Licensee—Invitee—Evidence.

Appeal by the plaintiff from the judgment of BRITTON, J., 5 O.W.N. 818.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

H. C. Macdonald, for the appellant.

Shirley Denison, K.C., for the defendant, the respondent.

CLUTE, J.:—The plaintiff is the widow of James W. Bilton, who came to his death by a fall from the second storey of a building being erected for the Metallic Roofing Company. The deceased was employed by one Egles, who had the contract for the painting of the building. The defendant had the contract for the carpenter work. One Hope, in the employ of the defendant, put down two planks across from one steel girder to another, being a distance of about ten feet from centre to centre.

There was no duty arising from the defendant to the deceased owing to any contractual relation, for none existed between them. . . .

[The learned Judge then set out the findings of the jury: see 5 O.W.N. at p. 819. The 3rd question put to the jury was: "Was it, or ought it to have been, within the reasonable contemplation of the workman Hope that painters or others having work to do in or about the building would or might use the passageway made by the plank or boards placed on the girders by Hope?" The answer of the jury was, "Yes."]

The trial Judge agrees with the findings of the jury as to all the answers except the answer to the 3rd question. . . . Can the answer to the 3rd question be supported upon the evidence? . . .

[Examination of the evidence.]

*To be reported in the Ontario Law Reports.

I think that there was evidence to support the jury's finding (the 4th) that the deceased was rightfully on the second storey of the building, and had a right from the inside of the building to do the painting on the outside of the window-sashes. He was not a trespasser. I think that there was an implied permission, under the circumstances, to do the painting on the outside from the inside, if he thought best. There was no prohibition; and, under the circumstances, and having regard to the weather, it was not unreasonable that he should desire to do so. . . . Hope had not been ordered to put down these planks, nor was there anything in the specifications calling upon the defendant to provide scaffolding for the painters.

The term "invitee" applies to persons who go upon premises on business which concerns the occupier, and upon his invitation. . . . Halsbury's Laws of England, vol. 21, para. 654. Among the classes of persons held to be invitees are mentioned persons having business at the premises: ib., sec. 655. The duty of the occupier of premises . . . is . . . to have his premises reasonably safe for the use that is to be made of them: ib., sec. 656; Indermaur v. Dames (1866), L.R. 1 C.P. 274. . . .

Here the deceased had no interest in the defendant's contract. . . . It cannot be said, therefore, that the deceased was an invitee of the defendant. He was there at the instance of Egles, the contractor for the painting. In the doing of Egles's work, he had the permission, no doubt, of the owner; but the defendant, as an independent contractor, had no authority either to grant or refuse permission. . . .

[Reference to Indermaur v. Dames, L.R. 1 C.P. 274, L.R. 2 C.P. 371; Corby v. Hill, 4 C.B.N.S. 556 (distinguishing it.)]

Here there was neither knowledge that the plank was dangerous, nor that it would be used by the deceased.

[Reference to Spence v. Grand Trunk R.W. Co. (1896), 27 O.R. 303, 308; Sullivan v. Waters, 14 Ir. C.L. Rep. 460; Gautret v. Egerton, L.R. 2 C.P. 371, 375; Keeble v. East and West India Dock Co., 5 Times L.R. 312; Batchelor v. Fortescue, 11 Q.B.D. 474; Coffee v. McEvoy, [1912] 2 I.R. 95, 290; King v. Northern Navigation Co. (1911-12), 24 O.L.R. 643, 27 O.L.R. 79.]

I have not been able to find any case where the facts were at all similar to the present. Had the deceased been intending to paint within the building, his business there would have made him, I think, an invitee, but not of the defendant; and it is doubtful even in such case if the law in regard to an invitee

would have applied. While it may be said that he was lawfully there, in the sense that he was not a trespasser, yet, I think, his right there was implied, not as an invitee, because in the ordinary course the work that he was about to do did not call him within the building, and the invitation, even then, would not be from the defendant. He, at most, is a licensee; and "a bare licensee is entitled to no more than permission to use the subject of the license as he finds it. He must accept the permission with its concomitant conditions and perils:" Halsbury's Laws of England, vol. 21, sec. 660; Hounsell v. Smythe, 7 C.B.N.S. 731. . . .

[Reference to Gautret v. Egerton, supra; Corby v. Hill, supra; Bolch v. Smith (1862), 7 H. & N. 736; Gallagher v. Humphrey (1862), 6 L.T.N.S. 684, 685; Murley Brothers v. Grove (1882), 46 J.P. 360; McFeat v. Rankin's Trustees (1879), 16 Scots. L.R. 1817; Lowery v. Walker, [1910] 1 K.B. 973, 975, [1911] A.C. 10; Deane v. Clayton (1817), 7 Taunt. 489; Breen v. City of Toronto (1910-11), 2 O.W.N. 87, 690; Bondy v. Sandwich Windsor and Amherstburg R.W. Co. (1911), 24 O.L.R. 409; Grand Trunk R.W. Co. v. Barnett, [1911] A.C. 361; Beven on Negligence, 3rd ed., pp. 442-447; Sullivan v. Waters, supra.]

Even admitting that there was evidence to support the answer of the jury to the 3rd question (of which I have grave doubt), it does not go far enough, under the peculiar facts of this case, to entitle the plaintiff to succeed.

In none of the cases that I have been able to find in England or Canada, as between strangers, where there was no duty arising from contractual or other relations, has there been held to be any liability unless the thing complained of was in the nature of a trap or hidden defect, known to the defendant or suggesting fraud on his part. . . .

[Reference to Maguire v. Magee, referred to in 6 Cyc., p. 61, as supporting the proposition that "the builder is not liable for the injuries . . . occurring to the employees of other contractors where they, without request or invitation, go upon a scaffold erected by him, and such scaffold gives way, thereby injuring the employees."

The difficulty in the plaintiff's way which, I think, is fatal to her right to recover, is this. The implied license which the husband had to be in the building came from the owner, through the contractor for the painting, whose servant the deceased was, and not from the defendant. The deceased had the right to be where his work called him, and it was not unreasonable, under

the circumstances, that he should paint the outside of the building from the inside. The defendant did not invite him, nor was he there by the defendant's license. The planks were put down for the defendant's own use; and, although they were defective, that was unknown to the defendant or his servant, Hope. There was no trap or defect, nor was there any suggestion of fraud or allurement.

I think the appeal should be dismissed, and with costs if asked for.

MULOCK, C.J.Ex., and SUTHERLAND, J., concurred.

RIDDELL, J., agreed in the result.

Appeal dismissed.

JUNE 15TH, 1914.

*CILLIS v. OAKLEY.

Motor Vehicles Act—Injury to Property by Negligence of Driver of Motor Vehicle — Vehicle Stolen by Driver — Absence of Negligence of Owner—Liability of Owner for Negligence of Thief—2 Geo. V. ch. 48, secs. 10, 11, 19, 23.

Appeal by the plaintiff from the judgment of WINCHESTER, Co. C.J., dismissing an action brought in the County Court of the County of York to recover damages for injury caused to the plaintiff's horse and buggy by a collision with an automobile owned by the defendant, which was, as the plaintiff alleged, at the time of the collision being negligently driven by a man who, as it appeared, had stolen it.

The County Court Judge tried the action without a jury, and dismissed it on the ground that the defendant was not, in the circumstances, liable; assessing the plaintiff's damages provisionally at $100.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

T. J. W. O'Connor, for the appellant.

T. S. Elmore, for the defendant, the respondent.

*To be reported in the Ontario Law Reports.

CLUTE, J. (after stating the facts):—The case, as it was argued before the Court, was whether or not the defendant was liable for the negligence of the thief, there being no negligence upon his (the defendant's) part. The section of the Motor Vehicles Act under which it is sought to make the defendant liable is sec. 19 (2 Geo. V. ch. 48), which is as follows: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council." It is argued that this means that the owner of a motor vehicle is responsible for all damage caused by such motor vehicle. The section does not say so, nor is that, I think, the meaning of the section. The Act is to "regulate the speed and operation of motor vehicles." It provides for a registration fee and a license to paid drivers; for certain equipment of bell or gong, etc., to be sounded on certain occasions; for lamps; for a number on the front and back of the vehicle; for search-lights; for rate of speed; and sec. 11 contains a provision against reckless and negligent driving, notwithstanding the section as to speed, and having regard to all the circumstances. It provides against racing on highways; that persons under 18, or intoxicated persons, shall not drive a motor vehicle; that a motor vehicle shall not pass a standing tram-car; that drivers are to use reasonable precautions not to frighten horses, and are to stop on signal and on meeting a funeral and in case of accident. Then follows sec. 19. Thus far it is nowhere declared that the owner is at all hazards to be responsible where his motor does injury. If the case falls within any of the preceding sections, it must be sec. 11 . . . but that section must be read in connection with sec. 10, which gives the rate of speed, and sec. 11 points out that, notwithstanding sec. 10, the person who drives recklessly or negligently or at high speed or in a manner which is dangerous to the public, having regard to all the circumstances, including the nature, condition, and use of the highway, and the amount of the traffic, shall be guilty of an offence under the Act. Section 11 certainly was not intended, I think, to create a liability where a person neither drives in the reckless manner mentioned nor is in any way responsible at common law for such reckless and careless driving, as in the case of a thief.

The meaning, I think, of the preceding sections is, that it was necessary to indicate some person who would be responsible for the violation of the Act, and the owner is named as such person, not to create a liability against such owner for the act

of one over whom he had no control, and who, in order to be in a position to perpetrate the act causing the negligence, had created a crime against the owner by stealing his motor vehicle.

Nor do I think that sec. 23 in any way creates such liability. It may, indeed, impose upon the owner the onus of shewing that the loss or damage did not arise from any negligence or improper conduct upon his part or upon the part of any one for whom he is responsible. I agree with what my brother Riddell says in this respect in Lowry v. Thompson (1913), 29 O.L.R. 478, at p. 488; "All that the section does is to shift the onus, not to impose a liability." It is unnecessary to consider whether or not the owner may be held liable where he has been guilty of negligence in not taking reasonable care so as to prevent the motor falling into the hands of a person not competent to drive it. . .

But it is said that this case is governed by Lowry v. Thompson, and that we are bound to hold, owing to the decision in that case, that the owner of a motor vehicle is liable for damage done by the motor vehicle when in the hands of a thief, without negligence on the part of the owner. . . . Referring to the Judges who sat in that case, as I may in case of doubt as to what they intended (see Nuttall v. Bracewell, L.R. 2 Ex. at p. 11), the Chief Justice of the Exchequer informs me that he did not intend to dispose of that point; Mr. Justice Riddell, that he did. Mr. Justice Sutherland gave no written opinion, but agreed that the case should be sent back for a new trial. Mr. Justice Leitch concurred with Mr. Justice Riddell.

I do not think, therefore, that the Lowry case precludes this Court now from expressing an opinion upon the question involved. . . .

[Reference to Wynne v. Dalby (1913), 30 O.L.R. 67.]

The facts in the Wynne case differ from the present. The question of the liability of the owner for the negligence of a thief was not raised; but the judgment, so far as it goes, tends to support the view here taken, that the owner in such case, at all events where there is no negligence upon his part in permitting the motor to fall into the hands of the thief, is not liable for injuries caused by the motor while in the thief's possession.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex. (after briefly stating the facts and referring to Lowry v. Thompson, 29 O.L.R. 478):—I do not think that the Court decided in Lowry v. Thompson that the owner of a stolen car is liable as contended for in this action; . . . and

I agree with the judgment of my brother Clute that this appeal should be dismissed with costs.

SUTHERLAND, J., for reasons stated in writing, agreed that the appeal should be dismissed with costs.

RIDDELL, J., dissented, for reasons stated in writing. He was of opinion that the case was exactly covered by Lowry v. Thompson; and that the appeal should be allowed.

LEITCH, J., agreed with RIDDELL, J.

Appeal dismissed; RIDDELL *and* LEITCH, JJ., *dissenting.*

JUNE 15TH, 1914.

*BELLAMY v. TIMBERS.

Promissory Note—Loan of Money—Exaction of Excessive Rate of Interest—Interest Act, R.S.C. 1906 *ch.* 120—*Money-Lenders Act, R.S.C.* 1906 *ch.* 122, *secs.* 6, 7, 8, 9, 10, 11—*Security not wholly Void—Recovery of Amount Secured, less Excess of Interest over Amount Legally Chargeable—Costs.*

Appeal by the plaintiff from the judgment of TAYLOR, Jun. Co.C.J., in favour of the defendant in an action in the 4th Division Court in the County of Lambton, brought to recover the amount of a promissory note made by the defendant.

The appeal was heard by MULOCK, C.J.Ex., HODGINS, J.A., RIDDELL and LEITCH, JJ.

J. G. Kerr, for the appellant.

A. Weir, for the defendant, the respondent.

HODGINS, J.A.:—Under the Interest Act, R.S.C. 1906 ch. 120, any person may stipulate for, allow, and exact on any contract or agreement whatsoever any rate of interest or discount which is agreed upon. This is subject to the provisions of that Act and any other Act of the Parliament of Canada. Under sec. 6 of the Money-Lenders Act, R.S.C. 1906 ch. 122, notwithstanding

*To be reported in the Ontario Law Reports.

the above provision, no money-lender shall stipulate for, allow, or exact on any negotiable instrument, contract, or agreement concerning a loan of money, the principal of which is under $500, a rate of interest or discount greater than 12 per cent. per annum.

It is argued that the negotiable instrument sued on in this case is vitiated by the inclusion in it of a sum of money, being interest during its currency at the rate of 24 per cent. . . . The appellant had from the respondent a security which was due and payable before the date at which the Money-Lenders Act came into force; and, under sec. 9, the principal of that debt ceased to bear more than 12 per cent. interest per annum. The two notes taken after that date include interest at 24 per cent., amounting to $61.04, while the proper charge was only $30.52, and it is clear that the note sued on includes that amount, and not merely the $22.25 credited as a rebate, because the two payments of $6.55 and $5 must be applied on the interest which the defendant could properly bear.

It is also beyond question that the voluntary abandonment of the excess does not purge the note of the vice inherent in it. It none the less includes that interest, and the very credit admits it. Until judgment there is no release: Winger v. Sibbold (1878), 2 A.R. 610.

The general rule is stated in Herman v. Jeuchner (1885), 15 Q.B.D. 561, where Brett, M.R., points out that the consideration and the promise determine and constitute a contract not under seal, and taken together they form the whole of the contract, and that where the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced.

This principal applies where either the promise or the consideration is itself illegal; and, where the consideration is in part illegal, the whole contract is illegal, and the part which is legal cannot be recovered in an action upon the contract: Browne v. Bailey (1908), 24 Times L.R. 644. . . .

[Reference to Victorian Daylesford Syndicate v. Dott, [1905] 2 Ch. 624, 629; Bonnard v. Dott, [1906] 1 Ch. 740; Whiteman v. Sadler, [1910] A.C. 514; and to the English Money-Lenders Act, 1900.]

Section 6 of our Money-Lenders Act prohibits the stipulation, allowance, or execution, "on any negotiable instrument, contract, or agreement concerning a loan of money, the principal of which is under $500," of a rate of interest or discount greater

than 12 per cent. per annum. This stipulation or exaction is not made penal, but merely the lending of money at a rate of interest greater than that authorised by the Act. . . . There may be an infraction of sec. 6 which is not an offence within sec. 11. Consequently, the statute, in prohibiting not only the lending of money at a greater rate of interest than 12 per cent., but its stipulation or exaction in any transaction concerning a loan, is dealing with two different things, or rather is extending the prohibition to something other than the original loan of money.

In this case the original loan was made at a time when the interest charged upon it was legal; and the prohibition affects the appellant only so far as has stipulated or exacted in the note in question a greater rate of interest than is allowed. In determining, therefore, whether the general law regarding illegality in the consideration is to be applied so as to render the whole security void, care must be taken to see whether the statute can have intended to render the whole transaction, represented by the note, void, or merely to vitiate it so far as it contravenes sec. 6 with regard to interest. It may be noted that where there is a contract to pay interest, it may be recovered in an action brought for interest alone: In re King (1881), 17 Ch.D. 191 . . . Division Courts Act, R.S.O. 1914 ch. 63, sec. 67(2). . . .

[Reference to Whiteman v. Sadler, supra; Wilton v. Osborn, [1901] 2 K.B. 110; Samuel v. Newbold, [1906] A.C. 461; and to secs. 6, 7, 8, 9, 10 of the Canadian Money-Lenders Act.]

If sec. 6, taken in connection with the other provisions of the statute, is limited to making void the provision as to interest, thus rendering the money lender incapable of receiving any excess interest, where he has stipulated for or exacted more than 12 per cent., the whole of the provisions of the statute can be harmonised and the end attained without treating the exaction of legal interest as paramount to the extent of justifying the risk of borrowers being dishonest enough, to use the language of Lord Mersey in Whiteman v. Sadler, supra, to refuse to pay back the money they had had.

I am free to admit that the construction of this Act presents much difficulty. But I think that in Bellamy v. Porter (1913), 28 O.L.R. 572, two Judges of this Divisional Court, my Lord the Chief Justice and Mr. Justice Sutherland, must have viewed the matter in the same light; and for that reason I feel more confident that this conclusion is correct. Mr. Justice Clute's judgment must, however, be taken to be contrary to it. . . .

Section 7 enables the Court in an action such as this is, i.e., one concerning a loan of money by a money-lender, "wherein it is alleged that the amount of interest . . . claimed exceeds the rate of 12 per cent. per annum," to reopen the transaction and take an account between the parties.

The relief that can be given seems limited to relieving the person under obligation from payment of any sum in excess of 12 per cent. per annum, and ordering repayment of that excess, if it has been paid, and to setting aside either wholly or in part, revising or altering, any security given in respect of the transaction.

The English Act is wider . . . and there is no limit to the discretion of the Court in arriving at the amount fairly due.

In the case in hand I am afraid that all that can be done is to relieve the respondent from the payment of the excess of interest, and this would seem to apply to interest only after the Act came into force (see sec. 9).

The judgment in appeal should be reversed, and the present security should be reduced to $113.70 and interest at 24 per cent. from the 10th September, 1905, to the 13th July, 1906, and thereafter at 12 per cent. per annum, less the payments of $6.55 and $5 already mentioned.

The appellant, therefore, succeeds but partly on his appeal, and should have no costs of it.

MULOCK, C.J., and LEITCH, J., concurred.

RIDDELL, J., agreed in the result, for reasons stated in writing.

Appeal allowed in part.

JUNE 15TH, 1914.

*RE FLETCHER.

Will—Construction—Testator Owning three Parcels of Land—Devise of first Parcel to Son — Devise of "Balance" to Daughter, Followed by Description of second Parcel — Claim of Daughter to third Parcel—Dominant Clause—Residuary Devise.

Appeal by Elsie Dawn Cowell from the judgment of MIDDLETON, J., ante 235, declaring the construction of the will of Daniel T. Fletcher, deceased.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

G. Lynch-Staunton, K.C., for the appellant.

S. F. Washington, K.C., for the adult residuary legatees.

S. F. Lazier, K.C., for the executors.

J. R. Meredith, for the infants.

SUTHERLAND, J.:— . . . The contention of the appellant . . . is, that the parcel of land . . . thirdly described . . . is included in the devise to her under the 6th paragraph of the will. . . . Smith v. Smith, 22 O.L.R. 127, 129, and Re Clement, ib. 121, . . . seem to me to have no application, as they have reference to wills in which lands devised by particular descriptions were never owned by the testator. . . .

The contention of the appellant is twofold: (1) that the first part of clause 6 of the will, namely, "I give devise and bequeath the balance of the lands and premises described in the aforesaid deed from Richard Quance, executor, to me," is the controlling part of the clause, and under it would pass to the appellant not only the parcel firstly described in the deed, to which it is admitted she is entitled thereunder, but the parcel thirdly described, which is the subject of the dispute. This would be so unless the general words used in the early part of the clause are restricted by those following, which are, "said lands being composed of part of lot 3 in the fourth block and second concession, as to which the appellant contends that they really are of no effect, as they do not in themselves describe any definite part of the lot.

*To be reported in the Ontario Law Reports.

Dealing with this last view first. When clause 6 is read, it is necessary, in either view, to refer to the deed to ascertain what is meant. If this is done, the appellant then contends, it shews two parcels remaining undisposed of, which comprise "the balance," each one of which is specifically described therein—the piece in question as the south-west part of lot No. 3 in block 4 in the 1st concession, followed by metes and bounds. The respondents, on the other hand, admit that in the same way they are driven to the deed for a specific description, since, after mentioning a balance of lands described in the deed, the will goes on to qualify and designate what the *said lands* are, namely, "being composed of part of lot 3 in the fourth block and second concession."

On looking at the deed, one finds that there is a part of the said lot, and only one part, therein mentioned, and it is described by metes and bounds, and thus made definite and exact.

I am unable to see that there is anything in the appellant's contention in this respect.

We come back to the other and main contention, that the general and exclusive description contained in the words "the balance of the lands and premises described in the aforesaid deed from Richard Quance, executor, to me," covers all the lands in the deed except that portion which is previously, under clause 4, given to John W. Fletcher, and so includes not only the parcels firstly described in the deed, but the piece thirdly described. . . .

[Reference to West v. Lawday, 11 H.L.C. 375, 381, 383, 388; In re Brocket, [1908] 1 Ch. 185, 193, 194, 195, 196.]

Applying the reasoning of these cases to the language of the will in question, it seems to me that the words "said lands being composed of," following immediately, in a continuous description, upon the general words, "the balance of the lands and premises described in the aforesaid deed," mean, in effect, "the particular lands I am referring to and devising"—"part of lot 3, block 4, second concession," which part is, on reference to the deed, made clear and definite, and no more; and that, therefore, the devise in the 6th clause does not pass to the appellant the south-west part of lot 2 in the 1st concession. It is the case of the substitution of "a definite and precise statement" for "an antecedent generality." It is not the case of an "imperfect and inaccurate enumeration of particulars," but a qualifying and defining statement. . . .

I agree with Middleton, J., that, apart altogether from the

residuary clause, the judgment appealed from rightly interprets the will in question; but the very fact that the residuary clause, which reads as follows, "All the rest and residue which remains of my real and personal estate," etc., makes a reference to real estate, when the fact appears to have been that at the time the will was made the testator had devised all the lands he owned, with the exception of the south-west part of lot 2 in the 1st concession, and that the reference to real estate would be useless unless it referred to it, would, on a consideration of the whole will, lend colour and weight to the view that this parcel did not pass, under the words "the balance of the lands" in clause 6, to the appellant, but was intended to pass under the word "real" in the residuary clause.

I would dismiss the appeal with costs.

MULOCK, C.J.Ex., agreed with the judgment of SUTHERLAND, J., for reasons briefly stated in writing.

LEITCH, J., also concurred.

RIDDELL, J., dissented, for reasons stated in writing.

Appeal dismissed; RIDDELL, J., *dissenting.*

JUNE 17TH, 1914.

FEHRENBACH v. GRAUEL.

Vendor and Purchaser—Agreement for Sale of Land—Action for Instalment of Purchase-money—Ability of Vendor to Convey—Right to Rescission—Damages—Limitation of—Abatement of Purchase-money—Application of Payment—Costs.

Appeal by the defendant from the judgment of LENNOX, J., ante 39.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

E. E. A. DuVernet, K.C., and W. H. Gregory, for the appellant.

R. McKay, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts at length) :—The notice of motion restricts itself, and the argument was limited to, a claim that it should have been found that there was nothing payable at the time of the issue of the writ. No appeal is taken against the dismissal of the counterclaim. . . .

The state of affairs at the time of the payment in February, 1913, was this: the defendant owed to the plaintiff a note and about $3,000 balance of the payment due in November, 1912; these were already payable. Then there was a debt not yet due, debitum in præsenti, solvendum in futuro, of over $8,000; all of this the defendant *might*, part of it, viz., $3,000, he *must*, pay on the 1st November, 1913.

An agreement was made whereby the price of 210 acres should be paid in February and land conveyed which, under the agreement, was not to be conveyed till the last payment of the purchase-money had been made. The money was paid generally; as the defendant says, he "paid it on the whole of the land contract;" before any claim was made by the defendant as to any application to be made of this sum, the plaintiff applies it to the "whole of the land contract," by applying it, first to pay the amount overdue and the balance on the whole contract. The defendant claims the right to apply the balance after paying overdue claims, upon the instalment due on the 1st November, 1913, and so establish that there was nothing due at the date of the writ.

At the time of the payment, the defendant had no right under the contract to pay any sum except the amount overdue and unpaid; even his right to pay more than $4,000 as of the 1st November, 1912, had gone with the day. Consequently, he must be considered as paying the excess under the agreement made specially as to the land sold to Fleager. The land was then considered as actually sold to the defendant, and he entitled to a conveyance. The right to a conveyance accrued only when all the purchase-money was paid, and it seems to me that it must be considered that this amount was paid as part of the final instalment. The argument that the plaintiff had, after the payment, a balance of money in his hands belonging to the defendant, cannot avail; neither considered the balance the money of the defendant; and, after payment, it was undoubtedly the money of the plaintiff, and not that of the defendant.

The argument which might be made that the defendant, in making the excess payment, did so under the option given him

of paying more than $4,000 in November, 1912, does not assist him. The application made by the plaintiff of the money has precisely the same effect as though he had been in February, 1913, allowed to exercise the option he had in November, 1912.

None of the circumstances succeeding February, 1913, has displaced the right of the plaintiff to appropriate the payment as he has done; and I do not see anything inequitable or unfair in his insisting on his rights when he made a conveyance of the land at the request of the defendant.

Whether the defendant has any rights against the plaintiff not raised by his pleadings, we need not consider.

I think the appeal should be dismissed with costs.

JUNE 18TH, 1914.

OLDS v. OWEN SOUND LUMBER CO.

Contract—Manufacture and Delivery of Lumber—Shipment—Payment for Lumber Delivered—Inspection of Lumber—Interest.

Appeal by the defendants and cross-appeal by the plaintiff from the judgment of MIDDLETON, J., ante 241.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and RIDDELL, J.

W. H. Wright, for the defendants.

J. H. Rodd, for the plaintiff.

THE COURT dismissed both appeals with costs.

SUTHERLAND, J., IN CHAMBERS. JUNE 18TH, 1914.

FISHER v. THALER.

Execution — Stay pending Appeal — Removal of Stay — Rule 496—Summary Judgment—Rule 57—No Real or Valid Defence.

Motion by the plaintiff, under Rule 496, for an order removing the stay of execution upon the plaintiff's judgment conse-

quent upon the defendants' appeal from the judgment having been set down to be heard.

Rule 496: "Unless otherwise ordered by a Judge of a Divisional Court, the execution of the judgment appealed from shall, upon an appeal being set down to be heard, be stayed, pending the appeal. . . ."

M. L. Gordon, for the plaintiff.

J. P. MacGregor, for the defendants.

SUTHERLAND, J.:—A motion to remove stay of execution pending an appeal from an order of a County Court Judge granting the plaintiff's motion for judgment on a specially endorsed writ, under Rule 57. The learned County Court Judge, on the material before him, came to the conclusion that the defendants were really not bonâ fide contesting the plaintiff's claim but merely seeking to gain time. It is said that he was asked to stay execution pending an appeal, and declined to do so.

While in a case where a defendant has sworn to a valid defence there is the right to an unconditional defence: Jacob v. Booth's Distillery Co., 50 W.R. 49, 85 L.T.R. 282; F. J. Castle Co. Limited v. Kouri (1909), 18 O.L.R. 462; a perusal of the material leads me to the same conclusion as the County Court Judge, that no real or valid defence is deposed to, and that there should be no stay of the execution.

The order will go as asked accordingly.

HIGH COURT DIVISION.

MIDDLETON, J. JUNE 16TH, 1914.

HERRIES v. FLETCHER.

Contract—Alleged Agreement to Devise Farm—Services Rendered by Expectant Devisee—Remuneration—Action to Enforce Agreement against Executors—Evidence—Corroboration—Intention of Testator—Failure to Prove Contract—Statute of Frauds—Quantum Meruit—Alleged Gift of Chattels and Promissory Note—Possession not Changed—Costs.

Action against the executors of John Fletcher, deceased, for specific performance of an alleged agreement between the plaintiff and the deceased.

The action was tried without a jury at Hamilton on the 11th June, 1914.

G. Lynch-Staunton, K.C., and J. G. Farmer, K.C., for the plaintiff.

S. F. Washington, K.C., for the defendants.

MIDDLETON, J.:—The plaintiff was the housekeeper of the late John Fletcher, who died on the 27th August, 1913, possessed of two farms and considerable personal property. Although she was paid wages during the testator's lifetime, at the rate of $12 per month, the plaintiff alleges that there was an agreement by which she was entitled to receive his homestead farm at his death. There are some minor disputes with reference to alleged gifts of chattels and a promissory note.

Fletcher was a married man living separate from his wife. His children were all grown up and living away from him. In August, 1906, he advertised for a housekeeper. The plaintiff applied, and was employed. She was then a widow, about 55 years of age. Fletcher was 8 or 9 years older. Matters progressed rapidly; for in October, 1906, while the plaintiff was away, Fletcher wrote her a letter, 24th October, addressing her as "Dear Helen," "Dear Nellie," and as "Darling." These affectionate relations were broken in upon before a year had gone by; and the plaintiff left some time in the summer of 1907; her intention then was to leave for good and all.

It is not clear whether the farm had been promised before this disruption; but Haines Elmer, a nephew of the lady, was employed by Mr. Fletcher as an emissary to conduct peace negotiations, and he was authorised to hold out the prospect of the ownership of the farm as an inducement. The lady yielded, she returned, and matters appear to have gone very smoothly for some time; for in June, 1910, the plaintiff and Fletcher went to Detroit to consult . . . an attorney . . . with reference to the obtaining of a divorce from the separated wife and with reference to the drawing of a will. Although a bill of divorce was drawn, it does not appear to have been prosecuted; and, upon learning that a will would cost about $25, Mr. Fletcher declined to go to the expense. . . . Although not expressly stated, it is clear that the whole substratum of these negotiations was a contemplated divorce from the separated wife and marriage with the plaintiff. . . .

The testator made his last will in January, 1909. It contains no reference to the plaintiff. Four of his sons (or their issue)

take the estate, save some small legacies. Whatever intentions the testator may have had towards the plaintiff, he has failed to express them by any testamentary instrument.

After the testator's death, the plaintiff claimed to be entitled to receive a balance of several months' wages due to her and this has been paid. The claim to the ownership of the property was not put forward until some time later.

I have no doubt that at different times the testator has expressed his intention to devise the farm to the plaintiff; but I have a great deal of doubt as to there ever being a contract to do so.

There are many circumstances of suspicion attending the plaintiff's claim. She remained in the testator's employment, nominally as his housekeeper, and undoubtedly in receipt of a stipulated monthly wage. In the letters produced there is no suggestion of giving the farm. The plaintiff says that there was another letter, in which this was set forth, but that she has destroyed it. The corroborative evidence given by Mr. Owens (the Detroit attorney) I accept to the fullest extent, but it falls far short of establishing a contract. It shews only an intention at that time to make a will. The evidence of Haines Elmer, the nephew, requires to be accepted with great caution; and, outside of this, there is no corroboration of the plaintiff's own story. It is so easy to turn a statement of an intention to devise into a contract to devise that the evidence here, lacking in precision and convincing force, falls very short of the standard set by the judgment of a Divisional Court in Cross v. Cleary (1898), 29 O.L.R. 842, where it is said that such an agreement as that set up by the plaintiff "must be supported by evidence leaving upon the mind of the Court as little doubt as if a properly executed will had been produced and proved before it" (p. 545).

Not only does the evidence, even if accepted, fail to establish and corroborate a bargain, but I have the greatest difficulty in giving it credence.

I think this case is, in this aspect, quite like Maddison v. Alderson (1883), 8 App. Cas. 467, and that there was not in truth a contract.

Other difficulties also confront the plaintiff. The contract is not in writing, and the Statute of Frauds would afford a complete answer to a claim for specific performance. She would then be entitled to recover upon a quantum meruit for the value of the services rendered by her; but she did not render these

services gratuitously, and has already received the precise wages stipulated for, even before the giving of the farm was ever mentioned. The amount paid was, according to the evidence, a fair wage for a woman occupying the position of housekeeper upon a farm, and I fail to find that any services were rendered going beyond the scope of the original employment; so that, if the plaintiff is entitled to recover upon a quantum meruit, there is nothing coming to her beyond what she has already received.

With reference to the claim for the horse and buggy and cow, the case appears to me to be governed by the decision in Cochrane v. Moore (1890), 25 Q.B.D. 57. The gift fails because there was not a change of possession.

Then, with reference to the $200 note: I think the plaintiff fails as to this also. The plaintiff admits that at one time it was with Fletcher's papers. Her whole account as to it is full of contradiction and discrepancies. The daughter-in-law and her husband gave clear evidence of payment. Such discrepancies as exist between the stories of these two witnesses shew conclusively that there was no collusion between them.

I think the action throughout fails; but the case is not one in which costs should be awarded. . . .

[Suggested that some allowance should be voluntarily made to the plaintiff by those interested in the estate of John Fletcher.]

MIDDLETON, J. JUNE 16TH, 1914.

COOK v. DEEKS.

Company—Contracting Company—Contract Taken by Majority of Directors as Individuals—Duties and Liabilities of Directors—Trust—Rights of Minority Shareholders—Evidence—Conflict—Finding of Trial Judge.

This action was brought by A. B. Cook, one of the shareholders of the Toronto Construction Company Limited, on behalf of himself and all other shareholders other than the individual defendants, against George S. Deeks, Thomas Hinds, George M. Deeks, the Dominion Construction Company Limited, and the Toronto Construction Company Limited, for a judgment declaring that the individual defendants and the Dominion Construction Company Limited were trustees for the Toronto Construction Company of a certain contract entered into be-

tween the Dominion Construction Company and the Canadian Pacific Railway Company for the construction of a certain line called in the evidence "the Shore Line"—more accurately known as the Campbellford Lake Ontario and Western Railway —and for ancillary relief.

The action was tried without a jury at Toronto.

Wallace Nesbitt, K.C., and A. M. Stewart, for the plaintiff.

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

MIDDLETON, J. (after stating the facts at length):—These three men (the individual defendants) could not, against their will, be compelled to continue to carry on business for the benefit of an uncongenial associate (the plaintiff). The only question is, whether they are able to free themselves from obligation to him by the course which they have taken. They represent seventy-five per cent. of the share value of the company. They are three directors out of the four. The substantial question is, can they, in this summary way, take, in their own names and for their own benefit, a profitable contract which they might, had they seen fit, have taken for the company? It is conceded that the position is not changed by the formation of the new company and the transfer of the contract to it.

Before considering the legal aspects of the question, the formal proceedings of the Toronto Construction Company ought to be mentioned. At a meeting of the directors on the 20th March, 1912, the question of the undesirability of taking any further contracts was discussed, and a general meeting of the shareholders was directed to be called. A meeting was called, and held on the 5th April, and adjourned till the 9th, when, after discussion, the meeting adjourned without taking any action. The office of general manager was abolished, and the sale . . . of the plant was authorised.

This action was not begun until the 12th March, 1913, almost a year later. The next minutes produced are those of the meeting of the directors held on the 3rd April, 1913. The sale already made of the company's assets was confirmed; the action of the company in not entering into new contracts was confirmed; and the directors declared that the company was not in any way interested in the contract in question. This action is then dealt with, a defence is directed to be made to the action, and the proposed statement of defence is approved of. A divid-

end is then declared out of the money on hand, $400,000 being divided.

The annual meeting of the shareholders was held on the 26th April. The sale of the assets was confirmed by the shareholders, the action of the company in not entering into any new contract, including that in question, was confirmed, and it was declared that the company did not desire any interest in the contract in question; the defence filed in the action on the company's behalf being formally approved. The four parties were again elected directors. At none of these meetings, it may be said, was Cook (the plaintiff) present, although he was duly notified.

There was at the hearing a good deal of discussion as to the exact position occupied by directors. Probably the most accurate statement as to the position of a director is, that he is a trustee for the company of all the property of the company which may come to his hands, and that he is the agent of the company for the transaction of all its business which he is called upon as director to transact. He occupies towards the company a fiduciary relationship, and it matters little whether he is called an agent or a trustee. He is under certain disabilities arising from the position he occupies. He cannot make personal profit out of transactions with the company. In all his transactions with the company he is called upon to act with absolute good faith; but there are many things which his position does not preclude him from doing.

The fundamental principle underlying all company law, that the majority must govern, so long as there is no fraud upon the minority, must be accorded its due recognition; and, when the majority determines that a company shall not go further and shall undertake no new business, this, I think, must bind the minority; and the directors, representing the majority, cannot, by reason of any supposed fiduciary obligation, be compelled to undertake business in behalf of all the shareholders, nor can they be prevented, if they see fit, from themselves undertaking profitable business which might well be undertaken by the company as a whole.

I accept to the full Mr. Nesbitt's statement that the directors, in the discharge of the company's business, must be absolutely loyal to the company; but, when the business is not the business of the company and when the company as a whole refuses the business, there cannot be any fiduciary obligation which prevents the directors from acting as individuals in their own individual interest.

It must also be borne in mind that the right of action which may be asserted by an individual shareholder in a class action is a right of action vested in the company. A minority shareholder may in this way redress a wrong done to the company, or recover money due to the company, where the majority refuses to act; but in this case, I think, Cook, though he may have shewn much to indicate that he was not treated with absolute fairness, has entirely failed to establish any right in the company. The company cannot, nor can the minority shareholders, compel the majority to continue to employ their capital in its ventures; nor can the company or the minority shareholders compel the majority to render those personal services without which the enterprise must be a failure.

For these reasons, I think the action fails; and, while I could wish that greater candour had been displayed towards Cook, on the whole I think his claim is absolutely devoid of merit. He has himself secured a contract from the railway company; all the profit from this will go to him, as in the case of the other contracts he was carrying on; and he has no moral claim to share in the earnings of the defendants.

In a case like this, where there is some conflict of evidence, it is probably my duty to express my opinion as to the weight to be given to the witnesses. Although there has been some failure of memory on the part of the defendants with regard to some minor details, I am satisfied that in the main their statements are entirely correct and that their evidence can be relied upon. I think their personal interest has not affected their evidence to the same extent that Cook's interest has affected his.

Action dismissed.

LENNOX, J. JUNE 16TH, 1914.

ALLAN v. PETRIMOULX.

Vendor and Purchaser—Agreement for Sale of Land—Assignment by Purchaser to Sub-purchaser—Rights of Sub-purchaser—Dispute as to whether Water Lot Included in Agreement—Construction of Agreement—Estoppel—Evidence—Notice to Sub-purchaser of Terms of Bargain—Acceptance of Payments by Vendor—Specific Performance—Costs.

Action by the executors of W. H. Allan, deceased, for specific performance of an agreement executed on the 27th March, 1911,

by which the defendant Petrimoulx agreed to sell his farm, bordering on the Detroit river, to the defendant Carnoot, who assigned the benefit of the agreement to the plaintiffs' testator.

A. R. Bartlet, for the plaintiffs.
F. D. Davis, for the defendants.

LENNOX, J.:—The defendant Carnoot is an intelligent man; but he was born in Arabia, is of French parentage, and has a very imperfect knowledge of the English language. He assigned his contract to W. H. Allan, deceased.

The issue is as to whether the agreement of the 27th March did or did not include the conveyance to Carnoot of an estate in fee simple absolute in the water lot in front of Petrimoulx's farm, or, alternatively, whether as a matter of estoppel the defendants are precluded from denying the plaintiffs' right to such a conveyance by reason of the wording of this agreement, whatever may have been the actual bargain between Carnoot and Petrimoulx.

It is in evidence, and not denied, that the verbal bargain was for the sale and purchase of the Petrimoulx farm, a parallel strip of land running westerly from a highway to a dike at the water's edge of the river Detroit; and, within these boundaries and east of the dike, some 15 or 20 acres are covered by water. This is all that has been patented by the Crown, this is what the defendant Petrimoulx owned and verbally agreed to sell and make title to, and this is what the defendant Carnoot verbally bargained for and understood would be conveyed to him. Legally it included, of course, without mention, all easements, privileges, and riparian rights appurtenant to the property. Carnoot is positive and explicit in saying that he never imagined at any time that he was getting any right whatever, not even an easement or privilege, west of the dike or water's edge. These two men having reached this agreement, including terms of payment, occupation, and the like, went to Mr. Gignac, a conveyancer, to have the agreement put into writing, and the instructions to Gignac did not go further than the verbal agreement; but Gignac, without instructions, incorporated an agreement to convey what is called the water lot. This he did by concluding the description with the words, "and the water lot in front thereof." Petrimoulx objected, saying that he did not own this, and the words were struck out, but the conveyancer had the idea that there should be some words in the agreement so as to

include any right or privilege of Petrimoulx incidental to ownership or occupation of the farm; and, evidently not being better able to express what he had in mind, after discussion, and with the consent of Petrimoulx, he restored the words he had already stricken out. Petrimoulx had no thought of agreeing to obtain a patent, or, after discussion with Gignac, that the words employed would obligate him to do so. The attitude of the other contracting party, of course, has to be taken into account. But Carnoot, as he swears, had no idea that any one could acquire any part of what appeared to him to be all a navigable river. He understood that all west of the dike was inalienably the property of the Crown or people; and, in following the discussion—in which he took no part—as well as he could, he concluded that what was referred to as "a water lot" meant the land covered by water east of the dike, and as to this he understood that he would get it in some way, but by a less satisfactory chain of title; and with this he was content.

The result, as a matter of fact, is that Petrimoulx never bargained to give and Carnoot never bargained to get the water lot, and the result in law is, that Carnoot could never compel Petrimoulx to obtain a patent for or convey this land to him. This is the situation as between the defendants. As between these two men their verbal agreement was never in fact varied, and in the working out of it in Court, the facts being undisputed, their rights inter se must be adjudicated upon on this basis.

Are the plaintiffs, then, in any stronger position than Carnoot occupied at the time he assigned? It is conceivable that, in certain circumstances, they might have rights which Carnoot could not successfully assert. I am distinctly of the opinion, however, that, in the circumstances of this case, the plaintiffs are limited to the rights acquired by Carnoot. The plaintiffs do not and could not successfully claim under the agreement what might be said to have been wrested from Carnoot on the 2nd January, 1913. The description in this instrument is admitted to be insufficient, and it was not put forward as a basis of this action either in the pleadings or at the trial. There was nothing to bind either party until execution of the assignment on the 6th January, 1913. Before this was obtained, the plaintiffs' testator and his solicitors were fully informed of the purport of the verbal bargain and of the facts and circumstances attending the execution of the agreement of the 27th March, as above stated. More than this, both he and his solicitors knew

that not only did the vendor repudiate any actual agreement to convey the water lot, but that Carnoot emphatically disclaimed any contract to get anything westerly beyond the dike. The right to the farm proper was all Carnoot professed to have or agreed to sell, and this is all the testator, under the circumstances, could acquire—except a law-suit.

An argument was pressed based upon the acceptance of payments by Petrimoulx. But Petrimoulx had a right to payment without prejudice to his rights in Court based upon the undisputed facts. He had a right to accept the stipulated payments, and to say "I will leave it to the Court to say what I sold."

I was asked to relieve the plaintiffs from payment of costs in any event. I do not think that this is a case calling for exceptional treatment of this character. There is more than a suggestion that the haste and urgency of Mr. Gauthier and the testator was actuated by a desire to obtain the property from an untutored foreigner before he would become aware of the sudden rise in the value of his farm. This is, of course, not illegal, but it is also not very commendable.

Carnoot was upon the verge of throwing up the whole transaction, but the plaintiffs insisted upon taking chances, against the protests of both Carnoot and Petrimoulx.

The plaintiffs should be content with what they knew and know Petrimoulx agreed to convey. They repudiated the bargain, and have failed in their attempt to substitute another. They are not now, strictly speaking, entitled to revert to the actual contract and claim specific performance of it, as admitted; and at the trial they were not even prepared to say then that they desired a conveyance under the contract as set up by the defendants.

If, within fifteen days, the plaintiffs serve notice in writing stating that they desire to obtain a conveyance of the land without the water lot, there will be judgment for specific performance—limited in this way—in the usual form; and, if not, the action will be dismissed; but, the plaintiffs having caused the litigation, the defendants must, in any case, be paid their costs of defence.

LENNOX, J. JUNE 16TH, 1914.

KINSMAN v. TOWNSHIP OF MERSEA.

Highway—Nonrepair—Death of Child by being Thrown from Waggon—Liability of Township Corporation—Neglect to Fence Ditches—Evidence—Action by Parents under Fatal Accidents Act—Damages.

Action by the father of a boy who was killed by being thrown from a waggon on a highway in the township of Mersea, to recover damages, under the Fatal Accidents Act, for the death of the boy, the plaintiff alleging that the highway was out of repair, by reason of the negligence of the defendants, the Corporation of the Township of Mersea.

M. Wilson, K.C., and W. T. Easton, for the plaintiff.
J. H. Rodd, for the defendants.

LENNOX, J.:—The plaintiff exercised reasonable care. The horses, though young, were shewn not to be vicious, and, on the contrary, the way they acted when the disaster culminated, and all were in the bottom of the ditch, shews that they were not. The circumstance that, with his boy lying dead, the plaintiff took blame to himself, thinking that possibly he might have got the boy out of the waggon, proves nothing. . . .

The plaintiff had never before been upon this highway. It is enough, as I find the fact to be, that he is a competent and careful driver; was proceeding along the highway with reasonable care; and, unexpectedly placed in a situation of peculiar difficulty, acted as a prudent man might be expected to act. If the defendants were negligent, and their negligence was the cause of the peril—if they created an emergency calling for immediate action—what right have they to demand of the plaintiff the exercise of extraordinary judgment or exceptional intelligence or forethought? And the defendants were guilty of gross negligence in the construction and care of the highway in question.

Every municipal corporation is bound to keep the highways they have opened for traffic in such a state of construction and repair as to be reasonably safe and sufficient for the requirements of the particular locality; regard being had, of course, to the means at the command of the council, the ordinary purposes

for which they are likely to be used, and the varying conditions which are likely to arise. They must not altogether overlook the fact that the highways are liable to be used by the comparatively unskilled as well as the skilful driver; by the old and the middle-aged, and the young; by the stranger as well as the resident; and by night as well as by day. They should be made reasonably safe for all persons likely to have occasion to use them: Lucas v. Township of Moore, 3 A.R. 602; Toms v. Corporation of Whitby, 37 U.C.R. 100; Walton v. Corporation of York, 6 A.R. 181; Plant v. Township of Normanby, 10 O.L.R. 16.

This road is in an old, well-established, and prosperous township and county. It is not pretended that the municipality had not the means to put and keep it in a proper state of repair.

At the place where the accident occurred, the highway between fences was 64 feet wide, only 16 feet of this, or less, were made available as a roadway, and the roadbed was exceedingly rounding—too rounding, as I think. Alongside of it was a ditch on either side, and the ditch into which the waggon overturned and in which the plaintiff's son was killed, was 24 feet wide and 8 feet deep. This ditch was not constructed for the drainage of the highway, but in connection with a municipal drainage scheme by local assessment, primarily for the advantage of a section of the people only, and the assessment should have provided for the safeguarding of the highway as a highway. It does not follow the natural flow of the watershed. It is a cut-off ditch, and diverts the water from its natural course. Even this narrow, precarious roadway was encroached upon by cross-cuttings, made to facilitate the scraping out of the ditch. These were negligently allowed to remain there, as they happened to be made, for several years. There was no fence or guard of any kind. The horses had only swerved for a couple of feet from the beaten path, when, two wheels dropping into the second of these ruts or cuts, the waggon upset and landed in the bottom of the ditch.

I have no hesitation in declaring that this road was dangerous and out of repair—the evidence upon the ground, as I may say, the cross-section filed in Court, even without the opinion testimony of the witness, would force this conclusion. The only wonder is that the defendants have been immune from damages for so long a time. But there was much testimony, and it was practically all one way. Some of the witnesses thought that it was "not very dangerous," that "with care and the right kind of horses it might be safe," and that you might pass along

all right "*unless there was an accident* and the horses scared" —the last proposition being hardly open to question I should think—but not one of them all ventured the opinion that it was actually safe. Aside from the question of fencing, I find as a conclusion of fact that the part of the highway available for travel was too narrow—narrower than it should have been—and narrower than, even with a municipal ditch carried along it, there was any necessity for leaving it. But, in any event, wide or narrow, with a ditch of this character on its margin, it should have been fenced. The defendants practically admitted this, and for excuse pleaded the expense of fencing all their ditches of this class, yet 75 cents a rod was the highest cost suggested for fencing, and 6 miles of fencing, or 1,820 rods, is the aggregate of it all for the whole township. It is waste of energy to discuss a question of this kind.

The plaintiff sues upon behalf of himself and his wife. It is more difficult to make a fairly accurate estimate of the pecuniary loss in the case of a child than for the loss of a parent or husband. The plaintiff's son was an active, ambitious little fellow, 10 years of age, and was beginning to be useful on the farm. The reasonable expectation of pecuniary gain or assistance from a boy on a farm is very different from what it is in the case of a town boy, at least in the majority of cases; as a rule the town boy is a charge upon his parents, or his earnings find their way into his own pocket.

There will be judgment against the defendants for $1,400 damages, with costs, and I apportion the damages as follows: namely, $800 to the plaintiff and $600 to his wife; costs, if any incurred by the plaintiff not recovered, to be borne, pro rata, by the shares of each.

BOYD, C. JUNE 20TH, 1914.

WIRTA v. VICK.

Unincorporated Society—Property of Society—Dissident Members—Ultra Vires Action of Majority—Breaking-up of Society into Factions—True line of Succession—Counterclaim—Damages.

Action by officers of the Copper Cliff Young People's Society for a judgment declaring them entitled to $1,313.80 in a bank at Copper Cliff; declaring them owners of Finland Hall and

entitled to possession thereof; and for $2,000 damages for the alleged wrongful and illegal taking and retaining possession

W. T. J. Lee, for the plaintiffs.

J. H. Clary, for the defendant.

BOYD, C.:—As preliminary these dates and facts may be set down in order:—

February, 1903. Copper Cliff Young People's Society formed and organised as a voluntary unincorporated association of persons, having for its chief object the promotion of temperance.

Lease of land for erection of a hall made on the 29th September, 1903, by the Canadian Copper Cliff Company to Herman Vick, as trustee of the Finland Temperance Hall, for a year, at a nominal rent, and the term to continue until the company should elect to discontinue the lease.

Up to 1910, hall and buildings erected at cost of about $3,000.

May 17, 1911. Local branch No. 31 of the Socialist Party of Canada was initiated and charter issued to members, some of whom belonged to the Young People's Society.

January 7, 1912. Annual meeting of Young People's Society carried, by vote of 74 to 24, a resolution to affiliate with the Socialist Party of Canada; and thereupon a charter was issued by the Socialists enrolling the society as "Local Young People's Society No. 31: Social Democratic Party of Canada" (this is dated the 1st January, 1912).

February 6, 1912. Action by Vick against this Socialist movement and to restrain alienation of the property of the Young People's Society to the new local branch No. 31.

June 26, 1913. Judgment of Kehoe, County Court Judge, dismissing the action of Vick, reversed by the Court of Appeal, and declaration that the action complained of was ultra vires and illegal.

September-October, 1913. No. 31 charter surrendered, and another issued excluding Young People's Society.

December 25, 1913. Resumption of possession of the hall by Vick—his party having been excluded since January, 1912, by the Socialists.

January 2, 1914. Confirmatory lease by the company to the said Vick as trustee, etc.

The present action was commenced on the 10th January, 1914.

This action is an outgrowth of former litigation in connection with "The Copper Cliff Young People's Society." In the report of that former litigation the early history and organisation of the Society is set forth in the judgment of Mr. Justice Maclaren in Vick v. Toivonen, 4 O.W.N. 1542.

The society began in a voluntary association of 25 persons, in February, 1903, and their local habitation was provided for by a lease of land from the Canadian Copper Company of Copper Cliff to Herman Vick, as trustee of the Finland Temperance Hall of Copper Cliff, on which a hall or place of entertainment was put up by the associates.

This lease was renewed on the 2nd January, 1914, to the same Vick (who is the defendant), as trustee of the Finland Temperance Hall of Copper Cliff.

The first action centred on proceedings taken at the annual meeting on the 7th January, 1912, when the members resolved, by a vote of 74 to 24, that the Young People's Society should unite with the Socialist Party of Canada. This was a packed meeting, and the opponents of the Socialistic movement were taken by surprise. Though the vote was on the 7th, the charter affiliating this society with the Social-Democratic Party of Canada bears date the 1st January, 1912.

This action of the majority was declared by the judgment in appeal ultra vires, and in violation of the original constitution of the Young People's Society—the emphatic note in which was "Temperance."

After this date—7th January, 1912—the Socialistic section practically ousted the original (Temperance) section from the hall and associate property, and such was the physical situation till Christmas-day, 1913, when the manager of the hall gave up the key to the defendant, and he took possession as trustee of the Temperance Hall and for the use of the faithful members of the Young People's Society.

In the County Court action brought by Vick to restrain the Socialistic movement, judgment was against him in the Court below, but this was reversed on appeal, and the ultimate decision, by judgment dated the 26th June, 1913, was brought to the attention of those in possession by the defendant Vick towards the end of September, 1913. They then sought to neutralise or obliterate what had been done, by procuring a repeal of the charter by which the Young People's Society had been enrolled as No. 31 of the Social-Democratic Party. The date of this was about the 1st October, 1913. The fact of this with-

drawal or cancellation of the Socialist charter was not made known to Vick or those who adhered to the original constitution, and practically there was no change in the conduct of the meetings thereafter. The Young People's element was slighted and minimised, while questions of socialism were the controlling factor. To outward appearance the Young People's Society in the hall up to Christmas, 1913, was still Local No. 31 of the Social Democratic Party. Thus we find ticket 803 (one of a series) giving, on payment of 25 cts., right of admission on the 15th December, 1913, to a sale in aid of Copper Cliff's Young People's Society, Local No. 31.

The membership books have disappeared as to both lines of the opposing claimants, which for the sake of distinction may be concisely called the Temperance as opposed to the Socialistic; but it may be taken that the utmost number of the latter was 74, as disclosed in the vote of 1912; now that number has diminished to about 50. The aggregate of those who support the action of Vick is 70; so that, counting heads and treating all as members of the original society, the clear majority is in favour of those now in possession. That ground is of itself sufficient to indicate that it is not the duty of the Court to interfere actively by changing the possession of the hall. But quaere, were those adherents of the plaintiffs' side to be reckoned as rightful members in regular succession to the associates of 1903? Guided by the reason assigned by the Court of Appeal, I should take it that there was a distinct breach in the society occasioned by the ultra vires action of the then majority. They voted themselves out of the original body and established a new chartered entity, bound together by obligations to and connection with the Social-Democratic Party of Canada. They separated themselves from the original body, and the true line of associated succession is to be found in the then minority, who have remained faithful to its principles throughout the whole period. Can the separated ones seek to retrace their steps to equal status with the faithful ones, without some inquiry as to their suitability? For instance, those represented by the plaintiffs are all or almost all members of the local body No. 31 of the Social-Democratic Party. Now, it is one of the rules laid down in the constitution of the Young People's Society that a person is "not able to act energetically enough in two societies at the same time;" and those who now hold the majority may think fit to invoke that provision to exclude outstanding Socialists who are thought over-zealous in their propaganda. It is not neces-

sary for the disposal of this case to pass definitely upon this question, for, I think, on other grounds, as now stated and as also stated viva voce at the close of the argument, that the locus standi of the plaintiffs does not call for the interference of the Court.

It is alleged by the plaintiffs that the defendant, by fraudulent means, obtained possession of the keys at Christmas, 1913. This has not been proved—so far as appears, the keys were yielded by the then holder as manager of the hall in obedience to the demand based upon the judgment of the Court of Appeal. A copy of the judgment was nailed up in the hall contemporaneously, as the justification of the act. Though the judgment does not in terms pass upon this, it may be inferred that this result is to be reasonably deduced therefrom. At all events, the plaintiffs had no right to exclude the party of the defendant, as they did, unless they would submit to Socialistic control.

In the line of true succession, Vick has been elected president and treasurer of the society, and he is also the fiduciary tenant under the lease; why should he be dispossessed by dissidents from the principles of the Young People's Society?

For the same reason, the money held in medio and now paid into Court should be paid to him in preference to the claim of the plaintiffs to control it; he giving the security required by the rules.

The plaintiffs have no claim for damages for loss of exclusive possession as against the defendant. The counterclaim for damages made by the defendant against the plaintiffs cannot be maintained on the present record—nor do I encourage such claim to be made, though I do not foreclose that claim, as the suit is now constituted. The Socialistic party were at first in possession, under the authority of the County Court Judge, till his judgment was reversed; and during that time I do not know, nor has it been proved, who were then the ostensible legal possessors and occupiers of the hall. The body of officers is changed every six months; those on the record were the ones elected in December, 1913—the month in which the defendants obtained possession. Who were the officers in the interval is not in evidence, and I do not know that they are the parties before me. My dismissal of the case with costs will be without prejudice to this claim for damages, if further litigation is sought.

I stated my general view of the situation at the trial; I adopt what I then said and make it part of my definitive judgment.

RAYNOR v. TORONTO POWER CO.—FALCONBRIDGE, C.J.K.B.—JUNE 15.

Master and Servant—Injury to Servant—Negligence—Electric Current—Evidence—Finding of Fact of Trial Judge.]—The plaintiff, on the 6th September, 1913, received severe injuries while painting on a certain unit, being part of a tower on which were strung the defendants' transmission wires, as the result of coming in contact with a wire charged with electricity. He had previously been assured that everything was safe; that is, that the electric current in that unit had been turned off, and that the wires were dead. The plaintiff brought this action against the defendants, his employers, to recover damages for his injuries. At the trial he swore positively that he did not touch any of the live wires on the adjoining unit. The evidence of the plaintiff as to where he was standing just before receiving the shock was corroborated. The direct testimony satisfied the learned Chief Justice that the plaintiff's injuries were caused by electric current on the supposed dead unit. The defendants' evidence was entirely of a negative character from which they attempted to draw the inference that the plaintiff was the author of his own wrong in touching the live wire on the adjoining unit. The learned Chief Justice preferred the positive evidence. Judgment after 30 days for the plaintiff for $1,200 and costs. J. H. Campbell, for the plaintiff. D. L. McCarthy, K.C., for the defendants.

CLARKSON v. FIDELITY MINES CO. AND ONTARIO FIDELITY MINES CO. LIMITED.—BRITTON, J.—JUNE 15.

Contract—Breach—Repudiation—Recovery of Moneys Paid without Consideration—General Damages—Evidence—Lis Pendens.]—Action for breach of an agreement made between the plaintiff and the defendant the Fidelity Mines Company, a Buffalo, New York, corporation. The two companies were entirely separate and distinct, although they acted together and had interests in common. It was stated and not denied that the Fidelity Mines Company owned all the stock of the Ontario company. The learned Judge said that the evidence given at the trial was meagre: there was no attempt on the part of the Fidelity Mines Company to carry out its part of the agreement. The plaintiff did, however, pay to the Bank of Montreal $700 on

account of a judgment held by that bank against the Ontario company, and did pay the further sum of $150 for that company. The Ontario company got and accepted the benefit of these payments, for which neither company paid or gave any consideration, and the plaintiff received no consideration directly or indirectly—the expected consideration having wholly failed by reason of the breach and repudiation by the Buffalo company of the agreement with the plaintiff. At the time of the payment by the plaintiff to the bank, the effects of the Ontario company were under seizure and about to be sold. This payment reduced the liability of that company to the bank, and the sale of that company's property did not take place at the time appointed, even if it ever did. There was the implied request of the Buffalo company to the plaintiff to make the payments to the bank, and the acceptance by the Ontario company, for which payments the plaintiff had received nothing. The plaintiff was entitled to judgment against both companies for the $700 and $150, with interest at 5 per cent. from the 1st March, 1913. The plaintiff was not entitled to recover, against either company, general damages for breach of the contract, because such damages had not been established; and the Ontario company was not a party to the contract. Judgment for the plaintiff for $850, interest, and costs. It was not a case for a *lis pendens*, and the plaintiff should discharge the registry of the certificate. K. F. Henderson, for the plaintiff. R. H. Greer, for the defendants.

ROYAL BANK OF CANADA v. SMITH—MIDDLETON, J.—JUNE 16.

Promissory Notes—Indebtedness of Makers to Payee—Finding of Trial Judge against Plea that Notes Made for Accommodation of Payee—Third Party Issues—Indemnity—Judgment—Enforcement.]—On the 11th November, 1912, Puddicombe and Smith, the defendants, made a promissory note for $10,000 in favour of Reinke, the third party; and, on the same day, the defendant Smith made another promissory note, also in favour of Reinke, for $5,000. Reinke endorsed the notes and delivered them to the plaintiff bank, and actions were brought by the bank upon the notes. The defendants set up that the notes were made by them for the accommodation of Reinke, and that there was no liability as between the original parties. It appearing that the notes were held by the bank as collateral security for advances

made to Reinke, and that the bank held in good faith and without notice, the actions were consolidated, and judgment was given against both defendants for $9,220.50, the amount due to the bank at the date of the judgment, the 16th February, 1914. Third party issues between Puddicombe and Smith and Reinke were tried before MIDDLETON, J., without a jury, at Hamilton. Smith and Puddicombe claimed to recover the amount of the bank's judgment against them from Reinke, upon the theory that the debt was his and not theirs; and Reinke claimed to recover from them the amount of the notes in excess of the amount for which judgment was recovered by the bank. These issues were now disposed of by MIDDLETON J., who gave written reasons for his judgment. He said that the documentary evidence was all one way; the oral evidence was conflicting; and he found, upon the evidence, that there was an indebtedness of Smith and Puddicombe to Reinke for which the notes were given; that certain company-shares transferred by them to Reinke were not so transferred in payment of the indebtedness, but as collateral to the notes; and, therefore, the claim of indemnity made by Smith and Puddicombe failed; and Reinke was entitled to claim against them the face amount of the notes over and above the amount of the bank's judgment. Judgment for Reinke against Smith for $5,478.55, the amount of the $5,000 note, with interest and notarial fees, and against Puddicombe and Smith for $995.40, the amount of the $10,000 note, less the amount for which judgment had already been given in favour of the bank, and less the amount of two dividends upon the shares, received by Reinke. Declaration that, upon payment of the judgment in favour of the bank, Reinke was entitled to enforce it against Puddicombe and Smith for the amount due, less the credit that should be given for the amount realised upon the sale of the shares. Reinke was entitled to costs throughout, including the costs reserved upon interlocutory applications. S. H. Bradford, K.C., for Smith and Puddicombe. S. F. Washington, K.C., for Reinke.

ROBINETT v. MARENTETTE—LENNOX, J.—JUNE 16.

Contract—Conveyance of Land to Defendant—Security for Moneys Advanced—Binding Agreement to Convey—Tender of Amount of Advances—Interest—Costs—Counterclaim.]—Action for specific performance of an agreement. The plaintiff and

Janisse, who assigned to the plaintiff, proposed to organise a company to take conveyance of a plot of ground and erect a library building for the benefit of the Catholic Mutual Benevolent Association, at Sandwich. The plaintiff had awakened the interest of some of the members of this association, and these members had committed themselves so far as to approve of the plaintiff and Janisse canvassing the situation and finding out what could be done. It was hoped that a sufficient number of members of the association would subscribe for stock of the company at $10 a share to enable the scheme to be carried out. Relying upon this—or, rather, taking chances of being able to carry the undertaking through—Janisse and the plaintiff purchased the land in question from Parent, and procured the conveyance thereof to the defendant. The learned Judge said that the deed to the defendant, though absolute in form, was in fact a mortgage to secure repayment to the defendant of a loan to Janisse and the plaintiff of $1,100, with interest at 7 per cent. It was true that the primary object these men had in borrowing the money and buying the land was to obtain a site, organise a company, and build a library to be used in connection with the association; but the only position the defendant asked for or obtained in connection with the transaction was that of mortgagee, as was clearly shewn by the agreement he executed at the time and his evidence at the trial. It would be beside the question to speculate as to how far the plaintiff would be bound if stock had been taken in sufficient sums and a company incorporated and organised. This had not happened; stock could not be sold; the whole scheme has fallen through; and the association refused to take over the property. At most, it was a dream of the plaintiff, and perhaps of a few other members; the defendant may have been in sympathy with the proposal; but *what he did* was to lend money, take a deed as security, and execute a controlling agreement. This agreement was binding upon the defendant. The plaintiff was assignee of the rights of Janisse. The money was twice tendered to the defendant; but in these days of speculation at Sandwich and the neighbourhood it was to be inferred that the money in his possession had been worth interest charges to the plaintiff in the meantime. It would be equitable to allow the defendant interest to this date; and, although with doubt, to relieve him from payment of costs. Judgment so declaring, and for specific performance in the usual form. Counterclaim dismissed without costs. F. D. Davis, for the plaintiff. J. H. Rodd, for the defendant.

MARCON v. COLERIDGE—LENNOX, J.—JUNE 16.

Contract — Purchase of Land for Speculative Purpose — Agreement to Divide Profits — Absence of Consideration — Misrepresentation — Secret Commission.]—Action to recover from the defendant one-third of the profits derived from a resale of 75 acres of land which the plaintiff brought to the attention of the defendant, and which the defendant bought for $30,000. The defendant stated that he was the holder of an option for the purchase of this land; but no option was proved at the trial, and it appeared that the plaintiff had received from the vendors, without the defendant's knowledge, a commission of $1,000. The plaintiff alleged an agreement that he, the defendant, and one Smith would do what they could, severally, to resell the property, and would divide the profits equally. Neither Smith nor the defendant put anything into the transaction, nor did either of them assume any obligation. The land was resold by the defendant to one Bell without the assistance of either Smith or the plaintiff. See Bell v. Coleridge, 5 O.W.N. 655. In the circumstances of the case, the learned Judge doubted whether there could be said to be any profits to divide; but he based his judgment dismissing the action mainly upon the plaintiff's concealment and misrepresentation as to his position in regard to the vendors and the secret commission he received from them, and the absence of any consideration to support the defendant's promise to divide profits. Action dismissed with costs. D. L. McCarthy, K.C., for the plaintiff. Matthew Wilson, K.C., and F. D. Davis, for the defendant.

COOK v. BARSLEY—BRITTON, J.—JUNE 18.

Vendor and Purchaser—Agreement for Sale of Land—Oral Agreement—Possession Taken by Vendee—Payment of Taxes—Statute of Frauds—Part Performance—Agreement Enforced against Grantee of Vendor with Actual Notice—Trespass—Injunction.]—Action for trespass to land in the city of Stratford, and for a declaration that the plaintiff was the owner of the land. Before the 4th May, 1908, the land belonged to one Barker. The defendant wished to buy the land, and induced one Holliday to advance the purchase-money. The land was conveyed to Holliday on the 4th May, 1908. The defendant went

into possession, paid the taxes, and paid interest to Holliday. Holliday, it was arranged, should convey to the plaintiff upon repayment of what he had paid. The plaintiff purchased the land from Holliday, and obtained from him a conveyance dated the 17th December, 1913. The defendant made valuable improvements. Holliday died after the sale to the plaintiff. The learned Judge said that the plaintiff knew of the defendant's possession, but that knowledge of possession by a claimant is not sufficient against a registered title. The agreement was enforceable against Holliday, though not in writing, because of the part performance; and the plaintiff had actual notice of the agreement; the plaintiff was therefore not entitled to succeed in the action. Action dismissed with costs. Interim injunction dissolved, and all costs relating thereto to be paid by the plaintiff. Judgment for the defendant, upon his counterclaim, declaring that the plaintiff purchased from Holliday with actual notice of the agreement between Holliday and the defendant; and directing that the plaintiff, upon payment to him of $500 and interest thereon at 6 per cent. per annum from the date of his purchase from Holliday, shall execute to the defendant a conveyance of the land free and clear, save as expressed herein, of any lien or incumbrance of any kind created by him. Arrears of taxes, if any, will not be considered an incumbrance; and, if any taxes were paid by the plaintiff, the amount shall be added to the purchase-money and be paid by the defendant to the plaintiff. If the plaintiff has executed a mortgage upon the property as a part of the purchase-money or for any other purpose, the defendant will assume that mortgage as part of his purchase-money. If the plaintiff has paid in full, payment by the defendant will be of the $500 and interest in full. R. T. Harding, for the plaintiff. J. J. Coughlin, for the defendant.

TANCOCK v. TORONTO GENERAL TRUSTS CORPORATION—FALCONBRIDGE, C.J.K.B.—JUNE 20.

Evidence—Corroboration—Action against Executors—Damages—Costs.]—Action by Catherine Tancock, married woman, against the executors of James Irvin Carter, deceased, to recover $2,144 for nursing and attending upon the deceased and for performing other services and for damages for breach of contract. The learned Chief Justice finds that there is corro-

boration of portions of the plaintiff's claim, and gives judgment in her favour for $152.50 for services rendered and $150 damages, with costs on the County Court scale, without a set-off of the defendants' extra costs. The defendants, on passing their accounts, to have costs as between solicitor and client out of the estate. J. R. Logan, for the plaintiff. A. Weir, for the defendants.

CORRECTION.

CITY OF WOODSTOCK v. WOODSTOCK AUTOMOBILE MANUFACTURING CO., ante 403. The appeal was by the defendants the Canada Furniture Manufacturers Limited, not by the Canada Foundry Company.