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COURT OF APPEAL.

JUNE 15TH, 1910.

*ALLEN v. CANADIAN PACIFIC R. W. CO.

Railway—Carriage of Goods—Destruction — Liability — Tort—Special Contract between Express Company and Shipper—Exemption—Application for Benefit of Railway Company—Contract between Express Company and Railway Company.

Appeal by the defendants from the judgment of RIDDELL, J., 19 O. L. R. 510, in favour of the plaintiff, in an action to recover the value of goods destroyed in the course of carriage.

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

Wallace Nesbitt, K.C., and Angus MacMurchy, K.C., for the defendants.

G. F. Shepley, K.C., and G. W. Mason, for the plaintiff.

The judgment of the Court was delivered by GARROW, J.A.:—The plaintiff, desiring to send a trunk of valuable samples from Toronto to Quebec, sent it in the usual way to the Dominion Express Co. by one of their carters, receiving the receipt set out in the judgment of Riddell, J. The plaintiff, either through ignorance of the necessity or from oversight, failed to place a value upon the articles contained in the trunk, with the result that such value, under the terms of the receipt, was fixed as between him and the express company at $50.

The express company are an independent company operating upon the lines of railway of the defendants in Canada, under a

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

general agreement with the defendants, admitted at the trial, containing many provisions, and, among others, one by which the express company assume all responsibility for and agree to satisfy all valid claims for the loss of or damage to express matter in their charge, and to hold the defendants harmless and indemnified against such claims.

The goods were placed by the express company in the car used for that purpose upon the defendants' railway, and there remained in the charge of the express messenger, where they were when a collision occurred between the train on which they were and another train of the defendants, as a result of which a fire took place and the goods were destroyed. The defendants admit that the collision was caused by the negligence of their servants; and for the damages thus caused this action is brought.

The cause of action is one arising, if at all, ex delicto, because the plaintiff had no contract with the defendants. And it is not the ordinary cause of action against a common carrier for not carrying safely—which may be in tort as well as upon the contract—because the goods were not received by the defendants in that character, but under their general agreement with the express company, which contains the exemption from liability clause to which I have referred.

That such an action will lie seems beyond question. To many of the authorites on the subject Riddell, J., has referred; and, as I agree in his conclusion, I need not here repeat what he has said. I will, however, refer to . . . Martin v. Great Indian R. W. Co., L. R. 3 Ex. 9. . . . Here, if the loss had occurred through any negligence on the part of the express company or their servants, the defendants would not have been liable. What they are, in my opinion, liable for is their own separate, or, as it is in some of the cases called, "active," negligence in bringing about the collision: see per A. L. Smith, L.J., in Taylor v. Manchester, etc., R. W. Co., [1895] 1 Q. B. 134, at p. 140; Meux v. Great Eastern R. W. Co., [1895] 2 Q. B. 387, at p. 394.

The only real defence to the plaintiff's claim is made upon two grounds: (1) that the defendants are entitled as against the plaintiff to the exemption from liability stipulated for in their agreement with the express company under which they received and were carrying the goods; and (2) that in any event they are entitled to the benefit of the limitation of liability to $50 provided for in the plaintiff's contract with the express company, which amount the defendants paid into Court without admitting liability.

There is, however, in my opinion, this fatal objection to the success of both defences that to the first agreement the plaintiff is

a stranger, and to the second the defendants are in the same position. And, in addition as to both, if the reasoning in . . . Martin v. Great Indian R. W. Co. is sound, as, in my opinion, it is, the exemptions claimed would not extend to include an act of collateral or "active" negligence . . . such as the collision. Such indemnity or exemption clauses are, quite properly, construed strictly, and, if intended to exclude claims for negligence, that should be clearly expressed: see Price v. Union Lighterage Co., 20 Times L. R. 177. . . .

[Lake Erie, etc., R. W. Co. v. Sales, 26 S. C. R. 663, distinguished.]

But, if the agreement between the plaintiff and the express company has any application, I agree with the construction placed by Riddell, J., upon the obscurely expresed clause relied on, "that the stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom through this company the below described property may be intrusted or delivered for transportation," namely, that it was not intended to apply and does not apply to the defendants, but to a company or person beyond the line of the defendants' railway, over the whole of whose lines in Canada the express company operate, to which company or person it might be necessary for the express company to part with the property in order that it might reach its destination.

Appeal dismissed with costs.

JUNE 15TH, 1910.

LECKIE v. MARSHALL.

Contract — Option — Construction—Election—Time—Extension —Tender—Waiver.

Appeal by the plaintiffs from the judgment of MACMAHON, J., ante 222, dismissing the action and allowing the counterclaim of the defendants.

The action was brought to recover possession of certain mining claims in the district of Nipissing, into the possession of which, it was alleged, the defendants had been permitted to enter under a written option to purchase which they afterwards failed to exercise within the time limited.

The defendants alleged that the effect of the documents, which consisted of a formal agreement, signed by the original parties thereto, dated the 6th May, 1908, and a joint letter from the same parties to the defendants the Royal Trust Co., enclosing the agreement and certain title deeds relating to the lands to be by that company held in escrow for both parties, was a completed agreement to purchase, and not an option, and that, in any event, they had exercised the option to purchase within the time limited by the agreement and the joint letter; and they claimed specific performance.

The agreement was expressed at the beginning of it to be an "option," and by the terms of it the purchase money, $250,000, was made payable as follows: $12,500 at the execution of the agreement; $37,500 on the 6th May, 1909; $50,000 on the 6th November, 1909; $50,000 on the 6th May, 1910; $50,000 on the 6th November, 1910; and $50,000 on the 6th May, 1911. And it was agreed that the down payment of $12,500 was to be regarded as the price of the option, and was to be forfeited if the option was not exercised, but, if exercised, was to be regarded as part payment of the purchase-money. The joint letter, which was prepared by the solicitors who drew the agreement, after reciting the various documents relating to the title which were enclosed, proceeded: "It is agreed that the said William Marshall or his assigns shall have sixty days' grace for the payment of each of the instalments. . . . It is also agreed that the payment of each instalment is to be made by William Marshall to you, and that you will then pay over to Robert Gilmour Leckie the amount received by you. It is expressly understood that, in the event of the instalments of $37,500 due on the 6th May, 1909, of $50,000 due on the 6th November, 1909, and of $50,000 due on the 6th May, 1910, not being paid within the sixty days agreed upon, the agreement of option shall become null and void. . . ."

The appeal was heard by Moss, C.J.O., Osler, Garrow, and Maclaren, JJ.A.

A. W. Anglin, K.C., and J. Wood, for the plaintiffs.

G. F. Shepley, K.C., and G. Bell, K.C., for the defendants Marshall and the Grey's Siding Development Co.

J. A. Worrell, K.C., for the defendants the Royal Trust Co.

Moss, C.J.O., said that upon this appeal four questions were presented for determination: first, as to the nature of the instrument of the 6th May, 1908—whether it was an option to buy the

mining properties in question in this action, or an absolute contract for their purchase; secondly, whether, if it is an option, there was, by virtue of the letter of the 6th May, 1908, an extension given of the time, viz., 12 months from the 6th May, within which the option was to be exercised and the election to become a purchaser made; thirdly, if there was an extension, whether the right was exercised and the election duly made in accordance with the terms of the instrument and letter within the extended period; and fourthly, if the answer be in the affirmative, whether there was such a tender of and refusal to accept the instalment of $37,500 as to entitle the defendants to claim specific performance from the plaintiffs.

As to the first question, the Chief Justice said, it seemed very clear that the instrument of the 6th May, 1908, was not only intended to be, but in its essence was, nothing more than an option to buy.

As to the second question, the Chief Justice said: As I read the letter of the 8th May, it means only that, provided the defendant Marshall made and signified his election to purchase in such way as to become bound to carry out the terms of purchase, then, instead of being required to pay on the day named in the instrument of the 6th May, he was to have sixty days' grace. If this be the proper conclusion, it ends the defendants' case, for it is conceded that there was no exercise of the option within 12 months. See Dibbins v. Dibbins, [1896] 2 Ch. 348. . . .

With regard to the third, I am of opinion that, assuming that the time for exercising the option was extended, there was within the extended period an election to purchase and a sufficient signification thereof to the plaintiffs. . . .

There was not actual payment, and the last question is as to the sufficiency of the tender made. It is said that the plaintiffs waived or dispensed with the necessity for tender. . . Nothing had been done that dispensed with the duty of the defendants Marshall and the Grey's Siding Development Co. to make payment or proper tender if they desired to retain the benefit of the agreement. . . . There was no essential reason why the money should not have been paid over to the Royal Trust Company. The nature of the properties and the circumstances under which the defendant Marshall held a right to purchase them rendered it a case in which he and his co-defendants . . . were bound to comply strictly with the terms and conditions under which they became entitled to purchase. This they failed to do, and were, therefore, not entitled to judgment for specific performance as awarded by the trial Judge.

I think, therefore, the appeal should be allowed and the plaintiffs declared entitled to the relief which they seek, with costs.

OSLER, J.A., for reasons stated in writing, agreed that the plaintiffs were entitled to succeed, and that the defendants' claim for specific performance should be dismissed.

GARROW, J.A.:—. . . The learned trial Judge construed the agreement as creating an option only, and the joint letter as extending for sixty days the period within which the option might be exercised. And I entirely agree with his conclusions upon both subjects. Both are questions of construction depending upon the written language which the parties have used. . . .

I have had much more difficulty in dealing with the next step in the inquiry—did the defendant Marshall duly exercise his option within the sixty days, which expired on the 5th July, 1909. . . . The evidence shews that there never was in express terms either a verbal or written acceptance. MacMahon, J., however, held that the tender made on the 5th July, 1909, was in itself sufficient to prove acceptance. . . .

Having regard to all the circumstances . . . it seems to me a fair inference of fact that the defendants Marshall and his assignee did, within the time allowed by the option, as I have construed it, elect to accept the offer contained in it, and did sufficiently inform the plaintiffs of such election.

The effect of such election was to place the defendants Marshall and his assignee in the position of purchasers upon the terms contained in the agreement, one of which was the payment of the first instalment of $37,500 on or before the 5th July, 1909.

On that day the tender . . . was made. . . . There being circumstances in the evidence qualifying the value and effect of the tender, it becomes necessary to inquire whether, under all the circumstances, the plaintiffs are in a position to complain. And, in my opinion, they are not. They had repudiated the agreement, and, as far as they could, cancelled the authority of the defendants the Royal Trust Co. to receive the money. . . . In the absence of any evidence of withdrawal, the repudiation was in itself evidence of a continuing refusal to perform and a waiver of conditions precedent: see Ripley v. McClure, 4 Ex. 344; Cort and Gee v. Andergate, etc., R. W. Co., 17 Q. B. 127. And this conclusion, derived from the cases at common law, is in conformity with the practice in equity upon the question of tender, which is excused if it is clear, as it is here, that to make it would have been a mere form: see

Hunter v. Daniel, 4 Hare 433; McSweeney v. Kay, 15 Gr. 432; Cudney v. Gives, 20 O. R. 500.

There is no suggestion of bad faith on the part of the defendants the purchasers. The evidence shews that, in addition to the large expenditure which they had made, the notary actually had with him the $37,500 ready to pay over. And it was not paid over simply because of the plaintiffs' conduct to which I have referred, which, in my opinion, amounted to a waiver of strict payment or tender within the time limited by the agreement.

The appeal should be dismissed with costs.

MACLAREN, J.A., agreed that the appeal should be dismissed with costs.

The Court being evenly divided, the appeal was dismissed with costs.

JUNE 15TH, 1910.

MACKISON v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Negligence—Evidence—Lowering of Gates—Conflict—Findings of Jury—Damages—Quantum.

Appeal by the defendants from the judgment entered at the trial by MEREDITH, C.J.C.P., upon the answers of the jury to questions submitted to them, awarding the plaintiff $2,500 damages.

The action was to recover damages for injuries suffered by the plaintiff, a lad under 21, through coming into collision with a locomotive engine belonging to the defendants at a level crossing upon Wellington street in the city of London.

For protection at the crossing the defendants had established and maintained gates with a watchman in charge. The crossing was in the vicinity of the defendant's yard at London, where there was a considerable shunting of cars going on. The gates consisted of long poles, one on each side of the street, worked by the watchman. The poles when lowered met in the centre of the street, and were intended to arrest all traffic, vehicular and pedestrian, across the railway, while engines and cars were crossing the street. When raised, they stood at an acute angle above the roadway, and when in this position indicated that the street was open to traffic across the railway. In consequence of the frequency of shunting at the point, the gates were being constantly lowered and raised.

On the day of the accident to the plaintiff, he was riding a bicycle on Wellington street, going south towards the crossing. Seeing—as he deposed—that the gates were raised, he made towards the tracks, and when approaching the second track he become aware of an engine with a car or cars attached moving along it, proceeding towards the east. His attention was called to it by hearing the watchman shout. He looked back in the direction of the watchman, and then towards the west and saw the engine. He endeavoured to stop or to turn his bicycle, but failed, and was carried between the engine and the car and seriously injured. The engine was engaged in shunting operations, and was at the time moving reversely towards the plaintiff.

The following were the questions submitted to the jury, with their answers: (1) Were the plaintiff's injuries caused by the negligence of the defendants? A. Yes. (2) If so, in what did that negligence consist? A. That the gate was not down in sufficient time to give the necessary warning. (3) Could the plaintiff by the exercise of reasonable care have avoided the accident? A. No. (4) If so, in what did the plaintiff's negligence consist? (not answered.) (5) At what sum do you assess the plaintiff's damages? A. $2,500.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

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

J. M. McEvoy, for the plaintiff.

Moss, C.J.O.:— . . . It is contended on behalf of the defendants that upon the plaintiff's own testimony the case ought to have been withdrawn from the jury, on the ground that he was bound, before coming upon the crossing, to have looked more frequently or more carefully to see if the line was clear.

He was riding towards the tracks, and when about 60 feet from the rail nearest to him, and from 30 to 35 feet from the gates, he looked and saw that they were raised, and the watchman standing at his shanty about 3 feet from where the operating levers are. He was not using the levers. The plaintiff heard no bell ringing nor any other warning sound, and he rode towards the track looking straight before him. He was unaware of the approach of the engine until the watchman's shout caused him to turn his eyes. He then did all he could to avert coming into contact with the engine.

Upon this state of facts, it cannot be said that the plaintiff's conduct was so careless or reckless as to justify the learned Chief

Justice in ruling that it had caused the accident, and that the case must be withdrawn from the jury. . . . At all events, it was—as the learned Chief Justice subsequently instructed the jury—a matter for them to consider whether, under all the circumstances, the failure to look or listen amounted to such want of care as to disentitle him to recover.

The defendants further contended that the answers are contrary to the evidence and the weight of evidence, and that the evidence on the plaintiff's behalf was insufficient to sustain the findings. Undoubtedly there was a very considerable body of testimony which might well have led the jury to a conclusion adverse to the plaintiff. Three witnesses, the watchman and two others, testified that, as the plaintiff approached the point where the gates are, they were coming down, and that the plaintiff lowered his head or "ducked," and passed under in that way. . . . In reply there was the testimony of one Thorne, which tended to support the plaintiff's version as to the position of the gates.

The whole testimony was very fully and carefully laid before the jury by the learned Chief Justice, in a charge to which no exception was taken . . . .

The jury had the evidence and the conclusions to which they might come upon it fairly presented to them. It was for them to judge between the plaintiff's testimony—supported to the extent it was by that of Thorne—and the testimony given on behalf of the defendants. No misconduct is imputed to them, and it is not suggested that they wilfully disregarded the evidence or the charge. It cannot be said that there was not evidence upon which they might reasonably find as they did.

It was strongly urged that the omission of the plaintiff to return to the witness-box at the conclusion of the testimony for the defence and expressly deny that he had "ducked" under the gates, was an admission of the truth of the statements to that effect, or that it tended to shew that truthfulness of the witnesses who so deposed. But this does not seem to follow. The plaintiff's statement that he rode past the gates when they were up and were not being lowered was a positive statement that he did not "duck" to avoid them. . . . Before the jury the defendants had the full benefit of the circumstance, for the learned Chief Justice commented upon it and intimated that it would have been better if the plaintiff had returned to the witness-box. The jury were left free to drawn their own inferences . . from the omission. . . . There was evidence on both sides to go to them. They were fully and properly instructed and assisted by the learned Chief Justice, and their findings should not been interfered with:

Metropolitan R. W. Co. v. Wright, 11 App. Cas. 152; Phillips v. Martin, 15 App. Cas. 193; Cox v. English Scottish and Australian Bank, [1905] A. C. 168. . . .

The learned Chief Justice pointed out to the jury the various items or heads which it would be proper for them to take into consideration in dealing with the amount of compensation to be awarded. The plaintiff was present in Court, and the jury, no doubt, were able to judge for themselves the nature and probable effect for life of the virtual loss of his hand—having regard to his age and prospects in life. The amount awarded seems considerable, but it is not so large or so excessive, under the circumstances, as to suggest that in fixing it the jury were actuated by any improper motive. And it is to be assumed that they considered fairly all the topics that were presented to them in the charge.

Appeal dismissed with costs.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing. He was of opinion that there should be a new trial, on the ground that the verdict was against the weight of evidence. In the absence of a direct denial by the plaintiff of the "ducking," reasonable men, unaffected by sympathy, could not have found in his favour: see Jones v. Spencer, 77 L. T. R. 536. The absence of such a denial made this case a very exceptional one.

JUNE 15TH, 1910.

*JONES v. TORONTO AND YORK RADIAL R. W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Excessive Speed—Failure to Give Warning—Neglect of Motorman—Failure of Person Injured to Look for Approaching Car—Contributory Negligence—Evidence for Jury.

Appeal by the defendants from the order of a Divisional Court, 20 O. L. R. 71, reversing the judgment of nonsuit pronounced by MACMAHON, J., at the trial, and directing a new trial.

The action was brought to recover damages for injuries sustained by the plaintiff owing, as he alleged, to the negligence of the defendants, whereby he was run over by a car while crossing Yonge street.

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

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

C. A. Moss, for the defendants.

John MacGregor, for the plaintiff.

GARROW, J.A.:—. . . The line of the defendants' railway is laid along the west side of Yonge street, and the plaintiff, crossing on foot from the east to the west side, had reached and was upon the track when he was struck by a south-bound car and injured. The direction in which the plaintiff was proceeding . . . was south-westerly, but not enough to have prevented him from looking to the north without turning. He, however, did not look to the north, although he did to the south, and for the failure to look in both directions MacMahon, J., held that he was the author of his own injury and was not entitled to recover.

The plaintiff's reasons, such as they are, for not looking to the north, as well as to the south, were that he was familiar with the railway and with the usual mode of operation, and some 500 feet to the north . . . he had . . . seen the car which afterwards struck him, standing at a switch . . . where it was customary for a south-bound car to stand and allow the north-bound car to pass, and he inferred that that was to be the case on the occasion in question, and therefore concentrated his attention upon the south, from which direction he expected a car would speedily come.

The plaintiff is deaf. Some passengers on the car which struck him, fearing that he was going to cross the track without observing the car . . . ., called out to him, but he did not hear. And, if passengers could see him, it is not an unreasonable inference that the motorman, if at his post, could also have seen him; but whether he did or did not, does not, except in that inferential manner, appear. According to the evidence, the car was going at a high rate of speed—one witness says at 18 miles an hour. No gong was sounded, nor other warning given, nor was the speed slackened, so far as appears, as the car approached towards the plaintiff.

In these circumstances, the Divisional Court regarded the judgment of nonsuit as erroneous, and directed a new trial, a conclusion in which I entirely agree. . . . There was . . . some evidence proper to be passed upon by the jury both of negligence on the part of the defendants and contributory negligence on the part of the plaintiff. This, however, it is needless to say, is not at all equivalent to saying, or in any way indicating that, in my opinion, the plaintiff is entitled ultimately to succeed. What he is entitled

to is to have his action tried according to law. And, as I understand it, it is the well-established rule that where reasonable evidence is given of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff, these issues must be determined by the jury. That is the general rule; and it will, I think, be found that most, if not all, of the cases which at first sight seem to qualify it, are cases in which the Court was able to reach the conclusion that the negligence of the plaintiff was the sole and not merely a contributing cause (see the example given by Lord Cairns in Dublin Wicklow and Wexford R. W. Co. v. Slattery, 3 App. Cas. at p. 1166), or that the conduct of the plaintiff was per se negligent, or the evidence so clear and undisputed that only the one inference could be reasonably possible, which could not, I think, be said in this case.

Appeal dismissed with costs.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., also agreed.

JUNE 15TH, 1910.

REX v. WALKER.

Criminal Law—Forgery—Evidence—Authority to Sign Cheque—Denial by Complainant—Magistrate—Stated Case.

Case stated by the Police Magistrate for the city of Ottawa.

The prisoner, it was alleged, had at various times drawn cheques in the name of a relative, which had been honoured. The prisoner was charged with the forgery of his relative's name to a subsequent cheque, and was convicted; and the question stated was whether it was competent for the magistrate, upon the evidence set out, to hold that the accused had no authority to sign the cheque, as he did.

The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

Counsel for the prisoner was allowed to place a written argument before the Court.

E. Bayly, K.C., for the Crown.

MEREDITH, J.A.:—The question must be answered in the affirmative, because there was the testimony of the defendant—whatever may have been its weight—that there was no such authority.

Whether the accused ought to have been found guilty, upon the whole evidence, is not a question over which this Court has jurisdiction, being, in this case, altogether a question of fact; but the whole facts may be presented to the Crown upon an application for clemency. Nothing can be done for the accused here, upon the ground that, upon the whole evidence, he ought not to have been convicted.

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

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

JUNE 15TH, 1910.

*IHDE v. STARR.

Easement — Conveyance of Lots according to Registered Plan—Park Reserve and Entrance Marked on Plan—Obstruction by Purchaser of Lots—Right of Purchaser of other Lots to Removal — Statute of Limitations — Equitable Title — Registry Laws.

Appeal by the defendant from an order of a Divisional Court, 19 O. L. R. 471, reversing the judgment at the trial of MULOCK, C.J.Ex.D., who dismissed the action.

The action was brought by the plaintiff, suing on behalf of herself and all others the property holders at Crescent Beach, in the township of Bertie, in the county of Welland, to restrain the defendant from obstructing an alleged right of way and for damages.

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

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

E. D. Armour, K.C., and G. H. Pettit, for the plaintiff.

GARROW, J.A.:—It is clear, I think, as was practically held in the Courts below, that the case must turn on the question whether the defendant has acquired a title under the Statute of Limitations. Mulock, C.J., held that the defence was made out, while Meredith,

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

C.J., delivering the judgment of the Divisional Court, was of the opinion that, as what the plaintiff claimed and was entitled to was an easement, the defendant's possession was insufficient to bar the plaintiff; and . . . I feel compelled to concur with that view.

Both titles, that is, the plaintiff's and the defendant's, are registered. The plan under which it must be held that both claim, was registered before either title began. The parcels mentioned in the defendant's 99-year lease are set out in the plan, and the parcels owned by the plaintiff are also described in it. And upon it are also plainly set forth the open spaces called "private entrance" and "park," upon both of which, it is not disputed, the defendant's buildings and improvements encroach. The defendant's occupation began in May, 1895, or perhaps a little earlier, . . . The plaintiff purchased the parcels which she first owned . . . in September, 1902. They had previously been the property of Mary S. and F. Sellick, who purchased from the association by deed dated the 26th October, 1899.

While the lots were all unsold there was nothing to prevent the original vendors, the Beach Association, from enclosing and using the land as it had been used before the plan was registered. There was no one then to complain. See Re Morton and St. Thomas, 6 A. R. 322. But this right would cease upon a sale being made under the plan. See Sklitzsky v. Cranston, 22 O. R. 590. The title to the soil of the way remained in the owner, who might sell and convey his interest in it. But such a sale would necessarily be subject not merely to the then existing rights in the way, if any, but also to similar future rights arising upon subsequent sales. So that, even if the conveyance to the defendant had actually been of the land which she claims she purchased, and her case can be put no higher than that, she must, even in that event, have taken subject to the rights of prior and subsequent purchasers of lots laid out in the plan, such rights resting upon and being protected by the prior registration of the plan, of which every one subsequently dealing with the land was bound to take notice.

And that such rights were in the nature of easements, I cannot doubt, notwithstanding the able argument of Mr. Douglas. The case, in my opinion, clearly falls within the authority of Mykel v. Doyle, 45 U. C. R. 65, which has been too long followed to be now questioned in any Court in Ontario.

The appeal must, in my opinion, be dismissed with costs.

MEREDITH, J.A., for reasons stated in writing, was also of opinion that the appeal should be dismissed.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

JUNE 15TH, 1910.

GENERAL CONTRACTING CO. v. CITY OF OTTAWA.

Mechanics' Liens—Municipal Lands and Buildings—Right of Lien —Summary Dismissal of Action by County Court Judge— Appeal—Remittal for Trial.

Appeal by the defendants from an order of a Divisional Court allowing an appeal from the judgment of a County Court Judge dismissing an action to enforce a mechanics' lien, and remitting the action to the County Court Judge for trial.

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

T. McVeity, for the defendants.

G. H. Kilmer, K.C., and W. H. Irving, for the plaintiffs.

MOSS, C.J.O.:—The effect of the order of the Divisional Court from which the defendants appeal is merely to remit this action for trial in the ordinary course of procedure as provided by secs. 31, 33, 34, 35, et seq., of the Mechanics' Lien Act; and, in my opinion, that order should not be disturbed. Assuming, without determining, that the learned County Court Judge has jurisdiction to deal with a claim under the Act in a summary manner, it is a jurisdiction to be sparingly exercised. This case presents features which seem to render it quite inadvisable to make a premature ending of it at the present stage.

Whether there is or is not, in the present state of legislation, a right of lien upon property of every description held by a municipal corporation in respect of work done and materials furnished in and about erections, buildings, or other works upon it, is not so entirely clear as to make it proper to so hold without investigation of the facts. The language of some of the sections of the Act seems to imply an intention to bring at least some classes of municipal property within its provisions. And, until all the facts appear, it cannot be said that the property in question here is not subject to a lien. If it be subject, then comes the question whether this is a proper case for the enforcement of such a remedy. And that, too, must depend upon the facts proved. It may turn out that the plaintiffs are unable to bring themselves within its provisions owing to the nature of the contract and what was done or not done under

it. It may be that the plaintiffs may be able to establish a lien for a part, if not the whole, of their claim, or . . . they may fail altogether. But all this is to be determined at a trial upon a proper record. At present there is nothing before the Court but a statement of claim. The plaintiffs should be left at liberty to prove, if they can, the allegations thereof, or any proper amendment in case the statement of defence or further investigation should demonstrate a necessity for it.

The order of the Divisional Court should be affirmed with costs.

MEREDITH, J.A., was of opinion, for reasons stated in writing, that the Act does apply to such buildings as those in question, and, therefore, that the County Court Judge's ruling was rightly overruled, and the case properly remitted to him. The appeal should, therefore, be dismissed.

GARROW, MACLAREN, and MAGEE, JJ.A., agreed in the result.

JUNE 15TH, 1910.

RICE v. TORONTO R. W. CO.

Street Railways—Injury to Person Crossing Track—Crossing behind Car without Looking — Negligence — Excessive Speed—Contributory Negligence—Findings of Jury—New Trial.

Appeal by the defendants from the judgment of SUTHERLAND, J., upon the findings of a jury, in favour of the plaintiffs, the executors of J. J. Rice, deceased, in an action to recover damages for his death, caused by a collision with one of the defendants' street cars, on the 8th December, 1908, on Gerrard street, in the city of Toronto.

The deceased had gone out intending to visit the Toronto General Hospital, which he was accustomed to do, and had alighted from a car on the southerly track proceeding easterly, when, attempting to cross the northerly track, he was struck by a westbound car upon that track.

The jury found that the defendants were guilty of negligence, consisting in a too high rate of speed at that place; that the deceased was not guilty of negligence; and they assessed the damages at $1,500. The question was also asked: "Notwithstanding the

negligence of the deceased, if any, could the motorman on the car, by the exercise of ordinary care, have avoided the accident?" To this the jury answered, "Yes"—though this was evidently intended not to be answered if the jury found that the deceased had not been negligent.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

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

J. MacGregor, for the plaintiffs.

GARROW, J.A.:—In view of the other questions and answers, which were quite sufficient to dispose of the issues, the last question and answer should, I think, be disregarded.

What remains is the simple case of negligence alleged and found against the defendants in respect of the excessive speed, and contributory negligence on the part of the deceased alleged by the defendants, but denied by the jury.

Both questions were, in my opinion, proper for the jury. There was evidence, if believed, of improper speed, as the jury say, "at that particular point." The motorman upon the west-bound car must have seen the east-bound car standing, and at least one passenger from it, Dr. Hincks, cross the north track towards the hospital; even if he did not see Dr. Hincks after crossing waving his hands towards the deceased in an effort to prevent him from making the attempt to cross. And there is no evidence that he slackened speed, which speed a jury might well regard as unreasonable and excessive under the circumstances.

There was also, in my opinion, clear evidence of contributory negligence on the part of the deceased, who came out from the rear end of the east-bound car, and apparently proceeded to cross without looking to see if he might do so safely. And, if he had looked, he must have seen the west-bound car in plenty of time to have kept out of danger.

It is not my purpose further to comment upon the evidence of contributory negligence, except to say that, in my opinion, the decided weight of evidence is against the finding of the jury, for which reason it seems to me that justice requires that there should be a new trial.

I would, therefore, allow the appeal and direct a new trial; the costs of the last trial and of this appeal to be costs in the cause to the successful party.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A., for reasons stated in writing, was of opinion that upon the plaintiffs' case the negligence of the deceased was established; that the appeal should be allowed; and (in this dissenting) that the action should be dismissed.

JUNE 15TH, 1910.

*STRATFORD FUEL ICE CARTAGE AND CONSTRUCTION CO. v. MOONEY.

Company—Promoters—Sale of Businesses — Profits — Liability to Account for—Intention to Sell Shares to Others—Directors not Independent of Vendors—Want of Knowledge—President and Manager of Company Interested as Vendors.

Appeal by the plaintiffs from the judgment of MACMAHON, J., 14 O. W. R. 489, dismissing the action without costs.

The plaintiff company, now in liquidation, and John Brown, the liquidator, brought this action, under the authority of an order made in the liquidation proceedings, to recover from the defendants $27,691.76, being moneys for which they were accountable to the plaintiffs. This sum represented part of the price ($79,600) agreed to be paid and actually paid by the plaintiff company in cash and debts assumed and paid, for the acquisition of the business and property of the Deacon Company Limited, an incorporated company, and the business and property of another business concern carried on under the name of the Stratford Cement Block Company. The defendants did not deny the receipt by each of them of sums which in the aggregate made almost the sum of $27,691.76, but they denied all liability to account therefor to the plaintiffs.

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

G. C. Gibbons, K.C., and R. T. Harding, for the plaintiffs.

Wallace Nesbitt, K.C., and R. S. Robertson, for the defendant Mooney.

G. G. McPherson, K.C., for the defendant G. R. Deacon.

F. H. Thompson, K.C., for the defendant F. B. Deacon.

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

The judgment of the Court was delivered by Moss, C.J.O.:—
. . . The defendants contend that the moneys divided amongst them were the property of the defendant F. B. Deacon, who was entitled to receive the purchase-price to be paid by the plaintiff company, that they came to him as representing the vendors, and that he was entitled to dispose of it as he saw fit. No doubt, if he could retain it as against the plaintiff company, he could do with it as he pleased. The question is: had he the right to the amount so divided as against the plaintiff company?

The learned trial Judge found, and it is really not in dispute, that a sum of $27,691, or thereabouts, represented the profit of the defendant F. B. Deacon upon the sale to the plaintiff company. But the learned Judge also found that for this profit the defendant F. B. Deacon was not accountable to the plaintiff company—that it was not a secret profit, but part of a price paid by the plaintiff company for property which it had, through its board of directors, agreed to purchase after due consideration.

But the question is: was the agreement made and entered into on behalf of the plaintiff company by an independent board of directors, to whom full disclosure had been made, and also were fully aware of the interests of the defendants F. B. Deacon and Mooney in the transactions? . . .

It is not questioned that the plaintiff company was the creation of the defendants Mooney and F. B. Deacon for the very purpose of taking over the two concerns in which both were interested. . . . They were promoters of the plaintiff company in every sense of the word. It was not intended that the company to be formed should be one of that class, not infrequent in the present day, in which the shares, or the chief part of them, are to be allotted to the owner or owners of the business concern intended to be taken over in consideration of the transfer of the property and business, such as in the well-known case of Salomon v. Salomon, [1897] A. C. 622. In the case before us it is manifest that from the beginning the intention was that ready money or its equivalent should be paid for the properties and businesses to be acquired, and that the required cash should be obtained by the issue to the public of the shares in the capital stock of the company when formed. The difference between the two cases, which is obvious, is alluded to by Lord Watson in the Salomon case, at p. 37 . . .; and by Lord Macnaghten, at p. 48. . . .

Here the intention and the course adopted were otherwise. For the purposes of procuring incorporation, five persons subscribed the memorandum of agreement, each agreeing to take 10 shares of $100 each. . . . These five persons were the provisional direc-

tors named in the letters of incorporation, and they were the persons to whom the defendant F. B. Deacon's offer to sell was submitted. They represented 50 out of the 1,000 shares which comprised the capital stock of the plaintiff company, and the remainder were to be offered to the public. . . .

The affair was really arranged between the defendant F. B. Deacon, the vendor and at the same time the real manager of the plaintiff company, and the defendant Mooney, the president of the plaintiff company, who was at the same time interested in the selling concerns.

There is no evidence upon which it could be fairly concluded that the directors as a board acted with full knowledge of the transaction and of the relations of the vendor towards the plaintiff company, which they were supposed to represent. Nor can it be held that they formed an independent board, dealing not for themselves alone but for and in the interests of the persons to whom they intended to apply to become shareholders and invest their money in the company. In the then existing state of affairs, it could not be said that "the executive management of the company was in the hands of a thoroughly independent board of directors, a board over which (the vendor) could exercise no influence, and which would, as the expression is, keep him at arm's length in making the bargain." See In re Hess Manufacturing Co., 23 S. C. R. 644, at p. 658.

To place the affairs of the plaintiff company in the hands of such a board was a duty which the defendants F. B. Deacon and Mooney, in their relation to the plaintiff company both as promoters and as manager and president, respectively owed to the future shareholders of the plaintiff company. It is not pretended that any of the transactions which have been disclosed, or probably only partly disclosed, in this action, were made known to any shareholders other than the members of the board, as to four of them only to the limited extent shewn by the testimony.

The result seems to have been that the defendant F. B. Deacon was enabled to obtain for the property and assets which he was selling to the company, of which he was one of the promoters and an officer, a price which brought him a very large profit. This he might possibly have been able properly to make, had the bargain for it been made in a different fashion. But, as the matter was initiated, carried on, and concluded, the plaintiff company was not fairly or properly represented in the bargaining, and for this the defendants F. B. Deacon and Mooney were responsible. And, therefore, to the extent to which each shared in the profit made, he should be held liable.

The defendants G. R. Deacon and Campbell should . . be held liable to the extent to which they shared.

Probably the most convenient manner of fixing the liability is to direct judgment against each for the amounts received by them by the cheques issued on the 6th September, 1905, with interest from that day. But, if any question arises, the matter may be spoken to in Chambers.

The appeal should be allowed and judgment entered for the plaintiffs as indicated. . . . The plaintiffs are entitled to their costs throughout.

HIGH COURT OF JUSTICE.

RIDDELL, J. JUNE 10TH, 1910.

*JOHNSON v. BIRKETT.

Evidence — Examination of Plaintiff for Discovery — Death of Plaintiff—Continuation of Action by Executor—Tender of Depositions of Deceased as Evidence on Behalf of Executor —Principal and Agent—Moneys Intrusted to Agent for Purchase of Stock—Purchase of Stock by Agent on his own Behalf—Intention to Appropriate Part to Principal—Absence of Evidence of Good Faith and Information Given to Principal —Scale of Costs—10 Edw. VII. ch. 30 (O.)

This action was brought by Mrs. Johnson in September, 1908, against Dr. Birkett, for the return of $500 alleged to have been paid by her to the defendant in 1906. After the pleadings had been delivered, i.e., in February, 1909, she was examined for discovery. She died in December, 1909, and her executor obtained an order to continue the action in his name.

The action was tried before RIDDELL, J., without a jury, at Toronto, on the 7th June, 1910.

The plaintiff offered as evidence the examination for discovery of the deceased Mrs. Johnson. The defendant objecting, the trial Judge allowed the examination to be marked for identification only, and the trial proceeded. The plaintiff then read certain parts of the examination for discovery of the defendant, and rested his case. The defendant called no evidence.

W. C. Mackay, for the plaintiff.

J. C. Sherry, for the defendant.

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

RIDDELL, J.:—It becomes necessary to consider whether, in the circumstances, the plaintiff can be allowed to make use of the examination for discovery of the original plaintiff, his testatrix. . . .

[Reference to Le Vesconte v. Kennedy, vol. 98 (N.S.) of the Printed Cases in the Court of Appeal, in the general library at Osgoode Hall; Con. Rule 483.]

It was said in Drewitt v. Drewitt, 58 L. T. R. 684, that a motion under the English Rule corresponding to Con. Rule 483 should be made before trial, but the Judge there (Brett, J.), said he would treat the application at the trial as having been made before the trial—and I shall pursue the same course in the present instance, and treat the application by the plaintiff to read the examination for discovery of Mrs. Johnson as an application regularly made for that purpose before trial. . . .

[Reference to Perkins v. Slater, 45 L. J. N. S. Ch. 224; Elias v. Griffith, 46 L. J. N. S. Ch. 806; Lawrence v. Maule, 4 Drew. 472; Taylor on Evidence, 10th ed., sec. 464, note 4; Erdman v. Town of Walkerton, 22 O. R. 693, 20 A. R. 444, 23 S. C. R. 352; Morgan v. Nicholl, L. R. 2 C. P. 117; Hulin v. Powell, 3 C. & K. 323; Randall v. Atkinson, 30 O. R. 242, 620; Con. Rule 461; Reid v. Diebel, 14 O. W. R. 77.]

There is nothing in principle or in authority to justify my admission of this examination to prove the case of the plaintiff here; and I accordingly reject it. My reasons briefly are: (1) the evidence could not be used at any stage of the action against the defendant upon any proceeding in the lifetime of the witness; (2) an examination for discovery is not an affidavit, so that Con. Rule 483 can apply; and (3) the Rules provide for the use to be made of the examination for another—and expressio unius est exclusio alterius.

Turning now to the admissible evidence. The statement of defence puts everything in issue except that the defendant, on or about the 24th August, 1906, "secured from the plaintiff instructions to purchase for her 500 shares of the capital stock of the Boston Mines Company Limited, at or for the price or sum of $1 per share.

The examination for discovery of the defendant sets out that he received a cheque for $500 from the plaintiff about the 24th August, 1906, which he cashed; that he had an agreement with the company for some shares, but they are still "pooled" and so not issued; that Mrs. Johnson bought some of his 2,000 shares in August, 1906, and by August, 1906, he had been paid by her for them. No shares have been issued yet to her, because her

solicitor didn't want it. He used the $500 received as his own, and did not pay it to anybody as the price of shares in the company; he never offered her certificates for any shares; he never had them to offer; the only thing he had was his agreement; on the 27th July, 1908, he received a letter from the solicitor of the plaintiff that his authority to buy shares was revoked, and requiring him to return the $500, which he refused to do.

Taking the admissions in the pleading and the examination together, it sufficiently appears that the defendant, having instructions from the plaintiff to buy for her 500 shares of the capital stock of the company, and having received $500 from her for that purpose, did not buy for her 500 shares at all, but bought for himself 2,000 shares of pooled stock, out of which he intended to give her 500 shares (as being bought from himself) when the stock should be issued—and that, the defendant not having carried out his instructions exactly, his authority was revoked, and the money demanded back. . . .

[Reference to Bentley v. Craven, 18 Beav. 75, 77; Pariente v. Lubbock, 20 Beav. 588, 592; Gillett v. Peppercorne, 3 Beav. 78, 83; Robinson v. Mollett, L. R. 7 H. L. 802, 815, 836, 838; Conmee v. Securities Holding Co., 38 S. C. R. 615; Selsey v. Rhoades, 2 Sim. & Stu. 41, 1 Bli. N. S. 1; Lowther v. Lowther, 3 Ves. 95, 103; Molony v. Kernan, 2 Dr. & War. 31, 38, 39.]

It may well be that, had the defendant seen fit to give evidence, he might have shewn not only perfect good faith on his part, but also full information given, but he has not done so. He makes the statement in a letter, but does not swear to it.

In any view of the case, upon this evidence the plaintiff is entitled to judgment. I follow the decision in Gillett v. Peppercorne, and direct judgment to be entered for the sum of $500 and interest at 5 per cent. from the day of the receipt of the cheque of Mrs. Johnson by the defendant—which appears to be the 24th August, 1906. (Interest to the 10th June, 1910, computed at $94.86). The plaintiff is also entitled to costs; and, as the action was begun before the Act 10 Edw. VII. ch. 30. (O.), the costs should not be affected by the passing of that Act.

DIVISIONAL COURT. JUNE 11TH, 1910.

*RE GILES AND TOWN OF ALMONTE.

Municipal Corporations — Local Option By-law—Voting—Form of Ballot—Departure from Statute—Interpretation Act, sec. 7 (35).

Appeal by William Giles from order of MEREDITH, C.J.C.P., ante 698, dismissing without costs a motion to quash a local option by-law.

The appeal was heard by BRITTON, CLUTE, and MIDDLETON, JJ.

J. Haverson, K.C., for the appellant.

W. E. Raney, K.C., for the town corporation.

CLUTE, J.:—The sole question argued was as to the sufficiency of the form of the ballot used at the voting. The form used was that existing prior to the amending Act of 1908, where the words in the respective columns are "For the by-law," "Against the by-law." The statute 8 Edw. VII. ch. 54, sec. 10, amends the Liquor License Act, sec. 141, and provides that the form of the ballot paper to be used for voting on a by-law under that section shall be as follows: "For Local Option"—"Against Local Option."

I agree with the learned Chief Justice that the defect in form, if any, is cured by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (35), which reads: "Where forms are prescribed, deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them."

Although the words used were "For the by-law," instead of "For Local Option," they were, in my view, the same in substance; nor do I think the change was calculated to mislead any voter.

I would dismiss the appeal with costs.

BRITTON, J., agreed, for reasons stated in writing, in which he referred to Re Hickey and Town of Orillia, 17 O. L. R. 317, and Re Sinclair and Town of Owen Sound, 12 O. L. R. 488.

MIDDLETON, J., reluctantly concurred, also stating reasons in writing.

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

RIDDELL, J. JUNE 13TH, 1910.

SKINNER v. CROWN LIFE INSURANCE CO.

Contract—Modifications—Authority of General Manager of Insurance Company—Contract with Agent—Commission on Renewal Premiums—Continuance beyond Lifetime of Agent—Acceptance of Services—Modifications Acted on.

Action by the executor of the late Robert B. Skinner to recover moneys alleged to be due to the deceased or his estate under a contract with the defendants.

C. Millar, for the plaintiff.

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

RIDDELL, J.:—The late Robert B. Skinner entered into a contract with the defendants as their agent. The general manager made a modification of this contract to the advantage of Skinner. No charge is made of any impropriety on the part of Skinner or of any intentional wrongdoing on the part of the manager; but now, after the death of Skinner, and after the manager's connection with the company has been severed, the company repudiate the action of the manager, and say that it is beyond his powers. . .

On the 11th June, 1903, a contract was entered into between Skinner and the company, both duplicates of which are produced, the one produced by the plaintiff executed by Roberts as managing director and by Skinner; the other, produced by the defendants, having the seal of the company affixed, and signed also by Dr. Machell, director. . . .

The plaintiff produces a letter of the 4th July, 1903, to the late R. B. Skinner: "If, for any reason, your contract with the Crown Life Insurance Company, dated the 11th day of June, 1903, should be terminated after having been continuously in force for a period of not less than two years from the date thereof, it is hereby agreed that you shall be entitled to the commissions you would have received had the contract continued in force, subject to a deduction to cover the cost to the company of collecting the premiums, not exceeding one per cent. of the amount of the premiums; the commissions payable to you under this clause to be credited to you each month as the premiums are paid to the company, and a settlement to be made with you half-yearly on the first days of February and August." This is signed by A. J. Hughes, secretary, for managing director, and below appears, "I agree to the above,"

signed by Skinner. A duplicate of this is produced by the company as attached to their duplicate of the contract of the 11th June, 1903.

Another contract is produced by the plaintiff, dated the 1st April, 1905, signed by Roberts as managing director and by Skinner. The seal of the company is also affixed, by no name of director, president, or vice-president. This seems to have been sent to Skinner at Vancouver with an accompanying letter (4th or 14th April), in which he was asked to affix his signature and return one copy, retaining the other.

In the contracts appears a clause, numbered 9: "The said company agrees to pay and the agent agrees to accept as full compensation for his services of every kind a commission upon such premiums as shall have been collected and paid over by him to the company on policies issued on applications secured during the continuance of this agreement, according to the following schedule of commissions. . . ."

It was apparently to meet this clause and change the effect of the first contract that the letter of the 4th July, 1903, was written.

On the 7th June, 1904, the managing director had written Skinner telling him that he (Skinner) would, under his contract, receive commissions "during the whole lifetime of the policy."

Upon the receipt of the second contract, Skinner (8th May, 1905), wrote the managing director . . . In answer the managing director (23rd May, 1905) says: "In regard to the adjustment of clause 9, I am satisfied that the enclosed letter will fully cover the question you have raised." And there was enclosed a letter in the same terms as that of the 4th July, 1903, omitting the words "After having been continuously in force for a period of not less than two years from the date hereof." . . .

The matters to be decided now are: (1) Is the plaintiff, as executor of Skinner, entitled to "renewals" after the death of Skinner, or does all right to these cease at Skinner's death. (2) If entitled to any, is she entitled on renewals upon policies effected before the 1st April, 1905?

The defendants contend that the letter of the 4th July, 1903, is not and never was binding upon them, although admittedly Skinner was paid according to its terms. They further say that, even if it ever was binding upon them, it was terminated by the agreement of the 1st April, 1905. . . .

The defendants deny liability in toto by reason of the fact that the letters modifying the printed contracts are signed only by the managing director, and not also by another director . . . It is argued that only such contracts signed by the managing dir-

ector are binding as are "in general accordance with his powers as such under the by-laws of the company:" R. S. C. ch. 79, sec. 32, and by-law 1, sec. 15. . . . Section 32 is not exclusive, and does not prevent other contracts than those signed in the particular manner mentioned being valid. . . .

The contracts with Skinner by these modification letters were made in the same way as very many other contracts of the same kind and in the regular course of the business of the company. . . . Moreover, Skinner was not in the management of the company—he had a right to expect that everything had been regularly done: Brice on Ultra Vires, 3rd ed., p. 599 sqq., and cases cited.

And again, the company have had the advantage of the services of Skinner rendered under their modification letters, and it would be inequitable and a fraud to allow the company now to repudiate the agreement.

I am of opinion that the company are bound.

Then did all right cease at the death of Skinner? . . . As to the first contract, the letter of the 4th July, 1903, provides that if, for any reason, the contract should be terminated, the agent will be entitled to the commissions he would have received had the contract remained in force, and this was explained by the letter of the 7th June, 1904, to mean that the agent would "receive them during the whole life of the policy"—not during his life. Moreover, the managing director in this letter says that this is the most liberal contract the company ever made; and we find that Henderson had a contract of the 9th January, 1902, in which it is expressly provided that his executors, administrators, or assigns are to be paid. I think it clear that the company's officers intended by the modification letter that Skinner should be entitled actually during the life of the policy, and not simply so much thereof as lay within his own life.

Then as to the second contract, Skinner by his letter of the 8th May, 1905, says, "There is no possibility of my terminating the contract except in the event of ill-health or death, in which case I certainly think that I would be entitled to receive the renewal premiums," etc.; and the managing director sends him the modifying letter, which he is "satisfied . . will fully cover the question" Skinner had raised. I think there can be no denying the rights under this contract.

Nor can the company, I think, be allowed to cut off the premiums on the policies under the first contract. The letters already referred to shew that both parties considered the "renewals" were to be paid to Skinner on policies obtained, while the first con-

tract was in full force, and the company paid and Skinner received sums of money on that basis. If the words of the second contract necessarily mean that there was no such right, I think it should be amended to meet the intention of both parties; but I do not think this course is necessarily to be followed. Both parties understood the annulling clause as preventing the terms of any previous contract applying to business obtained subsequently, and both acted upon that basis, paying and receiving money; and I think the contract may and should be so construed.

The counterclaim of the defendants will be dismissed with costs; the plaintiff declared entitled as asked, with a reference to the Master as to the amount; the defendants to pay the costs of the action up to judgment, except so far as these have been increased by the claim for $1,236.71. Further directions and costs of reference reserved.

RIDDELL, J. JUNE 13TH, 1910.

NORTHERN CROWN BANK v. YEARSLEY.

Promissory Note—Collateral Security—Pledge of Shares to Bank—Transfer by Bank by Mistake into Name of Stranger—Control Retained by Bank—Liability on Note.

Action upon promissory notes.

The defendant, a mining broker in Toronto, bought 200,000 shares of the capital stock of the Cobalt Development Company Limited from George Stevenson, another mining broker in Toronto, a 9 cents per share, and gave his note for $18,000 in payment therefor. Both parties expected that the note would be discounted, and accordingly the defendant wrote Stevenson a letter as follows: "Toronto, 15th April, 1907. I herewith tender you my note . . $18,000 at 3 months from April 12th, in payment for $200,000 shares of the Cobalt Development Company Limited. In consideration of your accepting my note as described, I hereby agree that the said shares are to be attached to my note referred to herein and held by any chartered bank in the city of Toronto in escrow as security for the due payment of my said note. It is understood that I am at liberty to tender payment of any sum or sums in excess of $200 on account of the said note, and that on tendering such payment a relative number of the shares held will be delivered on the basis of the value of not less than 9 cents per share. This agreement is irrevocable, and becomes binding upon delivery to the chartered bank referred to above. In case default

be made in payment of said note, you to be at liberty at once to take possession of said stock or so much thereof as shall remain in the hands of such bank, and sell or dispose of same without any notice to me, and your so doing shall not affect my liability on said note. Nothing herein contained shall be deemed to extend the time for payment of said note as expressed therein or to in any way alter or prejudice my obligation thereunder. In case you or your associates require any of this stock for any of your transactions, you have the privilege of going to the bank, without consulting me, and getting any of the said stock by crediting my note for the value thereof at 9 cents per share."

Stevenson took this note with the letter to the plaintiff bank; he procured the issue by the company of a certificate for 200,000 fully paid-up shares to William Worthington in trust. (Worthington was the nominee of the plaintiffs). This certificate was indorsed by Worthington with an assignment in blank; and note, letter, and certificate left with the plaintiffs.

The defendant sold certain shares to other persons. The method pursued was for the defendant to send Stevenson the sold note and a cheque for the value of the sold shares and 9 cents per share. Stevenson would take the cheque to the bank, apply the amount upon the note of the defendant, and have a transfer of the proper number of shares made to the purchaser. As the bank had several certificates of this stock as collateral to Stevenson's indebtedness, and these were for smaller amounts than the Worthington certificate, it was thought desirable not to break up this large certificate, but, instead, to transfer smaller certificates.

The plaintiffs, when the note became due, demanded payment, but the defendant left the matter to Stevenson to arrange, and Stevenson arranged renewals with the plaintiffs, which renewals the defendant signed. The note was broken up into two, one for $11,000 and another for $6,300, and these renewed from time to time, resulting in the long run in the two notes sued upon, one for $11,000, dated the 25th November, 1907, at 3 months, in favour of Stevenson, and one for $6,300, dated the 28th July, 1908, at 3 months, also in favour of Stevenson.

The defendant was credited upon the original note for $18,000 with the full amount of his cheques on account of the stock.

The plaintiffs at one time, as appeared by entries in their books, claimed to hold the 200,000 shares as securities for an indebtedness of the North Cobalt Land Corporation, but this was through a mistake, and the defendant had no notice or knowledge of the fact until about the time of the trial of this action.

The management of the bank changed hands in the autumn of 1908 and the spring of 1909. Worthington left the employment of the bank in November, 1908; and the new management made use of the indorsement in blank of the certificate by Worthington, after he had left the bank's employment, in March, 1909, to deliver up the old certificate and take out a new one for the same number of shares in the name of the North Cobalt Land Corporation, taking the precaution, however, to have that company indorse the certificate in blank and at all times to keep it in their (the plaintiffs') possession.

The defendant stopped paying, and at length the bank sued. The defendant never tendered the money on his notes nor demanded the shares. He said they were worthless. His defence was that the plaintiffs, by their method of dealing with the shares, had released him from liability on the notes.

The plaintiffs replied that the transfer of the shares into the name of the North Cobalt Land Corporation was a mistake made by the new management, through their want of acquaintance with all the facts; that the plaintiffs always had the stock in their power, and could have transferred it if the money had been tendered; that, if the money had been tendered, the bank would at once have made inquiry, and the facts would have become apparent, and the stock would have been transferred, and could now be transferred, etc.

The defendant did not allege that he had been damaged, but said that in law he was released. There was no imputation of fraud or bad faith.

F. Arnoldi, K.C., for the plaintiffs.

C. P. Smith, for the defendant.

RIDDELL, J. (after setting out the facts above):—The stock was in the first place collateral to the original note for $18,000, and I shall assume that it was (at least to the extent of it as not disposed of by the defendant) collateral also to the several notes, including these sued upon. . . .

[Reference to Ames v. Conmee, 10 O. L. R. 159, 12 O. L. R. 435; S. C., sub nom. Conmee v. Securities Holding Co., 38 S. C. R. 601; and distinction pointed out.]

In the present case the bank had the certificate for 200,000 shares indorsed in blank by the company in whose name the certificate had issued, and could at once have transferred them to the defendant if he had paid. And this they could do without violating any duty they owed to the North Cobalt Land Corporation. Suppose the bank had so transferred this certificate to the defendant, and

the North Cobalt Corporation had brought on action—a perfect defence would be made out by shewing the facts, and the Corporation could have no claim. And the book-keeping of the bank would not change the situation.

There are other difficulties in the defendant's way; but I do not pass upon them.

The plaintiffs are entitled to judgment for the amount sued for, interest, and costs.

DIVISIONAL COURT. JUNE 13TH, 1910.

*RE TOWNSHIP OF PEMBROKE AND COUNTY OF RENFREW.

Municipal Corporations — Maintenance of Bridge — Duty of County Council—Bridge Crossing Stream Forming Boundary between Local Municipalities—Assumption of Bridge by County —Enforcement of Obligation to Repair—Decision of County Council — Review by County Court Judge — Municipal Act, 1903, secs. 613-618.

Appeal by the Corporation of the County of Renfrew from an order of the Judge of the County Court of Renfrew, dated the 4th April, 1910, made on the application of the Corporation of the Township of Pembroke, under sec. 618 of the Municipal Act, 1903, as amended and re-enacted by 7 Edw. VII. ch. 40, sec. 24, and 9 Edw. VII. ch. 73, sec. sec .29, whereby he declared that the duty and liability of maintaining a certain bridge, known as Foster's bridge, over the Muskrat river, belonging to and rested on the county corporation.

The material facts, as found by this County Court Judge, were: that the bridge spans the Muskrat river, which river at this point forms, since the 28th September, 1864, the boundary line between the township of Pembroke and the town of Pembroke, in the county of Renfrew; that the public highway connected and made continuous by the bridge is one of the main public highways in the township of Pembroke, and has been so used for over 40 years; that the bridge is out of repair to such a degree as to make it unsafe for public travel over it; and that the bridge, besides being one of the main public highways in the township of Pembroke, is also part of a much travelled main highway through the county of Renfrew from Pembroke to Eganville, known as the Eganville road, and upon the last mentioned road large sums of money have

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

been spent by the Government from time to time since about 1868.

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and MIDDLETON, JJ.

H. E. Rose, K.C., for the county corporation.

P. White, K.C., for the township corporation.

CLUTE, J.:— . . . Reference is made to secs. 598, 606, 607, 613, 617, and 622 of the Municipal Act, 1903.

Section 613 provides that every county council shall have exclusive jurisdiction (1) over all roads and bridges lying within any township, town, or village in the county which the county by by-law assumes, with the assent of such township, town, or village municipality, as a county road or bridge, until the by-law assuming the same has been repealed by the council; and . . . (4) over all bridges over rivers, streams, ponds, or lakes forming or crossing boundary lines between two local municipalities in the county.

It is contended that this bridge comes within sub-sec. (4) of this section; and the County Court Judge has so found . . . .

Mr. Rose urged very strongly that , , O'Connor v. Otonabee, 35 U. C. R. 73, was applicable to this case. It was there held that sec. 410 of the Municipal Act, 1873, must be read, as modified by secs. 416 and 431, as meaning that every road dividing different townships shall, when assumed by the county council, be within the exclusive jurisdiction of the county council. In other words, that there must be read into sec. 410 the words "when assumed by the county council." Section 410 corresponds to sec. 613, and 416 to 622, of the present Act. The judgment in the O'Connor case was an endeavour to reconcile secs. 410 and 416 . . . Section 410 provided for a joint jurisdiction in certain cases, and here arose apparently a conflicting jurisdiction, which was reconciled by the Court holding that sec. 410 must apply only to those cases where the county had assumed jurisdiction over the bridge.

An amendment to sec. 416, as it now appears in clause (a) of sec. 622, reads: "The word 'road' in this section shall not include a bridge over a river, stream, lake, or pond forming or crossing the boundary line between two municipalities other than counties which bridge it is the duty of the county council to erect and maintain." In my opinion, this entirely eliminates the ground of the decision in the O'Connor case. . . .

The bridge being there in fact and upon a public highway, the effect of sec. 613 is to give to the county council exclusive jurisdic-

tion over the bridge; and the effect of sec. 617 is to impose upon the same county council the duty to erect and to maintain such a bridge.. . .

In my opinion, the effect of the statute, as amended, is not only to give jurisdiction to the county, but to impose upon the county the duty of maintaining a bridge such as the one in question; and this duty is obligatory, under the circumstances of the present case, whether the bridge was ever formally assumed by the county or not. . . .

I also think there is evidence sufficient to support the finding of the County Court Judge that the county council by their solemn act and by-law authorising the expenditure of money . . . upon this bridge thereby assumed the same as a county bridge, and, although they have not subsequently contributed to its maintenance, their neglect of duty in that regard does not relieve them from the obligation imposed, on their earlier assumption of the bridge.

The appeal should be dismissed with costs.

MULOCK, C.J.:—I agree.

MIDDLETON, J., agreed in the result, for reasons stated in writing. He was of opinion that, the County Court Judge having found that there was assumption, it could not be said that he was wrong (referring to Hubert v. Township of Yarmouth, 18 O. R. 458, 467, and Holland v. Township of York, 7 O. L. R. 533.) He was also of opinion that the obligation to repair could be enforced under sec. 618, which was wide enough to apply, and was intended to give to an aggrieved municipality a summary and effectual remedy when any other municipality charged with the duty of erecting or maintaining (i.e., repairing) a bridge, fails to discharge that duty. He also desired to be free to consider (when it should arise) the very important question whether the decision of the county council could be reviewed by the Judge. It must not be assumed, he said, too readily that Brooks v. Haldimand, 3 A. R. 73, is no longer law, or that that case was successfully distinguished in the judgments of Burton and Patterson, JJ.A., in Re Moulton and Haldimand, 12 A. R. 503.

DIVISIONAL COURT. JUNE 13TH, 1910.

*LINDSAY v. IMPERIAL STEEL AND WIRE CO.

Company — Issue of Shares — Contract—Construction—Purchase of Inventions—Transfer of Shares to be Used as a Bonus to Purchasers of Preferred Shares — Colourable Transaction — Illegal Dealing with Shares — Double Contract — Declaration that one Part Ultra Vires—Status of Shareholders to Maintain Action—Evidence—Books of Company—Companies Act, secs. 113, 119—Transaction Declared Valid in Part in Favour of Non-appealing Defendant.

Appeal by the defendants the Imperial Steel and Wire Co. and Currie from the judgment of CLUTE, J., ante 347.

The action was originally brought by Anna B. Lindsay, W. J. Lindsay, and William Henry Schneider, in their own names, against the company, Currie, and McBean, for a declaration that the transfer of 50,000 shares of the common stock of the company to the defendant McBean was null and void, and that the shares should be retransferred to the company; for a declaration that the issue of $800,000 additional stock was a fraudulent and illegal issue, and for cancellation thereof; and for other relief. At the trial an amendment was made allowing the plaintiffs to sue on behalf of themselves and all other shareholders of the company.

By the judgment of the trial Judge, as entered, the allotment and issue of the 50,000 shares to McBean were declared ultra vires the company and illegal, the allotment and issue were set aside, the defendant McBean was ordered to deliver the certificate of the shares to be cancelled, the register of the company was ordered to be rectified, the agreement between the defendant McBean and the company was declared ultra vires the company and null and void, and the defendants were ordered to pay the costs.

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

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

C. A. Masten, K.C., for the plaintiffs.

No one appeared for the defendant McBean.

RIDDELL, J.:—At the trial the only viva voce evidence adduced was that of two witnesses, Schneider and Saddington. The

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

examinations for discovery of the defendants Currie and McBean were also read, of course against themselves only. Upon the appeal it was urged that the trial Judge must have taken into consideration, against the company, these examinations, and that was made one ground of complaint. It was suggested to counsel for the plaintiffs that he should take an enlargement so as to have the evidence of McBean and Currie available against the company, and that of McBean available against Currie. He declined to do so, and insisted upon resting the case upon the evidence already in. We have no power to compel either side to call a witness, and cannot, without the consent of the parties, ourselves call a witness. The law has recently been put in a more satisfactory state by the Court of Appeal in In re Enoch Arbitration, [1910] 1 K. B. 327.

It, therefore, becomes necessary for us to examine the evidence which is admissible against the company and Currie respectively, without the assistance of that which, though given at the trial by reading the examinations for discovery, is not so available. This is to me a very unsatisfactory proceeding, as the Court would in all cases prefer to be placed in possession of all the evidence, available so as to be able to do justice, not only upon the evidence, but also upon all the facts. We, however, have no other course open to us than that indicated.

The books mentioned in sec. 113 of the Ontario Companies Act are made evidence in any action or proceeding against the company or any shareholder (sec. 119). How far the other books and papers produced by the company are evidence against the company or Currie, we need not inquire, as counsel agreed that they could be used as evidence of the facts. There might otherwise, perhaps, have been some difficulties: Taylor on Evidence, 9th ed., sec. 1781; Phipson on Evidence, 3rd ed., ch. 34. . . .

One of the chief objections taken is as to the right of the plaintiffs to maintain this action at all; and both parties accept . . . as sound law the proposition to be found in Buckley's Companies Acts, 9th ed., p. 613: "In any proceeding brought to redress a wrong done to the corporation or to recover property of the corporation, or to enforce rights of the corporation, the corporation is the only proper plaintiff;" but "a single shareholder, suing on behalf of himself and others, or suing alone and not on behalf, may make the company a defendant and may restrain the company and directors from doing an act which is illegal or criminal or ultra vires the corporation, and which a majority are, consequently, unable to confirm . . . If, however, a majority are opposed to the illegal act, quære whether

the company should not be made or at any rate joined as a plaintiff?" . . . It is quite clear, on the authorities, . . . that, if the acts complained of were intra vires the corporation, this action cannot succeed. It will be necessary, therefore, to inquire whether the issue of the 50,000 shares of stock was or was not so intra vires.

From the books it appears that this stock was issued to McBean, and the credit entries are: cash, $10; sundries, $499.990; making $500,000. We have no evidence to indicate that the agreement attacked was not entered into in good faith, no evidence as to the financial standing of McBean, or as to the value of the patents. . . .

Mr. Masten relies upon . . In re Alkaline Reduction Syndicate Limited, 45 W. R. 10, as shewing that this agreement is ipso facto ultra vires the corporation. . . .

In the present case, without going beyond the evidence admissible, it seems to me that it would be an abuse of language to call the 50,000 shares of common stock the purchase-price of the inventions. The language is not that the stock is to be issued to McBean in payment for the inventions—his interest in the inventions is to be transferred to the company in consideration of the transfer to him of "50,000 shares . . . on the terms and conditions hereinafter set forth." He is to apply for 50,000 shares, paying only $10, and to transfer 40,000 shares of these to a person mutually agreed upon between himself and the president of the company, so that such person may, in his discretion, use them as a bonus to purchasers of preferred stock. I think this must mean purchasers from the company, so that the company may have the advantage of this stock so far as may be necessary. It is true that the amount to be so used is to be in the discretion of the person so chosen, but there can be no doubt of the intention that it is to be for the benefit of the company. . . . It is simply an indirect method of selling the company's preferred stock with a bonus from the company of common stock. This is "a colourable transaction entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount"—to use the language of Lord Watson in Ooregum Gold Mining Co. v. Roper, [1892] A. C. 125, 137, and is ultra vires of the company: Mosely v. Kaffirfontein, [1904] 2 Ch. 108.

But I do not think (on the available evidence) that the whole contract is void. . . . I read the contract as in reality double —one an agreement for the transfer of the inventions for 10,000 shares, and the other a colourable arrangement made to enable the company to deal with its shares illegally. . . . We cannot go

into the propriety of such an agreement, having no evidence of value or other evidence of fraud, even if the action should be considered properly constituted: Ooregum Gold Mining Co. v. Roper, supra; Re Eddystone Co., [1893] 3 Ch. 6; Re Wragge, [1897] 1 Ch. 796; and many other cases to the same effect. . . .

[Re Lake Ontario Navigation Co., 20 O. L. R. 191, distinguished.]

A certificate for 50,000 shares has been delivered to McBean, 10,000 for himself and 40,000 for delivery over to a trustee; and the contract is double and separable. I cannot see why either he or the company may not insist on the real contract being carried out for the purchase of the inventions for 10,000 shares, leaving void what was tacked on the contract for the illegal purpose already spoken of. Unless McBean and the company agree (as they may) to cancel the whole transaction—and this would, perhaps, be found the preferable course—there should be a declaration accordingly.

In any case there should be no costs of this appeal.

I think we can make this order notwithstanding the fact that McBean has not appealed. Where the effect of a judgment upon the appeal of one defendant is to establish the validity of a transaction between two defendants, then the transaction may so be declared valid in respect of the other, even if that other does not appeal.

[Webb v. Hamilton, 10 O. W. R. 192, referred to.]

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

DIVISIONAL COURT. JUNE 14TH, 1910.

*THOMPSON v. BIG CITIES REALTY AND AGENCY CO.

Pleading—Counterclaim—Order Striking out—Practice—Convenience—Cause of Action—Con. Rules 254, 261—Prayer for General Relief—Set-off—Promissory Notes—Company—Signature—Abbreviations—Powers of Officers — Intra Vires—Stay of Proceedings on Judgment for Plaintiff pending Trial of Counterclaim—Terms—Costs.

Appeal by the defendants from an order of SUTHERLAND, J., striking out their counterclaim, and from the judgment of SUTHERLAND, J., at the trial, in favour of the plaintiff.

On the 15th April, 1909, the plaintiff brought this action against the defendants, a joint stock company, upon four promissory notes. The statement of claim was delivered on the

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

31st May. On the 9th June the defendants delivered a statement of defence and counterclaim, bringing in one Drake and his wife as defendants by counterclaim. The company (defendants) set up that they had received no money by way of loan; that the notes were not binding; and that they were without consideration; that the plaintiff and Drake had agreed to deal together in real estate, and that any money advanced had been advanced to Drake; that the notes had been procured by the plaintiff from the company by conspiracy with Drake, under the representation that the company owed the plaintiff; that the plaintiff and Drake and Mrs. Drake, having agreed to purchase and deal in real estate in Toronto, used the pretended loan and other money and assets of the company for such purposes. The counterclaim was that the plaintiff and the Drakes should account for all money so wrongfully used by them, for a refund, and also for further and other relief. On the 12th June the plaintiff joined issue on the defence and counterclaim. On the 23rd June the Drakes delivered a defence to the counterclaim, denying all the charges, but saying that if any money, etc., of the company was appropriated by them, they had returned it before service upon them of the counterclaim. The company replied denying the alleged return.

Upon motion of the Drakes, upon the 10th March, 1910, SUTHERLAND, J., sitting as trial Judge, made an order striking out the counterclaim, "with costs of the motion and pleading to the said counterclaim forthwith after taxation thereof."

The trial of the plaintiff's case was then proceeded with, and judgment given for the plaintiff against the company for $1,192.50 and costs.

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

T. Hislop, for the company, the defendants.

Joseph Montgomery, for the plaintiff.

W. C. Mackay, for the Drakes.

RIDDELL, J.:— . . . No doubt, if the matters to be tried were only between the company and the Drakes, the counterclaim was irregular and improper; the counterclaim must claim relief against those brought in and the plaintiff: Con. Rule 248; Treleven v. Bray, 1 Ch. D. 176; Turner v. Hednesford, 3 Ex. D. 145; and similar cases. In the present case, however, the claim is against the plaintiff and those brought in, so there is no difficulty in that regard.

I do not think it competent for a Court to determine upon the shewing of one side that the claimant has no real claim. No doubt, the Court may and does strike out a counterclaim which is plainly frivolous or vexatious, but in that respect a counterclaim does not at all differ from any other pleading, and the power of the Court is exercised under Con. Rule 261. Such a case is Lee v. Ashwin, 1 Times L. R. 291 . . . Jurisdiction under the Rule is to be exercised with caution, . . .; and, while affidavits may be admitted, as a rule only the pleadings will be looked at. See the cases in Holmested & Langton, pp. 469, 470. Unless there is something equivalent to an admission on the part of the party pleading . . . the power will not, except in an extraordinary case, be exercised. Certainly no such case is made here. And the same rule applies where it is sought to strike out a pleading under the other part of Con. Rule 261. Moreover, in applying this Rule, the application should be made promptly—preferably indeed before pleading (Attorney-General v. London and North Western R. W. Co., [1892] 3 Ch. 274), although it may be even at the close of the pleadings (Tucker v. Collinson, 34 W. R. 356, 16 Q. B. D. 562); and where not made till after the close of the pleadings, and the case is set down for trial, the Court will as a rule consider that there has been undue delay, and will refuse the motion (Cross v. Howe, 62 L. J. Ch. 342).

It has been suggested that we should look at the evidence taken at the trial in order to satisfy ourselves that the counterclaim is frivolous and vexatious. I do not at all agree. In the first place, if the application is under Con. Rule 254, it must be made before trial . . .; while, if under Con. Rule 261, it must in general also be made before trial. But, while this evidence was not before my brother Sutherland upon the application, I do not at all say that, though his order was wrong when made, an appeal from it should be allowed if it now appear that the counterclaim was in fact one that should have been struck out. Now, evidence was gone into at the trial which, if not contradicted or modified, would shew that there is no foundation for the counterclaim. The counsel for the company, however, informs us that he has and had other evidence which was not heard. It is true that such evidence does not seem to have been offered, but I am of opinion that this evidence could not have been received if it had been offered. . . .

It is plain that this wrongful taking of the company's money, etc., cannot be pleaded as a payment upon the notes. "To constitute a payment the transaction must have the assent of both parties:" In re Miron v. McCabe, 4 P. R. 171, 174; Osterhout v. Fox, 14 O. L. R. 599, 604. Nor could the matter have been raised by way of set-off. . . .

[Reference to Chamberlain v. Chamberlin, 11 P. R. 501; Girardot v. Welton, 19 P. R. 162; Holmested & Langton, p. 445; Arnold v. Bainbrigge, 1 Ex. 153; Owen v. Wilkinson, 5 C. B. N. S. 526.]

There is, however, another consideration. The plaintiff and the Drakes are charged with taking the money of the company and putting it into land. A mere judgment for the money used might be of little avail, and a lien might have to be declared upon the land. This could, of course, be done on the counterclaim under the prayer for general relief: Watson v. Hawkins, 24 W. R. 884; Newell v. National Bank, 1 C. P. D. 501; Duryea v. Kaufman, ante 773; but not in a defence simply of set-off in the original action, to which the Drakes are not parties. . . . Girardot v. Welton, 19 P. R. 162, at p. 165.

The relief sought must, then, be by way of counterclaim. . . . The company's counsel alleging that he has other evidence, it would be obviously unfair to decide against them on the evidence now available to the Court.

In my opinion, the order striking out the counterclaim was improper, unless it can be said that the cause of action on the counterclaim is not "relating to or connected with the original subject of the cause." . . . It can hardly be contended that the taking of the very moneys for which the notes were given is not connected with the note transactions. It would be for the trial Judge to decide how far an inquiry might go in respect of such other matters and moneys; but at this stage the counterclaim as a whole could not go by the board.

It may be considered that the order was made in reality because it was not convenient to try the issues at the same time. I do not agree that it was not convenient . . . . Even if the order could be supported, it would still be proper to stay the execution of the judgment against the company until the dealings of the plaintiff with the property of the company were investigated: Auerbach v. Hamilton, 19 O. L. R. 570. And that relief should be given the company now.

Then as to the main appeal, the first contention is that the notes are not signed in the name of the company. This, with some other objections, was raised in Farmers Bank v. Big Cities Realty and Agency Co., ante 397, and there overruled. As that was a County Court case, we are not bound by it; I have accordingly considered these objections anew, and see no reason to change the opinion previously expressed.

The notes . . . are signed by a rubber stamp "The Big Cities Realty & Agency Co. Ltd.," and immediately below appear

(in writing) "John Lusden," (in stamp) "President, and (in writing) "Robert Rae," (in stamp) "Secy-Treas." The Ontario statute is appealed to, 7 Edw. VII. ch. 34, sec. 27; but that statute, sec. 27 (2), specifically provides that the word "Limited" may be contracted to "Ltd." where, as here, the word "Company" forms part of the name of the corporation. The complaint then is reduced to the use of the contraction "Co." for . . "Company." I know of no law compelling a company to use its full name without contraction in any instrument. The cases cited are nihil ad rem. . . .

[Reference to Penrose v. Martyn, E. B. & E. 499; Atkin v. Wardle, 61 L. T. R. 33; Nassau v. Tyler, 70 L. T. R. 376; Boyd v. Marton, 30 O. R. 290; Alexander v. Sizar, L. R. 4 Ex. 102; Canada Paper Co. v. Gazette Publishing Co., 32 N. B. 689; Falk v. Moebs, 127 U. S. 597; Fairchild v. Ferguson, 21 S. C. R. 484.]

As to the argument that it is not proved that the persons who appear to have affixed the name of the company are those having power to do so, the simple answer is that the plaintiff has nothing to do with this, having received the notes in good faith, and having nothing to do with the management of the company. It cannot be contended that the making of the notes is ultra vires of the company. And in any case the company would be liable for the money received.

Upon the facts I see no reason to disagree with the findings of the trial Judge. . . . The appeal against the judgment should be dismissed with costs.

But the proceedings on this judgment should be stayed—"the judgment to stand for the protection quantum valeat of the plaintiff," as was done in Auerbach v. Hamilton, supra, until the counterclaim be tried. . . .

The plaintiff, having opposed the motion against striking out the counterclaim, should not in any event get costs of this motion, but, having consented to go down for trial, he should not be ordered to pay them forthwith—he should pay the costs of this motion in the cause in any event of the cause, and be allowed to have these costs set off against his judgment. The Drakes have caused the whole difficulty by their motion to strike out the counterclaim, and they have insisted on retaining the advantage which they have improperly obtained . . . they should pay the costs of this appeal and of the motion before Sutherland, J., forthwith after taxation thereof.

FALCONBRIDGE, C.J., and BRITTON, J., concurred; the latter giving written reasons.

DAVIS v. CLEMSON—BOYD, C.—JUNE 10.

Contract—Work and Labour—Building Boats—Acceptance.]—Action to recover $1,015.22 for two gasoline boats built by the plaintiffs for the defendant. The Chancellor holds that the smaller boat was accepted by the defendant, though it needed a good deal of adjustment and attention before it was made to run satisfactorily. As to the larger boat he holds that there was no acceptance, and the defendant should not be obliged to pay for it. As to the first boat, it was to be treated as fully paid for by the cash and extra freight paid, plus something for trouble, etc., in connection with it. The defendant was, however, liable to the plaintiffs for the price of some goods and supplies. Judgment for the plaintiffs for $106.75 without costs. A. B. Cunningham, for the plaintiffs. G. Mahaffy, for the defendant.

SLATTERY v. HEARN—MASTER IN CHAMBERS—JUNE 13.

Parties—Substitution of Plaintiff—Terms—Action Brought without Authority.]—Motion by the defendant to stay or dismiss the action, as having been brought without authority, and motion by the plaintiff to substitute a new plaintiff. The action was brought upon a promissory note. The Master said that it was plain that the plaintiff had not given instructions for the action, and that he had parted with all interest in the note in question, which it was alleged was now held by the person whom it was sought to substitute as plaintiff. Whether the alleged present holder had a cause of action could not be determined otherwise than by a trial or an application under Con. Rule 261. Order made substituting as plaintiff the person referred to, upon his consent being filed, and allowing the action to proceed; service of the amended writ of summons dispensed with; time for appearance to run from the date of the amendment only. Costs of both applications to the defendant in any event. L. V. McBrady, K.C., for the defendant. T. F. Slattery, for the plaintiff.

SOVEREIGN BANK v. FROST—MIDDLETON, J., IN CHAMBERS—JUNE 13.

Discovery—Examination of Officer of Plaintiff Bank—Pleadings—Relevancy of Questions—Foreign Commission.] — Motion by the defendants to commit the general manager of the plaintiffs for refusal to answer certain questions and produce certain documents upon examination for discovery. The defendants also moved for a commission to take evidence abroad. The learned Judge

made a resumé of the pleadings and stated the nature of the discovery refused. He was of opinion that none of the matters as to which discovery was sought were relevant to the issues, and therefore dismissed the main motion with costs to the plaintiffs in any event of the cause. Order made for a commission as asked; to be returned by the 1st September. C. A. Moss, for the defendants. W. J. Boland, for the plaintiffs.

BUGG v. BUGG—SUTHERLAND, J.—JUNE 13.

Alimony—Cruelty—Evidence—Amount Allowed.]—An action for alimony. The plaintiff at the time of the trial was 66 years of age and the defendant 64. The marriage was in 1865, and the parties lived together till July, 1909. The plaintiff alleged that for years the defendant had pursued such a course of conduct towards her as to affect her physical, nervous, and mental condition, and injure and impair her health in a serious degree, and put her in great fear of bodily harm. The plaintiff testified as to the defendant having caught her by the throat and treated her roughly several years ago, and that she was in fear of him on account of that and his subsequent conduct to her. She also alleged improper intimacy of the defendant with other women. The learned Judge concludes, upon the evidence, that the plaintiff's health has been injuriously affected by the conduct of the defendant prior to and up to the time that she left his domicile; that the defendant's conduct for a long time prior to the plaintiff's departure, and in the final scene occasioning it, was such towards the plaintiff as continuously to annoy and distress her, cause her great grief and sorrow, and at times actual fear, and this to such an extent as to amount to legal cruelty and affect her health: Lovell v. Lovell, 15 O. L. R. 547. Judgment for the plaintiff with costs for alimony at the rate of $2,000 a year in monthly payments. E. F. B. Johnston, K.C., and G. Grant, for the plaintiff. J. A. Paterson, K.C., for the defendant.

UNION BANK OF CANADA v. TAYLOR—BRITTON, J.—JUNE 13.

Trust — Land Conveyed to Trustee — Declaration in Aid of Execution—Evidence.]—Action by execution creditors of the defendant James A. Corry to have it declared that the property in the city of Ottawa known as "the Corry block" is the property of the defendant Corry and not of the defendant Edith Taylor, and that it or the equity of redemption in it is liable to the plaintiffs' execution now in force and in the hands of the sheriff of the

county of Carleton. The property was conveyed at the instance of the defendant Corry to the defendant Taylor, his niece, in February, 1905; and there was a further conveyance to her in February, 1909. Upon the evidence, the learned Judge finds that the lands now standing in the name of the defendant Edith Taylor are not really her lands, but, subject to the mortgages thereon, are the property of the defendant Corry. Judgment for the plaintiffs as prayed with costs. Travers Lewis, K.C., for the plaintiffs. W. D. Hogg, K.C., for the defendants.

NILES v. CRYSLER—BOYD, C., IN CHAMBERS—JUNE 14.

Summary Judgment—Rule 603—Promissory Notes—Leave to Defend.]—An appeal by the plaintiff from the order of the Master in Chambers, ante 895, was dismissed; costs in the cause. Grayson Smith, for the plaintiff. J. M. Ferguson, for the defendant.

MCPHILLIPS v. STEVENSON—MASTER IN CHAMBERS—JUNE 15.

Summary Judgment—Con. Rule 603—Defence not Raised on First Affidavit—Leave to Use Second—Costs.]—Motion by the plaintiff for summary judgment under Rule 603 in an action upon a promissory note for $1,500. The note was given in settlement of all matters in dispute between the parties, and it was admitted that $500 had been paid. In answer to the motion the defendant at first filed an affidavit which was not sufficient to entitle him to defend, as it only disputed the amount due. The defendant afterwards tendered an affidavit attacking the settlement itself and raising such questions as would be an answer to the motion. The Master referred to Crown Bank v. Bull, 8 O. W. R. 8, 77; Northern Crown Bank v. Yearsley, ante 655; Farmers Bank v. Big Cities Realty and Agency Co., ante 397; and said that he did not think the affidavit should be refused, or the defendant put upon such terms as were ordered in Crown Bank v. Bull—the defendant in this case having explained that his first affidavit was filed pro forma and with an understanding that it might be supplemented after cross-examination of the plaintiff, though this was denied. If the plaintiff desired, he should be at liberty to cross-examine upon the second affidavit. If not, the motion should be dismissed, but the costs should be to the plaintiff in the cause in any event, as the defence should have been raised in the first affidavit. W. G. Thurston, K.C., for the plaintiff. R. C. Le Vesconte, for the defendant.