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APPELLATE DIVISION.

Second Divisional Court. April 13th, 1917.

*BEURY v. CANADA NATIONAL FIRE INSURANCE CO.

Insurance—Fire Insurance—"Insurance Contract"—Interim Receipt—Difference in Contract from that Applied for—Failure to Point out Difference—Insurance Act, R.S.O. 1914 ch. 183, sec. 2 (14), (45), sec. 194, Condition 8—Fire Taking Place after Expiry of Period Named in Interim Receipt—Oral Application—Subsequent Written Application—Evidence—Questions of Fact—Terms of Interim Receipt.

Appeal by the defendants from the judgment of Britton, J., 11 O.W.N. 413.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Rose, JJ.

A. C. Heighington, for the appellants.

Gideon Grant, for the plaintiffs, respondents.

Meredith, C.J.C.P., read a judgment in which he said that the plaintiffs apparently expected the Court to assume that the case was one within the provisions of statutory condition 8, under sec. 194 of the Insurance Act, R.S.O. 1914 ch. 183, and apply its provisions so as to exclude the defence that the insurance actually effected was for 30 days only, and that the loss occurred after the expiration of the 30 days. But the plaintiffs must catch their hare before they could cook it.

* This case and all others so marked to be reported in the Ontario Law Reports.

Reference to Sharkey v. Yorkshire Insurance Co. (1916), 37 O.L.R. 344, 54 S.C.R. 92, and discussion of the judgments in that case.

In the present case, the provisions of statutory condition 8 could not be applied until the plaintiffs had proved that the interim receipt, upon which the action was brought, was not in accordance with the terms of their application for such insurance, and that the defendants did not point out in writing the particulars wherein it so differed. And the only point of difference that was material was, whether the insurance was one for the long date—one year—or was one for the short date—30 days. If for the short date only, the defendants were not liable; if for a year, the defendants were liable.

The parties were agreed upon two things: (1) that a contract of insurance was made; and (2) that it was made orally, by telephone.

The interim receipt recited an application for insurance for 12 months, but gave it for 30 days only.

The onus of proof was on the plaintiffs, and, in order to succeed, they must have proved at the trial either: (1) that the contract of insurance was for 12 months; or (2) that, on an application for 12 months' insurance, the defendants, without pointing out in writing that their interim receipt was for 30 days at most, sent to them their interim receipt for that short date only. These questions were purely questions of fact; the trial Judge did not quite so deal with them; and, if the case had now to be determined by the Chief Justice alone, he would probably reach the conclusion that the plaintiffs had failed to satisfy the onus in both respects. But in this Court the Judges had had the benefit of a full discussion of these considerations, and yet three of them at least were able to find in favour of the plaintiffs on one or both of the questions, and the judgment of the Court must be in favour of the plaintiffs.

Riddell, J., read a judgment in which he stated the facts, and said that it appeared to him that the defendants, upon receipt of the application in writing, chose to accept the written application rather than to carry out the oral arrangement. Their manager, upon receipt of the written application, issued an interim receipt in answer and expressly referred to it. The defendants must be in the same position as if the written document shewed the contract. When the application is for a 12 months' policy, any policy furnished "after" such application shall be deemed "to

be in accordance with the terms of the application" for 12 months —statutory condition 8—unless the company take the prescribed precaution. The interim receipt is, by the combined effect of sub-secs. 45 and 14 of sec. 2, a "policy;" the defendants did not point out in writing the particulars wherein it differed from the application; and the effect of the statute was to make this a binding policy for 12 months.

The decision of the Supreme Court of Canada in Dominion Grange Mutual Fire Insurance Association v. Bradt (1895), 25 S.C.R. 154, prevents this Court from giving any advantage to the defendants from the terms of the interim receipt.

The subsequent conduct of Corbold, the defendants' Toronto manager, has not been taken into consideration in this judgment; it does not assist, but weakens, the case of the defendants.

The appeal should be dismissed.

Rose, J., reached the same result, for reasons stated in writing.

Lennox, J., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

Second Divisional Court. April 13th, 1917.

*Re WATSON AND MONAHAN.

Mines and Mining—Mining Claim—Staking out—Failure to Do Second Year's Work—Order of Mining Commissioner Relieving from Default—Mining Act of Ontario, R.S.O. 1914 ch. 32, sec. 85 (4 Geo. V. ch. 14, sec. 4)—Jurisdiction of Commissioner —"Prevented"—"Other Good Cause Shewn"—Right of Appeal —"Decision" of Commissioner—Sec. 151 of Act.

J. Craig Watson staked out two mining claims in a surveyed township. He did the first year's work as required by the Mining Act of Ontario, R.S.O. 1914 ch. 32, but failed to do the second year's work. Thereupon Walter Monahan (making, it was said, a new discovery) restaked the claim. Watson applied to the Mining Commissioner for reinstatement, under sec. 85 of the Act; the Commissioner granted the request; and Monahan now appealed.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

A. G. Slaght, for the appellant.

R. S. Robertson, for Watson, the respondent.

RIDDELL, J., read a judgment in which, after stating the facts, he said that it was objected by the respondent that the exercise by the Mining Commissioner of the power given by sec. 85 was not the subject of an appeal under sec. 151. This objection could not be sustained. Section 151 gives an appeal against any decision of the Commissioner. The Commissioner was called upon to exercise not an arbitrary but a judicial discretion on the application before him, and his determination was a "decision."

It was argued for the appellant that the Commissioner had no power, in the circumstances of this case, to grant the application of the respondent. Under sec. 85 (as enacted by the amending Act 4 Geo. V. ch. 14, sec. 4), the Commissioner has power only when compliance with the statute is prevented (1) by pending proceedings or (2) by incapacity from illness of the holder or (3) by other good cause shewn. Nothing of the kind appeared here—the holder was not prevented from doing the work at all; on his own story, he misunderstood the Act, and, while he did not intend to let his claim go, he did not intend or try to do the necessary second year's work at the proper time. As he was not prevented from doing the work, the jurisdiction of the Commissioner did not attach.

There was nothing to prevent the respondent from applying to the Lieutenant-Governor under sec. 86; nor to prevent his asserting that his understanding of the Act was the true construction, and so disputing the validity of the appellant's claim.

The order of the Commissioner should be set aside, with costs here and below.

The other members of the Court agreed that the appeal should be allowed; MEREDITH, C.J.C.P., and ROSE, J., giving reasons in writing.

Appeal allowed with costs.

HIGH COURT DIVISION.

KELLY, J. APRIL 7TH, 1917.

PATTERSON v. CANADIAN BANK OF COMMERCE.

Parent and Child—Son Inducing Aged and Illiterate Mother to Join in Mortgage of Land—Undue Influence — Absence of Independent Advice—Improvidence—Knowledge of Mortgagee —Mortgage Set aside as to Mother's Interest in Land.

Action by a widow, 75 years of age, illiterate, and hard of hearing, to have set aside and declared invalid, as against her estate and interest in a farm, a mortgage of the farm made on the 12th December, 1892, by herself and her son William George Patterson to one Crossley, as trustee for the defendants, and to restrain the defendants from proceeding to sell and take possession of the farm, so far as her interest was concerned.

The plaintiff's husband died about 23 years ago, having by his will devised to his son, William George Patterson aforesaid, the farm referred to, subject to charges in the plaintiff's favour intended to provide for her maintenance; these provisions she accepted in lieu of dower, and at the time the mortgage was made she had no other property or possessions of any kind. Her son accepted the devise, subject to the charges, and operated the farm. He got into difficulties and was involved in litigation, in which the solicitor for the defendants acted as his solicitor. He owed the defendants about $2,000, and the mortgage referred to was for that amount. The plaintiff executed the mortgage in the office of the defendants' solicitor; he read over the mortgage and explained it to her, but she said she did not hear it. Later, the defendants began proceedings on the mortgage; the plaintiff then repudiated it, and this action was brought.

The action was tried without a jury at Stratford.
F. H. Thompson, K.C., for the plaintiff.
S. G. McKay, K.C., for the defendants.

KELLY, J., in a written judgment, said, after stating the facts, that the plaintiff's relationship to her son was such that what he wanted from her he could have; she was in a sense dependent on him; and he exerted the influence of that relationship to obtain what was for his benefit, regardless of her interests. He refrained

from explaining what it was he wanted, or the nature of the paper, but asked her to sign—she did so, making her mark, for she could neither read nor write. The defendants knew the son's financial condition, and knew that the plaintiff did not and could not benefit by the transaction. The plaintiff acted in passive obedience to her son's directions—she had no will of her own. Nor had she any means of forming an independent judgment, even if she had desired to do so. She was ready to sign anything that her son asked her to sign, and did anything he told her to do: Stuart v. Bank of Montreal, [1911] A.C. 120, 136.

Judgment for the plaintiff as prayed with costs.

FALCONBRIDGE, C.J.K.B. APRIL 7TH, 1917.

NEWHOUSE v. CONIAGAS REDUCTION CO.

Nuisance—Smelter—Emission of Noxious Vapours—Destruction of Bees in Neighbourhood—Evidence—Failure to Connect Alleged Cause with Effect—Onus—Elements of Doubt.

This action and eight others were brought by different plaintiffs against the same defendants for an injunction and damages in respect of the wrongful emission from the defendants' smelting works of noxious vapours or substances which killed the plaintiffs' bees.

The actions were tried without a jury at St. Catharines.

H. H. Dewart, K.C., and S. H. Bradford, K.C., for the plaintiffs.

Wallace Nesbitt, K.C., and H. H. Collier, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiffs had to prove to the satisfaction of a Judge or jury that the loss which they had suffered was caused by the wrongful acts of the defendants. The onus was upon the plaintiffs. It was not a case of res ipsa loquitur. The plaintiffs must prove their case beyond reasonable doubt.

Reference to Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, at pp. 507, 508, 509, and two unreported cases there referred to—Connacher v. City of Toronto and Campbell v. Acton Tanning Co. These cases enunciated no new law, but were peculiarly apposite to the facts of the present cases.

It was not sufficient to find that the destruction of the bees might have been caused by the defendants' works—the question was, whether it had been proved. There were too many elements of doubt to resolve them all in the plaintiffs' favour:—

(1) Very little is known about the diseases of adult bees, and the causes of the known diseases are not satisfactorily established.

(2) The poison was said to have been arsenical. No analysis shewing arsenic in bees or brood, comb or honey, was in evidence. Samples were said to have been sent to Guelph and Toronto, but no arsenic was found.

(3) The symptoms of the bees, as described by different witnesses, did not point with sufficient accuracy to arsenical poisoning, nor did they exclude the diagnosis of some one of the known diseases. The admitted rapidity of the action of arsenic did not assist the plaintiffs on this branch of the case.

(4) There was evidence of the destruction of colonies of bees outside the probable zone of the smelter's influence, and of bees thriving at points nearer the smelter than several of the plaintiffs' hives.

(5) The scientific evidence shewed how arsenic would gather on the pollen of flowers and be fed to the bee brood, whereas there was no evidence of arsenical poisoning of the brood.

(6) The positive and uncontradicted evidence of the defendants' witnesses as to the devices adopted to prevent the escape of arsenic.

(7) The proved existence of abundant and prolific insect life in the immediate vicinity of the smelter.

The plaintiffs having failed to prove their case to the reasonable satisfaction of the trial Judge, their actions must be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. APRIL 10TH, 1917.

FLEXLUME SIGN CO. LIMITED v. GLOBE SECURITIES LIMITED.

Practice—Chambers Order Issued ex Parte—Dispute as to Terms of Order—Order not Conforming to Order as Pronounced—Death of Judge who Pronounced Order—Order as Issued Set aside by another Judge—Resettlement of Order—Stay of Actions—"Event"—Determination by Court of Last Resort—Delay in Settling Order—Costs.

Motion by the plaintiffs to set aside an order issued on the 4th April, 1917, as of the date upon which it was pronounced by the late Chancellor, the 21st June, 1916, upon a motion in Chambers. See 10 O.W.N. 380.

A. C. McMaster, for the plaintiffs.
F. Arnoldi, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that the order was improperly issued ex parte to the defendants' solicitor. There was a dispute as to what the order should be. The order as issued must be set aside and vacated, and the question in dispute dealt with as though the order now had to be settled.

The dispute was as to the "event" until which this and other actions were to be stayed.

The plaintiffs contended that the event upon which the judgment in the other 9 actions was to depend was the final event of the action of Flexlume Sign Co. Limited v. Macey Sign Co. Limited, judgment in which was pronounced by a Divisional Court of the Appellate Division on the 3rd April, 1917 — the determination in the Court of final resort; while the defendants contended that the event was the determination in the Appellate Division.

In the view of the learned Judge, the case is not "determined" until the last appellate Court has made its pronouncement. The case is now going on to the Supreme Court of Canada.

The order should now issue in such form as to express the Chancellor's intention—that the "event" was the final determination by the ultimate appellate Court.

As the trouble arose from the procrastination of both parties, neither should have costs.

CLUTE, J. APRIL 10TH, 1917

FULTON v. MERCANTILE TRUST CO.

Husband and Wife—Land Vested in Wife—Oral Agreement between Husband and Wife—Evidence—Corroboration—Statute of Frauds, R.S.O. 1914 ch. 102, sec. 10—Trust—Joint Tenancy—Survivorship—Action by Husband after Decease of Wife—Declaratory Judgment—Parties—Costs.

Annie Fulton died on the 4th November, 1916, intestate, leaving her surviving her husband, the plaintiff, but no children. The legal title to a parcel of land, purchased with the plaintiff's savings, stood at the time of the wife's death in her name; and this action was brought by the husband against the administrators of her estate and three persons appointed by the Court to represent her next of kin and heirs at law, for a declaration that the land formed no part of the estate of the wife.

The action was tried without a jury at Hamilton.

W. M. Brandon, for the plaintiff.

G. C. Thomson, for the defendant company.

W. E. Kelly, K.C., for the other defendants.

CLUTE, J., in a written judgment, said that, upon the evidence, he had no doubt that the understanding between the husband and wife was, that whichever survived should have the property —while both lived it was held for the benefit of both. A number of authorities were cited to shew that the presumption was in favour of a gift to the wife. There was no doubt about that. But the presumption might be rebutted, and it was satisfactorily rebutted by the testimony of the plaintiff, corroborated in the clearest manner by the evidence of his solicitor. The learned Judge saw no difficulty in the plaintiff's way in carrying out what was clearly the agreement between the husband and wife, acted upon for many years.

There should be a judgment declaring that the land was held in the name of the wife in trust for herself and the plaintiff as joint tenants; that the land formed no part of the estate of the wife; and that the plaintiff was entitled to the same by survivorship.

The defendant company and the other defendants were parties necessary to join in order that the plaintiff might obtain this judgment, and should have their costs paid by him.

Reference to sec. 10 of the Statute of Frauds, R.S.O. 1914 ch. 102; Green v. Carlill (1877), 4 Ch. D. 882; In re Whittaker (1882), 21 Ch. D. 657; Anning v. Anning (1916), 38 O.L.R. 277; Breitenstein v. Munson (1914), 16 D.L.R. 458; Rochefoucauld v. Boustead, [1897] 1 Ch. 196; Gordon v. Handford (1906), 16 Man. R. 292; In re Duke of Marlborough, [1894] 2 Ch. 133; Marshal v. Crutwell (1875), L.R. 20 Eq. 328; Scheuerman v. Scheuerman (1916), 52 S.C.R. 625; and, on the question of costs, Roman Catholic Episcopal Corporation of Toronto v. O'Connor (1907), 14 O.L.R. 666; Gilbert v. Ireland (1904), 9 O.L.R. 124.

CLUTE, J. APRIL 10TH, 1917.

GRABOT v. GILES.

Crown—Patent for Land—Misstatement in Application for—Rights of Squatter—Recognition by Patentee—Priority of Application—Evidence—Special Circumstances—Action for Cancellation of Patent—Certificate of Ownership under Land Titles Act—Costs.

Action for the delivery up and cancellation of letters patent from the Crown issued to the defendant for 18.6 acres, being the part of the north-east quarter of broken lot 6 in the 6th concession of the township of Broder, in the district of Sudbury, lying west of the Long Lake road, and for damages for trespass.

The letters patent were issued on the 30th January, 1915; and on the 18th February, 1915, a certificate of ownership under the Land Titles Act was issued to the defendant.

The action was tried without a jury at Sudbury.

J. H. Clary, for the plaintiff.

J. S. McKessock, for the defendant.

CLUTE, J., in a written judgment, found the facts as follows: that the plaintiff's husband cleared the portion of land in question, and was in occupation of it during his lifetime; that he devised all his real estate to the plaintiff, and that she had been in possession and occupation of the same by herself or her tenants ever since; that her late husband had made application to the Department of Crown Lands for the land, but before lands in the township of Broder came under the Free Grant and Homesteads Act and that no subsequent application was made by him or by the

plaintiff for the land until after the defendant had applied for it; that a statement in the defendant's application, by himself and his two witnesses, was not correct, for it was perfectly well known to the defendant that the plaintiff claimed the land as part of the premises upon which she resided, although subsequent to her settlement thereon the Long Lake road had been constructed through the lot which she occupied; that a portion of the land in question, west of the road, had been cleared and seeded in timothy by the plaintiff's late husband, who had for years cut the hay growing thereon; that the defendant had offered to buy the plaintiff's right to the land, recognising her as in occupation; and that the defendant was aware that the plaintiff was making a claim.

Zock v. Clayton (1913), 28 O.L.R. 447, distinguished.

In the present case the plaintiff's difficulty was, that she had made no application for the land in question prior to the defendant's application; and that, while the Department usually recognises the claim of an actual squatter, it felt justified, upon the evidence before it and the report of an inspector, in having the patent issued to the defendant, being influenced, no doubt, by the very small value of the land and the great inconvenience to the defendant in regard to a way out of his land, which he had improved to the value of $2,000.

In all the circumstances, the case was not one in which the Court should interfere to set aside the patent.

No opinion expressed as to the effect of the certificate issued under the Land Titles Act.

In the circumstances, the action should be dismissed without costs.

CLUTE, J. APRIL 11TH, 1917.

*UNITED STATES FIDELITY AND GUARANTY CO. v. UNION BANK OF CANADA.

Mistake—Money Paid under Mistake of Fact—Right to Recover—Surety Company—Fidelity Bond—Theft of Money by Employee of Bank—Application of, to Replace Moneys Stolen before Commencement of Period Covered by Bond—"Pecuniary Loss"—Right of Bank to Recover over upon Bond Covering Period in which Money Stolen.

Action to recover $2,010 alleged to have been paid by the plaintiff company to the defendant bank, under a mistake of fact, upon a surety bond issued by the plaintiff company.

The defendant bank denied liability, and claimed over against the Canadian Surety Company, made a third party, upon an indemnity bond issued by the third party.

The action and the claim against the third party were tried without a jury at Hamilton.

G. Lynch-Staunton, K.C., and C. W. Bell, for the plaintiff company.

W. B. Raymond, for the defendant bank.

A. E. Knox, for the third party.

CLUTE, J., in a written judgment, said that on the 1st August, 1914, the plaintiff company issued to the defendant bank two surety bonds protecting the bank against loss through the fraud or dishonesty of its employees. On the 23rd September, 1914, the bank discovered that M., manager of its eastern branch in the city of Hamilton, had stolen money from it. A package containing $6,750 was said by M. to have been made up by him at his branch and delivered to the main office at Hamilton, between the 31st August and the 3rd September, 1914. At the main office it was said that this package had never been delivered. M. was convicted of the theft of the $6,750; and about the 5th March, 1915, the plaintiff company paid that sum to the bank. About the 10th September, 1915, it was discovered that M. had not stolen the package of $6,750, but that it had in fact been stolen by one D., teller at the main office. D., being placed upon trial, pleaded "guilty" to the theft of this money, and stated that it had been applied by him in covering shortages of his own in his dealings with the bank's funds, and shewed that on the 3rd September, 1914, the day on which he took the package, he was in default to the extent of $2,010, and that he had been in default to that amount and more since before the bonds of the plaintiff company came into being. On the 3rd September, D. applied $2,010 of the moneys in the package to cover his shortage of that amount, and converted the balance, $4,560, to his own use; and so the loss to the bank during the life of the bonds was $4,560 only.

By its bonds, the plaintiff company guaranteed to pay the bank, the employer, "such pecuniary loss as the employer shall sustain by theft" etc. Although the theft was complete when D. appropriated the $2,010, there was no pecuniary loss by reason of the theft, for the money never in fact left the custody of the bank. It made no difference, as between the plaintiff company and the bank, that D. applied it to cover a shortage. The

plaintiff company was not in fact liable for the shortage, because it took place before the bonds were issued.

Gwynne v. Burnell (1840), 7 Cl. & F. 572, distinguished.

The plaintiff company was entitled to recover $2,010 with interest from the day of payment with costs.

The bank sought to recover against the third party the amount for which it was liable to the plaintiff company, under a bond issued by the third party, which extended to and was inclusive of the 6th August, 1914, which covered any theft or defalcation during its period; and it was not disputed by the third party that this bond covered the period during which D. stole the various sums amounting to $2,010, nor was it seriously argued that, if the bank was liable to the plaintiff company, the third party was not liable to the bank. The bank was entitled to judgment against the third party for the $2,010 and interest and the costs for which the bank was liable to the plaintiff company and any further costs occasioned by the defence of the third party.

SUTHERLAND, J. APRIL 12TH, 1917.

RE EDDY.

Will—Construction—Estate Given to three Children in Equal Shares—Absence of Residuary Clause—One Child Dying before Testatrix—Lapse of Share—Intestacy—Right of Childless Widow of Deceased Child—Assignment of Share—Effect upon Further Shares Accruing on Intestacy.

Motion by the executors of the will of Electa Eddy, deceased, for an order determining a question arising upon the will.

The motion was heard in the Weekly Court at Toronto.

R. R. Waddell, for the executors.

D. C. Ross, for C. M. Eddy and Estella M. Eddy, his wife.

SUTHERLAND, J., in a written judgment, said that the will directed the executors, as soon as convenient after the decease of the testatrix, to sell all her estate, real and personal, to pay out of the proceeds her debts and funeral and testamentary expenses, and, after such payment, to distribute the remainder as follows: "To my son Charles Mattison Eddy, one-third; to my son Hiram Rial Eddy, one-third; to my daughter Charlotte Electa

Eddy, wife of Michael Norman Parker, one-third; to each of them, their heirs, executors, or assigns, absolutely." The will contained no residuary clause.

Hiram Rial Eddy predeceased the testatrix, leaving a widow, but no children.

Charles M. Eddy assigned all his interest in the estate to his wife, Estella Maud Eddy.

The question was, whether the testatrix died intestate as to the one-third share of the residue of her estate bequeathed to her son Hiram.

The learned Judge was of opinion that the legacy lapsed when the proposed recipient predeceased the testatrix, and that such share must be dealt with as though there had been an intestacy as to it.

The two surviving children of the testatrix, Charles M. Eddy and Charlotte Electa Parker, were entitled to Hiram's one-third share in equal parts, and the widow of Hiram to no share therein. Estella took her husband's share of Hiram's share, under the assignment.

Apparently, the widow of Hiram was notified informally of this motion; but the order should not issue until the result had been communicated to her by registered letter, and an opportunity given her to take action.

Costs of all parties out of the estate.

CLUTE, J. April 13th, 1917.

*BRENNAN & HOLLINGWORTH v. CITY OF HAMILTON.

Contract—Construction of Sewers for City Corporation—Misrepresentations of Servant of Corporation as to Depth of Rock—Absence of Fraud—Change of Line—Work Completed under Contract—Contract Price—Extras—Decision of City Engineer—"Final and Binding"—Engineer Found not to be Impartial Arbitrator—Contractors not Bound by Decision—Allowance for Extras—Reference.

The plaintiffs, engineers and contractors, in November, 1915, contracted with the defendant city corporation for the construction of sewers in certain streets of the city; they alleged that the corporation, through its engineers, made certain representations as to the depth of rock to be encountered in the construction of the sewers; and that, relying upon these representations, they were

induced to enter into the contract for the price and on the terms therein mentioned; they further charged that the representations so made were untrue and misleading—that there was much greater depth of rock than was represented, whereby the cost was greatly increased; they further charged that the line of the sewer was so materially altered, in spite of their protests, and the ground through which they were required to construct the sewers was so much more difficult than that through which the sewers were originally laid out, that the contract was in fact abrogated; and they claimed to recover as upon a quantum meruit for the value of the work done, or, in the alternative, for payment for extras in addition to the contract price.

The action was tried without a jury at Hamilton.

R. McKay, K.C., and Gideon Grant, for the plaintiffs.

I. F. Hellmuth, K.C., and F. R. Waddell, K.C., for the defendant corporation.

Clute, J., in a written judgment, found that the representations made by one Taylor, an engineer employed by the defendant corporation, as to the depth of rock, were acted on by the plaintiffs in fixing the amount of their tender; but was of opinion that the plaintiffs were not entitled to rely upon these representations as a ground for a claim against the defendant corporation. There were plans and specifications upon which the tender was based, which formed part of the contract. The defendant corporation was under no obligation to give further information. The plaintiffs were bound to satisfy themselves as to the depth of rock. The plaintiffs received such information as the defendant corporation had, which was given in good faith. Fraud or intentional misleading was not suggested. This portion of the plaintiffs' claim should be dismissed.

The claim that the contract was abrogated by a change of the line of sewer was also untenable. If, by reason of such change, the cost had been increased, that might be a ground for allowing extras. The contract was in fact not changed; and this case must be disposed of under the contract, as the work was carried on and completed thereunder. This portion of the plaintiffs' claim should also be dismissed.

The contract price was $3,399, which had been paid in full; an additional sum of $435 had been paid for extras. The actual cost of the work—declared by the city engineer to be a first-class job—was $9,782.93.

In regard to the claim for extras, the first question was, whether the city engineer, under the contract, had dealt with these extras,

and, if so, whether his action was final. It was provided in the specifications that "any additional work required by the engineer must be ordered in writing, and no claim for extra work will be allowed except on production of such written order."

The learned Judge finds that, when the plaintiffs protested against being made to do work not called for by the contract, the engineer requested them to go on, and said that they would be paid what was fair and right under the contract; that the engineer was not an impartial and indifferent arbitrator between the parties; and, therefore, holds that the plaintiffs were not bound by the engineer's action in respect of any dispute arising under the contract, notwithstanding a clause in the contract to the effect that his decision should be "final and binding on all parties."

Reference to Hickman & Co. v. Roberts, [1913] A.C. 229; Bristol Corporation v. John Aird & Co., [1913] A.C. 241; Hill v. South Staffordshire R.W. Co. (1865), 12 L.T.R. 63; Wallace v. Temiskaming and Northern Ontario Railway Commission (1906), 12 O.L.R. 126, affirmed in Temiskaming and Northern Ontario Railway Commission v. Wallace (1906), 37 S.C.R. 696; Price v. Forbes (1915), 33 O.L.R. 136.

The learned Judge, continuing, found the plaintiffs entitled to be paid the additional cost of certain items specified; and expressed his willingness to fix the amount which should be paid as a reasonable allowance, if the parties so desire. Otherwise, there will be a reference, and further directions and costs will be reserved.

MASTEN, J. APRIL 13TH, 1917.

*ABELL v. VILLAGE OF WOODBRIDGE AND COUNTY OF YORK.

Easement—Artificial Stream Crossing Highway—User for Bringing Water to Mills for 50 Years—Prescription—Limitations Act, R.S.O. 1914 ch. 75—Easement not Enjoyed for 16 Years before Action—Lost Grant—Presumption—Legal Origin—Permanent Watercourse—Effect of Non-user—Abandonment—Intention—Interference by Municipal Corporations with Stream—Parties —County and Village Corporations—Declaration—Injunction —Restoration of Passageways for Water.

The plaintiff, claiming a right to carry an artificial stream of water across a highway known as Pine street, formerly in the con-

trol of the defendants the Corporation of the Village of Woodbridge, now in the control of the defendants the Corporation of the County of York, alleged that the defendants had by partly blocking this artificial stream or raceway, where it crossed the highway, interfered with his easement; and he brought this action for a mandatory order requiring the defendants, or one of them, to restore the raceway to its former condition or to take such steps as would enable the plaintiff to enjoy the easement as fully as before the interference.

The action was tried without a jury at Toronto.

J. H. Moss, K.C., for the plaintiff.

O. L. Lewis, K.C., and C. W. Plaxton, for the defendants the county corporation.

W. A. Skeans, for the defendants the village corporation.

Masten, J., in a written judgment, said that the evidence carried the history and use of the easement only as far back as 1845, at which time the raceway and highway were each in the same plight and condition as they stood down to 1905. No evidence was adduced by either party to shew the situation prior to 1845, nor the origin of either the raceway or the highway.

The learned Judge made this finding: The easement was enjoyed as of right by the predecessors in title of the plaintiff from as early as 1846, and water was brought down through this raceway from the Humber river to two mills—a woollen mill and a grist, afterwards a shoddy, mill—from that time until 1898. During all that period the water flowed through the two branches of the raceway and across the highway. The property had not been operated as a milling undertaking since 1898, nor had the easement been used for milling purposes since that year.

In 1906, the plaintiff's alleged right was first infringed by the village corporation removing the bridge over the westerly branch of the raceway, filling in the roadway, and inserting underneath a tile pipe—said to be insufficient as a means of bringing water to the woollen mill. The plaintiff protested and complained, but took no legal or other effective action until he began this action on the 11th June, 1914.

In 1912, the highway and bridge were taken over by the county corporation, and in the course of improvements by the Highways Commission the bridge over the eastern branch of the raceway was removed, and an opening for water to pass under the road by means of an iron pipe was provided. This, the plaintiff said, was insufficient for mill purposes.

In the circumstances shewn, the plaintiff had acquired no prescriptive right at common law: Burrowes v. Cairns (1846), 2 U.C.R. 288; Grand Hotel Co. v. Cross (1879), 44 U.C.R. 153.

The plaintiff could not substantiate a claim under the prescription provisions of the Limitations Act, R.S.O. 1914 ch. 75, because the easement had not been actually enjoyed by him since 1898. Lancaster v. Eve (1859), 5 C.B.N.S. 717, considered and distinguished.

The plaintiff's case must therefore rest upon a lost grant.

The first inquiry was, whether the plaintiff had in 1898 acquired a prescriptive right by way of lost grant. Reference to Philipps v. Halliday, [1891] A.C. 228, and other cases. There was from 1845 until 1898 an open enjoyment of the easement by he plaintiff and his predecessors as of right unexplained, and consequently the presumption of a lost grant arose without further evidence, unless the contention of the defendants that the easement could not have had a legal origin was entitled to prevail.

There is not now and never was power either in the municipal corporation or the Crown to grant to the plaintiff or his predecessors the right to carry water for power purposes across a highway by means of an artificial raceway: Regina v. Hunt (1865), 16 U.C.C.P. 145; Attorney-General v. Harrison (1866), 12 Gr. 466. But no evidence was adduced to shew when Pine street became a highway, and it was entirely consistent with all the evidence that the plaintiff's predecessors originally owned the lands now known as Pine street, and that the street was dedicated by them as a highway, reserving this easement. Every presumption should be made in favour of the legal origin of the plaintiff's enjoyment of this right.

It was contended that the plaintiff's property, not having been used for milling purposes since 1898, had become valueless for such use, and that the easement had also ceased; citing Burrows v. Lang, [1901] 2 Ch. 502, 507; Baily & Co. v. Clark Son & Morland, [1902] 1 Ch. 649, 668. But here the watercourse was of a permanent, not a temporary, character. The source of supply, the Humber river, is permanent, and the raceway was shewn to have been used for three different mills; the cessation of use of the whole three does not carry with it the result of a cessation of the easement. The site is still valuable as a mill privilege, and possesses practical commercial value at the present time. Therefore, prescriptive rights may be acquired in it and may be retained notwithstanding the fact that the plaintiff is not at the present

time actually exercising his rights: Ivimey v. Stocker (1866), L.R. 1 Ch. 396, 406, 409; Rameshur Pershad Narain Singh v. Koonj Behari Pattuk (1878), 4 App. Cas. 121, 128.

There had been no abandonment by the plaintiff of such rights as he may have possessed in 1898—there never was on his part any intention of abandoning the property as a milling property.

There had clearly been an interference by the defendants with the plaintiff's easement.

The county corporation are in charge of the highway and responsible for the alterations necessary to restore the plaintiff's rights; but the village corporation still have an interest in the highway, and possibly a title to the soil, and were properly joined as defendants.

Judgment for the plaintiff, with costs, declaring that he is now entitled to an easement giving him the right to bring water across the highway in the same manner and to the same extent as was practised down to 1898; enjoining the defendants and each of them from interfering with the exercise by the plaintiff of his right; and for a mandatory order requiring the defendant county corporation to restore the passageways for water across the highway to the condition in which they were before any interference.

DEAN v. TOWNSHIP OF GUELPH—KELLY, J.—APRIL 7.

Municipal Corporations—Work Done under Local Improvement Act, R.S.O. 1914 ch. 193—Invasion of Land-owner's Property —Private Lane—Irregular Procedure—Injunction—Damages.]— Action for an injunction and damages in respect of the invasion of the plaintiff's lands in the township of Guelph by the township corporation, purporting to be working under the Local Improvement Act, R.S.O. 1914 ch. 193. The action was tried without a jury at Guelph. KELLY, J., in a written judgment, said, after stating the facts and discussing the evidence and the provisions of the statute, that the plaintiff had rights in or over the lands referred to as "the terrace," which the defendants without authority invaded; his enjoyment of these rights was interfered with by work actually done before the defendants were restrained by interim injunction, and access to his property over "the private lane" was impeded. The injunction should be made permanent, both because the private lane had not been constituted a public street or highway, and by reason of the

multitude of irregularities which rendered the defendants' whole procedure illegal as an attempt at compliance with the Local Improvement Act. The plaintiff swore that he had already suffered damage to the extent of at least $100, and no one had satisfactorily contradicted him. The damages should be assessed at that amount. Judgment accordingly with costs. R. L. McKinnon and J. R. Howitt, for the plaintiff. N. Jeffrey, for the defendants.

Cline v. Cline—Falconbridge, C.J.K.B., in Chambers—April 10.

Partition—Nature of Estate of Parties Interested in Land—Tenancy in Common or by Entireties—Binding Effect of Judicial Decision.]—Appeal by the defendant from an order of the Local Judge at Simcoe directing partition or sale of lands in the county of Norfolk. The grounds of the appeal were: (1) that the lands were held by the plaintiff and defendant as an estate or tenancy by entireties, and were incapable of severance or sale; (2) that the material filed was insufficient, and there was no jurisdiction to make an order. The learned Chief Justice, in a written judgment, said that the defendant's counsel asked to have it declared that Re Wilson and Toronto Incandescent Light Co. (1891), 20 O.R. 397, was wrongly decided; but a Judge in Chambers had no power to do that; nor, if there was power, would it be exercised in this case. The judgment in the case referred to was pronounced 26 years ago, and it had, no doubt, been acted on in many instances. The Chief Justice added that he had a good deal of respect for the opinion of the Judge who pronounced it. Appeal dismissed with costs. J. E. Jones, for the defendant. A. W. Langmuir, for the plaintiff.