THE

ONTARIO WEEKLY REPORTER

VOL. XIII. TORONTO, MAY 6, 1909. NO. 18

MEREDITH, C.J. APRIL 23RD, 1909.

WEEKLY COURT.

COLBECK v. ONTARIO AND QUEBEC NAVIGATION CO.

Damages—Breach of Charterparty—Hire of Ship for Season—Failure of Owners to Fulfil Contract—Measure of Damages—Principle of Assessment.

Appeal by defendants and cross-appeal by the plaintiff from the report of the local Master at St. Catharines, dated 1st February, 1909, upon a reference to assess damages for the breach of a charterparty.

McGregor Young, K.C., for defendants.

W. M. German, K.C., for plaintiff.

MEREDITH, C.J.:—The action is brought to recover damages for the breach by the defendants of a charterparty entered into between the plaintiff and defendants, bearing date 24th April, 1908, by which the defendants chartered to the plaintiff from 20th May, 1908, to 20th September following, the steamship "Niagara" belonging to the defendants.

The consideration for the charterparty was $2,000, which was agreed to be paid by the plaintiff as follows: $500 on taking over the steamship, $500 on 10th July, 1908, $500 on 10th August, 1908, and $500 on 1st September, 1908.

By it the defendants agreed to fit out the steamship in proper condition ready for delivery at the port of Picton, and to deliver it to the plaintiff there on or about 20th May, 1908, and that it would pass both American and

Canadian inspection. The defendants also agreed to have their captain, mate, and engineer on board when it was inspected.

The charterparty also contains a provision entitling the plaintiff, at any time before 20th September, 1908, to purchase the steamship for $8,000, and a further provision that, in the event of this option being exercised, the $2,000 should be credited on the purchase money.

The action came on for trial on 21st December, 1908, when judgment was pronounced ordering and declaring that the contract in question in the action had been broken by the defendants, and that the plaintiff should recover from the defendants damages for the breach of it, and referring it to the local Master at St. Catharines "to inquire and determine what damages the plaintiff had sustained by reason of the matters in the plaintiff's statement of claim mentioned."

Upon the inquiry before the Master it was shewn that the defendants had not the steamship ready for delivery at Picton by the time mentioned in the charterparty, and that it was not in a condition to pass the Canadian inspection, although the plaintiff was there ready to take delivery of it.

It was then stated to the plaintiff that certain pulleys and 50 feet of hose had to be put on board before the government inspector would certify that the steamship had passed inspection, and it was then arranged that the plaintiff's agent should take it to Welland, have the pulleys and hose placed on it there, and that the government inspector would go to Welland, and, if he found that these articles had been supplied, would then give the necessary certificate.

It also appeared that on this understanding the steamship was taken to Welland, and the pulleys and hose were there put on board of it, but that the necessary certificate was never obtained, and that the steamship was never in or put in such condition as to pass inspection.

The plaintiff, however, ran the steamship until 16th July, 1908, and after that date was no longer able to do so for want of the certificate, and he then returned the steamship to the defendants at Picton.

The Master has found that the plaintiff's outlay in operating the steamship while he had possession of it was $3,961,06, and that the amount earned by it was $1,822, and the difference between these two sums he has assessed as the

damages to which the plaintiff is entitled under the judgment.

The Master disallowed a claim made by the plaintiff for expenditures in the construction and operation of a fruit-stand in connection with the business carried on by him, although, as the defendants allege, he included in the earnings of the steamship the receipts of the fruit-stand, and this constitutes the ground of the appeal by the plaintiff from the report.

I am of opinion that the damages have been assessed on a wrong principle. The measure of the plaintiff's damages is the additional sum beyond the contract price which it would have cost him to have hired another steamship to take the place of the one he had hired from the defendants, for the remainder of the season for which the latter had been hired by him, which had still to run when he was prevented from using it owing to its not being in a condition to pass inspection, or, if none could have been hired, the loss he sustained by not being able to run the steamship for the full term for which it had been hired; in other words, such a sum as would put him in the same position as he would have been in if he had not been prevented from running the steamship for the whole of the term for which he had hired it, but had been able to run it during the whole of that term if he had been so minded.

It is manifest that to assess the damages on the principle upon which they have been assessed would work great injustice to the defendants if, as they contend, the steamship could not have run by the plaintiff except at a loss, and would be practically to shift from the shoulders of the plaintiff to those of the defendants the loss necessarily incident to the carrying on of what from the beginning must have proved a losing venture.

I express no opinion, however, as to whether or not this contention of the defendants is well founded.

The appeal of the defendants must, therefore, be allowed, and it will be referred back to the Master to assess the damages on the principle I have indicated, and the appeal of the plaintiff must be dismissed.

There will be no costs of the appeals to either party.

CARTWRIGHT, MASTER. APRIL 26TH, 1909.

CHAMBERS.

GOLLEY & FINLEY v. CORE.

Practice—Cross-examination of Deponents on Affidavits Filed in Answer to Motion for Costs—Deponents Out of the Jurisdiction—Application for Order Requiring them to Come to Ontario for Cross-examination.

Motion by plaintiffs for an order for payment by defendants of the costs of the action, as in Knickerbocker v. Ratz, 16 P. R. 191, the action being no longer either possible or necessary.

A. R. Clute, for plaintiffs.

E. C. Spereman, for defendants.

THE MASTER:—The motion was adjourned to allow defendants to file affidavits. This has been done, and 3 affidavits have been filed in answer to the motion. They are all made by persons out of the jurisdiction, and counsel for the plaintiffs asks for an order requiring the deponents to come to this province to be cross-examined. He relied on Smith v. Babcock, 9 P. R. 97, and Lick v. Rivers, 1 O. L. R. 57. I think, however, that I must follow the decision in Lefurgey v. Great West Land Co., 7 O. W. R. 738, 11 O. L. R. 617.

From a perusal of the material, it would seem that the amount involved is not very large. As one of the deponents lives in Pennsylvania, another in Illinois, and a third in California, cross-examination will prove relatively very costly, if taken.

It does not appear that any relevant facts are in dispute. The only question to be determined is, was the action reasonable and justifiable when brought? Is not this rather a question of law than of fact?

It would seem to be to the interests of both parties that the motion should be decided without additional expense, if possible.

TEETZEL, J. APRIL 26TH, 1909.

CHAMBERS.

EVANS v. DOMINION BANK.

Security for Costs—Plaintiff out of Jurisdiction—Property in Jurisdiction—Sum of Money Claimed in Action—Defence on Merits—Practice.

Appeal by plaintiff from order of Master in Chambers requiring plaintiff to give security for costs.

F. J. Roche, for plaintiff.

W. B. Milliken, for defendants.

TEETZEL, J.:—Plaintiff resided in Ontario when the action was begun, but, after statement of claim and before defence served, he removed to the city of Baltimore, in the State of Maryland, which is now his permanent residence.

The ground chiefly relied on by Mr. Roche in support of the appeal was that, upon the examinations for discovery filed with the Master, it sufficiently appeared that the defendants had in their possession $600 belonging to the plaintiff, which would be more than sufficient to satisfy any costs to which defendants might be held entitled.

The action is to recover this $600, and the defendants are denying liability, alleging that the money in question was, with plaintiff's consent, deposited by his solicitor to the credit of the solicitor's account, and was drawn out by the solicitor in the ordinary course of business, without any notice to the defendants that the solicitor had not plaintiff's authority to do so.

A careful perusal of the examinations for discovery fails to satisfy me that there is no defence to the action upon the merits; therefore, I think the case is not brought within the authorities cited by Mr. Roche.

The plaintiff residing beyond the jurisdiction of the Court, and not having clearly established that he has property in Ontario, in the defendants' hands or elsewhere, which would be available to meet the costs that might be awarded against him, the defendants are entitled to security according to the well-settled practice of the Court.

Appeal dismissed with costs to the defendants in any event.

TEETZEL, J. APRIL 26TH, 1909.

CHAMBERS.

RE LAKE ONTARIO NAVIGATION CO.

DAVIS'S CASE.

Company — Winding-up — Contributory — Subscription for Shares—Payment of 10 Per Cent. of Value—Allotment —Condition that no Further Call be Made—Powers of Directors — Illegal Condition — Ontario Companies Act— Right to Repudiate—Estoppel—Cheque Given for Purchase Money—Voting on Shares by Proxy—Election to Become Member of Company.

Application by the liquidator of the company in winding-up proceedings to place William E. Davis on the list of contributories in respect of $13,000 stock in the insolvent company. The winding-up order was made by TEETZEL, J., and subsequent proceedings were had before him.

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

J. H. Moss, K.C., for majority shareholders.

I. F. Hellmuth, K.C., for minority shareholders.

F. J. Dunbar, for Davis.

TEETZEL, J.:—Davis was a friend of F. T. Hutchinson, who was president of the company. On or about 2nd February, 1907, he was solicited by Hutchinson to apply to the company for 130 shares of $100 each, on which Hutchinson said 10 per cent. had been paid, and which, he represented, could be purchased on payment of an additional 10 per cent., with no further liability for calls; and on that day Davis signed and forwarded to the company an application in the following words:—

"To the Lake Ontario Navigation Company, Limited.

"I hereby apply for the sale or issue to me of 130 shares of the capital stock of your company, upon which there has been paid 10 per cent. of the par value thereof, and agree to pay therefor the sum of $1,300.

"I apply for these shares on the condition that no further call be made thereon.

"Dated this 2nd day of February, 1907."

At a meeting of the directors, on the same day, a resolution was passed accepting the application in the following words:—

"Moved by Mr. Hazlett, seconded by Mr. Rutherford, that the application of Mr. W. E. Davis for 130 shares of the 10 per cent. stock of the company (being the stock upon which has been paid only 10 per cent.) be accepted, and that the said shares be and the same are hereby allotted and issued to him, for and in consideration of the sum of $1,300, to be paid upon demand, and that a certificate be forthwith issued to the said W. E. Davis."

Then follows this entry in the minutes: "The said shares were allotted and issued on the condition that no further call would be made thereon."

Davis was notified by Hutchinson of the acceptance of his application. On 11th February, 1907, Davis sent his cheque to the company for $1,300, and also gave to a shareholder a proxy to vote on the shares allotted to him, which proxy was exercised at the shareholders' meeting that day on the election of directors.

Some dispute arose at the meeting in regard to Davis's stock, and, on this being reported to Davis by Hutchinson, Davis decided to have nothing further to do with it, and he telephoned the bank to stop payment of the cheque. The evidence establishes that Hutchinson concurred in the payment of the cheque being stopped, and that he instructed the company's secretary not to present it for payment.

There is no minute of any subsequent meeting of the directors, and nothing further was ever done by Davis in the way of repudiation.

The winding-up order was made on 14th May, 1907.

Davis's name is entered on the company's register of transfers as the holder of 130 shares, as of 9th February, 1907, and there is with the company's papers a certificate, which was never delivered to Davis, signed by the president and secretary, dated 9th February, 1907, certifying that Davis is the owner of 130 shares of the company's stock, but not stating that they are fully paid, or not subject to call.

The questions for determination are: first, whether the condition attached to this application, not being within the power of the directors to legally comply with, though in form they purported to do so, affords any answer to the

motion to place him on the list of contributories; and, second, whether by subsequent conduct he is estopped from relying on that defence.

No questions of company law are more clearly settled than that a company organised under the Ontario Companies Act cannot issue shares at a discount, and that prima facie, in a winding-up proceeding, the holders of shares are liable for the full amount unpaid on shares issued to them, notwithstanding that they may have been issued as paid-up, if in fact they were not paid-up. See In re Almada and Territo Co., 38 Ch. D. 415; In re Ooregam Gold Mining Co., [1892] A. C. 125; In re Welton and Saffery, [1897] A. C. 299; Ex p. Walton, [1895] 1 Ch. 255; In re Wiarton Beet Sugar Co., McNeil's Case, 10 O. L. R. 219, 5 O. W. R. 637.

Unless, therefore, it can be held that the condition contained in the application, that no further call should be made on the shares in question, brings the case within such authorities as In re Richmond Hotel Co., Pellat's Case, L. R. 2 Ch. 528, and In re Standard Fire Insurance Co., Turner's Case, 7 O. R. 459, Davis cannot, in any event, escape liability.

So far as allotment was concerned, the directors in fact, although not in law, literally complied with the condition, though the certificate which was signed, but not delivered, did not in terms comply with the condition. There is no doubt that all parties intended that there should be no further liability for calls, but they misapprehended the law on the question. In an action by the company to compel Davis to take the shares, he would have had a perfect defence, on the ground that the application for shares was subject to a condition precedent which the company were not capable of observing, and therefore, for the want of mutuality, the application, though in terms accepted by the company, was not enforceable against the applicant; in other words, the company could not disregard the condition and force upon the applicant something he did not ask for.

The point of the decision in Pellat's Case, supra, was that Pellat was not a contributory, for that he had only agreed to take the shares upon the conditions of the special agreement as to set-off, which, if ultra vires of the company, was not binding on the company, and therefore for want of mutuality not binding on Pellat; and, if intra vires, was still not enforceable against Pellat, because the

stipulations on the part of the company had become incapable of being performed.

Unless, therefore, the conduct of Davis, after sending in his application, was such as to estop him from disputing his liability as a shareholder, or to establish an agreement with the compny to hold the shares subject to the liability imposed by law, he is entitled to succeed.

Mr. Masten, for the liquidator, relied chiefly on In re Railway Time Tables Publishing Co., Ex p. Sandys, 2 Ch. D. 98. In that case the Court of Appeal held, in allowing the appeal, that, although the contract under which the respondent took the shares could not have been enforced against her, she having, with knowledge that her name was on the register as holder of the shares, dealt with them as if she had been a member of the company in respect of them, had assented to keep them, and was liable, under the 25th section of the Companies Act, 1867, to pay the whole amount of them in cash, notwithstanding her misapprehension of the legal effect of the contract she had originally entered into. Bowen, L.J., at p 117, says: "The question is, whether the respondent, whose name is upon the register, has agreed to become a member. The original contract under which she applied for shares was not one that, as long as it rested in fieri, could have been enforced. She applied for shares to be given to her, coupled with a condition which the law would not recognise, and the company had no right, disregarding the condition, to force upon her something which she had not asked for. If the case stood there, there would have been an end of the matter. The original contract was not one which could have been enforced, and in giving her the shares without attaching the condition to them, which she made a portion of her offer, the company were not giving her what she asked for. But the matter does not rest there, and this is just the point of the case. After her name was placed on the register, and after she knew that her name was on the register, she did certain acts which were only consistent with an intention on her part to be treated as a member of the company, and to treat herself as a member of the company, in respect of these particular shares which had been so appropriated to her. If that is not evidence of an agreement to be a member, I really do not know what is."

Now, can it be said that what was done in this case by Davis was only consistent with an intention on his part to be treated as a member of the company? Beyond sending his cheque in payment, the only act he did in support of this view was giving a proxy to a shareholder to vote on the shares which had been appropriated to him. So far as it appears, both Hutchinson and Davis were honestly ignorant of the law which made it impossible to allot the shares in the terms of the application. For the purposes of the motion, Davis must be presumed to have known the law and not to have been fraudulently deceived by Hutchinson. Everything was done by the company to make Davis a member, and, having been advised by Hutchinson of the fact, he gave a proxy to vote on the shares for him and gave his cheque for the purchase price. The shares were voted on at the election of directors, and it was stated by counsel that one result of voting on his shares was to elect a board favourable to Hutchinson and opposed to the view of shareholders who, but for the Davis shares, were in a majority.

Now, in the light of Pellat's Case and the Sandys case, supra, the moment he heard of the allotment he might have successfully repudiated the contract and been relieved from obligation to carry it out. He does not do this, but, with full knowledge of the facts, though ignorant of his legal rights, he treated himself as a shareholder by giving the proxy to vote on these shares.

To paraphrase the language of Bowen, L.J., supra, I think his action after notice of the allotment was only consistent with an intenion on his part to be treated as a member of the company and to treat himself as a member of the company in respect of these shares which had been appropriated to him.

It is not necessary to find that he expressly agreed to accept the shares subject to liability to calls, because once he is in a position as a member of the company there is a statutory liability under sec. 68 of the Ontario Companies Act, 7 Edw. VII. ch. 34, and sec. 51 of the Dominion Winding-up Act, R. S. C. 1906 ch. 144, to contribute the amount unpaid on his shares.

As to the effect of voting on shares, see Hindley's Case, [1896] 2 Ch. 121; Sharpley v. Louth, 2 Ch. D. 663; and Hutchinson's Case, [1895] 1 Ch. 226.

It is correctly stated by Mr. Lindley in his Law of Companies, 6th ed., p. 1079, that "few questions present more difficulty than those which arise when a person who has agreed to take paid-up shares is sought to be put on the list in respect of shares not paid-up. He naturally desires to repudiate them, but he seldom can do so unless the matter rests merely in agreement;" and in the subsequent pages he collects all the authorities bearing upon this difficult question.

While the matter rested merely in agreement between the company and Davis, he could not have been placed on the list of contributories, but I think, on the authority of the Sandys case (supra), that what he did was an election by him to treat himself and to be treated as a member of the company, and he cannot now, as against the liquidator, be relieved from statutory liability.

I direct, therefore, that his name be placed upon the list of contributories for 130 shares, upon which 10 per cent. only has been paid, with the costs of the motion.

TEETZEL, J. APRIL 26TH, 1909.

CHAMBERS.

RE LAKE ONTARIO NAVIGATION CO.

HUTCHINSON'S CASE.

Company — Winding-up—Director—Misfeasance—Dominion Winding-up Act, sec. 123—Arrangement with Subscriber for Shares to Stop Payment of Cheque given for Shares—Money Loss to Company—Liability of Director for.

Application by certain shareholders of the company, in winding-up proceedings, under sec. 123 of the Dominion Winding-up Act, for an order requiring one Hutchinson, a director of the company, to pay to the liquidator $1,300 and interest, because of misfeasance in office in regard to a cheque for $1,300 which one Davis sent to the company in payment of his shares, as set forth in Davis's Case, ante.

J. H. Moss, K.C., for the shareholders applying.

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

I. F. Hellmuth, K.C., for Hutchinson.

TEETZEL, J.:—It is quite clear upon the evidence that, but for Hutchinson reporting to Davis the dispute at the meeting in regard to Davis's shares, Davis would not have stopped payment of the cheque; and I also find upon the evidence that Hutchinson agreed with Davis that the best thing for him to do was to stop payment of the cheque, and later instructed the company's secretary not to present it for payment or collect it. I find, further, that Davis was good for the amount of the cheque, and that he had made provision at his bank for meeting it on or about 18th February, 1907, and that but for Hutchinson's intervention it would have been paid.

Hutchinson's conduct in the matter was, in my opinion, an active breach of duty—in other words, misfeasance within the meaning of sec. 123—in relation to the company of which he was president, which resulted in the company losing $1,300.

The law in regard to the general duty of a director is, I think, correctly stated at p. 197 of Messrs. Parker & Clark's valuable book on Company Law, upon the authorities there cited by them, as follows: "It is quite clear that the duty of a director makes it incumbent on him to give his whole ability, business knowledge, exertion, and attention to the best interests of the shareholders who place him in that position where these interests are involved, and it is incumbent upon him to assume no part which will be inconsistent with the proper, free, and independent discharge of his duties in that respect."

In In re Forest of Dean Coal Mining Co., 10 Ch. D. at p. 453, Jessel, M.R., says: "They (the directors) are no doubt trustees of assets which have come to their hands or which are under their control, but they are not trustees of a debt due to the company."

In Spackman v. Evans, L. R. 3 H. L. 171, Lord Cranworth, at p. 186, says: "The duty of the directors, when a call is made, is to compel every shareholder to pay the company the amount due from him in respect of that call, and they are guilty of a breach of their duty to the company if they do not take all reasonable means for enforcing that payment."

I therefore order that Hutchinson pay to the liquidator $1,300, with interest at 5 per cent. from 18th February, 1907, and costs of the motion.

RIDDELL, J. APRIL 26TH, 1909.

CHAMBERS.

REX v. MECEKLETTE.

Criminal Law—Conviction of Foreigner for Offence against Morals—Valid Conviction and Warrant of Commitment—Habeas Corpus—Right to go behind Conviction and Review Evidence before Magistrate — Prisoner not Understanding Proceedings before Magistrate — Interpreter — Capacity—Question for Magistrate.

Motion for the discharge of a prisoner upon the return to a writ of habeas corpus granted by TEETZEL, J.

T. C. Robinette, K.C., for the prisoner.

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

RIDDELL, J.:—The return is admittedly good upon its face, shewing a warrant of commitment which recites the conviction of the defendant for unlawfully committing an act of indecency in a public place.

But I am asked to act upon certain affidavits intended to shew that the defendant, not understanding English, did not know that he was on trial, and did not understand the evidence given. An interpreter was sworn to interpret, and he says that he understands and speaks Italian, that he interpreted and explained the charge to the defendant, that the defendant pleaded "not guilty," and that he (the interpreter) has no doubt that the defendant thoroughly understood all about the trial and the evidence given. A policeman also swears that he, upon arresting the defendant, had a conversation with him for about 10 minutes, that the defendant spoke fairly good English, and that he (the policeman) understood practically all the defendant said, and that the defendant answered intelligently questions put to him in English.

For the defendant it is set up that he comes from the north of Italy, and the interpreter is a Sicilian, who does not understand or speak Italian.

Upon a motion to discharge upon the return of a writ of habeas corpus, care should be taken not to conduct the proceedings as though they were an appeal from the magis-

trate's findings; the most that can be done is to see if there is evidence upon which the magistrate could pass and find as he has done: Rex v. Farrell, 15 O. L. R. 100, 10 O. W. R. 790.

I do not decide that even this can be done under a habeas corpus in a criminal case such as this is. But, if such an inquiry can be made, it can go no further. Here there is ample evidence to support the conviction.

All questions as to admissibility of evidence, method of conducting examinations, etc., are considered as in the power of the trial tribunal; and such questions cannot be raised upon applications of this character: Rex v. Graf, ante 943.

Were it open to me to consider all the allegations in the affidavits, I should unhesitatingly believe the interpreter's statements. I am convinced that the defendant had a fair trial. There is, moreover, much to be said in favour of the view that there is no inherent right in any alien that the proceedings taken in our Courts shall be made wholly intelligible to him, even though he should be charged with crime. It might be impossible, within a reasonable time, and at a reasonable expense, to procure a person who could explain the proceedings to a foreign defendant. The cases in which a contrary doctrine is laid down are all upon some statutory or constitutional provision. For example, in Rex v. Ah Har, 7 Haw. 319, a case in Hawaii, it was held that the accused must in some way be made acquainted with the evidence of the witnesses, and that, if he have no counsel, the testimony, if in a language foreign to him, must be interpreted to him. But the Constitution of Hawaii provided, sec. 7, that an accused person should have the right to meet the witnesses produced against him face to face, and that he might, by himself or his counsel, at his election, examine the witnesses. The Court held that sec. 7 is not complied with unless the accused is in some way made to understand the evidence, in order to enable him to avail himself of his further expressed constitutional right of cross-examining the witnesses and of meeting their evidence by his own proofs.

So, after a change in the form of government, the same rule was approved in 1899 in the case of The Republic of Hawaii v. Yamane, 12 Haw. 189.

The case of Commonwealth v. Lenousky, 206 Pa. St. 277, is not in point—the gist of that case being that certain evidence, which admittedly could not be received unless cross-examination had been had or waived, was not rendered admissible upon the ground of waiver by the fact that the prisoner had been present, had had an opportunity of cross-examining, and had not cross-examined. "This opportunity amounted to nothing. The prisoner was a foreigner, acquainted with the language of the witness, but not with that in which the proceedings were conducted, and ignorant of their nature and of his rights under them. There could be no waiver without knowledge, and the circumstances all indicate that the prisoner did not know of his right." Whether this decision is unsound, as intimated in Wigmore on Evidence, sec. 1393, n. 3, is unnecessary to inquire. The case is not helpful.

I am not prepared to assent to the doctrine of the Hawaii cases as applicable to our Courts, and I do not find any authority tending to that conclusion, and, in any case, the capacity of the interpreter is a question for the magistrate. All matters connected with the interpretation of evidence, etc., are for him, and his finding cannot be attacked in this way.

The present disposition of the matter will not, of course, interfere with any proceedings by way of appeal.

The motion will be refused.

APRIL 26TH, 1909.

DIVISIONAL COURT.

FARMERS BANK v. BLOW.

Banks and Banking — Subscription for Shares in Bank — Condition as to Opening Branch in Village—Fulfilment—Failure to Maintain—Oral Promise of Agent—Agreement as to Payment for Shares — Bank Act, secs. 37, 38 — Powers of Directors — Times of Payment.

Appeal by defendant from judgment of County Court of Oxford, dated 19th December, 1908, after the trial without a jury on the 10th of the same month before COLTER, County Court Judge, sitting for the Judge of that Court.

The action was brought to recover from the defendant the amount alleged to be due by him in respect of two shares of $100 each of the capital stock of the plaintiffs, for which the defendant was alleged to have subscribed at 25 per cent. premium, and to have agreed to pay up as follows: $12.50 per share when the plaintiffs should open for business at Springford, $12.50 per share "upon allotment and transfer" of the shares, and $10 per share per month for 10 months, commencing 30 days after allotment, and continuing at intervals of 30 days thereafter, until the whole should be paid.

C. Millar, for defendant.

L. F. Heyd, K.C., for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The shares were allotted to defendant on 20th November, 1907, and notice of the allotment was given to him on the same day.

The plaintiffs opened for business a branch bank at Springford on 12th November, 1907.

Two questions were raised by the defendant at the trial and on the argument before us: (1) that his subscription for the shares was conditional on the plaintiffs opening, carrying on, and maintaining a branch of their bank at Springford; (2) that the plaintiffs had no authority or power to accept a subscription for shares on the terms as to payment to which I have referred.

The defendant's agreement to subscribe for the two shares is in writing, and by it he agreed to subscribe for two shares of the capital stock of the plaintiffs of the par value of $100 each, at a premium of $25 per share, "on the strength of the said bank agreeing to open a branch at Springford," and to pay for the shares by the instalments and in the manner already mentioned.

According to the findings of the learned County Court Judge, the plaintiffs opened a branch of their bank at Springford about 15th November, 1907, and closed it about the end of April following, after a fair trial, with the result that sufficient business was not offered to enable the branch to be carried on except at a loss; and these findings are fully warranted by the evidence.

An attempt was made by the defendant to shew that he subscribed for the shares on the verbal promise of one Lindsay, who solicited and obtained his subscription, that a branch of the bank would not only be opened, but be maintained at Springford.

This was contradicted by Lindsay, and it is impossible, therefore, to find, and the learned Judge did not find, that the alleged promise was made.

As the learned Judge points out, the defendant is seeking to vary by parol the written agreement which he entered into, and evidence of the verbal promise was not therefore admissible. It was, moreover, if made, and binding on the plaintiffs, not a condition precedent, but a promise, the breach of which would not entitle the defendant to repudiate his subscription, but for which an action for damages would be his appropriate remedy.

The other question depends upon the effect to be given to secs. 37 and 38 of the Bank Act, R. S. C. 1906 ch. 29.

Sub-section 1 of sec. 37 is as follows: "(1) The shares of the capital stock shall be paid in by such instalments and at such times and places as the directors appoint." And sec. 38 is as follows: "38. The directors may make such calls of money from the several shareholders for the time being, upon the shares subscribed for by them respectively, as they find necessary. 2. Such calls shall be made at intervals of not less than 30 days. 3. Notice of any such call shall be given at least 30 days prior to the day on which the call is payable. 4. No such call shall exceed 10 per centum of each share subscribed."

It was argued by the learned counsel for the defendant that the mode provided for by these sections was the only one authorised, and that such an agreement for paying in the shares as was made with the defendant was ultra vires, and the subscription, therefore, not binding on the defendant.

In our opinion, there is nothing in either of these provisions which prevents the directors of a bank from agreeing with a shareholder as to the manner in which his shares shall be paid in—at all events when the times for payment agreed on are such as the directors might fix, if there were no agreement as to it, under sec. 38.

It was so decided by my brother MacMahon in Port Hope Brewing and Malting Co. v. Cavanagh, 8 O. W. R. 985, and

his decision is in accordance with the jurisprudence of several of the States of the neighbouring Union: New Albany and Salem R. R. Co. v. Pickens, 5 Ind. 247; Ross v. Lafayette and Indianapolis R. R. Co., 6 Ind. 297; Breedlove v. Martinsville and Franklin R. R. Co., 12 Ind. 114; Estell v. Knightstown and Middletown Turnpike Co., 41 Ind. 174; Waukon and Mississippi R. Co. v. Dwyer, 49 Iowa 121; Ruse v. Bromberg, 88 Ala. 610; Williams v. Taylor, 99 Md. 307; Cook on Corporations, 6th ed., sec. 106.

The appeal, in our opinion, fails, and must be dismissed with costs.

LATCHFORD, J. APRIL 27TH, 1909.

TRIAL.

THORPE v. TISDALE.

Company—Shares — Powers of Directors — By-laws — Companies—Directors Allotting Shares to themselves in Payment for Services—No Confirmation by Shareholders—Control of Company—Proxies—Illegal Scheme—Injunction.

Action by William A. Thorpe, on behalf of himself and all other shareholders of the Ruethel Mining Company of Windsor, Ontario, against Edward J. Tisdale and 4 other directors of such company, and against the company, for a declaration as to the issue of certain shares, and for an injunction and other relief.

A. H. Clarke, K.C., for plaintiffs.

A. St. G. Ellis, Windsor, for defendants.

LATCHFORD, J.:—The affairs of this company have been litigated in the suits of Ruethel v. Thorpe, 9 O. W. R. 942, 10 O. W. R. 222, and Beaudry v. Read, 10 O. W. R. 622.

In the latter case the effect was considered of an issue of shares made at a meeting of the shareholders held on 5th June, 1907. The issue to Hovey of 1,400 shares and to McPhail of 2,000 shares was regarded as valid, and was not interfered with by the Court; but the Court declined to confirm the issue of stock to the defendants Tisdale, Newcombe, Read, Wolst, and Munsell. The action as against Reece was dismissed. Reece held at the time 2,500 shares. His hold-

ings were afterwards increased by the individual defendants to 4,000.

The judgment in Beaudry v. Read was delivered on 21st October, 1907. A meeting of the directors was convened on 2nd November. While the company are described as of Windsor, and have property near Haileybury, their business office is in Detroit, Michigan; and in Detroit, where all the parties reside, the meetings, other than general meetings of the shareholders, were held. At the meeting on 2nd November, upon motion of Newcombe, seconded by Wolst, a resolution was adopted that sec. 13 of the company's by-laws be repealed, and the following substituted in its stead: "That the directors shall hold office for one year, and until their successors shall be elected." Section 13 of the by-laws contained the substituted clause, and further provided that shareholders holding a majority of the stock represented at any special general meeting should have power to declare the office of any directors vacant and to elect a successor to fill the office of the director so removed.

The meeting of 2nd November was adjourned to 7th November, when there were present the defendants Tisdale, Newcombe, Read, and Wolst. A motion passed 6th March, 1906, that 5,000 shares be sold at 60 per cent. of par value, was unanimously rescinded as to the unsold balance of such shares. A resolution was also adopted on motion of Wolst, seconded by Newcombe, that the "present board of directors" be allowed and paid $5 a meeting for attendance at the meetings of the board since the organisation of the company, "and in accordance with sec. 15 of the by-laws of the company." This section provides that the directors, by resolution of the board, may be allowed $5 for attendance at a regular special meeting of the board, "if present at roll call and until adjournment, unless excused."

The resolution was intended to mean that only the directors present at the meeting of 7th November should be paid for attendance at board meetings. One Reece and the defendant Munsell were at the time directors, but were not in attendance at this meeting. On motion of Tisdale and Wolst, accounts of Newcombe for $900 for services as treasurer and serving on committees, and for $200 for attendance at 40 meetings, were allowed, and ordered to be paid; Newcombe not voting. On motion of Tisdale and Newcombe, an account of Wolst for attendance at 31 meetings was allowed

and ordered to be paid; Wolst not voting. On motion of Tisdale and Wolst, an account of Read, $145, for attendance at 29 meetings, was allowed and ordered to be paid; Read not voting. On motion of Wolst and Newcombe, 3 accounts of Tisdale were allowed and ordered to be paid; Tisdale not voting. The first account was for $155, for attendance at 31 meetings; the second, for $600 for services as secretary from April, 1906, to 7th November, 1907; and the third for $1,500, for legal services. The bills are not itemised.

In contemplation of the issue of stock in payment of their accounts, the 4 directors, Newcombe, Wolst, Read, and Tisdale, then unanimously adopted a resolution that 15,000 shares of the capital stock of the company be placed on the market for sale at a 70 per cent. discount from par value. The shares are "fully paid up and non-assessable." Mr. Tisdale swears that the bills or accounts so allowed were presented at that meeting or the meeting of 2nd November.

At a meeting of the directors held on 11th November, on motion of Tisdale and Wolst, the bill of George J. Munsell, amounting to $140, for attending 28 directors' meetings, was allowed, as rendered, and ordered to be paid; Munsell not voting. Munsell's account is dated at Detroit, 11th November, 1907. Tisdale's account for attendance at directors' meetings is dated 7th November, but his account for legal services to 5th June, 1907, $1,500, and that for services as secretary to 7th November, 1907, both bear date 11th November. The accounts of Newcombe, Read, and Wolst all bear date 7th November.

When asked to explain how two of his bills, sworn to have been produced at the board meetings on 2nd November, or 7th November, were dated 11th November, Mr. Tisdale said: "It may be a mistake in the date. Perhaps the bill was not dated. I cannot recall those little things. The bills were there, and the services had been performed, whether they were rendered on the 11th or the 7th."

I think Mr. Tisdale was mistaken in saying that any bill of his other than that dated 7th November for attendance at 31 meetings, $155, and interest $1, was before the directors prior to the 11th. His bills for services, otherwise than as director, were allowed before they were rendered. Munsell's bill, like two of Tisdale's, was submitted on 11th November, and, as stated, then allowed.

On 12th November certificates were issued to Tisdale for 7,660 shares; to Newcombe for 4,130; to Read for 860; to Wolst for 680; and to Munsell for 460—in all for 13,790 shares. This issue at 30 cents per share was intended to be in payment of accounts rendered by the 5 directors, and of certain cash advances said to have been made to the company. These appear to be as follows: Read, $113; Newcombe, $137; Wolst, $50; and Tisdale, $42. No bills were rendered for these sums, but Mr. Tisdale stated that the amounts mentioned had been actually advanced, and were entered in the books of the company.

When the shares were issued by the individual defendants to each other, they expected, according to Tisdale, to have the issue confirmed at the next shareholders' meeting; but in the meantime the plaintiff began the present action, and obtained an injunction restraining the defendants Tisdale, Newcombe, Read, Wolst, and Munsell from disposing of or voting upon the 13,790 shares, and "from acting as directors of the company or confirming the issue of such shares, or issuing further shares to themselves, until further order of the Court." At the time this injunction issued, Tisdale and his co-defendants controlled the company by holding voting power on a majority of the issued stock, apart from the 13,790 shares issued on 12th November. But his control did not arise from their holding prior to that date. It was acquired by adding to such holdings the voting power of 4,000 shares issued to Reece. As will appear by reference to Beaudry v. Read, at p. 624, the 2,500 shares which had been issued to Reece in June, 1907, were issued on condition that he should not appeal from the judgment of Mr. Justice Anglin in Ruethel v. Thorpe. But Reece, who had previously purchased 1,000 shares, did appeal. Notwithstanding this, he was given a certificate for 4,000 shares by Tisdale on 6th January. Without a proxy to vote upon these 4,000 shares, the Tisdale party would not have had control. Tisdale obtained from Reece a proxy upon the 4,000 shares, irrevocable until after the annual meeting of 1909. I have no doubt it had been previously arranged that the 2,500 shares to which Reece was not entitled, as he had broken the condition upon which he was held entitled to them, and the 1,500 shares additional, were issued to him upon other conditions, which he did perform, namely, the giving to Tisdale of a proxy (irrevocable until the difficulties with Thorpe were ended)

and the transfer to Tisdale of 500 of such shares. Both these conditions were fulfilled. Tisdale's manner in giving evidence in regard to the transaction with Reece impelled me to the belief that his unsupported testimony is unworthy of credence.

To prevent the plaintiff from voting at the annual meeting, Tisdale and his associates obtained an interim injunction in the State of Michigan in an action brought there. This suit, however, failed, but at the date of the trial was said to be in appeal.

At the meeting on 7th November, attended by Tisdale, Newcombe, Wolst, and Read, the resolution to pay themselves, and not the absent directors Reece and Munsell, $5 for attendance at each meeting, was adopted unanimously. There is evidence of unanimity also in the allowance and payment of the accounts.

Tisdale, Newcome, and Wolst agreed that Read's account should be allowed and paid; Tisdale, Newcombe, and Read agreed that Wolst's account should be allowed and paid; Tisdale, Wolst, and Read agreed that Newcombe's account should be allowed and paid; and Newcombe, Wolst, and Read agreed that Tisdale's account should be allowed and paid. Each religiously abstained from voting when his own account was in question, and each, at the same time, with equal solicitude, was careful to provide that his own account should be paid. It is not in evidence that there was the slightest objection taken to the form or amounts of the large accounts submitted without details by Newcombe and Tisdale. Munsell did not come within the intent of the resolution that the $5 per meeting should be paid to those only who were present on the 7th; but, learning on the 11th of what had been done, he asserted his claim, and it was recognised as the others had been. There were no funds in hand to pay out, but there was stock, and that stock the 5 directors apportioned among themselves to the extent necessary to give them control of the company. The proxy subsequently obtained from Reece for the 1,500 shares given him, in addition to the 2,500 to which he had forfeited any right, was, I think, an afterthought. Without this proxy and apart from the stock issued on 11th or 12th November, Tisdale and his co-defendants would be in the minority. Tisdale admits that the issue to the defendants was for the purpose of obtaining control. The company had never earned any pro-

fits. It had no resources but its unissued stock, and for this there was no market. I regard the sale of 2,000 shares to one Baker of Detroit for $600, of which only $135 was paid, as made to assist Tisdale in securing control. No security, not even a promissory note, for the balance of $465 was given by Baker, but certificates for the 2,000 shares, expressed to be fully paid-up and non-assessable, were, nevertheless, promptly issued to him.

The issue to Baker and that to Reece are not attacked here.

There has been no confirmation by the shareholders of any of the acts of the defendant directors, as required by sec. 17 of the company's by-laws and sec. 88 of the Companies Act.

The plaintiff asks for a declaration that the stock issued on 11th or 12th November was illegally and fraudulently issued; that an order be made setting aside the proxy given by Reece; and restraining the defendants from acting as directors until a properly constituted meeting of the shareholders has been held; and for such other relief as may be proper.

Section 89 of the Companies Act, 7 Edw. VII. ch. 34, provides, inter alia, that "no directors of any company shall at any directors' meeting vote in respect of any contract or arrangement made . . . with the company in which he is interested, either as vendor or purchaser or otherwise."

I find that while Tisdale, Newcombe, Wolst, Read, and Munsell did not in fact each in person actually record his vote in respect of his own accounts, yet each did arrange with the others that he would vote for the allowance and payment of their accounts, if they would vote for the allowance and payment of his account. There is, it is true, no direct testimony to this effect, and Tisdale, the only witness called, might, if questioned, have denied any such arrangement. But he does say that they had a common purpose—the obtaining control of the company. There was undoubtedly an arrangement between all the defendant directors, promise for promise, actus contra actum, and each in fact by such arrangement did as effectively vote for the issue to himself of the shares in question as if he had openly declared that he voted in his own favour, and it was so recorded in the minutes. The whole issue of 13,790 shares on 11th or 12th November is thus vitiated, and should be

set aside. There will be judgment to that effect. The injunction granted will be made perpetual, and Tisdale and Newcombe will be restrained from using at any meeting of shareholders the proxy they have obtained from Read, and the proxy obtained from Baker, except in the latter case as regards the number of shares—450—which Baker has paid $135 for.

The defendant directors should pay the costs, including the costs of the orders of 22nd January and 30th January, 1908.

Reference to Re George Newman & Co., [1895] 1 Ch. 674, at p. 686; Birney v. Toronto Milk Co., 5 O. L. R. 1, 1 O. W. R. 736; and Re Publishers' Syndicate, Paton's Case, 5 O. L. R. 392, at p. 404, 2 O. W. R. 65.

MULOCK, C.J. APRIL 27TH, 1909.

TRIAL.

EUCLID AVENUE TRUSTS CO. v. HOHS.

Husband and Wife—Mortgage Given by Wife to Secure Debt of Husband—Wife Acting on Importunity of Husband and without Independent Advice—Interview with Solicitor for Husband—Evidence—Mortgage Void.

Action by mortgagees against Agnes Hohs and her husband Edgar Hohs, to recover possession of the mortgaged lands, situate in the city of Toronto.

M. H. Ludwig, for plaintiffs.

R. S. Robertson, Stratford, for defendants.

MULOCK, C.J.:—The plaintiffs are a company incorporated under the laws of the State of Ohio, one of the United States of America, and are empowered to carry on business in that State. The defendant had been residing in Toronto, but the husband, having become manager of a company called the Cleveland Colour Company, passed much of his time in the State of Ohio, where the business of the company was carried on. He had arranged to purchase from one Hatch his interest in the company, and, in connection with such purchase, desired to borrow from the plaintiffs $4,000.

Mrs. Hohs, his wife, owned the lands in question, and the plaintiffs agreed to advance to Mr. Hohs $4,000 if his wife would give collateral security therefor by a mortgage upon her property. Her husband endeavoured to induce her to do so; at first she was most reluctant; but ultimately yielded to her husband's importunities, and upon 23rd March, 1905, she joined with him in signing a promissory note for $4,000 in favour of the plaintiffs, and in executing a mortgage on the lands in question as collateral security for payment of the note.

The plaintiffs knew that the money was being borrowed by the husband for his own use, and that the wife was becoming surety for him. After these papers were signed, the plaintiffs paid to Mr. Hohs the full amount of the loan, namely, $4,000, and sent the mortgage to R. F. Segsworth, a solicitor practising in Toronto, for registration. Later on they learned from him that it had not been prepared in conformity with the Ontario Registry Act, and instructed him to prepare a new mortgage. This he did, sending it to Cleveland for execution. In the meantime Mrs. Hohs and her husband returned to Toronto. Mr. Hohs then called at Mr. Segsworth's office, and there executed the mortgage which he had in the meantime obtained. Subsequently Mrs. Hohs called at Mr. Segsworth's office, at her husband's request, and, in Segsworth's presence, also executed the mortgage. Throughout this mortgage transaction Mr. Segsworth was acting as solicitor for Mr. Hohs and the plaintiffs, but not for Mrs. Hohs, and she had no independent advice before becoming a party to the mortgage. She was examined before me, and gave her evidence frankly and honestly. She is a simple-minded, trusting woman, with no business experience, and, unaided, is unable to form a reasonably sound judgment in regard to business matters.

The following is an extract from her examination for discovery:—

"Q. In any event after you came back to Toronto you consulted your own solicitor, Mr. Segsworth? A. Yes.

"Q. And you told him what you were doing, giving a mortgage? A. Yes.

"Q. And you told him to draw up the mortgage? A. Yes.

"Q. To secure $4,000? A. Yes.

"Q. You told him you had given a note for $4,000 to the Euclid Avenue Trust Company, and you wanted to give a mortgage on your property in East Toronto as collateral security? A. I do not know.

"Q. I read to you a recital from the mortgage (reads same)—so that Mr. Segsworth, your solicitor, must have been told about the giving of the note before he could have drawn that mortgoge? Do you remember telling him about it? A. No; Mr. Hohs saw him; I did not come down until I came down to sign it; I did not have anything to do with the drawing of it; Mr. Hohs was acting all the time.

"Q. And you told him you were quite willing to give the mortgage? A. Yes, on the distinct understanding that it was merely to satisfy this Finance Committee and not to be taken advantage of in any way.

"Q. Did you say anything to your solicitor about these conditions? A. I suppose Mr. Hohs did when he saw him; I told you I said nothing whatever; I simply went there and signed the mortgage.

"Q. And said nothing at all about it? A. Not that I can recollect; I may have made a passing mention of it."

Mr. Segsworth was examined as a witness, and swore that he was not acting for Mrs. Hohs, and that he gave her no advice in the matter. His account of the execution of the mortgage by her is that her husband executed it first and left it with him, intimating that he would send Mrs. Hohs to execute it, and that Mrs. Hohs did call for that purpose, and not for advice as to whether or not it was prudent for her to enter into the transaction, and that she had no conversation in fact with Mr. Segsworth as to the wisdom of her course.

The evidence of the plaintiffs shews that they wrote Mr. Segsworth, instructing him to prepare the mortgage; that it was prepared by him without consultation with either Mr. Hohs or Mrs. Hohs, and was executed by Mrs. Hohs in manner above referred to, not as the result of deliberation on her part, or consultation with Segsworth, but at her husband's instance.

It appears that when the property in question was purchased, Segsworth had acted as Mrs. Hohs's solicitor, and this circumstance doubtless accounts for her referring to Segsworth as her solicitor. But, though he may have been her solicitor when she purchased the property, he was not

her solicitor in connection with the mortgage transaction. The plaintiffs were well aware of this fact, as their correspondence with Segsworth and Mr. Hohs shews. For instance, when it came to the payment of Mr. Segsworth's fees in the matter, Segsworth having sent an account to the plaintiffs, they insisted that, as Segsworth was acting for Mr. Hohs, the latter should pay Segsworth's costs, and this Mr. Hohs did. When Hohs himself proposed to the plaintiffs to obtain a mortgage from his wife, he put them in communication with Segsworth as his solicitor, not as Mrs. Hohs's solicitor, and, throughout, the plaintiffs regarded Segsworth as acting in Mr. Hohs's interests in securing the execution and registration of the mortgage.

But, even if Segsworth advised Mrs. Hohs—which he swears he did not—his was not independent advice, for he was acting for the husband. On this state of facts, the case falls within the principle laid down in Cox v. Adams, 35 S. C. R. 393, followed in Stuart v. Bank of Montreal, Supreme Court of Canada, 5th April, 1909. The wife having become surety for her husband without having had independent advice, the transaction is assumed to have been brought about by the husband's undue influence, and is therefore void; and this action must be dismissed with costs.

APRIL 27TH, 1909.

DIVISIONAL COURT.

PORTER v. PARKIN ELEVATOR CO.

Contract—Putting Elevator in Building—Time for Completion—Delay — Extension of Time — Novation — Accord and Satisfaction — Damages for Non-performance of Contract—Measure of.

Appeal by defendants from judgment of ANGLIN, J., in favour of plaintiff in an action for damages for non-performance of a contract.

M. A. Secord, Galt, for defendants.

W. D. Hogg, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., TEETZEL, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—The plaintiff was the proprietor of the Alexandra Hotel, Ottawa. On 9th September, 1907, he gave to the defendants an order, which was accepted, for a passenger elevator for the hotel, price $2,485, and according to certain specifications. The time for completion was fixed as at 1st November. Some delay took place, and on 3rd December, 1907, the defendants arranged with Mr. MacLaren, the plaintiff's architect, by giving a written guaranty, to have the elevator in complete and in proper running order within 10 working days after the arrival of certain guides; and agreeing to pay "$15 for each day after the time the elevator remains in incomple (sic) running order." At that time the defendants represented that the guides were on the way. The guides arrived about the middle of December. After a good many delays, the elevator was in and running towards the end of January.

I accept the finding of the trial Judge that the elevator never was complete, never was such as the plaintiff had a right to expect, and this from the default of the defendants. After many complaints, the parties agreed that a set of doors, differing from what had been agreed upon, should be put in, and this was done. These doors are satisfactory, but nothing else. Repairs were made from time to time, and complaints were frequent. The plaintiff never intended to accept the work unless and until it was satisfactory, and I agree with the trial Judge that he did nothing which would in law constitute an acceptance, though he did in fact use the elevator and pay certain amounts on account of the purchase price.

In August, 1908, it was plain that the elevator was defective, and an incident then occurred which, it is contended by the defendants, changed the relations of the parties.

On 28th July Thornton & Norman, who do certain work for the defendants in Ottawa, found the elevator in such a condition as that they would not guarantee its safety—did not consider it safe indeed—and it was accordingly closed. The defendants were communicated with; they sent a man down to Ottawa (their works are at Hespeler); he examined the elevator, and found a state of affairs which necessitated taking the elevator apart and taking certain of the pieces

away. The plaintiff knew this, and knew that MacLaren, his architect, had asked that this should be done. But, while this was in the course of being attended to, some bungling took place, which was the last straw which overloaded the plaintiff's endurance, and he then positively refused to have the elevator on any terms.

I think quite too much was made upon the argument of the plaintiff's acquiescence in another attempt on the part of the defendants to carry out their contract. I can find nothing more in what was done than what had been done before; and I am unable to see any novation or any accord and satisfaction of the original contract. No doubt, the defendants are encouraged to press this by reason of certain expressions of the learned trial Judge, Mr. Justice Anglin. I am, however, unable to see any waiver or anything which prevents the plaintiff asserting the claim he does in this action.

The present action is for damages for non-performance of the contract; it was tried at the Ottawa winter assizes, 1909, and resulted in a judgment for the plaintiff for $3,500 and costs. This sum was made up of $1,000 rent lost for the month of November, 1907, $1,000 rent lost for the month of August, 1908, $1,000 money paid on account by the plaintiff to the defendants, and $500, being part of the difference in price of a new elevator put in by the plaintiff and that which the defendants agreed to put in.

It seems to me, from the evidence of the plaintiff himself, that in December, when he was threatening to call the whole contract off, the former contract, so far as time is concerned, did go by the board, and both parties agreed to a new period for the performance of the contract by the defendants—that is "10 working days after the arrival in Ottawa of the cold drawn steel guides for the elevator" (exhibit 5). The guides arrived about the middle of December; and certainly by the end of December the elevator should have been fully installed and in good working order. The result is that the defendants contracted with the plaintiff to have the elevator in and in good working order. They failed to do so; and I can see no reason why they are not liable to pay damages. Their undertaking is to pay "$15 for each day after that time the elevator remains in 'incomple' (plainly 'incomplete') running order." There can be no doubt upon the findings of the trial Judge, with which,

justified as they are by the evidence, we should not interfere, that the elevator never was in anything else but incomplete running order.

The claim of the defendants that they were to have all the time they desired to put the elevator in complete working order, I think cannot be sustained. When it becomes apparent that the defendants were not going to get it in running order within a reasonable time, there was no obligation on the plaintiff to give further time and run further inconvenience and suffer further loss.

From the end of December to the 12th August is 225 days—at $15 per day the amount is $3,375. The other incidental damages, under all the circumstances, need not be invoked, because the amount paid must be repaid, and consequently the total sum assessed by the learned trial Judge is more than made up.

In this view it does not seem necessary to examine and analyse the items of damage given.

This is not a case for the application of the principle of Webb v. Roberts, 16 O. L. R. 279, 10 O. W. R. 962, 11 O. W. R. 639, and similar cases.

The appeal should be dismissed with costs.

APRIL 27TH, 1909.

DIVISIONAL COURT.

RE DENISON AND WRIGHT.

Liquor License Act—Application for License to Sell Intoxicating Liquors on Premises in Village—Creation of Village after Final Passing of Local Option By-law of Township of which Village Formed Part—Municipal Act, 1903, sec. 55—"By-laws in Force"—Prohibition of Local Option By-law not Actually Operative—Existing By-law.

Appeal by Mrs. Denison from an order of MULOCK, C.J., dated 19th March, 1909, dismissing her application for a mandamus to the respondents, who constituted the board of license commissioners for the license district of East Simcoe, requiring them to consider her application for a license to sell liquor on her premises in the village of

Coldwater, without reference to a by-law passed by the municipal council of the corporation of the township of Medonte on 25th January, 1908, prohibiting the sale of liquor in that township.

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

J. R. Cartwright, K.C., for the respondents.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—Coldwater was erected as a village by by-law of the county council of the county of Simcoe passed on 29th January, 1908, and was formed out of part of the township of Medonte.

The by-law of the township council to which reference has been made was provisionally adopted on 11th November, 1907, voted on by the electors on 6th January, 1908, and finally passed on 25th January, 1908.

The fifth section of the by-law is as follows: "5. This by-law shall come into operation and be of full force and effect on and after the first day of May next after the passing thereof."

Section 55 of the Consolidated Municipal Act, 1903, provides as follows: "55. In case a village is incorporated, or a village or town (with or without additional area) is erected into a town or city, or a township or county becomes separated, the by-laws in force therein respectively shall continue in force until repealed or altered by the council of the new corporation; but no such by-law shall be repealed or altered unless it could have been legally repealed or altered by the council which passed the same."

The authority under which the by-law in question was passed is sub-sec. 141 of the Liquor License Act, which enables the council of every township, city, town, and incorporated village, with the assent of the electors of the municipality, to pass by-laws for "prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any tavern, inn, or other house or place of public entertainment, and for prohibiting the sale thereof except by wholesale in shops and places other than houses of public entertainment."

By sub-sec. 2 of the same section it is provided that no by-law so passed shall be repealed by the council passing

the same until after the expiration of 3 years from the day of its coming into force, nor until a by-law for that purpose has been submitted to the electors and approved by them in the same manner as the original by-law.

Section 143 provides that "no tavern or shop license shall be issued or take effect within any municipality in which there is in force any by-law passed in pursuance of section 141 . . ."

The short question is, whether the by-law of Medonte was in force in that township when that part of it which now constitutes the village of Coldwater was erected as a village, within the meaning of sec. 55 of the Consolidated Municipal Act, 1903.

The learned Chief Justice of the Exchequer Division was of the opinion that it was, and I am of the same opinion.

The words "in force" are used in various parts of the statute law of this province, and not always, as I think, in the same sense, and the meaning to be attached to them must be gathered in each case by a consideration of the subject matter to which they relate.

In sub-sec. 2 of sec. 143, which I have quoted in part, they are used, I think, as meaning when the prohibition of the by-law came into operation.

So also in sub-sec. 2 of sec. 141 and in secs. 144, 145, 146, 149, 150, 152, 154, 155, 156, they appear to mean, while the prohibition of the Act or by-law referred to is in operation.

In all these cases the subject matter dealt with indicates that the words "in force" were intended to have the meaning I would give to them.

The words used in sec. 55 have not, I think, that meaning.

The by-law in question, though by its terms the prohibition of the 5th section was "to come into operation and be of full force and effect" only on and after the next first day of May, was, nevertheless, an existing law of the municipality, and could not be repealed even before that day, for the effect of sub-sec. 1 of sec. 141 is to prohibit the passing of any repealing by-law at any time after the passing of the by-law until 3 years from the day of its coming into force have elapsed.

The words "in force" in this section are used, I think, as meaning "having the force of law" or as being in existence, and, in my opinion, the by-law in question had the force of law from the time of its final passing, although its prohibition did not become operative until a later day, and it certainly was an existing by-law.

Section 56, which is in pari materia with sec. 55, deals with the case of an addition to the limits of a municipality, and its provision is that by-laws of the municipality are to extend to the additional limits and that the by-laws of the municipality from which the addition has been detached, are to "cease to apply to the addition, except only by-laws relating to roads and streets," and that "these shall remain in force until repealed by the council of the municipality to which the addition has been made."

It is plain that the words "remain in force" are used as the equivalent of "continue to apply."

The corresponding words in sec. 56 are "continue in force," but, though the form of expression is changed, the meaning is the same in both sections.

The expression "the by-laws in force therein" in sec. 55 means, I think, the existing by-laws of the municipality, and has the same effect as if the section had provided, as is done in sec. 56, that the by-laws of the municipality of which the new municipality formed part, or of which it was comprised, should continue in force or continue to apply to the new municipality until repealed or altered by the council of the new corporation.

It is, besides, most improbable, I think, that the legislature intended any such thing as, according to the contention of the appellant, the language it has used means, viz., that an existing by-law was not to affect the new municipality if the time for its coming into operation had not arrived when the new municipality came into existence.

I would dismiss the appeal with costs.

MEREDITH, C.J. JANUARY 7TH, 1909.

DIVISIONAL COURT. APRIL 27TH, 1909.

BREEN v. TORONTO GENERAL TRUSTS CORPORATION.

RE BREEN.

Lunatic—Committee of Estate—Moneys Advanced by Committee on Mortgage of Lunatic's Lands — Accounting—Expenditures Made in Improvement of Estate not Sanctioned by Court—Allowance for, on Taking Accounts—Costs of Accounting—Failure to Account Yearly as Ordered—Rule 766—Reference.

Appeals by defendants from two reports of J. S. Cartwright, K.C., an official referee; and cross-appeal by plaintiff from one of the reports.

The action was brought by the husband of Emily Breen, deceased, against the trusts corporation for an account of their dealings as mortgagees of lands of deceased. One report was made in that action, and the other in the matter of Emily Breen, a lunatic, the trusts corporation having been the committee of her estate.

The appeals and cross-appeal were heard by MEREDITH, C.J., in the Weekly Court, on 7th January, 1909.

J. H. Moss, K.C., for defendants.

J. D. Montgomery, for plaintiff.

MEREDITH, C.J. (at the conclusion of the argument):—There will be a reference back, both upon the appeals and the cross-appeal, with a declaration that the defendants are to be allowed for the expenditure upon the stable, if, upon the facts as found, a case is made which would have been sufficient to have obtained an order permitting the expenditure to be made had an application been made to the Court for authority to incur it, and that the fact that the committee did not pass their accounts annually is not alone sufficient ground for charging them with sums with which they would not otherwise have been chargeable, or for disallowing sums which they would have been otherwise entitled to have allowed to them, and that the order is not to prejudice the right, if any, of the defendants to claim that

they are not to be chargeable as committee, but as mortgagees in possession, in respect of their dealings with the property in question.

I think that, if it can be done without too much trouble, it would be desirable to have the accounts stated in both ways, that is, on the basis of an accounting as mortgagees in possession and an accounting as committee; because, if the Court should come to the conclusion that Mr. Moss's contention is right, and that his clients are chargeable only as mortgagees in possession, the case would be ripe for adjudication without the necessity of a reference back, if the accounts are taken on the basis of the defendants being liable as committee, and that is held to be the wrong basis.

I do not express any opinion upon the plaintiff's cross-appeal or any dissatisfaction with the finding which is complained against, because I have not considered it.

I will reserve the costs to be dealt with by a Judge in Chambers after the final disposition of the matter, that is, after the confirmation of the report or after the appeal is disposed of, if there is an appeal from the report.

Montgomery. I wish to reserve the right, if it comes up again, to urge that the principle just enunciated by your Lordship is wrong in the case of the committee of a lunatic, as to the improvements of the stable. I do not wish to appeal from the order now in that respect, and I thought I should otherwise be precluded.

MEREDITH, C.J.:—I suppose that you would be precluded unless you appeal.

Montgomery. I think your Lordship might make it a term.

MEREDITH, C.J.:—Would it not be better to have that determined now?

Montgomery. Then I would ask leave to appeal from that.

Moss. There is no objection to a reasonable stay if my learned friend wants it.

MEREDITH, C.J.:—I suppose it would be reasonable that the order should not issue for 10 days to allow Mr. Montgomery to appeal if he desires to do so.

Moss. It will have to be issued, but not to be taken into the Master's office.

MEREDITH, C.J.:—The committee exists for certain purposes. Why should not they make a formal application to the Court for an order nunc pro tunc allowing the expenditures objected to, for it may turn out that technically Mr. Cartwright is right—that he has not power to allow for them, because he is not a Judge of the Court. I will reserve, as far as I can, the right to the defendants to make such application to the Court as they may be advised in respect of these improvements.

The plaintiff appealed from the order of MEREDITH, C.J., to a Divisional Court.

The same counsel argued the appeal.

The judgment of the Court (BOYD, C., MAGEE, J., LATCHFORD, J.), was delivered by

BOYD, C.:—In re Brown (1849), 1 Macn. & G. 201, at p. 207, sanctions the form of inquiry which has been directed by the Chief Justice as to the expenditure in the erection of a driving shed. According to that case, the costs of such an inquiry, to some extent, if not altogether, fall upon the committee, who have acted without the intervention of the Court, and are, therefore, called upon afterwards to justify their course in onerating the estate. But in principle the direction complained of in appeal is right, and should be sustained. See also In re Churchhill (1839), 3 Jur. 719, to the same effect. This accords with the modern practice: Tempest v. Ord (1816), 2 Mer. 55.

In the circumstances of this case, it is perhaps better to have the Referee reconsider the question of the costs of accounting and other allowances, and not proceed upon the view that the mere failure to account yearly should ipso facto disentitle, in analogy to Rule 766. If there is a good excuse for not accounting yearly, as, e.g., the reasonable belief that the property had depreciated, or for some reason had become not worth what had been paid upon it by the trust company to clear it of the claims of mortgagees pressing for payment, and so a yearly accounting would be merely adding to the financial burden, that aspect may well be further considered by the official referee. Altogether,

I do not think the order in appeal should be disturbed, and the costs of appeal will be further dealt with on the final report upon the estate.

Personally I may say that, had there been no question to go back to the referee in regard to allowance for improvements, I should have been disinclined to disturb his ruling as to the costs of accounting, etc. See In re Clarke, 1 Ves. Jr. 156. I think the onus is still on the committee to satisfy the Referee that costs and other allowances should be given, and in how far they should be given, not withstanding the disregard of the order directing an annual passing of accounts.

MAGEE, J. APRIL 28TH, 1909.

TRIAL.

EVERIST v. GRAND TRUNK R. W. CO.

Railway — Destruction by Fire at Station of Goods Left for Carriage—Liability of Railway Company—Carriers—Warehouseman — Evidence — Request for Car to Ship Goods in—Contract — Implied Incorporation of Usual Shipping Terms—Exemption from Liability.

Action by a dealer in fruit to recover the value of a number of barrels of apples destroyed by fire while lying on the platform of defendants' railway station at Londesborough, which was accidentally burned on 10th November, 1907.

E. E. A. Du Vernet, K.C., and A. H. F. Lefroy, K.C., for plaintiff.

Wallace Nesbitt, K.C., and M. Lockhart Gordon, for defendants.

MAGEE, J.:—The plaintiff, by his agents, was in the habit of purchasing large quantities of apples from the farmers in various sections of the country. One Cantelon, who has been shipping apples for 20 years, acted as purchasing and shipping agent for him in the territory around Londesborough, which is a small country station, on one of the defendants' branch lines, and shipped from various stations in that section. The practice in 1907 appears to have

been the same as in previous years--the farmers from whom the fruit had been purchased would bring the barrels of apples to the defendants' stations, where they would accumulate until shipped. Cantelon, for the plaintiff, had made a private arrangement with Carlisle, the defendants' station master at Londesborough, to pay the farmers for the apples as delivered. It does not appear that this arrangement with Carlisle was known to the defendant company, or any of his superiors, or that, if known, it would have been objected to.

The apples so delivered were left, some on the open platform surrounding the station building, but in whole or part under the projecting roof, and some on the ground close by, within the defendants' station-yard, when not room for them on the platform. Cantelon says that Carlisle would see that they were properly piled by the farmers. The apples would be shipped "through different points," but were all consigned to "McWilliams & Everist," that being the firm name under which the plaintiff traded. Several shipments had been made during the season of 1907 from Londesborough by Cantelon. It was customary for the plaintiff's men to load the barrels on the defendants' cars when the cars could be had. The defendants' employees took and were to take no part therein. Before the car-load would be put in transit, the plaintiff's men occasionally stencilled or put some mark on each barrel. This was ordinarily done when loading the car. It was not usual to so mark any until they were about to be put in transit. The marking was entirely discretionary with the plaintiff and for his own purposes. Until those to be shipped were selected by his men and placed on the car for transmission, and the station agent so informed, the apples seem to have been wholly under the control of the plaintiff, and might have been disposed of or removed or shipped to various points, as he chose. The defendants would not know which barrels he wished to be shipped or to what point or to what consignee they were to be sent, until special instructions were given. Usually, so soon as a car could be furnished by the defendants, it would be loaded by the plaintiff's men from the apples at the station, if sufficient, or as soon as enough barrels to fill it were obtained, the plaintiff's men making their own selection of those to be forwarded. It was not usual to send less than a car-load at any time.

On Friday 8th November, 1907, out of a larger quantity of apples then at the station, Cantelon had loaded and dispatched two cars, the only ones then placed at his disposal by the railway company. When loading those two cars, there were quite a number of barrels beside the fence for which there had been no room on the platform. Some of these were loaded, and the balance brought over to and left on the platform by Cantelon and his men. When the two cars were completed, he and they "went to work and selected," he says, the apples for another shipment, and took the south and west sides of the platform and left the apples placed for loading another car.

After doing this, Cantelon went to the neighbouring town of Clinton—which has a station on the same line. Before leaving Londesborough, he says he counted up and knew he had "what you would call a minimum car, 146 barrels." He says 140 to 180 barrels can be loaded in the smallest cars. As he puts the total number of barrels eventually at the station as 228, and 82 of those came in afterwards, the 146 barrels must have been the total number at the station when he left. It does not clearly appear how many of them he had, as he says, selected for loading and shipment. Before leaving, he told Carlisle to count the apples he (Cantelon) had on hand, and that he was very anxious to get a car to load the next day, and also that the apples were for Toronto and for storing. Carlisle promised to do the best he could for him.

That Friday evening Carlisle was also at Clinton. Cantelon met him there, and told him—as was the fact—that he had seen at the Clinton station a loaded car on its way from Toronto to Londesborough, and he asked Carlisle if he could have that car to ship the apples from Londesborough to Toronto the next morning; Carlisle, without seeing the car or asking what company it belonged to, said that he could have it.

After Cantelon had left Londesborough that Friday, 48 more barrels were delivered at the station by farmers, for the plaintiff, but Cantelon only learned that afterwards, probably on Saturday. On Saturday 34 more barrels were delivered, making in all 228 barrels ready to be forwarded if the plaintiff so desired.

Early on Saturday morning Cantelon sent men to Londesborough station to load the car which he had seen at

Clinton, and which had been promised to him. It turned out that the car belonged, not to the defendants, but to another railway company. Carlisle had not been aware of that fact when at Clinton, and, under his general instructions from the defendants, he could not allow another company's car to be used without special authority, which would have to be obtained from the car superintendent at Toronto. He, therefore, refused to let Cantelon's men load the car. In consequence, although the men were ready to do so, and the apples were on the platform ready for shipment, no apples were placed upon it, and, there being no other car available, the apples remained where they were. It does not appear that any had been stencilled, marked, or otherwise selected from the whole number as those to be forwarded, beyond whatever selections had been made on Friday before Cantelon left. It may be remarked that, though thus refusing the car to Cantelon's men, it appears that Carlisle did in fact allow it to be used for another purpose, but whether under authority specially obtained, or otherwise, consistently with rules, does not appear. If the car had been obtained, it would have been consigned to the plaintiff at Toronto, and I take it that it would have been filled. Its capacity is not known.

On the following Sunday night the station building was burned—it is not shewn to have been through any negligence of the defendants. With it were destroyed the plaintiff's apples. He claims to be entitled to be recouped the loss of one car-load, which, it is here agreed, would be 165 barrels, and his valuation of $2.50 per barrel is not disputed. The statement of claim asked $450 for 180 barrels.

On previous shipments by Cantelon there had been given and received between the plaintiff's agent and the defendants' agent, a shipping order and shipping receipt, both on the defendant company's ordinary printed forms, which are used for all shippers. Both forms had the same "general terms and conditions of carriage" printed on the back, "all of which are agreed to . . . as a special contract in respect of said property." By the 2nd of these conditions, it is agreed that "the company shall not be responsible for or in respect of any goods carried or intended to be carried upon its railway unless receipted for by its duly authorised agent."

The 4th condition is not very clearly worded, but was treated by counsel as exempting the company from "damages occasioned by . . . fire," and not merely from damages occasioned by delay caused by fire. It is probably the same as that in Milloy v. Grand Trunk R. W. Co., 21 A. R. 404, referred to in the judgment of Rose, J., in that case, 23 O. R. at p. 463.

The 5th condition has a reference to non-responsibility for goods warehoused for the convenience of the parties by or to whom they are consigned, and the 9th condition to insufficiency of cars at any station, or inconvenience of using them, or inability to forward them. The 10th condition refers to warehousing being at the owner's risk and expense. The 18th condition refers to delay in loading the goods by the consignor, and the 19th to goods unloaded and stored on the company's premises being at the risk of the owner as to damage by fire. But these 5 conditions are only referred to now as shewing the general intention of the parties assenting to them to limit the liability of the company thereby.

These shipping notes and shipping receipts were not usually signed on either side until the car-load was made up and the barrels on board. Cantelon says it did not always happen that after the loading he got a shipping bill, which both signed, but it was the usual practice. No shipping order or bill was made out in this case.

It is conceded by the plaintiff that no case has been established for holding the defendants liable merely as warehousemen. But it is contended that they are liable as common carriers for damage by fire, and that a car-load was in fact in their charge as such, and that, although they might have been exempted from liability if the usual conditions had been signed, yet, as the company had not so limited their liability, and in fact did not ordinarily so limit it until the goods were actually loaded, the full common law responsibility exists.

The defendants, on the other hand, say they do not assume liability except as warehousemen, or as carriers upon the terms of their ordinary shipping receipts, and that those terms having been assented to in all their previous dealings with the plaintiff, must be taken to be those on which their liability as carriers should be regulated, and in either case they are not liable for the loss by fire. But, besides all

this, they say the goods had not come to their possession or control as carriers at all, but were still in the possession and control of the plaintiff.

It is, I think, clear that the fact of Carlisle having paid the vendors for the apples on behalf of the plaintiff, did not change the situation as between the plaintiff and the defendants, and that it remained the same as if the payment had been made by Cantelon. It is also clear that the 146 barrels left on hand on Friday were not left at the station on the faith of any car being appropriated or ready or available for them. So also the 48 barrels delivered on Friday were not left on that account. Neither does it appear that the 34 barrels were delivered on Saturday in consequence of the arrangement about the car on Friday, and indeed the inference is that they were not, as the 194 already at the station would more than fill the car, if the 180 barrels claimed for by the plaintiff in his pleading represents its capacity. I will assume that the station master had authority to undertake for the defendants the duties of carriers, whether he had authority to agree to furnish the other company's car or not.

The only distinction I can see between the facts in this case and those in Milloy v. Grand Trunk R. W. Co., 21 A. R. 404, is that in this case a particular car had been actually promised and withdrawn before anything further had been done, instead of a general promise, as in that case, of some car, although not expressly mentioned. It would seem from the judgment of Rose, J., 23 O. R. at p. 462, that there, as here, "the plaintiff, according to the ordinary custom, would have signed a shipping contract," exempting the company from damages occasioned by fire. The distinction I have referred to does not seem to me to make a difference. The plaintiff contends that, so soon as the car was promised, or at least so soon as it became available at Londesborough station, there was an agreement by the defendants to ship the apples by it, and then, if not before, they became invested with the character of carriers.

In delivering the judgment of the Court of Appeal in the Milloy case, Hagarty, C.J.O., said: "But surely until the plaintiff has selected the goods designed for the car, indicated those selected for transport, the goods were not in their hands as carriers. The plaintiff was not bound to ship a single barrel out of the 250 barrels. The defendant

company could not of their own motion have picked out a car-load or sent them to Toronto or elsewhere. If a number of barrels had been placed in the defendants' hands for immediate shipment, and had been received by the company to be at once forwarded to a named consignee, without further action or instruction from the plaintiff, we can understand the argument that the goods were held as carriers. But the whole case negatives any such assumption. The plaintiff had further to intervene before the company could in any way act as carriers."

That was the ground of the decision against the plaintiff in that case. I do not see that the facts here are any stronger in this plaintiff's favour. It is true that there were 146 barrels at the station when the car was promised, and that some, or perhaps even all, of these had been selected by the plaintiff's agent in his own mind, but there were no instructions to the defendants' agent that he was positively to carry those alone or those with others to be added. It was intended that whatever car was furnished should be filled. It could not be said that the plaintiff's agent had finally appropriated those particular barrels to be forwarded, and so indicated it that the defendants could have sent them without further instructions, or that he intended to restrict his selection on the following day when loading the car. It may be conceded that the custom of stencilling, and the fact of the plaintiff having to do the loading, do not affect his rights, as he was prepared to do both. The important point is, did he finally instruct the company as to any particular barrels that they were to forward them? I think he did not, and on that account that his action fails.

Were the fact otherwise, whatever might be the plaintiff's rights if he had not had previous dealings with the company, it would require strong authority to induce me to hold that during a period waiting the plaintiff's own convenience before presenting his shipping order, which both parties contemplated would be given and would govern their contract, he should be entitled to greater rights against the defendants as carriers than that shipping order would give him.

Since the argument I have been furnished with a copy of the judgment of Mr. Justice Meredith in the unreported case of Lumsden v. Canadian Pacific R. W. Co., in which he

said: "But, if the defendants are to be deemed to have received the goods as carriers, the action fails, because (2) the shipping bills given and accepted exempt the defendants from liability for loss occurring as this loss occurred as stated, and, for the reasons given in the McMorrin case, and if they are to be held to have in fact received the car-load as carriers, they must, I think, be held to have received them on the same, and their invariable and well known, terms and conditions, so as to be likewise exempt from liability."

Those remarks would apply to the present case, and with them I entirely concur. It had been sought to distinguish that case from this upon the ground that it was not usual for the company with this plaintiff to ask a shipping order or give a shipping receipt until the goods were on the car. It may be that the latter would not be given until they had been selected, which would be concurrent with the loading, but the shipping order would, in contemplation of both parties, be given at the very inception of the receipt of the goods as carriers, and would be in fact the instructions to receive for carriage, and the very reason it was not signed before loading was in all probability that until loaded the shipper had dominion over the goods. In view of the second condition and the previous dealings between the parties, the case of Detroit v. Michigan R. Co. and Adams, 15 Mich. 458, cited for the plaintiff, is rather an authority against him.

In a good many of the authorities to which I have been referred, the element of an exemption clause in the ordinary contract was wanting, and the question was merely when the duties and liabilities of a carrier commenced.

I must dismiss the action with costs.

I should add that the jury having been dispensed with by consent, at the suggestion of the defendants' counsel, and on the ground that Mr. Cantelon's evidence was practically unchallenged, any conclusions or inferences I have arrived at are not on account of questioning his statements of fact in any way, but, on the contrary, my view is that they should have full effect.

APRIL 28TH, 1909.

DIVISIONAL COURT.

CURRAH v. RAY.

Vendor and Purchaser—Contract for Sale of Land—Action for Specific Performance—Reference as to Title—Possessory Title of Vendor to Strip of Land Laid out as Lane upon Plan—Knowledge of Purchaser — Conveyances of Lands Adjoining Lane by Reference to Plan—Easement —Extinguishment—Statute of Limitations—Intention to Renounce Right — Evidence as to Notice — Effect of Notice.

Appeal by defendant from order of TEETZEL, J., ante 652.

J. H. Rodd, Windsor, for defendant.

A. H. Clarke, K.C., for plaintiff.

THE COURT (BOYD, C., MAGEE, J., LATCHFORD, J.), dismissed the appeal with costs.

BOYD, C. APRIL 29TH, 1909.

CHAMBERS.

RE MOFFATT.

Infant—Mortgage of Lands—Sanction of Court—Replacing Buildings Destroyed by Fire—Benefit of Infant—Safeguards.

Application by executors for leave to mortgage property in which an infant was interested, to replace buildings destroyed by fire.

C. A. Moss, for applicants.

F. W. Harcourt, K.C., for the infant.

BOYD, C.:—I think the cases warrant the application to mortgage for the purpose of building on and so utilising the land which has had the former buildings destroyed by

fire. This seems obviously for the advantage of the infant and the estate, and it is done with the sanction of the infant, who is old enough to have an intelligent opinion on the matter. The order may go, with the usual safeguards as to the expenditure being with the privity of the official guardian, as and for the building as it progresses.

CLUTE, J. APRIL 29TH, 1909.

TRIAL.

KENT v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

Accident Insurance—Payment of Claim for Total and Partial Disability for Short Period Following Accident—Release of Company from Liability for all Injuries from same Accident—Release Signed by Assured as "a Receipt in Full"—Matter in Contemplation of Parties—Release not at Bar to Further Claim for Injuries Subsequently Developing from same Accident.

Action upon an accident insurance policy.

C. R. McKeown, K.C., for plaintiff.

G. T. Blackstock, K.C., for defendants.

CLUTE, J.:—The plaintiff is an insurance inspector, and, at the time of the accident when he received the injuries complained of, was insured under a policy of the defendants' company.

On 3rd September, 1907, while a passenger on the Canadian Pacific Railway travelling from Orangeville to Toronto, the plaintiff received the injuries complained of as a result of an accident on the railway at what is known as the "Horse Shoe," near Caledon. He returned the same evening to Orangeville, and did not consider himself injured to any serious extent. In his evidence he says: "I was thrown against the car. When I got out, I thought I was going to be all right. When I reached home I did not feel seriously injured. I first noticed that I was injured at Brampton two or three days after. The first intimation I had at Brampton was that I lost control of my hand

at table; I could not take supper. I seemed to recover on my way home. I consulted Dr. Henry, who advised rest, and I did take rest for some time. I could do work to some extent. Trying to perform work set me back."

The plaintiff somewhat improved, but still he was unable to do any work for some 8 weeks, and then he began to improve. On 17th December following the accident, he put in a claim for insurance under the policy in question, which contains this statement of his injury and its result:—

"On the 3rd day of September, 1907, at 9.30 a.m., I was on the train C. P. R. and wrecked on the Caledon Mountain. I was on third car from the rear and second of train. I was thrown with force against the car seats, and received injuries which did not develop for some time afterwards, and upon medical examination I found that I suffered from spinal and brain concussion. As the direct result of such accidental injury, I have been confined to the house for 8 weeks. I was wholly and entirely disabled and prevented by such injuries from performing any and all of the business of my occupation for 8 weeks—from 19th September to 18th November, 1907. I first began after my injury to attend to some part of the business of my occupation on 18th November, 1907, and was partially disabled and prevented by such injuries from performing some one or more necessary daily duty or duties pertaining to the business of my occupation for 4 weeks—from 18th November, 1907, to the present day of December 16th, 1907."

On the 26th of December the defendants wrote the plaintiff as follows: "We are in receipt of your proof of claim in this case for 8 weeks' total and 4 weeks' partial disability, and hand you herewith our cheque for $425 in settlement of your claim. The total indemnity is double, in accordance with the terms of the policy, but the partial indemnity is not. Trusting you will find this satisfactory, I desire to remain," etc. The letter is signed by the general manager.

The plaintiff acknowledged receipt of the cheque on 31st December, in the following words: "I duly received yours of the 26th inst. with cheque enclosed in settlement of my claim, with thanks for your prompt settlement."

The cheque upon its face was in the usual form, for $425. Upon the back was the following receipt: "I hereby acknowledge by my indorsement of this cheque I have this day received the sum of $425 in final settlement of my claim, including double liability, under policy No. 64276, for injuries received on the 3rd day of September, 1907, and I hereby acquit and discharge the Ocean Accident and Guarantee Corporation, Limited, from all and any further claim under said policy which I have or might hereafter have as a result of said injuries."

This was signed by the plaintiff in the presence of a witness. The plaintiff said that he signed this document in a formal way, but did not read it over, and did not notice at the time that it was a release of his entire claim. He took it to be an ordinary receipt. He further stated that at the time he did not know the extent of his injuries; that he thought he was sufficiently recovered to go on and do his business. Since the signing of the receipt, instead of improving, he has become worse. From the date of the receipt to 14th April, 1908, the plaintiff was partially disabled, and from 14th April, 1908, to 3rd September, 1908 —21 weeks and about 5 days—the plaintiff was totally disabled and incapacitated from work.

There is no question of fraud in this case; both parties acted bona fide; the plaintiff, supposing that he was on a fair way to recover, and that the amount claimed would in that case be a reasonable compensation under the policy, put in his claim for injuries, which was promptly paid by the defendants without question.

In his examination for discovery he says that he did not see any agent of the company at all in respect to the claim; that he represented himself; that immediately after 17th December he started to work.

"Q. I suppose you knew at the time you got payment from the company the total amount of the claim had to be arrived at? A. I suppose, yes.

"Q. And that was your intention in making the claim as you did? A. That was my intention, yes.

"Q. Fixing the portion of the partial disability and the duration of the total disability? A. Yes.

"Q. And then asking the company for payment of that amount? A. Yes.

"Q. Then they did pay you the amount you asked? A. Yes."

With reference to the receipt he says: "Q. You never read it over? A. No. I supposed it was a settlement of the claim, and I accepted it as that.

"Q. But you understood what you were signing? A. A receipt in full . . .

"Q. As you told me before, you made up your claim shewing the duration of the partial disablement and the duration of the total disablement? A. Yes.

"Q. In order to get a settlement from the company? A. Yes.

"Q. And you have already told me when you signed this cheque you signed it as a receipt in full to the company? A. I considered it that.

"Q. What do you say now about having read the back of the cheque before you signed? A. I do not think I did. I think I just signed it the same as I would any ordinary cheque without ever looking at it.

"Q. Now, then let us go back to the 13th of December. At that time you had made up your mind that your injuries had ceased? A. Yes, I thought they had.

"Q. And that you were recovered? A. Yes.

"Q. And then you made your claim to the company? A. Yes.

"Q. To get the money? A. Yes.

"Q. And when they sent you a cheque, you thought it was a settlement in full? A. Yes, I did.

"Q. And that is the way it was accepted by you? A. Well, you can call that an acceptance by me in that way.

"Q. You thought it was a settlement in full? A. I thought I was well."

I find as a fact, upon the plaintiff's evidence, which I believe, that he did not read the receipt, but signed it supposing it to be in the usual form. I find further that at that time it was not in the plaintiff's mind to make a further claim. He intended to and did accept the same in full of his injuries up to that time, not supposing that in the future there would be any ill effects to be suffered by him from his injuries. Perhaps what took place in respect of his claim against the Canadian Pacific Railway Co. will illustrate his condition of mind at this time. He was just

about signing a settlement with them for $400, when, finding that he did not improve, he withdrew from the negotiations, and brought action, which was settled by that company paying him $4,000.

I find as a fact that at the time of said payment to the plaintiff he supposed that he had recovered from his injuries, and would be able to continue his business as an insurance inspector, and that it was in such belief that said payment was accepted. The question of further injury from the accident was not, I think, present to his mind, and did not enter into consideration in signing the receipt.

In Rideal v. Great Western R. W. Co., 1 F. & F. 706, the receipt was in the following form: "Received of the G. W. R. Co. the sum of £20, in full satisfaction of the injuries arising from the accident of the 31st ultimo, and all consequences arising therefrom." In that case the collision took place on 31st January, and a receipt was sent on the following day. Except some bruises there were no external injuries. The medical evidence, however, was strong to shew that he had sustained serious and permanent injuries which afterwards developed themselves. Erle, C.J., in charging the jury, said: "The question for you will be, whether the plaintiff's mind went with the terms of the receipt. The plea is, that the plaintiff accepted the money in satisfaction for the 'grievance complained of,' i.e., the injuries now proved to have been sustained. In terms the receipt which he signed, no doubt, supports that plea. Did his mind go with those terms? Was he aware of their import and effect at the time he signed? If, as he declares, he did not read the receipt, and supposed it was a mere receipt, it is clear that he did not so agree. But, on the other hand, if he did read it, being a man of business, he must be taken to have understood it, and it expressly included future and consequential injuries. No doubt a man might well be ready to take a certain sum in satisfaction of such injuries as he was sensible of, which would not be any equivalent for serious and permanent injuries. Still if, in fact, a man has done so, he is bound by his bargain. No improper practice has been proved, nor does it appear that the company's servants took any unfair advantage of the plaintiff. The question, therefore, simply is, did his mind go with the terms of the paper which he signed, and was he aware of its effect?"

In Lee v. Lancashire and Yorkshire R. W. Co., L. R. 6 Ch. 527, a passenger who was injured by a railway accident sent in a claim for £691 compensation. The traffic manager of the company called upon him, and after some discussion the passenger accepted £400, and gave a receipt acknowledging it to be in full discharge of his claim. About a year afterwards he commenced an action against the company for further compensation, to which the company pleaded that he had accepted £400 in full satisfaction and discharge of the causes of action. The plaintiff filed his bill to restrain them from relying on the plea, and from setting up the acceptance of the £400 or the receipt as a satisfaction or discharge of the damages, except to the extent of the £400. The bill did not allege fraud, but that the plaintiff had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time. It was held that, as the statement in the receipt could be rebutted by evidence that the plaintiff did not receive the money in full satisfaction of all demands, the whole case could be tried at law better than in equity, and that the bill ought to be dismissed. In the judgment of Mellish, L.J., it is pointed out that where the release is not under seal, it does not amount to a discharge of the causes of action altogether, but is merely evidence of satisfaction and liable to be rebutted by contrary evidence, and he refers to Skaife v. Jackson, 3 B. & C. 421; Graves v. Key, 3 B. & Ad. 313; Bowes v. Foster, 2 H. & N. 779; and also Roberts v. Eastern Counties R. W. Co., 1 F. & F. 706. Reference is also made by the Lord Justice to the case of Alner v. George, 2 H. & N. 787, where Lord Ellenborough said that a receipt in full was an estoppel; and the Lord Justice states that that is not the law; that "the distinction between a receipt and a release has been established, and that the fact of a release must be pleaded and put on record. A receipt cannot be pleaded in answer to the action; it is only evidence on a plea of payment; and, where a defendant is obliged to prove payment, a document not under seal is no bar as against the fact that no payment has been made." Dealing with the question there involved, and holding that the matter could be well tried at law under the plea, his Lordship quotes the language of Erle, C.J., in his charge to the

jury in the Rideal case, and proceeds: "That, I apprehend, if this case is tried at law, will be the precise question the Judge ought to leave to the jury. Did his mind go with this receipt, and did he understand and know at the time that he was accepting it in full satisfaction and discharge?" James, L.J., also held that the giving of the receipt did not estop the plaintiff from saying that there was no accord and satisfaction.

Where a release is general in its terms, the Court will limit its operation to matters contemplated by the parties at the time of its execution: Lyall v. Edwards, 6 H. & N. 337; Begg v. Toronto R. W. Co., 6 O. W. R. 239; London and South Western R. W. Co. v. Blackmore, L. R. 4 H. L. 610, where Lord Westbury, at p. 623, says: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given."

Pomeroy in his book on Equity Jurisprudence, 2nd ed., vol. 2, sec. 839, defines mistake to be "a mental condition, a conception, a conviction of the understanding—erroneous indeed, but none the less a conviction—which influences the will and leads to some outward physical manifestation."

Story defines mistake as "some unintentional act, or omission or error, arising from ignorance, surprise, imposition, or misplaced confidence."

Kerr on Fraud and Mistake, 3rd ed., adopts this definition.

In McCarty v. Houston and Texas Central R. Co., 21 Tex. Civ. App. 569, the Court of Appeal held, in a case very similar to the present, that the plaintiff was not bound by a former release under seal on the ground of mistake where it subsequently developed that there were other and much more serious injuries that were not known or considered at the time of the release. Gill, J., who gave the judgment of the Court, in part says, after disposing of other matters involved in the appeal: "There is, however, considerable evidence tending to shew that the alleged injuries to appellant's spine and bowels were unknown to the parties connected with the transaction, and that these graver and more permanent injuries were not taken into consideration by any party to the settlement. That appellant signed the release under a mistake as to the real situation in this regard, and could not have been induced

to sign had these other injuries been known to him, has equal support in the testimony. This being true, the question arises, can a release couched in terms broad enough to cover all personal injuries growing out of a particular accident be avoided on the ground of mistake?"

After referring to Lyall v. Edwards, 6 H. & N. 33, he proceeds: "We can see no logical reason why the principle thus applied to releases affecting property may not be applied with equal force and justice to claims like the one under consideration. The right involved is certainly valuable, and to the appellant was perhaps more important than any other in his possession. The cases in which the rule has been so applied are not numerous, and, so far as we know, the question whether it can properly be done has not been adjudicated in this State." He then refers to Lumley v. Railway, 6 Am. & Eng. Ry. Cas. N. S. 81, and a number of other American cases, and also to Roberts v. Eastern Counties R. W. Co., 1 F. & F. 460, where the plaintiff, who had been injured in a railway accident, accepted £2 for injury to his clothes, not supposing that he had been hurt. He went to his usual business, but soon began to suffer great pain, and it was then ascertained that he had been more seriously injured than he had at first conceived. Cockburn, C.J., said: "It surely cannot be seriously urged that if the plaintiff has been seriously injured he is precluded from recovering because he agreed to accept £2 for his hat." This case is cited in Cyc. 308, with American cases, for the proposition that accord and satisfaction do not operate as a bar in regard to matters not contemplated by the agreement.

What then was in the contemplation of the parties at the time this settlement took place? That, I think, can only be gathered from what took place between the parties prior to the settlement, and that consisted simply of the two facts, as far as the settlement was concerned, namely, the sending in of the claim of the plaintiff and the payment of that claim.

Now, it will be seen, on an examination of the claim, that it is a claim for a definite number of weeks, and not a claim for his injuries, whatever they might be, more or less; and the letter enclosing the cheque treats it as such. It does not, in short, cover future injuries, and I find as a fact that the plaintiff did not intend to accept the payment

in respect of loss of time arising in future from the effects of the accident. That question was not contemplated by him, and it would further seem from the subsequent correspondence that it was not contemplated by either of the parties.

On 19th May, 1908, the plaintiff's wife wrote to the company as follows: "Policy No. 27476. Mr. Kent has been laid up for some few weeks, and Dr. James Henry attending. The doctor will give you the facts concerning the case." The company replied to this on the 29th: "In answer to your letter of recent date advising that this insured has been laid up for some weeks, we are, without prejudice, handing you herewith blank form for further particulars. You will please see that the same is completed in detail and returned to us as soon as possible;" to which Mrs. Kent again replied on 30th May, stating that "Mr. Kent is still under the doctor's treatment, so cannot fill out the enclosed blank. Dr. Henry will advise you from time to time."

On the same date the company wrote to Dr. Henry, who was attending the plaintiff, stating that "W. R. Kent, of Orangeville, holds a policy in this corporation, and he has notified us that he is disabled and under your care, and has referred us to you for further particulars. Would you be good enough therefore to advise me: (1) the date of the commencement of his disability (ans.—commencing 14th April, 1908); (2) the nature and extent of his disability (ans.—hemiplega right side); (3) the probable length of his disability (ans.—cannot say; he has improved very much the last few weeks); (4) his present condition (ans.—able to be out and walk moderately well, yet unsteady and drags the leg a little.)"

The company on 3rd June replied that the report was not full enough, and on 8th June Dr. Henry replied giving fuller particulars. On 12th June the company's surgeon wrote the plaintiff stating "your notice of disability has been placed before us. Your medical attendant's report of your disability states that you suffer from hemiplega of the right side, and this he will, no doubt, advise was due to hæmorrhage of the brain. Your disability was the result of a diseased artery, and not the result of an accident, and we regret to have to advise you that your policy does not cover you from your recent disability." On 15th June,

1908, the plaintiff received a further letter stating that "in accordance with paragraph 8 of the conditions we are cancelling the above policy, and beg to advise you that the same is void and of no force or effect from this date. Enclosed find cheque for $9.04, being pro rata unearned portion of the premium. Please acknowledge receipt and return policy at your earliest convenience."

Paragraph 8 of the policy provides, amongst other things, that "the corporation may cancel this policy at any time by offering to refund said premium, less a pro rata share for the time it has been in force."

There is a further letter from Mrs. Kent, giving also fuller particulars of the accident.

A cheque was sent to the plaintiff for the unearned premium on 15th June, which was returned to the defendants and again returned to the plaintiff on 23rd June, and sent back to the defendants on 25th June. No further correspondence took place until 19th October, when the first reference is made to the settlement and cheque of 26th December, in which it is then stated that the company holds "his complete and final discharge under the policy as a result of the accident referred to. Under the circumstances we do not see why we should be called upon to open the case at this date." There is further correspondence between the plaintiff's solicitor and the defendants, which, on this branch of the case, is not very material.

I infer from this correspondence, above quoted, that both parties regarded the policy as still in existence and the claim as still open. The company treated the case as one in which there might or might not be a valid claim. It is difficult to understand why, if they relied upon the release for further injuries resulting from the accident, not contemplated or covered by the previous payment, they did not state so during the correspondence. It confirms my view that neither the plaintiff nor the defendants understood or contemplated that the payment made and the receipt given was for anything else than the matters covered by the claim which was sent in. There was no accord or satisfaction or settlement of any further claim. Nor do I think the defendants are entitled to set up the form of the receipt as a bar to the plaintiff's action, for the reasons above indicated. That the plaintiff is suffering and has suffered from serious ill-effects from the injuries, which

were not contemplated or taken into consideration at the time of the settlement, is, I think, beyond doubt, and for this he is entitled to recover. The cancellation of the policy on 15th June does not affect his right to recover for the effects of an injury which occurred while the policy was in force. Under clause 5, the plaintiff is entitled to recover for 14 weeks at $12.50 a week ($175), having been paid for the previous 12 weeks, during which he was either totally or partially disabled. He is also entitled to recover from 14th April to 3rd September, 1908, or 21 weeks and 5 days, at a rate of $50 a week, making $1,085, or a total of $1,260, with costs of action.

APRIL 29TH, 1909.

DIVISIONAL COURT.

RE ANDERSON AND KINRADE.

Coroner—Powers of—Subpœna to Testify at Inquest Served on Witness out of Coroner's Territorial Jurisdiction—Disobedience—Issue of Warrant to Arrest—Ministerial Act—Certiorari—Motion to Quash Warrant—Prohibition—Witness already Examined—Re-examination Limited to New Matters.

Motion on behalf of Florence Kinrade, upon the return of a certiorari, to quash a warrant issued by one Anderson, a coroner, for the purpose of having the applicant brought before him, "to be dealt with according to law," she having been summoned by him, by a subpœna or summons served upon her at Toronto, to appear before him at Hamilton to give evidence upon an inquest pending as to the death of Ethel Kinrade, sister of the applicant. The applicant also asked in the alternative for a prohibition.

G. Lynch-Staunton, K.C., T. C. Robinette, K.C., and T. Hobson, Hamilton, for the applicant, contended that the coroner had no power to punish for contempt; that his warrant did not run out of his county; and that he had no power to have the applicant examined again, she having already been examined at great length, and having told all

she knew about the death of her sister, and answered all the questions put to her by counsel for the Crown.

J. R. Cartwright, K.C., and J. B. Mackenzie, for the Attorney-General, contended that the coroner had jurisdiction, and also that the remedy of certiorari, and equally that of prohibition, was not available.

The judgment of the Court (BOYD, C., MAGEE, J., LATCHFORD, J.), was delivered by

BOYD, C.:—This application was argued upon the merits, subject to a preliminary objection. I have considered the matter in both aspects, and will briefly give my conclusions.

First, I think that the proceeding by way of certiorari is not the proper method of seeking redress. The coroner, in issuing the warrant to apprehend, based upon default in obeying the summons to appear and testify, was acting not in a judicial but a ministerial capacity. His duty is to serve such witnesses as may be indicated by the Crown or its representative, and to follow up that summons, in the event of default, by enforcing their attendance. Therein he acts not according to his discretion, but according to the mandate of another, as provided by the statute R. S. O. ch. 97, sec. 5.

The little authority there is as to the examination of magistrates' warrants upon certiorari justifies this distinction and this conclusion. For example, if the warrant is of a judicial character, such as a search warrant, certiorari will lie; otherwise, if the warrant is of ministerial character: Rex v. Lediard, Sayer R. 6; Rex v. Kehr, 11 O. L. R. 517, 7 O. W. R. 446.

On the other branch, I think it is very clear that the coroner is a local officer, and can act only within his own municipal jurisdiction. Whether the service of his summons out of the county be or be not a valid service, I do not express an opinion, but I am very well satisfied that the warrant to arrest or apprehend, based thereon, cannot be validly executed in another county. This is pretty distinctly indicated in Jervis on Coroners, 2nd ed., pp. 54 and 55, and 6th ed., p. 85, and Encyc. of Laws of England, 2nd ed., vol. 3, p. 687, where it is said that the precise point has never been decided. But a similar situation has been judicially passed upon in this province in Grantham v. Bishop,

1 C. P. 237, to the effect that the process of a local officer cannot be legally carried into effect outside of his territorial jurisdiction.

I do not think we should interfere on the ground that the witness, having been already questioned at great length, should not be subjected to further examination. We must assume that the magistrate will not permit the witness to be unduly harassed; that he will not permit the examiner to go over ground already traversed; that he will not permit any line of inquiry tending to lay a foundation for collateral purposes; and, from what was said by the Deputy Attorney-General in Court, it is to be assumed that the witness is to be examined on new matter lately disclosed or discovered.

The application is dismissed; no costs.

APRIL 29TH, 1909.

C.A.

LAMONT v. WENGER.

Appeal to Supreme Court of Canada—Leave to Appeal from Judgment of Court of Appeal—Doubt as to Jurisdiction without Leave—Appeal Launched and on List for Hearing—Order ex Cawtela—Refusal of—Remedy by Application under Rule 1 of the Supreme Court.

Motion by defendant for special leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, pronounced 30th June, 1908, reported 12 O. W. R. 481.

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

H. E. Rose, K.C., for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.:—At the trial the action was dismissed, and a Divisional Court affirmed the judgment. Upon appeal by the plaintiffs to this Court, judgment was ordered to be entered for the plaintiffs, with a reference to the

Master at Woodstock to ascertain and state what damages, if any, the plaintiffs sustained by reason of the fraud referred to in the pleadings, reserving further directions and costs. Since the date of that judgment the case has passed through the following stages. On 19th October, 1908, the certificate of the judgment of this Court (the issue of which was delayed owing to some question as to the form of the reference) was finally passed and entered. On 11th November, 1908, the defendant filed a bond as security for the costs of an appeal to the Supreme Court and for the costs and damages ordered to be paid by the defendant to the plaintiffs, and on the same day he obtained from a Judge of this Court an order (12 O. W. R. 880) extending the time for appealing to the Supreme Court, and allowing the bond filed as sufficient security for the costs of the appeal and for the aforesaid costs and damages, and also declaring in the usual manner, following the language of the Supreme Court Act, that "the appeal to the said Supreme Court of Canada is therefore allowed." On 1st February, 1909, the appeal case having been settled, printed, and filed on or before 26th January, the appeal was inscribed for hearing at the sittings of the Supreme Court commencing on 15th February. On 19th March the case appeared on the peremptory list, and again on 22nd March, when, owing to inability to obtain a Court of Judges competent to hear the case, it was ordered to stand for argument at the next sittings commencing on 4th May; and then on 19th April, the defendant's advisers apparently having had suggested to them doubts whether the Supreme Court may not of its own motion raise objection to its jurisdiction to entertain the appeal, a motion is made to this Court to grant leave to appeal.

In the affidavit in support it is stated that no motion or application has been launched or made on the part of the plaintiffs as provided by Rule 4 of the Supreme Court, and no objection has been raised that the Supreme Court has not ample jurisdiction to hear the appeal, and the only ground put forward in justification of this application is the apprehension of the possible action of the Supreme Court. Upon the argument the defendant's counsel would not concede want of jurisdiction in the Supreme Court, but, nevertheless, pressed us to deal with the case as if leave was necessary. This is a course we should not adopt, for

reasons which are quite apparent. One is that a very obvious course is provided by the Supreme Court Rules for settling a question of this kind, which the defendant should have adopted. He might have applied under Rule No. 1 to a Judge of the Supreme Court in Chambers, on notice, for an order affirming the jurisdiction of the Court to hear the appeal, and have had the matter set at rest one way or the other. When jurisdiction was negatived, then for the first time would occasion arise to apply either to the Supreme Court or to this Court for leave to appeal. But this course was not adopted, and no explanation is offered.

The manifest object of the Rule is to remove from the Court appealed from the vexed question whether the Supreme Court has jurisdiction to hear the appeal, and to end the uncertainty with regard to the matter that formerly prevailed.

The Supreme Court being the final arbiter as to its own jurisdiction, the ruling or decision on the point, of the Court appealed from, does not bind it, and it has not infrequently happened that its views on the subject have not coincided with those of the Court below, e.g., Jermyn v. Tew, 28 S. C. R. 497, and Young v. Tucker, 18 P. R. 449, 30 S. C. R. 185.

The Rule enables the proposing appellant to ascertain his position in the Court at an early stage. If he does not choose to do this, he ought not to be permitted, unless in very exceptional circumstances, to come to the Court appealed from for an order based upon an hypothesis which he refuses to admit. As the case stands at present, the defendant is affirming that there is jurisdiction. If that view be correct, we should not make ex cautela what may turn out to be an unnecessary, and perhaps improper, order. See Frankel v. Grand Trunk R. W. Co., 3 O. L. R. 703, 1 O. W. R. 339, 396, and S. C., 33 S. C. R. 115. And we should not be asked to decide that there is want of jurisdiction as a condition precedent to an order, and so determine a question which is for the Supreme Court, and not for us.

In the circumstances, the proper course for us is to refuse this application, and so leave the parties in the position in which they have chosen to place themselves before the Supreme Court.

APRIL 29TH, 1909.

C. A.

RE BREWER AND CITY OF TORONTO

RE ROBINSON AND CITY OF TORONTO.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court Affirming Order Refusing to Quash Municipal By-law—Reduction of Liquor Licenses in City —By-law Applicable to Future Years—Liquor License Act—Annexation of New Territory to City.

Motions by John Brewer and William Robinson for leave to appeal to the Court of Appeal from the orders of a Divisional Court, ante 954, dismissing appeals from orders of MEREDITH, C.J., refusing their applications to quash a by-law of the city of Toronto providing for a reduction in the number of liquor licenses to be issued for the city.

A. M. Lewis, Hamilton, and J. B. Mackenzie, for the applicants.

W. C. Chisholm, K.C., and F. R. MacKelcan, for the city corporation.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.:—In my opinion, leave to appeal should be refused. As to the first objection, I think the by-law is in substance sufficient, though it seems to have been passed without any clear apprehension of the proper construction of sec. 20 of the Liquor License Act. That section enacts that the council may, by by-law to be passed before 1st March, in any year, limit the number of tavern licenses to be issued (in the municipality) for the then ensuing license year beginning on 1st May, or for any future license year until such by-law is altered or repealed. . .

The license year commences on 1st May in each year, and ends on 30th April in the next ensuing year: the Liquor License Act, R. S. O. 1897 ch 245, sec. 8 (1) (2).

Any by-law to limit the number of licenses must be passed before 1st March in any year, and, whatever may

be its scope, it must go into effect on 1st May of the year in which it is passed, if it is not repealed, as of course it may be by the same council before that date.

The case does not, in my view of the meaning of the section, turn at all upon the question upon which so much was said on the argument, whether the word "or" at the commencement of the last branch of sec. 20 should be read "and."

The plain object and intent of the section is to enable the council to do one of two things, namely: to pass a by-law (1) limited in its operation to the then ensuing license year, which will come to an end, ex vi termini, at the end of that year, leaving the next succeeding license year to be provided for, if at all, by a new by-law to be passed before 1st March next before its commencement; or (2) a general by-law applicable to any future license year, commencing with 1st May after its passage. The expression "any future license year," to my mind, plainly means "all" future license years. There is nothing to restrict the generality of the word "any." It is a word which excludes limitation or qualification: Duck v. Bates, 12 Q. B. D. 79; Liddy v. Kennedy, L. R. 5 H. L. 134; Isle of Wight R. W. Co. v. Tahourdin, 25 Ch. D. 332; Beckett v. Sutton, 51 L. J. Ch. 433; and other cases cited in Stroud's Judicial Dict., sub voce. And it is to such a general or standing by-law, as I may call it, that the words "until such by-law is altered or repealed" apply, since there can be no repeal or alteration of a by-law which has come into force and which is confined to the limitation of licenses for "the then ensuing license year," nor indeed, of any by-law, general or annual, so as to affect the limitation upon the issue of licenses in any license year in which it may be in force.

A by-law to limit the issue of licenses for any future license year necessarily includes the then ensuing license year commencing on 1st May after its passage, as well as subsequent license years, and a by-law so expressed, without specifically mentioning the then ensuing license year, would have well attained the object aimed at, namely, a general or continuing by-law to remain in force until altered or repealed. In effect, I consider that this is what has been done, though from excess of caution or from not attending to the true interpretation of the section, the city council thought proper to divide the future into two parts, namely,

the "next ensuing" license year and the "subsequent" license years. But these two expressions cover the whole; and therefore the by-law is one which provides a limitation for any future license year--sc., "all" future license years--after its passage, and will remain in force until altered or repealed, as provided by the section. I do not agree with the view which seems to have found favour with the Divisional Court that a by-law providing merely for a limitation of the number of licenses to be issued for the then ensuing license year continues in force throughout future years until altered or repealed, treating the words "or for any future year" as surplusage.

As to the license limitation by-law of East Toronto, a corporation the territory of which had become annexed to and was part of the city of Toronto before the passage of the by-law now in question, I am unable to see how the former can in any way affect the validity of the latter, or be thought to restrict the right of the city council to pass a by-law affecting the whole territory then under the jurisdiction of the city council. The corporation of East Toronto no longer existed, and the by-law of the city of Toronto council applied to and came into operation in respect of the whole territory then forming part of the city. It appears to me that the by-law was absolutely inconsistent with the continued existence and operation of the East Toronto by-law. Whether, if the city had passed no by-law, the East Toronto by-law would have continued to affect the added territory is a question we are not concerned with, and it is probably enough to say that, the by-law being good on its face, nothing appears to justify its being interfered with.

A further objection was that after the city by-law had been introduced and read a first time the additional territory of Wychwood and Bracondale was annexed to the city, and that after this the by-law was read a third time and passed. It was contended that the by-law should have been again introduced and the regular course of procedure of the council followed in reading it a first and second time after the addition of the new territory. But this procedure was merely matter of the internal regulation of the business of the council, which, in the absence of statutory obligation, they were at liberty to alter and suspend at their discretion, and failure to observe it, even in the absence of formal

alteration or suspension, cannot, as a general rule, be invoked for the purpose of attacking a by-law which is within the jurisdiction of the council and is good on its face.

On the whole, I am of opinion that the applicants fail to shew that the result arrived at by the council by-law is wrong, and therefore leave to appeal should be refused. The applicants' contention that leave to appeal is not necessary seems to be only an additional reason for refusing it.

MEREDITH, C.J. APRIL 30TH, 1909.

CHAMBERS.

REX v. RENAUD.

Liquor License Act—Selling Liquor in Prohibited Hours—Convictions for Second Offences—Information Charging First Offences—Acknowledgment of Guilt—Payment of Fines as for First Offences—Informations Subsequently Amended so as to Charge Second Offences—Convictions—Penalties—Imprisonment as for Second Offences—Minute of Adjudication—Affidavits—Recovery of Penalties by Distress—Term of Imprisonment—Motion to Quash Convictions—Objections not Affecting Jurisdiction of Justice of the Peace—2 Edw. VII. ch. 12, sec. 14 (O.)

Motion by Honore Renaud, the defendant, to quash two convictions dated 28th September, 1908, made by Henry Smith, a justice of the peace for the united counties of Prescott and Russell, for offences against the Liquor License Act—selling during prohibited hours—the same being second offences.

J. A. Macintosh, for defendant.

J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.:—According to the contention of the applicant, having been summoned to appear before Mr. Smith on 28th September, 1908, at one p.m., to answer these charges of selling liquor during prohibited hours, they not being alleged to be second offences, he went in the morning of that day to the justice, acknowledged his guilt, was found guilty and fined, and paid his fines, and subsequently on the same day, the information having been in the meantime amended by charging the offences as second offences, he was again convicted and fined for the same offence.

The principal objection argued was, that the alleged convictions were bad because the penalties imposed exceeded those authorised for first offences—the imprisonment being for 3 months, while for a first offence the maximum term of imprisonment is one month, and that the alleged second convictions—those made at the later hour—were bad because of the existence of the alleged first convictions made earlier in the same day.

In my opinion, this objection fails. The affidavits in opposition to the motion shew that no convictions were made at the earlier hour; that the applicant appeared before the justice, acknowledged that he was guilty of the offences with which he was charged, and asked what the fines he would be required to pay would be, and was told by the justice what the fines and costs would amount to, and thereupon paid the amount to the justice.

There was no adjudication by the justice upon this occasion, and nothing occurred to dispense with the attendance of the applicant before him at the hour for which he was summoned to answer the charges which had been made against him.

At, or shortly after, the hour for which he had been summoned, the applicant attended before the justice, the County Crown Attorney being also present; and the informations which, as I have said, had in the meantime been amended by charging the alleged infractions of the Act as second offences, were then read to the applicant, and he was informed of the two charges which had been laid against him, and to them he pleaded guilty.

He was then and there further charged that on 14th August, 1907, he had been convicted before the police magistrate for the united counties of Prescott and Russell, of having on the 7th day of that month sold liquor during prohibited hours, contrary to the Liquor License Act, and, on this further charge being stated to him, he pleaded guilty to it, and the justice thereupon adjudged that for each of the two offences of which he had pleaded guilty, the same being second offences, he should pay a fine of $100 forthwith and costs amounting to $4.40 in each case, and that in default he should be imprisoned in the common gaol at L'Orignal for 3 months.

The papers returned in obedience to the notice to the justice do not shew any proceedings had upon either of the informations except those resulting in the adjudication to which I have referred, and there does not appear to have been any minute of any proceedings before or of any adjudication by the justice at the earlier hour of the day.

The applicant controverts the accuracy of the minute of the adjudication of the justice which is returned, but the affidavits filed in answer to the motion satisfy me that the minute is accurate.

The affidavits of the applicant are not, I think, candid. By paragraph 25 of his affidavit sworn on 3rd November, 1908, an attempt is made to shew that the minute returned by the justice is inaccurate, but this is done by assuming, contrary to the fact, that it is a minute of what occurred in the morning, and by paragraph 26 of the same affidavit he states that the minute is not a correct minute of what took place in the afternoon, because, as the paragraph reads, "I was neither convicted nor did I pay any fine as noted in the said minute or record, as I had been convicted and had paid the said penalty and costs between 9 and 10 o'clock in the morning of the same day."

Exactly what is meant by the statements of paragraph 26 is difficult to understand. If they mean that he was not convicted of the two offences as second offences, as shewn by the minute, it is sufficient to say that the affidavits to which I have referred satisfy me that the statements are contrary to the fact. If they mean merely that because of what took place in the morning he was not legally convicted, and that the payment of the fines and costs was under convictions made in the morning, the answer is, as I have said, that there was no conviction in the morning, and therefore no payment of the fines, but at most a deposit with the justice of the amount of the fines and costs which would be imposed when the summonses were returnable and the complaints were formally heard by the justice.

The other objections urged against the convictions relate to the provision as to the recovery of the penalties by distress, which is found in the convictions but not in the minute, and the term of the imprisonment imposed in default of payment of the fines and costs, the former being, it is said, wholly unauthorised, and the latter in excess of what is authorised by the Act; but, in the view I take, it is unnecessary

to say whether both or either of them are well founded, for, assuming both to be valid objections, which cannot now be got rid of by amendment in the present proceedings, I am of opinion that the Court has no jurisdiction to quash the convictions.

Rex v. Cook, 12 O. W. R. 829, decides that such objections as these do not entitle the applicant to invoke the aid of this Court to quash the convictions, notwithstanding the provisions of sub-sec. 2 of sec. 70 of the Ontario Summary Convictions Act, as enacted by 2 Edw. VII. ch. 12, sec. 14, which provides that no conviction or order of, among other functionaries, a justice of the peace, made under the authority of provincial legislation, "shall be removed into the High Court by certiorari except upon the ground that an appeal to the Court of General Sessions of the Peace . . . would not afford an adequate remedy."

That case decides that such objections do not affect the jurisdiction of the justice in the sense in which his jurisdiction is affected according to decided cases so as to make the provisions of the sub-section inapplicable.

That decision is binding on me, and it was said upon the argument that leave to appeal from it was refused, which gives it greater weight. It is also, if I may say so, in accordance with my own view.

It would have been a matter of regret if I had been compelled to reach a different conclusion, for, in my opinion, it would be difficult to parallel the effrontery of a person who, upon his own statement, goes before a justice by whom he had been summoned to appear, confesses to him his guilt of the charges laid against him, asks and learns what the penalty he will have to pay is, and pays it, and then when, according to his statement, the justice makes a formal conviction, and by it imposes imprisonment in excess of that authorised by law, comes to the Court and asks that the conviction be quashed on that ground and he be let go "scot free," receiving back the money he has paid, and to be himself indemnified for the costs of the proceedings to quash the conviction—a conviction which could not by possibility have harmed him in the slightest, because the penalty had been paid, and it was only in case of default in paying it that the imprisonment was to be suffered.

The motion is dismissed with costs.

RIDDELL, J. APRIL 30TH, 1909.

TRIAL.

TOWN OF SUDBURY v. BIDGOOD.

Municipal Corporations—License for Bowling Alley—By-law—Forfeiture of License—Conviction of Servant of Licensee for Illegal Sale of Intoxicating Liquor on Bowling Alley Premises—Declaration of Invalidity of By-law and Consequent Forfeiture—Electricity Supplied to Consumers by Municipal Corporation—Servant of Licensee Tapping Main and Abstracting Electricity—Action for Value—Proof of Quantity Taken—Omnia Præsumuntur contra Spoliatorem—Evidence.

Action for the value of electricity abstracted by defendant, as alleged.

Counterclaim by defendant for a declaration of the invalidity of a by-law of the plaintiffs and the forfeiture of defendant's bowling alley license, and for damages and for other relief.

J. H. Clary, Sudbury, for plaintiffs.

C. McCrea, Sudbury, for defendant.

RIDDELL, J.:—This case, tried before me without a jury at Sudbury, arose out of the actions of one John Bidgood, now a convict serving a term in the central prison for theft. He does not seem to have been a specialist in any particular form of crime; his activities took a wide range, as it was made to appear that he had been convicted of selling liquor without a license, of selling obscene post cards, etc., of perjury, and of other offences. It is necessary to mention the kind of a man Bidgood is, in order to appreciate the course taken at the trial.

The defendant is the wife of John Bidgood, and carries on business as "J. Bidgood & Co." in Sudbury. She has 4 bowling alleys, and sells cigars and the like. She herself has taken no part in the business, but her husband, John Bidgood, has had complete control without the knowledge of or interference by his wife in any matters.

The town of Sudbury supplies electric light to the citizens, amongst them the defendant. Becoming suspicious

that the meter was not registering all the electricity used in the Bidgood establishment, the town electrician, on 22nd February last, made an examination and found that the main had been tapped outside the meter, and that the town was being defrauded accordingly. Bidgood was charged with theft under sec. 351 of the Code; and, being convicted, was, by the police magistrate at Sudbury, sent to the central prison for a term of 6 months.

This action is brought by the town for the value of the electricity abstracted.

The defendant, in addition to denying the facts, counterclaims for damages, in the following circumstances. On 5th January, 1907, the plaintiffs issued to the defendant, under the name of "John Bidgood & Co.," a license "to carry on the business of a bowling alley . . provided the said John Bidgood & Co. shall duly observe all such by-laws, rules, and regulations, matters and things, as are or may be enacted by the municipal council . . ."

The general by-law No. 27, passed 15th March, 1894, had provided, by sec. 12: "In case any person who has taken out a license to keep a bowling alley . . . under this by-law is convicted of a breach of any of the provisions of the . . . by-laws regarding tavern or shop licenses . . . or of any of the provisions of the Liquor License Act, such person shall . . . if the council so decide, absolutely forfeit his license for the remainder of the current year . ." Section 22 provides: "The act of the wife, servant, clerk, or other employee of any person licensed to carry on business or calling under this by-law shall be deemed and taken to be the act of the licensee, and the licensee shall be held responsible therefor as though he had done the act himself."

On 1st February, 1909, the town council passed a by-law, No. 215, wherein and whereby, after reciting the issue of the license, the conviction on 30th January of John Bidgood, the manager of John Bidgood & Co., on 4 charges of selling liquor without a license on the premises of John Bidgood & Co., contrary to the provisions of the Liquor License Act, and also reciting the provisions of secs. 12 and 22 of by-law No. 27, the council enacted that the license was forfeited for the remainder of the current year. Accordingly for 16 days the bowling alleys were idle, and at the trial the defendant further contended that, even after the bowling alleys were again allowed to operate, the custom was diminished by the wrongful act of the plaintiffs in closing up the business. The de-

fendant, in her counterclaim, asks that the obnoxious by-law shall be declared ultra vires, and the action of the council declaring the forfeiture of the bowling alley license "annulled." She asks also damages, &c.

I deal first with the counterclaim. Upon objection taken at the trial by counsel for the plaintiffs that the defendant could not in this action, the by-law subsisting and not being quashed, claim damages, counsel for the defendant abandoned all right to damages. (The damages proved amounted to $137). Counsel for the plaintiffs then said that the plaintiffs did not object to a declaration that the by-law was invalid. On public grounds, I do not think that I should declare any by-law of a municipality invalid, even upon the consent of the municipality, unless the by-law is bad.

This is the case here, in my judgment. The power to create a forfeiture is a power to be jealously watched. No one's property, whether it be land or license, should be forfeited unless all necessary formalities have been complied with, and, if under some general law, all the requisites of that law met.

Assuming, without deciding, that secs. 12 and 22 of by-law No. 27 are intra vires of the council, it is under sec. 22 only the "act" of the employee which is deemed and taken to be the act of the licensee; and by sec 12 it is not the act of selling liquor without a license, but the fact of being convicted of so selling, which enables the council to decide upon the forfeiture. The offending party, Bidgood, could not be said to be doing an act when he was being convicted. He was patiens, not agens, passive not active. It may be that the licensee is liable for the act of selling liquor, but she certainly is not for the suffering of the conviction. The occasion, then, never arose for the exercise of the powers given by sec. 12 of by-law No. 27, supposing such powers to exist (as to which I express no opinion).

The counterclaim, then, will be allowed so far as the declaration asked for is concerned, with costs fixed at $40.

In the principal case, the evidence shews that the main had not been tapped on 7th March, 1905, and it is contended by the plaintiffs that, as the means of knowledge as to the precise date at which the stealing began are wholly within the power of the defendant and her manager, all presumptions should be made against the defendant. The defendant replies that she is an innocent party, and that she ought not to be called upon to prove the exact time, but that the whole

onus is upon the plaintiffs. She adds that she ought not to be asked to produce the convict as a witness, as she could not very well ask a court to believe a thief, who had also been convicted of perjury.

Evidence was given at the trial, without objection, which I wholly believe, that John Bidgood, as early as March, 1905, in effect said that he had tapped the mains. He had full control of the defendant's business, and, acting in his capacity as manager, he, while giving directions to another servant, told him to shut off certain of the lights, as he had to pay for them, leaving the others burning. It is, of course, clear law that a statement made by a servant in the course of his employment is evidence against the master. I think, therefore, that it is fairly proved, even if the onus be upon the plaintiffs, that the stealing began as early as March, 1905.

But, even if this be not properly admissible evidence, I think the plaintiffs are right.

Since the case of Armory v. Delamirie (1722), 1 Str. 505, and probably long before, it has been the law that "omnia præsumuntur contra spoliatorem." In that case the jeweller was held liable to pay the value of the most precious stone which would fit the socket of the ring of which he had wrongfully deprived the finder, a poor chimney sweep, unless he should produce the jewel and shew it not to be of the finest water, and the same rule would have been laid down if the jeweller had not himself removed the jewel, but one of his shopmen had done so for his master's benefit, even though without his knowledge, unless, at the least, the offending shopman had been produced as a witness.

The law is thus correctly laid down by Wigmore, sec. 285: "The failure to bring before the tribunal some . . . witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate as the most natural inference that the party fears to do so, and this fear is some evidence that the . . . witness, if brought, would have exposed facts unfavourable to the party." It will not do for the defendant here, upon being challenged to produce John Bidgood, to say that the plaintiffs might have called him. No one can be blamed for not calling a witness who would naturally be prejudiced against him: Wigmore, sec. 287.

Nor does the excuse avail that the defendant could not ask the Court to believe this man by reason of his past conduct and crimes. He is the one man who can, if he would, disclose the exact time at which the illegal acts commenced.

From all the circumstances of the case, I find that the illegal abstraction of electricity began in March, 1905. It seems to have been intermitted for a short time about 1st January, 1906, when one Harris was working at the place; but I do not find that the interruption took place for any time worth taking into account. I think it was only while Harris was actually at work.

I accept the estimate of the town electrician as to the amount of electricity abstracted. The only question remaining is as to the price.

The defendant contends that the price should be the amount which the electricity abstracted cost the plaintiffs. It seems to be impossible to prove, and it certainly was not proved what the electricity did cost the plaintiffs; but I do not agree that this should be taken as the proper price. If I have been in the habit of selling my neighbour seed wheat at $1 per bushel, then, if his hired man steals some and sows it on my neighbour's land, I do not think that I can be put off with the amount the wheat may have cost me; and, if it should turn out that the plaintiffs actually lose money by selling at too low a figure, I do not think the defendant would insist on paying the actual cost.

The terms of sale were 15 cents per unit; and, if the amount were paid within a limited time, a discount of 40 per cent. was allowed, making the net price 9 cents per unit. The price being 15 cents, I think the defendant is chargeable with this price.

The judgment will be for 11,182,416 at 15 cents = $1,677.36, and costs, against which costs the sum of $40 costs of the counterclaim will be set off.

Any necessary amendments of the pleadings may be made.

APRIL 30TH, 1909.

DIVISIONAL COURT.

McINTYRE v. COOTE.

Motoring—Horse Frightened by Motor-car Left Unattended at Side of Highway—Obstruction—Liability of Owner of Car for Injury Caused by Horse Bolting—Negligence —Contributory Negligence—Onus—Motor Vehicles Act, secs. 10, 14, 18—Findings of Jury.

Appeal by defendant from the judgment of the County Court of Elgin, dated 8th December, 1908, in favour of

plaintiff, after a trial before FINKLE, Judge of the County Court of Oxford, sitting for the Judge of the County Court of Elgin, with a jury.

The action was brought by a resident of the village of Port Stanley, alleging that on 2nd August, 1908, while he was driving along George street, in that village, with a horse and buggy, the horse became frightened at an automobile which the defendant had left standing on the highway, and shied, and, becoming unmanageable, ran away, and the plaintiff was thrown from the buggy and injured, and the horse, buggy, and harness were injured and damaged; and that the automobile was left standing on the highway for many hours, and was a nuisance and an obstruction to the highway; and the plaintiff claimed damages for his personal injuries and the injury to his property.

Upon the findings of the jury, judgment was entered for the plaintiff for $76; and the defendant appealed.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., TEETZEL, J.

W. E. Middleton, K.C., for defendant.

Shirley Denison, for plaintiff.

MACMAHON, J.:—The plaintiff's evidence is that he left home about a quarter to 7 in the evening, and was approachin what is known as Casey's hill in Port Stanley, and at the top of the hill he noticed an automobile of a bright red colour, with brass fixtures at the foot thereof, which was standing on the roadway a little off the driving track, not more than a couple of feet clear of the waggon track; that when about two-thirds of the way down the hill the horse noticed the automobile (which was standing on the south side of the road), and threw his head in the air and shewed signs of fright; that he urged the horse on, but he shewed an inclination to leave the road, and the plaintiff pulled the horse back on the road and up to a post within a rod and a half of the automobile, and the horse wheeled to the right, and the buggy struck the sidewalk and upset and threw him out, when he lost possession of the lines, and the horse started up the hill, dragging the buggy on its side. The plaintiff followed after the horse and found him with his head on the sidewalk, with the buggy partly on top of him; he was pretty badly peeled about the legs, and bleeding.

George Minhinnick corroborated the plaintiff as to the distance the automobile was from the beaten road.

Several witnesses were called who had driven the plaintiff's horse, to shew that he was not vicious or accustomed to shy, and as to the value of the animal and the injuries sustained, etc.

The defendant and Keith Hammond, who rode with him in the automobile, said their objective point was the Fraser House, an hotel at or near Port Stanley, and that they endeavoured to reach it by a back road, which was in such bad condition that they could not get the automobile through, and they then came around to the road leading to Casey's hill, which the automobile attempted to ascend, and, although the ascent was slight, it was said to be in a worse condition than the back road, and the ascent could not be accomplished, so the automobile was left locked at the foot of the hill, about half past 4 o'clock in the afternoon, and defendant and Hammond walked to the Fraser House, where they remained until 8 o'clock that night.

The defendant says the automobile was standing as close as he could get it to the sidewalk, and not more than one foot from it, which, he said, would give the plaintiff ample room in the highway to pass the automobile.

The defendant had registered his automobile under sec. 2 of 6 Edw. VII. ch. 46, and a permit had been issued authorising him to use his automobile on the highways and streets.

That the legislature considered an automobile, while in motion, likely to frighten horses, is manifest from sec. 10 of the above Act, which reads: "10. Every person having control or charge of a motor vehicle shall, whenever upon any public street or highway and approaching any vehicle drawn by horse or horses, or any horse upon which any person is riding, operate, manage, and control such motor vehicle in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse or horses, and to insure the safety and protection of any person riding or driving the same . . .; and if he approach any such person riding or driving any animal or horse upon any public highway outside the limits of any city or town, he shall also stop any such motor vehicle when signalled by such rider or driver so to do by raising

his hand, or otherwise requested, and shall remain stationary so long as may be necessary to allow such rider or driver to pass, or until directed by such rider or driver to proceed; and in case any animal ridden or driven by such rider or driver appears to be frightened, the operator of such motor vehicle, and any occupants of the same, shall upon request render assistance to such rider or driver in control of such animal or animals."

Section 14 provides: "14. Every motor vehicle shall be provided with a lock, key, or other device to prevent such vehicle being set in motion, and no vehicle shall be permitted to stand or remain unattended in any shed, highway, park, or other public place, without first locking or making fast the vehicle."

The defendant could not find fault with the charge by the learned trial Judge, which was rather favourable to him. The Judge submitted questions to the jury, which, with their answers thereto, are as follows:—

1. Did the plaintiff meet with accident referred to in pleadings by any negligence of defendant? A. Yes.

2. What do you find defendant negligent in? A. By leaving so long in public place, when he could have found a near-by yard.

3. Could the motor in question be put in motion after being locked as described as being done by defendant, and key being taken away? A. No.

4. Was there ample room to pass the motor on the road in question? A. Yes.

5. Was the defendant negligent in leaving the motor on the side of the street referred to? A. Yes.

6. Was there any street the plaintiff could have taken and avoided passing the motor? A. No.

7. What damages occurred to the horse in question after accident? A. $50.

8. What damage was done to the buggy in question by reason of accident? A. $20.

9. What damage to plaintiff by reason of being injured himself? A. $6.

The yard referred to in the answer to the 2nd question is the yard and shed of the Franklin House, a block and a half from where the automobile was left.

Counsel for plaintiff requested the Judge to leave to the jury this additional question: "Was the motor, left as it

was, likely to frighten a horse on the highway?" The Judge said in reply to the request, "There is only one answer to that question?" And counsel for defendant said, "I think that is all practically included in the questions your Honour has put to them."

From the reply the learned Judge made, one might suppose that, as the horse was a quiet one, and was frightened and shied on seeing the bright red automobile and brass fittings, other quiet horses would also be frightened at seeing the automobile when approaching it; and he therefore concluded that it was unnecessary to put the question asked for by plaintiff's counsel. . . .

[MacMahon, J., then set out the head-note to Harris v. Mobbs, 3 Ex. D. 269, and quoted the remarks of Denman, J., at p. 271; also the head-note in Wilkins v. Day, 12 Q. B. D. 110, and the remarks of Grove, J., at p. 113; and referred to Brown v. Eastern and Midlands R. W. Co., 22 Q. B. D. 391; and concluded:]

The jury, in answer to the 2nd question, having in effect found that it was not a reasonable user of the highway to leave the automobile on the highway for such a long time, when it could have been driven to the Franklin House, 500 or 600 feet away, it was, to use the language of Grove, J., in the Wilkins case, "an unauthorised obstruction of that which was part of the highway, and which obstruction made it less safe for user by the public," and, damage having resulted to the plaintiff therefrom, the defendant is liable therefor.

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

Teetzel, J.:—Notwithstanding that sec. 18 of 6 Edw. VII. ch. 46 placed the burden upon the defendant of proving that the plaintiff's damage did not arise by the negligence or improper conduct of the defendant, the plaintiff undertook that burden, and the jury have found in his favour.

I think the only question for this Court to determine is, whether there was any evidence upon which a jury might reasonably find defendant guilty of negligence which caused plaintiff's damage.

The gist of the negligence charged was in improperly leaving upon the highway an object likely to frighten horses, thereby unreasonably using the highway and endangering its use to others.

Upon the evidence there can be no doubt that the motor in question, standing where it did, unattended by any one, was likely to frighten horses. . . .

I think the test is as stated by Denman, J., in Harris v. Mobbs, 3 Ex. D. at p. 272: "The real question in such cases is whether the highway has been obstructed for an unreasonable time and in an unreasonable manner, or, in other words, in such a way as to amount to something beyond a fair and reasonable use of the way."

The degree of care required by the owner of a motor or other conveyance likely, whether standing or moving, to frighten horses, must be regulated by the exigencies of the particular situation.

An interesting discussion on the rights and duties of automobile owners is found in Indiana Springs Co. v. Brown, 74 N. E. Repr. at p. 616. . . .

Now, the amount of care required by the defendant in this case should, I think, be estimated by at least the following exigencies: (1) the striking colour of his motor; (2) the width of the highway; (3) the fact that he was storing it at the foot of the hill; (4) that the locality was one in which the presence of a motor standing unattended might not be expected; (5) the time during which he expected to leave the motor unattended.

I think, having regard to these matters, there was evidence to leave to the jury on the question whether the defendant was guilty of negligence in his user of the highway.

. . .

[Reference to Rounds v. Stratford, 26 C. P. 11, distinguishing it; also to Harris v. Mobbs, 3 Ex. D. 268; Wilkins v. Day, 12 Q. B. D. 110; Brown v. Eastern and Midlands R. W. Co., 22 Q. B. D. 391; Vars v. Grand Trunk R. W. Co., 23 C. P. 143; O'Neil v. Township of Windham, 24 A. R. 341.]

The rule to be reduced from all the cases is, I think, that whether the defendant failed to exercise reasonable care in the circumstances, and whether, in consequence thereof, there was an unreasonable user resulting in an

obstruction of the highway and causing plaintiff's injury, are clearly questions for the jury.

Unless, therefore, in this case, the jury can be said to have come to a wrong conclusion, the judgment must stand.

I think the findings of the jury were fully warranted by the evidence. The jury also found that there was not any street the plaintiff could have taken and avoided passing the motor. In view of that finding, I do not think there was any other evidence proper to be submitted to the jury on the question of contributory negligence; at any rate, counsel for the defendant did not insist upon such a question being submitted to the jury, and I think therefore there is no justifiable reason for granting a new trial.

I agree with my brother MacMahon in dismissing the appeal with costs.

MEREDITH, C.J. (dissenting), referred to the evidence, discussed the cases above cited, and concluded:—

I am not prepared to hold that, in the circumstances of this case, there was any reasonable evidence to go to the jury in support of the plaintiff's case.

There was, besides, much in the plaintiff's own testimony . . . to lead to the conclusion that the accident was due to his own want of care. He saw the motor-car standing where it was when he was about 20 rods away from it, and he saw also that his horse was frightened at it, and yet he pressed him on, intending apparently to force him to go past it.

The question of contributory negligence was not, however, left to the jury, and there is no finding as to it, nor was the jury asked to say whether the motor-car, placed where it was, was an object calculated to frighten horses of ordinary gentleness, though probably the answers of the jury, in view of the Judge's charge, involve a finding against the appellant on the latter question.

If it were not for the provisions of sec. 18 of the Act already referred to, I should be of opinion that there was no reasonable evidence to go to the jury in support of the plaintiff's claim.

Section 18, however, casts upon the owner or driver of a motor vehicle, where any "loss or damage is incurred or sustained by any person by reason of a motor vehicle on a

highway," the onus of proving that the loss or damage did not arise through his negligence or improper conduct, and it may be difficult, therefore, to direct that judgment be entered for the defendant; but, in my opinion, the defendant is entitled to have the findings of the jury and the judgment entered upon them set aside and to a new trial, and the costs of the last trial and of the appeal should be costs to the defendant in any event of the action.

It is to be regretted that further litigation should be necessary where the amount of the damage is so small, but the questions involved are of very great importance to the owners and users of motor-cars, as well as to the travelling public, and it would be a regrettable thing if the rights of the owners and users of motor-cars, which have been considerably restricted by legislation, should be further restricted by the findings of juries based not upon an impartial consideration of the evidence, but influenced by the well known prejudices, especially of the farming community, and shared by persons who are not farmers, against such vehicles.

APRIL 30TH, 1909.

DIVISIONAL COURT.

STAVERT v. McNAUGHT.

Jury Notice—Striking out—Separate Sittings for Jury and Non-jury Cases—Practice—Power of Judge in Chambers to Strike out Jury Notice before Trial—Issues of Fact and Law—Determination as to Method of Trial Left to Trial Judge.

Appeal by defendant McNaught from order of RIDDELL, J., ante 921, striking out defendants' jury notice.

F. Arnoldi, K.C., for defendant McNaught.

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

R. C. H. Cassels, for third parties.

The judgment of the Court (BOYD, C., MAGEE, J., LATCHFORD, J.), was delivered by

BOYD, C.:—This is a common law case, in which the issues to be tried are of disputed but not very complicated

facts. The defendant, who has given notice for a jury, has therefore a prima facie right to have the case submitted for jury trial, subject to the control as to the manner of trial, which can be better exercised by the Judge at the trial than at any earlier stage by any other Judge: per Osler, J.A., in Conmee v. Canadian Pacific R. W. Co., 12 A. R. 769 (1886). This view was enforced as being the more convenient method, by a Divisional Court in Bristol and West of England Loan Co. v. Taylor, 15 P. R. 313 (1893); by Mr. Justice Rose in Hawke v. O'Neil, 18 P. R. 165 (1898), who expressed himself very strongly after consultation with several of the Judges. Concurrence with this view was expressed by Meredith, C.J., in Sawyer v. Robertson, 19 P. R. 173, at p. 175, speaking for a Divisional Court, in 1900. And he repeats the view that this is the practice in Shantz v. Town of Berlin, 4 O. L. R. 730 (1902).

In Lauder v. Didmon, 16 P. R. 74 (1894), it was first pointed out, I think, that it was desirable, where provision was made for the holding of separate jury and non-jury sittings, to have it settled at an early stage which was to be the forum. That was said in a case in which there was no doubt that the notice for trial by jury had been given in a case involving equitable issues, and therefore not properly triable by a jury as of right.

Following upon this, a distinction was drawn by Meredith, C.J., in Montgomery v. Ryan, 13 O. L. R. 297, 9 O. W. R. 855 (1906), that though where the venue was out of Toronto, the practice was to leave the mode of trial to the trial Judge, it should be otherwise in Toronto, where the non-jury sittings are practically continuous throughout the year, and then it was advisable to settle in Chambers, by a Judge, whether the jury notice should stand or not. But the Chief Justice was careful to say and to repeat that the case should be one which "plainly" ought to be tried without a jury, in order to invoke interference with the jury notice. That case, Montgomery v. Ryan, was a very simple one, of legal nature, and eminently proper to be tried by a Judge alone, on a note, the defence being that part of the amount was discharged by an over-payment of interest. This view was again expressed by Meredith, C.J., in the Divisional Court, in 1907, Bryans v. Moffatt, 15 O. L. R. 223, 10 O. W. R. 1029, where the action appears to have involved equitable issues and the reformation of a document—matters not to be tried

by a jury. And the same opinion was expressed by the Court in Clisdell v. Lovell, in the same year and volume, 15 O. L. R. 379, 10 O. W. R. 609, 925, in which again equitable issues were involved. All the Judges agreed that these ought not to be tried by a jury, but Mr. Justice Anglin guarded his judgment by saying that the striking out of a jury notice by a Judge in Chambers should be strictly confined to cases in which it was obvious that no Judge would try the issues with a jury. The qualification expressed by this Judge was acted upon by Mr. Justice Teetzel in Dyment v. Dyment, 13 O. W. R. 461 (February, 1909), who declined to act in Chambers, though, had he been trial Judge, he would have been inclined to dispense with a jury.

Next comes the case in appeal, decided by Mr. Justice Riddell, Stavert v. McNaught, 13 O. W. R. 921 (April, 1909). The case of Dyment v. Dyment does not seem to have been brought to the notice of Mr. Justice Riddell, and leave to appeal from his order has been given by Mr. Justice Teetzel, that there may be a settled practice (if that is possible,)

I favour the opinion expressed by Mr. Justice Anglin, though it may be perhaps a little too broad, rather than to do away with the right of trial by jury in proper cases by the intervention of a Judge in Chambers. The critical test in actions merely of common law character, and in which a jury would be the recognised forum, if sought by either party, as to the method of trial, should not be taken out of the hands of the trial Judge. The reasons given for letting that determination rest with him prevail, to my mind, over those of convenience and expedience which are sought to be applied peculiarly to actions tried at Toronto. The non-jury sittings are continuous throughout the year; so practically are jury sittings, if there is anything to be tried; and there is no reason why the trial Judge at the jury sittings, if he comes to a case which, after hearing the counsel, he is of opinion should be tried without a jury, should not transfer that case to the non-jury list, or, which would be better, exchange with the non-jury Judge for the purpose of that particular trial. That adjustment would work less harm than the interlocutory mode of taking away the right to a jury in a case which is prima facie of jury competence, and in which one of the litigants has claimed a jury.

I agree with the course pointed out and the language used by Armour, C.J., in Bank of Toronto v. Keystone Fire Insurance Co., 18 P. R. 117 (1898), that litigants are entitled to have their cause tried in its order upon the list, and they are the only persons whose convenience ought to be consulted; and therefore that the Judge sitting for jury trials, who holds that a given case is to be tried without a jury, should himself carry out what he has declared, and not turn it over to another Judge, who may think that it ought to be tried with a jury. With Judges sitting concurrently in Toronto for jury and non-jury trials, there should be no real, practical difficulty in interchanging work for the time being.

In this appeal I think the jury notice should be restored; costs in the cause.

My own judgment respecting the matters to be tried in this case, depending almost entirely on the credibility of the opposing parties and their witnesses, would be to submit the controversy for the arbitrament of a jury rather than of a Judge sitting alone.

CARTWRIGHT, MASTER. APRIL 30TH, 1909.

CHAMBERS.

GILLES v. SMITH.

Mortgage—Foreclosure—Subsequent Incumbrancer Made Party in Master's Office and Foreclosed by Consent — Opening Foreclosure—Terms—Costs.

Motion by Alice A. Smith, made a defendant in the Master's office, in a mortgage action for foreclosure, to set aside an order foreclosing her, made on consent, and to be allowed in to redeem one parcel of the mortgaged lands, on which she held a second mortgage, and for a reference to the local Master at Hamilton to appoint a day for redemption and fix the amount required to redeem that parcel.

C. A. Moss, for the applicant.

G. S. Hodgson, for the plaintiff.

THE MASTER:—Alice A. Smith, the applicant, was made a party in the Master's office in a foreclosure, and consented to be foreclosed. This was under the idea that the original defendant would not redeem, and, by arrangement with the plaintiff, the applicant would have become owner. The

plaintiff's mortgage was on 3 separate parcels, and on one of them, with other lands, the applicant holds a second mortgage, under a deed absolute in form, which is now being dealt with by the Master at St. Catharines.

The first mortgage was redeemed by the father of the original defendant, and the mortgage was accordingly directed to be assigned to the father, but, owing to the applicant's claim, this has not yet been done.

The applicant was (and perhaps is) the wife of the original defendant, though they do not appear to be in friendly relations at present.

The foregoing are facts appearing from the affidavit of the applicant and the exhibits.

I am not aware of any authority for making such an order as is asked, unless the holder of the first mortgage were consenting. Had the matter proceeded in the usual way, the applicant would have been ordered to redeem the whole, and, on her doing so, the original defendant would, as between them, have had to pay off the second mortgage before he could redeem the first.

As matters are at present, it does not appear that the applicant is in any danger. If any good purpose will be served, the foreclosure may be set aside, and the matter go back into the Master's office. The costs of this motion and all lost or occasioned thereby should be paid by the applicant. unless they can, by agreement, be added to the mortgage debt.

FALCONBRIDGE, C.J. MAY 1ST, 1909.

WEEKLY COURT.

RE MUTUAL LIFE ASSOCIATION.

W. E. WELLINGTON'S CLAIM.

Life Insurance—Winding-up of Insurance Company—Distribution of Deposits Held by Minister of Finance and Assets Held by Trustees under Dominion Insurance Act—Payment of Dividends where Beneficiaries are Infants—Dominion Winding-up Act, secs. 162, 163—"Policyholder"—Preferred Beneficiaries—Payment of Moneys into Court Subject to Changes by Assured within Class of Preferred Beneficiaries—Payment out on Death of Assured.

An appeal by the official guardian, on behalf of Beatrice Wellington, an infant, from the certificate of Mr. J. A. Mc-

Andrew, the referee in the winding-up of the association, dated 31st March, 1909.

M. C. Cameron, for the appellant.

W. E. Middleton, K.C., for the liquidator.

E. B. Ryckman, K.C., for W. E. Wellington.

FALCONBRIDGE, C.J.:—The winding-up order was made under the Dominion Act (R. S. C. 1906 ch. 144) on 18th February, 1908. The deposits of the association held by the Minister of Finance and the assets held by trustees under the Insurance Act (R. S. C. 1906 ch. 34) are now in the hands of the liquidator, and are being distributed by him, and an interim dividend of 40 per cent. upon the claims has been ordered. In the distribution of the fund the question has arisen as to the payment of dividends where the beneficiaries in policies, upon which claims have been allowed, are infants. An appointment was given by the referee for the consideration of this question, and the point was argued. The referee subsequently issued his certificate dated 31st March, 1909, by which he held that the dividends are payable to the assured, and not to the beneficiaries named in the policies.

The official guardian and the solicitor for the liquidator subsequently applied to the Chief Justice of the Common Pleas for directions as to what form the appeal from the above certificate should take, and they were directed to select one claim as a test case.

W. E. Wellington, whose claim is one of the largest, has, at their request, consented to his claim being put forward as the one to be appealed. The claim is made under policy No. 156,676 of the association for $20,000 on the life of W. E. Wellington, and the beneficiaries named are "Earle, Stanley, Frederick William, Beatrice Maud, and Blanche Norine Wellington (children), share and share alike . . . . . if living at the time of the death of said member, otherwise to the executors or administrators of said member."

The referee by his certificate has held, as above stated, that the dividends payable in respect of this policy are payable to W. E. Wellington, and not to the beneficiaries. From this the official guardian on behalf of the infant Beatrice Wellington now appeals.

The referee has based his decision particularly on secs. 162 and 163 of the Winding-up Act. Those sections form part of part III. of the statute, which part relates particu-

larly to life insurance companies. The purpose of these sections generally is to provide for the application of deposits held by the Minister and of the assets held by the trustees under the Insurance Act, and they provide in effect that the policy-holders in Canada are entitled to claim for the net values of their policies, that such claims rank with judgments against the company upon policies in Canada, and that the proceeds of the sale of the securities held by the Minister and the assets held by the trustees are to be divided pro rata in accordance with such claims and judgments.

There are no definitions in the Winding-up Act which affect the present question; but the Insurance Act, R. S. C. 1906 ch. 34, by sec. 2 (h), defines "Canadian policy" or "policy in Canada," as regards life insurance, to mean a policy issued by any company licensed under that Act to transact the business of life insurance in Canada in favour of any person or persons resident in Canada at the time when such policy was issued. By sub-sec. (u), "policy-holder in Canada" means, as respects life insurance, any person in favour of whom any company licensed under that Act to transact the business of life insurance in Canada has, while such person was resident in Canada, issued a policy. These definitions do not in words include assignees of the assured or the beneficiaries to whom the policies are made payable. The assignee is provided for in one case; he is included in the term "policy-holder," as defined by sub-sec. (v) of sec. 2, when used in reference to the person to whom a tender is made by the Minister upon a company which voluntarily ceases to do business in Canada applying for a release of deposits. If full effect is to be given to these definitions, it would seem that where a company ceases to do business and applies for a release of its deposits, the assured or his assignee is entitled to say whether he will accept a transfer of his policy to another company or a surrender; whereas, if the company is being wound up compulsorily under the Winding-up Act, no provision is made for the protection of the assignee.

I think that the intention of the Insurance Act is simply to provide funds to meet the claims of persons who are resident in Canada at the time the contract with the company was made, and that, both under that Act and the Winding-up Act, the provisions for the distribution of the fund are directed entirely to the questions arising as between the company and the assured and between the Canadian policy-holders themselves. I do not see that the statute was intended

to interfere or does in any way interfere with rights which may have been acquired by third persons against the policy-holder. The fund for division represents as nearly as possible the moneys secured by the policy, and in the division of that fund the rights as between the policy-holders and their assignees or the beneficiaries to whom their policies have been made payable, are not affected by the winding-up. It could hardly be argued that the effect of the Winding-up Act was to defeat the rights of an assignee. The position of preferred beneficiaries under the Ontario Insurance Act (R. S. O. 1897 ch. 203, sec. 159) is the same for present purposes. These beneficiaries have in interest in the policy, even during the lifetime of the assured: Doull v. Doelle, 6 O. W. R. 39. The moneys payable in respect of the policy are trust funds, as to which they are beneficiaries, and their nomination as beneficiaries is in effect an assignment of the policy to them, subject to the right of the assured to change the beneficiaries in the cases permitted by the Act, and to their surviving the assured. The liquidator is, therefore, bound to take notice of assignments of the policies in respect of which he is making a distribution of the fund, and also of the declarations in favour of preferred beneficiaries. The principle of the Ontario Insurance Act is to permit the assured from time to time to make whatever changes he may consider necessary or advisable in the members of the preferred class of beneficiaries who are to take. And, in any event, the right of any such beneficiary to participate is not absolute until he shall have survived the assured. Therefore, in this case the mere accident that moneys become payable in respect of the policy by reason of the winding-up of the association in the lifetime of the assured, while it does not impair, does not accelerate, the rights of the beneficiaries.

The moneys should be paid into Court to the credit of this matter, and, while there, will be subject to such control of the assured as is exerciseable by him over a trust fund created by sec. 159 of the Ontario Insurance Act, and, subject as above, the moneys may be paid out on the death of W. E. Wellington to the named beneficiaries then surviving, in equal shares.

As this matter is brought up wholly as a test case in the winding-up of the association, and not as a contest between W. E. Wellington and his children, the costs of all parties will be paid by the liquidator out of the funds in his hands.

TEETZEL, J. MAY 1ST, 1909.

TRIAL

SCOTT v. PERE MARQUETTE R. R. CO.

Negligence—Destruction by Fire of Wood Piled near Railway Siding—Escape of Fire from Engine—Proof of Negligence — Accumulation of Combustible Matter — Defective Condition of Screen.

The plaintiff, a dealer in wood and timber, by arrangement with the defendants had the right to and did store cordwood on the defendants' property adjoining their tracks at Foster's siding. A large quantity was burned on 4th July, 1907, and a smaller quantity on 22nd April, 1908, and this action was brought to recover the value. It was tried at Sandwich without a jury.

A. H. Clarke, K.C., and A. R. Bartlet, Windsor, for plaintiff.

F. Stone, Chatham, for defendants.

TEETZEL, J.:—I have no difficulty in finding upon the evidence that both fires were caused by sparks escaping from defendants' locomotives, but, in order to make the defendants liable for the loss, negligence must also be found.

As to the July fire, there was not, in my opinion, sufficient evidence to establish negligence, either in using a defective locomotive or allowing combustible material to exist on the right of way or otherwise.

As to the fire on 22nd April, 1908, there is evidence upon which negligence by the defendants in respect of two matters may be found, and I think both combined to cause the destruction of the plaintiff's wood.

In the first place, I think the defendants were negligent in allowing to remain along the side of their right of way near plaintiff's pile of wood, an unreasonable amount of long, dead grass, the growth of the previous year, and in which, I am of opinion, the fire started and spread to the wood.

On 23rd April the plaintiff and two engineers of experience examined the locomotive from which the sparks were emitted on the 22nd, which caused the damage, and they

found the netting or screen used to break or reduce the escape of cinders, in a very bad condition; it had 3 holes in it, 2 of which were described as large enough to admit a man's 3 fingers. Admittedly a screen in that condition was defective and unfit for the purpose intended, and would be a source of danger in allowing large cinders to escape. It was in evidence for the defendants that the locomotive had been inspected on 21st April, and a witness who inspected it swore that on that day he did not find any such holes and was sure they did not exist on that day. From its condition on the 23rd it is inconceivable to me, in the absence of any evidence of any accident acounting for the holes in the screen during its use on the 22nd, that it could have been properly inspected on the 21st, and, in my opinion, it was not properly inspected before it left for the trip on the 22nd. If it had been properly inspected, which it was the duty of the defendants to have done, the defects could have been discovered. I am, therefore, of the opinion that the plaintiff has established negligence entitling him to recover, and I fix the amount of his loss on 22nd April, 1908, at $300, and direct judgment to be entered for that sum with costs, not including costs in respect of his claim for the July fire, as to which I make no order for costs.