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FALCONBRIDGE, C.J. FEBRUARY 6TH, 1909.

TRIAL.

PACIFIC COAST PIPE CO. v. CITY OF FORT WILLIAM

PACIFIC COAST PIPE CO. v. NEWMAN.

Sale of Goods—Action for Price—Defence—Reliance on Statements and Warranties—Correspondence and Catalogue—Defects in Goods Supplied—Failure of Consideration.

Actions for the balance alleged to be due to the plaintiffs for wooden piping furnished by plaintiffs to defendants for the purpose of constructing a system of waterworks within the municipality. The actions were tried together, without a jury.

F. H. Keefer, K.C., for plaintiffs.

H. L. Drayton, K.C., and F. R. Morris, Fort William, for defendants.

FALCONBRIDGE, C.J.:—I find that the pipes were purchased by the defendants relying upon statements and warranties contained in the plaintiffs' catalogue and in the correspondence: in effect that the pipe would give satisfaction and would fill all requirements perfectly.

I refer to the catalogue (exhibit 1) passim; and particularly to pp. 9, 11, 15, 17, 22, 25, 29, 30, 33, 35, and 37. On p. 21 they say: "We furnish full instructions in regard to laying pipe, making connections, cutting pipe, etc., upon request; or we can furnish an experienced man to lay pipe for you, if desired." And on p. 23: "The simplicity of the coupling renders great speed in laying possible, and obviates the necessity of skilled labour."

As to the correspondence I refer to exhibit 2: "There is no doubt or question but that our pipe will fill your requirements, and fill your requirements in the most satisfactory manner possible." In exhibit 3 there is an assurance about the cost of iron coupling. In exhibit 4 there is a guarantee of the pipe. In exhibit 23, letter of 9th March, 1906, plaintiffs say: "If desired, we can send a good man who would be a working foreman under your inspector, and with a gang of unskilled labourers would lay the pipe to your satisfaction." The man was sent accordingly (Wilson, who is referred to in exhibit 5 by plaintiffs as "our man Wilson."). In exhibit 23, a letter from defendant Newman to the plaintiffs, of 8th June, 1906, says: "I understand you have entered into an agreement or understanding with the town to send a man here to put the pipe together for $3 per day and travelling expenses, you guaranteeing the pipe against all leaks, damages, etc, if your man put them together. I would ask you therefore to send a man along on the above terms at once."

I have not been able to find that there was any repudiation by plaintiffs of this suggestion or statement; on the contrary, the secretary (Perry) writes to Captain McAllister on 23rd June, referring to Newman's letter, and saying, "Our man will be there."

I find that the defendants relied on the plaintiffs' skill and judgment to supply pipes fit for the purpose required, and that the pipes were purchased by the defendants relying upon the statements and warranties made by plaintiffs that such pipes would give satisfaction and would fill all the requirements, &c. I find that the pipes have not filled such requirements, but have proved unsatisfactory, insufficient, and unsuited for the purposes for which they were wanted. And I find that such condition of affairs has not been caused by any negligence on the part of defendants in the laying of the pipes, which was done largely under the supervision of the expert supplied by the plaintiffs.

The pipes were not reasonably fit for the purpose for which they were supplied. The chief, but not the sole, defect, is in the coupling, which proved to be absolutely defective. But there is also evidence that to some extent at any rate the staves did not answer the representation on p. 29 of the catalogue, that they would be dressed on both sides to true mathematical segments so that when assembled would form a perfect circle.

There was a total failure of consideration, and the plaintiffs' action is dismissed with costs.

There will be judgment for the defendants upon the counterclaim, with a reference to the Master to ascertain the damages.

The above findings embody my own opinion upon the weight and credibility of the testimony, the admitted facts, and the written and printed documents.

By and with the consent of counsel for all parties an order was made (as of 27th June, 1908), under Con. Rule 94, referring it to Mr. E. H. Keating, C.E., to inspect and report on certain matters as therein set forth.

His report was, after long delay, taken up by the parties and was presented to me on the 16th ult.. . . .

In sending an expert of the standing of Mr. Keating to the locus in quo, I was not without hope that all parties might adopt some temporary or permanent modus vivendi in order to avoid a result which would in the end turn out to be disastrous to one party or the other, and I observe that on 28th August Mr. Keating suggested to the parties, as worthy of a fair trial, a method of repairing the defective joints. If that device has not been tried for the benefit of whom it might concern, no doubt the condition of the pipe will not have improved in the interval.

BOYD, C. FEBRUARY 8TH, 1909.

CHAMBERS.

AMYOT v. SUGARMAN.

Costs— Scale of—Increased Jurisdiction of County Court— Amount Involved — Ascertainment "as Being Due"— County Courts Act, R. S. O. 1897 ch. 55, sec. 23 (2)— 4 Edw. VII. ch. 10, sec. 10.

Appeal by plaintiffs from the ruling of the local registrar at Ottawa that the costs awarded by the judgment to be paid to plaintiffs by defendant of this action, brought in the High Court, should be taxed on the County Court scale.

The appeal was heard at Ottawa.

A. Lemieux, for plaintiffs.

R. J. Sims, for defendant.

BOYD, C.:—The County Courts Act as to jurisdiction was amended in 1904 by 4 Edw. VII. ch. 10, sec. 10, by inserting the words "as being due" after "acceptance," so that R. S. O. 1897 ch. 55, sec. 23 (2), now reads: "The County Court shall have jurisdiction . . . in all causes and actions relating to debt, covenant, and contract to $600 where the amount is liquidated or ascertained *as being due* by the act of the parties or by the signature of the defendant." The new words introduced are taken, it may be inferred, from the judgment of Mr. Justice Osler in Robb v. Murray, 16 A. R. 506, from the sentence in which he says, speaking of the scope of this section: "The intention was to give the larger jurisdiction only in the comparatively plain and simple cases where by the act of the parties or the signature of the defendant, the amount was liquidated or ascertained *as being due* from one party to the other on account of some debt, covenant, or contract between them."

Mr. Hoyles, in commenting on the year's legislation in 24 C. L. T. p. 256, suggests that the effect of the amendment is to rehabilitate that judgment, which had been considerably overruled by the same Court in Ostrom v. Benjamin, 21 A. R. 467.

Upon the pleadings this action is founded upon a contract to build a house at a total cost of $3,000 The plaintiffs in their claim give credit for payments made by the owner up to $2,460 and for a set-off, agreed to be allowed on account, of $240, and, deducting these sums, they sue for a balance of $300.

The defence set up in effect admits that the amount in dispute is only $300, but says it is not payable because the plaintiffs did not complete their contract according to plans and specifications.

Upon the trial the learned Judge awarded judgment for $300 with costs. Upon the taxation the registrar ruled that the case was within the competence of the County Court, and proceeded to tax under Rule 1132. The plaintiffs appeal.

This action is respecting a contract involving payment of $3,000 for the proper construction and completion of the buildings, and upon the pleadings it was all open for the defendant to range over all the details and to question the insufficiency of what was done. The fact that by payment and set-off the total amount agreed upon had been brought down to $300 does not suffice, if that amount is not liqui-

dated or ascertained as being due by the act of the parties or by the signature of the defendant. The act of the parties, no doubt, has reduced the actionable part of the contract (as to amount) to $300, but there is no ascertainment of that balance by the signature of the defendant. On the contrary, this very attitude of the parties in this action indicates in the strongest way that the amount claimed is not ascertained or liquidated, but contested by the defendant. It looks very much as if the last amendment has confined the jurisdiction of the County Court to cases where the claim has been admitted by the signature of the defendant, or where something has been done between the parties which amounts to an account stated.

In this case I cannot accept the registrar's conclusion, and think the record must go back to have costs taxed as usual on the High Court scale. No costs of appeal.

It would be well, I think, in cases of small recovery, where the question of jurisdiction may be mooted, that the Judge who tries the case should also express his views as to the scale of taxation. He can better judge than any other what is the proper way to dispose of the costs, and in this way appeals from the rulings of the taxing officers are avoided.

FALCONBRIDGE, C.J. FEBRUARY 8TH, 1909.

TRIAL.

RAMSAY v. NEW YORK CENTRAL AND HUDSON RIVER R. R. CO.

Sale of Goods—Action for Price—Inspection—Place of Delivery—Acceptance of Part—Subsequent Return—Defects in Quality—Evidence—Breakages in Transit.

Action for the price of goods sold and delivered.

R. A. Pringle, K.C., for plaintiff.

R. Smith, K.C., and A. Langlois, Cornwall, for defendants.

FALCONBRIDGE, C.J.:—The contract is contained in exhibits 1 and 2. The goods were deliverable and were delivered at Cornwall, and billed as directed by defendants.

The material purchased was subject to the defendants' inspection and approval, but that inspection should have been at the point of delivery. Some of the tile was accepted and imbedded by defendants' servants, but it was afterwards exhumed and re-shipped to plaintiff as being unfit for use.

I think the plaintiff is entitled to recover. I do not accept in its entirety the evidence offered by defendants of the extremely bad quality of the material. If I were making an allowance for non-delivery according to the contract, I would base it on the evidence of Robert L. Orr, section foreman and witness for defendants, who says that 46 lengths in all were total loss and the remainder were good for practical purposes. There were 260 lengths delivered, so that one-fifth, or $75, would be a fair allowance; but, in view of the strong evidence as to the quality of the tile when shipped and the care taken by plaintiff to protect it from damage in transit, I am of the opinion that the breakages were caused by rough treatment on the cars, or in unloading, and I therefore give judgment for the full amount, with costs.

ANGLIN, J. FEBRUARY 9TH, 1909.

TRIAL.

JARVAS v. TORMEY.

Landlord and Tenant — Agreement for Lease—Relinquishment of Rights by Plaintiff—Burden of Proof—Delay in Commencement of Action—Refusal of Specific Performance—Discretion—Damages for Breach of Agreement—Measure and Quantum — Value of Premises — Loss of Profits—Compensation for Loss of Lease—Increase in Rental Value.

Action for specific performance by the defendant of an agreement for the lease of shop premises in Rideau street, in the city of Ottawa, and also for damages for wrongful exclusion, possession of the premises, mesne profits, an injunction restraining the defendant from using or occupying the premises, a mandamus directing him to execute a lease

pursuant to the agreement, and other relief. Counterclaim for negligence.

D. O'Connell, Peterborough, for plaintiff.

E. J. Daly, Ottawa, for defendant.

ANGLIN, J.:—By sublease, dated 1st August, 1905, the plaintiff became tenant of the premises under T. Lindsay and Co., who were lessees thereof from the defendant for a term expiring on 15th February, 1907. On 4th August, 1905, the plaintiff obtained from the defendant an agreement for a lease of the same premises for a term of 3 years from 16th February, 1907, to 16th February, 1910, at $90 a month, and for an extension of lease for two years to 16th February, 1912, at $100 a month. The plaintiff went into possession under his sublease from T. Lindsay & Co., and occupied the premises as a fruit and confectionery shop.

On 22nd January, 1907, the building was partly destroyed by fire and rendered unfit for occupation. After the fire the plaintiff arranged for the return to the vendors of a number of store fittings, upon which he had made comparatively small payments. Other fittings which belonged to him were sold. Most of his fixtures were thus disposed of.

The plaintiff remained in Ottawa for 2 or 3 weeks after the fire. His evidence, corroborated by that of his daughter, is that, prior to his leaving Ottawa, the defendant had obtained the key of the premises for the purpose of making repairs, and had, at least once, and perhaps twice, refused to return it, intimating that he intended to retain possession. The plaintiff then went to Montreal and remained there about two months, returning to Ottawa in the early part of April. According to the evidence of himself and his brother-in-law, who accompanied him, he then again demanded possession of the premises from the defendant, and was again refused. The premises were not then ready for occupation, but were made so about the early part of April.

The defendant denies that before the plaintiff went to Montreal he demanded possession, and was refused. In the statement of defence it is admitted that the plaintiff "returned to Ottawa and claimed possession of the premises, which was refused to him by the defendant." The defendant further stated that early in February he went to the plaintiff and asked that he be given the lease, which

he said he wanted for the purpose of cancellation, though he did not say that he so informed the plaintiff. He says that he then wished to get rid of the plaintiff as a tenant. The plaintiff told him that the lease had been burnt with his books. The defendant did not ask for delivery or possession of the premises. As he was leaving, a man named Adamson, who was of the same nationality as the plaintiff, and had been conversing with him in the Greek tongue, followed the defendant to the door, and told him that he would give him (the defendant) the lease in the morning. The plaintiff was not asked about this incident. Adamson was not called as a witness, and there is no evidence that this statement was heard by the plaintiff or was made by his authority.

The defendant leased a portion of the premises in question, on 20th March, 1907, to one Louis Daniels, for two years, at a rental of $100 a month, and for a further term of one year at an increased rental, the increase to be equivalent to any increase in taxes, and the remainder of the premises, on 1st April, to one Chambers, for two years, at $75 per month.

By way of defence the defendant alleges that he was induced to make the agreement for lease by false and fraudulent representations of the plaintiff that he was possessed of large capital. No evidence was given in support of this allegation. He further alleges that after the fire the plaintiff left the city of Ottawa, as the defendant believed, with a view to defeating or delaying claims of creditors, and that after the plaintiff had so left Ottawa, in the belief that the lease was void or voidable, he proceeded to repair, and thereafter leased the premises to other tenants. Although his pleadings are silent on this point, at the trial he sought to prove that it was a condition of the agreement for lease that the plaintiff should make certain repairs and improvements, which he failed to make. The evidence did not establish that there was any such term applicable to the agreement, and the sufficiency of the repairs and improvements made by the plaintiff seems not to have been questioned until the trial of this action.

By way of counterclaim the defendant alleges that the fire which injured the premises was caused by negligence of the plaintiff, and he claims the sum of $1,300 for resulting damages. There was no evidence whatever to support this allegation of negligence.

The defendant does not in his pleadings allege that the plaintiff in fact abandoned his interest in the premises, or that any release was obtained from him of his rights as lessee.

I am unable upon the evidence to find whether or not the plaintiff left Ottawa with intent to relinquish his rights under his agreement with the defendant. There are several circumstances which rather indicate that he did. But, if his evidence and that of his daughter be true, before he left Ottawa the defendant had taken the position that he would not recognise any right in the plaintiff under the agreement, and would not give him possession of the premises. I incline to believe this evidence. The defendant was, I am satisfied, desirous of being rid of the plaintiff as a tenant before the latter left Ottawa.

The burden is upon the defendant to establish satisfactorily a relinquishment by the plaintiff of his rights under the agreement. He has failed to do so. He certainly did not make any reasonable effort to ascertain the plaintiff's whereabouts, or to communicate with him to know whether or not he intended to carry out the agreement. He probably could have found the plaintiff had he wished to do so. Without communication with the plaintiff he leased the premises to Daniels and Chambers at a largely increased rental. I am satisfied, however, that when the leases to Daniels and Chambers were made, the defendant actually believed that the plaintiff did not intend to resume business in Ottawa or to carry out the agreement for lease. Moreover, although the plaintiff was definitely and finally refused possession early in the month of April, 1907, this action was not begun until the 2nd December following.

Having regard to all the circumstances, to the uncertainty created by the plaintiff's own conduct in absenting himself from Ottawa for two months without communication with the defendant, to the belief of the defendant that the plaintiff had relinquished his claim as lessee, and to the plaintiff's delay in commencing this action, the discretionary remedy of specific performance should not, I think, be given. But, upon the authorities, the plaintiff is, in my opinion, entitled to damages for breach by the defendant of his agreement for lease: Ford v. Tiley, 6 B. & C. 325.

It remains to determine what should be the measure and quantum of such damages. Counsel for the plaintiff

maintains that his client is entitled to recover the amount by which the rental now payable to the defendant exceeds that which the plaintiff had agreed to pay. He says that this amount represents the difference between the actual rental value of the premises and the rent payable by his client, and is therefore the proper measure of the damages sustained. He further urges that the defendant should not be allowed to profit by his breach of contract, and that, unless damages are awarded upon this footing, the breach of contract will in fact prove profitable.

For the defendant, on the other hand, it is urged that the plaintiff's financial position after the fire, his selling and otherwise disposing of his shop fixtures and furniture, and his leaving the city of Ottawa without any definite understanding with the defendant as to the repairs, or as to the time when the shop would be ready for occupation, indicate clearly that he had no intention of resuming business, and that the evidence shews that he was not in fact financially able to again fit up and open his confectionery shop.

No evidence whatever was given to shew that the plaintiff could not have readily procured other premises equally suitable for his purposes, and at a rental not greater. The plaintiff made no effort to procure such premises, although, according to his own statement, he knew early in February that the defendant did not intend to allow him to have possession of his property.

The plaintiff gave some evidence to shew the profits which he had made in carrying on his business before the fire took place. His evidence upon this branch of the case I think decidedly extravagant.

In Marrin v. Graver, 8 O. R. 39, it was held by the Queen's Bench Divisional Court, Wilson, C.J., dissenting, that the proper mesaure of damages in an action by a tenant against his landlord for refusing to give him possession of the demised premises, is the difference between what the tenant agreed to pay for the premises and what they were really worth. It is not open to the tenant to shew that he rented the premises for the purpose of carrying on a business, for which the landlord was aware that he could not procure other premises, and to claim the profits which he might have made in such business, had he been let into possession. The early case of Ward v. Smith, 11 Price 19, where loss of profits

was held to be recoverable as damages under an allegation of general damages, was disapproved of in Marrin v. Graver.

In Day v. Singleton, [1899] 2 Ch. 320, Lindley, M.R., and Rigby, L.J., expressed the view that, where a lessee fails to obtain possession through the fault of the lessor, he is entitled to the damages which he sustains by the loss of his bargain; and Sir F. H. Jeune was of the opinion that in estimating the amount of these damages the fact that a larger rental was subsequently obtained by the defaulting landlord would be material for consideration (at p. 335).

In Jacques v. Millar, 6 Ch. D. 153, Fry, J., awarded to a disappointed tenant, in addition to specific performance, damages for the period during which he was kept out of possession upon the footing of "what would have been the value of the possession of the premises to the plaintiff" during such period.

The text-writers and the authorities agree that where by leasing to a third person, a lessor puts it out of his power to give possession of demised premises, he is liable to pay damages to the person aggrieved to the extent of the value of his bargain. In such a case the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term, is considered the natural and proximate damage.

Upon the authority of Marrin v. Graver, a tenant cannot recover in Ontario for prospective loss of profits from the business which he intended to carry on upon the premises. Neither is he entitled to treat his landlord as a trustee of the premises, and to hold him accountable for whatever increase in rental he may gain upon a re-leasing of the premises. In some cases of breach of contract between master and servant, this measure of damages has been applied. See Sheppard Publishing Co. v. Harkins, 9 O. L. R. 504, 7 O. W. R. 482. But, so far as I can discover, it has not been applied in any other class of cases to the assessment of damages for breach of contract. The basis upon which the tenant's damages should be assessed is compensation to him for the loss of his lease, and not punishment to the landlord for his breach of duty.

What, then, upon the evidence, was the value of his bargain to the plaintiff—what was the difference at the time of breach between the rental which he was to pay for the premises and their actual value? The evidence shews that between 1905—when the agreement was made—and

1907—when the breach occurred—there had been an increase in the rental value of property in Ottawa. It further shews that, in order to obtain the increased rental which he has secured, the defendant divided his premises and spent upon them considerably more money than would have been necessary to put them in repair for the plaintiff. He also leased a portion of the premises to the proprietor of a theatorium. Tenants of this class pay exceptionally high rents. Now, it was a condition of Jarvas's lease that he should not assign or sublet without leave. He, therefore, could not have done with the premises what the defendant has been able to do. Yet I do not think that the whole increase in the rental obtained is due to the additional expenditure made by the landlord, or to the manner in which, or for the purpose for which, he has let his building. I must find upon the evidence that there was some increase in actual rental value between the date of the making of the agreement and the date of the breach, and to that increase the plaintiff is, in my opinion, entitled by way of damages. There is nothing to indicate that the rental agreed upon was not the actual rental value of the premises at the time when the agreement for lease was made. I think I may fairly assume that it was. Acting as a jury, I find that the increase in rental value had been at the rate of $10 per month, and that the premises are now worth and are likely to be worth during the entire term $10 per month more than the rental agreed upon between the plaintiff and defendant. I therefore assess the plaintiff's damages at $580. There will accordingly be judgment for him for this sum, with costs, and the defendant's counterclaim will be dismissed, also with costs.

FEBRUARY 9TH, 1909.

DIVISIONAL COURT.

MELADY v. JENKINS.

Contract—Carriage of Grain—Rate of Payment for Carriage —"Bushel"—Different Standards of Measurement—Place where Contract Made—Place of Completion—Bills of Lading—Evidence of Usage or Custom—Ship—Powers of Master as Agent of Owners—Action to Recover Overpayment Made Voluntarily.

Appeal by defendants from judgment of MORGAN, Jun. Judge of the County Court of York, in favour of plaintiff in an action in that Court, to recover $153 alleged to have been overpaid to defendants, in the circumstances stated in the judgment.

The appeal was heard by BOYD, C., BRITTON, J., MAGEE, J.

G. R. Geary, K.C., for defendants.

W. N. Ferguson, K.C., for plaintiffs.

BOYD, C.:—The defendants, carriers and owners of the steamer "Squire," contracted with plaintiffs to carry a quantity of oats from Fort William, in Ontario, to Buffalo, in the United States, at the rate of 2½ cents per bushel. Bills of lading were issued in respect thereof, directing the delivery to the Bank of Hamilton, and these were indorsed by the bank to the plaintiffs, merchants in Toronto, owners of the oats. Upon claiming delivery, the defendants charged freight at the rate of 2½ cents upon each 32 lbs., the American standard of measurement, which they claimed to be a bushel within the meaning of the contract; the plaintiffs, contending that the Canadian standard of 34 lbs. to the bushel was what the contract meant, paid the whole amount demanded, $2,607.74, and now bring suit for the recovery of the excess claimed to be paid, i.e., $153.

The agreement for carriage was made by telegrams and correspndence from Chicago to Toronto, through Prudeville & Co., agents for the owners of the vessel, the defendants, in the States, to the plaintiffs, at Toronto. And it

was thus briefly expressed: "Charter for one compartment for about 90,000 oats to Buffalo at 2½ per bushel." If anything should turn upon it, this contract was completed at Toronto, and is to be treated as a contract made in Canada. The cases are cited by my brother Magee.

The oats were delivered on board the steamer at Fort William, and bills of lading given and signed by the master of the ship, also the agent of the defendants, which accepted the cargo as measured by weight on the Canadian standard of 34 lbs. to the bushel. That is indicated by the figures giving quantities upon the face of the bills, and it is, to my mind, the turning point of the appeal. On these bills it is also said, "Rate of freight as per agreement." The documents are thus to be read together, one is incorporated with the other, and there is no inconsistency or discrepancy between them. The agreement specifies the rate of freight to be paid on each bushel; but that term "bushel" is vague and ambiguous so far as weight is concerned; that is to say, there is an American bushel of oats equalling 32 lbs., and there is a Canadian bushel equalling 34 lbs. This is a Canadian contract, and prima facie, I should say, the parties contracted as to the Canadian standard of measurement being applied to the Canadian (Manitoba) product shipped from the Canadian port. The silence of the contract as to the method of measurement may be made intelligible by evidence of usage or custom or other evidence not contradictory of what is expressed therein. See Russian Co. v. Silver, 136 B. N. S. 610. The bill of lading may, therefore, be properly used for the purpose. No evidence is given by the defendants or by the master of the ship or by the agents of the ship-owners who mediated the terms at Chicago. In general the powers of the master as agent are as given by Lord Chelmsford in McLean v. Fleming, L. R. 2 Sc. App. 130: "The bills of lading signed by the master are prima facie evidence that the quantities mentioned in them have been received on board. The master is agent of the ship-owner in every contract made in the usual course of the employment of the ship. . . As it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the ship-owner the onus of falsifying them."

In the last edition of Smith's Mercantile Law, 11th ed. (1905), vol. 1, p. 426, it is stated: "Unless the mode of

calculating the weight or measurement of the cargo is indicated by the contract itself or the usage of the particular trade, it seems that freight will be payable according to the mode of computation at the port of loading." He cites the case from which I proceed to quote.

Bowen, L.J., in Spaight v. Farnsworth, 5 Q. B. D. 225: "Inconvenience in practice must obviously often arise unless some one measurement of the quantity delivered is agreed upon for the purpose of the calculation of freight. . . There is nothing accordingly unnatural that the ship and the charterer should agree that freight is to be paid on the measurement figures arrived at at the port of loading." This language indicates, to my mind, that it is quite within the competence of the master to accept the freight on the footing of a 34 pounds-to-the-bushel standard of measurement, and, failing all other evidence, that his signature to that effect binds his principals, the present defendants. Thus reading the prior agreement and the completion of its unmentioned but necessary terms in the bill of lading, I do not need to resort to any consideration as to the cases cited to us on the conflict in private international law. This complete contract is governed and is to be interpreted by its own terms, which, upon all the evidence given, entitle the plaintiffs to succeed.

The first defence set up, that the contract was for payment of freight at the rate of 32 lbs. to the bushel, is, I think, negatived. The second defence, that the overpayment was made voluntarily and cannot be recovered, is amply answered by the decision in Shand v. Grant, 15 C. B. N. S. 234, which in the facts as to the payment is on all fours with the present. The same point as to the recovery of unpaid freight was long ago decided in Geraldine v. Donaldson, Holt R. 246.

The judgment should be affirmed and the appeal dismissed with costs.

BRITTON, J., agreed that the appeal should be dismissed with costs, for reasons stated in writing, in the course of which he referred to Moller v. Living, 4 Taunt. 102; Spurrier v. La Cloche, [1902] A. C. 446; Rodocanachi v. Milburn, 18 Q. B. D. 67; Lloyd v. Guibort, L. R. 1 Q. B. 115; The "Skandinev," 50 L. J. N. S. Adm. 46, 51 L. J. N. S. Adm. 93; North-West Transportation Co. v. McKenzie, 25 S. C.

R. 38; Leake on Contracts, 5th ed., p. 64; Newell v. Tomlinson, L. R. 6 C. P. 405.

MAGEE, J., dissented, for reasons stated in writing, in the course of which he referred, in addition to some of the cases cited by the Chancellor and Britton, J., to Pearson v. Goschen, 33 L. J. C. P. 265; The "Canada," 13 Times L. R. 238; Harris v. Carter, 3 E. & B. 559; Magann v. Auger, 31 S. C. R. 186; Dunlop v. Higgins, 1 H. L. C. 381; Godwin v. Francis, L. R. 5 C. P. 295; Cowan v. O'Connor, 20 Q. B. D. 640; 9 Cyc. 295; Robertson v. Jackson, 2 C. B. 442; Keating v. Dillon, Q. R. 28 S. C. 323; In re Missouri S. S. Co., 42 Ch. D. 321; In re Wilhelm Schmidt, 25 L. T. 34; Meyer v. Dusser, 16 C. B. N. S. 646; Smidt v. Tiden, L. R. 9 Q. B. 446; Raffles v. Wichelhaus, 2 H. & C. 906; Keele v. Wheeler, 7 M. & G. 665; Riley v. Spotswood, 23 C. P. 318; Rossiter v. Cahlmann, 8 Ex. 361; Jones v. Giles, 10 Ex. 119, 24 L. J. Ex. 259; Hughes v. Humphreys, 3 E. & B. 958.

DEROCHE, Co. C.J. FEBRUARY 10TH, 1909.

COUNTY COURT OF HASTINGS.

ASPEGREN & CO. v. POLLY AND WHITE.

Sale of Goods — Contract — Breach of — Action by Purchasers for Damages—Jurisdiction of Court—Arbitration Clause in Contract—Waiver by Parties—Making of Contract—Correspondence—Broker's Bought and Sold Notes —Terms of Contract—Car-loads of Prime Apples—Custom of Trade at Place of Delivery — Meaning of "Car-loads"—Meaning of "Prime" — Delivery of Part of Part of Goods—Refusal to Accept—Inferiority of Quality — Evidence — Deficiency in Quantity — Vendors not Shipping Second Car-load—Damages—Purchase to Fill Contract — Difference between Contract and Market Prices.

The plaintiffs are dealers in produce and members of the Produce Exchange of New York, and carried on business in the city of New York, and the defendants were manufacturers of evaporated apples, dealers in dried apples and

apples for export, and carried on business at the town of Trenton, Ontario.

The plaintiffs alleged that in the month of October, 1903, they bought from the defendants a certain quantity of apples of a certain quality, to be delivered in New York, and that the defendants failed in the performance of their contract, so that the plaintiffs were forced to buy other apples to take the place of the ones purchased from the defendants, and in so doing suffered a loss of $150, which they claimed as damages against the defendants.

The defendants said that they never entered into a contract to sell to the plaintiffs, as alleged by them, and, if there was any contract at all between them, then they fulfilled their part of the contract in part, by the shipment of a portion of the apples, but the plaintiffs refused to accept them, and such refusal relieved the defendants from further shipment. The defendants further said that, if there was a contract, it was subject to the term of matters in dispute being submitted to arbitration, and that therefore the Court had no jurisdiction.

W. N. Ponton, K.C., for plaintiffs.

E. G. Porter, K.C., for defendants.

DEROCHE, Co. C.J.:—The questions which are raised in this issue are: first, the question of the jurisdiction of the Court; second, was there a contract between the parties, and, if so, what were its terms? third, was there a breach of the contract on the part of the defendants? and fourth, are the plaintiffs entitled to damages, and if so, how much?

I will then first deal with the question of jurisdiction. In the bought and sold notes passed by the broker to each of the parties there is this clause, "any difference arising under this contract to be settled by arbitration," and it is upon that that the defendants are alleging that the jurisdiction of this Court is ousted. Neither of the parties, however, asked for arbitration, although the breach, if any, occurred in October, 1903, and the writ was not issued until 24th March, 1904, and no objection was taken to the action before pleadings filed, according to R. S. O. 1897 ch. 62, sec. 6, and there was no objection taken in the original pleadings; in fact, no objection taken anywhere to the jurisdiction of the Court until the trial, which was held in January, 1909,

and then the defendants' counsel asked to amend his pleadings by raising that question, amongst others.

Further than this, one of the defendants swears that he was advised by his agent Delmarle, broker, not to accept arbitration, that he did not want arbitration, and that he would not have consented to arbitration. It seems to me that if the defendants had any rights under this clause, then those rights were waived by these various facts and circumstances, and there is clearly the right to waiver, as stated in 2 Am. & Eng. Encyc. of Law, 2nd ed., pp. 586, 587; I refer particularly to note 5 on p. 586, including the case of Wright v. Susquehanna Mutual Fire Insurance Co., where the Court said: "It was the right of either party to demand arbitration; it was the right of either party to waive it; and the defendant, having made no such demand, must be presumed to have waived it." And note 5 also includes a reference to Russell on Awards, 6th ed., p. 63, where it says that "until the arbitrators are named in such an agreement, the submission is not complete, because there is no one who has binding authority to determine the questions submitted." But, beyond this, I do not think such a general clause as to arbitration as we find in these bought and sold notes is sufficient to oust the jurisdiction of the Courts, and as authority for this I refer also to the same volume and edition of the Am. & Eng. Encyc. at pp. 570, 571, 572, and 573. On p. 570, note 2, there is a reference again to Russell on Awards, at p. 64, where he says that the rule that persons by private agreement cannot oust the Courts of their jurisdiction seems sometimes to have been misunderstood; and then he adds, that such an agreement does not oust the jurisdiction of the Courts where there are no excluding words; and at p. 572, in note 2, he refers to the case of Snodgrass v. Gavit, where the terms of the agreement were that all misunderstandings or questions between the parties thereto should be submitted to 3 arbitrators to be mutually chosen, whose decision should be final, and it was held that in order to make this stipulation a defence to an action on the contract, the defendant must first shew that he offered to choose arbitrators, and that the plaintiff refused. I also refer to the supplement of the same Encyc. at p. 313, in note 2, referring to the case of Hind v. Lowe, where it was held that a contract which contained a general agreement to arbitrate differences of opinion arising between parties, but which did not make a submission to arbitration a condition precedent to the right to sue,

did not prevent a suit on the contract without previous arbitration.

I therefore hold that there is jurisdiction in this Court to try this action, notwithstanding the clause relating to arbitration in the bought and sold notes.

The second question is, was there a contract, and if so, what were its terms? The whole agreement, whatever it was, is contained in letters and telegrams or in bought and sold notes, or in both combined. On 1st October, 1903, the defendants wrote to Delmarle Brothers, brokers in New York, saying: "We offer two cars prime wood evaporated apples delivered New York 5½ October delivery; see what you can do for us on these lines." On 5th October Delmarle Brothers telegraphed: "Letter dated 1st, just received; sold the two cars prime wood dried 24th October delivery 5½ delivered; confirm." On the same day Delmarle Brothers wrote to the defendants confirming the telegram, and on 6th October the defendants replied to Delmarle Brothers by telegram saying, "Confirm sale two cars October delivery 5½." And on 7th October Delmarle Brothers wrote the defendants: "We beg to acknowledge receipt of your telegram and confirm sale of the two cars prime wood dried evaporated for October, and herewith hand you enclosed contract, accepted; kindly accept duplicate and return to us. These goods are sold to Messrs. Aspegren & Co., and we are glad to place the goods with this firm, as we consider them one of the best in the business."

The wording of the bought and sold notes enclosed in that last letter is as follows: "Sold for account of Messrs. Polly & White, Trenton, Ontario, to Messrs. Aspegren & Co., New York City, one care 600 boxes prime wood dried evaporated apples, crop 1903, at 5½ cents per pound, delivered New York with free lighterage, seller to have the option of delivering the goods in bond; terms, sight draft against bill of lading; draft to be held for arrival and examination of goods. Any difference arising under this contract to be settled by arbitration." These notes were signed, "Delmarle Brothers, brokers." The broker Delmarle made his entry in his book of this transaction as follows: "October 7th, 1903, Polly & White, 600 boxes evaporated wood at 5½, Aspegren & Co., October;" and the second entry is: "Polly & White 600 boxes evaporated wood dried 5½ Aspegren & Co., October." Delmarle says, however, that these entries

were not signed by him in the book, but that is the way they made all their entries.

Delmarle says in his evidence that he prepared the bought and sold notes according to the usual terms in the New York market under such a contract, and forwarded to Aspegren & Co. and Polly & White each for acceptance, merely as a protection to himself and to each of the parties, but they are not the contract, as he considered the contract complete by the correspondence and without the notes; that by these bought and sold notes he was not attempting to incorporate any new condition in the contract, but merely putting in detail what the terms of the contract really were, that had been made according to the custom of the New York market and as customary between brokers and contracting parties. As a fact the plaintiffs accepted the bought notes in writing, the defendants received the sold note with the knowledge of acceptance by the plaintiffs, held the notes, and the only reply made was they supplied a car of apples to the plaintiffs.

It seems very clear to me that both plaintiffs and defendants considered that they had made a contract, because the defendants in their letter of 22nd October, after some differences had arisen between the parties, say: "We sold you two cars of apples; a car capacity is 24,000; we made it 500 cases; we are shipping you another car of the same capacity." Then in the statement of defence I notice that while the defendants deny such a contract as the plaintiffs set up, yet in paragraphs 4, 5, and 6 there seems clearly an admission that there was some agreement between the plaintiffs and defendants, and then I notice also that Mr. Polly, one of the defendants, in his examination for discovery (questions 4, 5, and 6) clearly says that they shipped a car of apples in pursuance of the bought and sold notes. In his examination at the trial, however, he modifies that by saying that they had not anything to do with the bought and sold notes, but there is nowhere a denial on the part of the defendants that they shipped the one car in pursuance of some contract they had with the plaintiffs; in fact, everything points the other way, and in no place, whether in the pleadings or in the evidence, do the defendants deny that they shipped the one car in pursuance of the contract as made by the letters and telegrams, so that I feel quite satisfied that in the minds of both parties at least they had contracted for the purchase and sale of certain apples. Were their minds at one in

regard to that contract? I think they were. It seems to me there was a complete contract, aside altogether from the bought and sold notes. In the communications passing between the defendants and their agents, Delmarle Brothers, the only point of difference seemed to be as to the date of delivery, whether it should be October delivery merely or delivery of 24th October, the defendants sticking to their offer of October delivery, and that was finally confirmed by Delmarle in his letter of 7th October, replying to their telegram of 6th October, and I think Delmarle is right when he says that the contract was completed by that correspondence.

On this question I refer to the case of Heyworth v. Knight, 17 C. B. N. S. 298.

Putting the case in the strongest light for the defendants, they must have believed that they contracted to sell two cars prime wood evaporated apples, delivered New York, at 5½, October delivery, and this seems to me to be exactly the contract which the plaintiffs also had in their minds.

What is the meaning of a car of apples? It was clearly established in evidence by the plaintiffs and by Mr. Ackerman, one of the witnesses for the defence, and was in no way contradicted by the defendants, that according to the custom of the trade in New York, a car of apples means 600 boxes or cases of 50 pounds net each; and the custom as to weight is if they were approximately 500 pounds for 10 boxes, then the boxes are taken to weigh 50 pounds net each.

And what is the meaning of prime apples? The evidence for the plaintiffs and the evidence of Mr. Ackerman, one of the defendants' witnesses, is—and there seems no reasonable doubt about it—that prime apples in New York have a particular meaning, that is, there is a standard for New York, and there is no such standard in Ontario; that standard is fixed at the beginning of each season and varies with the season; that prime apples in New York means apples of that particular season, amongst other things, so that, so far as the New York market is concerned, a contract reading "two cars prime apples" means the same thing as "two cars 600 boxes each prime apples, crop 1903, "when the contract is made in October, 1903, as this was, and therefore there was no addition to the contract by the terms in the bought and sold notes, except some terms as to settlement, which are there for the benefit of the vendors or the defendants in this case. I therefore think that the minds of

the plaintiffs and defendants were at one, and that the contract is the same, whether it is taken from the letters and telegrams alone or whether the bought and sold notes are incorporated with it. As a fact the defendants shipped one car in pursuance of their contract, and what did they ship? They shipped, as they say, prime wood evaporated apples, crop 1903, 50 pound boxes, and to be delivered in New York at 5½ cents, and drew on plaintiffs against the shipment, which is exactly in terms with the bought and sold notes, so far as the apples are concerned, except that they put 500 boxes in the car instead of 600 boxes, so that the only point of difference that could be said to be in the minds of the parties is the question of whether a car should contain 500 boxes or 600 boxes, and, if the custom of the New York market is to govern, clearly it must be 600 boxes. This one point of difference will be emphasised further in considering the question of breach of contract, because it seems to me that is the real matter of difference causing the breach.

Now, does the custom of the New York market govern this contract? I find in Benjamin, 4th ed., p. 223, in the note quoting a judgment of Mr. Justice Shelden in Bailey v. Bensley: "A person who deals in a particular market must be taken to deal according to the known general and uniform custom or usage of that market, and he who employes another to act for him at a particular place or market (as the defendants did employ Delmarle in this case) must be taken as intending that the business to be done will be done according to the usage and custom of that place or market, whether the principal in fact knew of the usage or custom or not." And Taylor in his Law of Evidence, vol. 1, 5th ed., at p. 184, says: "It may also be laid down as clear law that if a man deals in a particular market, he will be taken to act according to the custom of that market, and if he directs another to make a contract at a particular place, he will be presumed to intend that the contract should be made according to the usage of that place;" and he cites a number of cases. In Bowstead on Agency, at p. 82, it is stated that every agent has implied authority to act in the execution of his express authority according to the usage and customs of the particular place, market, or business in which he is employed.

Then there is the case of Graves v. Legg, 26 L. J. Ex. 316, where it was held that a usage of trade at Liverpool

was binding on a London merchant who employed a broker to make a contract for him there; and in Robinson v. Mollett, L. R. 7 H. L. 802, it was held that a person who employs a broker to transact business for him in a market, with the usages of which the principal is unacquainted, gives him the authority to contract upon the footing of such usages, provided that they are only such as relate to the mode of performing the contract, and do not change its intrinsic character. In the case before us the question of whether a car shall be 500 or 600 cases, and each box shall weigh 50 pounds, refers only to a method of performing the contract, and does not affect its intrinsic character.

I therefore hold that the defendants were bound by the custom of trade in the New York market, and therefore the details set forth in the bought and sold notes are merely explanatory of what the words "car of apples" and "prime apples" mean in New York, and mean according to the contract which they entered into by letters and telegrams.

In this view of the case, it materially differs from Crossley v. Maycock, L. R. 18 Eq. 180, relied on by the defence, and this view of the bought and sold notes also distinguishes this case from Pitts v. Becket, 13 M. & W. 743, which was also relied upon by the defence.

I also refer to Addison on Contracts, 10th ed., p. 65, where he says, quoting from the judgment in certain cases there referred to: "The known usage of a particular trade and the established course of every mercantile dealing are considered to be tacitly annexed to the terms of every mercantile contract made in the ordinary course of business, in which the usage prevails, and parol evidence thereof may consequently be given. The principle on which the evidence is admitted is that the parties have set down in writing those only of the terms of the contract which were necessary to be determined in the particular case, leaving to implication all those general incidents which a uniform usage would annex, and according to which they must have considered to contract unless they expressly exclude them.

The third question is, was there a breach of contract on the part of the defendants?

The defendants on 17th October shipped a car of 500 cases, 50 pounds each, 1903 apples, and, as they contend, prime wood evaporated apples. They complied with the contract, as I find it, except that the car contained 500 cases instead of 600 cases. On receipt of this car, the plaintiffs

wrote the defendants on 20th October, saying: "We received your invoice to-day for 500 boxes evaporated apples, and a draft against this shipment was also presented to-day. We wish, however, to call your attention that our contract calls for 600 and not 500 boxes. If you will, however, deliver 700 boxes in the next car, we will not raise any question about the shortage in this car." To this letter the defendants replied on 22nd October, saying: "We sold you two cars of apples; a car capacity is 24,000 pounds, we made it 500 cases. We are shipping you another car of same capacity." I may add here that it seems to me that this correspondence clearly shews that the parties were at one as to the terms of the contract except as to the meaning of a car of apples. The plaintiffs replied to this on 24th October, saying: "As to quantity in the car, we beg to call your attention to that our contract with you calls for 600 cases and not 500 cases." The defendants made no reply to this letter whatever, and shipped no more apples, not even the car of 500 case capacity which they said they were shipping, and nothing more was done between the parties until 28th October, when the plaintiffs, having examined the car of apples in New York, telegraphed the defendants: "Reject car shipped 17th October, not prime, also partly unsound, must insist complete fulfilment of contract."

Leaving aside for the moment the question of quality and this telegram, it seems to me there was a breach of contract by the defendants, aside from quality altogether, in not shipping a car containing 600 cases, or, after that had been waived by the plaintiffs on condition that the second car contained 700 cases, then there was a breach on the part of the defendants in not shipping the second car of 700 cases before 3.15 p.m. on 28th October, when they received this telegram, because the delivery was to be October delivery at New York, and therefore the car of 700 cases must reach New York on 31st October at latest to complete the contract, and the defendants themselves swear that they could not ship a car on 28th October in Trenton which would reach New York on 31st October, and particularly so when there must be time given for examination in New York before delivery is complete, and it requires two days for this examination, according to the evidence.

I asked Mr. White, one of the defendants, while giving evidence, why they did not ship the second car, and he said because the first car was rejected as not prime, but when I pointed out to him that on his own testimony there was no rejection until past the time for shipment, he then said it was because the New York market was slumping, and they were afraid the plaintiffs would not accept the apples. If this be true, then it seems very clear that the defendants had already decided not to complete the contract, even before they recived the telegram of 28th October, and before the question of quality was raised. I am strengthened in this view by the letter of the defendants of 22nd October, where they say, "We are shipping you another car of the same capacity," shewing they had no intention of filling the contract for 1,200 cases, and they did not ship a second car of 500 cases, and they never did ship a second car at all.

I think, therefore, the defendants were wrong in refusing to ship or failing to ship a second car of 700 boxes to make the contract complete, and in that they committed a breach, even before the question of quality was raised.

I refer to 24 Am. & Eng. Encyc. of Law, 2nd ed., p. 1077, where it is said, on the authority of the cases cited, that "the seller is bound to tender or deliver the exact quantity called for, neither more nor less, unless the contract is separable, in which case a tender or delivery of the exact quantity called for by some severable part of the contract is pro tanto sufficient, and must be accepted;" also to the case of Flynn v. Kelly, 8 O. W. R. at p. 125, the last paragraph on the page, being a portion of the judgment of Mr. Justice Anglin.

But I find further that the car of 500 cases shipped by defendants to plaintiffs as a part performance of the contract did not contain prime apples as called for by the tract. The evidence as to quality seems on the face of it to be very contradictory, but much of this, I think, can be explained. For the plaintiffs, Mr. Eden says they caused the apples to be examined in New York in the regular and customary way and found them off grade, some wet, sour and fermented; only one box that was examined could be called prime. Mr. Delmarle, the broker through whom the defendants sold the apples, also examined them at Aspegren's, and again had his own inspector bring samples to him, and each time he found the apples were not prime.

The defendants say the apples were prime and in good condition when they left Trenton. They were bought from a Mr. Cole and a Mr. Horsley, who also say they were prime when delivered to Polly & White, and another witness, Shourds, also says he examined them in Trenton and they were prime, but he knows nothing of the New York standards. They all say the apples should have reached New York in good condition. All these witnesses, of course, except Shourds, are interested in making the best possible shewing for the apples, but there was a witness for the defence, Mr. H. W. Ackerman, a man of long experience and who has been the largest shipper in this Trenton district for two years; he is totally independent, and I rely much upon his testimony throughout. He says that there is a standard for prime apples in New York fixed each year; that there is no standard for Ontario; that the standard in New York is higher for prime apples than as usually understood in Ontario, so that what seem prime apples to the Trenton people might not be prime apples in New York. Again, Mr. Ackerman says that apples shipped prime in Trenton should reach New York prime, but if they are shipped in a warm car and not well evaporated they might deteriorate, and from this, I think, we get some explanation of the apparent conflict in testimony. Of the 500 cases shipped Mr. Cole says he would not swear that they contributed more than 150 boxes; in fact, he says, they delivered to Polly & White, in the latter part of October (Cole is a farmer, but runs an evaporator in the fall), while these 500 cases were shipped on 17th October. Horsley says they probably contributed about 300 cases to Polly & White by 16th October, as he sold to Polly & White his whole output, and it would be as much as that by that time, so clearly the bulk of the 500 boxes were from Horsley. This was only Horsley's second year as an independent packer, so it occurs to me that it might be a fair inference that, with Mr. Horsley's small experience as an evaporator, he might not have dried the apples sufficiently, and hence they might have deteriorated in the warm car. These explanations seem to me to harmonise, to some extent at least, the apparent conflict in testimony, and while the defendants may honestly believe that the apples left Trenton prime, they, nevertheless, reached New York off prime.

I find on the evidence of Eden and Delmarle, who impressed me as being very reliable, that the apples were not

prime when examined in New York, and therefore the plaintiffs had a right to reject them, and by sending apples inferior in quality the defendants committed a breach of contract; the quality of course is determined by the place of delivery; this, I think, is well established in law.

I refer to the case of Jones v. Just, L. R. 3 Q. B. 197, where it was held that upon a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must be saleable or merchantable under that description.

On being advised by plaintiffs of inferior quality, the defendants wired Delmarle that they would ship no further until that car was accepted, and instructed Delmarle to look after the apples, but he could not sell in New York, on account of the inferior quality, and the defendants then advised him to ship to Halifax for sale, which he did, shewing clearly that these apples were not merchantable on the New York market.

On this branch there is the case of Dougall v. Choulou, Q. R. 15 K. B. 300 (1906), which seems very much in point. It was a contract for the sale of prime evaporated apples rejected in New York, the New York evidence being that the apples were not prime, and the local evidence being that they were prime when shipped. They were inspected and sampled and examined in New York apparently the same way as in this case, and the apples were afterwards sold as of prime quality and accepted as such. I follow the view taken in that case, in so far as it applies to this case, and it seems to me to apply very closely indeed.

I notice also that after the rejection of the apples in New York the defendants telegraphed the plaintiffs on 2nd November as follows, "Can ship car 500 prime to-day for one rejected," which looks to me as though at that time the defendants were not so positive that the apples were prime as they seem to be now. The plaintiffs replied to this telegram by letter saying that they had already covered on the defendants' contract, and any way shipment would now be too late, and they also wrote on the same day to defendants, saying: "Enclosed please find statement $150, being difference on the two cars of apples covered in against your contract. We shall draw on you on Wednesday at sight for same, which we ask you to protect." And on 4th November the defendants replied: "Will not

accept draft amount named; our offer two cars means here 1,000 cases, which prepared to settle, you furnishing documentary evidence sworn to price you covered." Again, this does not seem to bear out the thought that the defendants were so confident at that time that the apples were prime. This, however, is only an indication, but I mention it in passing.

This latter correspondence incidentally introduces a question which was raised by the defendants in the 8th paragraph of the statement of defence, the defendants alleging that there was practically an agreement to settle between the parties, which was a condition precedent to the plaintiffs recovering anything. I cannot say that there is much in this contention. It arose in this way. The plaintiffs on 5th November, in replying to the defendants' telegram of 4th November, saying prepared to settle subject to documentary evidence being sworn to, said they were perfectly willing and ready to let them have all particulars as to the two cars bought in against the contract, and would have the same sworn to in case the defendants demanded it, stating also that they bought both cars through brokers in New York, one car from L. S. Towne, Rose, New York, and the other from Young & Beach, Ontario. There was no reply to this by the defendants, and no demand ever made for the sworn testimony, but it now turns out in evidence that the particulars given in that letter of 5th November by the plaintiffs are correct, and I cannot therefore see that there is any force in the question raised in the 8th paragraph of the statement of defence as to settlement.

The last question I have to discuss is: Are the plaintiffs entitled to damages, and if so, how much?

After the breach of contract by not supplying the number of cases to the car, as the contract called for, and by shipping apples which were not prime, there was some correspondence between the plaintiffs and defendants about the matter, and on 29th October the plaintiffs wrote the defendants and concluded in this way: "In conclusion we can only repeat that we are not willing to let you off on your contract, and shall proceed to buy in the apples to fill your contract, and hold you for whatever loss there may be." And on 31st October the plaintiffs bought through John Mearns, broker, New York, two cars—600 cases each—prime wood dried evaporated apples at 5¾ cents per pound delivered New York each free lighterage.

Mr. Porter, counsel for the defence, contends that in any event the plaintiffs had no right to buy in until after 31st October, because the plaintiffs had all that day in which to deliver, and he cites Benjamin, 3rd ed., at p. 685, but I find the statement there to be: "A party who is by contract to do a thing transitory to another anywhere on a certain day has the whole of the day, and if on one of several days the whole of the days for the performance of his part of the contract, and until the whole day or the whole of the last day has expired no action will lie against him for the breach of such contract." This, of course, is true, but it refers to the time of bringing the action, and in this case the plaintiffs did not bring their action until long after 31st October.

I find also on p. 686 of the same edition, these words: "If he is to deliver goods, he must tender them so as to allow sufficient time for examination and receipt." In the case before us, the time for examination, according to New York custom, is 48 hours, and therefore the actual delivery should have been on 29th October in any event. But, as the plaintiffs did not purchase until the 31st, this, perhaps, does not come into this case.

In the same edition of Benjamin, at p. 1031, I find: "The general rule is well established that on the seller's failure to deliver the goods according to the contract, the ordinary measure of damages is the difference between the contract price and the market price of the goods at the time when and at the place where they should have been delivered, and when there is no market at the place of delivery, then at the nearest available market, with the addition of the increased expense of transportation and hauling." And in Addison on Contracts, 8th ed., p. 953: "If the vendor has a month or any specific period of time allowed him for making the delivery, and finds before the time has elapsed that he will be unable to complete delivery, and gives notice to the purchaser that he refuses to proceed therewith, and the price rises, the measure of damages is the difference between the contract price and the highest price of the subject matter on the last day of the period within which the delivery ought to have been made." Again: "If the vendor of shares neglects to deliver the shares or complete the transfer, the measure of damages is the difference between the price agreed to be paid and the market price on the day on which the sale

should have been perfected." These authorities satisfy me that the measure of damages in this case should be the difference between the contract price, 5½ cents per pound, and the price paid by the plaintiffs to Mearns, 5¾ cents per pound, because it was established in evidence before me that these plaintiffs tried several brokers before they made their final purchase, and they got the very best price they could on that day.

This also answers the suggestion made by the defendants that the reason why they did not ship the second car was because of the slumping market in New York, and also the suggestion that the reason why the plaintiffs complained that the apples were not prime was because the market was slumping in New York.

The difference between the contract price, 5½ cents per pound, and the 5¾ cents per pound paid by them on the 1,200 cases, is $150.

I therefore find that this Court has jurisdiction to try this action; that there was a contract on the part of the defendants to sell to the plaintiffs certain apples at a certain date, as previously stated; and that the defendants committed a breach of that contract in not supplying the quantity called for by the contract, and also in not supplying the quality called for by the contract; and that the plaintiffs are therefore entitled to damages for breach of the contract, and were entitled to buy in other apples on the last day of the delivery which should have been made by the defendants, and that the market price on that day was 5¾ cents, which was paid by the plaintiffs to cover this contract, and they are therefore entitled to damages to the extent of $150.

Judgment will therefore be entered for the plaintiffs against the defendants for $150 and costs.

CARTWRIGHT, MASTER FEBRUARY 10TH, 1909.

CHAMBERS.

REX EX REL. SHARPE v. BECK.

Municipal Elections—Deputy Reeve of Town—6 Edw. VII. ch. 35, sec. 1 (a)—Number of Qualified Voters on List Entitling Town to Deputy Reeve—Names Occurring more than once—Question of Right of Town to Deputy Reeve not Open on Proceeding to Set aside Election—Relator Voting at Election — Property Qualification of Deputy Reeve Elect—Freehold Property under Contract for Sale —"Actual Occupation"—Municipal Act, 1903, sec. 76 (f)—Exclusive Unqualified Right to Possession.

Proceeding to set aside the election of the respondent as deputy reeve of the town of Brampton.

T. J. Blain, Brampton, for the relator.

B. F. Justin, K.C., for the respondent.

THE MASTER:—The motion is based on three grounds. First, it is said that Brampton is not entitled to a deputy reeve, because, as stated in the affidavit of Mr. Blain, counsel for the relator, and also town clerk of Brampton, although there are 1,086 duly qualified voters, there are only 965 persons. The difference arises from the fact that some of the electors are qualified in more than one ward.

The Act 6 Edw. VII. ch. 35, sec. 1 (a), provides that a municipality such as Brampton shall be represented in the county council by a reeve, and, "if the municipality had the names of more than 1,000 and not more than 2,000 persons on the last revised voters' list of the municipality as qualified voters at municipal elections, then by a first deputy reeve." The language is clear, and if it stood alone it could not be contended that Brampton is not entitled to a deputy reeve. Had the words been "qualified to vote for a deputy reeve," then the matter would have required further consideration and evidence.

It was, however, contended that the proper construction of the statute does not give a deputy reeve to Brampton. It was argued that sec. 2, sub-sec. 3, of the Act provides that such reeves and deputy reeves shall be elected by gen-

eral vote in the manner provided by the Consolidated Municipal Act of 1903; and that sec. 158 of the latter Act prescribes that every elector may vote only once for mayor, &c.

Then in sec. 4, sub-secs. 4 and 5, of the Act of 6 Edw. VII. it is provided that, if there is a tie at the election of warden in certain cases, the casting vote shall be given by the reeve, or in his absence by the deputy reeve of the municipality having the greatest number of municipal voters on its last revised voters' list. And sec. 5 says: "In counting the names of voters referred to in the preceding section the name of the same person shall not be counted more than once, whether it appears on the voters' list only once or more than once."

It was therefore contended that the town of Brampton was not entitled to a deputy reeve, and that the election was void.

To this argument there is more than one answer. The language of the Act does not by any means compel that construction. On the contrary, if it had been so intended, it would have been easy and natural to have inserted in sec. 1 (a) after the word voters the words "for deputy reeve." Their omission in that place seems to shew that the actual number of names on the voters' list is the only test of the right of a municipality to have a deputy reeve, while the use of equivalent words in sec. 5 suggests that it was only in this latter and most unusual case that any count of the actual voters was to be made. This view is supported by the lack of any procedure to ascertain the fact of the number of separate persons. There is not the slightest provision for this of any kind in either section. It may therefore well be that in the latter case dealt with in sec. 5, it was thought safe to leave the decision to the knowledge of the members of the county council. And if they could not agree then to let any one interested and qualified proceed as he might be advised to have the matter judicially determined. In any case it would be entirely contrary to the spirit of the law to allow this important question to be decided on a side issue between two only out of admittedly nearly 1,000 other voters who are entitled at least to have notice of such a proceeding and to be represented at the hearing if they so desire.

If any one competent to raise this question wished a declaration that Brampton is not entitled to a deputy

reeve, the obvious course would be to move to quash the by-law passed in November for holding the election. In such a proceeding the necessary facts could be established, if the Court adopted the meaning of the qualifying section, 1 (a), which is asserted by the relator.

But, however that may be, this question cannot possibly be raised here and now. All that can be determined on this motion is whether the respondent was duly elected; not whether the town is entitled to have a deputy reeve elected.

As this point has been raised and is one of general interest, I have considered it at some length, though it may be, strictly speaking, obiter. For in any event this objection cannot be raised by the relator or by any one who voted at the election in question. Why this is so, is fully set out in the judgment of Harrison, C.J., in Regina ex rel. Regis v. Cusack, 6 P.R. 303, cited and approved by the Court of Appeal in Dillon v. Township of Raleigh, 13 A. R. 53, at p. 66, and affirmed in 14 S. C. R. 739.

It was further objected that the respondent had not the necessary property qualification, because his freehold was not only mortgaged but he had also agreed to sell his equity of redemption. These facts are admitted, but not the result contended for by the relator.

Counsel for the respondent submitted that the equitable estate was still in his client, and that all that passed to the purchaser under the agreement was an equitable right to acquire that equitable estate on 6th May next as provided by the agreement.

He cited In re Flatt and Counties of Prescott and Russell, 18 A. R. 1, Whitehead v. Watt, [1902] 1 Ch. 835, and other authorities.

I entirely agree with that contention. It is evident that the purchaser has no estate nor any right to call for a conveyance until 6th May. It may be that the agreement will never be carried out. It may be cancelled by mutual consent, or the purchaser may be unable to complete the purchase.

It cannot be denied that if the respondent sold to another purchaser for value and without notice the present purchaser could get nothing from the vendor except damages for breach of the agreement to sell to him.

The only remaining argument was that the respondent must be unseated because he has not been in actual occupation of his freehold since 1st November. It is not denied that the house has been vacant, and that Mr. Beck has been living elsewhere. It does not, however, seem necessary to give to these words such a strict interpretation in any proceeding of this nature.

In 29 Cyc. 1341 it is said that, as applied to land, actual occupation means no more than possession: "residence is not essential:" see note 25 and cases cited. It seems sufficient in this case that the respondent has control over the freehold. No one else is in occupation or can assert any right thereto.

Under these circumstances, I see no difficulty in holding that the provision in the Municipal Act of 1903, sec. 76 (f), was intended to require, in case of a mortgaged freehold, that no one else but the mortgagor should be in possession. As long as he has the exclusive unqualified right to possession (apart from the mortgage) he is in "actual occupation," within the meaning of the Act.

It should perhaps be noticed that the respondent has been living since October with his brother-in-law, Mr. Packham, who has filed an affidavit on this motion. From this it appears that Mr. Beck has borne half the expenses of every kind of the up-keep of the joint establishment. This was to support, if necessary, a claim of the respondent to be considered as a tenant in respect of this occupancy. But, as neither Mr. Packham nor Mr. Beck is assessed, no qualification could be acquired in this way. Nor do I think that Mr. Beck was really more than a boarder. To endeavour in this way to qualify reminds one of the saying that a drowning man clutches at a straw.

The motion must be dismissed with costs, excluding any that were incurred in setting up the alleged joint-tenancy with Mr. Packham.

CARTWRIGHT, MASTER. FEBRUARY 10TH, 1909.

CHAMBERS.

GAGE v. NASH.

Pleading—Statement of Claim — Action Transferred from Division Courts—Plaintiff not Confined to Claims within Jurisdiction of Division Court.

Motion by defendant to strike out part of the statement of claim, in the circumstances stated in the judgment.

R. C. H. Cassels, for defendant.

John Harrison, Hamilton, for plaintiff.

THE MASTER:—This case was transferred from a Division Court to the High Court, pursuant to sec. 81 of the Division Courts Act. By the order then made, the parties were ordered to file and deliver the usual pleadings in an action in the High Court. The action was for trespass in taking stone from plaintiff's land, and the damages in the Division Court were necessarily limited to $60. In the statement of claim the damages were put at $500. The defendant now moves to have the paragraphs alleging trespass quare clausum fregit and putting the damages at $500 struck out, because the plaintiff can make no greater claim in this Court than could have been made in the Division Court from this action has been transferred.

The motion must be dismissed. There is nothing embarrassing in the statement of claim. Once the action is transferred to the High Court of Justice, the parties have all the rights and remedies of that jurisdiction. It was unnecessary to name any sum for damages, as the real question is as to the title to the land, and the second paragraph, which alleges trespass, is correct.

Costs to the plaintiff in any event.

TEETZEL, J. FEBRUARY 10TH, 1909.

CHAMBERS.

DYMENT v. DYMENT.

Jury Notice—Motion to Strike out—Discretion—Reference to Trial Judge.

Motion by defendant to strike out the jury notice filed by plaintiff.

A. E. H. Creswicke, K.C., for defendant.

W. E. S. Knowles, Dundas, for plaintiff.

TEETZEL, J.:—If I were the trial Judge, I should probably proceed to try the case without the assistance of a jury, but, in view of the amendment to the statement of claim, I am not sufficiently satisfied that another Judge might not take a different view.

The jurisdiction to strike out a jury notice in Chambers, being a matter of discretion, should, as stated by my brother Anglin, in Clisdell v. Lovell, 10 O. W. R. 925, 15 O. L. R. 379, "be strictly confined to cases in which it is obvious that no Judge would try the issues upon the record with a jury."

I think, in the proper exercise of discretion in this case, I should decline to strike out the jury notice on this application, but refer the matter to the trial Judge at the Hamilton jury sittings, to be taken up, on notice, either on the opening of the Court or when the case is called. Costs of the motion up to date in the cause.

MEREDITH, C.J. FEBRUARY 10TH, 1909.

TRIAL.

FRALICK v. GRAND TRUNK R. W. CO.

Master and Servant — Injury to Servant and Consequent Death—Railway—Engine-driver—Collision of Train with Yard-engine—Disobedience of Rules—Neglect of Duty by Yard-foreman—Liability under Workmen's Compensation Act—Liability at Common Law—Defective System—Gross Negligence—Findings of Jury—Selection of Competent Persons to Superintend Work—Supply of Adequate Resources and Materials—Dismissal of Claim at Common Law.

Action by the widow and administratrix of the estate of Frank Fralick, deceased, to recover damages for his death by the alleged negligence of the defendants. The deceased was an engine-driver in the employment of defendants, and met with his death owing to a collision between a train which was being drawn by his engine and a

yard-engine of defendants. The yard-engine was employed for shunting trains in the defendants' station yard at Brantford, and was also used for pushing heavy trains up the grade between Brantford and Mount Vernon on the Tilsonburg branch of the defendants' railway.

G. C. Gibbons, K.C., and G. S. Gibbons, London, for plaintiff.

D. L. McCarthy, K.C., and Pope, Montreal, for defendants.

MEREDITH, C. J.:—The movements of the yard-engine, when engaged in pushing a train up the grade, were not regulated, as those of other trains were, from the train-despatcher's office at London, but, by the defendants' rules, it was allowed to push freight trains up the grade without special orders from the train-despatcher, and the yard foreman in charge of the yard-engine was declared to be responsible for protecting it and for knowing that it had returned before allowing a train or engine to follow.

On the morning on which the collision occurred, the yard-engine had been used to push a freight train up the Mount Vernon grade, and was returning to Brantford, when it collided with the deceased's train, which had been permitted, contrary to the provisions of the rule, to follow the yard-engine.

Maguire, who was the yard-foreman, neglected his duty under the rule, and the proximate cause of the accident was undoubtedly this neglect.

The plaintiff claims both at common law and under the Workmen's Compensation for Injuries Act.

Her right to recover under the Act was admitted, and defendants paid into Court $3,069.09 in satisfaction of the claim, which plaintiff refused to accept.

The plaintiff's claim at common law was based on the alleged negligence of the defendants in not providing "a proper and efficient system to control the operation of the yard-engine," and she alleges in her statement of claim that it was gross negligence to leave the control of the yard-engine to the yard-foreman, because of his many duties making it "impracticable for him to control the movement of out-going trains."

The plaintiff also alleges that, under proper and efficient regulations, the yard-engine would have been under the

control of the train-despatcher, and the orders for the movements of the deceased's train in that case "would have been given in relation to the movements of the yard-engine, and the said accident under such proper and efficient system could not and would not have happened."

It is also alleged by the plaintiff as a further neglect of duty that the foreman of the yard was given other duties beside that which was cast upon him by the rule, and the system adopted by the defendants in operating the Tilsonburg branch and their yards at Brantford is also attacked as not being a proper and modern system of operating and directing the movements of trains, and because proper rules and regulations in regard to this were not provided.

The plaintiff further alleges that defendants were negligent in not employing competent and experienced men to "operate" the station-yard at Brantford, and in failing to select proper and competent persons to superintend and direct the working of their railway, and to furnish them with adequate materials and resources for that work, and that the materials were inadequate and the "means and resources were unsuitable to accomplish the work, that is to say, to safely control the movements of other trains on the defendants' road operating between said points, and also to safely control the movements of others trains on defendants' road, having regard to the movement of such pilot-engine."

There is also an allegation as to negligence in not using the block system, but nothing turns upon that.

I determined at first to dispense altogether with a jury, which had been required by plaintiff, but subsequently decided to take the opinion of a jury on any question as to which I might desire to have their assistance, and reserved to myself the disposition of any question of fact not covered by their findings, which might be necessary to be found in order to determine the rights of the parties.

I accordingly submitted to the jury 11 questions, including 3 which relate only to the quantum of damages.

In answer to these questions the jury found:—

1a. That the system in use on the defendants' railway, in respect of the pilot-engine, was not a reasonably safe and adequate one for the purpose it was intended to serve.

1b. That it was a defective system, exposing the employees to unnecessary danger.

2. That it was defective, in that the yard-engine or pilot-engine, when away from the yard, should have been under the control of the despatcher.

3. That the use of the defective system was due to the negligence of the defendants or their servants.

4. That the superintendent, Gillen, and the yard-master, Maguire, were the servants guilty of the negligence.

5. That the accident was due to a collision between engine No. 189 (the deceased's engine) and the pilot-engine which Maguire allowed to leave the yard without protection.

6. That the accident would have been prevented if the defects in the system had not existed.

7. That the defendants' railway was managed and the rules for its operation were made by competent officials.

8. That the deceased did not, fully apprehending the risk involved in doing his work under the rules, voluntarily undertake that risk.

Upon these answers the plaintiff's counsel contended that the plaintiff's right to recover at common law was established, and that judgment should be entered for her for $8,250, which was the sum at which on the basis of the defendants being liable at common law the damages were assessed.

The principle which governs and must be applied in determining whether the plaintiff is entitled to recover at common law is that enunciated in Wilson v. Merry, L. R. 1 H. L. Sc. 326.

That principle, whatever may be said as to dicta or expressions of opinion of individual Judges in subsequent cases, has not been departed from, and was applied in the recent case of Cribb v. Kynoch, [1907] 2 K. B. 548, which was approved by the Court of Appeal in Young v. Hoffman Manufacturing Co., [1907] 2 K. B. 646.

In Wilson v. Merry, the Lord Chancellor (Cairns) said (p. 332): "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be in-

competent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And, if the persons so selected are guilty of negligence, this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen."

The observations of the Lord Chancellor on p. 333 are also pertinent to the present inquiry.

In Cribb v. Kynoch, [1907] 2 K. B. 548, Bray, J., after discussing the authorities, including Wilson v. Merry, said: "We think that the rule to be deduced from the authorities is that the servant takes upon himself the risk of negligence on the part of his fellow-servants, whatever position they hold, so long as they are fellow-servants, and there is no room, therefore, for the exception which the learned Judge has engrafted upon it in the present case, namely, that there is on the part of the master a personal duty to be performed, which, in dangerous employments, and in the case of an infant, he cannot delegate to others:" p. 561.

Canada Woollen Mills v. Traplin, 35 S. C. R. 424, was relied on by the plaintiff. In that case, in the view of Davies, J., the defendants were liable at common law, because, upon the evidence, he held that knowledge of the worn-out and defective condition of the elevator by the falling of which the plaintiff's injuries were occasioned, was to be imputed to the employer. It is also to be noted that there was no evidence that it was the duty of any person specially to inspect the elevators and to see from time to time that they were reasonably fit for their work, nor was any evidence given as to the system on which the mill was operated, and that the learned Judge pointed out that, though "it appeared incidentally that there was a manager and also that there was a general manager of the

company for all their mills," the Court was "left entirely in the dark as to their powers or duties and as to the resources placed at their disposal, if any, to supply or provide new machinery when required." And he added: "From all that appears in evidence, all of these powers and duties may have been purposely retained in their own hands by the directors." In view of the state of the evidence, it may well be that the defendants were liable on the principle laid down in Wilson v. Merry, because they had not shewn that they had discharged their duty towards the plaintiff by doing that which the Lord Chancellor stated to be their duty. Killam, J., agreed with Davies, J., that the case fell "within the class of cases in which an employer has been held liable on the ground that the state of the appliances was such that there could properly be imputed to him knowledge of the defects or neglect of the duty to know them" (p. 450), and he added: "And, while the onus was upon the injured workman, at common law, to shew negligence in the employer himself, it might be discharged by evidence of circumstances raising an inference either of knowledge of the defects or of neglect of the duty to exercise care to acquire such knowledge and remedy them." The Chief Justice concurred in holding that the defendants were liable at common law, but gave no reasons for his conclusion beyond saying that "the case for the jury was one of inference of fact from the fact clearly proved of the dilapidated condition of" the elevator. Nesbitt, J., delivered a dissenting judgment, in which he reviewed the cases and vigorously combatted the view that there was any common law liability.

There is, in my opinion, nothing in the Traplin case which, on the facts of the case at bar, as found by the jury, would justify my entering judgment for the plaintiff for the damages assessed on the hypothesis that the defendants are liable at common law.

Both Gillen and Maguire are found to have been proper and competent persons to do the work with which they were intrusted. Gillen, the superintendent, was an official of many years' experience, and competent to superintend and direct the work of moving the trains on the defendants' railway; the system which he adopted as to the movement of the shunting engine was deliberately adopted in preference to that which the jury found to be the proper one, differing in that from the view of Mr. Gillen and from the judgment of a number of experienced railway men connected with the

management and operation of some of the largest railway systems in the United States and Canada, although not a single witness having the experience and knowledge necessary to qualify him to give an opinion on the subject was called to question Mr. Gillen's view or the judgment of the witnesses to whom I have referred.

There must, therefore, be judgment dismissing without costs the plaintiff's action so far as it is based on the defendants being liable at common law, and judgment for the plaintiff on the other branch of the case for $3,300 with costs.

The $3,300 will be apportioned between widow and children on the same basis as the jury apportioned the $8,250, and the infants' shares must be paid into Court.

RIDDELL, J. FEBRUARY 10TH, 1909.

TRIAL.

REX v. SWYRYDA.

Criminal Law—Murder—Verdict of "Guilty"—Application to Trial Judge, after Death Sentence, for Reserved Case—Charge to Jury—Reconsideration—Absence of Prejudice.

Application on behalf of a prisoner under sentence of death for a reserved case.

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

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

RIDDELL, J.:—In this case, tried before me at the Brampton assizes on 17th and 18th November of last year, by a jury of the county of Peel, an application has been made to me a second time by Mr. O'Connor, on behalf of the prisoner, to state a case for the Court of Appeal. The prisoner was charged with the deliberate murder of a young fellow-countryman; his trial was conducted with the utmost fairness on behalf of the Crown, and with very great skill (and I may add propriety) by his own counsel, Mr. Morris. The charge to the jury was largely upon questions of fact. At the close of

the charge counsel were asked whether there were any objections, and each counsel answered that there were not. The jury found the prisoner guilty. No reserved case was asked for at the trial, and the prisoner was sentenced to be hanged on Thursday 11th February. The proper report was sent to the Minister of Justice, as required by the statute, and an application, as I am informed, was made by the then counsel for the prisoner to the Minister for some relief; and I understand that application was refused.

Recently, on Saturday of last week, on my return to the city, Mr. O'Connor, counsel for the prisoner, asked me to state a case for the Court of Appeal, on certain grounds which he argued with great earnestness and ability, but I was not able to see that it was my duty to grant the reserved case asked for, nor did I conceive it would tend to the ends of justice. I am informed that an application was made to the Court of Appeal yesterday by way of appeal from my refusal, but that the Court of Appeal considered they had no right to deal with it. Mr. O'Connor last evening again applied to me for a reserved case.

I have nothing but praise for the conduct of Mr. O'Connor, nor indeed of the previous counsel, in the manner in which they have endeavoured to the very last to do everything possible for their unfortunate client. They have both lived up to the best traditions of their honourable profession, and I would be the last man in the world to find fault with any barrister for straining every effort, using every means, honourably, to assist a client to whom they were bound by professional ties. In deference to the very earnest and urgent request of Mr. O'Connor, I have again gone over the proceedings since the Court rose last evening. This, I ought to say, is the fourth time that I have carefully considered the proceedings at the trial from beginning to end. When I made, or caused to be made, the report to the Minister of Justice, I conceived it to be my duty, notwithstanding the fact that no request had been made at the trial for a reserved case, and no objection had been taken to the charge, to examine carefully all the proceedings in order to see whether it might not be that by inadvertence or ignorance there had been something done, or left undone, which ought not to have been so performed or left unperformed. Before my temporary absence from the city, occasioned by causes into which I need not here enter, I again went through the

proceedings with care, and with the same object in view, and I have twice since done the same, the last time last night. It is gratifying, to say the least, and reflects credit, I venture to think, upon the administration of justice, that two such able counsel as have been employed by the prisoner are able to lay their fingers only upon the matters of which I am about to speak as even affording any glimmer of reason for appealing to a higher Court. These I shall now speak of.

The first ground upon which I am asked to reserve a case is that this question may be put: "Was the learned trial Judge right in making the following statement in his charge to the jury: 'If it were proved as a fact, instead of being left to you to draw as an inference if you like, that the poor lad had a roll of money about him, then no doubt you would think that the case would be extraordinarily strong; but the case is exactly as I have told you.'"

The facts of the case were, that it was proved that the lad had about $2.80; it was shewn to be not uncommon that persons in his position, of immigrant from his country, should conceal about them large sums of money, while they were strongly asseverating that they had no means, or very little means. Counsel for the prisoner had urged upon the jury the fact that there was no evidence in fact that the young man had any money more than $2.80, and counsel for the Crown, with his usual fairness, had frankly told the jury, "There is no evidence whatever here that this young man as a fact had any more money than that which was sworn to by Paul Morris, namely, $2.80." Then when I was addressing them I stated (p. 8): "The lad had some money, had $2.80 at least, if we are to believe the evidence of Paul Morris. He may have had a very much larger sum, if he did that which we are told by some of the witnesses is not an uncommon thing, that is, secreted the greater part of his money so that nobody would know anything about it."

The remarks which are complained of, if indeed I am not putting it too strongly when I say they are complained of, are found some pages later on, on p. 16, and I say, speaking of the fact that the prisoner had, before the occasion of his taking the young man away from Toronto, no money according to his own shewing, and immediately thereafter had a considerable sum of money: "If it were proved as a fact—instead of being left to you to draw as an inference if you like—that the poor lad had a roll of money about

him, then no doubt you would think that the case would be extraordinarily strong; but the case is exactly as I have told you." Then I go on to say: "I have no right or any desire to make the case any stronger against the prisoner than I have told you. He is entitled to fair play."

I am unable to see, with the most anxious and careful scrutiny of these words as they appear in black and white, or casting back my recollection to the occasion when the words were used viva voce, that there was any suggestion to the jury that there was any express evidence that the young man had any money about him other than the $2.80, and I am unable to conceive how any jury could have supposed that I was doing anything else than telling them that if the evidence had been different the case would be extraordinarly strong, but, the evidence not being different, then they must take the evidence as they found it.

The next objection is: "Was the learned trial Judge right in making the following statement in his charge to the jury in regard to the evidence of Joseph Sokolsky, one of the witnesses for the accused: 'Do you think it safe for you to believe this man's view of what hour of the day it was that he saw this prisoner, if he did see him upon that day, drinking, as he says he was, and getting muddle-headed when he did drink, as he says he was?'" Joseph Sokolsky was a witness who was called to prove an alibi, and his story is that he saw the prisoner on the evening, and he remembers the night—I am reading from p. 143: "Because I was buying a suit of clothes and shoes. Because I was buying on that day, buying the suit and shoes, and then in the evening I was baptising my purchase. I was wetting it. That was in the evening after 6 o'clock. This prisoner, with another man who I did not know, he came." He was asked how he knew it was after 6 o'clock, and he says: "Because I can figure when I left the house to buy my things, and how long it would take me, how many hours it took me." Then he is asked: "Ask him what time he got home to his house?" A. "Well, about after 6 o'clock, I came in the evening to my house." Then again he gave the story; he remembers that day because he wanted to buy a suit of clothes and some shoes, and he, being a high-priced workman, had taken a day off for the purpose of buying the suit of clothes and shoes, and then he set to work to baptise his purchase, as he calls it. Then upon being cross-examined he says: "All the week I was

working except Thursday, Friday, Saturday, and Sunday." On that Thursday after breakfast he took a walk with his friend through the street to go and make his purchase. "I purchased this suit." Then he is asked when he began baptising on Thursday. "Well, we have done this, and I drank only a few glasses of beer; in the morning none at all, not a drop." "Q. What time in the afternoon did he commence?" About 4 or 5 he went to the hotel, was there a few minutes, talked a little and then went home. "I went home after 6 'oclock." He was standing and talking only, but was not drinking. This was between 4 and 6 o'clock, and he never saw the prisoner again. What I said about that to the jury will be found on p. 23 of the charge: "One man says, 'I was a working man, a moulder, I wanted to buy a new suit of clothes, and I took a day off to buy me a suit of clothes, to baptise that suit of clothes after I bought it. And I met this prisoner at half past 6 or 7 (I forget exactly the hours—you will remember) in a certain hotel that night.'" It is to be remembered that the particular hour was a matter of importance. Then I go on to say: "I do not know what experience you have had of people who take a whole day off to do a little job, and then go out and drink in order to celebrate the fact of buying a new suit of clothes, but I should not be at all astonished if a jury were to find that a man who went to baptise early would before very long forget what time it was entirely. That is for you. Do you think it safe for you to believe this man's view of what hour of the day it was that he saw this prisoner, if he did see him upon that day, drinking as he says he was, and getting muddle-headed when he did drink, as he says he was?"

I fail to see any impropriety, and I go further and say that I do not see how any other Court can see anything wrong about that. I think it is for the jury to say whether a man who takes a whole day off to buy a suit of clothes, and then sets to work to baptise that—it is for the jury to say whether they are going to believe him when he says he knew exactly the hour when anything took place after he started drinking. That was wholly for the jury, and was left for them to find.

Then the only other matter which is complained of is: "Was the learned trial Judge right in his comments made by him on the evidence of Paul Morris, one of the witnesses

for the accused?" What I say about Paul Morris is this (Paul Morris was swearing he had seen Loutick after the night upon which the Crown was charging he had been murdered)—what I said about Paul Morris is this: "Then the only other point on which it seems that I need say anything to you at all about is the evidence of Mr. Morris, Paul Morris. Dates are important. When dates are not important, Judges are in the habit of telling juries that, after all, it is not so much the dates that are the important thing as the circumstance or the fact that the alleged occurrence did really take place. Any man may forget the date upon which anything took place, and if he does not forget but remembers the date, he will perhaps forget the hour; but a man ought not to forget the existence or non-existence of a certain alleged fact. But in this case dates are of importance, and therefore it is that you have a right to call upon a witness who swears to a date to be accurate in his date. Now let us see what this man says. He said that Loutick came into his office. He came in a second time, and he thinks with the prisoner, but he is not absolutely sure. Now, what is the importance of the date? He is asked, "What was the space of time between these two dates?" He first of all says two days, and then, without any cross-examination to remind him or anything of that kind, he says 3 or 4 days. Then ultimately he gets it 5 or 6 days, and then on another occasion he said that the second occurrence was 5 or 6 days before Good Friday. Good Friday was on the 17th April. Six days before that was the 11th—5 days before that was the 12th. When was it that for the first time this prisoner got hold of the boy? On the 14th. Now do you see the utter inconsistency of the whole story; according to the story of the prisoner, according to the story of the Vassilinas, it was the 14th, the Tuesday, the two days before Good Friday, or three days before Good Friday, for the first time these two men got together, and yet we have Mr. Morris coming here in the witness box and carefully telling you that not the first, but the second time that these two men came in together it was 5 or 6 days before Good Friday. If that is so, the first occasion must have been at least 7 or 8 days before Good Friday, and that must have been much earlier than apparently the boy came into the country at all. And then he says that he believes that Loutick came in between the 19th and 20th. Well, you may know how

much reliance to place upon the evidence of a man who talks about a boy coming in between the 19th and 20th, when you know the 19th was on a Sunday. Nobody says that Mr. Morris is a liar in the sense that he is wilfully and deliberately telling what he knows to be untrue—if I thought that I would have him before the grand jury in 10 minutes—but, is he such a witness as you can rely upon, a man who tells you first of all that the lad came into the country early, in the first part of April, when according to everybody else he came in about 12th April? Then he says they came in and two days afterwards they came in again, and that was 5 or 6 days before Good Friday—when the first time they ever saw each other, at the most, was only about 3 days before Good Friday."

I closed the whole address on this subject with these remarks:" Now, that is all for you, and I think you are men of sufficient sound common sense to test this evidence without my detailing it, without my going any further into it."

I have looked up my own notes of the trial and gone through the evidence as it is put here in black and white by the shorthand reporter, and I do not comprehend how any Court could say that I was wrong in addressing a jury as I have done in the manner I have just read. It is for the jury in every case, and that is so perfectly plain law that no Court could controvert it. It is for the jury to say how much of the evidence of a witness they believe. All that a Judge can do is to the best of his ability draw the attention of the jury to what the witness has sworn to, and then if he has made any mistake of fact that ought to be corrected by the counsel, or it may be corrected by the recollection of the jurymen themselves. But to say that a Judge is not to comment in the manner in which comments have been made in what I have just read, is quite opposed to all the theory of our jurisprudence. There are countries in which all that a Judge can do is to charge on the law, and a Judge has no right to say anything about the facts, he has no right to state his own view of the facts. That I am glad to say is not our law. A Judge has undoubtedly the right, and it is very often his duty, to assist the jury to the best of his ability in arriving at a conclusion by intimating or suggesting at least his own view. If I did that, I did right. I did no more than that, and I fail to see how any possible

prejudice could have accrued to the prisoner under the law from what I have said.

Now, I feel the very grave responsibility cast upon me at the present moment (as all other tribunals have refused to interfere) in determining whether or not this man must suffer the penalty of death to-morrow. It is a responsibility which my office casts upon me, and which must be borne in the same way as the other responsibilities which such an office involves. In my humble view, in the administration of criminal justice by the Courts there is no room for weak sentimentality or even sympathy. No man of right feeling desires the death of another, but every man charged with the administration of justice has cast upon him the duty of seeing that justice is administered in the manner called for by the law. If I had thought that there was any prejudice to the prisoner in any remarks made by me, then I should not have waited for an application to reserve a case, but should have myself reserved a case ex proprio motu. Upon the application being made to me now, as it was last Saturday, if I could see anything of the kind, I would, even at this late hour—because it is never too late to save life—even at this late hour, gladly grant a case. Or, if I could conceive any court of appeal holding that the prisoner was unduly dealt with, then I should most gladly grant a case and a reprieve accordingly; but it must be remembered that law is law, and law must be enforced, and law must be promptly enforced. I conceive I should be doing wrong if upon this application I should grant a perfectly hopeless reserved case, the whole effect of which would be to reprieve the prisoner for some time long or short, as the case may be, give him longer to live, when I had already in fixing the time given a very considerable period during which all proper efforts could be made on his behalf. I repeat that counsel are not to be blamed for using every effort as they have done, and I have no complaint to make, but, in my view of my duties as a criminal Judge, it is impossible for me to grant this request.

BOYD, C. FEBRUARY 10TH, 1909.

TRIAL.

SEMI-READY LIMITED v. TEW.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Preferential Claim on Insolvent Estate for Rent and Taxes—R. S. O. 1897 ch. 170, sec. 34 (1)—Provisions of Lease—Application to Sub-tenant or Agent of Lessee in Possession of Premises under Oral Agreement—Yearly or Monthly Sub-tenancy—Assignee's Possession after Assignment—Liability for Taxes—Extra-provincial Corporation—Status to Maintain Action.

Action for a declaration of the plaintiffs' right to rank on the estate of one Hallman, in the hands of the defendant as assignee for the benefit of creditors, for the sum of $987.46 in priority to claims of ordinary creditors.

G. Kerr, for plaintiffs.

G. M. Clark, for defendant.

BOYD, C.:—The turning-point of this case appears to rest upon an ascertainment of the real status of the parties in respect to the store in question, which was leased by the owner, Kranz, for 5 years, to the plaintiffs, at a rent of $800, payable monthly. The term began on 1st March, 1907, and rent was to be paid first on 1st April, and so on, not in advance. The plaintiffs, through their agent and manager, Beatty, at Berlin, made an arrangement with the insolvent Hallman by which he was to become the exclusive local agent of the plaintiffs for the sale and disposal of their garments for 5 years from 2nd March, 1907, and it was understood between them that this line of business should be carried on in the store leased from Kranz.

The letters which passed, so far as in evidence, throw the most satisfactory light on the arrangement, for the evidence by parol is conflicting. Beatty writes to Hallman on 11th March: "I am to-day in receipt of 3 copies of a lease drawn up by Millar & Sims between Mr. Kranz and our company. The directors have accepted your contract and the line of credit agreed on, but would like you to take over the lease

direct from us, and, if this matter can be arranged, that you give us some satisfactory guarantee and take over the lease, it will be quite satisfactory. This is a matter that can be settled when you come to Montreal" (the headquarter of the plaintiffs). Hallman went to Montreal to select goods and discuss the lease. He swears that there was no alteration of what had been arranged between him and Beatty, and that was, that when he produced the security of his brother, the lease was to be turned over to him. Two officers of the company say that it was agreed at Montreal that Hallman was to take over the lease in its entirety and to get his brother as security.

The next (material) letter is from the plaintiffs at Montreal of 26th March, 1907, addressed to Millar & Sims, in which it is said: "We are enclosing two copies of lease as entered into between Mr. Kranz (sic). This has been properly signed by the officers of our company. We would ask you to give one copy to Mr. Kranz and give the other copy to Mr. Hallman; but before giving Mr. Hallman his copy, we would ask you to kindly prepare a document to be signed by him whereby he takes over this lease from us as per conditions of same. Also have his brother, Mr. A. H. Hallman, or some other party in Berlin of equal financial standing, to guarantee as against loss. In other words, Mr. Hallman will take over the lease and will be properly guaranteed against loss."

Beatty is not called, nor are the solicitors. Hallman says no writing as to the premises was given to him or signed by him. He could not get the security of his brother or its equivalent, and he apparently went into possession and began selling the goods, nothing more being said or done as to the nature of his holding.

The lease forbids the plaintiffs assigning the term, but permits subletting "to any agent appointed by the company to carry on a branch of their business in the town of Berlin."

In the pleadings the plaintiffs allege that they entered into possession of the premises pursuant to the terms of the lease, and a short time afterwards sublet the premises to Hallman, at the same rental and upon the same terms and conditions as were provided in the Kranz lease.

All that Hallman admits is, that he read the Kranz lease and knew of its terms, and that he paid a monthly rental of $66.66 to Kranz up to 1st September, 1907. The

knowledge of the terms of the head-lease carries the matter no further; for the law expects such an inspection from every under-tenant: Clayton v. Leech, 41 Ch. D. 103.

The legal result appears to be this: there was a subsisting tenancy for 5 years between Kranz and the plaintiffs, which continued until some adjustment took place between them by which the term was ended in May, 1908. There was a sub-tenancy between the company and the insolvent, manifested by his taking possession and paying monthly rent.

Some other matters are now to be considered. By the terms of the written contract as to the agency, he was to have the exclusive right to sell "Semi-Ready clothing in Berlin for 5 years from 2nd March, 1907, subject to be terminated by either party giving 3 months' notice in writing, and also subject to its termination by the company on 10 days' notice in writing, on his making default in payment for goods or making an assignment for the benefit of creditors, or attempting to sell contrary to the contract. The company exercised this right of putting an end to the agency for cause on 1st August, 1907, when, as the vice-president, M. Woods, puts it, "we cancelled the contract" as to the exclusive sale. Hallman paid the monthly rent to Kranz on 1st September, but thereafter made default, and, getting into difficulties generally, he assigned for the benefit of creditors to the defendant on 9th January, 1908.

In view of these circumstances, what was the nature of Hallman's sub-tenancy? At the most, I do not think it could be carried further than a yearly tenancy, but, considering the precarious nature of his agency contract, its termination in August, and the monthly payments made by him, closing in September, the law should not impute a larger interest in him than that of a monthly tenant. In the absence of other controlling circumstances implying a different intention, the payment of monthly rent is deemed to indicate a monthly tenancy: Bell's Landlord and Tenant, p. 32.

The rent in arrear from 1st October, 1907, and the taxes, etc., for 1907 and 1908 have been paid, the one to the landlord, Kranz, and the other to the town corporation by the tenants, the plaintiffs.

A double set of preferential claims for these taxes and 3 months' accelerated rent have been made by the landlord, Kranz, and the tenants, the plaintiffs, but they have been merged by assignment to the plaintiffs. The claim is rested on the statute and on the terms of the lease, which (inter

alia) provides that "if the lessees, their agent or agents, shall make any assignment for the benefit of creditors . . then the current 3 months' rent next accruing and the taxes and frontage and local improvement rates for the then current year shall immediately become due and payable . . the taxes to be recoverable in the same manner as the rent hereby reserved."

The statute is R. S. O. 1897 ch. 170, sec. 34 (1): "The preferential lien of the landlord for rent shall be restricted to the arrears of rent due for the period of one year last previous to and for 3 months following the execution of such assignment, and from thence so long as the assignee shall retain possession of the premises leased."

The assignee had disposed of all the goods by 26th February, and relinquished possession then. The evidence fails to establish that this lease was taken over by the assignee, Hallman, with all its liabilities. This was intended by the plaintiffs, and they had directed a proper document to be prepared for that purpose, but, as Hallman failed in providing security, this intention was not carried out, and nothing appears to implicate Hallman except the mere fact that he went into or was let into possession of the store early in March, 1907. If this entry and the payment of rent monthly would amount to a yearly tenancy, that year would expire at the end of February, 1908 (the lease being dated 1st March, 1907.) If it was less than this, and amounted only to a monthly tenancy, his tenancy ended with the assignment in the month of January, 1908. He was not assignee of the lease, but at most a sub-tenant not in privity with the landlord, and not liable on the covenants in the lease to pay taxes, etc. So far as Kranz was concerned, he had the right to collect and distrain for the rent due to him by his tenants, the plaintiffs, up to the time of the assignment and for a month thereafter out of the goods of Hallman then on the place. That amount of arrears, $322.30, the assignee is willing to allow as a first charge on the assets—a preferential lien. The statute does not aid Kranz any further, for his tenant has not become insolvent or made an assignment, and he can claim rent from him as it falls due, subsequent to February, when the goods were sold and the assignee went out of possession. Nor does the lease aid Kranz as against Hallman, for Hallman was not personally bound by its provisions,

though he may have occupied subject to them, as between the plaintiffs and their landlord.

So far as the plaintiffs are concerned, they have proved no agreement touching this property and rent which binds Hallman in contract. I may just note that on the words of the lease itself there has been no breach of the proviso, even if it is applicable to this sub-tenant. What is covered is the case of an assignment by the agent of the company—but the agency of the insolvent ceased when the contract was duly cancelled in August, 1907. The plaintiffs must rest on the statute, so far as it applies, and that does not carry the matter further than as to the rent up to the end of February. The statute does not apply to the case of a monthly tenancy, i.e., from month to month, but to a case where there is a term existing of at least yearly duration. But the year in this case, assuming a yearly term, would end on the last of February, and rent up to that date is agreed on as a preferential claim. After that date, the assignee being out of possession, there can be no arrears of rent to which the restrictions of the statute can apply: see Langley v. Meir, 25 A. R. 372.

As to the taxes for 1907, Hallman says he did not agree to pay taxes, and that no tax-bills were served upon him or taxes demanded from him. The expenses of advertising the business were paid by the plaintiffs, and it is not unreasonable that they should also pay the taxes, if no provision was made to relieve them from their covenant to do so. As a matter of fact, when the claim was made for the taxes as a preference before the assignee, these taxes had not been paid, and the goods had been sold and realised upon. The plaintiffs paid the taxes for which they were legally liable, after action, on 17th June, 1908, and the claim was contested on 6th May, 1908, and the writ was issued on 2nd June, 1908. Under the contract the business conducted at Berlin by the insolvent was practically the business of the "Semi-Ready" concern, and primarily they should meet the losses, if there was no other agreement with their agent Hallman: Dove v. Dove, 18 C. P. 424, and Assessment Act, 4 Edw. VII. ch. 23, sec. 92. No one is called to prove anything about the taxes, when or how imposed, when demanded, or to whom charged. I find no ground on which the taxes of either 1907 or 1908 should be ranked as preferences in favour of the plaintiffs.

This conclusion renders it unnecessary to deal with the locus standi of the plaintiffs to maintain an action because of the inhibition laid upon extra-provincial corporations by the Ontario statute 63 Vict. ch. 24, secs. 6 and 40. It is for the interests of the creditors of the estate to have the right to rank preferentially determined rather than to have it determined that the plaintiffs are unable to raise the question in the Courts. As it is, I find that the claim of the plaintiffs fails, and should be dismissed with costs—on the undertaking of the defendant to allow a ranking preferentially to the extent mentioned of $322.30.

FEBRUARY 10TH, 1909.

DIVISIONAL COURT.

BOWMAN v. WATTS.

Limitation of Actions—Real Property Limitation Act—Acquisition of Title by Possession—Adverse Possession—Occupation of Land in Return for Services—Evidence—Payment of Taxes not Equivalent to Payment of Rent—Transmission of Interest Acquired under Statute—Successive Occupants—Combined Terms of Possession.

Appeal by defendant from the judgment of HARDY, County Court Judge, sitting as trial Judge for BOYD, C., by which the plaintiff was held to have a good title to some real property in Brantford. The plaintiff was the grantee of one Catherine Doyle, widow of John Doyle. The paper title was admittedly in the defendant.

The appeal was heard by FALCONBRIDGE, C.J., ANGLIN, J., CLUTE, J.

W. S. Brewster, K.C., for defendant.

A. L. Baird, Brantford, for plaintiff.

ANGLIN, J.:—John Doyle, an employee of the defendant, went into possession about 1870, upon an arrangement, according to the defendant's evidence, that he might occupy the property in part consideration for his services, he undertak-

ing also to pay the taxes. From 1874 Doyle was assessed as owner. In 1887, 1888, or 1889—the evidence is not clear as to the precise year—Doyle ceased to work for the defendant. The evidence of the defendant's son is, that he then made a verbal arrangement with Doyle that "so long as we did not want the place and he chose to pay the taxes on it, we would not disturb him." Doyle occupied under this arrangement until 1899, when he died intestate and leaving an estate worth less than $1,000. His widow remained in possession, according to the evidence of the defendant's son, on a new verbal arrangement that "as long as we did not require the house and she paid the taxes she could live in the house." She remained in possession until 1902, when she went to the poor house, living there until she died. Shortly after her husband's death, however, she had made a deed of the property to the plaintiff, which, under sec. 12 of the Devolution of Estates Act, R. S. O. 1897 ch. 127, and sec. 13 of the same Act, as amended by 2 Edw. VII. ch. 17, sec. 3, operated as a valid transfer of whatever title was vested in Mrs. Doyle.

The learned trial Judge held that John Doyle had acquired title by his possession while in the defendant's employment. Upon the evidence I should regard this conclusion as perhaps doubtful, because, in addition to paying the taxes, Doyle rendered services which it appears may have been partly paid for by allowing him the use of the land.

But, whatever should be the proper conclusion as to this earlier period, it is clear that from the time he left the defendant's employment—at the latest in 1889—the only return Doyle made for the use of the land was to pay taxes. This, upon the authority of Finch v. Gilray, 16 A. R. 484, is not a payment of rent such as is requisite to prevent the statute running in favour of the occupant. After Doyle's death his wife remained in possession upon the same footing. She gave no written acknowledgment of the defendant's title, and her possession was in fact a continuation of her husband's possession. She succeeded to his rights accruing or accrued. It would render nugatory the requirements of the statute that only a written acknowledgment of title should be allowed to interrupt its running, to hold the conversation between Mrs. Doyle and the defendant's son sufficient for that purpose. Between them John Doyle and Catherine Doyle enjoyed at least 12 or 13 years of continuous and uninterrupted possession, without paying rent or giving any

written acknowledgment of title to the defendant. This, in my view, sufficed to vest in Catherine Doyle title to the lands in question, and that title she had effectively transmitted to the plaintiff.

Upon this ground I would affirm the judgment below and dismiss this appeal. In the special circumstances of this case, and because the judgment is sustained upon a ground somewhat different from that upon which it was based by the learned trial Judge, I concur in the disposition of the costs made by my Lord the Chief Justice.

CLUTE, J.:—I am unable to find from the evidence that any portion of the services rendered by Doyle was paid for by allowing him the use of the land.

In answer to a leading question by his own counsel, the defendant acquiesced in the suggestion that the rent was part of the consideration of the wages for Doyle, but the defendant's own statement of what took place when Doyle entered upon the land, to my mind, satisfactorily refutes such a suggestion.

I am, therefore, of opinion that his occupation of the land was sufficient to give him a title while he was still in the employ of the defendant, and I concur in the view expressed by the learned trial Judge in that regard.

But, even if that were not the proper view to take from the evidence, I agree with my brother Anglin that the subsequent occupation by Doyle and afterwards by his wife, through whom the plaintiff claims, is sufficient to make title under the statute. Having regard, however, to all the circumstances of the case, I think the appeal should be dismissed without costs.

FALCONBRIDGE, C.J.:—I reluctantly agree in dismissing the appeal. But, as plaintiff's predecessors in title took advantage of defendant's benevolence so as to steal his land, I would dismiss this appeal without costs.

CARTWRIGHT, MASTER. FEBRUARY 11TH, 1909.

CHAMBERS.

PRINGLE v. HUTSON.

Costs—Motion for Summary Judgment—Refusal by Master, with Costs to Defendant in the Cause, unless otherwise Ordered by Trial Judge—Refusal of Trial Judge to Deal with Question—Application to Master, after Judgment for Plaintiffs at Trial, to Allow Plaintiffs Costs of Motion.

A motion for summary judgment in this action came before the Master in Chambers, and was "dismissed with costs to the defendant in the cause, unless otherwise ordered by the trial Judge:" see 12 O. W. R. 1186.

The action was tried on 10th February, 1909, and judgment given for plaintiffs for $3,395.98 with costs. Application was made to the trial Judge to have the costs of the motion for judgment allowed to plaintiffs, but this was refused.

The motion was now renewed before the Master.

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

C. B. Nasmith, for defendant.

THE MASTER:—As suggested by counsel, I spoke to the learned trial Judge, and was told by him that he did not see fit to deal with the question in any way. The result of this is that the order stands just as if no reservation had been made to the trial Judge, and, as I have no power now to vary my own order as to costs, the present motion must be dismissed, with costs to be set off against the costs payable to plaintiffs.

LATCHFORD, J. FEBRUARY 11TH, 1909.

CHAMBERS.

REX v. VANZYL.

Liquor License Act—Conviction for Keeping Intoxicating Liquor for Sale without License—Information—Allegation of Previous Conviction—R. S. O. 1897 ch. 245, sec. 100 (1)—Evidence—Accused Questioned as to Previous Conviction before being Found Guilty on Subsequent Charge — Question not Referring Expressly to the Conviction Alleged in Information.

Motion by defendant to quash a conviction made by P. V. Ellis, police magistrate for West Toronto.

R. C. Levesconte, for defendant.

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

LATCHFORD, J.:—An information under the Liquor License Act charged that Henry VanZyl, at West Toronto, on 5th October, 1908, did unlawfully keep certain intoxicating liquor for sale. The information also alleged a prior conviction of VanZyl on 31st March, 1908, for having unlawfully sold liquor without a license.

The conviction is attacked on many grounds, only one of which appears to me tenable. This is, that the defendant, before he was found guilty of the offence committed on 5th October, was asked whether he had been previously convicted.

The evidence was taken down in narrative form by Mr. Ellis. No record was made of the questions asked. It was stated by Mr. Levesconte upon the argument that Mr. Monahan, who acted for the prosecution at the trial, had asked the defendant if he had been previously convicted as charged in the information. For the Crown it was stated that the question had been a general one, and had no reference to the prior conviction mentioned in the information.

I am obliged to decide the case on the record of the evidence as it came before me upon the return. That record on the point in question is as follows: (To Mr. Monahan) "I have been charged with a similar case before for keeping for sale and for selling and convicted in each case."

This evidence was given after VanZyl had testified on his own behalf; and, while not so expressed upon the notes, it was manifestly given upon cross-examination by Mr. Monahan.

It is clear to me that the defendant was asked if he had been previously charged with keeping liquor for sale and selling it, and whether he had been convicted of keeping liquor for sale and selling it.

Section 100 (1) of the Liquor License Act, R. S. O. 1897 ch. 245, sets forth what the proceedings shall be "upon any information for committing an offence against any of the provisions of the Act, in case of a previous conviction or convictions being charged."

So far as material the proceedings prescribed are as follows: "(1) The justices or police magistrate shall in the first instance inquire concerning such subsequent offence only, and if the accused be found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted, as alleged in the information."

Before VanZyl was found guilty of the subsequent offence, he was asked if he had been previously convicted of keeping liquor for sale and selling it. But it is argued in support of the conviction moved against that it does not appear that the defendant was asked "whether he was so convicted, as alleged in the information;" and that, as the question was not directed to the prior offence, as set forth in the information, it is not within the prohibition of the statute.

I cannot agree in this view. When a previous offence is charged, as in this case, the subsequent offence only shall be inquired into in the first instance. The magistrate exceeded his powers in taking evidence of any offence but the subsequent offence, before he had found the defendant guilty of the subsequent offence. The general rule is that enactments as to procedure are imperative and not directory only: Rex v. Nurse, 7 O. L. R. 418, at p. 421, 3 O. W. R. 224. Moreover, the section quoted not only provides that the subsequent offence only shall be inquired into in the first instance, but it expressly prohibits an inquiry regarding the previous offence before the accused has been found guilty of the subsequent offence: "If the accused has been found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted as alleged in the information." The question put to the accused, while it may not have referred expressly to the very conviction alleged in the in-

formation, included that conviction, and was so understood and answered by the accused.

Before VanZyl was convicted of the subsequent offence, he was asked what the statute distinctly and emphatically prohibits until he has been so convicted. Even if the purpose of the question was to discredit the testimony of the accused, it was still, I think, within the prohibition intended by the statute: see Faulkner v. The King, [1905] 2 K. B. 76. The conviction should be quashed.

Apart from the admission of evidence of the former offences, the trial appears to have been conducted with fairness and propriety. There should be no costs. The usual order may issue for the protection of the magistrate.

TEETZEL, J. FEBRUARY 11TH, 1909.

WEEKLY COURT.

RE SHERMAN AND KEENLEYSIDE.

Vendor and Purchaser—Contract for Sale of Land—Title—Power of Executors to Sell—Legal Estate and Power of Sale Impliedly Given by Will—Application under Vendors and Purchasers Act.

Motion by vendors under the Vendors and Purchasers Act for an order determining as to the validity of certain objections to the vendors' title to land.

Grayson Smith, for the vendors.

Featherston Aylesworth, for the purchaser.

M. C. Cameron, for an infant interested.

TEETZEL, J.:—Emma L. Sherman was in her lifetime entitled to a half interest on the lands in question. The following provisions of her will affect the property:—

"Second. All the rest, residue, and remainder of my property of every kind, real, personal, and mixed, and wherever the same may be situate, I give, devise, and bequeath as follows, to wit:—

"One-third thereof to my husband Henry Bond Sherman, but, in the event of his death before my own decease, then

the said one-third shall go to my children, Henry L. Shermand and Emma Louise Sherman, share and share alike, and, in the event of death of either, then to the survivor.

"One-third thereof to my son Henry L. Sherman, but, in the event of his death before my own decease, or before he attains the age of 25 years, if he survives me, leaving no issue him surviving, then the said one-third shall go to my daughter Emma Louise Sherman. If, however, my said son shall leave issue him surviving, then the said one-third shall go to such issue share and share alike.

"One-third thereof to my daughter Emma Louise Sherman, but, in the event of her death before my own decease or before she attains the age of 25 years, if she survives me, leaving no issue her surviving, then the said one-third shall go to my son Henry L. Sherman. If, however, my said daughter shall leave issue her surviving, then the said one-third shall go to such issue share and share alike.

"If at the time my said son or my said daughter shall be entitled to receive any portion of my estate under this my will, he or she shall be under the age of 25 years, then I direct that the portion of my estate to which such child is entitled be held, managed, and controlled by the trustees hereinafter named, who shall invest, reinvest, and keep such portion of my estate invested in such real and personal property as to them shall seem safest and best, and, after paying all of the expenses connected with the management, care, and conservation of said trust property out of the income derived therefrom, shall pay the residue of such income in semi-annual payments to such child until he or she, as the case may be, arrives at the age of 25 years, and then the said trustees shall grant, transfer, assign, and deliver such trust property to such child."

The vendors are the testatrix's sister, Mrs. English, who owns the other half interest in the property, the testatrix's husband, and her executors.

The question for determination is respecting the shares of her two children, Henry L. Sherman and Emma Louise Sherman, both of whom survived her, but have not yet attained the age of 25 years, the latter being still an infant.

The purchasers object to the title on the ground that no legal estate is vested in the executors by the will, and no power given them to sell and convey the real estate.

In determining whether these objections are valid, it is appropriate to adopt the well-settled rule aptly expressed by Pearson, J., in In re Davies to Jones, 24 Ch. D. at p. 194, viz., "that you must find out the intention of the testator from the whole will taken together and decide according to that, and, though there may be words capable of a different meaning, still if it appears on the whole construction that you cannot give effect to the will unless you give the executors a legal estate, then you must hold that they have the legal estate."

Now in this case the testatrix was disposing of both personal and real estate, and to make provision for the contingency which has happened, viz., that her son and daughter might become entitled to receive any portion of her estate under the will before they attained the age of 21 years, she makes a provision that prevents them getting actual possession of it, by directing that the portion of her estate to which such child might become entitled before attaining the age of 21 years should "be held, managed, and controlled by the trustees . . . who shall invest, reinvest, and keep such portion of my estate invested in such real and personal property," &c., followed by the provision that when the son or daughter arrives at the age of 25 years, "then the said trustees shall grant, transfer, assign, and deliver such trust property to such child."

Now, the question arises whether it is possible to give effect to the whole will, in the light of these provisions, unless the executors are given the legal estate.

It seems to me clear that the legal estate must be held to be given to them in order to enable them to carry out the whole purpose of the will.

I think the direction "shall invest, reinvest, and keep such portion of my estate invested in such real and personal property," etc., by necessary implication gives the legal estate in any lands affected by the will to the trustees. An investment of that portion of her estate could not be made without realising upon the land, and her intention is also quite clear that they shall have the power to invest in real estate and reinvest such investment. And then the direction that when the children attain 25 years of age the trustees shall grant, etc., further clearly implies a power to convey the legal estate in any land then forming part of the trust estate.

In Affleck v. James, 17 Sim. at p. 121, it was held that a trust to invest in funds or in real security at the discretion of the trustees, etc., authorised impliedly a sale of real estate; but, without any other authority than the language of this will, I am of the opinion that with an estate consisting of both land and personal property, the direction to hold, manage, control, invest, and reinvest, would by necessary implication involve not only conferring the legal estate upon the trustees in the land, but give them power and authority to sell and make title to the same.

I am therefore of opinion that the vendors can make a good title to the purchasers. There will be no costs of the motion except to the official guardian, whose costs will be paid by the vendors.

BRITTON, J. FEBRUARY 11TH, 1909.

TRIAL.

STRONG v. VANALLEN.

Contract—Company—Sale of Shares, Business, Assets, Stock, and Goodwill—Construction of Contract—Previous Option—Assumption of Liabilities by Purchaser—Liabilities not Appearing on Company's Books — Liabilities Incurred between Dates of Contract and Transfer—Innocent Misrepresentation — Evidence — Waiver — Debts — Salary —Set-off.

Action by J. G. Strong and the E. VanAllen Co. Limited for a declaration that the defendant should pay all the liabilities of the plaintiff company existing on 31st August, 1906, which did not appear on the books of the company on that date, and all the liabilities of the company incurred since that date and prior to the taking over of the property and assets of the company by the plaintiff Strong, other than ordinary running expenses and liabilities of the company for that period, also for an account of the liabilities.

N. W. Rowell, K.C., for plaintiffs.

A. O'Heir, K.C., for defendant.

BRITTON, J.:—The defendant was the president and general manager of the plaintiff company, and owned or

controlled a majority of the shares in its capital stock. There were negotiations between the plaintiff Strong acting for himself and others, and the defendant, for the purchase of all the shares of the plaintiff company, and for the taking over all the property and assets of the company. These negotiations commenced in October and culminated on 30th November, 1906, by an offer in writing made by the defendant to the plaintiff Strong, which was that the defendant would accept $230,000 in cash, and would hand over to the plaintiff Strong or that he would get the transfer of all the shares, and a conveyance of all the property, assets, and effects of the company, the plaintiff Strong assuming the liabilities of the company as they stood on the books of the company on 31st August, 1906, and also all the ordinary running expenses and liabilities of the company incurred since that date. This offer is fully set out in the statement of claim. The plaintiff Strong accepted the offer on 5th December, and on that day paid $50,000, and on 15th December paid the balance of $180,000, being payment in full, and the defendant closed the bargain and delivery by giving a writing in these words:—

"Received from Jas. G. Strong, per cheque of James Rodgers on Bank of Montreal, the sum of $180,000, being balance in full of purchase money of E. Van Allen & Co. Ltd. business and assets, as per option and contract dated respectively the 1st and 30th days November, 1906. I hereby agree to do whatever may be necessary in perfecting the title and conveying the property and assets being purchased with said option and contract to you or your assigns. E. VanAllen."

This agreement made on 5th December by accepting defendant's offer of 30th November refers to the option of 1st November, and it is necessary to refer to that for the purpose, and only for the purpose, of ascertaining precisely what the defendant was selling and what plaintiff Strong was buying and was to get. That option of 1st November, as to the other parts than the description of property, was entirely at an end, and was so regarded by both parties. It expired on 16th November.

The property which plaintiff Strong bought and which the defendant sold for $230,000, and which represented only $100,000 of money of the defendant and his co-shareholders, is in that option described as: "All the capital

stock of Eli VanAllen Company Limited, all the real and personal estate, rights, property, trade-marks, credits, assets, and effects, and the goodwill of the business of the said company, free and clear of all debts and liabilities of the said company."

Then the option of 1st November repeats and further and more fully describes the property as "all the real estate, plant, sewing machines, machinery, factory and office furniture, appliances, appurtenances, and effects, and also the goodwill of the said company, free of all charges and incumbrances thereon and free of all debts and liabilities of the company;" and all the other assets, which may be designated the net liquid assets of the company, including raw material, goods manufactured and in process of manufacture, debts, claims and demands, contracts, orders for goods, money and securities for money, "as the same appear on the books of the company on the 31st August, 1906." That was the date of the termination of the company's fiscal year.

In the option of 1st November the defendant named $200,000 as in round figures the value of the real estate, plant, etc., and provided a way for arriving accurately at the value of what were called "liquid assets." Had that option been accepted, it would have necessitated careful stock-taking and verifiation of liabilities, but all that was off and fell through with the expiration of that option. The real agreement which was afterwards made was different. There was to be no stock-taking before closing; no deposit of any amount by way of security, but a reliance upon the representation of the defendant and a payment in cash for what defendant sold and agreed to deliver.

The plaintiff's claim is that he is entitled to the assets free and clear of any liability, charge, or incumbrance except such as appeared on the books of the company as liabilities of 31st August, 1906. The plaintiff says he did not get what he bargained for, as, in order to get or retain the benefit of his purchase, he was obliged to pay or the company were obliged to pay certain liabilities—liabilities all the same although not appearing on the books of the company as such.

The specific claim of the plaintiff is given in particulars furnished . . .

The defence is a general denial of all the allegations in the statement of claim, and the defendant contends that,

whatever may have been the negotiations and agreements between the plaintiffs and defendant preceding the final sale of defendant's shares, the defendant eventually sold all his shares in the plaintiff company to James Rodgers at $230 a share; that the only agreement was the sale of shares; and, if any other agreement was entered into between the parties, it was not carried out nor intended to be carried out.

The defendant wrote to Mr. Kerr, solicitor for the plaintiffs, on 28th March, 1907, putting his defence fairly and squarely as follows: "The agreement was that I should deliver the entire capital stock of the company to you for $230,000, and you undertook to put that agreement in the form of a letter, and that was the way the transaction was, as a matter of fact, carried out. There were no deeds of the land or bills of sale of the assets made, nor could there have been. The company owned the property, and you controlled the company."

The agreement certainly was that the defendant "should deliver the entire capital stock of the company," for a certain sum, but the value of the stock depended upon the excess of assets over liabilities of the company, and therefore what the agreement was as to liabilities is most important. As the agreement was in writing, the defendant's understanding of what it means, or what it ought to mean, can make no difference. No fraud or misrepresentation is alleged. There was no mutual mistake, and no case was made for setting the agreement aside or for its reformation. Does the agreement differ in substance from what the defendant says it really was? The company owned their property, and the property was subject to the company's liabilities. The owner of all the shares would, as defendant says, own the company. The value of the shares was dependent upon the assets and liabilities, and these liabilities were to be determined as of 31st August, 1906, and the only way plaintiff could know of these accurately, or in any business way, would be from their appearing in the books of the company.

The agreement or option of 1st November was prepared by and signed by the parties in presence of defendant's solicitor. It is a somewhat lengthy document, and bears evidence of great care and caution in almost every paragraph of it. It seems perfectly plain that, upon payment by plaintiff and performance of his part as provided in that

agreement, the defendant would sell and deliver "all the capital stock of the E. VanAllen Company Limited . . . including 1,000 fully paid-up shares in that company . . . and transfer real estate, personal estate, trade-marks, credits, assets and effects, and goodwill of the business, free and clear of all charges and incumbrances thereon, or any part thereof, and free and clear of all debts and liabilities of the said company."

By that agreement the value of what were called the "net liquid assets" was to be determined, as therein provided, by what appeared on the books of the company on 31st August, 1906.

The plaintiff Strong did not take up the option, so that agreement came to an end on 16th November. New negotiations were entered upon, and continued, with full discussion, until the 30th of that month, when the parties seemed to have arrived at a full understanding that if defendant would accept the round sum of $230,000 for the same property and what had been the subject of the lapsed agreement, the plaintiff might purchase or find a purchaser. The defendant was asked to put his offer to sell in writing, and the defendant asked Mr. Kerr, who was solicitor for plaintiff Strong, to write out the offer. It was done, and the defendant signed. There was nothing difficult or technical about it. The defendant fully understood his agreement of 1st November. Why should he not equally understand as well the offer of 30th November? Subject to the changes hourly taking place in an active and continuing business, there was no difference in what the defendant was to sell or the plaintiff to buy, and in both cases the assets and liabilities were the determining factors in ascertaining the value of the stock and the value of the assets and liabilities or the net value of the "liquid assets," as of 31st August, 1906. The plaintiff Strong was to get for $230,000 all the stock of the company, was to own the company, and so was to get, was to have, all the personal property, assets, and effects, as set out in the option; the plaintiff Strong, and the company to be owned by him, assuming the liabilities of the company as they stood on the books of the company on 31st August, 1906, and also all the ordinary mining expenses and liabilities of the company incurred since that date. If there were in fact liabilities of the company on 31st August which were not on the books, of course the company must pay, and a payment of these

by the company would be practically a payment by plaintiff Strong or his successors, and such a payment would lessen the value of the assets by the amount of it, and would proportionately lessen the value of each share. The payment of any such undisclosed liability by the plaintiff or by the company was a payment for which defendant should be liable.

As to the question of law, I am of the opinion upon the construction of the agreement that the defendant is liable for debts of the company which existed on 31st August, 1906, and which did not appear on the books of the company as debts of that date.

The plaintiff can, as to the liabilities, put his claim upon the ground of misrepresentation, the representation being that there were no liabilities on 31st August, 1906, other than what were shewn as such on the books of the company. There were in fact liabilities as of 31st August not shewn in the books. That was misrepresentation; it was misrepresentation without fraud, but it was a term or condition of the contract; a most material term; something on which plaintiff was entitled to rely, and amounts to warranty by the defendant that his statement was true, and, not being true, gives to the plaintiff a right of action for damages. The company, being solvent, are obliged to pay to the last cent their liabilities. Their assets are incumbered by these liabilities until paid, and when paid there is, by the amount of these liabilities, just so much less assets available for and owned by the plaintiff, as the owner of all the shares.

I am asked by the defendant to find that the agreement made with the plaintiff was given up by the plaintiff and waived in favour of Rodgers and his associates, who simply purchased the 1,000 shares of capital stock at 230, irrespective of what the existing debts of the company were. I cannot do this. The evidence warrants finding the contrary of this. The bargain in writing, for whomsoever the buyers were, was relied upon by the plaintiff, and there is no evidence of waiving or of any intention to vary or depart from the bargain. The business was a going concern, and it was intended that there should be the changes necessarily involved in the manufacture of raw material into a finished product and selling the product for cash or on credit.

I agree with the argument that the word "liabilities" has a much wider meaning than the word "debts," and the

agreement does not, in my opinion, mean that the defendant would be obliged to make good any liability or loss upon an executory contract existing on 31st August.

All this is consistent with my view that the defendant should be liable for such debts as actually existed and were demandable on 31st August and which were not shewn on the books of the company and as to which plaintiff had no knowledge.

I do not think it any answer that these accounts, if paid, would have added to the book statement of value, of either buildings or personal property.

The plaintiff looked at the buildings, and knew of the assets, and knew that as against these must be placed debts of the company. He could only know of debts from the books; and it was with reference to what appeared on the books that he contracted.

The items claimed by plaintiff, particulars of which were furnished, will be set out in exhibit 16. I will deal with these in their order.

(1) Drake & Avery claim for $768. This was paid by the company in 3 payments: 12th October, $300; 3rd November, $310; 11th December, $158: altogether, $768. This account is for a new heating apparatus, placed in a new factory being built by the company. The contract was not made for this until 29th August. The work and materials were put into this heating apparatus after 31st August. There was no liability to pay on the part of the company on 31st August; nothing on the building to deceive or mislead the plaintiff. It was necessary work for plaintiff's business, and, when put in after the 31st, it increased the value of the property by the amount paid for it. This being necessary work for the premises, while not, within the agreement, an existing debt on 31st August, it may be considered as work done in connection with the ordinary running of the business. Even if it was an expenditure on capital account, that is not necessarily the test of liability as to work undertaken after 31st August. This is the same position as extensive repairs or improvements to enable the company to do more or better work.

The item will be disallowed.

(2) Parkin Elevator Co., $350. This was paid for by the company in 5 instalments: on 8th September; 22nd October; 2nd November; credit note 19th October. I find

upon the evidence that this account was for an elevator in the new building of defendant's company. The liability was incurred prior to 31st August, 1906, and it should have appeared in the books of the company as a liability of that date. The sum of $300 was paid by the company. The credit note, in the absence of further evidence, was not an amount paid in money, but a credit to which the company were entitled, and which the Parkin Elevator Company were willing to allow.

The plaintiffs, in my opinion, are entitled to recover $300 on this account.

(3) Paid J. Goodfellow for glazing $8. This was paid by company on 8th October.

(4) Paid Martin & Andrew for plumbing $94.56. This was paid on 29th September, 1906.

(5) Paid C. Drew balance of account for roofing and repairs. Paid on 23rd January, 1907, $122.

(6) Paid to D. H. Evenden, on 1st September, $90, and on 11th September, $16.30: altogether $106.30.

These items, from 3 to 6 inclusive, were liabilities, and they did not appear on the books of the company. There seems to be no reason why they did not appear, but they did not, and for reasons already given they should be allowed to the plaintiffs.

(7) Paid Ontario Pipe Line Co. The account was rendered to 27th August, 1906, at $34.75, and this was paid on 17th September. A further charge is made of $5.50 for the 4 days from 27th to 31st August. As this was a current account, not due in the ordinary sense, for something known to the plaintiff as being used, the charge of $5.50 should not be allowed.

(8) Paid A. Hansford & Sons, plastering, $40.53. This amount should be reduced by $3.13, and allowed at $37.40.

(9) Water rates for July and August, 1906, charged at $18.50. I am of the opinion that knowledge must be imputed to the plaintiff that water was used constantly and paid for periodically, and, so long as there was nothing in arrear at what may be called the due date for payment for water, it was not a liability within the meaning of this agreement. In a way this, if a liability, did appear in the books of the company, for, with water constantly used and the payment shewn to certain dates, the plaintiff would not be mistaken as to this.

(10) Hamilton Cataract Power, Light, and Traction Co., paid 25th April, 1907, $224.42. This was a disputed account, but the defendant did not so enter it, or enter it at all. It was prima facie a liability, and the plaintiff company have paid it.

To the extent of the ordinary use of light, heat, or power, what I have said in regard to water applies. This is different, as it is on account for a year. If any liability should be entered, as such, on the books of the company, this should have been with such explanatory note as the company or defendant thought proper; that being so, if I am correct, the defendant should have protected himself, if he desired to do so, in making the contract with the plaintiff. The account is for lighting and power; the lighting account, $110.96, was from 2nd October, 1905, to 18th August, 1906. A very large part of this account, viz., $98.81, was past due on 23rd February, 1906. This I allow. The part since that amounts to $12.15, and this should not be allowed. The power account is $113.46. The part of the account rendered prior to 31st August was $80, the balance, $33.46, for July and August, not rendered, I do not allow.

(11) $165.73 paid A. J. Rodgers, April, 1907, plumbing account.

(12) Campbell Brothers, $272.85, paid 9th April, 1907, carpentering account.

These were liabilities as of 31st August, 1906. The company were obliged to pay these, so, upon the governing principle in my decision, they must be allowed.

(13) Placed on pay roll as salaries to employés as of 31st August, 1906, and paid 8th September, 1906, $555.58.

(14) T. Allen's salary as of 31st August, paid 8th September, 1906, $31.88.

(15) Miss Carroll's salary for the year ending 31st August, $200.

These last three items (13, 14, 15,) must be regarded as liabilities, and they were not upon the books of the company as such as of the date mentioned.

(16) Refund of deductions R. B. McGregor, $15.

(17) Commissions paid deducted on orders, $4.58.

I have difficulty in finding upon the evidence that these were really liabilities of the company. The fact that the company allowed these and paid them is not evidence as

against the defendant. The amounts are small, they may be right, but, possibly by my omission to note it, I do not find sufficient evidence of these claims.

(19) The claim for arrears of salary to J. H. Payne was not proved, and was formally withdrawn by plaintiffs' counsel.

The only remaining item is for amount overdrawn by defendant from the company as salary. The defendant's salary with the plaintiff company had been $3,000 a year; it could not be any more, for, by what was perhaps wise foresight, the charter of the company prohibited any larger salary being paid. The defendant worked for that salary down to 5th or 15th December, when control of the company went to the plaintiff. It would require a very distinct bargain to permit the defendant to draw from the company a salary largely in excess of the $3,000 for the months of September, October, and November, when that increase would be at the expense of the new proprietors.

The amount for salary over the $3,000 per annum was, in my opinion, clearly an amount overdrawn by the defendant. There was never any unconditional promise by the plaintiff or by either company or anything from which a promise to pay at the rate of $5,000 per annum could be inferred, except upon condition that the defendant would engage with the company to remain one year or a term. Any stipulation in the first option cannot be incorporated in the option of 30th November. Former negotiations were at an end when the offer of defendant was reduced to writing and in terms accepted; that was the bargain. The defendant's own letters shew conclusively that the parties were not together on the question of increase of salary.

The defendant should refund the amount drawn by him in excess of his true salary.

He left about 4th February. The excess would be 5 months and 4 days at $2,000 per annum—$855.51. On 4th February defendant paid himself $804.73, and that was considered by himself as in full.

According to plaintiffs' contention the defendant's ledger account in company's books would shew a balance against defendant of $907.01 if salary credited at $3,000 per annum instead of at $5,000 per annum.

I did not understand Mr. VanAllen to dispute the correctness of the amount if entitled to only $3,000 a year. The position he took was that he was paid and was entitled

to be paid at rate of $5,000 a year. If I have not correctly understood the defendant, the amount can be reduced to the true amount according to my decision.

Apart from the question of salary, the dispute is really one as to the construction of the contract. Was the bargain really that the plaintiff as the purchaser should merely get the stock and accept the assets and liabilities for better or worse, or should the plaintiff be indemnified against all liabilities existing on 31st August and not on the books of the company? I find that it was a term of the contract on which plaintiff is entitled to insist that the liabilities were defined and limited to those appearing on the books of the company. Subject to defendant's contention as to the construction of contract, he admits in his letter, exhibit 27, and the evidence of the secretary of the company, Miss Carroll, and other evidence, establishes the liabilities as existing on 31st August, 1906, and that these did not appear on the books of the company.

As to set-off, I do not find any limitation as to the assets of the company. Whatever the company owned, the plaintiff was to get, and it is quite outside of my duty to know whether the plaintiff made a good or bad bargain. The plaintiff and those for whom he acted certainly agreed to pay a large price, and paid it; the plaintiff paid all he agreed to pay, and seems to have scrupulously kept his agreement, so he ought to get all he bargained for, and of course no more.

The plaintiffs, on condition of their contention being admitted, were willing to admit that . . . $437.17 ($369.13 + $68.04) should be allowed to defendant against the liabilities which they claimed; the plaintiffs having so conceded, and as I have found in the main in favour of plaintiffs' contention, I allow the reduction, even although the defendant, while admitting the existence of debts, has not admitted his liability to the plaintiffs. If it happens that my finding in favour of the plaintiffs is wrong, the allowance against the plaintiffs must not stand.

I ought not to take into consideration the agreement between the E. VanAllen Company Limited and the VanAllen Company Limited, dated 14th January, 1907, which was not put in or tendered in evidence on the trial. If the Court shall be of opinion that I err in this, and that this agreement should even now be allowed in as evidence, then the VanAllen Company should be added as a party; and

the consent in writing of that company to be added was tendered by counsel for plaintiffs on argument in reply.

In my view of the case, no subsequent dealings between plaintiff Strong and either company or between plaintiff Strong and any other person or between the two companies should impair or alter or affect the contractual rights between the plaintiff and defendant.

What defendant did, whether he intended to do so or not, was to give an undertaking that there were no outstanding debts against his company, other than those which appeared in the books, so that in some form they could be seen by plaintiff.

It was argued that defendant, as manager, could give bonus additions to the salaries of the employés. This he could not do at the expense of and without notice to the purchaser. If the defendant could keep out these bonus additions, he could keep out salaries to any extent, and so reduce the value of the stock.

The plaintiffs, therefore, will be entitled in all, exclusive of salary overdrawn, to the aggregate of items 2 to 8 inclusive and 10 to 15 inclusive, $2,107.85, from which must be deducted $437.17, leaving $1,670.68. I find the further sum for overdrawn salary $907.01, making in all $2,577.69.

If it is objected that in strict law the plaintiff company are not entitled to the $1,670.68, and that plaintiff Strong is, and that Strong is not entitled to the judgment for $907.01 overdrawn salary, the formal judgment can be varied upon the election of plaintiffs. In substance and at this stage, after the trial, it can make no difference, both being plaintiffs.

I do not allow interest.

Judgment will be for the plaintiffs for $2,597.69. The plaintiffs are entitled to a decree that the defendant should pay all the debts of the plaintiff company existing on 31st August, 1906, which did not appear on the books of the company as of that date, and all liabilities of said company incurred after 31st August, 1906, and prior to 5th December, 1906, other than ordinary runnning expenses and liabilities of the said company for the said period.

As it was not suggested that there are any other matters in controversy than those as to which evidence was given, there will be no need of a reference.

Judgment will be with costs.

FALCONBRIDGE, C.J. FEBRUARY 11TH, 1909.

TRIAL.

KINNEAR v. SHANNON.

Trespass—Absence of Injury—No Damages—Landlord and Tenant—License by Tenant to Strangers to Cross Land —Costs.

Action for damages for trespass and injury to land.

D. B. Maclennan, K.C., for plaintiff.

R. A. Pringle, K.C., for defendant Curry.

G. A. Stiles, Cornwall, for defendants McGillivray and Maloney.

FALCONBRIDGE, C.J.:—The tenant Shannon did not commit any breach of the covenant not to assign or sublet without leave. He merely gave people leave and license to cross the land for one day or two days. To constitute such a breach there must be a substantial parting with a substantial portion of the demised premises: Mashiter v. Smith, 3 Times L. R. 673, cited as law in the modern textbooks. See also Leys v. Fisken, 12 U. C. R. 604.

There was no damage capable of being estimated in money suffered even by the tenant, and absolutely none caused to the reversioner, who has accepted $5 from defendant Shannon.

In Alsfon v. Scales, 9 Bing. 3, there was a subtraction of a portion of reversioner's bank, which might tend to alter the evidence of title. Here the subject of complaint is a single temporary act—a few stones have been rolled from one part of a rocky and valueless piece of land to another, the tenant being in possession. See Bleeker v. Colman, 3 U. C. R. 172.

The plaintiff fails, but the defendants might, by assuming a different attitude, have rendered unnecessary all this costly litigation about nothing, so there will be no order as to costs.

FEBRUARY 11TH, 1909.

DIVISIONAL COURT.

ERB v. DRESDEN PUBLIC SCHOOL BOARD.

Public Schools—Board of Trustees—Contract—Architect—Preparation of Plans for School Building—Payment for—Powers of Board—Rate of Remuneration—Quantum Meruit—Costs.

Appeal by plaintiff and cross-appeal by defendants from judgment of MACMAHON, J., 12 O. W. R. 864, dismissing the action without costs.

The appeal was heard by BOYD, C., MACLAREN, J.A., BRITTON, J.

A. Weir, Sarnia, for plaintiff.

L. G. McCarthy, K.C., for defendants.

BRITTON, J.:—The action is to recover for plans and specifications prepared by plaintiff, as architect, for the defendants, for a new public school building which the defendants proposed erecting at Dresden. The learned trial Judge dismissed the action, on the ground that an expenditure for plans and specifications was ultra vires of the school board and so not binding upon them.

I am of opinion, with great respect, that, at all events since the enactment of 1 Edw. VII. ch. 39, sec. 65, it is quite within the power of trustees of public schools to employ an architect for hire to prepare plans, etc., for a proposed school house. Section 65: "It shall be the duty of the trustees of all public schools, and they shall have power . . . (4) to purchase or rent school sites or premises, and to build, repair, furnish, and keep in order the school-houses, furniture, fences, and all other school property," etc.

I regard plans and specifications as a necessary prerequisite to building, and even to an application to a municipal council, or to submitting a by-law to the people. The ratepayers are entitled to know, and it is the duty of or certainly within the power of the trustees to procure and submit plans and specifications.

Smith v. Fort William Public School Board, 24 O. R. 365, does not go the length of saying that the trustees

could not, under the law then in force, do what may be called preliminary work. The learned trial Judge in this case considers that, for he says (p. 867 of 12 O. W. R.): "The school trustees had procured from the plaintiff a skeleton of the proposed school building with a description thereof and an estimate of the cost, which was all that was necessary for the purpose of informing the municipal council of the amount required for the proposed new school building." The defendants did not depend upon the plaintiff making a gift to them of the plan and sketch mentioned. The fact that it was reasonably necessary to procure plans and sketch, and that they did procure such from an architect, establishes liability to pay, or to provide money to pay, unless there is some agreement or some other thing which would deprive plaintiff of reasonable remuneration.

Upon the argument of the appeal it was strongly urged that by the terms of plaintiff's empoyment he was to get no compensation or remuneration, unless the work of building the school was proceeded with. If the work should be proceeded with, the defendants were to engage the plaintiff to take charge of the work "at a compensation to be agreed upon."

The plans were competitive plans. The defendants, having full authority, as I venture to think, appointed a committee "to secure plans and specifications for a proposed school building." That committee, for the purpose of giving all architects who should be notified an equal chance in preparing plans, if they should so desire, formulated certain "rules and general instructions," which were fully set out, and which the architects submitting plans were asked to carefully observe. The rules and instructions in reference to compensation are as follows:—

"Compensation. Providing a plan is decided on and approved by the proper authorities, the trustee board will commission the author of the design selected by them in this competition to take charge of the work at a compensation to be agreed on. The authors of the designs given 2nd and 3rd places shall receive $10 and $5 respectively."

Plans and specifications were prepared and presented to the defendants, and those of the plaintiff were selected. The plans of other architects were considered, and two were awarded second and third places, and their authors received $10 and $5 respectively. The defendants, having selected plaintiff's plan, ordered certain other work to be done upon

it or in reference to it; and other work, more or less, was done by the plaintiff according to the instructions of the defendants or their committee.

The proposed school-house was never built, and the defendants now contend that they are not liable to pay to the plaintiff anything for the plans and specifications prepared by him.

Apart from any special agreement, and according to all the authorities, an architect, employed as such, who as such prepares plans and specifications for the owner in accordance with the directions of the owner, is entitled to remuneration. The present plaintiff is, therefore, entitled to remuneration, unless deprived of it by the rules and conditions upon which the plaintiff did his work. These rules do not expressly say that he shall get no remuneration other than what he possibly may get under some agreement to be made if the work proceeds, and if the plaintiff should be put in charge of it.

There was not an express agreement that the plaintiff should get nothing in the event of the school-house not being built; and, in my opinion, no such agreement can be inferred from what took place between the parties. If the defendants had intended that plaintiff should not be paid anything if work not proceeded with, they would have said so when providing that the architects getting 2nd and 3rd places were to get respectively each a small sum. The plaintiff, having done work—work of a beneficial character to defendants—work accepted by defendants—presumably is entitled to be paid. The presumption is not rebutted in the present case by anything that took place between the parties. In fact, there apparently was care to avoid saying that plaintiff would not be paid in the event of school-house not being built. It is of some importance that defendants on 1st May, 1908, passed a resolution that plaintiff should be paid. That resolution was subsequently rescinded. The defendants cannot be bound by the resolution to pay, if otherwise not liable, but the resolution speaks what was in the mind of the defendants when the resolution was passed—and that is that the plaintiff was entitled to remuneration. It is an admission in the only way that the defendants as a corporation could make an admission, and as such is some evidence of liability for some amount. Suppose the school-house had been built, and the parties could not agree as to plaintiff's remuneration for his super-

vision of the work, both parties acting in good faith, but no agreement, the plaintiff ought not, as it seems to me, to be deprived of pay for initial work asked for and accepted by defendants.

Then there is no evidence that even the plan prior to the competition plan should not, after its acceptance, be paid for. That plan the learned trial Judge says was sufficient. Even although not to be paid for when first prepared, if afterwards it was accepted and used in submitting a by-law, something should be paid for it.

I think plaintiff should be paid. It is rather difficult to say just how much the plaintiff should get upon a quantum meruit. From a careful reading of the evidence, the inference is warranted that the plaintiff did not, prior to the rejection of the by-law to build, spend a great deal of time upon these plans and specifications. Completed plans were not presented to the defendants until after refusal to pay, and then probably a tender for the purpose of this action. That does not disentitle plaintiff to recover for what he did furnish and what the defendants accepted. The instructions to plaintiff really limit the work very much: "The drawings required are as follows: (1) basement; (2) first floor; (3) second floor; (4) front elevation; (5) south elevation; (6) perspective from north-west. Drawings to be executed to minimum scale of ⅛ inch to foot, and finished in line only, without shading in India ink," etc. There were other limitations intended to reduce labour and consequently cost. There was a good deal of correspondence, suggestion, and discussion, which had referenee to carrying the by-law rather than necessary work in the preparation of the preliminary plans and specifications. It was a plain building, but would have cost a large sum of money by reason of its size. The ordinary percentage charge for what was done would not be proper in this case.

Upon the best consideration I can give, the plaintiff should get $125, with costs of action and of appeal. Costs to be on the County Court scale, and no set-off of costs should be allowed.

The defendants' cross-appeal dismissed without costs.

MACLAREN, J.A., gave reasons in writing for the same conclusion, referring to Lawford v. Billericay Rural Council, [1903] 1 K. B. 772; Bourne v. Marylebone Corporation, [1908] W. N. 52; Burn v. Miller, 4 Taunt. 745; Manson v.

Baillie, 2 Macq. H. L. 80; Leake on Contracts, 5th ed., p. 418.

BOYD, C., dissenting, was of opinion, for reasons stated in writing, that the evidence failed to prove a contract made between the plaintiff and defendants by which they were liable to pay for the plans prepared by the plaintiff, citing Tilley v. County of York, 103 U. S. 155. But, assuming that the plaintiff should be paid for his plans on the basis of a quantum meruit, the Chancellor was of opinion that the plaintiff would not be entitled to more than $40 with costs on the appropriate scale and set-off, and on that ground also the judgment below should not be interfered with.

FEBRUARY 11TH, 1909.

DIVISIONAL COURT.

RE FOSTER AND KNAPTON.

Dower—Limitation of Actions—R. S. O. 1897 ch. 133, sec. 25—Absence of Claimant from Province—Sale of Land Free from Dower—Order under Vendors and Purchasers Act not to Prejudice Claim for Dower—Costs.

Appeal by Mary Wagner from order of LATCHFORD, J., ante 176.

F. P. Betts, London, for Mary Wagner.

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

J. R. Meredith, for the purchaser.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), varied the order appealed from by directing that the appellant's interest or right should not be affected by the order made as between the vendor and purchaser, and that her costs here and below should be paid by the vendor.

FEBRUARY 11TH, 1909.

DIVISIONAL COURT.

BROWNRIDGE v. SHARPE.

County Court—Jurisdiction—Amount Involved—Ascertainment as being Due — New Trial—Transfer of Action to High Court.

Appeal by defendant from judgment of County Court of Peel in favour of plaintiff.

T. J. Blain, Brampton, for defendant.

W. H. McFadden, K.C., for plaintiff.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), ordered a new trial, and expressed the opinion approving and following the decision of Boyd, C., in Amyot v. Sugarman, ante 429, that the amount involved was beyond the jurisdiction of the County Court. By consent of counsel, the Court ordered that the action should be transferred to the High Court, with the pleadings as they stand. The defendant, if so advised, to be at liberty to serve a jury notice within 4 days. No costs of former trial or of this appeal.

RIDDELL, J. FEBRUARY 12TH, 1909.

WEEKLY COURT.

RE READ.

Will—Construction—Devise — Devisee not Excluded from Share of Residue—Devise not a Legacy.

Application by the executors of Aaron Read, deceased, for a further direction as to a question arising upon the will. The judgment of RIDDELL, J., upon the original application is reported in 12 O. W. R. 1009.

H. W. Mickle, for the executors.

RIDDELL, J.:—In working out the judgment made in this matter, 12 O. W. R. 1009, the question arose whether Margaret Paxton, the devisee named in paragraph 3 of the will, was excluded from any share in the residue by reason of the devise to her of the homestead farm (subject to the life estate of the widow).

Those who are excluded are "all those to whom legacies are above given in this my will." The testator has accurately distinguished between "devise" and "legacy," using the former word in the case of realty, the latter in the case of personalty. The devise to Margaret Paxton is not a legacy, and she is not excluded.

This was my former conclusion, as appears from the memorandum attached to the judgment, but it was proper that my attention should again be called to the matter, lest an error should have crept in by inadvertence.

The executors will have their costs of this application.

FEBRUARY 12TH, 1909.

DIVISIONAL COURT.

SOVEREIGN BANK v. McINTYRE.

Promissory Note—Action on by Bank—Defence—Failure of Consideration—Onus—Inference from Facts — Purchase of Shares.

Appeal by defendant from judgment of MAGEE, J., in favour of plaintiffs in an action on a promissory note.

J. M. McEvoy, London, for defendant.

J. B. McKillop, London, for plaintiffs.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

MULOCK, C.J.:—It appears that the defendant had some negotiations with one Karn, agent at London of the plaintiffs, with regard to the acquisition of 10 shares of the capital stock of the plaintiffs, and that the defendant made a written

offer to purchase 10 shares at the price of 130. Subsequently the defendant delivered to Karn, as such agent, his note for $1,380. At this time there was to the defendant's credit in the bank at London the sum of $41.50, less $6.80, being interest charged upon an item of $1,400, with which the defendant was then debited.

Upon 14th July there appeared in the bank's books then owing by the defendant to the plaintiffs the sum of $1,365.30. The proceeds of the discount of the note in question realised this amount exactly. Subsequently the bank issued 6 cheques in all at different times in favour of the defendant. On their face each of these cheques stated that it was a dividend cheque upon stock of the bank. The defendant indorsed each of these cheques. The learned trial Judge held that the evidence led to the inference that the defendant knew when giving the note that its proceeds would be used in payment for 10 shares at 140. If, then, he paid for the stock under circumstances that justify the inference that he was buying it at 140, his previous attitude had evidently been changed.

The onus is upon the defendant to shew want of consideration. The circumstances do not discharge this onus, but, on the contrary, support the plaintiffs' contention that the consideration was the allotment to the defendant of 10 shares of stock. The circumstance that, after the giving of the note, the defendant received and indorsed 6 cheques, on their face appearing to be for dividends, affirms this view, and it is impossible for us to say that the learned trial Judge was wrong in the inference which he has drawn from the defendant's action.

We, therefore, think that this appeal should be dismissed with costs. It may be that, notwithstanding all that occurred, the defendant did not become a shareholder in the bank, and, should he at any time desire to take this attitude, this order shall be without prejudice to his rights.