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COURT OF APPEAL.

JANUARY 24TH, 1912.

RE SANDWICH WINDSOR AND AMHERSTBURG R.W. CO. AND CITY OF WINDSOR.

Assessment and Taxes—Agreement between Municipal Corporation and Electric Railway and Lighting Company—Construction—Exemptions.

An appeal by the railway company from an order or decision of the Ontario Railway and Municipal Board declaring that, upon the true construction of the agreement between the company and the city corporation, the company's buildings, machinery, etc., and the poles, wires, etc., used in connection with their lighting plant, were not exempt from assessment and taxation, and confirming the assessment of the city commissioner.

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

A. H. Clarke, K.C., and A. R. Bartlett, for the appellants.

W. M. Douglas, K.C., and A. St. G. Ellis, for the respondents.

GARROW, J.A.:—Appeal by the railway company from the order of the Ontario Railway and Municipal Board dismissing an appeal from the local assessment of the company's properties at the city of Windsor.

After much puzzling over clause 9* of the agreement in

*"9. The tracks, right of way, wires, rolling stock, and all superstructures and substructures, and all the properties of the said parties of the second part (the appellant company and the City Railway Company of Windsor Limited) not exempted by law from taxes shall, except the real estate not hereinbefore mentioned, be exempt from all taxes other than school rates until and including the 31st day of December, 1922."

question, I have arrived at the conclusion that as to the main point the order should not be disturbed.

As I read that clause, it applies to exempt only the real estate therein mentioned, since it expressly excepts from its operations the real estate not "hereinbefore" mentioned. And the only real estate which is mentioned is the tracks, etc., enumerated in the beginning of the clause, which, by the statute, are to be interpreted, for the purposes of taxation, as "land."

Why so many words should have been used to express so simple a matter is not apparent. It was certainly not necessary, for instance, to refer to property already exempt by law; and, with that part of the clause out, it might very well have read affirmatively, thus: "The tracks, right of way, wires, rolling stock, and all superstructures and substructures . . . shall . . . be exempt . . .;" for that, in my opinion, is what it means and what the parties intended. This, it may be said, gives no meaning to the words, "and all the properties . . . not exempted by law;" but, unless such properties were land, or in the nature of land, they were not assessable. And, if they were land, then the exception from the operation of the agreement of the real estate" (which, of course, includes land in the statutory sense) not thereinbefore enumerated, leaves the matter just as it would have been with all these words out of the clause.

I can find no excuse in the agreement for an exemption of the electric lighting property or plant, or for exemption, in respect of it, from the ordinary business tax. But the latter tax could not, under the provision of sec. 226 of the Assessment Act, lawfully be imposed in respect of the other property, as was in effect conceded on the argument.

I would otherwise dismiss the appeal, but, under the circumstances, without costs.

MOSS, C.J.O., MACLAREN and MEREDITH, JJ.A., concurred; MEREDITH, J.A., giving reasons in writing.

MAGEE, J.A., dissented. He was of opinion, for reasons stated in writing, that the assessment of $4,500 on poles and wires of the lighting business and all the business assessments of $5,125, $3,125, and $1,350, should be struck out, but the other assessments should stand.

In the result, the order of the Board was varied in regard to the imposition of a business tax in respect of the street railway department, *i.e.*, 25 per cent. of $50,500, and affirmed in other respects.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. DECEMBER 18TH, 1911.

SIMPSON v. RUBECK.

Mechanics' Liens—Building Contract—Non-completion of Work —Substantial Performance—Costs.

Appeal by the plaintiff from the judgment of Mr. J. A. C. Cameron, Official Referee, dismissing without costs an action brought by the plaintiff to recover $170, being the balance of the contract-price, including extras, for the construction of a verandah for the defendant, and to enforce a mechanics' lien therefor.

The Referee held that the plaintiff, not having completed his contract in accordance with the terms thereof in respect of the items in the judgment mentioned, was not entitled to payment or to a lien, upon the authority of Sherlock v. Powell, 26 A.R. 407, and Cole v. Smith, 13 O.W.R. 774.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ.

C. W. Plaxton, for the plaintiff. The contract rested in parol, the written tender of the plaintiff having been accepted verbally by the defendant, with the qualification or upon the understanding that "A1" lumber was as good as the plaintiff was ordinarily using in verandahs, and that the verandah in question was to be as good as the one next it, which had been built by the plaintiff; that the evidence shewed that "A1" lumber was not clear lumber, but the grade next to it, and was not disqualified so long as it was solid and free from black knots; that the evidence shewed the lumber used to be unobjectionable in these respects, and that the contract had otherwise been complied with. Sherlock v. Powell and Cole v. Smith, counsel contended, were distinguishable, the work and materials having been approved by both the defendant and her husband; and that, under sec. 7 of the Mechanics' Lien Act, the husband in this case must for such purposes be presumed conclusively to be the agent of his wife. In support of the doctrine of "substantial performance" counsel relied on Addison on Contracts, 10th ed., pp. 813, 814; Lucas v. Godwin, 4 Sc. 509, 6 L.J.C.P. 205; Stavers v. Curling, 6 L.J.C.P. 44; Thornton v. Place, 1 Moo. & R. 218; Adams v. McGreevy, 17 Man. L.R. 115; Davis

v. O'Brien, 18 Man. L.R. 79; Rockel on Mechanics' Liens (1909), secs. 49, 64. Once the lien attaches, the statute, being a remedial one, should be construed liberally. Under the authorities and the evidence, justice would be done by deducting the price of one coat of paint from the contract-price, especially as the defendant had admitted that she offered to pay the plaintiff the full amount if another coat of paint were put on. Section 49 of the Mechanics' Lien Act, 1910, counsel contended, should be construed liberally in favour of the plaintiff.

Louis M. Singer, for the defendant, contended that it would be impossible to fulfill the contract unless the verandah were rebuilt with new materials. (He was stopped by the Court.)

The judgment of the Court was delivered by MEREDITH, C.J.:—We have no right to enforce moral obligations. We think this appeals fails. It is not a case in which it is necessary to determine how far the doctrine of substantial performance obtains, because, upon the findings of the learned Referee, which are supported by the evidence, there was no performance of the contract. It is not a case of slight defects; but there was a serious failure to perform important terms of the contract.

The learned Referee finds that the lumber used in the construction of the verandah was not as specified in the contract; that the verandah was not properly constructed in respect of the joists; and does not comply with the city by-laws regulating the construction of buildings; the upstairs balustrade was not properly secured; the door sill put in by the plaintiff was not properly secured; the eaves-troughs were not properly hung; the painting was not in accordance with the specifications, and has not been properly applied; and that the downstairs balustrades are not properly connected.

Now, to call these trifling defects in the work seems to me a misuse of the English language. They constitute a serious and substantial failure to perform the contract in its material and important aspects; and I think that no other conclusion could be arrived at than that, according to law, the plaintiff, having failed to perform his work according to the contract, was not entitled, in an action, to recover the amount to which, if he had performed it, he would have been entitled, or to enforce his lien.

The doctrine that Mr. Plaxton has attempted by his argument to set up again, of substantial performance, as far as this Court is concerned is concluded by the decision in Sherlock

v. Powell, 26 A.R. 407. Dealing with that doctrine, Mr. Justice Lister, delivering the judgment of the Court, says (p. 410): "The doctrine of 'substantial performance' pressed by counsel for the plaintiff, and which is held by the Courts of many States of the neighbouring Union, has never been adopted by the English Courts or by the Courts of this country. Mr. Hudson, in the second edition of his work on Building Contracts, vol. 1., p. 201, refers to this doctrine thus: 'Where the contract is entire, and completion is a condition precedent to payment, no English case has yet decided that any allegation of "substantial performance" will enable the builder to recover, unless there is some act of the employer, such as acceptance, waiver, or prevention, or evidence from which a contract can be implied to pay for the work as performed and according to value, although it is not entirely completed.'" Then the learned Judge goes on to point out that the author refers to certain cases which he names; then he proceeds: "The plaintiff, having failed to establish that the contract was performed or that its non-performance was owing to the fault or concurrence of the defendant, cannot, as it seems to me, on the authorities, recover in this action."

It is impossible to come to the conclusion, on the evidence, that the defendant or her husband, by anything that was done, acquiesced in the improper work, or the use of improper materials by the plaintiff.

There is nothing from which it could be found as a fact that they acquiesced in the substitution of the inferior lumber for the lumber that was to be used, or that the defective work was to be accepted as if it had been in accordance with the contract.

It is an extraordinary doctrine to urge that, where a person makes a contract with a builder, no architect intervening, to put up a verandah or house in accordance with a certain stipulation, because the person who makes the contract with the builder is there and sees the work going on, he is therefore prevented, if it turns out afterwards that the builder has put in improper material or done improper work, from objecting to it. There is no such law, and it is contrary to common sense.

It is very probable that these people knew nothing about matters of that kind, and it requires somebody of experience in work of the character of that which was being done to tell what we are asked to assume the defendant or her husband knew.

It may be that this is a very hard case, and that the defen-

dant has got a verandah nearly as good as that which she contracted for, and yet the result of this judgment is, that she escapes paying anything for it except the $10 which she has already paid.

This judgment, however, does not in any way preclude the plaintiff from recovering if it is possible for him to rectify what has been wrongly done. All that is decided is that at the time this action was brought he had no cause of action in respect of the contract.

We think, under all the circumstances, that we should follow what was done by the Official Referee, and dismiss the appeal without costs.

DIVISIONAL COURT. JANUARY 10TH, 1912.

WILLS v. BROWNE.

Bailment—Mandate—Negligence—Personal Trust — Delegation to Another—Liability for.

Action in the County Court of the County of York to recover $300, in the circumstances mentioned below.

The action was tried by DENTON, Jun.Co.C.J., without a jury.

W. D. McPherson, K.C., for the plaintiff.

H. C. Macdonald, for the defendant.

DENTON, Jun.Co.C.J.:—The plaintiff is a real estate agent, having an office in College street, Toronto; the defendant is a grocer, his firm having its store close to the plaintiff's place of business. The plaintiff and defendant had had business dealings before the transaction in question occurred, the plaintiff having collected the defendant's rents, and the defendant having borrowed money from the plaintiff from time to time on the security of these rents. On Saturday the 22nd July, 1911, between 11 and 11.30 in the morning, the plaintiff went to the defendant's store and asked him if he had time to go down to the city hall and buy for him $500 worth of tickets of admission to the Canadian National Exhibition. These tickets could then be bought at a discount of 10 per cent.; in other words, $450 would buy $500 worth of tickets. The defendant said that he had the time, and that he would get the tickets, whereupon the

plaintiff handed the defendant $450 in cash. The Exhibition offices at the city hall closed at 12 o'clock, so that there was no time to be lost. Shortly after the plaintiff and defendant separated, something came up in the store to prevent the defendant going in person. The defendant then called in one Innes, a clerk, and handed him the money, with instructions to go down and get the tickets. Now, Innes was a young man about 21 years of age, who had been employed from time to time by the defendant, to deliver goods. Innes had been intrusted with the work, not only of delivering goods, but of collecting cash for the goods, when occasion called for it. Frequently he would collect as much as $10 and occasionally as much as $40 or $50 before paying it in. The defendant swore, and it is not contradicted, that up to this time he had always found Innes an honest boy, and had every reason to believe that he would execute properly and honestly the business intrusted to him. Innes took the money and started off for the city hall, where these tickets were to be bought. He did not buy them, but, instead, got drunk with the money, and, when found, had only $150 in his possession. The defendant, his employer, laid a criminal charge against Innes, who was found guilty and sent to prison. The $150 recovered by the police was paid over to the plaintiff on account. The plaintiff now sues the defendant to recover the remaining $300.

The argument of the defendant's counsel . . . is, that the defendant, at most, was an ordinary gratuitous bailee of this money, and can be held liable only in case it is shewn that the act of intrusting the money to Innes amounted to gross negligence. It is also contended that there was no binding contract on the part of the defendant to get these tickets for the plaintiff, because there was no consideration for the promise. But there are different kinds of gratuitous bailments; and what might be considered gross negligence in one class might not be so considered in the other. This case comes under that class of gratuitous bailments called mandates. This is an obligation which arises where there is a delivery of money or goods to somebody who is to carry them or do something about them without any reward. The difference between this class and the ordinary class of gratuitous bailments is, that in the one class the principal object of the parties is the custody of the thing delivered, and the service and labour are merely incidental; while in the other the labour and services are the principal objects of the parties, and the custody of the thing is merely incidental. It has been held time and again that the mere acceptance of the goods by the

mandatory is a sufficient consideration for his promise to render service in respect of them; in other words, that the owner's trusting him with the goods is a sufficient consideration to oblige him to do without negligence what he agreed to do. SeeWheatley v. Low, Cro. Jac. 668; Shilliber v. Glyn, 2 M. & W. 143; Coggs v. Bernard, 2 Ld. Raym. 909; Whitehead v. Greetham, 2 Bing. at p. 468; Hart v. Myles, 4 C.B.N.S. 371; Beale on Bailments, p. 105.

There was, therefore, in this case, a contract entered into between the defendant and the plaintiff whereby the defendant agreed that he would take the money down to the city hall and buy the tickets. There was no thought or suggestion, at the time, that any one else should do it for the defendant; and, I think, the nature of the services to be rendered necessarily imports into the contract a promise that what was to be done was to be done by the defendant personally. The plaintiff handed the money to the defendant because he knew him and had business relations with him, and the commission was one which called for honesty and care.

The plaintiff is, I think, entitled to judgment on two grounds. First, there being a contract, the defendant is responsible for any breach of that contract. The question on this branch of the case is not whether the defendant was negligent in handing the money over to Innes and asking him to undertake the commission, but whether the defendant, through his agent or employee, Innes, was guilty of misconduct or dishonesty or gross negligence. In this particular case, the defendant must be held responsible for Innes's acts. Innes's negligence or misconduct is the defendant's negligence or misconduct, so far as the determination of this case is concerned.

Then, I think, the plaintiff is entitled to judgment on another ground. Even if it be necessary to shew that the defendant was grossly negligent in handing the money to Innes, I have reached the conclusion that, inasmuch as the defendant knew that the plaintiff was trusting him only and relying upon his personal honesty, the handing the money over, without the plaintiff's knowledge or consent, to a young man who had not been doing work of that kind or importance, and who had not been intrusted with any large sums of money at one time, and who was a mere errand or delivery boy, was, in the circumstances, such negligence on the part of the defendant as makes him responsible for the money.

Mr. Macdonald referred to the case of Tindall v. Hayward, 7 U.C.L.J.O.S. 243, which in some respects is akin to this, and

in which the defendant was held not liable. I think that case can be distinguished; but, even if it cannot, it is not a decision that I am obliged to follow.

In cases like this, the question whether there is actionable negligence must be determined in the light of all the circumstances of the particular case in hand; and it does not follow, because in one case there was found to be no actionable negligence, that in another case resembling it, though not in all respects similar, the same conclusion must be reached.

No doubt, this is a hard case on the defendant; but, in my opinion, there must be judgment for the plaintiff for the $300 and the costs of the action.

The defendant appealed from the judgment of DENTON, Jun. Co. C.J.

The appeal was heard by BOYD, C., RIDDELL and SUTHERLAND, JJ.

H. C. Macdonald, for the defendant, argued that the defendant was a gratuitous bailee, and so only liable for gross negligence, which his handing over of the money to Innes did not amount to: Tindall v. Hayward, 7 U.C.L.J. O.S. 243; Brown v. Livingstone, 21 U.C.R. 438; Palin v. Reid, 10 A.R. 63; Whitechurch Limited v. Cavanagh, [1902] A.C. 117. To render the defendant liable, in the circumstances, Innes must have acted within the scope of his authority, which he did not do: Coll v. Toronto R.W. Co., 25 A.R. 55. There was no contract binding on the defendant to procure the tickets for the plaintiff, as there was no consideration for the promise.

W. D. McPherson, K.C., for the plaintiff, was not called upon.

The judgment of the Court was delivered by BOYD, C.:— While commending the assiduity of counsel for the appellant, we must state that the law is against him. We believe the judgment of the trial Judge is right. A personal trust was contemplated here. The defendant should have notified the plaintiff before delegating the trust to another, if he wished to escape liability. He did not do this, so he took the risk. The personal element differentiates this case from ordinary bailment.

The appeal must be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 22ND, 1911.

HAY v. SUTHERLAND.

Writ of Summons—Service out of the Jurisdiction—Con. Rule 162 (g)—Joinder of Parties.

Appeal by the defendant Sutherland from an order of the Master in Chambers dismissing the appellant's motion to set aside an ex parte order authorizing service upon the appellant, out of the jurisdiction, of the writ of summons, and to set aside the writ and the service and all proceedings based thereon.

Grayson Smith, for the appellant.
McGregor Young, K.C., for the plaintiff.

MIDDLETON, J.:—A case is within clause (*g*) of Con. Rule 162 when it appears that the defendants are properly joined. The question of joinder must be determined quite apart from the residence of the defendants, and entirely upon the Rules regulating the joinder of parties.

If an action is properly brought against two persons who are both within the jurisdiction, it can be said that either is a proper party to an action properly brought against the other; and so, when either is out of the jurisdiction, an order may be made for service upon him, provided his co-defendant is first served.

This construction of the Rule has been invariably adopted.

Appeal dismissed with costs to the plaintiff in any event.

MIDDLETON, J. JANUARY 23RD, 1912.

GREER v. GREER.

Stay of Proceedings—Action Pending in Foreign Court—Parties and Causes of Action not Identical—Trust—Account—Payment—Pleading—Statement of Claim—Motion to Strike out.

A motion by the defendant A. B. Greer to stay this action pending the trial of an action in Arkansas; and, in the alternative, for an order striking out paragraphs 9*c* and 9*d* of the statement of claim, on the ground that, according to the law of Arkansas, the plaintiff had no right to maintain this action.

R. Bayly, K.C., for the applicant.
G. N. Weekes, for the plaintiff.
T. G. Meredith, K.C., for the B. W. Greer estate.
J. B. McKillop, for W. H. Wigmore.

MIDDLETON, J.:—The allegations in the statement of claim, so far as now material, are that certain lands in Arkansas were held by the late B. W. Greer in trust for the late J. H. Greer and A. B. Greer. Some of these lands were sold, and the proceeds were received by B. W. Greer and deposited in the bank account of the firm of which he and Wigmore were partners. The unsold lands were conveyed to A. B. Wigmore in trust.

The executor of J. H. Greer now seeks an account and payment.

The action in the Arkansas Court is not by the same plaintiff—the beneficiaries under the will of J. H. Greer, claiming as his heirs, allege the trust and ask that it may be declared.

The question of law suggested is this. J. H. Greer, domiciled in Ontario, by his will appointed M. A. Greer and M. H. Greer his executors, and devised his property, real and personal, to them in trust. M. H. Greer renounced, and probate issued to M. A. Greer alone. This probate has been recognised by the Arkansas Courts. M. H. Greer disclaimed as trustee, and refused to act. It is said that, according to the law of Arkansas, where the land is, when one of two trustees disclaims, the land does not vest in the other. The affidavit is not candid, because it does not go on to explain what should be done. I would infer that a new trustee to take the place of the disclaiming trustee should be appointed.

I cannot see what this has to do with either action. The land is vested in A. B. Greer, and it is asked that he be declared a trustee.

So far as accounting is concerned, the Court here is by no means impotent; and, if necessary, a new trustee can be appointed, so that the defendants can be adequately protected.

So far from being any reason for the staying of the action, the ground suggested is so flimsy and dilatory merely, that it affords the strongest reason for allowing the action to proceed.

The motion against the statement of claim, as pointed out on the argument, is misconceived, because the Rules only contemplate a motion based on the pleading itself; but, quite apart from that, what has been said indicates that this may be found to be no defence at all. I do not determine this, as much clearer evidence as to the law of Arkansas must be given.

Motion dismissed. Costs to the plaintiff in any event.

MIDDLETON, J. JANUARY 24TH, 1912.

VERNER v. CITY OF TORONTO.

Municipal Corporation—Purchase of Land outside of Municipal Limits—Erection of Isolation Hospital—Refusal by outside Municipality to Consent to—Powers of Council—Acquisition and Resale—Action by Ratepayer to Rescind Purchase—Status of Plaintiff—"Use of the Corporation"—Purpose of Holding—Right to Inquire into—Crown.

Action by John Verner, on behalf of himself and all other ratepayers of the City of Toronto, against the Corporation of the City of Toronto and one Thompson, for a declaration that the defendant corporation were not legally empowered to purchase certain land in the Township of York, alleged to have been purchased for the purpose of erecting an isolation hospital thereon, and to set aside the conveyance from the defendant Thompson to the defendant corporation, and to restrain the defendant corporation from expending any money on or taking any steps towards the purchase of the land or the erection of the hospital thereon.

W. C. Chisholm, K.C., for the plaintiff.
H. L. Drayton, K.C., for the defendant corporation.
C. A. Moss, for the defendant Thompson.

MIDDLETON, J.:—I am content to accept the statement in Dillon, 5th ed., par. 990: "Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding at the instance of the State."

The municipality has the power to purchase and hold lands for the use of the corporation (Municipal Act, 1903, sec. 534), and has, for certain purposes, the further right to expropriate lands both within and outside the municipal limits.

Under sec. 104 of the Public Health Act, this hospital cannot be established without the consent of the Township of York. This consent was not asked at the date of the purchase, and, when asked, has been refused, or, perhaps it should be said more accurately, was not given.

It is argued that, this being the object of the purchase, the consent should have been obtained before the land was purchased. The statute does not so provide. All that it aims at is

the establishment and maintenance of the institution which the municipality may regard as objectionable. There can be no objection to the ownership of the land by another municipality.

The city council, fearing that the disclosure of their plans before the site had been secured might make it impossible to purchase at all, or at a reasonable price, bought before any application was made to the township. This course was prudent; but, whether prudent or not, I have no right to criticise, if it was within the power of the council, as I think it was.

The council, if they cannot obtain the consent of the township, may have to use the land for some other municipal purpose, or may, if they see fit to determine that it is not required, sell. This, it is said, is speculation in land, which is *ultra vires*. I do not think so. Speculation and the making of a profit out of the land by resale formed no part of the motive for the purchase. The purchase was made because it was deemed a good business transaction to buy the site before disclosing the municipal intentions. The municipality took the chance of obtaining the consent of the township, and took the chance, if the consent is finally refused, of selling without loss. I cannot find any jurisdiction in the Court to interfere with this. Nor should I do so unless I found some express prohibition.

I can find no trace of any right in the Court to rescind a sale, actually carried out, at the instance of a ratepayer. A ratepayer has the right to prevent the expenditure of municipal funds for purposes *ultra vires* the corporation; and, when a loss occurs by reason of the *ultra vires* transaction, he may hold the individual councillors responsible for the loss; but this does not justify an action to rescind and to compel the vendor to repay the price he has received.

This land has been purchased; the title has passed; as between the vendor and purchaser the transaction is completed. If the land was not purchased "for the use of the corporation" or "the public use of the municipality," then the Crown alone can object.

It is clear that this land was purchased for the use of the corporation. There is no room for the suggestion that any other than a municipal purpose was ever contemplated.

The purpose of the purchase was plain from the proceedings of the council—the establishment of an hospital for contagious diseases.

If in any way material, I find that there is no evidence brought home to the vendor of knowledge of the purpose of the purchase before the completion of the sale.

The action must be dismissed with costs.

DIVISIONAL COURT. JANUARY 24TH, 1912.

*SINGER v. RUSSELL.

Principal and Agent—Agent's Commission on Sale of Land—Implied Promise—Taking Benefit of Agent's Exertions in Finding Purchaser—Finding of Trial Judge—Appeal.

Appeal by the defendant from the judgment of DENTON, Jun. J. Co. C. York, in favour of the plaintiff, an estate agent, for the recovery of $187.50, in an action, in the County Court of the County of York, for commission on the sale of land for the defendant.

The appeal was heard by BOYD, C., RIDDELL and SUTHERLAND, JJ.

D. Macdonald, for the defendant.

J. M. Ferguson, for the plaintiff.

BOYD, C. (after setting out the facts at length and referring to portions of the evidence):—There was no express bargain about commission, according to the evidence of both parties; but, on the plaintiff's evidence, there is clear enough proof that he was working upon an implied promise of compensation. This being so, the defendant takes the benefit of what was done by the agent (the plaintiff) in preparing the way for the final sale, and the agent's intervention efficiently furthered the completion of the transaction. Slight service in bringing together the parties so as to result in a sale is sufficient: Mansell v. Clements, L.R. 9 C.P. 139, per Keating, J. It is for the jury (or a Judge trying the case) to say whether the sale was or was not brought about by the agency of the plaintiff, by his introduction or intervention: Lumley v. Nicholson, 34 W.R. 716.

The principle of the decision in In re Beale, Ex p. Durrant, 5 Mor. 37, is applicable in its facts, where the test is explained by Mr. Justice Cave to be, whether the sale has been brought about in consequence of the introduction and is traceable thereto.

The learned trial Judge has come to a conclusion, upon the evidence, in favour of the plaintiff; there is evidence well warranting the result; and I think his judgment should be affirmed with costs.

*To be reported in the Ontario Law Reports.

SUTHERLAND, J., also made a full examination of the evidence, and reached the same conclusion as the Chancellor, stating reasons in writing, in the course of which he referred to Sager v. Sheffer, 2 O.W.N. 671; Morson v. Burnside, 31 O.R. 438, 442; Wilkinson v. Martin, 8 C. & P. 1, 5; Green v. Bartlett, 14 C.B. N.S. 681, 685; Wolf v. Tait, 4 Man. L.R. 59; Aikins v. Allan, 14 Man. L.R. 549; Burchell v. Gowery and Blockhouse Collieries Limited, [1910] A.C. 614, 625; Stratton v. Vachon, 3 Sask. L.R. 286, 44 S.C.R. 395.

RIDDELL, J. (dissenting), was of opinion, for reasons stated in writing, that, upon the facts as found by the trial Judge, the plaintiff was not entitled to commission—that the case was covered by authority in a sense adverse to the judgment. He referred to Toulmin v. Millar, 58 L.T.R. 96 (H.L.); Mansell v. Clements, L.R. 9 C.P. 139, 143; Green v. Bartlett, 14 C.B.N.S 681; Toppin v. Healey, 11 W.R. 466; Barnett v. Isaacson, 4 Times L.R. 645; Green v. Miles, 30 L.J.C.P. 343; Alder v. Boyle, 4 C.B. 635; Wycott v. Campbell, 31 U.C.R. 584; Rimner v. Knowles, 22 W.R. 574, 30 L.T.R. 496; Morson v. Burnside, 31 O.R. 438; Wilson v. Deacon, 2 O.W.N. 1229; Noah v. Owen, 3 Times L.R. 364, 365; Curtis v. Noxon, 24 L.T.R. 706, 708.

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

CLUTE, J., IN CHAMBERS. JANUARY 25TH, 1912.

ONTARIO AND WESTERN CO-OPERATIVE FRUIT CO. v. HAMILTON GRIMSBY AND BEAMSVILLE R.W. CO. AND CANADAN PACIFIC R.W. CO.

ONTARIO AND WESTERN CO-OPERATIVE FRUIT CO. v. GRAND TRUNK R.W. CO.

Discovery—Examination of Manager of Plaintiff Company—Inadequacy of Information—Duty to Obtain Information—Examination of Former Agent of Company—Relevancy and Reasonableness of Information Sought.

Appeal by the plaintiffs from an order of the Master in Chambers allowing the defendants to examine one Griffin, agent of the plaintiffs, for discovery, or for the further examination of McAllum, the plaintiffs' manager, for discovery.

Glyn Osler, for the plaintiffs.

Angus MacMurchy, K.C., for the defendants the Canadian Pacific Railway Company.

Frank McCarthy, for the defendants the Grand Trunk Railway Company.

CLUTE, J.:—The question arose out of certain transactions in which the plaintiffs shipped fruit from Beamsville to Winnipeg. The action was brought for damages for not shipping the fruit within the time agreed upon and for damages for loss of fruit by want of care on the part of the defendants.

Griffin entered into an agreement with the plaintiffs, dated the 6th August, 1910, whereby he agreed to market for the plaintiffs shipments of fruit and vegetables during the season of 1910 to Winnipeg and points west. McAllum was examined for discovery; and, his examination being considered by the defendants insufficient, the application to the Master was made. The Master made an order: (1) that the plaintiffs produce Griffin for examination for discovery, or, in the alternative, that McAllum attend for further examination for discovery, after having applied to Griffin for information touching the matters in question in the action; and (2) that, after the examination of Griffin or further examination of McAllum, the plaintiffs may issue a commission to examine witnesses.

It was contended on behalf of the plaintiffs that, inasmuch as the arrangement between the plaintiffs and Griffin had expired and their accounts had been closed, the defendants had no right to have Griffin examined, nor were they entitled to call upon McAllum for further examination after he had obtained the information from Griffin.

Mr. Osler chiefly relied upon Bolckow v. Fisher, 10 Q.B.D. 161, to support his contention that the plaintiffs were not bound to inquire from Griffin what the facts were in regard to the disposal of the fruit, nor were they entitled to examine Griffin for discovery. . . . In that case the servants were still in the employ of the defendants; and, as I read the case, it was not necessary to decide, and the Court did not decide, that information which the defendants might obtain by the asking could not be obtained simply because the persons to be inquired of had ceased to be their servants. It might indeed be that such person would refuse to give the information because he had ceased to be in the defendants' employment; but, if such information could reasonably be obtained after he ceased to be in such employment, I can see no reason why it should not be obtained for the purpose of discovery. . . .

[Reference to Rasbotham v. Shropshire Union Railways and Canal Co., 24 Ch. D. 110; Anderson v. Bank of British Columbia, 2 Ch. D. 645, 657; Earl of Glengall v. Frazer, 2 Hare 99.]

In the present case, the information asked is relevant and reasonable. The damages claimed are by reason of the loss to the plaintiffs in having to sell the fruit at a less price than the fruit had in fact been sold for and rejected. To whom was it sold, and why was it rejected, and by whom? Questions of this kind, which form the basis of the plaintiffs' claim, ought to be within the knowledge of the plaintiffs or their agents who had charge of the transaction; and I cannot doubt that, if the request was made, Griffin would give such information as he had from his books and otherwise as to what took place in the transaction, both as to the alleged prior sale and the subsequent disposition of the fruit. At all events, there should be an honest endeavour on the part of the plaintiffs to obtain this information.

The order made by the Master appears to me reasonable and within the recognised practice of the Court. The appeal is dismissed with costs.

CLUTE, J., IN CHAMBERS. JANUARY 25TH, 1912.

STAVERT v. CAMPBELL.

Appeal—Privy Council—Security for Costs of Appeal—Effect of—Stay of Execution—Security not Given as Required by Con. Rule 832 *(d)—Privy Council Appeals Act,* 10 *Edw. VII. ch.* 24, *sec.* 4*—Effect of Repeal of R.S.O.* 1897 *ch.* 48 *—Re-enactment with Modification—Interpretation Act, sec* 7, *cl.* 48 *(a).*

Motion by the defendant to set aside a writ of fi. fa. issued by the plaintiff upon the judgment of the Court in favour of the plaintiff, upon the ground that, security having been given by the defendant for an appeal to the Judicial Committee of the Privy Council, execution in the original cause was thereby stayed, and that the issue of the writ was irregular and contrary to the Privy Council Appeals Act, 10 Edw. VII. ch. 24, sec. 4.

F. Arnoldi, K.C., and F. McCarthy, for the defendant.
F. R. MacKelcan, for the plaintiff.

CLUTE, J.:—Section 3 of the Act declares that no appeal shall be taken to His Majesty in His Privy Council until the appellant has given security as therein provided. Section 4 declares that, upon the perfecting of such security, unless otherwise ordered, execution shall be stayed in the original cause. Section 5 provides that, subject to rules to be made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council.

Con. Rule 832 declares that, upon the perfecting of the security upon an appeal to the Privy Council, execution shall be stayed in the original cause, except in the following cases: (*d*) If the judgment appealed from directs the payment of money, execution shall not be stayed until the appellant has given security, to the satisfaction of the Court of Appeal or a Judge thereof, that, if the judgment be affirmed ,the appellant will pay the amount, etc.

It was urged by Mr. Arnoldi that the statute, having been passed since the Rule came into force, overrides the Rule.

The statute is simply a revision of R.S.O. 1897 ch. 48, with a slight modification. Section 3 of the revised statute corresponds to sec. 4 of 10 Edw. VII. ch. 24, except that the words "unless otherwise ordered" are not in the revised statute.

I do not think that this objection can be supported. It would mean that any Rule of practice would be abrogated without reference to it where a statute was repealed and re-enacted in almost the same terms. Such a view cannot, I think, be entertained. Besides, the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, clause 48 (*a*), expressly provides that all rules made under the repealed Act shall continue good and valid, in so far as they are not inconsistent with the substituted Act or enactment, until they are annulled and others made in their stead.

I do not think the giving of the required security for appeal to the Privy Council had the effect of staying execution in the Court below.

Motion dismissed with costs.

CLUTE, J. JANUARY 25TH, 1912.

RE SHATTUCK.

Will—Construction—Devise—Life Estate—Remainder to Sons in Equal Shares—Vested Estates or Interests.

Application by the executors of the will of Joseph E. Shattuck, deceased, for an order determining three questions arising upon the construction of the will.

W. C. Brown, for the executors.

V. A. Sinclair, for S. Shattuck, William J. Shattuck, and the executors of Elmer L. Shattuck.

W. M. Douglas, K.C., for Lorenzo Shattuck and Edgar Marshall Shattuck.

CLUTE, J.:—The testator, after directing his executors to pay his debts, proceeds as follows: "I give to my wife Margaret all my real and personal estate as long as she remains my widow" (describing it). "In case of my wife's death or marrying again I wish my lands to be sold and also my personal property and the proceeds to be equally divided between my younger sons Angus Lorenzo Shattuck, Edgar Marshall, Noah Safford, Elmer Lincoln, and William Joseph Shattuck."

The widow, without having married, died on the 4th December, 1911. Elmer Lincoln Shattuck did not marry, and died in July, 1903, leaving a will, whereby he devised his estate to certain heirs.

The following questions are submitted:—

1. Does the wording of the will grant a life estate to the wife, with remainder over at her death or remarriage to the five children, younger sons, in equal shares, so that each of the said sons, upon the death of the testator, took a vested interest in the said lands?

2. Did the interest of Elmer Lincoln Shattuck lapse upon his death, or did it pass under the will of Elmer Lincoln Shattuck, deceased, to his executors?

3. Did Elmer Lincoln Shattuck, during his lifetime, have a vested interest in the estate of the said Joseph E. Shattuck?

It will be seen that in this will there is no gift over. It is clear, I think, that the intention of the testator was to make a gift to his children. The possession of the gift is delayed by keeping out a life estate for the widow; and, upon her death or

remarriage, the real and personal estate is to be sold and divided between the five children.

This brings the case, I think, within the rule laid down in Packham v. Gregory, 4 Hare 396, where Sir James Wigram, V.-C. said: "But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed." See also Jarman on Wills, 6th ed., p. 1404; Rogers v. Carmichael, 21 O.R. 658.

In this last case, there was also a devise and bequest of real and personal estate to the wife for life or until marriage, with power of disposal; and, by a residuary clause, the testator devised the residue not specifically devised or bequeathed, and not sold or disposed of by his wife, immediately after her death or marriage to his executors to sell and convert the same into money, and out of the proceeds pay a specific sum to each of his five sons, and divide the balance, share and share alike, between his three daughters. One of the sons died prior to the widow, leaving no issue, and it was held that the legacy to him became vested on the testator's death, payable on the widow's death, and that his personal representatives were entitled thereto.

So in Town v. Borden, 1 O.R. 327, where a testator by his will gave to his wife the use of his personal property and his farm for the support of his children, "and at her decease the whole of the personal and real property to be equally divided between my six children," it was held that the shares of the children vested on the death of the testator. In this case reference is made to Baird v. Baird, 26 Gr. 367, referred to by Mr. Douglas; and Proudfoot, J., points out that the report in the Baird case is defective. In that case, an apportionment was to be made "to each of our children alive at the time," etc., which, of course, precluded the vesting of their interest at the time of the testator's death.

In Webster v. Leys, 28 Gr. 475, it was held by Proudfoot, V.-C., that a bequest in the form of a direction to pay or to pay and divide at a future period vests immediately, if the payment be postponed for the convenience of the estate or to let in some other interest.

Theobald on Wills, Canadian edition, gives the rule in these words, at p. 584: "If the postponement of division or payment is merely on account of the position of the property, if, for instance, there is a prior gift for life, or a bequest to

trustees to pay debts, and a direction to pay upon the decease of the legatee for life, or after payment of the debts, the gift in remainder vests at once. But where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time." See also Martin v. Grant, 15 Gr. 114; Kirby v. Bangs, 27 A.R. 17.

I think in this case the gift of the testator, Joseph E. Shattuck, to his five sons vested upon his death, and that Elmer Lincoln Shattuck, during his lifetime, had a vested interest which passed by his will to his executors. Costs of all parties out of the estate.

KELLY, J. JANUARY 25TH, 1912.

LABONTE v. NORTH AMERICAN LIFE ASSURANCE CO.

Life Insurance—Policy on Semi-Tontine Investment Plan—Election by Insured at End of Period—Surrender Value of Policy—Evidence.

Action upon a policy of life insurance.

W. F. MacPhie, for the plaintiffs.
J. A. Paterson, K.C., for the defendants.

KELLY, J.:—The defendants issued a policy of insurance, dated the 21st October, 1890, on the life of the plaintiff Pierre Labonté, on the defendants' semi-tontine investment plan, and in consideration (amongst others) of the annual premium of $29.65 payable on delivery of the policy, and thereafter on the 20th October in every year for nineteen years, insured the life of the plaintiff Pierre Labonté, and therein promised to pay to his wife, Zelia Mahen, "should his death occur within the tontine period hereof, otherwise to himself, his executors, administrators, or assigns, the sum of one thousand dollars, first deducting therefrom the balance of the current year's premium, if any, and all loans on account of this policy, upon satisfactory proof at its head office, of the death of the insured during the continuance of this policy and its surrender with the last renewal receipt thereof," under the provisions contained in the policy.

It was also set forth in the policy that it "is issued and accepted under the company's semi-tontine dividend plan, upon

the following special provisions printed and written and also those on the back hereof, all of which are hereby incorporated herein and made part hereof.'' One of these provisions was, that the tontine dividend period of the policy would be completed on the 20th October, 1910, and that, upon completion of that period, provided that the policy should not have been terminated previously by surrender, lapse, or death, the legal holder or holders of the policy should have certain options upon its then surrender, one of which options was to withdraw in cash the policy's entire share of the assets, that is, the accumulated reserve fixed by the policy at $465.70; and, in addition thereto, the surplus apportioned by the defendants to the policy.

On the 22nd September, 1910, a representative of the defendants wrote to the plaintiff Pierre Labonté, transmitting to him a form setting forth various options which the legal holders of the policy had the right to choose from, on the completion of the tontine dividend period, on the 30th October, 1910, and asking him to signify the options selected, so that the necessary voucher might be forwarded.

One of the options set forth in the form was ''No. 4,'' that the policy might be surrendered for its entire cash value, comprising surplus and reserve, and amounting to $642.70.

The plaintiffs, by writing under seal, dated the 3rd October, 1910, which was transmitted to and received by the defendants, signified that, after carefully considering the various options offered them, they had decided to take that numbered 4 (namely, surrender the policy and accept its entire cash value, $642.70).

On the 28th October, 1910, the defendants sent to the plaintiff Pierre Labonté a form of discharge, to be signed by him and the beneficiary in accordance with the option so chosen by the plaintiffs. In reply, the plaintiff Pierre Labonté wrote to the defendants on the 31st October, 1910, stating that the amount which he had chosen to accept was $662.70, and not $642.70, and asking the defendants to look over the matter. On receipt of this letter, the defendants, to convince the plaintiff Pierre Labonté, wrote him on the 3rd November, 1910, returning to him for inspection the option form which had been signed by the plaintiffs, and requested that it be returned to the defendants with the discharge and policy, when the defendants' cheque for the proceeds would be immediately mailed to him.

The option form was not returned to the defendants, nor was the policy surrendered to the defendants, both of these documents having remained in the possession of the plaintiffs and

being produced by them at the trial. The plaintiffs did not further communicate with the defendants, but commenced this action, claiming that, by the terms of the policy, they are entitled to payment of $1,000.

Having regard to all the terms of the policy, I find that what the plaintiffs were entitled to, at the end of the twenty years' dividend period, namely, on the 20th October, 1910, was not $1,000, but one or other of the options mentioned in the policy; that the plaintiffs chose to accept the option which entitled them to the cash surrender value of the policy at that time, and which was stated by the defendants and admitted in writing by the plaintiffs to be $642.70, on surrender of the policy. Not only did the plaintiffs choose to accept the $642.70, but the evidence shews that, under the terms of the policy or contract of insurance in question, this sum is the amount which an annual premium of $29.65 for twenty years produced or purchased as the surrender value, at the end of that time, of a policy on the plan and terms of that in question here, and having regard to age, etc., of the insured.

The defendants have been ready and willing to pay the holders of the policy the cash surrender value thereof, $642.70, on compliance by the plaintiffs with the conditions of the policy.

I, therefore, dismiss the plaintiffs' claim with costs; and, I direct that, on payment by the defendants to the plaintiffs, or if the plaintiffs refuse to accept it, then into Court, of $642.70, less their taxed costs, the policy be declared satisfied and be delivered to the defendants; and that in the meantime the policy remain in Court.

KELLY, J. JANUARY 25TH, 1912.

O'DONNELL v. TOWNSHIP OF WIDDIFIELD.

Municipal Corporation—Contract for Construction of Municipal Works — Resolution of Council Authorising — Meeting of Council not Properly Called or Constituted—Absence of By-law—Unexecuted Contract—Dismissal of Action for Breach.

An action by a contractor against the Municipal Corporations of the Township of Widdifield and the Town of North Bay for $10,000 damages for breach of contract by the defendants and for $200 for work performed.

Peter White, K.C., for the plaintiff.

G. H. Kilmer, K.C., and J. M. McNamara, K.C., for the defendants.

KELLY, J.:—By a proclamation issued by the Lieutenant-Governor of the Province of Ontario in Council, dated the 7th April, 1910, it was declared that certain parts therein particularly described of the township of Widdifield, in the district of Nipissing, should be withdrawn from that township and be annexed to the town of North Bay, and that such withdrawal and annexation should take effect on and after the 1st January, 1911.

On the 10th August, 1910, a by-law was passed by the municipal council of the township of Widdifield authorising the expenditure of $33,000 for the carrying out of the work of making certain permanent improvements for the purpose of opening, improving, grading, and gravelling certain streets, the opening, making, and constructing of certain storm sewers, and the constructing certain waterworks and watermains in that part of the township of Widdifield so to be annexed to the town of North Bay, and providing for the issue of debentures of the township for the purpose of raising these moneys.

On the 12th December, 1910, an application was made to the Court to quash this by-law, and the application was dismissed; but on appeal the by-law was quashed by a Divisional Court on the 23rd June, 1911: Re Angus and Township of Widdifield, 24 O.L.R. 318.

Some time prior to the 15th October, 1910, the council of the township proceeded to call for tenders for the construction of the storm sewers and works in connection therewith; and the plaintiff put in a tender for that work, and it is alleged that the council accepted his tender, following which what is alleged to be an agreement, dated the 15th October, 1910, was made between the plaintiff and the defendants the Corporation of the Township of Widdifield, for the carrying out of the work so tendered for by the plaintiff.

The municipal council of the township consisted of the reeve and four other members.

Prior to the opening and consideration of the tenders, there was evidently a difference of opinion amongst the members of the council as to the advisability of proceeding with the work, the reeve and two other members being in favour of it, while the other two disapproved of it.

When the time arrived for opening and considering the tenders, the reeve verbally notified three of the four councillors to attend a meeting of the council at his place of business on a certain day, on or about the 5th or 6th October, 1910. The other councillor, Overholt, was not notified, the explanation given by the reeve being that at a regular meeting of the council, held some time previously, Overholt had said he would not be satisfied with what the other members of the council would do. Overholt, on the other hand, referring to his not having received the notice of the meeting, said he was opposed to the by-law and the carrying out of the work, and was disgusted, and that he only heard of the meeting two or three days after it had taken place.

No business was done at the meeting on the day for which it was so called, and it was adjourned until the following day. It does not appear certain that any particular hour was named for the adjourned meeting, one of the members, McIntosh, saying that ten o'clock was named. His account of it is, that he attended at the reeve's place of business, the place named for the meeting, at 10 o'clock a.m. on the following day; that the reeve was not at home, his son stating that he had gone out to the country; that he (McIntosh), after waiting for a time, went away and returned at 12 o'clock; and, finding that the reeve had not yet returned and that there was no appearance of a meeting being held, again went away, and later on went out of town.

On the afternoon of that day, the reeve and two other members of the council, namely, Doyle and Irvine, met at the reeve's place of business, neither Overholt nor McIntosh being present, and decided upon accepting the plaintiff's tender, the only other person present at the meeting being the the township engineer.

As appears by the evidence, no by-law of the corporation was passed accepting the plaintiff's tender or awarding him the contract or authorising the making or signing of any contract with him, the only action of the council thereon being a minute as follows: "Moved by Doyle, second Irvine, that P. O'Donald be awarded the contract for laying sewer." Signed "John Murphy."

The written record of what took place is of the most meagre kind, and, so far as the evidence shews, this record remained in possession of the engineer until the time of the trial, and no minute of what took place was entered in the books of the corporation, nor was the clerk of the municipality present at the meeting.

A term of the specifications of the work on which the plaintiff tendered was, that "the contractor shall commence actual operations on the construction of the work within fifteen days after the signing of the contract;" and, before the plaintiff signed the contract, there was added thereto, at the plaintiff's request, the following: "And satisfactory financial arrangements have been made by the corporation."

The defendants do not appear to have taken any other steps towards proceeding with the work or ordering or requiring the plaintiff to do so. The plaintiff, however, of his own account, did some work in December, 1910, the value of which he estimates to be about $38 or $40.

The evidence does not satisfy me that the meeting in question was properly called or properly constituted. All members were entitled to proper notice of the meeting and of the time and place of holding it; and it cannot be said that the manner in which this meeting was convened was in accordance with the necessary requirements in such cases. Even had it been properly convened, there was wanting an essential requisite to the making of the contract with the plaintiff, in that no by-law was passed awarding the contract to the plaintiff or authorising the making of it.

Section 325 of the Consolidated Municipal Act, 1903, provides that "the jurisdiction of every council shall be confined to the municipality which the council represents, except where authority beyond the same is expressly given; and the powers of the council shall be exercised by by-law, when not otherwise authorised or provided for."

This section is in the exact words of sec. 282 of ch. 184, R.S.O. 1887, which was well considered in the case of Waterous Engine Works Co. v. Town of Palmerston, 21 S.C.R. 556, where it was held that a by-law is necessary in order that a municipal corporation shall make a valid contract, even where the contract is made under the seal of the corporation.

This requirement was not complied with in the case now under consideration. The transaction was one of more than usual importance to the municipality, the proposed contract contemplating an expenditure of more than $20,000, according to the evidence both of the plaintiff and of the engineer for the township of Widdifield—a very substantial liability for a township to incur. One would have thought that the decision to make such an expenditure and to bind the municipality to an obligation of that extent was, to use the language of Mr. Justice Patterson, in Waterous Engine Works Co. v. Town of Palmerston,

"a matter of sufficient importance to deserve whatever amount of deliberation and care the law aims at securing by requiring the action of the council to take the form of a by-law."

Nor can it be contended that the contract was an executed contract, or that the defendants in any way became bound by acceptance of the benefits thereof. The plaintiff admits that whatever work he did for the defendants was done to "test them out."

I can come to no other conclusion than that the plaintiff is not entitled to succeed; and I, therefore, dismiss his action. In view, however, of the circumstances surrounding the holding of what was intended as a meeting of the township council, and of the irregularity and want of care shewn in dealing with a matter of such importance to the municipality, the dismissal of the action is without costs.

It was contended by the defendants at the trial that the plaintiff's action should fail on other grounds shewn in the evidence, such as the quashing of the by-law authorising the issue of the debentures from the proceeds of which it was intended to pay the cost of the work tendered for by the plaintiff; that the plaintiff was not entitled to proceed with the work except at such time and place as the engineer of the defendants the Corporation of the Township of Widdifield should direct, and that the engineer did not give him any direction so to proceed; and that the defendants were bound only conditionally upon their making satisfactory financial arrangements, which they failed to make.

In view of the conclusion I have come to, for the reasons given above, I have not thought it necessary to consider these contentions.

SWALE v. CANADIAN PACIFIC R.W. CO.—MASTER IN CHAMBERS—JAN. 19.

Parties—Third Party Notice Served after Issue Joined—Setting aside—Indemnity—Con. Rule 209.]—Motion by the third party to set aside the third party notice served by the defendants under an order made ex parte on the 2nd December, 1911. The action was begun on the 1st February, 1910. The statement of claim was delivered on the 21st March, 1910, and was never amended. The statement of defence and counterclaim was delivered on the 8th April, 1910, and was amended on the 9th October, 1911. The cause was for a long time at issue, and was even set down for trial. The trial was delayed

by a commission on the part of the defendants to take evidence in England, which had never been executed. The plaintiff was not objecting to the delay, but submitted to any order that might be made. The counsel for the third party strongly pressed his motion, and relied mainly on Parent v. Cook, 2 O.L.R. 709, and cases there cited. Parent v. Cook was affirmed by a Divisional Court, 3 O.L.R. 350. The Master said that, in these circumstances, the order should not have been made, and must now be set aside. It was not by any means clear whether, even if the defendants had moved promptly, it was a proper case for an order under Con. Rule 209. The claim would have to be maintainable on the ground of indemnity. If based on the contract between the defendants and the third party, who, as an auctioneer, sold the goods for which the action was brought, then it would not be a case for the third party procedure. See Birmingham and District Land Co. v. London and North Western R.W. Co., 34 Ch. D. 261 (C.A.) Another reason was, that the third party should have full discovery both from the plaintiff and the defendants, if so desired. This had been fully gone into already between the plaintiff and defendants, and to add a third party at this stage would be almost equivalent to a new action, the expense of which would, as between the plaintiff and defendants, as well as between the defendants and the third party, have to be costs against the defendants in any event. The third party had been asked to join in the action, and had refused to do so or to undertake the defence. It would, therefore, seem that he would be bound by the result. See Parent v. Cook, 2 O.L.R. at p. 712. These two latter grounds were only mentioned as shewing that little, if any, benefit would result to the defendants if the order was sustained. But, in setting it aside, the Master acted on the authority of Parent v. Cook, supra. The order must, therefore, be set aside with costs to the plaintiff in any event; and costs to the third party forthwith after taxation, unless the defendants would agree to their being fixed at $25. W. Laidlaw, K.C., for the third party. Angus MacMurchy, K.C., for the defendants. W. M. Hall, for the plaintiff.

REX v. DEMETRIO—MIDDLETON, J., IN CHAMBERS—JAN. 19.

Criminal Law—Magistrate's Conviction for Keeping Disorderly House—Evidence—Amendment—Criminal Code, sec. 1124—Refusal to Quash Conviction—Leave to Appeal.]—Motion by the defendant, under sec. 101a, sub-sec. 9, of the

Judicature Act (8 Edw. VII. ch. 34), for leave to appeal from the order of SUTHERLAND, J., ante 313, dismissing a motion to quash a conviction. MIDDLETON, J., said that he thought the case was concluded by authority. On the evidence, the offence was proved, and enough was shewn to warrant all the amendments necessary to make a perfect conviction. The intention of Parliament in giving the power to amend is, that, when guilt appears upon the evidence which has been believed by the magistrate, the accused should not escape by the defects in form occasioned by the error, or even stupidity, of the magistrate. Motion dismissed with costs. F. Arnoldi, K.C., for the defendant. J. R. Cartwright, K.C., for the Crown.

BANK OF HAMILTON v. KRAMER-IRWIN CO.—MASTER IN CHAMBERS—JAN. 20.

Company—Winding-up—Commencement of—Day of Service of Notice of Petition—R.S.C. 1906 ch. 144, secs. 5, 22—Consent Judgment—Authority to Consent after Service of Notice—Motion by Liquidator to Set aside Judgment—Necessity for Action—Leave of Referee.]—Motion by the liquidator of the defendant company to set aside a consent judgment entered on the 19th January, 1905. On the 24th January, 1905, an order was made for the winding-up of the company, upon a petition dated the 4th January, returnable on the 10th, on which day it was moved before the Judge in Chambers. By sec. 5 of R.S.C. 1906 ch. 144, "The winding-up of the business of a company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding-up." The Master said that the winding-up began on the day of service of the notice: Fuches v. Hamilton Tribune Co., 10 P.R. 409; and, whatever might be the effect of the difference in the language of sec. 5 and sec. 22 of the Act, it might well be that on the 19th January, 1905, there were no solicitors authorised to give the consent on which the judgment now attacked was pronounced. That was reserved for further consideration. It was objected by Mr. Rose that the motion was made coram non judice. He argued that a consent judgment could be set aside only in an action brought for that purpose, citing Holmested and Langton's Judicature Act, 3rd ed., pp. 838-840; and that the liquidator must obtain leave from the Official Referee named in the winding-up order

before such an action can be brought. The Master agreed with this contention, and directed the present motion to stand for a week to enable an application to be made to the Referee, notice of which should be given to the plaintiffs. G. H. Kilmer, K.C., for the liquidator. H. E. Rose, K.C., for the plaintiffs.

CRABBE v. CRABBE—MASTER IN CHAMBERS—JAN. 20.

Interpleader—Payment into Court—Husband and Wife—Rival Claims to Money Due from Sale of Chattels.]—This was an action to have it declared that certain lands and chattels which had been dealt with by the defendant were the property of her husband, the plaintiff. The farm in question had been leased for five years, at a rent of $700 a year, to one Roche, who had also bought from the defendant and partly paid her for the chattels. A further payment being due, the plaintiff served upon Roche a formal notice of his claim, and Roche now moved for the usual interpleader order. The Master said that the facts were analogous to those in Trebilcock v. Trebilcock, 2 O.W.N. 303. Unless, therefore, the parties could agree on some different arrangement, an order must be made as in that case. F. J. Roche, for the applicant. E. W. Boyd, for the defendant. Johnston (W. Laidlaw), for the plaintiff.

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*PARSONS v. CITY OF LONDON—DIVISIONAL COURT—JAN. 24.

Municipal Corporations—Sale of Municipal Lands—City Hall Property—Market Place—Change of Site—Powers of Municipality—Authority to Sell—1 Geo. V. ch. 95, sec. 10 (O.)—Position of Council—Trustees—Precautions—Bona Fides—Reasonable Grounds.]—Appeal by the plaintiff from the judgment of MIDDLETON, J., 25 O.L.R. 172, ante 321. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ. The Court dismissed the appeal with costs. N. W. Rowell, K.C., and C. G. Jarvis, for the plaintiff. T. G. Meredith, K.C., for the defendants the Corporation of the City of London. J. B. McKillop, for the defendants the Royal Bank of Canada.

*To be reported in the Ontario Law Reports.

HAMILTON v. VINEBERG—SUTHERLAND, J.—JAN. 24.

Building Contract—Extras — Architect—Counterclaims.]—By an agreement in writing, dated the 28th September, 1909, the plaintiffs, builders and contractors, agreed to provide all the materials and perform all the work mentioned in the specifications and shewn on the drawings prepared by D. Burnham, architect, for the defendant, for the erection and completion of a dwelling-house in Toronto. The plaintiffs' claim in this action was for $1,627.49 for extras, under a written order of the architect. The defendant counterclaimed against the plaintiffs and D. Burnham, the architect, for damages; and Burnham cross-counterclaimed against the defendant. Certain issues of fact were raised upon the claim and counterclaims, which the learned Judge found in favour of the plaintiffs and Burnham. Judgment for the plaintiffs for $1,627.49, less $174, making $1,453.49, with interest from the 26th October, 1910, and costs. Counterclaim of the defendant dismissed with costs. Judgment for Burnham on his counterclaim against the defendant for $60 and costs. E. C. Cattanach, for the plaintiffs and Burnham. H. Cassels, K.C., and R. S. Cassels, K.C., for the defendant.

MCPHIE v. TREMBLAY—KELLY, J.—JAN. 25.

Assignments and Preferences—Assignment by Insolvent Partnership for Benefit of Creditors—Assets of Firm—Action by Assignee to Make Available Lands Purchased by Wife of Partner—Fraudulent Conveyance—Evidence.]—An action tried at North Bay, without a jury. The plaintiff, to whom Boulanger and Tremblay (a firm of which the defendant Peter Tremblay was a member) made an assignment for the benefit of their creditors on the 30th May, 1910, alleged that certain property purchased by the defendant Evelina Tremblay, wife of the defendant Peter Tremblay, was purchased or acquired, and buildings erected thereon, out of the funds or assets of the insolvent firm, and that such property should be declared a part of the firm's assets. The plaintiff also asked that a conveyance of the lands and property in question by the defendants Peter Tremblay and Evelina Tremblay to the defendant Routhier, on or about the 27th September, 1910, should be declared fraudulent and void as against the creditors of Boulanger and Tremblay. The learned Judge said that the only evidence offered at

the trial was that of the defendants Peter Tremblay and Evelina Tremblay, both of whom were called by the plaintiff; and the evidence shewed, and the learned Judge found, that the moneys used in the purchase of the property in question and in the erection of the buildings thereon, which the plaintiff alleged belonged to Boulanger and Tremblay, were the moneys of the defendant Evelina Tremblay, and did not belong to Boulanger and Tremblay, nor to the defendant Peter Tremblay; and the property and buildings formed no part of the assets of the insolvent firm. No evidence was offered to substantiate the claim that the deed to the defendant Routhier was fraudulent and void. Action dismissed with costs. G. A. McGaughey, for the plaintiff. G. T. L. Bull, for the defendants.

CHEESEWORTH v. DAVISON—SUTHERLAND, J.—JAN. 25.

Contract—Mining Venture—Syndicate—Breach of Agreement — Return of Money Paid — Damages — False Representations.]—An action to recover $600 paid by the plaintiff and certain associates of his (of whose claims he had an assignment) to the defendant upon an agreement by which the defendant was to take up and operate mining claims in Alaska and the Klondike district and share the profits with the plaintiff and his associates. The plaintiff also asked damages for breach of the agreement and for an account; and (by amendment) damages for misrepresentation and fraud. The agreement was made on the 8th May, 1903. The action was begun in January, 1908. SUTHERLAND, J., after stating the facts and reviewing the evidence, said that, in the circumstances and upon the evidence and documents and after the great lapse of time, it would be impossible to find that contract was not as the parties intended it, or that the defendant made any false or fraudulent representations to induce the plaintiff and his associates to enter into it. Action dismissed with costs, subject to certain deductions in favour of the plaintiff. W. D. McPherson, K.C., for the plaintiff. J. T. White, for the defendant.