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BRITTON, J. JUNE 17TH, 1903.

TRIAL.

SLONEMSKY v. FAULKNER.

Landlord and Tenant—Attornment—Damage to Tenant by Act of Third Party—Negligence.

Action tried without a jury at Ottawa. Mary A. Casey died intestate, leaving real estate which was heavily incumbered. Letters of administration were obtained by the Ottawa Trust and Deposit Co., who, pending a sale of the premises, leased them to one Donovan. The latter sublet the stores on the ground floor to different persons, one of whom was the present plaintiff, but Mrs. Casey's husband and children continued to reside upstairs, without paying rent or acknowledging any tenancy. The property was sold to the defendant on 30th October, 1902, and he at once notified all the tenants that he was to collect the rent in future. The plaintiff attorned and paid the November rent to the defendant, but the Casey family did nothing to recognize defendant as landlord. Defendant refused to accept the title from the trust company, because of a possible claim by the husband as tenant by the curtesy. The trust company then obtained an assignment of a judgment that had been recovered by the mortgagee of the property some time before, but it was not until January, 1903, that a vesting order was issued to the defendant.

On 13th December, 1902, Mr. Casey died, and on the following day the children moved out, but they did not remove their furniture or give up the key until 10th January, 1903. They did not notify defendant, but he learned that they had gone out, and he obtained access to the premises immediately afterwards to repair a waste-pipe which had frozen in a vacant store downstairs. On the night of 29th December, 1902, the waste-pipe upstairs leading from the street main, burst,

flooding the plaintiff's store, and damaging the stock, which consisted of clothing. Plaintiff sued for damages. Defendant denied liability, contending that either the trust company or the Caseys were liable, as he had not possession of the upstairs, or a title by which he could have obtained possession at the time the damage occurred.

M. J. Gorman, K.C., for plaintiff.

D. J. McDougal, Ottawa, for defendant.

BRITTON, J.—I think I must hold the defendant liable in this case. It may be, and I think it is, a very hard case for him in some respects; and it would perhaps be difficult to find another case which—in the peculiar facts and circumstances which render him liable, if he is liable—is like it.

I think he must be held, for the purposes of this action, to have been the person in possession of and in control of the property, although he had not a perfected title at the time the accident occurred. The sale took place on the 30th October, 1902, and he then acted in all respects as the owner, subject, of course, to any rights he might have over against the trust company, who were the vendors of the property. He assumed to deal with the tenants as if he owned the property, and from the 1st November he began to deal with the plaintiff in reference to these premises.

So it went on until some time in December. The agent then went to the Caseys. He did not interview Mr. Casey, because he was sick; and, as a matter of fact, Mr. Casey died on either the next day, or, at all events, very shortly, after this intended interview by the agent of the defendant. Faulkner knew of the death; and he says that the neighbours told him that the Casey family had moved out, and that they had gone to somewhere on Besserer street to some relative. So that at that time there was knowledge on the part of Faulkner of the Caseys having left the house as a place of residence; and it was at a time of the year when, in the ordinary course of things, frost might be expected to do injury to premises left vacant—left vacant, that is, in the sense of not being occupied as a residence, though there may have been furniture in the house. But there is more than that in the case. It is admitted that there was knowledge on the part of Faulkner of the waste-pipe in the vacant store being frozen, and of a plumber having been sent for, and having cut that pipe off.

There was a discussion with reference to the lock, on the day that there was information given to Faulkner, that the Caseys had moved out, although their furniture remained

in the place. This was at a time when the defendant was receiving rent from the plaintiff as a tenant, when he had received one month's rent, and when a duty was cast upon him with reference to the tenants who were occupying in good faith, to look after the property. With that knowledge, and dealing, as he was, with the other tenant, he takes no steps to find out how the upper part of the premises is occupied, in fact, does nothing, according to his own evidence, until this accident occurred. So I think there was negligence here on the part of the owner of a property who had knowledge that the family of a person who had been occupying it, had gone away, and that it was negligence with respect to the plaintiff of which the latter has a right to complain.

By what was done between the parties the relation of landlord and tenant had been established between the plaintiff and the defendant. No such relation was established as between the defendant and the Caseys. It simply stands that the defendant, exercising authority, taking possession of this property, dealing with it as the owner, left the upper part of it unprotected after he had knowledge of the head of the house having died and the acting head of the house—that is Miss Casey—having left with the children.

Under the circumstances I think there is evidence of negligence; and hard as it may be on the defendant, I think it is a case where, if, as Mr. Gorman puts it, one of two innocent parties must suffer through the fault of another, that one must suffer who left it in the power of another to do the act, or to neglect to do something that he ought to have done; and, while I feel that I am dealing with a case that is not perhaps expressly covered by authority, I think that is the only disposition I can make of it.

Judgment for plaintiff.

CARTWRIGHT, MASTER. JUNE 29TH, 1903.

CHAMBERS.

LANDER v. BLIGHT.

Summary Judgment—Promissory Note—Defence—Contemporaneous Parol Agreement.

Motion by plaintiff for summary judgment under Rule 603.

M. H. Ludwig, for plaintiff.

H. A. E. Kent, for defendant.

THE MASTER.—Plaintiff's affidavit sets out the indorsement on the writ of summons, which is in the usual form

where the action is on a promissory note. The security was dated 1st June, 1899, for $1,000, payable in 3 years, with interest at 6 per cent. The payment of interest on 1st July last is admitted.

Defendant's affidavit states "that the note sued on was given to plaintiff on the understanding that the same was merely an acknowledgement, upon which I had to pay $5 a month so long as she lived; the principal after her death to go to me or my representatives as my share of her estate."

Defendant was not cross-examined, but plaintiff filed an affidavit in reply denying the statement of defendant. Plaintiff was not cross-examined.

Mr. Ludwig argued that the alleged defence could not be heard, as it was an attempt to vary the terms of a written instrument by a contemporaneous parol agreement, citing New London v. Neale, [1898] 2 Q. B. 487.

Mr. Kent relied on Jacobs v. Booth's Distillery Co., 85 L. T. R. 262. . . . I am not able to see how the present case differs. I think the circumstances are more favorable to defendant than they were there, and I feel compelled to dismiss the motion. . . . Costs to defendant in the cause.

JUNE 29TH, 1903.

DIVISIONAL COURT.

STEWART v. GUIBORD.

Equitable Execution—Declaration of Right to Apply Amount due to Plaintiff by One Defendant against Co-defendant—Foreign Judgment—Simple Contract Debt—Declaratory Judgment—Ineffective Proceeding—Statute of Limitations—Absence of Defendant from Province.

Plaintiff had a claim against the Government of Canada for $1,500, and he was indebted to defendant Lallemand in a considerable sum. Lallemand was in financial difficulties and assigned to defendant Guibord his claim against plaintiff. Guibord brought an action in the Province of Quebec against plaintiff upon this claim, whereupon the Montreal Rolling Mills Co., having a judgment in the Province of Quebec against Lallemand, intervened and sought to seize the debt against plaintiff, alleging that it was in fact the property of their debtor, and was held by Guibord only as trustee. The company, however, finding themselves unable to prove their case, withdrew their intervention; then plaintiff settled the action by assigning to Guibord his claim against the Government, and Guibord released him from the debt.

Afterwards plaintiff purchased from the company their judgment against Lallemand, and brought this action in Ontario against Guibord and Lallemand, claiming judgment against Lallemand upon the Quebec judgment assigned to him, and against both defendants a declaration that Guibord held the transfer of the claim against the Government merely as trustee for Lallemand, and that Lallemand was the beneficial owner of it, the object being to enable plaintiff to obtain the money from the Government in some other proceeding, or to have the amount due from the Government applied by some other proceedings in settlement pro tanto of his claim as assignee of the company's judgment.

The action was referred for trial to the local Master at Ottawa, who found in favour of plaintiff. Defendants appealed to MEREDITH, C.J., who reversed the decision of the Master as far as plaintiff's claim against Guibord was concerned, dismissing the action with costs as against him, and ordering judgment to be entered against Lallemand for the amount of plaintiff's claim on the Quebec judgment; ante 168.

From this judgment plaintiff appealed to a Divisional Court, and defendant Lallemand also appealed upon the ground that the remedy against him in this Province was barred by the Statute of Limitations.

Glyn Osler, Ottawa, for plaintiff.

W. E. Middleton, for defendants.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.— . . . Stewart has a simple contract debt against Lallemand; Guibord holds a claim against the Government; Stewart brings this action against Lallemand and Guibord, asking for judgment against Lallemand upon his simple contract debt, and for a declaration against both defendants that Lallemand, and not Guibord, is beneficial owner of the claim against the Government.

In my opinion, he is not entitled to such a declaration because at the time he began this action he was not a judgment creditor of Lallemand: Thompson v. Cushing, 30 O. R. 123, 388. . . . The reasons which prevent the owner of a mere simple contract debt, not reduced to judgment, from taking garnishing proceedings or proceedings for equitable execution, prevent his having any locus standi to obtain the preliminary relief of a declaration that the debt which he desires to seize is due to his debtor.

Further, . . . this is not a case in which the power to make a declaratory judgment merely could be properly exercised. No consequential relief is asked, nor is it suggested that any is within our power . . . . We could not follow up the proposed declaration by any further order or judgment for the payment by the Government to plaintiff of the money which he is seeking to obtain. This being the case, the authorities seem clearly against the right of plaintiff to obtain a mere declaration: Barraclough v. Brown-[1897] A. C. 615; Grand Junction Waterworks Co. v. Hampton Urban Council, [1898] 2 Ch. 331.

The appeal of plaintiff should, therefore, be dismissed with costs. . . .

The judgment in the Province of Quebec was recovered on 10th October, 1893, and the present action was begun on 29th May, 1902. By the law of Quebec the judgment could be enforced at any time within 20 years. In this Province, being merely a simple contract debt, the remedy upon it would, under ordinary circumstances, be barred at the end of 6 years from the time it became due, that is to say, from the date of the recovery of the Quebec judgment. It appears, however, that at the time of the recovery of the judgment Lallemand was domiciled and resident in Quebec, and that he has not been in this Province at any time since then.

Under these circumstances, I think, the remedy is saved by sec. 40 of R. S. O. ch. 324, and the debt was not barred: Boulton v. Langmuir, 24 A. R. 618: Bugbee v. Clergue, 27 A. R. 96.

Appeal of defendant Lallemand dismissed with costs.

JUNE 29TH, 1903.

C.A.

BIRKBECK LOAN CO. v. JOHNSTON.

Building Society—Shares—Advance on—Trusts—Notice—Mortgages—Pledge of Shares—Action—Parties—Variation of Judgment.

Appeal by plaintiffs from the judgment of a Divisional Court, 3 O. L. R. 497, 1 O. W. R. 163, in so far as it was against plaintiffs, in an action against Amelia Johnston, Frank K. Johnston, and Anna K. Johnston, to obtain consolidation of two mortgages, to recover the amount of the mortgages, and for foreclosure of the interest of defendants in certain shares of the plaintiffs' stock, in default of payment. The Court below held that plaintiffs were affected with notice that the mortgagor was not the owner of six of the shares, and had no power to mortgage; that sec. 53 of

R. S. O. ch. 205 did not empower plaintiffs to disregard the trusts; and that plaintiffs could not consolidate the two mortgages as against the person to whom the mortgagor had conveyed the lands, subject to one of the mortgages, as that person was a purchaser for value without notice.

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

A. B. Aylesworth, K.C., and T. H. Luscombe, London, for appellants.

P. H. Bartlett, London, and J. F. Faulds, London, for defendants.

MOSS, C.J.O. — Considering the comparatively trifling amount at stake in this case, it is to be regretted that, owing to the frame of the action and the absence of necessary parties, it is not possible to finally determine some of the questions which the plaintiffs call upon us to deal with on this appeal.

The shape the case took at the trial was not at all that which was presented by the pleadings.

The plaintiffs by their pleadings made no claim to the six C. shares as forming part of the securities assigned to them by the transfer of the 20th July, 1897. The defendants Frank K. Johnston and Anna K. Johnston denied all knowledge of the transaction of 20th July. Nowhere was any reference made to the claims or rights of the other children of the defendant Amelia Johnston as cestuis que trust of the six C. shares. These children are not parties, nor are their claims or rights properly represented. The defendant Amelia Johnston has made no defence, and the interests of the other defendants are in point of form adverse to those of their brothers and sisters. Therefore, there can be no disposition of the case as regards the six C. shares in question as against the interests of these children. It may be assumed, as I think the evidence shews, that the shares were intended to be dealt with by, and were included in, the transfer of the 20th July, 1897, but that does not advance the plaintiffs' case as regards these shares. If, as contended by the defendants at the trial and on the argument of the appeal, the defendant Amelia Johnston held these shares in trust for the children, the plaintiffs' dealing with her in respect of them is not protected by R. S. O. ch. 205, sec. 53. That section does not entitle a company to obtain for itself a better title to its shares than its grantor or mortgagor has.

The object of the section was to protect a company from responsibility where a holder of shares in trust transferred to some other person, and the company were called upon to assent to the transfer or to permit it to be made.

The plaintiffs therefore cannot hold these shares by any higher title than the defendant Amelia Johnston had, and as a trustee she could not deal with them to the prejudice of the cestuis que trust. The evidence seems to shew that the money obtained from the plaintiffs was for the purpose of being expended for the benefit of the children, and on a properly framed record, and with the necessary and proper parties before the Court, a case might perhaps have been made for establishing a special lien on the trust interest to satisfy any balance of the plaintiffs' claim under the transfer of the 20th July, 1897.

As the case now stands, this could only be done in this action by a complete recasting of the whole case, and on payment of the costs already incurred.

Nothing would be saved to the plaintiffs by any attempt of this kind. There are, however, one or two matters in the judgment of the Divisional Court as issued which should not remain as they are. The defendants concede that the defendant Frank Johnston should not have been awarded any costs, and the judgment should be amended accordingly. It is also incorrect in referring to any lands as including in the transfer of the 20th July, 1897, and it should not deal in any way with the six C. shares, for, as pointed out, there can be no adjudication in respect of them. With these modifications, the appeal should be dismissed with costs, but the judgment should be without prejudice to any rights the plaintiffs may claim to have against the six C. shares for moneys properly advanced for the benefit of the parties beneficially entitled thereto.

The other members of the Court agreed in the result, OSLER and MACLENNAN, JJ.A., giving reasons in writing.

JUNE 29TH, 1903.

C.A.

BANQUE PROVINCIALE DU CANADA v. CHARBONNEAU.

Negligence—Agent of Bank—Promissory Note—Neglect to Take in Proper Form—Subsequent Alteration—Loss of Remedy on Note—Damages.

Appeal by plaintiffs from judgment of MEREDITH, C. J., at the trial at Ottawa, awarding plaintiffs three cents nominal damages and costs on the appropriate scale and a set-off

of costs to defendant on the High Court scale, in an action for damages for alleged gross negligence and disregard or omission to follow plaintiffs' instructions to defendant, while local manager of their bank at Ottawa, in not obtaining a joint and several note for $5,000 from certain persons for an advance of that sum, and for materially altering and avoiding a joint note made by them for such advance by writing the words "jointly and severally" on the face of the note before the words "promise to pay," whereby plaintiffs lost all right of action thereon and the money so advanced. The appellants appealed on the ground that they were entitled to substantial damages and costs.

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

A. B. Aylesworth, K.C., and W. H. Barry, Ottawa, for appellants.

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

MOSS, C.J.O.—The action of the defendant in accepting a promissory note which was not joint and several and did not bind the parties jointly and severally, was undoubtedly a breach of the instructions which he received from his superiors. And if the plaintiffs' loss had been occasioned by that act, the defendant would have to make good the amount. But the form of the note which he did take was sufficient to secure to the bank the liability of the parties in this Province as effectively to all intents and purposes as if the note had been in the exact form called for by his instructions. And therefore no more than nominal damages to the plaintiffs resulted from that act or omission.

The next inquiry is, should the defendant be held liable for the consequences of his subsequent act? Because of his instructions, and probably also because he was more cognizant of the laws of Quebec than of Ontario, the defendant naturally attached importance to the note being expressed to be joint and several. And upon discovering that it was not in that precise form, it was to be expected that his mind would be directed to endeavouring to repair what he thought was a material objection.

It cannot be said that he had any intention of injuring or impairing the plaintiffs' position, or that he was guilty of misconduct in that sense. His object was to do something which would improve the plaintiffs' position, if possible. The case is not one of intentional injury to his employers, but of an act done in good faith and with a purpose meritorious in itself.

The question is, did the defendant exercise such a reasonable degree of skill, care, and diligence as was required of him under the circumstances, or did he shew such a want of capacity or want of attention to the plaintiffs' interests as to render him responsible for the loss which occurred? And that is a question to be determined upon the circumstances of the case, taking into consideration the plaintiffs' knowledge of the defendant's capacity and fitness for the position, their subsequent knowledge of what had been done, and their attitude with regard to it before the loss had actually occurred.

The defendant was of course bound to exercise reasonable care and diligence in looking after and protecting the plaintiffs' property in his possession or under his control, including, of course the promissory note which he had received for the plaintiffs upon the transaction in question. But the plaintiffs cannot expect their managers or cashiers to be infallible, or that they may never fall into an error of judgment, save at the peril of having to make good any loss occasioned by the mistake. Nothing higher could be required of the defendant in his position than reasonable skill and ordinary diligence, by which is understood such skill as is ordinarily exercised by persons of average capacity engaged in similar pursuits. A loss caused by an act or step which a banker of experience acting in similar circumstances might be liable to do or take, is not a loss for which the bank can look for indemnity from the person whose error caused the difficulty.

In the present case the evidence shews that the defendant wrote the words "jointly and severally" into the note, with the idea of making it conform to the intention of the parties, and under the belief that all the parties to it would assent to the change, and ratify it by their initials. Two of the parties to the note by their words and conduct led him to that conclusion, and it was not until after the words had been written that doubts were raised and he was led to think that he had acted prematurely. Upon that he hesitated as to whether he should present the altered note to the other makers, and was led to conclude not to do so. His next proceeding was what any prudent person should adopt. He consulted the bank's solicitor, and was advised by him that under the circumstances the validity of the note was not effected. This advice would of course tend to strengthen his conclusion not to endeavour to get the initials of the other makers to the alteration. The defendant afterwards informed the general manager of what had taken place. He did not take the position that the note was rendered invalid, and the only sugges-

tion or direction he gave to the defendant was to see that the next note was in proper form. The opinions of the general manager and of the solicitor appeared to coincide that no harm had been done by the writing on the note, and seemed to render it unnecessary for the defendant to take immediate action.

The evidence as a whole seems to me to relieve the defendant from the charge of gross negligence which it was incumbent upon the plaintiffs to establish. He cannot be said to have been guilty of negligence in the sense that he acted in a manner in which no person in his position exercising ordinary care and judgment would have acted. Under the circumstances he had reasonable grounds for supposing that what he was doing would be implemented by the parties to the note, and his action after the difficulty arose was under the advice and with the cognizance of the plaintiffs' officials. That in the result his judgment proved to be wrong and his act prejudicial to the plaintiffs, is not enough, in my opinion, to render him liable: Stafford v. Bell, 31 C. P. 77; S. C., 6 A. R. 273.

I think the appeal should be dismissed.

MACLENNAN and MACLAREN, JJ.A., gave reasons in writing for the same conclusion.

GARROW, J.A., also concurred.

OSLER, J.A. dissented, and gave reasons in writing for being of opinion that the appeal should be allowed.

JUNE 29TH, 1903.

C.A.

DODGE v. SMITH.

Limitation of Actions—Mineral Lands—Reservation in Deed—Estoppel—Tenancy—Payment of Taxes—Leave to Adduce Further Evidence on Appeal.

Appeal by plaintiffs from judgment of a Divisional Court, 3 O. L. R. 305, 1 O. W. R. 46, reversing the judgment of LOUNT, J., at the trial, and dismissing the action, which was brought to restrain trespass to land by working mines thereon, and to recover damages therefor.

The land consisted of lot 17 in the 6th concession of the township of Bedford, in the county of Frontenac. The defendants claimed title under one Patrick Murphy to both the land and the mines, alleging title by possession. It appeared that the defendants' predecessor, after he had acquired title, nevertheless took a conveyance from the owner of the paper

title, reserving to the grantor the mines and minerals, and gave a mortgage back "saving and excepting the mines, which the said mortgagor has no claim to." The Divisional Court held that this did not revest the mines in the grantor, nor were the defendants estopped, the action not being based on the mortgage.

A. B. Aylesworth, K.C, for appellants.

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

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Garrow, and Maclaren, JJ.A.) was delivered by

Moss, C.J.O.— . . . While the case was standing for argument in this Court the plaintiffs discovered in an unused building or part of the residence of E. G. Dodge, through whom they claim title to the premises in question, some letters appearing to bear upon the question in dispute. Thereupon, and upon affidavits now of record in this Court, they moved for and obtained leave from this Court to adduce evidence of the letters, together with explanatory evidence, liberty being also to adduce evidence in answer.

Pursuant to the order, evidence was adduced by both parties before the Judge of the County Court of Frontenac, and the same was returned to this Court. Thereafter the appeal was argued upon the whole case.

The defendants' contention is, and the Divisional Court so found, that their ancestor Patrick Murphy had acquired a title to the premises by virtue of the Statute of Limitations as against the plaintiffs' predecessors in title, prior to the execution of the conveyance of 10th July, 1884; and that the execution of the conveyance had not the effect of re-vesting in the plaintiffs' predecessors the title to the minerals.

The evidence at the trial did not disclose the origin of Patrick Murphy's possession of the lands more than to shew that they had been in occupation by his brother John Murphy, and that upon the latter giving up possession Patrick entered upon the lands and remained there.

The evidence subsequently adduced shews that Patrick Murphy went in as tenant of Edwin Dodge, the then owner of the lands, probably in 1870, and that he continued as tenant, paying rent, for some years thereafter. It was proved that between 1869 and 1874, one C. H. Russell was an agent for Dodge in connection with these lands. During a portion of these years Dodge was carrying on mining and prospecting over parts of the premises, and Russell was in the habit of coming from the United States to visit the properties and pay the men engaged in mining.

The renting and looking after the payment of taxes and

the general care of the properties for Dodge appear to have been placed in the hands of one Foley, a shopkeeper in the neighborhood, who is now dead. Several letters in his own hand writing written to Russell between January, 1869, and March, 1874, were proved. In all but one of these he speaks of having received money on account of the land, and as declarations against interest they are receivable in evidence. In a letter dated 9th February, 1870, he says that John Murphy leaves in March and will pay up rent in full. His brother Patrick agrees to pay the same rent as John paid for his place, and also $20 per annum, taxes included, for another farm. In another dated 4th November, 1871, he says that John Murphy's lot is yet occupied by his brother Pat. Pat Murphy and Bill Judge have paid rent so far. In another on the 26th February, 1872, he says: "P. Murphy has paid rent to me $75, and W. Judge has also paid the $15 rent, and both intend to continue." In the last one, dated 28th March, 1874, he speaks of having asked Murphy for the rent, and he promised to hand it in in a few days.

Then there are some letters purporting to be written by Patrick Murphy to E. G. Dodge, who became the owner of the premises in April, 1877. Letters appear to have been written between March, 1878, and February, 1881, and there are two others which bear no date, but were probably written at a still later date. Patrick Murphy was unable to read or write, and it is contended that there is no evidence that they were written or sent by his direction or with his authority. Thomas Asselstine, a witness called for the plaintiff, had been a collector of taxes for the township of Bedford at times between the years 1877 and 1890. He knew Patrick Murphy and his brother John, and the various properties. He knew that Patrick was in occupation of the lands formerly occupied by John and paid taxes upon it. He was shewn a letter dated the 2nd December, 1880, purporting to be written to Mr. Dodge, and signed "Patrick Murphy," and identified it as his handwriting, but said he could not remember writing it, or being asked by Patrick Murphy to write. He added: "It is likely he may have asked me when I was collecting." Asked, "Why do you say that?" he answered, "For the reason that he was always talking to me about his affairs when I was collecting taxes, and said that he must pay the taxes and have the receipts to send to Dodge. I remember him telling me that several times." Further on he was again asked, "If you wrote that, how did you come to write it?" He answered, "He certainly wished me to write it." In answer to a question by the learned

County Court Judge, he said, "I could not say that he asked me, he must have told me to write for him anyway, or I would not have done it."

If the matter had remained in this way, there could have been no question but that the letter was proved to have been written by Asselstine at Murphy's request. On cross-examination he at first reiterated positively that it was his writing, but, being referred to another paper written by him, and some suggested variations of writing and spelling being pointed out, referring to exhibit "J," he said, "Well that don't look like my writing on closer examination; well, sir, I don't think that is my writing. I don't think that is my writing when I come to look at it." And finally he said, "I will say that the name on the back of it, Patrick Murphy, I never wrote"—thus bringing his positive denial down to the signature. He had been shewn a paper signed by him, purporting to be a certificate of payment of taxes by Patrick Murphy and others for the years 1879 and 1880, and identified it as being in his handwriting. He said he gave it to Patrick Murphy. Asked "Why did you give that particular certificate in that way, in the way it is given?" he answered, "He told me he wanted to send it to Mr. Dodge to let him know the taxes were paid on the property. Of course he always talked with me in that way."

This certificate was one of the papers produced by the plaintiffs on the application for leave to adduce further evidence, together with a letter dated the 10th March, 1881, purporting to be signed by Patrick Murphy, and addressed to Mr. E. C. Dodge, in which it is said, "As we were disappointed in meeting each other, but however I will give you what I offered for this year, if you leave it to me let me know, for I have got a line fence to build from one concession to the other; if you are going to let me have it, I will keep the rates paid on your lands here, as I have done. I hope you are all well. Here is the bill of taxes that you demanded from me. Patrick Murphy."

Obviously the bill of taxes is the certificate which he had obtained from Asselstine. It is not shewn by whom this letter was written, but it is produced by the plaintiffs, and there can be no doubt that it came from Murphy. At the time of the examination Asselstine was an old man, and he spoke of his memory as not being very good. There were other letters shewn him, but they were not written by him, and he could throw no light upon them. But, taking his evidence, and the other facts and circumstances shewn, there is sufficient to justify the conclusion that the two letters, and

indeed all the letters spoken of, were written and sent by Patrick Murphy's directions. It is clear from the testimony that he was in communication with Dodge, and that he was in the habit of sending him the receipts for the taxes, and, as he could not write, he must have employed some other hand to write his letters. There are telegrams also produced purporting to have been sent by him, manifestly referring to some of the letters produced. Asselstine's statement must be taken as a whole, and upon them, taken in connection with the other circumstances, a jury or a Court may fairly and properly conclude that he was the writer of exhibit J.: Pilkington v. Gray, [1899] A. C. 401. The letters and evidence also justify the conclusion that at the time the letters were written Patrick Murphy was a tenant paying taxes and rent as spoken of by Foley in his letter of 7th July, 1870, and that he had paid all arrears of rent and taxes up to the year 1881, as he says in the letter of 10th March, 1881. If this be so, then the Statute of Limitations did not commence to run, if it ever commenced to run, until the year 1882, and the transaction of sale and conveyance was in 1884. There was, therefore, no acquisition of title by Patrick Murphy before the date of the conveyance. His tenancy under Dodge continued, and was not turned into a tenancy at will so as to give a start to the statute, until the expiration of a year from the beginning of 1881, at the earliest. Further, there is enough in these letters, read with a certificate as to taxes, to take the case out of the statute, even if it be assumed that there is no evidence of payment of rent after 1872, or even 1871. In that case the tenancy at will would end with the year 1872 or 1873. But within ten years from either date the letters were written and sent, and they contain a distinct acknowledgment of title sufficient to take the case out of the statute. There is more than an oral acknowledgment such as in Doe Perry v. Henderson, 3 U. C. R. 386. Commenting on the latter case in Ryan v. Ryan, 5 S. C. R. at p. 414, Gwynne, J., said: "But Doe Perry v. Henderson does not, nor does any case, decide that the oral acknowledgment by a party in possession, made to the owner or his agent, that the relation of landlord and tenant is then existing between the person in possession and the true owner, is not good evidence as against the person making it of the fact of the present existence of the relationship, so as to give a new departure for the running of the statute." These remarks are a fortiori in the case of an acknowledgment in writing. See also the remarks of Patterson, J.A., in Workman v. Robb, 7 A. R. at p. 409.

There is, in addition to the other circumstances, the fact of Patrick Murphy paying $900, and taking a conveyance of the premises from E. C. Dodge, a circumstance of great weight in its bearing on the previous relationship of the parties.

The proper conclusion upon the whole evidence is, that at the date of the conveyance E. C. Dodge was the true owner of the premises thereby granted. By that conveyance the minerals and the rights thereto were reserved to the grantor, and it is conceded that after the date of the conveyance there were no acts or dealings with the minerals or rights thereto, sufficient to deprive the grantor or those claiming under him of their property therein.

The judgment appealed from should be reversed, and judgment should be entered for the plaintiffs in terms similar to those in the judgment pronounced by Lount, J.

The plaintiffs are to have their costs of the action up to and inclusive of the trial before Lount, J. No costs of the subsequent proceedings to either party.

JUNE 29TH, 1903.

C.A.

REX v. LEWIS.

Criminal Law—Manslaughter—Parent's Omission to Provide Necessary Medical Treatment for Child—Legal Duty—Lawful Excuse—Religious Belief—"Necessaries"—Admission of Evidence—Judge's Charge.

Crown case reserved by FALCONBRIDGE, C.J.

The defendant was convicted of manslaughter in not providing medical treatment for his infant child, who died of diphtheria.

The questions reserved were: (1) Whether there was evidence on which the jury might properly find the defendant guilty; (2) whether medical treatment was included in "necessaries," (3) whether evidence of defendant's religious belief was admissible for any other purpose than to shew good faith.

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

A. B. Aylesworth, K.C., and W. W. Vickers, for defendant.

J. R. Cartwright, K.C., and Frank Ford, for the Crown.

OSLER, J.A.—The prisoner was indicted for manslaughter, for that he, being the parent of a certain child named Roy Lewis, then under the age of 16 years and a

member of his household, and being as such parent under a legal duty to provide necessaries for such child, did then and there, unlawfully and without lawful excuse, omit to provide necessary medical treatment, medicines, and assistance, and other necessaries, for the said Roy Lewis, whereby the death of the said Roy Lewis was caused, etc.

The prisoner's child, an infant between 6 and 7 years of age, and a member of his household, was ill of a disease which turned out to be diphtheria, from a Thursday to the following Tuesday, when it died of such disease. During part of this time it enjoyed what is called by the sect known as Christian Scientists, to which the prisoner belonged, mental treatment, i.e., silent prayer, administered by a Christian Science "demonstrator," but not medical aid or assistance or medicine, or medical treatment, as commonly understood by such expressions, as administered by any legally authorized or regular expert in such matters.

The questions to be determined on such a prosecution as the present are: (1) whether the prisoner was under a legal duty to provide necessaries for the child, which involves the further question whether what was omitted to be provided was a necessity under the circumstances; and (2), if such duty existed, whether the prisoner, without lawful excuse, omitted to perform it.

It is unnecessary, in my opinion, to inquire into what was the nature and extent of the parent's duty at common law to an infant of tender years in his care, charge, and custody, or whether at common law a parent was under an obligation to provide for such an infant medicines or medical aid or treatment—a question upon which there has been much difference of opinion.

The indictment in this case is founded upon sec. 210 of the Criminal Code, which enacts that "Every one who as parent, guardian, or head of a family, is under a legal duty to provide necessaries for any child under the age of 16 years, is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of the child is caused or if his life is endangered or his health is, or is likely to be, permanently injured by such omission."

The legal duty referred to in this section, for the consequences resulting from the breach of which the prisoner was indicted, is that imposed by sec. 209, "Every one who has charge of any other person unable by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, is under a legal duty to supply that

person with the necessaries of life, and is criminally responsible, for omitting, without lawful excuse, to perform such duty, if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission."

The duty of a parent under secs. 209-210, is contrasted with that under sec. 211 of a master or mistress who has contracted to provide a servant or apprentice under the age of 16 years with necessary food, clothing, or lodging.

The question, therefore, of the prisoner's guilt or innocence, depends upon whether he had or had not omitted, without lawful excuse, to provide necessaries, that is to say, the necessaries of life, whatever they were, for his child; in consequence of which its death was caused. What are or may be such necessaries, in any particular instance, is not defined by the Code, but I can see no reason for saying that medical aid, assistance, or treatment, may not, under the circumstances, be necessaries quite as much as food and clothing are so. That was evidently the opinion of the Lord Chief Justice in Regina v. Senior, [1899] 1 Q. B. 283-292, as regards the duty of a parent at common law. A fortiori, the modern statutory provision admits of as wide a construction. The question, therefore, was one for the jury under the direction of the Judge as in civil cases. It was for the latter to say whether medical aid and treatment or medicines were capable of being necessaries within the meaning of the Code, and for the former to determine whether in fact under the circumstances they were necessaries. The jury were told that, as matter of law, necessaries included medical treatment and assistance when it was reasonable and proper that medical treatment and assistance should be provided—a part of the direction which I do not quarrel with—but also that the medical aid referred to was "that which was authorized, that which was referred to in the Code, not the treatment, if one might so call it, of any particular class or sect in the community." I am not sure that I understand what the learned Judge meant by "authorized" medical aid, assistance, and treatment. It cannot be laid down as matter of law in dealing with a case of this kind that medical aid, assistance, and treatment must necessarily be of an authorized kind, if by that is meant that it can only be administered or furnished by a legally qualified physician or practitioner belonging to one of the recognized schools of medicine. So much, indeed, may be inferred from sec. 212 of the Code. The illness might be of such a character as to make it apparent to an ordinarily prudent person that the assistance of a qualified expert, i.e., a physician or professedly skilled person in such

matters, should be invoked if he had the means of doing so, or it might be such as to suggest that nothing was necessary beyond the attention of a trained or experienced nurse or parent, and the administration of ordinary or well known remedies. This part of the charge, though in my opinion erroneous, cannot, however, be said to have prejudiced the prisoner, because the child received no medical aid or assistance of any kind beyond the Christian Science treatment referred to, and it was proved that this was by reason of the peculiar tenets held by the prisoner, which are opposed to dealing with diseases otherwise than by prayer to the Almighty.

There was evidence on which the jury might find that medical aid and assistance ought to have been provided, and the further questions for their determination were whether it had been in fact provided, and if not whether it had been omitted—neglected—by reason of any lawful excuse. In dealing with all these questions, the jury would have to take into consideration, and they were so directed, the prisoner's knowledge of the child's illness and its serious nature, and his ability to procure and pay for medical aid and treatment.

In giving evidence on his own behalf, the prisoner admitted that the child's illness was such that at one period of it he would have called in a doctor if he had not been a Christian Scientist. Speaking for myself, I must say that in such a case as this a jury ought to be told that no matter how earnestly a parent might believe in the efficacy of Christian Science treatment, as developed in Mrs. Eddy's handbook of the doctrines of the sect, yet if they came to the conclusion that medical aid and treatment was necessary, they ought also to find that it would not be furnished by means of mental treatment by a Christian Science "demonstrator." Persons sui juris may by mutual consent, and within certain limits, practise upon each other what experiments of this kind they please, and in some instances and in some kinds of disorders, where the mind of the patient is responsive to the treatment, it may possibly be done with beneficial results. But it would be shocking if in the case of infants or others incapable of protecting themselves, they and the community in which they live were to be exposed to danger from contagious or infectious diseases, which the instructed common sense of mankind in general does not as yet find or admit to be curable by means only of subjective or mental treatment.

If I rightly apprehend the scope of the sections of the Code which I have referred to, namely, that they do, where the necessity exists for it, impose the obligation upon a parent

of providing medicine, or medical aid and treatment, for his infant child, some observations of the late Lord Chief Justice Russell in the recent case of Regina v. Senior, [1899] 1 Q. B. 283-291 are quite pertinent. In that case the prisoner was a member of a sect called the "Peculiar People," whose religious doctrines as to the treatment of the sick by means of prayer were not dissimilar from those held by Christian Scientists, and were, as the Chief Justice said, certainly to the ordinary apprehension remarkable. The prisoner's child was dangerously ill, but no medical aid was given it, in consequence of which it died. "Neglect," said the Chief Justice, "is the want of reasonable care—that is, the omission of such steps as a reasonably prudent person would take—such as are usually taken in the ordinary experience of mankind, that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. I agree with a statement in the summing up, that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation which would not have been thought so in a preceding generation, and that regard must be had to the thoughts and habits of the time. At the present day, when medical aid is within the reach of the humblest and poorest member of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect. Mr. Sutton contended that because the prisoner was proved to be an affectionate parent, and was willing to do all things for the benefit of his child, except the one thing which was necessary —he ought not to be found guilty of manslaughter on the ground that he abstained from providing medical aid for his child, in consequence of his peculiar views in the matter; but we cannot shut our eyes to the danger which might arise if we were to accede to that argument, for where is the line to be drawn?"

In The People v. Pierson, 81 N. Y. Supplement 214, decided since the argument of the case at bar, and similar in its circumstances, the Court say: "The guide to proper conduct must be ascertained by asking what would an ordinarily prudent person, solicitous for the welfare of his child, do under the circumstances of the particular case? The conviction in that case was quashed for the insufficiency of the indictment. I refer also to Rex v. Brooks, 9 Brit. Col. L.R. 13, also a case similar to the present; the conviction was upheld by the Supreme Court against the same contention as the prisoner here puts forward.

I think there was sufficient evidence to warrant the verdict, of all the essential facts, namely, the dangerous character of the child's illness, the necessity under the circumstances for medical aid and treatment, the prisoner's knowledge of both, his omission, without lawful excuse, to provide such medical aid, and the consequence of such omission.

The evidence admitted at the trial of cures believed by the prisoner and other members of the sect to have been performed in "Christian Science," though admitted only for the purpose of shewing his "good faith," was not, in my opinion, relevant or admissible, at all, if, as I think, his motive or belief was not a lawful excuse for omitting to provide what the statute law requires.

I answer the first question in the case reserved in the affirmative.

The second and third I also answer in the affirmative, with the qualifications above stated as to each.

MOSS, C.J.O., and MACLAREN, J.A., gave written reasons for the same conclusions.

MACLENNAN and GARROW, JJ.A., also concurred.

JUNE 29TH, 1903.

C.A.

MOFFATT v. CANADA LUMBER CO.

Water and Watercourses—Dam—Injury to Land by Overflow—Splash Boards—Construction of Consent Judgment in Former Action.

Appeal by plaintiffs from judgment of MEREDITH, C. J., dismissing an action to recover $10,000 damages for injuries alleged by plaintiffs to have been occasioned by a dam constructed by defendants across the Mississippi river, in the county of Lanark, which caused the water in the river to overflow plaintiffs' lands.

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

G. H. Watson, K.C., and C. McIntosh, Carleton Place, for appellant.

A. B. Aylesworth, K.C., and R. Patterson, Carleton Place, for defendants.

MACLENNAN, J.A.—The only question reserved after the argument was the construction of clause 2 of the judgment

pronounced by consent of counsel on the 31st October, 1889, in a former action.

By that paragraph the defendants were authorized to place splash boards on the part of the dam between C. and D., and for a certain distance between C. and B., but next to C., of a height not exceeding ten inches, and upon the rest of the dam except between B. and C., to within fifteen or twenty feet of C., of a height of seven inches. The effect of this would be that the tops of the splash boards would all be on the same level, that is, 13 feet, 2 inches, above the datum line. The paragraph provided that these boards might be placed whenever the water in the dam was running over that portion between C. and D. to a depth not exceeding eleven inches. Having thus authorized the putting on of splash boards, and having defined at what stage or height of the water they might be put on, the paragraph goes on to say: "But the same are to be removed when the water in the dam exceeds in height the figure at which the said splash boards can be placed thereon, and so from time to time." The learned Chief Justice held that this did not mean that if, when the splash boards were put on, they had the effect of raising the water more than eleven inches above the solid structure of the dam, the boards should be removed. He thought that could not be the meaning of the judgment, for the result would be that the boards must always be taken off in a very short time after they were put on, inasmuch as, if put on when eleven inches were flowing over a dam upwards of 200 feet in length, the immediate effect must be to raise the water several inches at least above the boards. He accordingly held that the defendants were entitled to maintain the splash boards, although water might pass over the top of them, so long as they did not maintain them when the condition of the water was such that the splash boards, if then removed, would not leave more than eleven inches above the dam.

I am clearly of opinion that the judgment of the learned Chief Justice is right.

I think the 3rd paragraph of the judgment throws light upon the meaning of paragraph 2. It provides that the defendants should, during the spring freshets, open certain sluice gates, placed in the dam, down to the bed of the river, so as to allow the escape of the spring freshets; and they were to be kept open until the water should fall in the pond to the height at which the splash boards might be put on.

This stipulation shews that paragraph 2 was intended to enable the defendants to hoard the water when the spring

freshets were over, by placing boards on the dam. Until the water falls to a certain level the sluice gates must be open to the very bed of the river, and no boards may be placed on the dam; but when it has fallen to the level of eleven inches, the sluice gates may be shut, and the boards may be put on. When that time arrives, there is no likelihood of any increase in the volume of water flowing down; but if that should occur, if there should be heavy or continuous rains, so that, if the boards were off, the flow over the dam should be more than eleven inches, then they must be removed until the flood is over. I think the words "water in the dam" in both members of the paragraph mean the same thing, that is, the state or height of the water in the absence of boards.

In my opinion, the appeal should be dismissed.

GARROW and MACLAREN, JJ.A., gave reasons in writing for the same opinion.

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

JUNE 29TH, 1903.

C. A.

BAXTER AND GALLOWAY CO. v. JONES.

Principal and Agent—Insurance Agent—Agreement to Give Notice of Further Insurance—Omission—Liability.

Appeal by defendant from judgment of LOUNT, J., 4 O. L. R. 541, 1 O. W. R. 554, in favor of plaintiffs for the recovery of $1,000 in an action for damages for injuries caused to plaintiffs by reason of the breach by defendant of an alleged agreement.

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

G. F. Shepley, K.C., and S. F. Washington, K.C., for appellant.

W. R. Riddell, K.C., and L. F. Stephens, Hamilton, for plaintiffs.

OSLER, J.A.—The plaintiffs are an incorporated milling company. The defendant is an insurance agent, through whom the plaintiffs had, in the year 1900, effected insurances in several companies for whom the defendant was acting, upon their mills and machinery, to the amount of $6,000, of which the sum of $1,500 was upon a gasoline engine.

In the month of January, 1901, the plaintiffs determined

to place an additional insurance for the sum of $500 upon their general mill machinery. They applied to the defendant to procure it, and they alleged that he promised and agreed with them to do so, and also to give notice of the further insurance to the insurance companies on the existing risks, a notice which would be necessary in order to prevent the earlier policies from being avoided by the subsequent insurance. The defendant procured the new policy, but negligently omitted to give such notice, and in consequence of such omission the plaintiffs sustained a loss of $1,000.

The learned trial Judge found the alleged agreement and the breach thereof proved, and that the plaintiffs had sustained damage in consequence to the full amount claimed, for which he directed judgment.

The defendant appeals. His points are (1) that if there was any agreement in fact (which he denies) it was gratuitous and without consideration; and (2) that, if the plaintiffs suffered loss in not being able to recover the whole amount of the insurance from the companies, it was not by reason of the defendant's omission to give notice of the further insurance, but because of a different objection to the claim in respect of the insurance upon the gasoline engine.

First, then, as to the agreement. The evidence shews that the defendant was a general insurance agent, through whom in January, 1900, the plaintiffs procured risks to be taken in several companies upon their mill property and machinery, to which at this time the power was supplied by means of a gasoline engine, the risk on which was $1,500, divided equally among four companies. The plaintiff stated that, before these insurances were placed, the defendant said that if they "would give him all the insurance he would look after it, see it was properly placed, all the policies made concurrent, and all the necessary notices of any changes which might be made —in fact he said, "we will take care of you."

Some changes in and rearrangement of the insurances which had been thus effected were made in December of the same year, which the defendant attended to, and in January, 1901, there were existing insurances on the plaintiffs' property in four companies, amounting to $6,000, $1,500 of which was on the gasoline engine, distributed as already mentioned.

On the 17th January, 1901, the plaintiffs applied to the defendant to procure for them an additional insurance to the extent of $500 upon their mill machinery. The defendant placed it in the Millers and Manufacturers Insurance Company for a year from the 21st January. (See his letter of

the 19th January to the company, and their answer of 21st written on the back.) A formal application was sent forward to him by the manager to be signed by the plaintiffs. This the plaintiffs did on the 23rd or 24th January, on which latter day they paid the defendant the premiums on the new insurance. An undertaking given by the defendant on this occasion was also relied on. One of the plaintiffs said: "At the time I signed the application I said, 'Now, Mr. Jones, you will see that the other companies get notice of this additional insurance. You won't forget.' He says, 'that is all right, we will take care of it.'" The policy was shortly afterwards issued bearing date the 21st January, 1901, and sent to the defendant. The same plaintiff met the defendant on the street about a month afterwards and said, "Mr. Jones did you attend to giving those companies notice?" He said, "Yes, we will attend to it. It is all right."

The plaintiff's answer on cross-examination made it reasonably clear that on the occasion of effecting the insurance of January-December, 1900, nothing more was said than that if the plaintiffs would give the defendant the whole of his insurance, he would take care of it, and that any notices which might then have been spoken of—a matter which is left very doubtful and uncertain—were such as might be necessary to complete those insurances and make them concurrent. Subsequent or further insurance was not then in contemplation or discussed. In reference to the insurance of $500 of January, 1901, there was no undertaking or promise on the defendant's part, except that which was proved to have been given on the 23rd or 24th January. By some slip or oversight of the defendant or the clerks in his office, no notice of the new insurance was given to the other companies. A fire occurred on the 26th April following, and these companies insisted that their policies were voided by reason of notice not having been given to them, and they availed themselves of this objection, as the plaintiffs contend, to force a settlement for $1,000 less than they would otherwise have been obliged to pay for the loss.

The question is, whether, on this evidence, any agreement is made out, for the breach of which the defendant is responsible. The plaintiffs cannot, in my opinion, rely upon anything which took place in January, 1900, when the four policies were effected, because further insurance was not then in contemplation, and his own statement of what the defendant then undertook to do does not go far enough, and is too vague and indefinite, to establish a general engagement on his part to give notice of subsequent insurance effected or

obtained by his means; nor were the policies left in his custody to be looked after. The plaintiffs must, therefore, rely on what took place in January, 1901. The defendant did then undoubtedly at some time promise to give the necessary notices of the new insurance to the companies on the existing policies. Was this a part of the employment he then undertook, or was his employment confined to procuring the new policy, the promise to give notice being an independent or subsequent promise made without consideration, and therefore a gratuitous one which imposed no liability in the event of its non-performance?

If the defendant's employment and promise was entire, to do both acts, viz., to procure the new insurance and to give the notices, then, even if it was, as it has been held in the Court below, a gratuitous promise, yet, having proceeded upon his employment, the defendant would be liable for negligently performing it in such a manner as to cause loss or injury to the plaintiffs. He knew the importance of giving the notices, and the effect of the omission to do so upon the plaintiffs' other policies. To stop when he had only obtained the insurance was simply to go so far with the business as to cause a direct injury to the plaintiffs if he went no further, and did not follow it up by notice to the other insurers. This cannot, as I think, be regarded otherwise than as actionable misfeasance.

It would rather appear that nothing was said of giving notice when the defendant was first employed or instructed to procure the insurance, but before the business was complete, and while the plaintiffs might still have withdrawn, they required the defendant, and the latter undertook, to give it. Defendant might have refused to assume that duty, and the plaintiffs would then have known that they must look after it themselves, or could have withdrawn their application and have sought insurance elsewhere. But the whole business having been ultimately intrusted to and assumed by the defendant, before any part of it had been completed, the plaintiffs have a right to complain that the defendant negligently proceeded with it only so far as to be detrimental to them.

I think the learned Judge rightly regarded the transaction as one of mandate, so that, if the defendant had not entered upon the execution of the business intrusted to him, he would have incurred no liability: Coggs v. Barnard, 2 Ld. Raym. 9, 10; 1 Smith's L. C. 182: but "it is well established that one who enters upon the performance of a mandate or gratuitous undertaking on behalf of another, is responsible not only for what he does, but for what he leaves unfulfilled,

and cannot rely on the want of consideration as an excuse for the omission of any step that is requisite for the protection of any interest intrusted to his care:" Hare on Contracts [1887], pp. 173, 164: Parsons on Contracts, 8th ed. (1893), vol. 2, ch. 11, sec. 2, pp. 103, 104; Thorne v. Deas, 4 Johns. N. Y. 84; Elsee v. Gatward, 5 T. R. 143. In French v. Reed, 6 Binney, 308, the plaintiff's requested the defendants to effect insurances on a vessel from Philadelphia to two ports in the Island of San Domingo. The defendants had insurance made to one port only, which the vessel reached in safety, but was captured on her voyage from that port to the other. It was held that, though the defendants were not bound to accede to the plaintiff's request, yet when they agreed to do as desired, and through want of due care did it ill, they were liable for the consequences. See also Eddy v. Livingstone, 88 Am. Dec. 122; the cases referred to in the judgment below: and Balfe v. West, 13 C. B. 466; Fish v. Kelby, 17 C. B. N. S. 194; Johnston v. Graham, 14 C. P. 9.

The next question is, whether the plaintiffs' loss can be properly held to have been caused by the neglect of the defendant to give notice of the additional insurance.

On the proofs of claim being sent in, the companies at once took the position, the soundness of which has not been disputed, that the omission avoided the policies, and that they were under no legal liability thereon. They did not, however, press this to the extent of an absolute refusal to pay, and after some negotiation and discussion they paid the plaintiffs a lump sum of $6,000 in settlement, deducting $1,000 from the claim. The defendant contends that this sum was, in fact, deducted from the insurance on the gasoline engine, in respect of which the adjuster for the companies objected that it was void on the further ground, for which the defendant was not responsible, that there had been a material alteration in the risk, the engine having ceased to be in use for some time before the fire, the power being supplied by an electric motor. I think the evidence leaves little room for doubt that it was the item of the insurance on the gasoline which formed the subject of the deduction, and that the second objection I have mentioned was made use of by the adjuster to reduce that item to such a figure as the engine would have been insurable for in its unused condition. From the evidence of the adjuster it is, however, in my opinion, tolerably clear that very little confidence was felt by the companies in the second objection, and that, if that had been the only one, they would not have pushed it so far as to resist payment of the claim. The controlling objection was that of

the omission to give notice of the further insurance. It was this, and I think this only, which placed the plaintiffs in the companies' power and to enable them to dictate the terms on which they chose to settle the loss. They said, in effect, "Though we are not liable at all because you did not give us notice of the subsequent insurance, we will pay what is reasonable. But of that we must be the judges, and we think that, under the circumstances, the insurance on the gasoline engine must be reduced by $1,000." The plaintiffs had no option but to accept the situation, for, even if the objection to the particular item could not have been maintained, the overriding objection of want of notice remained, and was insisted on, and was sufficient to have defeated the claim in toto. I therefore think that the judgment should be affirmed, and the appeal dismissed with costs.

MACLENNAN, JJ.A. gave reasons in writing for the same conclusion.

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

JUNE 29TH, 1903.

C.A.

WITTY v. LONDON STREET R. W. CO.

Damages—Street Railway—Excessive Damages—Second New Trial —Reduction of Damages.

Appeal by defendants from judgment of FALCONBRIDGE C.J., in favour of plaintiff, upon the findings of a jury, for $10,000 damages for injuries sustained by reason of the alledged negligence of defendants in operating their railway, causing a collision between two cars, in one of which plaintiff was seated. He was violently thrown down and his back and spine were injured. At the first trial of the action a jury awarded plaintiff $5,500, and a new trial being directed upon defendants' application, the damages were assessed at $10,000.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for appellants.

W. R. Riddell, K.C., and J. Cowan, K.C., for plaintiff.

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

OSLER, J.A.—Upon a full examination of the evidence and consideration of the arguments which have been addressed to us, we are obliged to say that there must be a new trial on the ground that the damages are excessive.

At the first trial the damages were assessed at $5,500. It is unnecessary to say whether or not that amount would have been deemed extravagantly large, if we had been obliged to consider the question on the former appeal. The second jury has now rendered a verdict for $10,000, nearly twice the amount which the first jury thought reasonable, and upon evidence which cannot justly be said to be materially different from that which the first jury had to deal with. The evidence of direct pecuniary loss beyond what is incident to anyone who sustains a serious accident is extremely slight; we mean that it was not led in the lines of such cases as Phillips v. London and South Western R. W. Co., 4 Q. B. D. 406, 5 Q. B. D. 78, and Church v. City of Ottawa, in this Court, 22 A. R. 348. So that the verdict has practically been given for the plaintiff's personal injury, pain, and suffering, loss of time, past and anticipated, and medical attendance. If it was right to award $5,500 a year ago, we can see nothing in the evidence at the second trial which could justify the jury in inflaming the damages as they have done.

If the plaintiff desires it, we will, in his own interest and to put an end to the prolonged litigation, which is, doubtless, to some if not a large extent, conducive to his delayed recovery, name a sum to which the verdict may be reduced.

In that event the appeal will be dismissed with costs. Otherwise it will be allowed with costs. The costs of both of the former trials to abide the event: Myers v. Sault Ste. Marie Pulp and Paper Co., 1 O. W. R. 280; Ford v. Metropolitan R. W. Co., ib. 218.

JUNE 29TH, 1903.

C.A.

RE TORONTO R. W. CO. AND CITY OF TORONTO.
RE TORONTO ELECTRIC LIGHT CO. AND CITY OF TORONTO.
RE INCANDESCENT LIGHT CO. OF TORONTO AND CITY OF TORONTO.
RE OTTAWA ELECTRIC CO. AND CITY OF OTTAWA.
RE OTTAWA GAS CO. AND CITY OF OTTAWA.

Assessment and Taxes—Property of Electric Companies—"Land"—"Rails, Ties, Poles," etc.—"Substructures and Superstructures"—"Rolling Stock, Plant, and Appliances"—Construction of Statute—Ejusdem Generis Rule.

Appeals by the companies and a cross-appeal by the corporation of the city of Ottawa from judgments of boards

of County Court Judges constituted under the Assessment Act, confirming or varying assessments of the companies.

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

J. Bicknell, K.C., and J. W. Bain, for the Toronto R. W. Co.

J. S. Lundy, for the Toronto Electric Light Co.

H. O'Brien, K.C., for the Incandescent Light Co. of Toronto.

G. F. Henderson, Ottawa, for the Ottawa Electric Co. and the Ottawa Gas Co.

J. S. Fullerton, K.C., for the corporation of the city of Toronto.

A. B. Aylesworth, K.C., for the corporation of the city of Ottawa.

OSLER, J.A.—These are appeals by the various companies, under sec. 84 of the Assessment Act, from decisions of boards of County Court Judges, and one question common to all of them is as to the proper construction of sec. 18, sub-secs. (3) and (4), of the Assessment Act, as substituted for the former sec. 18 of that Act, by the Assessment Amendment Act, 1902, 2 Edw. VII. ch. 31.

The new section is a further attempt to settle some of the difficulties arising out of the former legislation upon the same subject, and it must be said that it has been so expressed as to raise, in more than one respect, plausible doubts of its own meaning. Sub-sections (1) and (2) provide, first, generally as to land, where it shall be assessed; and second, especially as to the land of companies, as follows: "The land of companies for supplying water, heat, light, and power to municipalities and the inhabitants thereof, telephone companies, and companies operating street railways and electric railways, shall, in municipalities divided into wards, be assessed in the ward where the head office of such company is situated, if such head office is situated in such municipality, but if the head office is not situated in such municipality, then the assessment may be in any ward thereof."

Sub-section (3) then provides as to certain kinds of property of the companies mentioned in sub-sec. (2) that: "The rails, ties, poles, wires, gas, and other pipes, mains, conduits, substructures, and superstructures upon the streets, roads, highways, lanes, and other public places of the municipality, belonging to such companies, shall be 'land' within the

meaning of the Assessment Act, and shall, when and so long as in actual use, be assessed at their actual cash value, as the same would be appraised upon a sale to another company possessing similar powers, rights, and franchises in and from the municipality, and subject to similar conditions and burdens, regard being had to all circumstances adversely affecting their value, including the non-user of any such property." The remainder of the section need not be quoted.

Pausing here, it will be seen that the definition of "land," "real property," and "real estate" in sec. 2, sub-sec. (9), of the Assessment Act, is not affected. These are, so far, merely extended or explained by the new enactment. They "include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty," and therefore all such property of any such company not upon the streets, roads, highways, lanes, and other public places of the municipality, would remain assessable as theretofore, or as now provided for by sub-sec. (2) of the new Act.

Then comes the sub-section which causes the principal difficulty:

(4) "Save as aforesaid, rolling stock, plant, and appliances of companies mentioned in sub-section (2) hereof, shall not be land within the meaning of the Assessment Act, and shall not be assessable."

The contention of the companies is that the effect of this sub-section is to exempt from assessment all their plant and appliances of every description, though otherwise land within the meaning of sub-sec. (9) of sec. 2 of the Act, and hitherto undoubtedly assessable as such, which is not upon the streets or roads of the municipality. It is hardly necessary to point out how novel and extensive an exemption is sought to be introduced by this construction, nor how clear must be the words which should compel us to adopt one so opposed to the general principles of the Assessment Act.

We can see from the terms of sub-sec. (3), read in the light of former legislation and the decisions of the Court thereon, that its main purpose is to provide for the assessment of the street properties of these companies, and we know that the rolling stock of the electric street railways had been held to be land and assessable as such, within the meaning of sec. 2, sub-sec. (9): Kirkpatrick v. Cornwall Electric Street R. W. Co., 2 O. L. R. 113.

Before the passage of the Act of 1902, 2 Edw. VII. ch. 31, rails, ties, poles, wires, gas and other pipes, mains, conduits, and probably, as included in these words, any other substructures and superstructures upon the streets and highways

of a municipality, belonging to the companies mentioned in sub-sec. (2) of the new sec. 18, had been held to be land within the meaning of the Assessment Act, and assessable as such. The first branch of sub-sec. (3), therefore, merely affirms the existing law. The difficulty was as to mode of assessing such property, and it is this difficulty which is sought to be remedied by sub-sec. (2), and the second branch of sub-sec. (3).

The rolling stock of electric railways had also recently, for the reasons given in Kirkpatrick v. Cornwall Electric Street R. W. Co., been held assessable as land within the meaning of sec. 2, sub-sec. (9), of the Assessment Act, as being something forming part of the realty.

No one has ever contended that plant and appliances in the nature of fixtures, or forming part of the realty belonging to any such companies, situated on their own grounds, or in their head office buildings, or elsewhere than on the streets, were not assessable. It is contended that by force of sub-sec. (4) of the new sec. 18, not merely rolling stock of street and electric railways, but all plant and applicances of those railways and of all other companies mentioned in sub-sec. (2), elsewhere than on the streets, though apart from such sub-section they would be assessable as land, shall be exempt from taxes, and shall not be land or assessable as such. What the legislature intended to remedy is very plain. The question is, whether, in applying the remedy, they have used language which must be read as creating a new and general exemption of property the liability of which to taxation has never been disputed. No doubt, the language used goes far to create this new difficulty, and if it is not fairly capable of being read otherwise than as the appellants contend for, we must so construe it, no matter how extravagant and unjust the result we may be forced to.

"Rolling stock, plant, and appliances." Are these general terms, meaning the rolling stock of the railway companies, and also the plant and appliances of the railways, and of all the companies, other than that included in sub-sec. (2)? Or are we to apply to them the well known rule of construction, and read plant and appliances as ejusdem generis with rolling stock? I am of opinion that the case is one for the application of that rule. It is intended by sub-sec. (4) to make it clear that rolling stock of the railway companies' plant, which is found and used on the streets, shall not, by reason of the wide words "substructure" and "superstructure" used in sub-sec. (3), be liable to taxation as land. The intention was to undo the effect of our decision in the Kirkpatrick case, and to declare that such rolling stock shall not be, as up to that time it had not been, liable to taxation.

The general words "plant and appliances," which follow the particular specific term, "rolling stock," ought, in my opinion, to be read as restricted to the same genus as the latter, the whole having the meaning of rolling stock, rolling plant, and appliances, such as tools in connection with or belonging to such stock. I see nothing to forbid such a construction, and a very great deal to commend it, having regard to what we know of the evil intended to be remedied by the legislation, and the, I may say, novel and extraordinary results which would flow from a contrary construction. But it is said that to confine the meaning of the sub-section in this manner, is to make it of no force as regards the companies which have no rolling stock, but have plant and appliances of a different kind, elsewhere than on the street. The answer is, that the word "companies" in sub-sec. (4) is to be read distributively. The sub-section is not in terms applied to all the companies mentioned in sub-section (2). Its language is, rolling stock, plant, and appliances of the companies mentioned in sub-sec. (2), that is to say, of companies which have rolling stock.

If I am right in saying that the general rule of construction I have mentioned is prima facie applicable to this collocation of terms, we ought not to construe them otherwise merely because the effect of doing so will give them no application to the other companies, unless the language of the sub-section in other respects shews that the latter were meant to be comprehended, which I think is not the case. The principal ground of appeal, therefore, in my opinion, fails.

A further objection was taken by the Ottawa Electric Company that their lamps, hangers, and transformers, were not "superstructures upon the streets," within the meaning of sub-sec. (3). I have felt some doubt on this point. The company in which that word is found seems to require its limitation to something fixed and permanent in its nature, as much so at least as "substructure" and poles, wires, and main. Lamps, hangers, and transformers are more aptly described, if I understand their connection with the equipment, as apparatus, though no doubt, in one sense, structures, as every mechanical contrivance is, the parts of which are assembled to make it. Nevertheless, they form, however easily removed and transferable from one place to another, parts of the permanent and essential street plant.

My learned brothers agree with the finding of the board of County Judges, and I cannot, with any confidence, come to a different conclusion.

As regards the appeal of the city of Ottawa in respect of the gas company's assessment, I cannot see on the evidence any reason to interfere with the amount to which the board of Judges reduced it.

I must add that in these assessment appeals, where the parties contemplate carrying them beyond the board of County Judges, more care should be taken to have the evidence before the board reported, and the contentions of the parties properly formulated there, than has been done in some of the matters brought before us.

MACLENNAN, J.A., gave reasons in writing for the same conclusions.

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

JUNE 29TH, 1903.

C.A.

ANDERSON v. ELGIE.

Dower—Assignment of—Mortgaged Lands—Fraud of Mortgagor—Mistake—Subrogation—Merger—Equitable Estate—Momentary Seisin.

Appeal by defendant from judgment of LOUNT, J. (1 O.W. R. 550) in favour of plaintiff in action for dower.

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

R. Bayly, K.C., for appellant.

J. Bicknell, K.C., for plaintiff.

MOSS, C.J.O.—The plaintiff claims to be entitled to dower out of the east half of lot 27 in the 5th concession of the township of Luther.

He asserts title thereto as the assignee or grantee of one Sarah Morrison, the widow of John Morrison, a former owner of the property.

The defendant is in possession of the premises under an agreement for the purchase thereof from the Agricultural Savings and Loan Co., mortgagees under an indenture of mortgage made by John Morrison and dated the 8th February, 1881. At the time of the execution of the mortgage John Morrison and Sarah Morrison were man and wife, but she was not a party to nor did she execute the mortgage, in which John Morrison is described as a widower. The mortgage was given to secure an advance of $2,500 to John Morrison, who appears to have made a statutory declaration that his wife had died in November, 1880.

At the time of the application for the advance and the execution of the mortgage to the company, the premises were subject to a mortgage in fee made by John Morrison, his wife joining to bar her dower, in favour of the Canada Landed Credit Co. This mortgage is dated the 30th January and registered the 11th February, 1879. A portion of the advance from the Agricultural Savings and Loan Co. was applied in payment of the mortgage held by the Canada Landed Credit Co., and thereupon they executed a discharge dated the 1st March, 1881. On the 5th March, 1881, the Agricultural Savings and Loan Co. caused the discharge to be registered in the proper registry office.

By indenture made in pursuance of the Short Forms of Conveyances Act, between John Morrison, the grantor, his wife, Sarah Morrison, who joined therein for the purpose of barring her dower, and the plaintiff, the premises were granted and conveyed to the plaintiff, and it is under this instrument that the plaintiff now claims dower as assignee of Sarah Morrison.

The plaintiff thus became entitled to the equity of redemption, and it is said became liable, as between himself and John Morrison, to pay the Agricultural Savings and Loan Co.'s mortgage, but this does not very clearly appear.

Neither the plaintiff nor John Morrison paid the principal money secured by the mortgage, which fell due and became payable on the 1st February, 1886, and the Agricultural Savings and Loan Co. took proceedings under the power of sale, and, by agreement dated the 27th February, 1892, contracted to sell the premises to the defendant, who has ever since been in possession as purchaser.

John Morrison died on the 19th September, 1901, leaving Sarah Morrison surviving him; and this action was commenced on the 11th September following.

The case was tried by the late Mr. Justice Lount, who gave judgment in the plaintiff's favour, holding him entitled to recover dower out of the premises.

Upon the appeal a number of objections were presented by counsel for the defendant.

The first was that, at the date of the indenture under which the plaintiff claims, Sarah Morrison was not entitled to an inchoate right of dower in the premises which could prevail over the Agricultural Loan and Savings Co.'s mortgage, and that thereafter no such right or any right of dower vested in her; and the point seems well taken.

It is asserted that at no time was John Morrison ever seised in fee of the premises so as to entitle his wife to dower at common law, but it is only necessary to consider the state

of the title from and after the execution of the mortgage to the Canada Landed Credit Co. on the 29th January, 1879.

As the law then stood, Sarah Morrison, having joined in the mortgage and thereby barred her dower, became entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled And as long as the mortgage subsisted, her husband could by a subsequent conveyance defeat her dower in the equity of redemption, either wholly, by an absolute conveyance, or partly, by a mortgage: Fitzgerald v. Fitzgerald, 5 O. L. R. 279.

And this vested right was not interfered with or affected by the Act 42 Vict. ch. 22, which became law on the 11th March, 1879: Martindale v. Clarkson, 6 A. R. 1; Beavis v. Maguire, 7 A. R. 704.

Therefore, the mortgage to the Agricultural Savings and Loan Co., though made on the 8th February, 1881, was a conveyance to that company of the premises free from any claim to dower on the part of Sarah Morrison. And her right to dower was thus reduced to dower in any interest in the premises to which her husband might die beneficially entitled. It was argued that the effect of the discharge of the Canada Landed Credit Co.'s mortgage was to revest the mortgaged estate in John Morrison for a period sufficient to restore his wife's right to dower—that there was a momentary seisin, and that the wife's dower vested.

But the mortgage to the Agricultural Savings and Loan Co. had been executed and delivered for some weeks before the execution of the discharge, and the effect of the registration thereof was not to revest the premises in John Morrison, but in the loan company, to whom he had conveyed them: R. S. O. ch. 136, sec. 76.

The prior mortgagee's estate was thus replaced in the parties best entitled to it, viz., the Agricultural Savings and Loan Co., whose money had been advanced to pay the prior claim on the premises. It thus appears that the estate of the Agricultural Savings and Loan Co., and of the defendant as their purchaser and assignee in equity, is paramount to any claim of dower on the part of Sarah Morrison or the plaintiff claiming through her.

In this view it is unnecessary to deal with the other objections.

The appeal should be allowed and the action dismissed with costs.

MACLENNAN, J.A., gave reasons in writing for allowing the appeal.

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

JUNE 29TH, 1903.

C.A.

CITY OF GUELPH v. GUELPH PAVING CO.

Municipal Corporations—Water Supply—Use of water by Contractors for Paving Streets—Implied License—Absence of Contract—By-law—Rates—Damages—Penalty.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiffs for the recovery of $200 in an action for the price of water from the mains of plaintiffs used by defendants in the construction of cement walks.

E. E. A. DuVernet and B. H. Ardagh, for appellants.

J. P. Mabee, K.C., for plaintiffs.

The judgment of the Court (OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—The statement of claim alleges that the defendants constructed certain sidewalks for the plaintiffs, from the years 1895 to 1900, inclusive; and that for the purpose thereof plaintiffs supplied to the defendants at their request water from the plaintiffs' waterworks, the water from which is supplied by plaintiffs to the various classes of consumers and users in the city, upon payment of water rates therefor. That the charge made by the plaintiffs and payable by the defendants at the rate of 10 cents for each cubic yard of walk, in making of which the water was used, which is the regular charge or price of the plaintiffs for water used for the said purpose, amounts in the whole to the sum of $442, which defendants have not paid. The plaintiffs gave credit for $241, moneys of the defendants in their hands, due and unpaid on account of contracts between the parties.

The defendants put the plaintiffs to proof, and also allege that it was understood and agreed between the parties that the plaintiffs should supply the necessary water free of charge, and that no charge or claim was ever made for payment for water used by them in construction of the walks, until the autumn of the year 1900.

At the trial it was proved that the several contracts for construction of cement sidewalks during the years mentioned in the statement of claim, provided inter alia that defendants should provide and supply all the necessary materials and labour, tools and implements of every description, and everything required for the due and proper laying of the walks in accordance with the specifications. The contracts are silent as to water. From time to time, and in many localties, the defendants obtained such water as they needed for watering the foundation and mixing the concrete from the lawn hy-

drants or other taps of private consumers along the line of street where they were working. This was known to the city engineer, to whose satisfaction the works contracted for were required to be done. The engineer said he was constantly along there, and knew it to be the usual practice. He made no remonstrance or objection. He made a return to the council in 1896 for the year 1895, shewing that defendants had used water in the construction of 968 yards. He made no return for subsequent years, being told (he thought by the city treasurer) that the defendants were not paying the rates.

The chairman of the waterworks committee of the council in the years 1895, 1896, and 1897, seems to have been aware that defendants were using the water in this way, and on one occasion it was mentioned in the committee, but no objection was made to it and nothing was done, and from year to year until the autumn of 1900, the defendants' claims under their contracts were settled and paid, without any demand or deduction on account of the water. Plaintiffs' engineer said that 10 cents per cubic yard was a reasonable sum to charge the defendants, comparing it with that charged for building rates. One of the defendants said that they had never expected to pay anything for water, and had not tendered on the footing of a charge being made for it. He had frequently asked various chairmen of the waterworks committee if they could use water from the city hydrants, "if they were stuck for it," and was told they could do so. They appear, however, to have confined their user to that taken from hydrants or taps on private premises as being more convenient. Water was thus used in the construction of at least a quarter of their work.

The city waterworks by-law contains a long schedule of rates chargeable to users of water for various specific purposes, but none applicable to the purposes for which it was used by the defendants.

In my opinion, the action fails. The evidence makes it quite clear that there was no such agreement as alleged in the statement of claim to pay for the water used by the defendants. They used it either because they thought that they had the right to do so in carrying out the city contracts, or because the plaintiffs were assenting to such user.

The plaintiffs' waterworks system was at first managed by commissioners, under their special Act, 42 Vict. (1879) ch. 77, and it was stated that the corporation assumed the management under the powers conferred by sec. 45 of the Act. Section 11 provides that the distribution and use of

water in all places and for all purposes where the same may be required, shall be regulated, and the prices for the use thereof, and the time of payment therefor, fixed. And this was done under the plaintiffs' by-law of 6th January, 1885, in force now, and during the periods in question.

No doubt the omission to fix by by-law any rate applicable to the user of the water for purposes for which the defendants required it, would not deprive the plaintiffs of the right to recover damages for its unlawful user, if the special Act made no provision on that subject. The water was the plaintiffs' property, and though, in the absence of a rate, there would be no promise, express or implied, to pay any particular rate, the value of what might be unlawfully taken would have to be paid as damages, as in the case of any other property unlawfully appropriated. But I think that, on the evidence, it ought to have been held that the plaintiffs were assenting to its user without charge. It must be inferred that they knew that the defendants were using it from time to time. The quantity used was comparatively trifling.

The plaintiffs never made claim upon them for it, and settled all demands under their contracts with them from year to year, without demand or deduction for the water taken.

Regarding the action as one for damages for unlawful user, the only form in which as a common law action it can be maintained, I think the evidence fails to support the case; and that the action ought to have been dismissed. Even if the plaintiffs were entitled to recover something, I think it should be a much smaller amount than has been awarded to them. Fifty dollars, it appears to me, would be a very liberal allowance.

There is a further ground on which, as it appears to me, the plaintiffs cannot succeed, viz., that sec. 17 of the Act provides the remedy to be adopted in the case of the wrongful abstraction of the water. This section enacts that if any person shall lay any pipe or main to communicate with any pipe or main of the waterworks, or in any way obtain or use any water thereof, without the assent of the commissioners, he shall forfeit and pay to them for waterworks purposes the sum of $50, and also a further sum of $5 for each day or part of a day or night or part of a night during which such pipe or main shall so remain, which said sum with costs of suit may be recovered by civil action in any Court in the Province having civil jurisdiction to the amount. These sums, though in the nature of penalties are recoverable for waterworks purposes entirely. They are recoverable from time to time

so long as the unlawful acts of taking the water or maintaining the pipes are committed or continued. In fixing these penalties, the legislature no doubt had in view the difficulty there would be in providing with any degree of exactness the quantity of water wrongfully taken, or ascertaining its price by any schedule of rates, and therefore made them large enough to be a full compensation for any injury inflicted by taking the water in this manner.

The appeal is allowed with costs, and the action dismissed with costs.

JUNE 29TH, 1903.

C. A.

McLAUGHLIN v. MAYHEW.

Specific Performance—Contract for Purchase of Land—Oral Contract—Possession by Purchaser—Part Payment—Conveyance Executed but not Delivered—Escrow—Statute of Frauds—Reference as to Title.

Appeal by defendants from judgment of ROBERTSON, J., 1 O. W. R. 308, in favour of plaintiff in action to compel specific performance of an agreement for the purchase of a lot in the village of Huntsville containing one-eighth of an acre.

G. Lynch-Staunton, K.C., for appellants.

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

The judgment of the Court (OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—The facts established by the evidence are briefly as follows:—The defendants Fairy Lodge No. 275 Independent Order of Odd Fellows, Huntsville, on the 16th June, 1900, being the owners of lot No. 56 on the south side of Main street in the town of Huntsville, then vested in David Wilkinson, F. J. McCollum, and the defendent Oscar Weiler, as their trustees, passed a resolution authorizing "the trustees to sell the lot to the best of their ability."

On the 16th July, 1900, the defendants Whaley and Mayhew were elected and appointed trustees in the room and place of Wilkinson and McCollum, "who had retired from office," and on the 24th July, 1900, the three defendant trustees, acting in pursuance of the resolution of the 16th June, entered into an oral agreement to sell the lot to the plaintiff for $365. The plaintiff paid $5 on account of the purchase money, and the balance was to be paid on the delivery of the deed. It was expected that the agreement would be carried

out at once, though time was not made of the essence of the contract. The defendants were told that the money would be placed in the hands of the plaintiff's friend, one Paget, to pay over as soon as the deed was ready; and he requested Paget to see that he got a deed in proper form. An instrument purporting to be a conveyance to the plaintiff in the usual form, bearing date the 24th July, was on that day, or a few days afterwards, prepared by one of the trustees, and signed by all of them, and produced to Paget for the plaintiff. Paget said it was necessary "to shew in the registry office that the new trustees had been appointed," and that the deed should be under the seal of the defendant corporation. He had the residue of the purchase money in his hands ready to be paid over on this being done. A certified copy of the resolution appointing the new trustees was prepared and signed by lodge officials, but, owing to the seal having been broken or injured, it was necessary to procure a new one. This was mislaid in the express office, and some delay occurred in consequence. Meantime the plaintiff, to the knowledge of the defendants, entered into possession of the lot, rented for a month to two persons for the purpose of putting up a "merry-go round," afterwards to several travelling medicine men, and received rent from the persons who thus occupied it.

In November, 1900, the collector of taxes for the year was referred by the trustees to the plaintiff for payment thereof, and he paid the same, and he was assessed for the lot as owner and occupier in the following year.

During the delay which occurred in procuring the new seal, the plaintiff had withdrawn the money from Paget's hands to use it for some other purpose, but when the deed and certified copy of the resolution were again produced duly sealed, the trustees were told that if immediate payment was required it would be made. They were content to let it remain at interest till called for, and this, as the trial Judge has found, was agreed to; the deed in the meantime to remain in the hands of the trustees. In April, 1901, the trustees, without further communication with Paget or the plaintiff, sold and conveyed the lot for $380 to the defendant Reid, who purchased with notice of the plaintiff's title, and after the registration of the lis pendens in the action.

The defendants pleaded that there was no agreement in writing to sell the land, and relied as a defence upon the provisions of the Statute of Frauds.

The plaintiff contended that the instrument exec[illegible] the trustees was a sufficient memorandum in writ[illegible]

contract, and, if not, then that the taking possession was a sufficient part performance of it to prevent the application of the statute.

The learned trial Judge found that there was a parol agreement between the parties, complete in all its terms; and that the instrument signed by the trustees was a note or memorandum thereof sufficient to satisfy the requirements of the statute. Specific performance thereof was accordingly adjudged.

The question whether a conveyance executed as the conveyance in such case was in escrow (Phillips v. Edwards, 33 Beav. 440) and retained in the vendors' own possession, to be handed to the vendee on payment of the purchase money, can be regarded as a note or memorandum in writing of a previous parol contract between the parties for the sale of the land on the terms mentioned in the deed, is one of some nicety, having regard to the state of the authorities on the subject. It would appear to have been decided in the affirmative by Spragge, C., in Gillatley v. White, 18 Gr. 1. But in Phillips v. Edwards, supra, which was not cited in that case, the Master of the Rolls seems to have been of a different opinion, although its expression was not necessary in the case before him, inasmuch as there was no complete parol agreement between the two parties. The same observation applies to McClung v. McCracken, 3 O. R. 596, where Gillatley v. White is referred to without approval. The cases of Moritz v. Knowles, [1899] W. N. 40, reversed in C. A., ib. 83, Kopp v. Reiter, 146 Ill. 437, 22 L. R. A. 273, Freeland v. Charnley, 80 Ind. 132, and Cagger v. Lansing, 43 N. Y. 550, are also opposed to the plaintiff's contention, although in these cases, also, there had been no antecedent parol contract complete in all its terms. On principle, there is some difficulty in maintaining the proposition, at all events where the conveyance relied upon contains no recital of the alleged agreement (see Re Hoyle, Hoyle v. Hoyle, [1892] 1 Ch. 84), that an instrument purporting to be an executed contract is evidence of a prior parol contract in the same terms. If the conveyance is the completion or the execution of the parol agreement, then, as the Master of the Rolls says, the latter has ceased to exist and is merged in it, and the Court can only look at the terms of the deed. If not, [illegible]e parol agreement is the matter which the Court is to en- [illegible] and the terms of which it is to investigate. If the [illegible]e delivered in escrow to an agent of the vendor, or [illegible] by the vendor himself, until the performance of some [illegible] such as payment of the purchase money, in the

absence of the statutory evidence of a prior agreement, there would seem to be nothing to prevent the vendor, while the condition is unperformed, from recalling or cancelling it. See also Brown on the Statute of Frauds, 5th ed. (1895), sec. 354 (b); and Reed on the Statute of Frauds (1888), vol. 1, sec. 388. In the case at bar there was a parol agreement as complete in all its terms as such an agreement can be, and the instrument at first executed and prepared by the trustees was inoperative as a conveyance of the estate, not being under seal, and perhaps for another reason. The appearance indicates that it was not even under the seal of the trustees, though there is an expression in the evidence of Paget which seems opposed to this. If that were the case, one of the difficulties suggested by the Master of the Rolls in Phillips v. Edwards, in the way of regarding it as being, in its former condition, a note or memorandum of the agreement, would be renewed, and the recent case of Re Hoyle, Hoyle v. Hoyle, [1892] 1 Ch. 84, shews what is the maximum required in the way of evidence of the parol agreement. As at present advised, however, considering the evidence before us, I hesitate to affirm the judgment upon the ground on which the learned trial Judge has placed it, because the other ground on which the plaintiff relies namely, the part performance of the agreement by entering into possession, is, in my opinion, well taken, and makes it unnecessary to consider that point further. It is true that there is no evidence that at the time of making the agreement anything was said about taking possession, but it was an agreement intended to be carried out at once, and it was the fault of the defendants that it was not. It was expected that the difficulty—a formal one—which stood in the way of their doing so, would be immediately removed, and the plaintiff, having deposited the purchase money in the hands of a third person to be paid over, not unreasonably entered into possession of the lot. He did so on the faith of the contract, and openly and continuously for some time remained in visible possession by his tenants. There was nothing equivocal about the possession thus taken. It was referable to the agreement, and to that only, and being sworn and not denied to have been so taken and maintained to the knowledge of the defendants, and without objection on their part, it ought, under the circumstances, to be assumed to have been taken with their assent. It was, I thi[nk] clearly of such a character as to exclude the operation [of the] statute: Fry on Specific Performance, 4th ed., 190[,] 601, 602, 603, and the cases of Cameron v. Spikin[g], 116, and Ungley v. Ungley, L. R. 4 Ch. 73, may be [re]

The judgment should be varied by directing a reference as to title, if the plaintiff desires it, but, subject to this, the appeal should be dismissed with costs.

JUNE 29TH, 1903.

C.A.

GRIFFITHS v. HAMILTON ELECTRIC LICHT, ETC., CO.

Master and Servant—Injury to Servant—Death from Electrical Shock—Electrical Works—Dangerous Place—Absence of Direct Evidence as to Cause of Death—Inference—Evidence to submit to Jury—Negligence.

Action for negligently permitting defendants' cables, wires, etc., to be in an unsafe and dangerous condition, whereby plaintiff's son, working among them under the orders and directions of defendants, lost his life. Plaintiff had been appointed administrator of his son's estate.

The action was tried before FALCONBRIDGE, C.J., and a jury. It was ruled that there was not sufficient evidence as to how the accident happened, and the action was dismissed.

Plaintiff appealed.

G. Lynch-Staunton, K.C., for plaintiff.

M. Brennan, St. Catharines, for defendants.

The judgment of the Court (OSLER, MACLENNAN, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.— . . . The deceased was a labourer, and with his fellow workman, one Higgins, was on the 1st July, 1902, ordered to cut a trench or opening at two places in the concrete floor of defendants' power house. This floor may be said to be covered with the various sorts of electrical apparatus used for the development and transmission of electric power, such as cables, wires, switch-boards, transformers, etc., access to and among which is obtained by . . . alleys or alley-ways, some passing east and west lengthwise through the room, and others transversely, called the north and south alleys, crossing the former from one side of the room to the other. On each side of the former is a series of witch-boards, from each of which depend two loose loops or of wire, the ends of which are attached to a movable These wires pass through the switch-board, and are d through the transferrer with the generators. The were to be cut in the transverse or north and south e east end of the room. The cables in the works

adjoining the north alley were dead, and there was no danger in working there. Those in the south alley were alive. According to the evidence of Higgins, he and his fellow workman were directed to clear up and remove the rubbish which would be made in cutting the trench in the concrete, which, from its hard and brittle character, was apt to fly and make a litter in every direction. They were engaged in doing this when the accident happened. Higgins said that he had gone into the east alley, i.e., that part of the east alley which was east and immediately opposite or at right angles to the south alley, in which one of the trenches had been cut, and was sweeping out the litter from there towards the trench, when he suddenly became unconscious, receiving, as there can be no doubt he in some way did, a severe electric shock. He had last before this noticed the deceased stooping over the trench about four feet distant from him. Live wires, it may be said, were proved to have been in the east alley within arm's length of any one working in the trench. The bodies of both men were discovered lying near each other just east of the switch-board in the east alley, that of Higgins being a little above to the north of the two switch-boards. From the evidence it may also be inferred that the deceased in some way received an electric shock, and that this was the cause of his death. Whether this was at the same time as Higgins or immediately or soon afterwards, does not appear.

To prove defendants' negligence it was shewn that there was a break or rupture in the insulation of the loose loop or coil of cable, hanging from the switch-board directly over where Higgins was lying, such as might be caused by its being bent backwards and forwards in its constant use. There was also evidence that, having regard to the enormous voltage passing through the wires, their insulation was quite insufficient for the purpose of safety of anyone working among them, in an unprotected condition, even though he did not actually come into contact with them, and also that the depending loop or coil might easily have been better guarded than it actually was. . . .

Whatever may be said of the case hereafter, when the evidence on both sides is in, I think that as it stood at the close of plaintiff's case there was evidence in support of it which could not properly have been withdrawn from the jur The men were not forbidden to go into the east alley it would be quite permissible for the jury to find, evidence of Higgins, that their instructions were suc require them to clean up any litter or rubbish which in the course of their work. I by no means inten

that the jury would be bound to infer this, or that there was not evidence, such as the putting up the slab or lath across the east alley, which would justify the contrary inference. As to the cause : if the men were lawfully in the place where they were found, one of them dangerously shocked and the other dead—they were working there without having had any special warning on the subject, in a place where a single unguarded movement might bring either of them in contact with death from the ruptured wire, or even if, as one witness suggests, the rupture might have occurred at the moment, then from a wire insufficiently insulated or insufficiently guarded. There is no reason that I can see to look further and imagine possible negligence on the part of the men themselves. They were sent or permitted to go into a place where danger of the very highest degree existed, and defendants' duty to their servants in such circumstances is aptly described in the language of the late Chief Justice of Canada in Citizens Light and Power Co. v. Lepitre, 29 S. C. R. 1. . . . See Mather v. Rellston, 156 U.S. 391, cited in Shearman and Redfield on Negligence, 6th ed., sec. 189, note. . . .

There was evidence that the death of the deceased was owing to the neglect of some precaution of this nature, or to the damaged condition of the wire close to which the body was found. I think it is quite immaterial whether both the men received the shock concurrently, one through the other, or whether Griffith's shock came after his fellow servant had been struck. It is enough that he was not wrongfully in the place where he met with his injury.

The appeal should be allowed with costs, and the costs of the last trial, to be paid by defendants.

JUNE 29TH, 1903.

C.A.

OTTAWA ELECTRIC CO. v. CITY OF OTTAWA.

Contract—Supply of Electric Light—"Unforseen Accident through no Default of Company"—Construction — Breach — Damages — Penalty.

Appeal by defendants from judgment of BOYD, C. (1 O. W. R. 508) allowing appeal of plaintiffs, and dismissing appeal of defendants, from report of local Master at Ottawa.

The action was brought by plaintiffs to recover $18,669.50 alleged to be due by defendants for electric lighting of the City of Ottawa under a contract.

The controversy was as to the legal relationship of the parties in consequence of the destruction of the works of plaintiffs in common with a large part of the city of Ottawa.

by the great fire in April, 1900. The Chancellor read the contract as meaning that if no light was furnished from unforseen accident, there was to be no pay and no penalty during such time; when light began to be furnished, pay began pro tanto, the company all the while being in no default.

A. B. Aylesworth, K.C., and T. McVeity, Ottawa, for appellants.

G. F. Shepley, K.C., and G. F. Henderson, Ottawa, for plaintiffs.

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

GARROW, J.A.—I agree with the judgment of the learned Chancellor upon the question of the construction of clause 7 of the agreement.

The clause in question, the cause of all the difficulties between the parties, is so obscure that no one, I think, can feel assured that he has correctly interpreted it, but the construction placed upon it in the judgment of the Chancellor has at least the merit of apparent fairness, inasmuch as it will enable the plaintiffs to be paid for the actual service rendered, while relieving them from a heavy penalty for the result of what was pure misfortune, in the destruction of their plant in the great fire of April, 1900.

The chief stumbling block in this clause 7 is, of course, the use of the words "in any event," or rather the use of these words as contrasted with the words which follow later on in the clause, which state that the report of the superintendent shall be final as to the number of lamps not kept lighted by the plaintiffs "according to the terms of this agreement." In reporting, it is clear that the superintendent is to be governed by the terms of the agreement, and one clear term is that the plaintiffs are to be excused from lighting and keeping lit all or any of the lamps in question when prevented by some unforseen accident. It would certainly be an odd result if the plaintiffs were to be held excused from lighting the lamps as the result of the destruction of their plant by the unforseen accident of the fire, and yet be held liable to pay the heavy penalty of fifty cents a lamp, or some hundreds of dollars each night, until the plant was restored. Mr. Aylesworth, as counsel for the defendants, urged that such a result was perfectly reasonable—that it was of the highest importance that a continuous service should be secured for the proper protection of person and property in the streets of the city at night. Well-lit streets are, of course, of great importance, and if this agreement had in plain terms provided the penalty or damages now claimed as payable in case

whether from accident or otherwise, I would, for one, have felt no inclination to escape from its infliction by my judgment on the ground of its unreasonableness.

But not only is the language upon which we are asked to reach this result ambiguous and unusually obscure, but, in addition, the defendants' construction is entirely repugnant to the exception explicitly provided for, earlier in the clause, in the case of unforseen accident.

The proper way to read the clause in question is, I think, to treat it as excluding for all purposes lights not lit as the result of unforseen accident. These unlit lamps are, of course, not to be paid for as if lit, and, on the other hand, there should in such a case be no penalty imposed for the failure to light.

This permits of the words "in any event" being applied, as I think they should be applied, to the lamps which the superintendent is to certify as not lit, under the terms of the agreement, which, as I have pointed out, seems to me to be not applicable to the case of lamps unlit as the result of unforseen accident. In this connection I am inclined to think that these words "in any event" have relation to the nature of the penalty rather than to the event upon which the payment is to be based. The plaintiffs are to pay "in any event," that is, as fixed and liquidated damages, and not as penalty, the stipulated sum of fifty cents a lamp for each lamp not lit and kept lit according to the terms of the agreement. So applying them, these words aid in the construction contended for by the defendants, that this sum is liquidated and agreed upon, and not a penalty, and in my opinion such is the proper conclusion.

The learned Master dealt very fully with the question of the necessity for a certificate from the defendants' superintendent as a condition precedent to bringing this action, a matter not apparently referred to in the judgment of the Chancellor, although fully argued before us. I think the Master came to the correct conclusion as to this, and also as to the cognate question of the necessity for a report from the fire and light committee, adopted by the council.

There is much to be said for the view that if, as the defendants contend, the superintendent is merely their servant [illegible]hecho, a certificate from him, or, in other words, from the [illegible]ndants, is not a condition precedent at all: Dallman v. [illegible] 4 Bing. N. C. 105, 44 R. R. 661; Stadhard v. Lee, 3 [illegible] at p. 471.

[illegible]dition, there is now the circumstance that the con- insisted upon by the defendants of the agreement

between the parties was erroneous. The plaintiffs did not agree to submit questions of law to the final opinion of the defendants or their officers. It is quite apparent that the superintendent was not a free agent. He considered it to be his duty to adopt implicitly the city solicitor's opinion, which, as the superintendent himself says in his evidence, left him no choice. In this additional sense, the defendants did prevent the superintendent from certifying, if his certificate was a condition precedent.

There is nothing in the argument that the plaintiffs are seeking to recover as upon a quantum meruit. Their action is based distinctly upon the contract, and upon the contract as properly construed they are, I think, entitled to recover the amount which may be found to be owing to them.

The appeal, in my opinion, fails and should be dismissed with costs, and the matter remitted to the Master to continue the reference.

JUNE 29TH, 1903.

C.A.

ARMSTRONG v. LANCASHIRE INS. CO.

Fire Insurance—Cancellation of Policies—Proposal—Acceptance—Return of Premiums—Payment by Cheque—Deduction of Commission.

Appeal by plaintiffs from judgment of MEREDITH, J., dismissing action upon two policies of insurance against fire issued by defendants at Montreal, in favour of plaintiffs, insuring certain buildings at Montreal West, the first dated 18th July, 1900, for $5,666.66, the second dated 27th September, 1900, for $2,800, each for the term of one year.

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

A. B. Aylesworth, K.C., and W. Johnston, for appellants.

L. G. McCarthy, K.C., and C. S. MacInnes, for defendants.

GARROW, J.A.—The plaintiffs are land agents residing and carrying on business at Toronto. They effected these insurances through a Mr. Bamford, residing at Montreal, who was at one time an agent of defendants, but who at the dates of the policies in question had ceased to be such agent, and had in fact become an agent for another insurance company.

In the policies the property insured is described (1) as two brick first-class roofed houses occupied as retail stores, and (2) a three-storey brick first-class roofed building occupied as a retail store and dwelling only.

As a matter of fact, the stores were not occupied at the dates of the policies, but were all vacant, although an upper storey in one was occupied as a dwelling, and two days after the second policy's date one of the stores became occupied also as a dwelling.

One of the rules of defendants was not to insure vacant house property, and plaintiffs, having had occasion to look over their policies, and finding this rule, wrote defendants on 4th January, 1901, at Montreal, informing them of the facts, to which defendants replied by letter, dated 5th January, 1901, that, "as we do not insure unoccupied property in the country, we must ask you to take these policies to our office in Toronto and have them cancelled, as we cannot remain any longer on the risk. I have advised our office that you will call, and on the return of the policies you will get the rebate, less the commission paid you"—referring to a commission of 15 per cent. which had been allowed to plaintiffs out of the premium under a former arrangement with defendants.

Both policies contained a condition in the following form: "If during this insurance the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the insured, or his representatives, of their intention to do so, in which case the company shall refund a ratable proportion of the premiums." And defendants in proposing to cancel were proceeding under the power contained in this condition.

Upon receipt of this letter, plaintiffs sent their clerk to the office of defendants at Toronto, and after two or three visits the transaction was completed. Plaintiffs signed indorsements upon the policies declaring them cancelled. Plaintiffs' clerk took the policies so indorsed, cancelled, to defendants' office, and there in the afternoon of 10th January, 1901, received defendants' cheque for 54.97, the amount of the rebate or unearned premium, less the 15 per cent., and gave up the policies to defendants. This cheque on its face shewed that the 15 per cent. commission had been deducted.

On the same day, but later in the afternoon, the insured premises were destroyed by fire, and plaintiffs were informed of the fire in the morning of the next day.

No objection to the cheque was made at the time, either as to amount or as to its nature as legal tender or payment. Plaintiffs on 16th January deposited the cheque in the bank, and received payment by having the amount placed to their credit.

This was the position until 23rd January, when plaintiffs wrote to defendants, and for the first time complained, and attempted to recall and undo what had taken place. They did not allege that they had acted under any misapprehension of fact, but simply that they had been advised that defendants had exceeded their powers in attempting to cancel the policies, and they returned by their own cheque the $54.97 which they had received, and claimed to recover the loss. Defendants at once returned the cheque and repudiated the claim, and hence the action.

The Judge at the trial held that Bamford was the plaintiffs' agent, and that plaintiffs had agreed so the cancellation and accepted the cheque as payment, and that the policies were cancelled and at an end when the fire occurred.

I agree with his conclusions. . . .

It was urged before us that defendants had no power to cancel, or that they exceeded their power, that in any event they had no right to deduct the commission, and that the cheque was not payment.

Under certain circumstances, each of these would probably be formidable enough, but it seems to me that they are all overborne by the facts and the necessary conclusions from them. Defendants may not have had power under the condition to compel cancellation or to compel it in the manner proposed, but they were quite at liberty to propose cancellation. . . . It is clear that plaintiffs accepted the proposal and themselves voluntarily executed formal cancellations on the policies, and sent them by their clerk to the office of defendants, intending that they should be delivered up as cancelled upon payment of the rebate. They had been told in the letter from defendants that the commission would be deducted. Its deduction, therefore, was one of the terms of cancellation proposed, and, as I think, accepted by plaintiffs, and the cheque given to the clerk and retained by plaintiffs and afterwards used as their own, shewed on its face the deduction of the commission.

Payment by cheque is the usual mode of closing such transactions. No one expects to be paid in legal tender. . . . Even when plaintiffs do complain it is not of payment of an insufficient amount, or by cheque instead of cash.

The case would have stood very differently, if, on the

morning of the 11th January, plaintiffs had returned the cheque. They could perhaps have then raised the questions which they now seek to raise, or some of them, effectually, but, retaining the cheque after the fire, and using it as they did, it seems to me very clear that they cannot now be allowed to say that the whole matter was not completely concluded and the risk at an end when the policies were delivered up. I think, under the circumstances, it may be properly held that plaintiffs accepted the cheque itself as payment. But, in any event, and apart from any special acceptance, the cheque was in law a conditional payment, the condition being that it was to be payment if funds were provided by the drawer to honour it. The cheque was duly paid, the condition was duly performed, and that, I think, is an end of the matter. See Bidder v. Bridges, 37 Ch. D. 406; Carmarthen, etc., R.W. Co. v. Manchester, etc., R. W. Co., L. R. 8 C. P. 685; Hughes v. Canada Permanent L. and S. Society, 39 U. C. R. 221.

The appeal fails and should be dismissed with costs.

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

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

JUNE 29TH, 1903.

C.A.

RE GRAND TRUNK R. W. CO. AND CITY OF TORONTO.

Assessment and Taxes—Exemption from Municipal Taxation—Railway—Tracks along Street or Highway—Toronto Esplanade—Construction of Order in Council, Statutes, and Agreements.

An appeal by the company from the decision of a board of County Court Judges affirming the assessment of a parcel of land near the water front of the city of Toronto, 40 feet in width, extending from Jarvis street to York street, and being part of the roadway of the company. The land was assessed at $15,000 per acre. The assessment was of a strip 52½ feet in width. The County Court Judges allowed an appeal from the Court of Revision as to a strip 12½ feet wide by the full length of the north side of the parcel, but confirmed the assessment of the remainder.

The County Court Judges were of opinion that 12½ feet in width of the parcel was part of the street or highway called Esplanade street, and that the company were exempt from municipal taxation in respect thereof by sec. 11 of the Provincial Revenue Act of 1899, 62 Vict. ch. 8, which declares

that "railways shall not be liable to municipal assessment or taxation of the tracks and roadways upon or along any street or highway." They were further of opinion that the remaining 40 feet, not being a street or highway, was liable to assessment.

W. Cassells, K.C., for the appellants, contended that both parts of the land were equally parts of a street or highway, and equally entitled to exemption.

J. S. Fullerton, K.C., and W. C. Chisholm, for the city corporation, contended that there was a distinction between the two parcels, inasmuch as the north 60 feet of the original esplanade was and had been for a long time known as Esplanade street, while the remaining 40 feet, the subject of the appeal, was still merely part of the esplanade, with the title in fee simple vested in the city, and whereof the railway company were occupants within the meaning of the Assessment Act.

The judgment of the Court (OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

MACLENNAN, J.A.—. . . The first instrument relating to the subject is the Order in Council of 17th August, 1837, which authorized the grant by the Crown to the city of nearly all the then ungranted land and land covered by water on the water front of the city, extending from the Don to Simcoe street. . . . In pursuance of this Order in Council a patent was issued to the city on the 21st February, 1840, expressed to be upon the trust for the fulfilment of the terms and conditions expressed therein, including the condition of filling the several lots up to the south side of the esplanade in the plan annexed, and the condition that the esplanade should be made and constructed of not less than 100 feet in width in all the lots at the place designated in the plan. . . .

The patent does not call the esplanade a street, as is done in the Order in Council, but . . . the two instruments must be read together, with the result that the esplanade provided for was intended to be a public street or highway.

In the year 1853 . . . an Act was passed, 16 Vict. ch. 219, reciting the Order in Council of 1837, and the patent of 1840 . . . and giving the city authority to enter into contracts for its construction, subject to the right of owners and lessees within a limited time to construct that portion thereof fronting upon and crossing their respective lots. By sec. 12 it was declared that no railway company should carry their railway along, upon, or across the esplanade without

the consent of the Governor in Council nor without compensation to the city.

[Reference also to 18 Vict. ch. 185; agreement between the city and the company of 30th August, 1856; 20 Vict. ch. 80; agreement between the city and the Great Western and Northern Railway Companies of 23rd December, 1863; agreement between the city and the three railway companies of 22nd December, 1864; 28 Vict. ch. 34.]

I do not find anything else in the agreements and Acts relating to the esplanade which has any bearing on the subject of this appeal, and I think it clear that, the original intention of the Crown, and of the city, manifested by the Order in Council of 1837, having been that the esplanade was to be a public street or highway, that intention has never been departed from. But for the concession to the company of the right of way over the south 40 feet, there could be no doubt that the esplanade was to all intents and purposes a highway, and I do not find that the right so conferred has changed its character. It remains a highway, subject to that right, and the city and the Legislature have been very careful to preserve unimpaired, save by the limited rights conferred upon the railway company, the right of all his Majesty's subjects to pass over every part of it, at all times for all lawful purposes.

No doubt, the learned County Court Judges allowed the appeal as to the southerly 12 feet, 6 inches, by reason of the express declaration of sec. 2 of 28 Vict. ch. 34, that Esplanade street was to be deemed a public highway, and was exempt by sec. 11 of the Provincial Revenue Act. I think that declaration was unnecessary, and that the esplanade, for its full width of 100 feet, was intended from the beginning to be, and has ever since its construction been, what was so intended, namely, a street or highway: and that the 40 feet in question is exempt equally with the 12 feet, 6 inches.

I am of opinion that the appeal should be allowed.

JUNE 29TH, 1903.

C.A.

RE NORTH GREY PROVINCIAL ELECTION. BOYD v. MCKAY.

Parliamentary Elections—Controverted Election Petition—Neglect to Leave Copy with Local Registrar—Necessity for Leaving—Statutes and Rules—Dismissal of Petition—Extension of Time—Terms—Costs.

Appeal by the petitioner from two orders of MACLENNAN, J. A., in Chambers, ante 231, the first of which directed that

the petition filed in the office of the local registrar at Owen Sound be dismissed and all further proceedings stayed, and the other of which dismissed an application by petitioner to extend the time for leaving a copy of the petition with the local registrar at Owen Sound, to be sent to the returning officer.

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

I. F. Hellmuth, K.C., for petitioner, appellant.

R. A. Grant, for respondent.

MOSS, C.J.O.—The first question to be determined is, whether, by the terms of the Controverted Elections Act, as amended by 62 Vict. (2) ch. 6, or of the general Rules respecting the trial of election petitions, or by the conjoint effect of the Act and Rules, the petitioner was bound, when delivering the petition to the local registrar, to leave with him a copy thereof to be sent to the returning officer, in order that the latter might forthwith publish a notice thereof, pursuant to sec. 2 of the Act. . . .

Before the amendments introduced by 62 Vict. (2) ch. 6, the procedure was clearly defined. Section 12 of the Act was and is silent as to the person upon whom lay the duty of furnishing a copy to be sent to the returning officer. But Rule 2 made it the duty of the petitioner. . . .

The Act was amended by 62 Vict. (2) ch. 6, and it was enacted that, in cases arising elsewhere than in the county of York or city of Toronto, presentation of the petition shall be made by delivering it to the local registrar of the High Court of the county in which the electoral district or any part of it is situated, or otherwise dealing with the same in the manner prescribed. Following this it was provided that, on presentation of the petition, the registrar of the Court of Appeal or the local registrar of the High Court, as the case may be, shall send a copy thereof by mail to the retusning officer of the electoral district to which the petition relates, thus making it the duty of the local registrar to send a copy to the returning officer for publication of a notice thereof.

Owing to some questions having arisen in consequence of there being no local registrars in some counties, and of there being no express provision for the case of an electoral district situate or partly situate in a provisional judicial district, Rules were passed to meet these cases, but Rule 2 was not amended. . . .

The Act and the Rules must be read together as part of one code. Rule 2 was, of course, framed with reference to

Rule 1, which provides that presentation of an election petition shall be made by leaving it at the office of the registrar of the Court of Appeal; and so Rule 2 properly provided that the copy should be left with the said registrar.

The effect of 62 Vict. (2) ch. 6, however, is to modify Rule 1, which must now be read as containing directions for leaving the petition at the office of the registrar of the Court of Appeal or of the local registrar of the High Court, as the case may be. The Court of Appeal being the only Court dealing with election petitions, and all petitions being required to be intituled in that Court, they must be taken to be received for it by the local registrars, who are constituted registrars of the Court for the purpose. Thus Rule 2 applies to make it the duty of the petitioner to leave with the petition a copy thereof for the registrar to whom or at whose office the petition is to be delivered, or send to the returning officer.

I agree, therefore, that the petitioner was in default in not complying with the requirements of the Rule in that behalf.

But the duty is imposed by Rule, and not by statute, and the provision as to the time when it is to be performed is subject to Rule 58, enabling the Court or a Judge in a proper case to increase, enlarge, or abridge the time appointed by the Rules for doing any act or taking any proceedings. It can make no difference that the Rule says that the copy shall be left at the same time as the petition, instead of saying, as it might, that it shall be left within 48 hours or a week after the delivery of the petition. In either case there is a time appointed for doing an act or taking a proceeding.

The power given by Rule 58 is wider than that under the English Rules, which were the guide in the Lisgar Election Case, 20 S. C. R. 1, and the Burrard Election Case, 31 S. C. R. 549. Section 64 of the Dominion Controverted Elections Act, to which reference was made in the latter case, is more restricted in its terms than Rule 58. It does not extend to enabling an enlargement of time although the application is not made until after the expiration of the time appointed. This Rule appears to me to furnish a satisfactory answer to the argument that the leaving of the copy of the petition is part of the presentation of the petition, without which it is incomplete. That argument proceeds upon the proposition that the two things are directed to be done and must be done together. But, though *directed* to be done together, they are not necessarily and in every case to be done together, because the Court or a Judge may increase or enlarge the time for the doing of the second act.

The next question is, whether in this case the time should have been . . . enlarged upon the application of the petitioner.

Neither the Act nor the Rules specify any time or number of days within which the copy of the petition is to be sent to the returning officer. By Rule 9 the registrar is required to send it forthwith upon the presentation of the petition and the notice of deposit of money, that is, within a reasonable time afterwards. There is thus less difficulty, in the absence of proof of substantial prejudice, in relieving against what is shewn to have arisen from a misunderstanding of the practice, or a misconception of the requirements of the Act and Rules, and not from intentional disregard of well understood procedure.

The question of what was necessary to be done is not at all free from difficulty. Even if the solicitor had had the Rules before him, he might have fallen into the same error, and, although he could in a case of such doubt have adopted the safe course, and would have acted more prudently if he had, yet his failure to do so was in good faith, and he ought not to be held strictly to the consequences of his mistake: McFeeters v. Dixon, 3 Ch. Ch. 84, 88.

I think, therefore, that the time should have been enlarged on proper terms. I would allow the appeal, but, inasmuch as the petitioner was at fault in the first instance, and as the points involved are new to some extent, the costs of the two motions should be costs in the petition to the respondent in any event, and the costs of the appeal should be costs in the petition. The order of dismissal of the petition should be discharged.

OSLER, J.A., gave reasons in writing for the opinion that this was, at the least, a case for relieving the petitioner under the provisions of Rule 58, and was content with the order proposed by the Chief Justice.

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

STREET, J., gave reasons in writing for the view that it was not necessary for the petitioner to leave a copy of the petition with the local registrar; but stated that if this view was incorrect, he agreed in the reasons given by the Chief Justice for allowing the petioner to make good his omission.

CARTWRIGHT, MASTER. JUNE 30TH, 1903.

CHAMBERS.

TOWN OF OAKVILLE v. ANDREW.

Venue—Change of—Rule 529 (b)—Naming Improper Venue in Writ of Summons—Motion by Defendant to Change—Estoppel by Previous Consent—Cause of Action—Preponderance of Convenience — Witnesses—Books of Bank—Extra Expense—Fair Trial—Costs of Motion.

Motion by defendant to change venue from Toronto to Milton, pursuant to Rule 529 (b).

W. N. Ferguson, for motion.

D. O. Cameron, for plaintiffs, opposed the motion on the grounds: (1) that defendant's solicitor had agreed to Toronto as the place of trial; (2) that the cause of action arose in Toronto; (3) that there was great preponderance of convenience against Milton, sufficient to satisfy the condition imposed in Pollard v. Wright, 16 P. R. 507.

THE MASTER.—The first ground is displaced by plaintiffs having named Toronto in the writ of summons itself as the place of trial. This writ was issued on 4th December, 1902, long prior to the interview with defendant's solicitor on which Mr. Cameron relies. Having thus named the place of trial, plaintiff could not have changed it without an order: Segsworth v. McKinnon, 19 P. R. 178. Apart from that, however, I do not think that a casual question, under the circumstances of the alleged consent in this case, could have the effect of a consent order, as argued by Mr. Cameron.

As to the second ground, I cannot agree with the contention of plaintiffs' counsel. In my view, the cause of action arose in the county of Halton. It was there that the contract was made between plaintiffs and defendant, as is set out in the statement of claim, paragraphs 3 and 4. It could not be successfully contended that the alleged wrongful deposit by the deceased treasurer at Toronto was the cause of action, any more than the refusal by defendant of payment set out in paragraph 11, and which was presumably in the county of Halton.

There remains the third ground, of preponderance of convenience, under which head may be also considered the alleged difficulty of having any other result than a disagreement at a trial by a jury in the county of Halton, as set out fully in Mr. Cameron's affidavit.

To meet any question of extra costs, Mr. Cameron has consented to the usual provision that these shall be borne by plaintiffs in any event, as a term of the dismissal of the motion, or he will agree to the allowance of the motion if defendant will waive his jury notice. Defendant is not willing to give any consent to either of these propositions.

The case must be dealt with as if the venue had been laid at Milton under Rule 529 (b) and plaintiffs were asking to have it changed under cl. (d). The question, therefore, is, whether they have made out "the very strong case" said in Pollard v. Wright to be necessary. The onus is clearly on plaintiffs, and I cannot say that they have satisfied it. The county of Halton has a population of nearly 20,000. Of these at least some hundreds must be qualified as jurors, and it can scarcely be presumed that twelve men cannot be found who will pay attention to their oaths to give a true verdict according to the evidence.

In any case plaintiffs can move before the trial Judge to dispense with the jury, and in a proper case this will doubtless be done.

As to the necessity of examination of the bank's books and officers and any inconvenience resulting to them from being required to attend at Milton, I would refer to Standard Drain Pipe Co. v. Town of Fort William, 16 P. R. 404. . . .

The venue must be changed from Toronto to Milton. Costs to defendant in any event, because the naming of Toronto as the place of trial in the writ of summons was a violation of Rule 529 (b), which was not in any way caused by anything said by defendant's solicitor.

MacMahon, J. June 30th, 1903

CHAMBERS.

Re WARBRICK AND RUTHERFORD.

Landlord and Tenant—Overholding Tenants Act—Proceedings under—Motion for Prohibition or Certiorari—No Writ of Possession Issued.

Motion by H. A. Rutherford for an order requiring the Judge of the County Court of Peel to send up the papers in a certain proceeding before him under the Overholding Tenants Act begun by J. F. Warbrick, as landlord, against the applicant, as tenant, and also for an order for prohibition to the Judge, Warbrick, and the sheriff of the county of Peel, to prohibit them from taking any further proceedings under the order of the Judge of 23rd July, 1902, directing a writ

of possession to issue to place Warbrick in possession of certain premises leased to Rutherford.

Gideon Grant, for the applicant.

J. G. O'Donoghue, for the landlord.

MACMAHON, J.—No writ of possession has as yet been issued, and under sec. 6 of the Act, it is only where such writ has been issued, that such a motion as the present can be made.

The motion must be refused with costs.

MACMAHON, J. JUNE 30TH, 1903.

CHAMBERS.

BONTER v. NESBITT.

Solicitor—Lien for Costs—Depriving Solicitor of—Settlement of Action—Collusion to Prevent Acquisition of Lien—Right of Plaintiff to Costs—Promise of Defendant to Pay—Leave to Continue Action for Recovery of Costs.

Appeal by plaintiff and his solicitor from order of one of the local Judges at Cobourg dismissing appellants' motion for an order upon defendant to pay the costs incurred by plaintiff in this action, upon the ground of a settlement of the action between plaintiff and defendant, behind the back of plaintiff's solicitor, which deprived the latter of his lien for costs.

R. C. Clute, K.C., for appellants.

C. H. Ritchie, K.C., for defendant.

MACMAHON, J.—The record had been entered for trial at the non-jury sittings at Cobourg commencing on Monday, the 20th April. The Court adjourned at ten o'clock at night, it being arranged that the trial of this action, which was for malicious arrest and prosecution, should be proceeded with at the opening of the Court on the following morning.

Shortly after the adjournment of the Court, the plaintiff and the defendant—who both live in the village of Brighton—met at a hotel in Cobourg and went into a room together, where they discussed the question of settlement until one o'clock of the following morning, when it was agreed that the action should be dismissed, and the defendant should pay the plaintiff $400, and discharge him from all claims arising out of the counterclaim against the plaintiff. Mr. Northrup, defendant's counsel, and Mr. Drewry, his solicitor, were called in; the former prepared a memorandum of settlement, styled

in the cause, by which it was agreed "that the plaintiff's claim and defendant's counterclaim should each be dismissed without costs, and the Court is requested to enter judgment accordingly." This memorandum was signed by the plaintiff and the defendant.

The plaintiff in his affidavit states that, during the discussion as to the settlement, he proposed to the defendant that Mr. Clute, his counsel, who was staying in the hotel, should be called in to assist and advise in the settlement; but this the defendant refused, and said if Mr. Clute were called in he would not settle at all. But, after the terms of settlement had been agreed upon, the defendant called in Mr. Northrup, K.C., his counsel, and Mr. Drewry, his solicitor, and after they left the room, the defendant paid plaintiff $50 in cash and gave him a cheque for $355 on the Standard Bank at Brighton, the extra $5 being to cover his expenses, under an arrangement between them by which the plaintiff was to take the early train for Toronto the same morning, so that when the Court should open he should not be present, and his counsel and solicitor should not know of his whereabouts. Plaintiff and defendant sat up together until three o'cleck in the morning, when plaintiff went to the Cobourg station, and took the 4.20 train for Toronto, according to the arrangement, and plaintiff left Toronto by the train at 5 o'clock in the afternoon and returned to Brighton. The plaintiff also states that, as part of the settlement, the defendant agreed to assist him in settling his costs, which included the costs of defence in a criminal proceeding brought or instigated by the defendant against him in respect of which the plaintiff's action was brought, and the costs of the action, and when plaintiff met the defendant at Brighton on the 22nd he spoke to him about the costs, and defendant urged him to pay no attention to the bill of costs. Plaintiff would not agree to this, and defendant then told him to get the bill and bring it to him and he would help him to settle it. On the 22nd he got the bill of costs from his solicitor, and took it to the defendant, who examined it and said, "I won't pay it, let them sweat a while."

The defendant denies that there was any arrangement between himself and plaintiff that plaintiff should leave Cobourg and go to Toronto, and says that he did not pay plaintiff anything for his expenses to Toronto, but that the arrangement was, that, as the case was settled, neither of them would require to appear in Court when the case was called, and Mr. Northrup should present the memorandum of settlement to the Court and ask to have the case marked settled

and struck off the list; that he did not agree to pay plaintiff's costs or to assist him in settling the bill of costs. He also states that he did not refuse to permit Mr. Clute to be called in on behalf of the plaintiff, but said if Mr. Clute was called that Mr. Northrup and Mr. Drewry should also be called in, and that they had better settle it themselves without any lawyers.

When Mr. Northrup and Mr. Drewry were called in to write the memorandum of settlement, neither of them was told of the terms of settlement, except those disclosed in the memorandum itself. Mutual releases under seal were prepared by Mr. Northrup and executed by the plaintiff and defendant, which on the plaintiff's part included the claims sued for in the action. No money consideration is mentioned. And the defendant's solicitor, Mr. Drewry, states in his affidavit that it was not until the 5th May that he learned from his client that any money had been paid or cheque given by him to the plaintiff.

Shortly before the Court opened on the 22nd, Mr. Northrup informed Mr. Clute that the case had been settled, and when the case was called Mr. Northrup informed the Court that a settlement had been arrived at, and read the memorandum of settlement and offered to put it in. Mr. Clute urged that the case should go on, and that Mr. Northrup could amend the pleadings by adding as an additional defence the settlement. After argument the trial Judge said that he would strike the case off the list, reserving to the plaintiff the right to move to have the case reinstated on giving notice.

The defendant states in his affidavit: "I assumed that if the plaintiff owed anything to his solicitor or counsel for costs, he would pay them out of the money and cheque I gave him." The affidavit is silent as to how the sum of $405 —the consideration paid the plaintiff to settle—was arrived at, or what the $5 was paid for, although plaintiff states expressly that it was given to pay his expenses to Toronto, in order that he should not be present when the Court opened. Defendant admits that he saw plaintiff in Brighton on the 22nd, "who said something about Gordon (plaintiffs solicitor) and arranging his costs, and I told him he had better get a bill of them and get them settled up," and that on the 23rd he saw plaintiff, who shewed him a bill of costs, which he had received from his solicitor, and he told plaintiff it seemed a very large bill, and if he were in his (plaintiff's) place he would have it taxed.

The learned local Judge, in his written judgment dismiss-

ing the plaintiff's motion, said: "The collusion that must be shewn is a conspiracy between the parties to cheat the solicitor of his costs." In this the learned Judge was in error, for in order to establish collusion it is not necessary to shew that they were acting fraudulently, or had entered into a conspiracy to cheat the solicitor. Mr. Justice Denman in Price v. Crouch, 60 L. J. Q. B. at p. 768, in referring to a statement of Lord Campbell's in his judgment in Brunsden v. Allard, 1 E. & E. 19, that where there is a compromise between the parties "the result of which is that the attorney loses his lien, provided that the arrangement is not a mere juggle between the parties to deprive the attorney of his costs," said: "I do not think, however, that Lord Campbell meant to say that unless there was a 'mere juggle,' a juggle in a fraudulent sense, there could be no collusion. The other Judges do not go so far. Mr. Justice Wightman hits the point; 'Was the object of the arrangement to deprive the plaintiff's attorney of his costs.'"

Although collusion must be clearly established, it may be inferred from the mere facts, or made out on the respondent's own evidence: Cordery's Law of Solicitors, 3rd ed, p. 380. Then, is the proper inference to be drawn from what is disclosed by the affidavits and the conduct of the parties, that the object of the arrangement was to deprive the plaintiff's solicitor of his costs? . . .

See the remarks of Kekewich, J., in Margetoon v. Jones, [1897] 2 Ch. at p. 318. The absolute silence of both the plaintiff and defendant as to the money payments shews there was an understanding between them that no disclosure should be made regarding the amount the plaintiff was to receive to end the litigation. The conduct of the parties is important. The plaintiff and defendant are together until three o'clock in the morning, when the plaintiff leaves for the station to board a train for Toronto, in order, as he says, that he may not meet his solicitor; and the payment of the extra $5—for which the defendant in no way accounts—would indicate that the plaintiff received it for the purpose stated by him.

. . .

If the costs due by the plaintiff to his solicitor were not discussed on the night of the 21st, and if defendant made no promise about settling them, what was the plaintiff's object in speaking to him, and what interest had the defendant in the matter calling for his advice to the plaintiff to get the bill, and after the bill was procured and brought to him, on the 23rd, if the defendant were not interested in the ques-

tion of the costs, why was he tendering advice to the plaintiff to have it taxed?

All this, however, while it shews there was collusion to prevent the plaintiff's solicitor acquiring a lien for his costs, on the amount agreed to be paid to the plaintiff, does not shew collusion between the plaintiff and defendant to absolutely deprive the solicitor of his costs, because the plaintiff states that the promise of the defendant to pay the costs was part of the agreement under which the settlement was effected. If that is so, then the plaintiff is entitled to recover of costs notwithstanding the release, otherwise it would be a fraud on the plaintiff to agree to pay, and on the strength of that secure the execution of a release, and when the bill of costs is furnished to set up the release. According to the plaintiff, both he and the defendant were by this arrangement providing for the payment of the plaintiffs' costs, and if that was his understanding, there was no collusion to deprive his solicitor of his costs.

Both the plaintiff and his solicitor are applicants, and, although the motion does not ask for an order in the alternative allowing the plaintiff to continue the action for the recovery of the costs, there is power to make such an order: Price v. Crouch, 60 L. J. Q. B. 767; Dunthorne v. Bunbury, 24 L. R. Ir. 6.

The substantial material upon which such an order ought to be made is abundant, and it should be made now without driving the parties to the expense of making a substantive motion. The order of the learned local Judge will therefore be varied by permitting the plaintiff to re-enter the record for trial for the next jury sitting at Cobourg, without paying any fee for such re-entry, and also by making the costs of that motion in the cause to the successful party. The costs of the appeal will be in the same way.

MacMahon, J. June 30th, 1903.

CHAMBERS.

MARSH v. McKAY.

Security for Costs—Defamation—Unmarried Woman—Trivial or Frivolous Action—Defence on Merits.

Appeal by defendant from order of Master in Chambers, ante 522, dismissing application by defendant for security for costs of an action for libel brought by an umarried woman against the publisher of a newspaper.

S. B. Woods, for defendant.

T. H. Lloyd, Newmarket, for plaintiff.

MACMAHON, J.—The article complained of appeared in the "Express-Herald" in its issue of the 13th February, 1903, sent by its correspondent from Roach's Point, and consists of two separate paragraphs, as follows:

"We beg to offer an apology to the 'Era' correspondent for the error of last week, concerning Miss Emma Young, and at the same time to inform the 'Era' scribe that we often make mistakes and are not ashamed to acknowledge them. But the 'Era' correspondent was never known to make any mistakes in his life, not even five years ago.

"Captain McKay is again at the Point, drawing the timber for Calder Boyd's barn. Wonder if he is renewing old acquaintances."

The "Era" newspaper is also published in Newmarket.

The above paragraphs are inserted in the statement of claim, and the innuendo is that the defendant was thereby "imputing or meaning that the plaintiff and said Captain McKay were committing fornication."

The plaintiff, who lives in the Township of North Gwillimbury, made an affidavit in which she states that in March, 1898, she became the mother of an illegitimate child, of which Captain McKay was the father, which was well known in North Gwillimbury, and that the article in question she has every reason to believe refers to her and that it imputes that she has been renewing improper relations with Captain McKay, and that since the birth of said child she has had no relations whatever with Captain McKay.

The plaintiff does not state in her affidavit that she is the correspondent of the "Era," and no such allegation is made in the statement of claim.

In the defendant's affidavit he swears he has a good defence to the action on its merits; that the words complained of were published in good faith and without malice and without intent to convey the meaning attributed to them by the plaintiff's statement of claim, or to insinuate that the plaintiff was guilty of fornication; that he was not at the time of the alleged publication aware that the plaintiff was then or ever had been the correspondent of the "Era"; and that the items have no connection with each other.

If the plaintiff is the correspondent of the "Era," the first paragraph would doubtless refer to her. The announcement that "Captain McKay is again at the Point, drawing timber for Calder Boyd's barn," is a legitimate item of news.

During the argument, counsel for the plaintiff admitted that if the paragraph relating to Captain McKay had ended

with the positive assertion that "he is renewing old acquaintances" (which, according to the plaintiff's affidavit, would have included her—she being an old acquaintance) he could not have contended that the effect of the paragraphs is to impute that the plaintiff and Captain McKay were committing fornication. But, because the correspondent of the "Express-Herald" put it in the shape of an interrogatory, and "wondered if he (Captain McKay) was renewing old acquaintances," he urged that the sting was in the word "wonder," and a different interpretation must be put upon the paragraphs from that which they would have born had the positive statement been made that Captain McKay was renewing old acquaintanceship.

As it had to be admitted that any innuendo that might be framed could not alter or extend the sense of the words if a positive statement had been made that Captain McKay was renewing old acquaintanceships, so as to make them mean that the plaintiff and Captain McKay were guilty of immoral conduct, it is clear, I think, that no innuendo can alter or extend the sense of the words in the paragraphs as they stand, so as to give them the meaning contended for, which is, that they impute that the plaintiff and Captain McKay were committing fornication.

Mr. Odgers, in his work on Slander and Libel, 3rd ed., at p. 90, says, in reference to the Act which permits an action to be brought for words spoken and published which impute unchastity or adultery to any woman or girl, "that the Act does not apply to any case in which gross epithets are used merely as general terms of abuse; the words must be such as to convey to the hearers a definite imputation that the plaintiff has in fact been guilty of adultery or unchastity."

So also in an action for libel in which it is charged that the writing imputes unchastity to a woman or girl, the language must be such as to convey to the readers a definite imputation that the plaintiff has been guilty of unchastity.

The grounds of action are, in my opinion, frivolous, and the order appealed against must be set aside and the plaintiff ordered to give security for the costs of the action.

The costs below and of this motion to be costs in the cause to the defendant.

FERGUSON, J. JUNE 30TH, 1903.

CHAMBERS.

RE GLANVILLE v. DOYLE FISH CO.

Prohibition—Division Court—Territorial Jurisdiction—Cause of Action, where Arising—Contract by Telegraph.

Motion by defendants for prohibition to the 3rd Division

Court in the district of Algoma. Action to recover the price of a quantity of fish sold by plaintiffs to defendants, the latter residing and carrying on business in the city of Toronto. The plaintiffs resided and carried on business at Thessalon, in the division of the Court in which the action was brought. On the 14th December, 1902, plaintiffs telegraphed from Thessalon to defendants at Toronto: "Offering fresh caught whitefish frozen five and a half cents f.o.b. here, if want how ship." Next day defendants telegraphed to plaintiffs from Toronto: "Freight ten hundred pounds white, some trout if you have them." The fish were shipped by plaintiffs immediately upon the receipt of this message.

Gideon Grant, for defendants.

Grayson Smith, for plaintiffs.

FERGUSON, J., held that plaintiffs' telegram was part of the contract, and that the contract was not wholly made at Thessalon, but partly in Toronto. Thus the cause of action, which consists of the contract and the breach, did not arise at Thessalon, and the Court there had no jurisdiction. The defendants had not by their conduct waived their right to prohibition.

Order made for prohibition with costs.

MACMAHON, J. JUNE 30TH, 1903.

WEEKLY COURT.

KOPMAN v. SIMONSKY.

Church—Change of Site—Resolution of Congregation—Meeting—Notice—Irregularity—Trustees—Injunction.

Motion by plaintiff for an interim injunction to restrain defendants from applying a sum of $1,000 in their hands as trustees upon the purchase of a new site in University street, Toronto, for a Jewish synagogue, for a congregation worshiping in a synagogue at the corner of Elm street and University street, and to restrain defendants from purchasing the site, on the ground that the congregation had not proceeded regularly to authorize the purchase.

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

J. Baird, for defendants.

MACMAHON, J.—The meeting of the Jewish congregation known as the "Goel Tsedec" called for the purpose of considering the advisibility of purchasing a new site for a synagogue, was not called on the day provided by the rules of the synagogue, nor was the requisite notice of four days given

to the members of the congregetion. The by-laws and rules provide that all meetings shall be held on the first Sunday of the month, and the regular meeting would have been on Sunday the 6th June, but a special meeting for considering the purchase of a new site was called for Sunday the 31st May, and the notices calling the meeting were not posted till the 27th May. It was stated that many members of the congregation are pedlars and frequently absent from the city, and in consequence the attendance at the meeting was small, only 34 out of a membership of 130 being present when a resolution was put and carried authorizing the purchase of certain property in University street for $4,600. A considerable number of the members of the congregation are opposed to the site chosen, and also to the sale of the site on which their present place of worship stands.

The notice for the special meeting was inadequate, having regard to the importance of the subject to be considered. The defendants, who, as trustees, hold the moneys of the congregation on deposit, must be restrained from withdrawing the same from the Imperial Bank, until after the trial, unless in the meantime a regular meeting of the congregation is held for the purpose of considering the question, when, if a majority resolve on the purchase of a new site, defendants or any other member or members of the congregation may move to dissolve the injunction.

Order accordingly. Costs in the cause unless otherwise ordered by the trial Judge.

BRITTON, J. JULY 2ND, 1903.

WEEKLY COURT.

RE SOLICITOR.

Costs—Assignment of Portion of Fund in Question in Action by Client to Solicitor—Decease of Client—Validity of Equitable Assignment—Corroboration.

Appeal by solicitor from decision of local Master at Ottawa upon taxation of costs of solicitor and accounting as against the estate of J. W. McCrae, deceased.

The Solicitor, in person.

J. F. Smellie, Ottawa, for estate of J. W. McCrae.

BRITTON, J.—The evidence of the solicitor; corroborated as it is, establishes a good equitable assignment by the deceased of so much of an existing fund as would pay the debt due to the solicitor; and the fact that bills of costs had not been rendered was not material. The deceased knew that a

substantial sum was owing; the costs had been incurred; and there was the liability for these costs—amount subject to taxation. Hughes v. Chambers, 22 C. L. T. Occ. N. 333, 14 Man. L. R. 163, and Palmer v. Culverwell, 85 L. T. N. S. 758, 759, referred to. If the fact of the assignment is established it makes no difference that the agent collecting the debt is himself a creditor to whom the equitable assignment is made. As to corroboration, see Re Curry, 32 O. R. 150, 23 A. R. 676. Appeal allowed without costs. Order made for payment over of balance. Costs of Ottawa Trust and Deposit Co., as between solicitor and client, to be paid out of this money.

MACMAHON, J. JULY 4TH, 1903.

CHAMBERS.

BERRIDGE v. HAWES.

Action—Summary Dismissal—No Reasoaable Cause of Action Alleged—Claim for Wrongful Dismissal—Claim to Enforce Mechanic's Lien—Company—Agreement with.

Motion by defendant to strike out the writ of summons and statement of claim, and to set aside the service thereof, on the ground that they disclose no reasonable cause of action, and because the claim indorsed on the writ of summons cannot be joined with a claim for enforcement of a mechanic's lien. The claim indorsed on the writ was for damages for wrongful dismissal from defendant's employment as building superintendent and foreman, and for breach of contract. The statement of claim set forth an agreement for (amongst other things) the formation of a company for the erection of apartment houses in the city of Toronto, services performed under the agreement and as building superintendent, the registration of a mechanic's lien, andc oncluded by claiming payment of $3,200, a declaration of lien, and $2,000 damages for breach of contract and wrongful dismissal.

W. H. Blake, K.C., for defendant.

W. E. Raney, for plaintiff.

MACMAHON, J.— . . . It appeared that building operations were commenced and carried on from March until May, when they were interrupted by a strike of the workmen, at which time $30,000 had been expended on the building. Plaintiff was paid $15 as superintendent during each week the building operations were in progress. In addition,

he was entitled, forthwith after the incorporation of the company mentioned in the agreement, on payment by him into the treasury of the company, to have allotted to him common stock of the company to the amount of $1,500, and as the expenditure on the buildings increased and reached $100,000, he would have been entitled to receive stock to the par value of $5,500, on payment of ten per cent into the treasury. . . . As the additional remuneration plaintiff was to receive was in the stock of the company, unless and until he tendered the ten per cent. ($150) on the par value of the stock, he was not entitled to have it allotted to him. Had he tendered the $150, and the company refused to allot it, he could have sued for specific performance or have recovered damages for non-delivery. If he had paid the $150 and the stock had been issued to him, it might not for some years be worth even the $150. He could not claim specific performance from defendant of the agreement to allot the stock, or sue him for breach of the contract to deliver the stock, as the contract is with the trustees until the incorporation, when it is with the company. On the present motion the claim of plaintiff must alone be looked at. Plaintiff sets out an agreement between himself and the trustees of the company about to be incorporated, whose service he entered as superintendent, and who agreed to pay him a weekly wage for his services, and, as an additional remuneration, to allot to him certain stock. That constitutes no reasonable cause of action against defendant, with whom he could not pretend to have any contract after the agreement was executed. The action is unsustainable. Order made setting aside statement of claim and vacating registration of lien, with costs. See Kellaway v. Bury, 8 Times L. R. 433; Willis v. Earl Beauchamp, 59 L. T. N. S.; Solomons v. Knight, 8 Times L. R. 472; Hubbuck v. Wilkinson, [1898] 1 Q. B. 86.

MacMahon, J. July 4th, 1903.

WEEKLY COURT.

REX v. DUNGEY.

Justice of the Peace—Quashing Conviction—Costs.

Motion by defendant to quash conviction with costs against convicting magistrates. A Divisional Court (2 O. L. R. 223) allowed an appeal from an order of Robertson, J., refusing a certiorari. The prosecutor and magistrate assented to the

quashing of the conviction, but opposed the motion as regards costs.

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

J. H. Moss, for magistrates and prosecutor.

MacMahon, J.—It is not a case for ordering the magistrates to pay the costs; under a mistake as to the law they considered that they had jurisdiction. Regina v. Chapman, 1 O. R. 582, distinguished. Order made quashing the conviction. Costs to be paid by prosecutor. No casts against magistrates.

Britton, J. July 4th, 1903.

TRIAL.

DAVIDSON v. INSURANCE CO. OF NORTH AMERICA.

Fire Insurance—Apportionment of Loss—Existence of Concurrent Policy—Difference in Parties Insuring and Properties Insured.

Action upon policy for loss by fire on the 25th January, 1902, of furniture in the Hotel Cecil at Ottawa.

J. Lorn McDougall, Ottawa, and E. J. Daly, Ottawa, for plaintiff.

G. F. Shepley, K.C., and A. T. Kirkpatrick, for defendants.

Britton, J.—By the terms of the policy further concurrent insurance was permitted without notice. The defendants invoked condition 9 of the statutory conditions; "In the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." Defendant's policy was for $3,500. They alleged that at the time of the fire there was concurrent insurance upon the same property, $5,100 in the Phœnix, and $3,500 in the Union. The plaintiff's total loss was $9,033.43. Defendants paid into Court $2,615.87, exclusive of interest. The plaintiff was the owner of the hotel premises and of a large quantity of the furniture therein. The hotel was leased to C. H. Genslenger, who was the licensee and hotel keeper, and the owner of other furniture which he brought into the hotel. There was no joint ownership. Plaintiff had insurance on his own furniture to the amount of $6,000, $2,500 in the Union and $3,500

in defendant company. He said his loss upon the property so insured was $7,264.74. Genslenger had at one time insurance upon his property in the hotel to the amount of $6,100, viz., $5,100 in the Phœnix and $1,000 in the Union. In December, 1901, Genslenger made an assignment for the benefit of his creditors, and plaintiff bought Genslenger's furniture in the hotel from the assignee. After the assignment, and before the policy for $5,100 expired, the agent of the Phœnix company asked plaintiff, in case he bought, to retain the insurance. Plaintiff said he would do so, and wanted the agent to keep the insurance in force. This the agent promised to do, and left with the plaintiff a renewal receipt, filled out in the name of Genslenger, purporting to continue the $5,100 policy for one year from 3rd January, 1902. The renewal premium was not in fact paid, and after the fire the Phœnix company denied any liability to plaintiff or to any one else. Plaintiff brought suits against the Phœnix and the Union, and Carrier, the agent. The suits were not brought to trial, but were settled for a sum said to be for costs. There was no recovery for loss on the Genslenger property.

Neither the $1,000 insurance nor the $5,100 insurance was in force at the time of the fire. Apart from that, the property covered by defendants' policy was not the same as the property covered by these other policies. Mason v. Andes Ins. Co., 23 C. P. 37, Bruce v. Gore District Mutual Ins. Co., 20 C. P. 207, Gardiner v. Waterloo Mutual Ins. Co., 6 A. R. 231, North British and Mercantile Ins. Co. v. Liverpool and London and Globe Ins. Co., 5 Ch. D. 569, referred to. . . . The insurance sued for was not against the same loss as in the other policies referred to, but against loss on other goods. The Geslenger insurance cannot be considered as "concurrent" with insurance upon property which he never owned, or as applicable to any other property than that which plaintiff purchased from Genslenger's estate. No question arises in this action as to the policy which plaintiff himself held in the Union for $2,500. That covered plaintiff's own furniture, and therefore the "same property." There were insurances on this property of $6,000. The loss was $7,264.74, so no question of contribution arises on these alone. There was not any admission by plaintiff in proofs of loss of any insurance upon the same property such as was contended for by defendants. Judgment for plaintiff for money in Court and $937.53 in addition, with costs.