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APPELLATE DIVISION.

NOVEMBER 24TH, 1913.

RE STANDARD COBALT MINES LIMITED.

Company—Winding-up—Claim on Assets—Assignments—Evidence—Finding of Referee—Notice of Adjudication—Appeal.

Appeal by the Bailey Cobalt Mines Limited from the order of FALCONBRIDGE, C.J.K.B., ante 144.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

Grayson Smith, for the appellants.

W. R. Smyth, K.C., for the liquidator.

H. E. Rose, K.C., and J. A. McEvoy, for the Security Transfer and Register Company.

S. S. Mills, for H. H. Hitchings.

THE COURT dismissed the appeal with costs.

NOVEMBER 25TH, 1913.

BROWN v. THOMPSON.

Charge on Land—Evidence to Establish—Laches—Statute of Limitations—Power of Attorney—Will.

Appeal by the plaintiff from the judgment of LENNOX, J., ante 19.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

F. D. Davis, for the plaintiff.

No one appeared for the defendant.

THE COURT dismissed the appeal without costs.

HIGH COURT DIVISION.

HOLMESTED, REGISTRAR, IN CHAMBERS. NOVEMBER 21ST, 1913.

CAIRNCROSS v. McLEAN.

Settlement of Action—Judgment Signed for Default of Defence—Solicitors—Correspondence—Order Setting aside Judgment—Motion to Set aside Statement of Claim—Enforcement of Settlement—Proceeding in Original Action—Practice.

Application by the defendant to set aside a judgment signed for default of defence, and also to set aside the statement of claim.

K. F. Mackenzie, for the defendant.

L. Davis, for the plaintiff.

THE REGISTRAR:—The action was commenced on the 9th November, 1910, to enforce a contract for the sale of certain land by the plaintiff to the defendant. It is common ground that a settlement was agreed to on the terms mentioned in a letter from the defendant's solicitors to the former solicitors for the plaintiff of the 12th April, 1911. It is also common ground that that agreement has been in part performed, viz., that the defendant has, in the plaintiff's name, brought an action against Frank W. Maclean, and has succeeded in vacating the registration of a mortgage on the property in question, and that the defendant has indemnified the plaintiff against the costs of that proceeding.

But there are two items of the agreement which it is alleged have not been performed, viz., the payment of the balance of the purchase-money and $15 for costs. About the costs I am not quite sure, as nothing was specifically said by either party, but

that is immaterial. According to the settlement, the balance of the purchase-money was to be paid as soon as the registration of the Maclean mortgage had been vacated. When this took place does not appear. Payment not having been made, the plaintiffs, on the 23rd October last, filed a statement of claim, and, on the 29th October last, sent the defendant's solicitor a statement of account shewing the amount alleged to be due, and claiming $50 for costs. On the 3rd November last, payment not having been made, the plaintiff's solicitors wrote to the defendant's solicitors requiring them to file a defence. And it is here that some misunderstanding arose. Mr. Cooke, a solicitor in the employment of the defendant's solicitors, says that, on receipt of this letter, he telephoned to either Mr. Davis or Mr. Mehr, and arranged with him that the action should stand until the return of Mr. Mackenzie to the city, as it was a matter on which the latter alone was instructed. This alleged arrangement is denied by Mr. Davis, and he states that he is informed by his partner, Mr. Mehr, that he at no time had any conversation with Mr. Cooke or with any one else regarding this matter.

This conflict is regrettable. In the circumstances of the case, it seems extremely probable that, in the absence of Mr. Mackenzie, some communication would in the ordinary course of business be made by Mr. Cooke to the plaintiff's solicitors in response to their letter of the 3rd November. Mr. Davis denies that the communication was made to him, which is no doubt true, and he says that Mr. Mehr informed him that he had no conversation with Mr. Cooke on the subject. I have, therefore, Mr. Cooke's positive statement that he did communicate with Mr. Davis or Mr. Mehr, and I do not think that that is displaced by Mr. Davis's affidavit and his hearsay statement as to what Mr. Mehr said.

In these circumstances, by some mischance, no doubt, the judgment appears to have been signed, in breach of an understanding that the matter was to stand till Mr. Mackenzie's return, and must be set aside, with costs to the defendant in the cause, to be set off against any money which may be found due by the defendant to the plaintiff.

With regard to the motion to set aside the statement of claim, I do not think that should be done on the present application. Where a settlement of a suit is come to, it is not perfectly clear that the settlement may not be specifically enforced in the same action, while there are some cases which seem to shew that a

new action is necessary, e.g.: Emeris v. Woodward, 43 Ch.D. 185; Pryer v. Gribble, L.R. 10 Ch. 534; Askew v. Millington, 9 Ha. 65; Forsyth v. Manton, 5 Madd. 78. On the other hand, there are others which seem to shew that it may be enforced in the suit which is the subject of settlement: see Small v. Union Permanent Building Society, 6 P.R. 206; Smith v. Shirley, 32 L.T.N.S. 234; see also 58 L.T. Jour. 443.

In the present case it may be said the statement of claim is not to enforce the compromise, but is based on the original cause. It is, however, subject to amendment. At all events it would seem clear that, if the defendant wishes to set up the compromise or settlement, he may do so by his defence. It would not, I think, be proper to strike out the statement of claim merely because it is based on the original cause of action; the settlement of the 12th April, 1911, may be a bar, but that is a matter which, I think, cannot properly be decided on an interlocutory motion to strike out the pleading. No extra expense appears to have been occasioned by this branch of the motion.

The order, therefore, will be that the judgment be set aside, and the defendant is to have until Tuesday next, inclusive, to file his defence.

HOLMESTED, REGISTRAR, IN CHAMBERS. NOVEMBER 26TH, 1913.

WILLIAMSON v. PLAYFAIR.

Writ of Summons—Special Endorsement—Liquidated Demand —Rules 33, 37, 56—*Appearance—Affidavit.*

Motion by the defendant to be relieved from filing an affidavit with his appearance, as required by the writ of summons, on the ground that the claim endorsed on the writ was not properly the subject of a special endorsement. See Rule 56 (Rules of 1913).

Frank McCarthy, for the defendant.
Hamilton Cassels, K.C., for the plaintiff.

THE REGISTRAR:—The endorsement reads as follows: "The plaintiff's claim is to recover from the defendant the sum of $2,963.93, balance due on this date by the defendant from 10,000 shares of the capital stock of the Williamson-Marks Mines Limited, which were held by the defendant as collateral security in respect of a loan of $1,000 made by the defendant

upon the plaintiff's promissory note for $1,000 dated the 10th April, and payable three months after date, with interest at the rate of seven per cent. per annum from its date to the date of its maturity. The following are the particulars." The endorsement then specifies the amount due on the $1,000 note with interest, the amount received by the defendant in respect of the shares, strikes a balance, and claims that balance, with interest from the date of the receipt.

It is said that this claim is not a liquidated demand, and McIntyre v. Munn, 6 O.L.R. 290, is cited in support of that contention. That case, however, appears to me to be clearly distinguishable from the present. There the plaintiff was suing for breach of an agreement by the defendant to manufacture timber, in respect of which he had made certain advances on account. The defendant having failed to complete the contract, the plaintiff claimed to recover the difference between the value of the timber delivered and the advances made, alleging that the defendant was overpaid. It is obvious that the value of the timber delivered was not an ascertained sum which a jury would have been bound to give a verdict for, but was an unascertained sum, to be arrived at upon the evidence, and the amount would depend on the view that the jury might take of the evidence.

In this case the claim is entirely different. The plaintiff alleges that the defendant has received $3,400, to which he (the plaintiff) is entitled. If the fact be as the plaintiff alleges, then a jury or the Court must give a verdict for that specific sum, and they could not properly give any more or any less; that, it appears to me, is what is meant by a "liquidated demand." Then the plaintiff gives credit for a specified sum, of which he gives the particulars, and arrives at the balance due, which sum is a fixed and ascertained sum. The interest on this balance is not, according to the authorities, a liquidated demand, because apparently it is not alleged to be payable by virtue of any contract express or implied, but, as I gather from the endorsement, by way of damages for detention of the money after it became due, and which a jury might or might not give. This, prior to the amendment of the Rules, would have rendered the special endorsement bad as a special endorsement altogether: Holmested and Langton's Judicature Act, 3rd ed., p. 270; but Rule 33, as at present framed, expressly authorises the inclusion in a special endorsement of a claim for interest, whether payable by way of damages or otherwise.

Under the Rules as they now stand, the whole endorsement is, in my judgment, a valid special endorsement properly made of a claim which is properly the subject of such an endorsement.

Even if the interest on the balance were not the subject of a special endorsement, the endorsement would still be a valid special endorsement as to that part of the claim which was properly the subject of a special endorsement: see Rule 37, which points out what is to be done where unliquidated claims other than for interest are joined with claims which may be specially endorsed.

The defendant's motion fails, and he must pay the costs of the motion.

MIDDLETON, J. NOVEMBER 27TH, 1913.

TOWNSHIP OF ETOBICOKE v. ONTARIO BRICK PAVING CO.

Nuisance — Blasting in Quarry—Reckless Use of Explosives—Limited Injunction—Acts of Servants—Leave to Apply—Costs.

Action by the Municipal Corporation of the Township of Etobicoke, the Trustees of Public School Section No. 3 of the Township of Etobicoke, and a private individual, to restrain the defendants from committing a nuisance in the operation of a shale quarry. The Attorney-General for Ontario was added as a plaintiff at the trial. The quarry was situated in approximately the centre of a parcel of land owned by the defendants. The public school was in the same block; and the Lambton road passed immediately to the west of the quarry property.

J. D. Montgomery and W. N. Tilley, for the plaintiffs.
G. H. Kilmer, K.C., and H. H. Davis, for the defendants.

MIDDLETON, J.:—At the trial I was satisfied that on a good many occasions the defendants' servants had somewhat recklessly used an unnecessary quantity of explosives, and that the blast had frequently been of such violence as unreasonably to interfere with the rights of those living near the property.

As usual in cases of this kind, there was some slight tendency to exaggerate the inconvenience, and in some instances a

tendency to magnify the possible danger, arising, no doubt, to some extent, from a nervous condition; yet, after making all possible allowances, I was satisfied that a real grievance did exist; at the same time I thought that all the matters affording a substantial ground for complaint arose from explosions that were entirely unauthorised or quite unnecessary for the due working of the quarry.

There was suggested to counsel the desirability of an independent expert being appointed, who should inspect the works with the view of ascertaining whether they could be conducted in a manner which would not be a menace to the safety of others or so as to amount to a nuisance. This was assented to, and I nominated Mr. W. H. Grant, a gentleman who has had much experience in dealing with explosives, and he has now sent in a report of his investigations (dated the 27th October, 1913).

This report makes it quite plain that the quarry can be operated without any danger or any appreciable inconvenience to others.

I think the proper disposition of the case is to award an injunction restraining the operation of the quarry in any way so as to cause a nuisance or endanger the life or safety of those travelling upon the streets in question, or residing or being upon the land adjacent to the quarry property; and to declare further that, so long as the quarry is operated in the manner pointed out by Mr. Grant in his report, this shall not be deemed a nuisance; reserving liberty to the plaintiffs to apply, if in actual experience it should develope that in so operating the quarry there is in fact a nuisance; and reserving liberty to the defendants to apply, if it appears that the quarry cannot be satisfactorily operated in the manner and under the restrictions set forth in the report.

I think it is better to embody these provisions in the judgment rather than simply to restrain the nuisance, leaving the parties to work out their rights upon a motion to commit. The liberty to apply which is reserved is intended to secure, on the one hand, that the plaintiffs' rights shall be respected, and, on the other hand, to prevent the destruction for practical purposes of a valuable property.

Inasmuch as the action was rendered necessary by the conduct of the defendants' servants, I think that the defendants must pay the costs.

MIDDLETON, J. NOVEMBER 27TH, 1913.

*BANNISTER v. THOMPSON.

Husband and Wife—Enticement of Wife—Alienation of Affections — Deprivation of Consortium — Findings of Jury — Adultery and Harbouring not Proved—Cause of Action—Damages.

Action for enticing away the plaintiff's wife and alienating her affections, tried with a jury at Hamilton, on the 23rd October, 1912.

E. F. B. Johnston, K.C., for the plaintiff.
C. W. Bell, for the defendant.

MIDDLETON, J.:—The plaintiff alleges that the defendant "enticed away from him his wife, Annie Bannister, and procured her to absent herself unlawfully, without his consent, for long intervals, from the house and society of the plaintiff," and further alleges that the defendant "by his wrongful act has alienated from the plaintiff the affections of his wife, Annie Bannister, and deprived the plaintiff of the love, services, and society of his wife, thus destroying the peace and happiness of his household." At the close of the plaintiff's case, a motion was made for a nonsuit, upon the ground that it appeared that the wife was still residing with the plaintiff in his house, and that adultery had not been proved, and was in fact disavowed by the plaintiff. I reserved judgment upon this motion; and, after evidence had been given on behalf of the defendant, I submitted two questions to the jury, in the precise words of the plaintiff's claim.

The jury has found that the allegations above made have been established, and have assessed damages, as instructed, separately upon each count, allowing $500 upon the first head, and $1,000 upon the second.

During the course of the argument it was suggested that, if necessary for the maintenance of the action, the jury could find upon the evidence that adultery had been shewn; and, after all the evidence was in, an application was made for leave, if necessary, to amend by charging adultery. In view of this, I decided to ask the jury whether, in their view, adultery had

*To be reported in the Ontario Law Reports.

been proved; and submitted a third question: "Were Thompson and Annie Bannister guilty of adultery?" The jury has answered thus: "The circumstances look that way." With nothing more, this might be taken as an euphemistic affirmative; but that was not the intention of the jury; for they stated to me that they were unable to answer the question either in the affirmative or negative, and asked me if they might answer it in their own way, as otherwise there would be a disagreement. So that, if necessary to establish adultery, it must be taken that adultery has not been found, either expressly or as included in the "wrongful acts" attributed to Thompson.

The defendant is a Councillor of the "Reorganised Church of Jesus Christ of Latter Day Saints for the Bishopric of Canada," and is a married man.

The plaintiff and his wife had not lived any too happily for some time, yet they were far from separation. The defendant was invited to stay at the plaintiff's house, and did stay, part of the time without his wife and part of the time with her, for a considerable period. He acquired a malign influence over the wife of the plaintiff, and his conduct was such that the inference that he was guilty of adultery is almost irresistible. The jury declined to draw the inference, although stating that the circumstances all point in that direction.

Without any doubt, the misconduct of the defendant has resulted in the total alienation of the affection of the wife and the wrecking of the plaintiff's home.

The considerations applicable to each of the counts differ, and they must be treated separately.

First as to enticement. The wife, while living under her husband's roof, had entirely ceased to discharge any wifely function. She slept in her own room, locking the door, She refused to speak to her husband; and he was as fully deprived of her consortium as if she lived in a separate building.

It is said that this constitutes no cause of action, because the defendant himself has not actually received her to his own house. I do not think this is so. It is not the fact that the woman is staying with her paramour that constitutes the wrong; it is depriving the plaintiff of the wife's consortium, which, under the circumstances, is just as full and complete as if the woman had been forcibly abducted.

The case of Marson v. Coulter, 3 Sask. L.R. 485, does not support the defendant's contention. . . .

Upon the other branch of the case in hand, the defendant's

contention is based upon the dictum of Osler, J.A., in Lellis v. Lambert, 24 A.R. 664, where he says, at p. 664: "The loss of a wife's affections, not brought about by some act on the defendant's part which necessarily caused or involved the loss of her consortium, never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no 'procuring and enticing,' or 'harbouring and secreting' of the wife, no action lay at the suit of the husband against the man."

This statement is purely obiter, as the question under discussion in that case was the right of a wife to maintain an action for the alienation of the husband's affections, adultery being charged. I find myself quite unable to accept this statement of the law. I think the case of Winsmore v. Greenbank, Willes 577, establishes otherwise, and that the law recognises the right of the husband to recover damages against a defendant for any misconduct which deprives the plaintiff of the love, services, and society of his wife—to use the words of this pleading—commonly called consortium. It may be that the two counts in this statement are really an alternative description of the same wrong, and that the view already expressed sufficiently shews the plaintiff's right to recover. . . .

[Reference to Bailey v. King, 27 A.R. 703, 712, 713.]

Winsmore v. Greenbank is not, so far as I can ascertain, doubted or qualified. It is everywhere cited as authority. . . .

An unlawful procuring, it is said, is shewn where the defendant persuades the wife with effect to do an unlawful act, this rendering it unlawful in the defendant; for "every moment that a wife continues absent from her husband it is a new tort, and every one who persuades her to do so does a new injury and cannot but know it to be so." The consequence of the unlawful act was said to be sufficiently laid when it was alleged that by means thereof the plaintiff "lost the comfort and society of his wife and her aid and assistance in his domestic affairs and the profit and advantage he would and ought to have had of and from her estates." . . .

[Reference to Smith v. Kaye, 20 Times L.R. 261.]

I do not think that in this I am deciding anything in any way in conflict with the decision in Quick v. Church, 23 O.R. 263;

Bailey v. King, 27 A.R. 703; and Patterson v. MacGregor, 28 U.C.R. 280.

The judgment will, therefore, be in accordance with the findings of the jury, for $1,500 damages and costs.

MIDDLETON, J. NOVEMBER 28TH, 1913.

RE ACHESON.

Will—Construction—Disposition of Residuary Estate—Division amongst "Brothers and Sisters and their Children"—Right of Children of Brother and Sister Dying before Date of Will—Intention of Testator—Expressions Used in Will.

Motion by the executors of the will of George Acheson, deceased, upon originating notice, for an order determining a question as to the proper construction of the will, arising in the administration of the estate.

M. Grant, for the executors.

W. N. Tilley, for the brothers and sisters of the deceased and their children.

W. Proudfoot, K.C., for the children of brothers and sisters of the deceased whose parents died before the will.

MIDDLETON, J.:—The question now arising upon the construction of this will lies in narrow compass. The testator at the date of his will had brothers and sisters then living. His brother John had predeceased him, leaving six daughters. His sister Elizabeth had predeceased him, also leaving a family. The testator gave legacies to the different members of these families, as well as to his surviving brothers and sisters and their children, giving to each family sums aggregating about $9,000. Then he directs the residue to be "divided equally between my brothers and sisters and their children." The question is, whether, under this, the children of the deceased brothers and sisters take.

After very careful consideration, I have concluded that they do not. Subject to the two considerations yet to be mentioned, the case is clear. Where the testator speaks of his "brothers and sisters," unless there is something in the con-

text to indicate otherwise, he is speaking of brothers and sisters then alive. See Re Fleming, 7 O.L.R. 651. And when this expression is varied by the words "and their children" these words are clearly confined to the children of brothers and sisters then living.

Against this it is urged in this case that the testator in the will has spoken of his nieces as "daughters of my brother John." I do not think that this shews a contrary intention or an intention that they should share.

Much more formidable is the difficulty arising from the fact that the testator had only one sister who survived him, and yet he uses the plural "sisters." I do not think that this is sufficient to indicate an intention to give anything to the sister already dead. Unless this is so, the children of that sister cannot take under the will.

Had the direction in the will been to divide the residue between "the children of my brothers and sisters," then I think that there would have been sufficient to indicate that the children of the dead brother and sister should be included. But I cannot read the will as being equivalent to this. The controlling words are the earlier words of the clause. The division is to be between the brothers and sisters—i.e., those living—and their children.

I am not asked to determine how the fund should be divided between the brothers and sisters and their children. The parties, it is said, can agree to that; they are all adults.

Costs may come out of the estate.

LENNOX, J. NOVEMBER 28TH, 1913.

BROCKVILLE AND PRESCOTT ROAD CO. v. COUNTIES OF LEEDS AND GRENVILLE.

Highway—Tolls Road Expropriation Act, 1 Edw. VII. ch. 33, Amended by 2 Edw. VII. ch. 35—Expropriation of Road—Costs of Arbitration—Parties to Arbitration—Townships Interested—Liability of County Corporation—Construction and Application of Statutes—Retroactivity—Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, cl. 46 (c)—Tolls Road Act, 2 Geo. V. ch. 50, secs. 76, 80—4 Edw. VII. ch. 10, sec. 68.

Action to recover $875.30, the costs of arbitration proceedings, under the Toll Roads Expropriation Act, 1901, to ascer-

tain the amount to be paid by the defendants as compensation for the abolition of tolls on the plaintiffs' road from Brockville to Prescott. The arbitrators found that the defendants must pay $17,321; and, the plaintiffs' road not having been taken and paid for within a year, the plaintiffs sued to recover these costs.

F. J. French, K.C., for the plaintiffs.
J. A. Hutcheson, K.C., for the defendants.

LENNOX, J.:—This case is not distinguishable in principle from United Counties of Northumberland and Durham v. Townships of Hamilton and Haldimand (1905), 10 O.L.R. 680. There the counties paid the owners' costs and brought action to recover them from the townships in which the petitions originated; here the owners bring action for costs exactly of the same class, and the defendants say: "We are not liable to pay these costs; you should recover them from the townships in which the petitions originated." In this case, differing in this respect from the Northumberland case, the petitions were presented to the county council, and the county council took the proceedings provided by the Toll Roads Expropriation Act, without the intervention of the township councils. If this circumstance were material, it would go to assist the plaintiffs, but I agree with the learned Chancellor that it does not affect the rights or liabilities of the parties.

There is another point of difference, namely, that upon the arbitration proceedings in this case the township municipalities were represented by counsel, but this was in spite of the protest of the plaintiffs.

It would not be proper to say here whether this may or may not affect the obligations, if any, the one to the other, of the township and county municipalities; it is enough for the purposes of this case to say that the representation of the township under such circumstances cannot prejudice the rights of the plaintiffs.

The defendants contend that they are not or should not have been treated as parties to the expropriation proceedings; that in all they did they merely executed a duty imposed upon them by statute; and they were not, in law at all events, represented upon the arbitration proceedings. The clerk of the county and the warden gave evidence to shew that counsel was not authorised to appear for the county. As a matter of fact, Mr. H. A. Stewart, the county solicitor, appeared at the arbitration, stating

that he represented the counties and one of the townships, and the subsequent proceedings appear to have been conducted upon this understanding. Mr. Stewart, no doubt, acted in good faith, but he was not called as a witness to state how the error occurred, if any there was. This circumstance again is immaterial.

It is quite true that the duty of doing what the defendants did is imposed by statute, but this, to my mind, so far from relieving them, makes them the actors on one side in the transaction; and there being no other source of payment indicated by the statute, and it being clearly provided that these costs, in the event which has happened, are to be paid to the plaintiffs, the inference is very strong, and I think conclusive, that, as between the parties to this action, these costs are to be paid by the defendants.

I am referred to 2 Geo. V. ch. 50, secs. 76 and 80, and it is urged that these provisions were in force at the time the costs became "certainly payable." Subject to appeal, the rights and liabilities of the parties were determined when the award was filed; and to hold otherwise would, I think, be clearly contrary to principle and in conflict with the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, clause 46, sub-clause (*c*).

I have endeavoured to trace the legislation since 1901, and I am of opinion that this case is to be decided under the statutes which governed in the Northumberland case, namely, 1 Edw. VII. ch. 33 and 2 Edw. VII. ch. 35. The difficulty arises, I think, from a failure to link the sections with their amending sections and to distinguish clearly between principal and subordinate sections. By the Act of 1902, ch. 35, above referred to, secs. 3, 4, and 5 of the Act of 1901 are repealed, and secs. 3 and 4, each having a number of sub-sections, take their place. These sections are to take the place, by substitution and number, of the old sections, but there is no longer a sec. 5. Then it must be kept clearly in mind that the new sections are broader than the old ones, and provide for a distinctly new class of expropriation not touched at all by secs. 3, 4, and 5 of ch. 33. Further, it must be noted that sec. 3 alone, with its sub-secs. (1) and (2), covers the whole ground formerly covered by secs. 3, 4, and 5, namely, the case of a single township within a county desiring to expropriate, in which the township and the owners are the only actors in the transaction, and the case of the county, or the ratepayers in two or more townships within a county, desiring to expropriate,

in which case the sole actors are the county upon the one side and the owners upon the other. The result is, that secs. 4 and 5 of the Act of 1901 are carried up into sec. 3 as introduced by the new Act, and there ceases to be a sec. 5. Then, as to sec. 4, the number is retained, and it takes its place in the old Act by virtue of the new Act as sec. 4, but it no longer deals with a township or two or more townships within the same county, but with an entirely new subject, namely, a toll road lying partly in a county and partly within a city or separated town, or partly in another county, and provides for expropriation in such case and the procedure by which it can be effected. A new section is also substituted by the Act of 1902 for sec. 9 of 1901, and sec. 10 is amended, but there is nothing to be said about this except that the change is necessitated by the new field opened up by sec. 4; and these changes go to prove what I have pointed out.

The whole contention in this case, however, arises out of a misconception of the meaning and office of the next amendment, namely: "4. Sub-section 8 of section 8 of the said Act is amended by adding thereto the following: 'In any case falling under section 4 the road shall be taken and the amount agreed on or awarded shall be paid within one year as aforesaid unless both municipalities elect that the road shall not be taken and so notify the owner and in that case the costs to which the owner has been put shall be paid by the municipalities in equal shares.' "

What municipalities are to pay "in equal shares," and what sec. 4 is referred to? Manifestly the sec. 4 introduced into the old Act by the new Act and the municipalities dealt with by that section. It has no reference whatever to two or more townships within the same county. This meaning is further manifested in sec. 68 of 4 Edw. VII. ch. 10; and as to sec. 80 of the Act of 1912, if it could be regarded as affecting an award made before it was passed, it would be enough to say that the townships passed no by-law of any kind, and the counties did—albeit they were compelled to do so under the Act, as contended.

Then as to the contention that the defendants should not have been made parties. I have already intimated that they are statutory parties; and, so far as I can see, there is no authority for treating the townships as substitutes. But, aside from this, how can effect be given to this objection now? The award was made on the 23rd and filed with the defendants' clerk on the 24th January, 1912. It came to the notice of the county council and was discussed. The defendants are parties to the

award on the face of it, and the arbitrators state that the majority of them "do hereby determine and award that the price or compensation to be paid by the county municipality to the owners of the road in order that the tolls on such road may be abolished is the sum of $17,321," and they fix the costs at $875.30

The defendants have not appealed. That was their remedy, if any, it seems to me.

The costs in detail are not disputed. It was agreed at the trial that the defendants, if liable at all, are liable for the sum claimed. There was a demand for payment served, but I do not know when. I cannot see that a demand was necessary. The costs are payable at a time certain, that is, a year after the making of the award.

There will be judgment for $875.30, with interest thereon from the 25th January, 1913, and the costs of the action.

BRITTON, J. NOVEMBER 29TH, 1913.

WALKER v. SKEY.

Vendor and Purchaser—Agreement for Sale of Land—Dispute as to Depth of City Lot—Interpretation of Agreement—Action for Specific Performance — Repudiation by Purchaser of Agreement by Vendors — Return of Deposit—Counterclaim—Damages—Costs.

Action for the specific performance by the defendants of an agreement by them for the sale of land in Toronto.

A. C. McMaster, for the plaintiff.
E. E. A. DuVernet, K.C., for the defendants.

BRITTON, J.:—The plaintiff sets up an offer by him to purchase from the defendants, for $21.840, the premises at the north-east corner of Dufferin and Dundas streets, which premises have a frontage of about 182 ft. on Dundas street and of about 111 ft. on Dufferin street, and have a depth at the easterly limit of 140 ft. to a lane, running at right angles to Dufferin street, the south limit of which said lane was to form the northerly limit of the land in question. This offer, as the plaintiff alleges, was accepted by the defendants, but they now refuse to carry it out. The plaintiff paid $1,000 deposit on account of

the purchase. The plaintiff avers a readiness and willingness to pay the balance and to carry out all the terms of the contract.

The defendants set out the offer of the plaintiff in full, and the acceptance of it. In this offer the land is described as follows: "All and singular the premises situate on the north side of Dundas street, the parcel of land known as lot No. —, Plan No. — as registered in the registry office for the said city of Toronto, having a frontage of about 182 ft. by a depth of about 111 ft. more or less, starting from the north-east corner of Dufferin and Dundas streets, running east 182 ft. on Dundas street." The price was fixed at $21,840, made up at $120 a foot frontage for 182 feet.

The defendants alleged that the plaintiff was never ready or willing to accept the property according to the real contract between the parties, but, on the contrary, that the plaintiff repudiated the real contract, and asserted and continued to assert, as he did in his bringing this action, that he was entitled to land to the depth of 140 ft at the eastern end of the said lot. The defendants gave a formal notice of cancellation of the contract, and they now ask for a declaration that the contract is cancelled and at an end, and that the deposit of $1,000 is forfeited to the defendants.

In reply the plaintiff denies that the defendants tendered any mortgage; denies that the agreement was properly cancelled; asserts that the defendants had not properly cleared the title so as to be in a position to convey to the plaintiff. The plaintiff also objects that the letter of the defendants attempting to cancel the agreement was not a reasonable notice. As an alternative, and by way of counterclaim, the plaintiff states his willingness now to accept the land according to the defendants' interpretation of the contract, viz., the land to be of the depth of 111 ft. throughout.

The plaintiff has failed to establish a contract for the sale, by the defendants, of the land described in the plaintiff's statement of claim. The evidence does not satisfy me that there was any verbal agreement or understanding, on the part of the defendants, that the plaintiff was to get a lot of land to the depth of 140 feet, at the eastern end of it; so the plaintiff has failed.

The remaining question is, can the plaintiff now, by his late willingness to accept the contract according to the defendants' interpretation, and I think correct interpretation, compel the

defendants to complete the sale? The defendants are trustees, and they and those for whom they act are entitled to have all the terms and conditions strictly complied with on the part of the purchaser. The situation is apparently somewhat changed since the defendants accepted the plaintiff's offer. The offer was made on the 28th October and accepted on the 30th. On the 14th November, the plaintiff's solicitors sent to one of the defendants requisitions on title. On the 3rd December, the plaintiff's solicitors asked for, and on the 17th December received, a draft deed. There was a good deal of correspondence, and there were many conversations in regard to certain restrictions to be embodied in the conveyance or to be provided for by separate agreement. On the 18th December, the defendants' solicitors asked for return of draft deed at earliest convenience, stating that it was a matter of much importance to have the sale closed. On the 23rd December, the defendants' solicitors wrote again, principally about restrictions, but again asked for the return of the draft deed and approval of it. On the 3rd January, the plaintiff's solicitors returned the draft deed approved, and on the 6th January, for the defendants' solicitors answered requisitions on title.

On the 9th January, the defendants' solicitors wrote to the plaintiff's solicitors as follows: "Referring to the many interviews we have had with reference to the restrictions herein, we enclose herewith further draft deed which contains the whole of the restrictions agreed upon by your client Mr. Walker, when the sale was arranged for. We have gone over these restrictions, and our clients tell us that they are absolutely correct in form, and they further tell us that your client will endorse them in the form in which we have put them. This matter has hung fire now for a very long time, and we must have this deed returned, either approved or not, before Saturday morning, as, if it is not approved in the form in which we have drawn it, our clients will not carry out the sale."

The draft deed was not returned on the Saturday, and the defendants' solicitors, on Monday the 13th January, wrote to the plaintiff's solicitors postponing the time for the return of the draft deed until the following Thursday. The plaintiff's solicitors wrote to the defendants' solicitors on Wednesday the 15th January, but the letter had reference to restrictions, rights of parties, etc. After that letter, the parties were at arm's length. On the 20th January, the plaintiff's solicitors wrote to the defendants' solicitors, and for the first time raised the

question that the description of the land should give to the plaintiff a depth of 140 feet on the eastern limit. The defendants did not consent to this, and negotiations as to other details continued. The conveyance was executed, and, on the 21st February, the plaintiff's solicitors wrote stating that the conveyance must be amended so as to make the description conform to the plaintiff's contention. They said that Mr. Walker insisted upon getting the additional 40 ft. After telephone conversations and conferences between solicitors, the defendants on the 25th February wrote appointing the following Thursday to close. The plaintiff was not ready to close, and did not recede from his contention that he should get the 140 ft. on the eastern limit; so the plaintiff's solicitors, on the 27th February, wrote cancelling the agreement.

After all the negotiations and delay and the plaintiff's continued refusal to accept, the case is not one for specific performance of the contract as the defendants interpreted it. The plaintiff was unwilling to carry out and resisted carrying out the real contract until his reply to the statement of defence. The position taken by the plaintiff is, that he was right in his interpretation of the contract, that he was right in refusing to complete the purchase when the defendants were ready, but that, now, if he fails in his contention, he is willing to accept the defendants' interpretation, as there will be a profit to him in so doing. If a profit to him, there will be a corresponding loss to the cestuis que trust. As between the parties, the defendants are entitled now to consider the agreement at an end.

The plaintiff's case is built upon Preston v. Luck, 27 Ch.D. 497. The present case goes much further in standing for and asserting an alleged contract not proved. The negotiations between the respective solicitors for the parties were exceptionally full and protracted. The plaintiff took his stand upon a contract the evidence of which the defendants denied. The plaintiff took his chance to get more than the defendants intended to sell, and he should not now complain if the defendants called off the whole agreement.

I find that the plaintiff did repudiate the contract, and that the defendants did not refuse to carry out the sale until after such repudiation.

I am of opinion that the defendants did all that was necessary to cancel the contract, and that the notice of such to the plaintiff was sufficient as to form and substance, and that the notice in point of time was reasonably sufficient under the circumstances.

The defendants, by the letter of their solicitors of the 25th February, 1913, stated that they would return to the plaintiff the cheque for $1,000 deposit. Counsel for the defendants, at the trial, said that he did not ask to have that deposit forfeited to the defendants.

The plaintiff should get a return of his deposit. If the cheque was used, the defendants should pay interest at five per cent. upon the amount from the 25th February, 1913. If not used, the claim for $1,000 will be satisfied by a return of the cheque so deposited.

Upon the evidence, it is clear that there would have been no difficulty in clearing the title if the plaintiff had accepted the contract. The matters in that respect complained of by the plaintiff were matters of adjustment.

The defendants counterclaimed for damages. They have sustained no damages other than the trouble of litigation. There will be a declaration that the contract was properly cancelled, and is now at an end.

There will be judgment for the plaintiff for $1,000, as above stated, without costs.

The counterclaim of the defendants will be dismissed without costs.

LENNOX, J. NOVEMBER 29TH, 1913.

RE CLAREY AND CITY OF OTTAWA.

Municipal Corporations—Waterworks By-law—Powers of Council—Expenditure of Money—Special Act, 3 & 4 Geo. V. ch. 109—Exceeding Sum Fixed by Act—Motion to Quash By-law—Discretion.

Motion by Thomas Clarey to quash a by-law of the City of Ottawa.

T. McVeity, for the applicant.
F. B. Proctor, for the Corporation of the City of Ottawa.

LENNOX, J.:—In the month of May, 1913, the Legislature of Ontario, by 3 & 4 Geo. V. ch. 109, authorised the Corporation of the City of Ottawa to construct waterworks for the use of the inhabitants of the city, partly within and partly beyond the

limits of the Province of Ontario, and, amongst other incidental powers, conferred the right to take and hold land, lakes and water powers in Ontario, and also in the county of Ottawa, in the Province of Quebec. The City of Hull is not mentioned, although it is intended that the water mains shall be carried through that city, and probably water disposed of there. Subsequently a special Act was passed by the Dominion Parliament, which I need not examine; and the Municipal Council of Ottawa is endeavouring to obtain legislation in the Province of Quebec and to make arrangements with the City of Hull.

In October last, Sir Alexander R. Binnie, having taken into consideration and estimated the cost of various waterworks schemes, reported in favour of obtaining a water supply from Thirty-one Mile Lake, Pemichangaw Lake, and Long Lake, in the Province of Quebec, and that the undertaking would cost $7,985,200. The Mayor of Ottawa thereupon transmitted the report, and a great number of other estimates, reports, and proceedings relating to a waterworks system for Ottawa, to the city council, and strongly recommended the adoption of the Binnie report and the prompt carrying on of the work on these lines. Amongst other things, the Mayor's report stated: "The estimated cost of the whole proposition, including the acquisition of the lakes, land, and watershed of 150 square miles, right of way, etc., is $7,985,200, say $8,000,000. . . . Under the special Act obtained at the last session of the Ontario Legislature, fifty-year debentures can be issued for the scheme. The annual interest and sinking fund on $8,000,000 is $412,000, as per the letter of the City Treasurer attached. To this is to be added $15,000 per annum for maintenance, making a total annual expenditure of $427,000."

At a special meeting of the council holden on the 17th October, 1913, called for the sole purpose of considering the Binnie report and waterworks question, the report of Sir Alexander R. Binnie was approved and adopted, and thereupon, following and based upon this report and the matters reported by the Mayor, and on the same day—whether at the same meeting or not I do not know—the by-law in question, authorising the construction of these works, was introduced, read a first, second, and third time, and passed by a two-thirds vote of the council.

This by-law is moved against, and a great many reasons are pointed out why it should be quashed: but, although many of these objections may be well taken, I still think, as I thought upon the argument, that the broad outstanding question, and

one which goes directly to the merits, is: Can this by-law be said to be a bonâ fide and legitimate exercise of powers conferred by the Ontario Legislature under the Act referred to?

A careful perusal of the provisions of the statute leads me to the conclusion that the Act does not authorise the doing of what the respondents have done. The Legislature confers upon the municipal council power to pass a by-law with the approval of the Board of Health, and without the consent of the electors, to raise a sum not exceeding $5,000,000 for the construction of waterworks of the same general character as in the by-law is provided for. It is true that this by-law provides for the issue of debentures to the amount of $5,000,000 only; but it is founded upon the Binnie report, recites it, and provides for the carrying out of a work which is to cost at the lowest $8,000,000; and, once the money is borrowed, the work entered upon, and the $5,000,000 expended, the city must go on and complete it, cost what it will, or lose these millions. Did the Legislature intend this, a limited borrowing power, but an unlimited commitment? I should require clear language to make me believe it. I think the language is clearly the other way. Sub-section 4 of sec. 2 says that the corporation may issue debentures at 50 years and borrow "a sum not exceeding $5,000,000 to provide for the cost of the construction of the said works and the acquisition of the water, lake or lakes, land and water powers."

Can this mean that the council can enter upon and put the money into a billion dollar scheme, so long as the initial borrowing does not exceed $5,000,000? The undertaking admittedly exceeds the borrowing power by 60 per cent., and in the working out another 60 per cent. may be added; but the point is that, if the undertaking is not limited to $5,000,000, it is not limited at all.

The council have availed themselves of the special privileges of the statute, and the privileges are exceptional and generous; they must accept the limitations as well.

It was argued that the council could have effected their purpose in another way. I have nothing to do with that. I have to deal only with what was done. The by-law purports to be under this Act; they must justify under it.

I have not overlooked the almost supreme importance of an early supply of pure water in Ottawa, but this must be obtained by regular and authorised methods. This work is earmarked; it is of an exceptional character; it is a proposal to go out 50 miles or so into another Province; and the cost had not been

even approximately ascertained when the Legislature was appealed to. Surely it was not intended that, without consulting the ratepayers, the council would have power to commit them to an unlimited expenditure. What the Legislature certainly meant was: "You may do this work, as a council, if you find you can do it for $5,000,000, but not otherwise."

I was reminded of my discretionary powers. The discretion against quashing is well exercised where the violation of law is merely technical, where no right is violated, and the by-law will work substantial justice; but here the property of every land-owner in Ottawa is being pledged for a sum equal to the total debenture debt of the city as it now is, and this, as I understand it, without legal sanction.

Entertaining this opinion, whatever the merits of the scheme and however urgent the need of it may be, I have no discretion, I have no right to say that the people's right to pronounce upon the expenditure as actually proposed and disclosed, either directly at the polls or through their representatives in the Legislature, shall be denied.

The by-law will be quashed with costs.

WEBSTER v. HENDERSON—LENNOX, J.—NOV. 27.

Fraud and Misrepresentation—Sale of Farm—Action for Deceit—Damages.]—Action to recover $2,000 damages for false and fraudulent representations whereby, as the plaintiff alleged, he was induced to purchase the defendant's farm. The learned Judge, at the conclusion of the hearing, made certain findings of fact against the defendant; and now stated, in a brief memorandum of judgment, that it followed upon those conclusions of fact that the plaintiff was entitled to recover damages against the defendant. The learned Judge was satisfied that the plaintiff was sincere in saying that he would rather be free of the contract than receive $2,000 by way of damages; but the plaintiff was not the best judge upon that question. Judgment for the plaintiff for $950 damages and the costs of the action; stay of execution for thirty days. J. A. Hutcheson, K.C., for the plaintiff. W. E. Raney, K.C., for the defendant.