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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

JANUARY 23RD, 1917.

RUDDY v. TORONTO EASTERN R.W. CO.

Railway—Expropriation of Land—Compensation—Arbitration—Award—Appeal—Railway Act, R.S.C. 1906 ch. 37, sec. 209.

Appeal by Ernest L. Ruddy, by special leave, from the judgment of the Supreme Court of Canada reversing the judgment of the Second Divisional Court of the Appellate Division, Re Ruddy and Toronto Eastern R.W. Co. (1915), 7 O.W.N. 796.

The respondents took for the purposes of their railway part of the appellant's land near Toronto. An arbitration to assess the compensation payable to the appellant was held by three arbitrators under the Railway Act, R.S.C. 1906 ch. 37, under which Act a valid award may be made by any two of the arbitrators. By an award of two of the arbitrators the compensation was assessed at $3,500. The appellant appealed, under sec. 209 of the Act, to the Supreme Court of Ontario (Appellate Division), which increased the award to $13,850, the amount found by the dissenting arbitrator. Upon a further appeal to the Supreme Court of Canada, the original award was restored, by a majority of three Judges to two.

The appeal was heard by a Board composed of LORD BUCKMASTER, LORD DUNEDIN, LORD PARKER OF WADDINGTON, LORD PARMOOR, and LORD WRENBURY.

D. L. McCarthy, K.C., and T. L. Monahan, for the appellant.

Clauson, K.C., and J. A. McEvoy, for the respondents.

LORD BUCKMASTER, in delivering the judgment of the Board, said that in an appeal under sec. 209 of the Railway Act the award

was placed in a position similar to that of the judgment of a trial Judge. The appeal lay both upon fact and law; but upon questions of fact the award should not be interfered with unless there was some good and special reason for doubting the soundness of its conclusions. In the present case the arbitrators appeared to have examined the evidence with great care, and had inspected the property on two occasions. There was no ground for the holding upon the first appeal that the award had proceeded upon a wrong principle. It should therefore be upheld.

Appeal dismissed with costs.

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MARCH 26TH, 1917.

W. A. STONE & Co. v. NATIONAL COAL CO.

Partnership—Promissory Note Signed in Firm Name—Liability of Member of Firm—Recognition by Endorsement—Satisfaction—Lost Instrument—Security.

Appeal by the defendant Stander from the judgment of BRITTON, J., 11 O.W.N. 309.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

W. S. Brewster, K.C., for the appellant.

J. Harley, K.C., and A. M. Harley, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. MARCH 26TH, 1917.

W. A. STONE & CO. v. STANDER.

Fraudulent Conveyance—Action to Set aside—Evidence—Intent.

Appeal by the plaintiffs from the judgment of BRITTON, J., 11 O.W.N. 315.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. Harley, K.C., and A. M. Harley, for the appellants.

W. S. Brewster, K.C., for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. MARCH 30TH, 1917.

RE PORT ARTHUR WAGGON CO. LIMITED.

SMYTH'S CASE.

Company—Winding-up—Contributory—Agreement to Take Shares in Company to be Formed—Inapplicability to Company Actually Formed—Acceptance of Shares—Acting as Director—Estoppel—Acquiescence—Allotment — Necessity for—Companies Act, R.S.C. 1906 ch. 79, sec. 46—Common and Preferred Shares—Appeal—Divided Court.

Appeal by the liquidator of the company from the order of BRITTON, J., 9 O.W.N. 383, reversing an order of the Master in Ordinary, in a reference for the winding-up of the company, confirming the placing of the name of W. R. Smyth upon the list of contributories.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. W. Bain, K.C., and P. White, K.C., for the appellant.

Strachan Johnston, K.C., for W. R. Smyth, the respondent.

MEREDITH, C.J.C.P., and RIDDELL, J., were of opinion, for reasons stated by each in writing, that the appeal should be

allowed and the order of the Master restored, the respondent being the holder of unpaid shares and so liable as a contributory.

LENNOX and ROSE, JJ., were of the contrary opinion, for reasons stated by each in writing.

THE COURT being divided, the appeal was dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 20TH, 1917.

LOUDON v. SMALL.

Contract—Sale of Hotel Business—Time for Completion—"If Possible"—Action for Balance of Purchase-money—Terms of Contract not Fully Carried out by Vendor—Failure to Procure Lease of Premises Freed from Option to Purchase Business—Possession Given and Rent Paid—Liquor License Transferred and Business Carried on—Failure of Purchaser to Shew Breach of Contract by Vendor—Specific Performance—Injury to Hotel Business by Enactment of Prohibitory Liquor Law—Effect upon Contract—Counterclaim—Damages—Tender of Lease.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of LATCHFORD, J., 11 O.W.N. 268, in an action to recover the purchase-money of an hotel business sold by the plaintiff to the defendant in July, 1914, for $40,000.

The appeal and cross-appeal were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

W. N. Tilley, K.C., for the defendant.

W. G. Thurston, K.C., for the plaintiff.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the contract of the parties was not that the sale should "be completed by the 1st August, 1914," but that it should be completed then "if possible"—meaning if possible from the point of view of business men in a business transaction of this kind. The plaintiff was being what is commonly called "held-up" unconscionably by a third person whose consent was needed to enable the plaintiff to complete the contract on his part; the de-

fendant was in possession, and had in equity all that he was entitled to except this consent, which gave excuse for non-payment of money which otherwise the defendant should have paid, and enabled him, if he found the purchase profitable, to go on as he was in full enjoyment of the property—otherwise to give reasonable notice to complete, and, in case of failure on the part of the plaintiff to do so, to get out of a bad bargain. The only disadvantage would be a possible inability to sell if he desired to do so. But, upon the whole evidence, he really never had any desire to do so until his occupation was gone, taken away by provincial legislation. The shadowy story of a desire and opportunity to sell, frustrated by non-completion of this contract, had no real weight. And so the plaintiff never broke his contract, and could recover at law upon it.

The matter was gone into at the trial fully, in all its aspects, and much more so as an action for specific performance than as an action merely for money payable under the contract. The action should be treated as one for specific performance: and, so treated, even if the words "if possible" formed no part of the contract, and if time were of the essence of the contract, there was no breach of the contract, the defendant having waived, obviously and repeatedly and in most substantial ways, any right he might otherwise have had in that respect.

There was nothing in the technical objections to the form of the lease tendered eventually. If a tender were necessary on the part of the plaintiff, it was made unnecessary by the position taken and still insisted upon by the defendant, that he was not bound by and would not carry out the contract, because of the plaintiff's delay and because of the Act of the Legislature (the Ontario Temperance Act, 1916) in making worthless the business carried on by him and for the purpose of carrying on which alone he made the purchase in question.

That the legislation had no effect upon the contract seemed plain. The contract was entered into with a full knowledge that such legislation might be enacted. The defendant got possession of all he bargained for—the plaintiff was not responsible for the disastrous effect of the legislation.

The coronation procession cases (such as Krell v. Henry, [1903] 2 K.B. 740) were inapplicable. It was not intended by either party that the sale of the lease was to be dependent upon the continuance of the liquor license laws as they were when the contract was made or upon their continuance at all.

The plaintiff should have the usual vendor's specific perform-

ance judgment as applicable to the facts of this case, or such other judgment as the parties may agree upon as suitable.

The contract not having been broken by the plaintiff, the defendant could not have damages for a breach of it.

Appeal dismissed with costs; cross-appeal allowed with costs.

SECOND DIVISIONAL COURT. MARCH 30TH, 1917.

*MORRISON v. MORRISON.

Partition—Summary Application for Order for Partition or Sale of Lands of Intestate—Rule 615—Right of Dowress to Compel Partition—Undisputed Right to Dower—Right to Possession—Partition Act, R.S.O. 1914 ch. 114, secs. 4, 5—Devolution of Estates Act, R.S.O. 1914 ch. 119, secs. 9, 13—Adverse Claim of Title—Issue—Parties—Personal Representative.

Appeal by the defendant Philip Morrison from the order of CLUTE, J., 11 O.W.N. 294, 38 O.L.R. 362.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

I. Hilliard, K.C., for the appellant.

H. S. White, for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the respondent applied for partition, under Rule 615, which provides that "an adult person entitled to compel partition of land or any estate or interest therein" may so apply. Clute, J., held that the respondent was a person entitled to compel partition, but delayed the partition until after the trial of an issue, which he directed, to determine whether the appellant had acquired title to the land under the Statute of Limitations.

The only interest the respondent had was as the widow of Alexander Morrison, deceased, who died intestate on the 9th January, 1915, seised in fee of the land, leaving his brother (the appellant), three sisters, one nephew and one niece, his only heirs at law and next of kin, and the respondent his lawful widow, him surviving.

* This case and all others so marked to be reported in the Ontario Law Reports.

The land was at one time let by Alexander Morrison to the appellant; but the appellant now asserted that he had had such possession of it, since that time, as to give him title to it.

In the issue directed the widow was made plaintiff and the heirs at law and next of kin defendants.

No one disputed the widow's right to dower—nor could under the Statute of Limitations—so that, as directed, the issue could be only a useless proceeding. The indirect purpose, however, was to determine, if possible, whether the appellant had acquired title to the land, not against the widow but against the appellant's co-heirs, so that she might be in a better position to make an election, under sec. 9 of the Devolution of Estates Act, whether to take under or against the provisions of that enactment.

There was no power to make use of Rule 615 for that purpose: it is applicable only to one entitled to compel partition, and is to be used only for the purpose of making partition. If she could compel partition at all, it could only be if she were not taking under the Devolution of Estates Act. And the issue directed could not aid such a purpose. The only question that could be tried was, whether the appellant had acquired a title against the respondent, and it was admitted and was obvious that he had not. No issue was directed between the appellant and the other heirs at law—none could be directed against their will; such an issue would be improper and might be useless.

The land, if it were the intestate's at the time of his death, had not yet devolved upon the heirs at law, but had devolved upon his personal representative. The respondent should become such personal representative, and then bring an action to recover possession of the land from the appellant.

All the heirs at law mentioned had been made parties to these proceedings, and the order for the issue had been made against them, although the appellant only had had notice of these proceedings. The names of all who had not had notice should have been struck out.

The issue ought not to have been directed, and must be set aside with the order directing it.

Again, a widow entitled to dower out of the whole of the land, which dower has not been assigned, is not a person who can "compel partition." A right to possession must exist to entitle any one to compel partition.

Review of the law and authorities upon this point.

Again, an application such as this, not only made within the three years (sec. 13 of the Devolution of Estates Act), but before

a personal representative has been appointed, is not only unwarranted but inexcusable.

The appeal should be allowed, the order directing the issue discharged, and the application for partition dismissed.

SECOND DIVISIONAL COURT. MARCH 30TH, 1917.

*GERMAN v. CITY OF OTTAWA.

Highway—Nonrepair — Sidewalk — Snow and Ice — Injury to Pedestrian—Municipal Act, R.S.O. 1914 ch. 192, sec. 460 (3) —Gross Negligence—Failure to Shew—Climatic Conditions—Means of Protection against—Evidence.

Appeal by the defendants from the judgment of BRITTON, J., 11 O.W.N. 331.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

F. B. Proctor, for the appellants.

H. H. Dewart, K.C., for the plaintiff, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that sec. 460 of the Municipal Act, R.S.O. 1914 ch. 192, had imposed upon the appellants the duty of keeping in repair "every highway and every bridge" within its territorial limits; and the single question involved was, whether they were guilty of gross neglect of that duty in respect of the place, in one of such highways, where the respondent fell and was injured, at the time when he so fell and was injured. The question was, whether it had been proved that the icy condition of the ways, at that time, was the result of, or that the absence of anything placed upon or done to them was, a neglect of the duty mentioned.

Negligence alone gave no right of action: the personal injury being caused by snow or ice upon a sidewalk, there must be gross negligence: sec. 460 (3).

The appellants' duty was to take all reasonable means to keep the highway in repair—to do that which reasonable men charged with such a duty would do in the performance of it in order to keep the highway in a condition sufficient for the needs of the traffic over it. The appellants' means and methods provided for the performance of this duty were good—more than ordinarily so.

The plaintiff's injury was on a Wednesday; and the sidewalk, according to the witnesses for the defence, had been sanded on the previous Monday. No one could reasonably assert that the failure to "sand" or to "harrow" the many miles of sidewalks in the city of Ottawa which needed it, before ten o'clock in the morning of Wednesday, was anything like evidence of negligence, gross or slight.

It was argued that the appellants should have so constructed and maintained their sidewalks as that the rain or melted ice or snow could not destroy the effect of protection methods—sand and harrowing. But there was no evidence of any kind upon which defective construction or want of keeping up of the sidewalk could be supported. If there be a means by which that can be accomplished, in this country, it has not yet been made known: see Papworth v. Battersea Corporation, [1916] 1 K.B. 583.

There was no evidence of negligence, not to speak of gross negligence, on the part of the appellants. On the contrary, there was uncontradicted evidence that the appellants took more than ordinary care to keep the highways in Ottawa in repair generally, and especially during the unusually trying weather conditions immediately before and at the time of the respondent's unfortunate accident.

The appeal should be allowed and the action dismissed.

ROSE, J., agreed.

LENNOX, J., agreed in the result, for reasons stated in writing, in which RIDDELL, J., concurred.

Appeal allowed.

SECOND DIVISIONAL COURT. MARCH 30TH, 1917.

*DICK v. TOWNSHIP OF VAUGHAN.

Highway—Nonrepair—Breach of Statutory Duty—Loss Occasioned by Having to Use another Way—Bridge—Traction-engine—Right of Action—Damages—Remoteness.

Appeal by the defendants from the judgment of the County Court of the County of York in favour of the plaintiff for the recovery of $75 and costs in an action for damages for injury to

the plaintiff's business by the neglect of the defendants to repair a bridge over the Humber river, thus preventing the plaintiff from taking his traction-engine and threshing-machine across it.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

W. Proudfoot, K.C., for the appellants.

G. S. Hodgson, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment, in the result of which the other Judges named concurred, in which he said that the plaintiff owned a threshing-machine, operated by a small steam-engine on wheels, commonly called a traction-engine, and took them, after harvest, to such of his neighbours, over a more or less extended district, as employed him to do their threshing. He lived upon the highway of which the bridge in question formed part; and had occasion to take his engine and threshing-machine over the bridge, once in a while. Thinking that the bridge was not strong enough to carry the weight of his engine, he asked the defendants to strengthen it. On the advice of their engineer, they declined to do more than was done by them; contending that it was strong enough; and assuming any risk in the plaintiff's crossing. The plaintiff refused to take any risk, and went by a longer way rather than cross the bridge. The trial Judge found that the bridge was not strong enough, or rather that, by reason of its limited carrying power, the plaintiff was justified in refusing to cross; and that the plaintiff had sustained loss by reason of going upon his threshing business by some other way.

The finding was, that the defendants failed to perform their duty to keep the highway in repair, and that the plaintiff sustained some loss by reason thereof.

The learned Chief Justice was of opinion that the plaintiff had no right of action for damages for breach of duty; he might have a remedy by indictment, mandamus, or injunction. And, in any case, the damages were too remote.

The following cases, among others, were referred to: Hislop v. Township of McGillivray (1887-90), 12 O.R. 749, 15 A.R. 687, 17 S.C.R. 479; Cummings v. Town of Dundas (1907), 13 O.L.R. 384; Strang v. Township of Arran (1913), 28 O.L.R. 106; Hubert v. Township of Yarmouth (1889), 18 O.R. 458; Iveson v. Moore (1699), 1 Ld. Raym. 486; Winterbottom v. Lord Derby (1867), L.R. 2 Ex. 316.

The appeal should be allowed and the action dismissed.

SECOND DIVISIONAL COURT. MARCH 30TH, 1917.

HORTON v. LEONARD.

Infant — Contract — Accord and Satisfaction — Evidence — Compensation for Injuries—Joint Tort-feasors—Payment into Court—Jury.

Appeal by the defendant from the judgment of the County Court of the County of York, upon the findings of a jury, in favour of the plaintiff for the recovery of $400 and costs, in an action for damages for injuries sustained by reason of the defendant's automobile striking a waggon and throwing it over on the plaintiff, which happened by reason of the defendant's negligence as alleged.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

M. H. Ludwig, K.C., for the appellant.

P. White, K.C., for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment, in the result of which the other Judges agreed, in which he said that, if the plaintiff were a person capable of making a binding contract, this appeal should be allowed, and his action should be dismissed: because, in that case, a defence of accord and satisfaction, with a joint tort-feasor, would be established.

At the trial the owner of the waggon which directly caused the plaintiff's injury was treated as a joint wrongdoer with the defendant, who was the owner of the motor carriage which collided with the waggon. The sum of $100 was paid by the owner of the waggon in satisfaction of a claim made against him for compensation for the injuries sustained by the plaintiff in that accident, and the jury in this action allowed to the defendant the amount of that payment in part payment of the damages assessed by them against the defendant in this action, for the same injuries.

But, the plaintiff being an infant, and so incapable of making such a contract, the case is quite different.

The defendant, pleading accord and satisfaction by a joint tort-feasor, should fail for want of proof of it. There was no evidence of accord and satisfaction with the plaintiff or with any one proved to have had any power to contract for him.

And, had he pleaded and proved accord and satisfaction with the infant, the infant might have proved an avoidance of his contract.

As the case stood, there was no defence or proof of accord and satisfaction; and so the appeal failed upon the merits; and it was unnecessary to say anything as to the formality of the proceedings. The money must be paid into Court: and care must be taken that it is not paid out to any one not entitled to it.

The appeal must be dismissed.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. MARCH 26TH, 1917.

LYNFORD v. UNITED STATES CIGAR STORES LIMITED.

Libel—Statement of Claim—Motion to Strike out—Reasonable Cause of Action—Unnecessary Allegation—Matter of Inducement—Exact Words of Defamatory Letter not Known to Plaintiff—Amendment after Discovery.

Motion by the defendants for an order striking out the statement of claim and dismissing the action, on the ground that no reasonable cause of action was disclosed.

By para. 2, the plaintiff alleged that he was employed by the defendants as a salesman and was dismissed without proper justification.

By para. 3, he alleged that, a few days after his dismissal, he obtained employment with a commercial firm, and, while in that employment, the defendants sent a letter to his new employers wherein the defendants falsely and maliciously wrote and published of and concerning the plaintiff that he had been living with a prostitute, and had been arrested while in their employment, wherefore the plaintiff was discharged by his new employers.

By para. 4, he alleged that he did not obtain a copy of the said letter, and the exact contents thereof were not known to him, but were in the peculiar knowledge of the defendants.

And, by para. 5, that by reason of the defendants' defamatory letter he had suffered damage.

And he claimed $5,000 damages.

A. W. Langmuir, for the defendants.

R. Honeyford, for the plaintiff.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that no damages were claimed in respect of para. 2 of the statement of

claim. It was matter of inducement—part of the history of the case—unnecessary, but innocuous.

"The very words complained of must be set out." This rule has particular application to actions against the author of a book or the publisher of a newspaper, as in Hay v. Bingham (1902), 50 L.R. 224, where no difficulty presents itself.

But Mr. Odgers says, Libel and Slander, 5th ed., p. 624: "If the plaintiff does not know the exact words uttered, and cannot obtain leave to interrogate before statement of claim, he must draft his pleading as best he can and subsequently apply for leave to administer interrogatories, and, after obtaining answers, amend his statement of claim, if necessary."

After examination for discovery, the plaintiff will, no doubt, apply to amend his statement of claim.

Motion refused; costs in the cause.

CLUTE, J. MARCH 27TH, 1917.

FLEMING v. PERRAULT.

Contract—Exchange of Properties—Provision as to Renewal of Mortgage — Condition Precedent — Waiver — Possession — Evidence to Vary Agreement—Inadmissibility—Failure of Defendant to Procure Renewal—Return of Property.

Action for the return of three Cadillac motor-cars with accessories and equipment and for an accounting by the defendant of all moneys received by him in the operation of a certain garage and the use of the cars in connection therewith.

The defendant set up that the cars were his property, having been transferred to him in exchange for land and houses in the city of Toronto.

The action was tried without a jury at Toronto.

J. F. Boland, for the plaintiff.

D. O. Cameron, for the defendant.

CLUTE, J., in a written judgment, said that the defendant's land was subject to two mortgages, one for $3,600 and one for $1,800, the latter including interest and costs, having been originally $1,500. Under the provisions of the exchange-agreement (26th August, 1916), the second mortgage was to be renewed at

$1,800. The clause in this regard was: "The vendor hereby agrees to replace or renew a first and second mortgage against the said property, at the purchaser's expense, provided the same shall not exceed $35, in accordance with the terms and conditions hereinbefore specified." Before the agreement an interim foreclosure order had been obtained in respect of the second mortgage, which would become absolute in October, 1916; and the agreement to renew had reference to the foreclosure proceedings. The agreement provided for a cash payment of $300 and for the securing by lien-notes of $1,090. The defendant paid $70 to the plaintiff's son-in-law on the day before the agreement was signed. No other payment was made in respect of the $300. The second mortgage was not renewed, and foreclosure took place, so that the title passed to the mortgagee.

The learned Judge finds, upon contradictory evidence, that the agreement between the parties was never varied so as to relieve the defendant from the obligation which he assumed under the agreement to renew the second mortgage. The obligation to have the mortgage renewed was wholly upon the defendant, and the default was his.

Having regard to the whole transaction, the renewal must be considered a condition precedent to the agreement being carried out. While the defendant was permitted to take possession of the cars, it was never intended that the defendant should be relieved from the obligation to renew the mortgage, and the plaintiff did not waive it. Contemporaneous verbal statements were not admissible to vary the agreement, and the evidence did not establish any other agreement.

The plaintiff was willing to waive an accounting upon the delivery of the cars to her, and this would be a fair adjustment of the matters in dispute. The defendant having failed to carry out his part of the contract, whereby it ceased to be enforceable, he made improvements and repairs to the cars at his own risk, and was probably well compensated by his use of them.

Judgment for the plaintiff, with costs, declaring that the cars never passed to the defendant, and that the plaintiff was entitled to receive the same, and enjoining the defendant from disposing thereof.

MIDDLETON, J., IN CHAMBERS. MARCH 28TH, 1917.

*REX v. McDEVITT.

Ontario Temperance Act—Magistrate's Conviction for Second Offence—Admission of Evidence of Former Conviction before Finding upon Second Offence—Sec. 96 of 6 Geo. V. ch. 50—Imperative or Directory.

Motion by the defendants, upon the return of a habeas corpus, for an order discharging him from custody.

James Haverson, K.C., for the prisoner.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that the accused was convicted of a second offence against the Ontario Temperance Act, 6 Geo. V. ch. 50, and sentenced to 6 months' imprisonment.

The statute, sec. 96, provides that the magistrate shall in the first instance inquire concerning the subsequent offence only, and if the accused is found guilty of that the magistrate shall then inquire concerning the prior conviction.

In this case the magistrate violated the provisions of the Act by admitting in evidence the former conviction before there was any finding of guilt as to the second offence.

Whether words used in a statute are compulsory or directory depends upon the subject-matter to which they are applied and the general scope and object of the statute: see Regina v. Justices of County of London and London County Council, [1893] 2 Q.B. 476, 491, 492.

When one finds in a statute a careful and elaborately considered provision as to just how the trial is to be conducted, and when the Legislature has said that when the accusation is of a second offence the magistrate shall in the first instance inquire as to the second offence, and shall enter upon the inquiry as to the former offence only when guilt has been established, the inclination is to conclude that the Legislature meant its instructions to be obeyed, and did not regard its enactment as "directory merely," in the sense that it is open to each magistrate to obey or to disobey as he sees fit without the risk of rendering his proceedings invalid.

In Rex v. Coote (1910), 22 O.L.R. 269, however, the majority of the Court of Appeal took the view that the provision there in question, similar to that now in question, "must be deemed to be but directory;" and the learned Judge was constrained to decide

that this provision is one which magistrates may with impunity ignore as they see fit.

In this case no great injustice would be done, as the defendant seemed to have been guilty, and the same magistrate convicted on the earlier trial. The defendant seemed to have fallen into the error of thinking that the provisions of the Act relating to the sale of liquor were directory merely.

Upon a wider ground also, the learned Judge was of opinion that the motion should not succeed. All commands of the Legislature are peremptory; it is intended that they shall be obeyed. If they are not obeyed, the question as to the effect of disobedience on the thing done arises. The designation "directory" is misleading. The real question in such a case as this is, whether the accused has in truth been prejudiced by the departure from what the statute has laid down. If he has, the Court must protect him. If he has not, the Court should not interfere. The question in each case is, was it the legislative intention that non-compliance with the particular provision of the statute should render the proceedings abortive? In this case, the answer should be, "No."

Order remanding the defendant to custody; no costs.

MIDDLETON, J., IN CHAMBERS. MARCH 29TH, 1917.

*PEARLMAN v. NATIONAL LIFE ASSURANCE CO. OF CANADA.

Discovery—Examination of Defendant—Production of Documents—Letters Written "without Prejudice" Leading up to Agreement—Examination Deferred until after Examination of Plaintiff—Breaches of Contract—Disclosure—Scope of Examination.

Motion by the plaintiff for an order requiring the defendant Ralston to attend for re-examination for discovery and to answer certain questions which he refused to answer when examined as a defendant and as an officer (managing director) of the defendant company.

W. R. Smyth, K.C., for the plaintiff.
J. A. Macintosh, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff was suing for commissions on insurance business. The defence

was, that the right to commissions depended on the plaintiff abstaining from acting as agent for any other insurance company. The plaintiff replied that the agreement under which he sued was made at the termination of his agency for the defendants, and that it was intended that the clause precluding his acting for any other company, which formed part of his original hiring, should be at an end; and, if that was not the construction of the document, he asked for reformation. He alleged also that the breaches of the agreement, if any, were brought about at the instance of the defendants themselves, who employed a detective agency to seduce him to do the things now set up as breaches.

An order had been made directing the defendants to give particulars of all acts relied upon by them as breaches, with liberty to give further particulars after the examination of the plaintiff for discovery.

(1) There being a claim for reformation, the defendants must produce the correspondence, originally without prejudice, leading up to the contract now sued upon; and the defendant Ralston must answer proper questions arising out of it.

(2) The defendants should state whether they employed detectives and whether the persons whom the plaintiff was said to have canvassed were "stool-pigeons" of these detectives; but the plaintiff should not be allowed to see the correspondence between the defendants and the detectives.

(3) The plaintiff should submit to a full examination as to his conduct before the defendants are called upon to disclose that upon which they rely.

(4) Before the plaintiff goes to trial, he has the right to know clearly and with certainty what it is that the defendants set up against him; and it is no answer to say, "The facts are within your own knowledge," for it may be that what the defendants intend to set up is something of which the plaintiff has no knowledge and which he might disprove if he had an opportunity.

Order that, upon the completion of the plaintiff's examination for discovery, the defendant Ralston be further examined, and that he produce all correspondence leading up to the agreement and submit to examination thereon; that he disclose whether the defendants employed detective agencies to endeavour to procure breaches by the plaintiff of his contract or to discover whether the plaintiff was in fact acting as agent for other companies, and also whether the breaches on which the defendants rely are those reported to them by the detectives, and, if so, which cases were so reported.

The plaintiff is not entitled to discovery for the purpose of ascertaining how the case against him is going to be proved—he is entitled to know only what the case is.

Costs in the cause.

KELLY, J. MARCH 29TH, 1917.

*TOUGH OAKES GOLD MINES LIMITED v. FOSTER.

Company—Election of Directors—Persons Entitled to Represent Shares and Vote at Meeting of Company—"Shareholders"—Registration—Proxy.

The plaintiffs, the above-named company and seven persons who asserted that they had been on the 26th January, 1916, elected as directors, alleged that the individual defendants, Clement A. Foster and five others, were prior to that date directors, and that on that day the individual plaintiffs were duly elected directors for the year then commencing; that immediately thereafter the newly elected directors met and elected officers; that the defendants refused to comply with the demands made upon them for the delivery of the seal, books, papers, documents, and assets of the plaintiff company, or to relinquish control of the company's rights, properties, and assets; and that they continued, without legal right or authority, to act as directors. And the plaintiffs asked: (1) that the individual defendants be restrained from acting or assuming to act as directors and from exercising the powers of directors and from dealing with the company's assets or managing its business; (2) that the defendants be directed to deliver to the plaintiffs the company's seal, books, property, and assets; (3) that the individual defendants be restrained from drawing cheques upon or dealing with the company's bank account, and that the defendant the Bank of Ottawa be restrained from honouring cheques other than as authorised by the plaintiffs; (4) that the defendant bank be directed to transfer the moneys of the company on deposit with it in accordance with the directions of the plaintiffs; (5) an accounting; (6) damages; and (7) general relief.

The action was tried without a jury at Toronto.

R. McKay, K.C., and A. G. Slaght, for the plaintiffs.

I. F. Hellmuth, K.C., Grayson Smith, Wright, and S. J. Birnbaum, for the defendants.

KELLY, J., in a written judgment, said that the real contest was as to whether there was on the 26th January, 1916, a regularly convened legal meeting of the company's shareholders who had the right and the power to elect the individual plaintiffs as directors, and whether the plaintiffs were at such meeting duly elected.

It was common ground between the parties that of the total of 600,000 shares of the company's capital stock 531,500 shares were subscribed for at the date of the meeting.

The learned Judge then quoted the by-laws of the company, and said that to constitute a quorum it was necessary that at least 177,167 shares should be represented either in person or by proxy—being at least one-third of the 531,500 shares subscribed for.

The crucial question was, whether two blocks of 25,000 and 15,000 shares were properly represented at the meeting.

After referring to the Ontario Companies Act, R.S.O. 1897 ch. 192, sec. 2; R.S.O. 1914 ch. 178, secs. 5 (4), 44, 45 (2), 54 (1), (2), 87, 118 (*b*); the English Companies Consolidated Act, 1908, sec. 23; the learned Judge said that persons in whose names shares stand in the share-register of a company, unless there be expressly something to the contrary, are to be deemed to be the holders of the shares for such purposes as the right to be present at meetings of the company and to vote upon the shares, and that that right continues so long as their names are so on the register. Until a transfer is registered, the transfer is not complete: Halsbury's Laws of England, vol. 5, pp. 192, 193, para. 316.

Reference to secs. 50, 60, and 72 of the Ontario Act, R.S.O. 1914 ch. 178; Pender v. Lushington (1877), 6 Ch.D. 70, 77, 78; Reese River Silver Mining Co. v. Smith (1869), L.R. 4 H.L. 64; Nanney v. Morgan (1887), 37 Ch.D. 346; Pulbrook v. Richmond Consolidated Mining Co. (1878), 9 Ch.D. 610; Bainbridge v. Smith (1889), 41 Ch.D. 462, 471, 474, 475; Cooper v. Griffin, [1892] 1 Q.B. 740; Sutton v. English and Colonial Produce Co., [1902] 2 Ch. 502; Howard v. Sadler, [1893] 1 Q.B. 1; Ritchie v. Vermillion Mining Co. (1902), 4 O.L.R. 588.

Myrtice Oakes and Winifred Robins were the registered holders of the shares in question, and as such they were entitled to recognition as shareholders to whom notice of meetings of the company should be given; and it was not within the province of the president or presiding officer to sit in judgment in respect of that right as between them and any others claiming these shares and to declare against the right of these two holders to attend or be represented and to vote at such meetings.

The two registered holders were represented at the meeting by another shareholder whom they had in writing appointed their representative, conformably with the statute and by-laws; and Harry Oakes, their proxy, was clothed with authority to represent them and to vote at the meeting in respect of their shares.

Other objections raised by the defendants were considered and determined against them.

Judgment declaring that the individual plaintiffs were duly elected directors of the plaintiff company on the 26th January, 1916. If the plaintiffs desire it, there will be a reference as to damages. The plaintiffs to have costs against the defendants other than the bank; the bank to have costs against its co-defendants. If the reference is proceeded with, further directions and costs of the reference will be reserved until after the Master's report.

KELLY, J. MARCH 29TH, 1917.

FOSTER v. OAKES.

Company—Shares—Dealings in—Ownership—Disputed Questions of Fact—Findings of Trial Judge—Counterclaim—Account—Costs.

Action by Clement A. Foster and Tough Oakes Gold Mines Limited against Myrtice Oakes and Winifred Robins upon claims respecting the ownership of certain shares of the capital stock of the plaintiff company, as follows: (1) for a declaration that the plaintiff Foster became and was the owner of two blocks of shares of the capital stock of the plaintiff company, purchased from the defendants, 25,000 shares of the defendant Oakes and 15,000 shares of the defendant Robins; (2) that since on or about the 21st May, 1915, the defendants had not been and were not on the 26th January, 1916, nor now, owners of or entitled to any beneficial interest in these shares; (3) to make perpetual an interim injunction granted on the 29th February, 1916, restraining the defendants from certain dealings with these blocks of shares; (4) for an order for the execution and delivery by the defendants of further transfers and records of ownership of these shares to the plaintiff Foster; and (5) damages for alleged wrongful, illegal, and fraudulent acts of the defendants.

The defendants counterclaimed for: (1) an account of Foster's dealings in respect of the shares intrusted to him and of the moneys he had received in respect of these shares; (2) payment by Foster of any amounts found due to the defendants; (3) the return by Foster to the defendant Myrtice Oakes of 833 shares and to the defendant Winifred Robins of 500 shares, their proportion of the 10,001 which, as they alleged, he fraudulently and illegally converted to his own use.

The action and counterclaim were tried without a jury at Toronto.

I. F. Hellmuth, K.C., and Grayson Smith, for the plaintiffs.

R. McKay, K.C., and A. G. Slaght, for the defendants.

KELLY, J., in a written judgment, set out the facts at length and made findings thereon. He was of opinion that, upon the evidence, the action failed, and should be dismissed with costs against the plaintiff Foster.

Upon the defendants' counterclaim, they should have judgment: (1) for the return and delivery by Foster to the defendant Myrtice Oakes of 833 paid-up shares of the capital stock of the plaintiff company and to the defendant Winifred Robins of 500 paid-up shares, and for an account and payment of dividends received on those shares since the 21st May, 1915; (2) for payment by Foster to the defendant Oakes of $1,398.88 and interest from the 31st July, 1914, and to the defendant Robins of $839.33 and interest from the same day; (3) for an accounting by the plaintiff Foster in respect of 25,000 shares of Kirkland Lake Proprietary Limited, and for payment by him to the defendants of their proportion of such part of the value of these shares as is attributable to the shares of the plaintiff company's stock which were agreed to be sold or optioned by the agreement of the 26th November, 1913, with interest from the time that $25,000, part of the consideration under that agreement, was received by Foster or his agent, with a reference to the Master in Ordinary to ascertain such value and the part or amount thereof to which the defendants respectively are entitled and the date when the $25,000 was received by Foster or his agent. The defendants to have their costs of the counterclaim against the plaintiff Foster. Further directions and costs of the reference reserved until after the Master's report.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. MARCH 30TH, 1917.

REX v. JACKSON.

Criminal Law—Vagrancy—Common Prostitute—Magistrate's Conviction—Criminal Code, secs. 238 (i), 239, 723 (3)—Form of Conviction—"Satisfactory Account of herself."

Motion by the defendant, Elsie Jackson, to quash a magistrate's conviction for vagrancy.

M. J. O'Reilly, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that under sec. 239 of the Code "every loose, idle, or disorderly person or vagrant is liable on summary conviction to a fine . . . or to imprisonment." Section 238 (as amended), in 12 clauses, names as many classes of persons who come within the category, i.e., it defines the mode of proof to establish vagrancy.

There was no information in this case—the officers thought, on the evidence of what they saw and in the exercise of their common sense, that the defendant fell within class (*i*), i.e., the clause dealing with "a common prostitute or night-walker."

The conviction stated that she "unlawfully is a loose, idle, or disorderly person, being a common vagrant." This followed the language of sec. 239 which makes the offence, and was a proper way of charging the offence, and was sufficient under sec. 723, sub-sec. 3.

It was objected that the officers should have interrogated the defendant to give her the opportunity of giving "a satisfactory account of herself" under clause (*i*), and that the conviction should set out that she was asked before the arrest to give an account of herself. There had been some conflict of judicial opinion on this subject, in cases not binding here. Rex v. Harris (1908), 13 Can. Crim. Cas. 394, and Rex v. Pepper (1909), 15 Can. Crim. Cas. 314, were in favour of the defendant's contention; but the learned Chief Justice preferred the opinion of Mr. Justice Walsh in Re Brady (1913), 21 Can. Crim. Cas. 123. It seemed to have been assumed, in these cases, that the "satisfactory account of herself" was to be given to the officer; if so, the officer must be the final judge of whether her account is satisfactory. The Chief Justice rather inclined to the belief that the satisfactory account was to be given to the magistrate. The defendant did give an account of herself to him, and he evidently and properly did not find it to be satisfactory.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. MARCH 30TH, 1917.

RE SINCLAIR.

Infant—Custody—Rights of Mother—Desertion—Abandonment—Neglected Child—Children's Aid Society—Foster-parents—Welfare of Infant—Access by Mother—Children's Protection Act of Ontario, R.S.O. 1914 ch. 231.

Motion by the mother of an infant for an order for her custody.

W. J. McLarty, for the mother.
W. Proudfoot, K.C., for the Children's Aid Society.

MIDDLETON, J., in a written judgment, said that the applicant was married to James Sinclair in 1904, and the child was born on the 30th January, 1911. Sinclair died in the previous November, and left his wife without means. The mother had to maintain herself, and placed the child with a Mrs. Webber to board. There was some question as to how long the board was paid; about January, 1912, the mother took sick and was unable to continue the payments, and did not for some time see the child. On the 14th February, 1912, the child was made a ward of the Children's Aid Society, and on the 28th February was adopted by the Webbers. They thought the child had been abandoned, and decided to adopt it.

The child remained with the Webbers until June, 1916, when Mrs. Webber, having left her husband, attempted to take the child with her to Detroit. She was deported by the United States Immigration Department, and returned to Toronto, when the child was taken from her by the Children's Aid officer. The child was placed with its present custodians on the 9th September, 1916.

The mother had now married again and had two children, one 11 months and the other 2 years and 4 months old. At the time this motion was made, she and her husband were living at his mother's, but they had since moved into a separate house. The husband worked in a foundry, at an average wage of $22 weekly, and was ready to accept the child as a member of his family.

The child was in reality abandoned; and, when a child is abandoned and has been made a ward of the Children's Aid Society, and has been placed in a home where it is being well cared for, the Court should not lightly interfere. The risk of taking this little girl from her present surroundings and giving her

into the custody of her mother and a step-father, who had at the time this motion was made no home of their own, is considerable. The matter should stand as it is for the present. If, after a few months, the home now established still continues, and the step-father still remains able and willing to maintain the child, the motion may be renewed, but it must be borne in mind that the affection of the foster-parents will in the meantime be growing, and that their rights must be considered, though these are of course subordinate to the true welfare of the child. The statute (Children's Protection Act of Ontario, R.S.O. 1914 ch. 231) seems to contemplate the desertion of the child as equivalent to the abandonment of parental rights; and, while this may, in some cases, bear hardly upon a parent, particularly where, as here, she has had no easy task to maintain herself, yet, if the guardianship of the society and the binding effect of its adoption agreements are lightly ignored, it may become impracticable to obtain homes for children. Few would care to adopt a child if it may be taken from them without any fault on their part.

The question of access to the child should stand for the present.

The officers of the society should keep watch over the whole matter and see if some arrangement cannot be made after the mother has shewn that she can give her child a good and permanent home.

MIDDLETON, J., IN CHAMBERS. MARCH 30TH, 1917.

MORRIS v. MORRIS.

Partition—Scheme Proposed by Referee—Sale of Lands and Chattels —Promissory Notes and Company-shares Pledged as Collateral —Direction for Sale Reversed—Collection of Money Due upon Notes by Action or otherwise—Receiver.

An appeal by the defendant from a ruling of a Local Judge upon a reference for partition.

L. B. Spencer, for the defendant.
G. H. Pettit, for the plaintiffs.

MIDDLETON, J., in a written judgment, said that by the judgment a partition or sale of certain lands and chattel property was directed. By an agreement of the 7th May, 1915, the parties had agreed to sell certain of the assets for, among other things, two notes of the Brown Brothers Company for $5,000 each, one

due on the 1st July, 1916, and the other on the 1st July, 1917, secured by the assignment as collateral security of 51 per cent. of the stock of the company. The 1916 note was past due and partly paid, and the remaining note had yet three months to run. The Master proposed to sell by public auction these notes and the stock held as collateral.

The plaintiffs had a three-fourths interest and the defendant a one-fourth interest in the property.

The amount would in all probability be paid, as the purchasers had gone so far that failure to carry out the purchase was most improbable.

Sale as an alternative for partition is quite appropriate when a partition cannot be made. The notes are not capable of partition, and the substitution of new notes—even if this could be arranged—would be to change the position of the parties. The object of the sale was the transmution of the notes into money, so that a partition might be made; and there was no reason why this should not be effected in the ordinary way. The maturing note might be met at maturity; if not, an endeavour should be made to collect. As the notes were payable to both parties, both should join in the attempt to collect. If either refused, a receiver might be appointed upon application, or the party refusing might be made a defendant in the action on the note. A sale of the note and of the stock held as collateral would probably provoke an attack on the part of the makers, for the stock was not to be dealt with until default.

The ruling of the Master ought to be varied, and these notes ought not now to be sold—nor should the collateral security. The other property might be sold, but these notes should be collected and the proceeds divided.

The defendant should be paid the costs of this motion by the plaintiffs, upon the final taxation.

CLUTE, J. MARCH 31ST, 1917.

*MAPLE LEAF LUMBER CO. v. CALDBICK AND PIERCE.

Sheriff—Sale of Logs under Execution—Removal by Purchaser—Seizure of Logs—Property Passing by Sale—Neglect of Sheriff to Ascertain Quantity of Logs—Damages Arising from—Liability—Purchaser—Notice—Measure of Damages—Remedy of Purchaser over against Sheriff.

Action against George Caldbick, the Sheriff of the District of Temiskaming, and Charles Pierce, the purchaser of logs at a sale

by the defendant Caldbick under execution, to set aside the sale and for damages.

The defendant Pierce served the defendant Caldbick with a third party notice; and Reamsbottom and Edwards, execution creditors of the plaintiff, who had also been made third parties, were, upon their written consent filed, added, at the trial, as co-plaintiffs.

The action was tried without a jury at Toronto.

Gideon Grant and P. E. F. Smily, for the original plaintiffs.

McGregor Young, K.C., for the added plaintiffs.

H. M. Mowat, K.C., and F. L. Smiley, for the defendant Caldbick.

J. Y. Murdoch, for the defendant Pierce.

CLUTE, J., in a written judgment, said that the main objection to the sale was, that the sheriff advertised, in addition to certain logs in the water, about 300 logs in the woods. As a matter of fact, there were more than 4,000 logs in the woods. At the sale, the sheriff was asked as to the number of logs in the woods. He did not know how many there were; he had made inquiry and was informed that there were about 300; and, without further inquiry or knowledge, and without going to the woods, some 4 or 5 miles away, he advertised them as "about 300." At the sale, he said that he was selling whatever the Maple Leaf Lumber Company had there—300 more or less; if there were less, the buyer would pay for 300; if more, he would get them; and, on this understanding by the bidders, the defendant Pierce became the purchaser of the logs in boom at the mill, about 900, and the logs in the woods, for $410. The sale was subject to $253.44 for unpaid Government dues.

The logs at the mill were sawn up and sold by the defendant Pierce, and he realised from their sale more than sufficient to recoup him for what he paid for the whole lot. He afterwards undertook to have the logs in the woods taken out; and at the time of the trial they were lying in the water in the boom near the mill.

What took place amounted to a seizure of the logs in the woods: Gladstone v. Padwick (1871), L.R. 6 Ex. 203; and the property passed by the sale: Halsbury's Laws of England, vol. 14, pp. 54, 55, 56; 17 Cyc. 1087; Osborne v. Kerr (1859), 17 U.C.R. 134, 141; McDonald v. Cameron (1867), 13 Gr. 84; and other cases.

The sheriff did not exercise reasonable care to ascertain the quantity of logs, and should be made liable for any damages

which arose directly from his neglect: Wright v. Child (1866), L.R. 1 Ex. 358.

The defendant Pierce, knowing the capacity in which the sheriff was acting, and that to sell as "about 300 logs" some 4,000, would be a breach of duty and would operate as a fraud on the creditors, was not a bona fide purchaser for value without notice, and was liable with the sheriff for the damages which the plaintiffs and the creditors had suffered.

The measure of damages was the difference between what the logs sold for and what they would have sold for if they had been properly advertised and the purchaser had known what he was buying. The value of the logs in the woods was 60 cents per log. If any party was dissatisfied with this assessment, that party might have a reference at the risk of costs.

There should be judgment for the plaintiff against both defendants for $2,400 and costs. Otherwise no costs.

The defendant Pierce was not entitled to relief over against the sheriff.

LENNOX, J. MARCH 31ST, 1917.

*TAYLOR v. DAVIES.

Assignments and Preferences—Assignment for Benefit of Creditors—Assignments and Preferences Act—Sale by Assignee of Lands of Insolvents to Inspector of Insolvent Estate—Non-compliance with Provisions of Act—Position of Inspector—Trustee—Sale Set aside—Limitations Act—Laches.

Action by Isabella Taylor, as a creditor of Taylor Brothers and as devisee, legatee, and executrix under the will of George Taylor, to set aside a conveyance, dated the 10th February, 1902, of 114 acres of land, by the defendant Clarkson, assignee for the benefit of the creditors of Taylor Brothers under a general assignment dated the 14th June, 1901, to the defendant Robert Davies, who died during the progress of the trial of the action. The action was then properly revived in the names of his personal representatives. He held a mortgage upon the land at the time of the sale to him. The sale was made at $45,000.

The action was tried without a jury at Toronto.

Wallace Nesbitt, K.C., M. K. Cowan, K.C., and Christopher C. Robinson, for the plaintiff.

I. F. Hellmuth, K.C., and M. H. Ludwig, K.C., for the defendant Davies.

W. N. Tilley, K.C., and R. H. Parmenter, for the defendant Clarkson.

LENNOX, J., read an elaborate judgment in which he reviewed the facts and discussed the law. He said that the two outstanding questions were: (1) whether the provisions of the Assignments and Preferences Act, R.S.O. 1914 ch. 134, had been substantially complied with; and (2) whether the defendant Davies, being an inspector of the estate of Taylor Brothers, was in a position to contract with the creditors and take a conveyance.

The learned Judge was of opinion that the defendant Clarkson, as assignee, acted throughout in good faith, but that his valuation of the land was made upon a wrong basis; that the assignee's error was the beginning of a chain of errors culminating in the improvident execution of the deed to Davies; and that Davies knowingly availed himself of the advantage it afforded him. The sale was made at a price much below the value of the property.

The position of an inspector as to purchase is defined in Re Canada Woollen Mills Limited, Long's Case (1905), 9 O.L.R. 367, as a fiduciary position as regards the disposal of the assets; and this trustee, Davies, never really discharged himself from his duties as a trustee. By sec. 22(3) of the statute, an inspector is debarred from purchasing.

Upon the evidence, if the property had been fairly advertised and offered for sale by competition in 1901, it would have realised a sum largely in excess of the total sum charged thereon by the Davies mortgage—a sum more than sufficient to pay in full the other creditors entitled to rank on the estate.

There was a very long delay in bringing action. The Statute of Limitations did not apply directly, Davies being a trustee; and there had been no acquiescence in or adoption of the transaction. Delay should not work a forfeiture of a plaintiff's rights so long as the parties can be restored to their former position, or justice can still be done; and particularly so if the action is founded upon a breach of trust. The delay, in the circumstances, was not a bar to giving the plaintiff relief.

Judgment declaring the conveyance to Davies void and directing its cancellation and the revesting of the land in the defendant Clarkson, with costs against the estate of Davies. No costs against the assignee. Terms of the judgment to be spoken to.

OLSEN v. CANADIAN ALKALI CO.—SUTHERLAND, J.—MARCH 26.

Contract—Building Contract—Disputed Items—Findings of Trial Judge—Interest—Costs.]—Action by John E. Olsen, as assignee of the Theodore Starrett Company, to recover certain sums for work done and material supplied under a building contract. The action was tried without a jury at Sandwich. SUTHERLAND, J., in a written judgment, set out the important provisions of the contract, and stated the facts. He said that at the trial the only sums in dispute were: (*a*) $110 for a sign alleged to have been constructed by the plaintiff; (*b*) $220 for draftsman's work; (*c*) $261 for superintendent's and engineer's services; and (*d*) $296.71 for interest: $887.82 in all. The learned Judge examined the evidence as to these items, and concluded that items (*a*) and (*b*) should be disallowed; that item (*c*) should be allowed at $229.59; and that item (*d*) should be allowed, but not at the amount claimed; the rate should be 5 per cent. only, and a computation should be made and submitted if the parties did not agree. There should, therefore, be judgment for the plaintiff for $229.59 and a sum for interest, but the plaintiff should pay the amount of a judgment recovered against him by a hardware company, or the amount of the same should be deducted from the sums now awarded to the plaintiff. The plaintiff should have costs down to the 5th March, 1917, when the defendants offered to pay the sum of $261. Otherwise no order as to costs in favour of either party. A. H. Foster, for the plaintiff. E. A. Cleary, for the defendants.