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COURT OF APPEAL.

DECEMBER 21ST, 1911.

*REX v. MUNROE.

Criminal Law—Vagrancy—Criminal Code, sec. 238(a)—"Visible Means of Maintaining himself"—Money Derived from Begging—Previous Conviction for Begging in Public Places.

Appeal by the defendant from the order of BOYD, C., ante 353.

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

J. W. Bain, K.C., and M. Lockhart Gordon, for the defendant.

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

THE COURT dismissed the appeal.

HIGH COURT OF JUSTICE.

MIDDLETON, J. DECEMBER 15TH, 1911.

RE AUGER.

Dower—Mortgaged Land—Wife Joining to Bar Dower—Sale of Land by Administrators of Estate of Deceased Mortgagor with Concurrence of Widow—Extent of Widow's Claim on Purchase-money.

Motion by the administrators of the estate of Michael Auger, deceased, under Con. Rule 938, for an order determining the

*To be reported in the Ontario Law Reports.

rights as to dower of Sarah Auger, the widow of the deceased, in the lands devolving upon his death.

R. J. McLaughlin, K.C., for the administrators.
J. J. Maclennan, for Sarah Anger.

MIDDLETON, J.:—The question arising upon this motion is the basis upon which dower should be allowed to Sarah Auger, the widow of the deceased.

The late Michael Auger, who died on the 12th May, 1909, on the 1st November, 1898, purchased the lands in question for $3,000—$2,800 being secured by a vendor's lien and mortgage, in which the wife barred her dower. The deed and mortgage were practically contemporaneous transactions; the inference being that the deed was first delivered, as it contains a clause "and the grantor releases to the grantee all his claims upon the said lands excepting the said lien for unpaid purchase-money and *the mortgage to be given therefor.*" The mortgage had been reduced to $1,700 before Auger's death; and since his death, the lands have been sold for $5,250; and the widow has joined the administrators in conveying, her rights being reserved for the opinion of the Court. The question is: has she a life interest in $1,750, a third of this price, or in $1,183.33, a third of the price less the mortgage?

Smith v. Norton, 7 U.C.L.J. O.S. 263, a decision of the Court of Error and Appeal, determines that at common law the seisin of the husband was complete and the right to dower attached. Esten, V.-C., distinguishes the case from a conveyance operating under the Statute of Uses, where the grantee to uses is a mere conduit to convey the estate to the person entitled, saying that, where the mortgage and deed are one transaction, "the person is by the deed fully and perfectly seised of the estate until by his own act (not the act of another) he parts with it by executing the mortgage." The case then before the Court was an appeal from a common law Court, in an action of dower by the widow of the purchaser, who had not joined in the mortgage back to secure the purchase-money. It was intimated by some of the Judges that in equity the mortgagee might obtain relief.

In the next year, a similar question arose in Heney v. Low, 19 Gr. 265. There, again, the wife did not join in a mortgage to secure the balance of purchase-money. The purchaser sold the equity of redemption; and the original vendor, who still held the mortgage, obtained a reconveyance. On an action being brought, at law, for dower, a bill was filed in equity to restrain the action at law. The situation was complicated by the question

of merger; but the question of the widow's right to dower in equity, under the circumstances, is also satisfactorily disposed of. Esten, V.-C., p. 269, says: "Supposing, however, the true effect of the agreement to be that S. in equity retained his mortgage, rather than took it back, so that it is equitably paramount to the title of dower, yet, undoubtedly, that title attached for every other purpose, and as against every other person. It could have been enforced against Low's heir. For every other purpose except to give priority to the mortgage the purchase-money must be considered paid and the estate conveyed." Spragge, V.-C., after pointing out that the legal right to dower could not be denied, and that the mortgagee would be protected in equity, says, of the purchaser of the equity of redemption: He "surely could have no equity to prevent the assertion of Mrs. Low's legal title to dower. . . . She could claim her dower, not against S. mortgagee, but against S. alienee of her husband; and I really do not see upon what principle this Court could interpose, unless in respect to the mortgage."

This being the situation when the wife does not join in the mortgage to bar her dower, her joining is, under sec. 10 of the Dower Act, 1909, to have no greater effect than necessary to secure the rights of the mortgagee.

Had the land been sold under this mortgage, sec. 10(2) of the Dower Act would have been applied and governed the widow's rights in the surplus money; but, where the land passes to the administrator, the rights of the parties are still regulated by Re Robertson, 25 Gr. 486, and Re Hague, 14 O.R. 660; and the wife, being a surety for her husband, has the right to cast the burden of the mortgage primarily on his estate. Neither the husband nor any one claiming under him has any equity which can be set up against her legal right to dower, which she has pledged as surety only for the husband's debt.

So declare. Costs out of estate.

BRITTON, J. DECEMBER 15TH, 1911.

SMITH v. GRAND TRUNK R.W. CO.

Railway—Injury to and Death of Servant—Engine-driver—Negligence—Person in Charge—Conductor of Train—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Rules of Railway Company—Negligence of Engine-driver—Responsibility—Findings of Jury.

Action by Jean Smith, widow and administratrix of the estate of Charles Franklin Smith, who was a locomotive engineer

in the employ of the defendants, and who was killed on the 20th July, 1911, his engine having, because of an open bridge, gone over the bank and plunged into the Welland canal, carrying him to his death.

At the trial the following questions were submitted to and answered as follows by the jury:—

(1) Was the conductor, McNamara, who was in charge of the train, on the engine of which the deceased C. F. Smith was engineer, guilty of any negligence by reason of which C. F. Smith lost his life? A. Yes.

(2) If so, what was that negligence? Answer fully. A. Having passed the semaphore, if the conductor had full authority in the running of the train, he, Mr. McNamara, should have signalled the engineer to back up the train again, until the semaphore was lowered.

(3) Was the deceased, the engineer, guilty of contributory negligence, that is, could the engineer, by the exercise of reasonable care, have avoided the accident? A. Yes.

(4) If so, in what respect was the engineer so guilty? A. For passing the semaphore without permission.

(5) Apart from what may be said of negligence on the part of the conductor or engineer, was there any other negligence on the part of the defendants which occasioned the death of the engineer? A. No.

And the jury assessed the damages at $1,800.

J. R. Logan, for the plaintiff.

E. Meredith, K.C., and W. E. Foster, for the defendants.

BRITTON, J.:—The evidence disclosed that the engineer passed, on his engine, the semaphore, which was up—against the train proceeding—and, having passed, stopped his engine at the water-tank, not disconnecting the engine from the train. Having taken water, he signalled that he was ready to proceed across the bridge, the bridge being only a short distance away. The conductor heard the engineer's signal and in reply gave to the engineer a signal to go on; and the engineer started. Apparently at that moment the bridge was being opened to allow a small tug to pass, and the engine went into the canal, and the engineer was drowned.

Upon the answers, each of the parties claims to be entitled to judgment.

The difficulty, if any, arises upon the answer to the 4th question. The negligence assigned to the engineer was that of pass-

ing the semaphore when up. Up to the point of the conductor's signal to the engineer to go on, no harm had come to the engineer. He was at a place of safety. His first negligence was not, it is contended, the cause of the accident, and should not, in view of the rules of the company, and of the statute, disentitle the plaintiff to recover.

It is argued that the death of the engineer was caused by the negligence of the person in charge of the train, within sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act. The defendants' rule 22 puts the train entirely under the control of the conductor, and his orders must be obeyed except where they are in conflict with the rules and regulations, or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable. Rules 52, 60, 213, and 232 were also cited. In view of these, and inasmuch as the deceased knew that the semaphore was up, and not lowered for the train of the deceased, he must be held equally responsible with the conductor; and so I must dismiss this action.

The action will be dismissed, but without costs.

BRITTON, J. DECEMBER 15TH, 1911.

PLOCKS v. CANADIAN NORTHERN COAL AND ORE DOCKS CO.

Master and Servant—Injury to Servant—Negligence—Person in Superintendence—Workmen's Compensation for Injuries Act, sec. 3, sub-secs. 1, 2—Defective System—Findings of Judge.

Action for damages for personal injury sustained by the plaintiff, while in the employment of the defendants, owing to the negligence of the defendants or their servants, as alleged.

The action was tried at Port Arthur, without a jury.

A. E. Cole, for the plaintiff.

W. F. Langworthy, K.C., for the defendants.

BRITTON, J.:—On the 8th May, 1911, the plaintiff, as a workman in the employ of the defendants, was engaged with other men—labourers—in shovelling coal. The defendants were mov-

ing their coal and distributing it to different places upon their coal docks and on their extensive coal storing premises. This work was done by means of a hoisting gear and tramway system —hoisting coal in buckets or skips from a lower level and conveying it to any place desired, emptying coal from the full buckets or skips, and returning empties to be refilled, etc.

The shovellers below were doing their work, apparently under the direction of a man, also in the employ of the defendants. This man was called the "hooker," and he, from below, directed the motorman or engineer above when to stop, when to lower the empties, when and where to stop to hoist the full buckets. At the time of the accident the plaintiff was working on a night shift. In general, the way the thing was done was to stop the hoist directly over the full bucket; and, when the bucket was hooked on to the chain from the crane, or whatever that may be called, the signal was given to hoist. On this 8th May, 1911, the motor was not directly over the bucket, but rather over the plaintiff, who, I have said, was working below; and, when the bucket began to move up, it swung from the vertical line, and struck the plaintiff, wounding him and making a wound 7½ inches long, directly across and completely through the wall of the abdomen—of course, severely wounding the plaintiff. The marvel is, that he was not killed.

I find that this man called the "hooker," but who had other duties put upon him, was at the time in superintendence for the defendants in and about the work of placing the buckets, lowering the empties, hoisting the full buckets, and all that pertained to that work. I find that this man so in superintendence was guilty of negligence which caused the accident to the plaintiff. He was, in my opinion, a person in the service of the employer, who had at that time superintendence intrusted to him, and this negligence was in the exercise of such superintendence, within the meaning of sec. 3, sub-sec. 2, of the Workmen's Compensation for Injuries Act. What this man did was, as it seems to me, within sec. 2, sub-sec. 1, which gives the meaning of superintendence.

I also find that the system of the defendants in the moving of this coal at night was defective, and was likely to be attended with accident such as the accident to the plaintiff now complained of. The system was defective in not having the coal piles so lighted that the motorman could always see when the buckets were to be hoisted—that they would be hoisted vertically. The defendants were negligent in adopting a system without proper protection, so far as reasonably possible, for

doing the work in so safe a way as it could be done without danger to the man below.

This case is different from Davies v. Badger Mines Limited, 2 O.W.N. 559.

Here the duty of this "hooker" was much more than that of signalling the engineer. He had put upon him the superintendence of the men doing the shovelling—the control of the motor to the extent of indicating the place where and the time when the chain or crane was to be lowered with the empty buckets and hoisted with the full buckets.

There should be judgment for the plaintiff.

The plaintiff was injured very badly. The wound will probably not cause permanent injury to him. He has, however, suffered great pain and lost considerable time, and he is not well yet. He finds a difficulty in stooping and lifting heavy weights, and that interferes partly with his work as a shoveller. I assess the damages at $600.

There will be judgment for the plaintiff for $600 with costs.

DIVISIONAL COURT. DECEMBER 15TH, 1911.

*CHANDLER & MASSEY LIMITED v. IRISH.

Company—Illegal Disposition of Assets—Acquisition by Shareholder of Shares in Another Company—Breach of Trust—Winding-up of Company—Right of Liquidator to Follow Assets—Estoppel—Form of Judgment.

Appeal by the defendant from the judgment of BOYD, C., 24 O.L.R. 513, ante 61.

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

H. E. Rose, K.C., for the defendant.

A. C. Master, for the plaintiffs.

The judgment of the Court was delivered by MULOCK, C.J.:—This is an appeal from the judgment of the Chancellor, who held that the plaintiffs, here represented by Osler Wade, their liquidator, were entitled to ten shares of stock in the Chandler Ingram & Bell Company, standing in the name of the defendant Irish.

*To be reported in the Ontario Law Reports.

During the argument of the appeal, it was conceded by counsel that, when settling the formal judgment, the parties agreed that, in lieu of its directing a transfer of the stock, it should order the defendant to pay to the plaintiffs the sum of $1,000. On this appeal, Mr. Rose argued the case as if the learned Chancellor had declared the plaintiffs to be creditors of the defendant for $1,000.

In view of the fact that the change of relief given the plaintiffs was by consent of the parties, their rights on this appeal should be determined as if the formal judgment was in accordance with the learned Chancellor's judgment, in which case the question for us to determine is, whether the plaintiffs are entitled to the stock in question.

Mr. Rose argued that, having regard to the statement of claim, it was not competent for the learned Chancellor to have made an order in respect of the stock, but that he was confined to the one issue, viz., whether the plaintiff was entitled to a return of the $1,000 in question.

The statement of claim clearly sets forth a case which, if established, would entitle the plaintiff to the stock in question, and not to a payment of money, the only defect in the statement of claim being that the relief asked for was a return of the money. Whether that or a delivery of the stock is the appropriate remedy is a matter of law; and it was quite competent for the learned Chancellor, having reached the conclusion that the plaintiffs were entitled to the stock, to have permitted an amendment of the prayer; and such amendment may now be made. . . .

The evidence, I think, fully warrants the Chancellor's finding. . . .

The defendant . . . seeks to shew that, by some personal agreement between himself and Mr. Chandler, president of the plaintiff company, the latter had personally agreed to pay up the $1,000 owing upon the ten shares standing in the defendant's name. Chandler, however, failed to make good such personal undertaking; but, instead, used the company's funds.

For this money the defendant gave no consideration. It was argued for the defendant that the shareholders of the plaintiff company had authorised the transaction; and, in support of that contention, the defendant points to the resolution of shareholders set forth in the statement of claim. The authorisation by such resolution was conditional on the defendant agreeing not to be entitled to any further dividends on certain stock held by him in the plaintiff company, or to any share

in its assets, and in the meantime to transfer such stock to the president of the plaintiff company in trust for them. The onus is on the defendant, who relies on the resolution, to shew that he has complied with its conditions. This he has not done. The stock stood in his own name, and he handed to Mr. Chandler, president of the plaintiff company, a certificate of his being such shareholder. That act, however, did not deprive him of his status as a shareholder and all the rights incident thereto. Thus the resolution never became operative; and the liquidator is not by the resolution estopped from following the funds.

Further, the resolution purports to authorise the payment, in consideration of alleged services rendered by the defendant; but in his evidence he admits having rendered no services. It is thus clear that the only consideration for the payment of the $1,000 was the return of the defendant's shares in the plaintiff company, an illegal consideration which deprives the resolution of any validity. Thus the bald fact remains that, without consideration or legal authority, $1,000 of the plaintiff company's funds was applied in payment for certain shares standing in the defendant's name. The moneys so misapplied are trust funds, and the trust attaches to the shares purchased with the trust funds.

If the defendant so elects, the judgment may be amended to conform to the Chancellor's decision; otherwise to stand as issued. With this exception, the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B. DECEMBER 18TH, 1911.

BROWN v. WEIR.

Municipal Corporations—By-law Appointing Board of Commissioners to Manage Water, Light, and Heat Works of Town —Validity—Municipal Waterworks Act—Municipal Light and Heat Act—2 Edw. VII. ch. 12, sec. 24—Pleading—Amendment.

Action for a declaration that the defendant Weir was not entitled, as the holder of any municipal office, under the title of "Water Light and Heat Commissioner," or otherwise, to interfere in the control or management of the waterworks system or the electric light and power plant of the Town of St. Marys, nor in the collection and disbursement of the funds of the munici-

pality connected therewith; for an injunction restraining him from so interfering; and for a declaration that he was not duly elected to the office.

R. S. Robertson, for the plaintiff.

J. S. Fullerton, K.C., and A. W. Ford, for the Corporation of the Town of St. Marys.

J. C. Makins, K.C., and W. H. Gregory, for the defendant Weir.

FALCONBRIDGE, C.J.:—By-law No. 11 of the Town of St. Marys, after having received the assent of the electors, was read a third time and passed on the 4th May, 1903. It constituted a Board of three Commissioners, of whom the Mayor should be ex officio one, to manage the water, light and heat works, owned or to be acquired by the Town of St. Marys. This by-law has been in force ever since, and it has not been shewn, or attempted to be shewn, that any wrong or grievance has resulted to any one by reason of the alleged irregularity complained of in this action, and hereinafter set forth.

The plaintiff sues on his own behalf, as well as on behalf of the ratepayers and electors of the corporation. Incidentally it may be mentioned that he sat as ex officio member of this Board for the year 1909, when he was Mayor of the town.

The irregularity complained of is as follows. The Municipal Waterworks Act, R.S.O. 1897 ch. 235, provides (sec. 40) that the council may itself exercise the powers by the Act conferred, or may elect Commissioners for that purpose. By sec. 14 of the Municipal Light and Heat Act, R.S.O. 1897 ch. 234, it is provided that the sections numbered 40 to 47, both inclusive, of the Municipal Waterworks Act, are incorporated with this Act, "as if the same were repeated herein, with the substitution of 'gas or other' for 'water' where 'water' occurs in said sections", etc.

By sec. 24 of 2 Edw. VII. ch. 12, sec. 40 of the Municipal Waterworks Act is amended by adding the following sub-section: "(5) The council of the township, city, town or village with the assent of the electors of the municipality, to be obtained in the manner provided by the Municipal Act in the case of by-laws for the creation of debts, may by by-law provide that the Commissioners elected or to be elected for the purposes of this Act shall have and possess the powers and shall perform the duties of Commissioners under the Municipal Light and Heat Act and from and after the passing of such by-law the said

Commissioners shall be known as 'The Water and Light Commissioners of the . . . of . . . ,' and shall have, possess, enjoy and exercise all the rights, powers and privileges and shall perform all the duties of Commissioners under the Municipal Light and Heat Act as well as of Commissioners elected under this Act.''

The Town of St. Marys took a short cut and passed the by-law in question for the management by one commission of the water, light, and heat.

It is quite manifest that I ought not to disturb a state of affairs which had existed for nearly eight years when the writ in this action was issued, unless I have a very clear opinion that the action of the corporation in passing by-law No. 11 was not authorised by law.

Although the Corporation of the Town was made a party to this action (it is said in consequence of objection raised by the defendant Weir), there were no words in the statement of claim apt to charge the Town, or ask for any relief against it. On this being pointed out, the plaintiff's counsel prayed leave to make certain amendments, which are now before me in writing. These amendments contemplated a direct frontal attack upon the by-law, not only on the ground that it was not the intention of the statutes that, by one or the same by-law, the electors should pass upon the question of creating the Commissioners under the Waterworks Act, and investing in such Commission jurisdiction under the Municipal Light and Heat Act, but, on the contrary, the intention is, that these two matters should be submitted separately; but also on other grounds.

I do not think that I ought to allow this amendment; and I accordingly refuse to do so.

I think that there has been a substantial compliance with the provisions of the law. It was plainly running through the legislative mind that the administration of these public utilities should be placed, if the ratepayers thought proper, in the hands of one Commission; for, by sec. 111 of the Municipal Law Amendment Act, 3 Edw. VII. ch. 18, it was provided that the same Commissioners might manage a sewerage system. There is no sewerage system in St. Marys, and this statute was passed two months after the final passing of by-law No. 11; and I mention it only in the view that I have stated.

The objection is of the most technical nature. The spirit of the law is observed; and, in my opinion, the plaintiff fails. In the view which I have taken of the merits, it becomes unnecessary

to pass upon the question of whether the Attorney-General is a necessary party plaintiff.

The action will be dismissed with costs.

DIVISIONAL COURT. DECEMBER 19TH, 1911.

*McLELLAN v. McLELLAN.

Gift—Cheques on Banks—Presentment and Payment after Death of Donor—Notice of Death—Bills of Exchange Act, secs. 127, 167—Gift inter Vivos—Gift Mortis Causâ—Delivery of Bank Pass-books to Donee—Purpose of—Evidence—Trust—Forgery—Mental Competence of Donor—Action by Executors against Donee—Costs.

Appeal by the defendant from the judgment of BOYD, C., 23 O.L.R. 654, 2 O.W.N. 1095.

The appeal was heard by MULOCK, C.J.Ex.D., TEETZEL and CLUTE, JJ.

C. R. McKeown, K.C., for the defendant.

I. B. Lucas, K.C., for the plaintiffs.

The judgment of the Court was delivered by TEETZEL, J., who said that a perusal of the evidence and the authorities reviewed by the learned Chancellor, in his very carefully considered judgment, and others cited upon the argument, left no room to doubt either the correctness of his findings of fact or conclusions of law. . . .

[Reference to Bouts v. Ellis, 17 Beav. 121, 4 DeG.M. & G. 249; Re Bernard, 2 O.W.N. 716, 717; In re Mead, 15 Ch.D. 651; In re Dillon, 44 Ch.D. 76; Brown v. Toronto General Trusts Corporation, 32 O.R. 319.]

Appeal dismissed with costs.

BOYD, C. DECEMBER 20TH, 1911.

CHAPMAN v. WADE.

Vendor and Purchaser—Contract for Sale of Land—Price not Fixed according to Number of Acres—Deficiency in Acreage—Misrepresentation—Waiver of Fraud—Specific Performance with Abatement in Price—Interest—Costs.

An action by the purchaser for rescission of a contract for the sale and purchase of land, upon the ground of misrepresenta-

*To be reported in the Ontario Law Reports.

tions as to the acreage, and for a return of the money paid by the plaintiff on account of the purchase, and damages; or, in the alternative, for specific performance with an abatement in the price.

D. S. McMillan, for the plaintiff.
John Cowan, K.C., for the defendant.

BOYD, C.:—In September, 1910, the plaintiff bought from the defendant lands in the township of Sarnia and described in the agreement as "composed of those portions of lots 65 and 66 in the 9th or front concession lying south of the right of way of the Grand Trunk Railway and north of those portions of said lands now owned by one Mara, containing 35 acres more or less." The purchaser paid $500 cash, and took possession and began to work thereon. He saw the place but once at the time of purchase, walked through the centre of the land, which was cultivated as a fruit farm, and, without haggling about the price, accepted the offer of $4,500 made by the owner.

The plaintiff is a carpenter, has no knowledge of land or ability to estimate the acreage of tracts of land, and it is admitted by the defendant that a person is likely to be deceived in an estimate of the quantity in this piece of land, from its shape and situation.

The defendant had lived on the place for at least 25 years, and the house thereon was built 21 years ago. Jane Wade, the wife of Charles Wade, the defendant, is the legal owner, but all the transaction of sale was carried out by the husband and the plaintiff. Some letters passed before the plaintiff came to see the place, in which it was stated that there were 2,000 fruit trees and 3,000 grape vines on the place. In the interview on the place, the plaintiff was told that there were 35 acres in the whole farm, and this he believed, as he did the statements as to the trees and vines, without verification. He liked the look of the place, and, though he counted the price high, he was willing to buy, because he wished to gratify his parents by moving from the States to Canada and make a home for them and himself on a fruit farm. They all moved on the place after the sale, and the defendant also continued to live there till the spring of 1911. About this time, the plaintiff was led to measure the place, and found that its contents were only 22⅛ acres, and by count the fruit trees were only 575 and the vines about 500 in number. Hence this litigation to obtain redress.

The defendant does not deny making the statements com-

plained of; but, as to the land, his version of what he said was, that he told the plaintiff he did not know what the quantity was in the piece of land over which they passed, but he thought or believed there were 35 acres. As a comment upon this, it is shewn that the defendant has lived and worked on and over the place for a quarter of a century; that it has been assessed for many years as 16½ acres; and that the information given by the defendant to the solicitor who prepared the agreement was as stated therein "35 acres." I have difficulty in finding that this error can be explained on the ground of honest mistake; I think that the defendant, giving full credit to his explanation, was content to remain in ignorance as to the exact dimensions of the land he owned and worked, so as to be willing to let it pass at 16½ acres in the hands of the assessor and at 35 acres in the hands of the purchaser. He might have said with truth that he did not exactly know how much it contained; but, whatever form of words he used in dealing with the plaintiff, the effect of it was to misrepresent the quantity and mislead the plaintiff. When complaint was made, the defendant offered to take back the place, allow for any improvements, and charge against them rent and repay the down payment, or, in the alternative, pay $600 for shortage. The plaintiff says that neither offer was sufficient, and he elects to hold to the land because he has changed his situation and manner of life in consequence of the purchase; has moved his family from Pennsylvania and has received his father and mother from Michigan, and all settled on this farm.

I remarked at the trial that, subject to a consideration of the legal aspect, I thought that the plaintiff should receive about double the compensation offered (i.e., $1,200 instead of $600.)

From the evidence given I find the value of the buildings on the lot to be from $1,000 to $1,500 at the outside. Deducting this from the price, it would leave the land-value (as fruit-growing property) at $3,500 in one aspect and $3,000 in another, according as you value the buildings. Or, in other words, the land per acre (as for 35 acres) would be $100 in one view and about $85 in the other. Taking the lower figure, the value of the 13 acres short would be $1,105. But some allowance should also be made for the deficiency in trees and vines, so that my conclusion is that $1,200 would be a fair approximation to reasonable and satisfactory compensation. The evidence shews that the place would be well sold at a price of $3,500.

As to cases, that relied on by Mr. Cowan, Wilson Lumber Co. v. Simpson, 22 O.L.R. 452, 23 O.L.R. 253, 2 O.W.N. 410, 799,

differs on the facts. The discrepancy was held in that case to be covered by the words "more or less:" the depth of a corner lot was represented at 110 ft., whereas it was only 98 ft. 6 inches. Here the difference shews not a comparatively trivial error, but gross mistake, or, if you choose, misstatement. It may be put on the ground of a careless and reckless misstatement falling short of one which is fraudulent; and, given this fact of a material discrepancy between the actual and the represented acreage, the purchaser may insist on holding what he has bought with compensation for what he has failed to get. And the rule is, as stated by Fry, that where there is a deficit in the quantity of the estate, the principle on which the abatement is calculated is, prima facie, acreage: Specific Performance, sec. 1275 (4th ed.)

Even if fraud exists, and the vendor can substantially perform his contract, the purchaser can waive the fraud and claim what the vendor has contracted for with proper abatement. Here what was sold was a fruit farm of 22 acres, represented to be 35 acres, and the proper abatement is based on the value of the acres short, according to the contract-price as nearly as can be ascertained. The plaintiff has paid $500; from the balance, $4,000, should be deducted $1,200=$2,800; this the plaintiff is prepared to pay forthwith, and the defendant is willing to receive immediate payment. Interest should be computed at 5 per cent., according to the rate in the contract, to the date of payment. As the plaintiff has substantially succeeded, he should have his costs of action.

There are no special conditions of sale in this contract, and the Court can act pursuant to its general equitable jurisdiction in matters of specific performance.

MIDDLETON, J., IN CHAMBERS. DECEMBER 20TH, 1911.

*RE C., AN INFANT.

Infant—Illegitimate Child—Custody—Rights of Mother and Putative Father.

Motion by the mother of an illegitimate child, upon the return of a habeas corpus, for an order awarding the applicant the custody of the child.

*To be reported in the Ontario Law Reports.

Gideon Grant, for the applicant.
N. W. Rowell, K.C., for the putative father.

MIDDLETON, J.:—The child is at present in the custody of the mother of the putative father, who claims to hold the child for him.

The putative father is a married man, living with his wife, who has no children; and the intention is, that he, his mother, and his wife shall reside together, and that his mother shall assume the actual care of the child.

On the material, no charge of unfitness is made against the mother of the child. She has no means of her own, but her relatives have given her a home, and she is now in a position to maintain her child. It is said that she voluntarily placed the child with the mother of the putative father; but this is denied.

I am not in a position to compare the respective ability of the parties, or finally to pass upon the question, as it was arranged that I should consider the legal aspect of the case in the first instance, and then deal, on oral evidence, with any question of fact that may remain. I, therefore, assume for the present the good faith of both parties.

In the earlier cases, there is to be found some difference of opinion as to the rights of the mother of an illegitimate child; and, even yet, the true principle upon which her rights are founded may be the subject of discussion; but in The Queen v. Barnardo, [1891] 1 Q.B. 194, affirmed in [1891] A.C. 388, sub nom. Barnardo v. McHugh, enough is said to shew how the matter should be dealt with. . . .

[Quotations from the judgments in the Barnardo case. Reference also to In re McGrath, [1893] 1 Ch. 143, and The Queen v. Gyngall, [1893] 1 Q.B. 232.]

This infant is now about four months old; and it would require the strongest possible evidence of the mother's unfitness to justify my interference. From the course the motion has taken, I cannot now pass upon this question. The respondent may have the opportunity of giving evidence upon this head, if he sees fit to do so; he must realise that it is not enough to shew that the child will be well cared for by him and his mother, but he must also shew that the applicant is, for some real reason, unfit to be intrusted with the care of her child.

Apart from anything else, it seems to me that it cannot be lightly assumed that the child, as it grows up, would find a suitable home with its putative father and his wife. Her attitude towards the child is not shewn.

If the respondent desires evidence to be given, he may so elect, and an appointment can be arranged. If not, the mother must have her child and her costs.

CLUTE, J. DECEMBER 21ST, 1911.

*MAYBURY v. O'BRIEN.

Vendor and Purchaser—Contract for Sale of Land—Authority of Agent of Vendor—Contract Signed by Agent in his own Name—Right of Principal to Enforce—Memorandum of Sale—Signature — Initials — Sufficiency — Statute of Frauds.

Action by the purchaser for specific performance of a contract for the sale and purchase of land. The defence was a denial of a contract within the Statute of Frauds and of authority to sell.

J. E. Irving K.C., for the plaintiff.
A. C. Boyce, K.C., for the defendant.

CLUTE, J.:— . . . In June last, the plaintiff came to one Pardee, a member of the firm of Wilcox and Pardee, real estate brokers in Sault Ste. Marie, and intimated that he desired to buy read estate in that town. Pardee did not have the plaintiff's property upon his list for sale at that time, but shewed him other properties, a number of which he bought. Pardee then brought to his attention the land in question, and got him to make an offer. As a result Pardee went to see O'Brien, and told him that he had a purchaser, naming his offer.

At this time, O'Brien held under the "Keenan agreement" to purchase, upon which there was a balance of unpaid purchase-money. O'Brien and Pardee discussed the terms. O'Brien wanted a third cash, and his equity of about $1,000 to be paid in December and January following, and the balance to be paid as provided in the Keenan agreement. He promised to telephone Pardee the same evening.

The papers upon which they figured, I find, were the papers produced in Court, exhibits 1 and 2. They shew that the price was $225 per foot, 28 1/2 ft x 132 ft., one-third down, balance of equity one-half December, 1911, one-half June, 1912, balance

*To be reported in the Ontario Law Reports.

as per agreement, $500 September and March each year, 7 per cent. The further figures appearing upon the papers of $6,412.50
4,788.00

$1,624.50

were shewn to be the sale-price, the price which O'Brien paid for the property and the difference between the two. "Balance as per agreement" was shewn to be the balance of purchase-money under the Keenan agreement, under which O'Brien claimed, and in which he had an equity of about $1,000.

They parted without reaching a conclusion. O'Brien promised to call up Pardee the same evening by telephone. This he did not do. On the following day, Pardee called him up. He was not in; and, after about 15 minutes, O'Brien called up Pardee, and stated that he would sell on the proposed terms.

And I find that Pardee said, on this occasion, that, if he (Pardee) could sell on these terms, he would do so without consulting O'Brien further, to which O'Biren said that that was satisfactory.

The plaintiff came into Pardee's office shortly after, and was told by Pardee that he was ready to sell on terms settled between Pardee and O'Brien, and the plaintiff said he would take the property on those terms. I find, further, that Pardee then called up O'Brien, and told him that he had sold the property, and O'Brien said "all right." Pardee asked O'Brien, who was looking after his property, meaning who were his solicitors, and he said Boyce & Heyward. Pardee then signed the following receipt and received $200 from Maybury: "Sault Ste. Marie, June 16th, 1911. Received from Alfred W. Maybury two hundred dollars account purchase 28 1/2 ft. x 132, being pt. lot 19, N. Queen, adjoining Sault Star building on east; price $225 per front ft., terms $200 down, balance of $1,937 after approved title and documents, $500 in September and March, balance of equity about $1,000 equally in December 11 and June 12, remainder semi-annually about $500 in September and March each year until paid. Interest 7 per cent., purchase-price, $6,412.50; Wilcox & Pardee, by Mr. Jno. B. Pardee." Pardee at the same time, wrote on the stub as follows: "Date June 16th, 1911; name, Alfred W. Maybury; address, a/c purchase for Wm. O'Brien; property 28 1/2 feet adjoining Star building, $200 cheque."

Mr. Pardee then handed the receipt to Mr. Irving, who was the plaintiff's solicitor in the matter. Mr. O'Brien made the following entry in his pass-book:—

"1911.

June 15. Sold 28 1/2 feet N. Queen to J. B. Pardee
Price $225 per foot, one 1/3 cash.
Total purchase-price $6,412.50
1/3 cash, $2,132.50
Balance of O'B. equity payments December and June interest 7 per cent.
Keenan payments to be assumed as per agreement; cost of property 4,788.00

$1,624.50"

In my opinion, the terms contained in the receipt and the O'Brien entry mean the same thing.

The defendant's solicitor drafted an agreement, which, the plaintiff's solicitor insisted, changed the terms; and, after some correspondence, the solicitor for the plaintiff rested upon the memorandum already made as sufficient evidence of the contract.

Mr. Pardee states on cross-examination that there was to be a formal agreement, and that was the reason he handed the receipt to the solicitor; that he was to conduct the negotiations; that the formal contract was to be prepared by the solicitor. He did not tell the defendant that he had given the receipt, nor that he had received the $200.

He further states that, in the interview with O'Brien, he was trying to get the best terms he could for Maybury, and O'Brien for himself. O'Brien had not in fact left the property with Pardee for sale prior to the interviews he referred to. Pardee and O'Brien substantially agreed as to the terms of the bargain; and, upon reference to the Keenan agreement, it becomes perfectly clear what the bargain was. . . .

I may mention that, at the close of the plaintiff's case, the defendant called no evidence; but, after Mr. Irving had completed his argument, and Mr. Boyce had in part replied, the case was re-opened, and I permitted the defendant to call his witnesses.

The fact that no evidence was called at first by the defence, I took to be a tribute to the accuracy of the statement made by Mr. Pardee. Whether this be so or not, I accept his evidence as against the defendant's where they differ.

There is no doubt in my mind that Pardee and O'Brien had agreed upon the terms of the contract for sale. The question still remains whether Pardee was authorised to enter into a binding contract on behalf of O'Brien. If so, it must arise from

what took place when Pardee called up O'Brien by telephone after the interview. Was Pardee authorised to sell the property without further communication with O'Brien? He swears that he said to O'Brien that, if he could sell on these terms, meaning the terms that O'Brien said he would accept, he, Pardee, would do so without considering him further, and O'Brien said that was satisfactory. I think this was an authority to sell, that is, to close a bargain on those terms; and, if he was authorised to sell, it would seem that that gave him the authority to sign a binding contract for sale. . . .

[Reference to Hamer v. Sharp, L.R. 19 Eq. 108; Rosenbaum v. Belson, [1900] 2 Ch. 267; Saunders v. Dence, 62 L.T. 644, 646; Godwin v. Bring, L.R. 5 C.P. 299; Chadburn v. Moore, 61 L.J. Ch. 674; Prior v. Moore, 3 Times L.R. 624; Wilde v. Watson, L.R. 1 Ir. 402.]

A number of these cases turn upon the question of title. In the present case, accepting the evidence of the witness Pardee, as I do, he was authorised to do more than find a purchaser. It was known that there was a purchaser in view, and he was authorised to sell without further consulting the defendant; and, after he had closed the sale, as he thought, he called up the defendant and informed him that he had sold the property, and O'Brien then said it was all right. Having regard to the circumstances of this case, I think what took place between O'Brien and Pardee amounted to an authority, not simply to negotiate, but to sell, and that Pardee had authority to sign a binding contract.

The next question is, whether there is a sufficient memorandum to satisfy the 4th section of the Statute of Frauds.

The receipt delivered to the plaintiff does not, it is said, disclose the name of the vendor; but it was urged on behalf of the plaintiff that the entry upon the stub of the book in which the receipt was written, does sufficiently disclose the vendor; and that, as this was one piece of paper written at the same time, it is a sufficient memorandum within the statute. . . .

[Reference to Pearce v. Gardner, [1897] 1 Q.B. 688; Laythroop v. Bryant, 2 Bing. N.C. 735; Hinde v. Whitehouse, 7 East 558; Kenworthy v. Schofield, 2 B. & C. 945; Cole v. Trecothick, 9 Ves. 234.]

It appears to me, however, that the receipt does disclose Wilcox & Pardee as the vendors; and, as will be shewn later, the principal may be bound. . . .

[Reference to Kennedy v. Oldham, 15 O.R. 433; Ridgway v. Wharton, 6 H.L.C. 238; Bauman v. James, L.R. 3 Ch. 508;

Long v. Millar, 4 C.P.D. 450; Cave v. Hastings, 7 Q.B.D. 125; Sarl v. Bourdillon, 1 C.B.N.S. 188; Salmon Falls Manufacturing Co. v. Goddard, 14 Howard (S.C.) 446; Jacob v. Kirk, 2 Moo. & R. 221; Knight v. Crockford, 1 Esp. 190, 5 R.R. 729; Ogilvie v. Foljambe, 3 Mer. 53, 17 R.R. 13; Stokes v. Moore, 1 Cox Eq. 219, 1 R.R. 24; Fry on Specific Performance, 5th ed., p. 257, secs. 504, 505; p. 263, secs. 516 and 517; Potter v. Duffield, L.R. 18 Eq. 4; In re Hoyle, [1893] 1 Ch. 99, 100; Oliver v. Hunter, 44 Ch. D. 205; Long v. Millar, 4 C.P.D. 450; Cave v. Hastings, 7 Q.B.D. 125; Rossiter v. Miller, 3 App. Cas. 1124, 1138; Chinnock v. Marchioness of Ely, 4 DeG. J. & S. 645; Fowle v. Freeman, 9 Ves. 351; Kennedy v. Lee, 3 Mer. 441; Thomas v. Dering, 1 Keen 729; Williams v. Jordan, 6 Ch. D. 520; Warner v. Willington, 3 Drew. 523, 530; Bolton Partners v. Lambert, 41 Ch. D. 295; Hussey v. Horne Payne, 4 App. Cas. 311.]

Taking the receipt with the counterfoil, which, at the time it was signed, was one piece of paper, and, therefore, a memorandum which, I am inclined to think, should be read as one, it appears that Alfred W. Maybury is purchasing the property of William O'Brien, which consists of 28 1/2 feet adjoining the Star building on the east, and being part of lot 19 on the north side of Queen street. I think, however, that the receipt signed by Pardee, without the counterfoil, is sufficient to satisfy the statute. . . .

It has long since been held that "it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement: Higgins v. Senior, 8 M. & W. 834; Rossiter v. Miller, 3 App. Cas. 1124; McCarthy v. Cooper, 12 A.R. 286.

I have no manner of doubt that the defendant intended to sell and the plaintiff intended to buy the land in question, for the price and on the terms stated. I have also no doubt that, when O'Brien was called up and authorised the sale upon the terms which he and Pardee had arranged, he intended that Pardee should do what was necessary to conclude the sale. . . .

Whether the initials appearing in the body of the note or memorandum made by O'Brien is a sufficient signature by him, it is unnecessary, in the view I take of the case, to decide. I am inclined to think, however, that it is. . . .

The plaintiff is entitled to specific performance and his costs of action.

Of course, any payments made by O'Brien on the Keenan agreement must be refunded, with interest.

SIMPSON v. TALLMAN BRASS AND METAL CO.—DIVISIONAL COURT —DEC. 15.

Master and Servant—Injury to Servant—Negligence—Contributory Negligence—Evidence—Findings of Jury—New Trial.]—Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Wentworth, in favour of the plaintiff, upon the findings of the jury, in an action by a workman employed by the defendants in their foundry to recover damages for a severe injury to his hand while working at a machine called a "tumbler." The jury found: (1) that there was a defect in the machine operated by the plaintiff that caused the accident; (2) that the defect was the absence of striking gear; (3) that the absence of striking gear was due to the negligence of the defendants; (4) that the plaintiff exercised reasonable care, and was in no respect guilty of any negligence; and they assessed the damages at $400. BRITTON, J., who delivered the judgment of the Court (FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.), said that there was such evidence that the case could not have been withdrawn from the jury. Speaking for himself, he could not accept the account of the accident given by the plaintiff; but that was a question of fact, and was for the jury. There should not be a new trial; probably, a new trial with another jury would not in the end assist the defendants. Appeal dismissed with costs. T. N. Phelan, for the defendants. H. Carpenter, for the plaintiff.

WELLAND COUNTY LIME WORKS CO. v. SHURR—SUTHERLAND, J.—DEC. 15.

Contract—Construction—Supply of Natural Gas—Joint or Several Contract—Oil and Gas Lease—Right to—Enforcement of Contract.]—Action for an injunction to restrain the defendant from interfering with the gas wells of the plaintiffs and an order that the plaintiffs be allowed to take gas from the

wells on the defendant's lands and that the defendant be ordered to carry out all the terms of a certain agreement under seal between the plaintiffs and the defendant and one Augustine, dated the 20th November, 1903, whereby the defendant and Augustine agreed to pay the plaintiffs $200 and give the plaintiffs the usual gas and oil leases of their respective farms; and whereby, in consideration of the $200 and the leases, the plaintiffs agreed to supply gas pipe to run from Burnaby to the front of the dwellings of the defendant and Augustine and supply, free of charge, sufficient gas to heat their houses. It was also agreed that, so soon as the plaintiffs should deliver to the defendant and Augustine sufficient gas pipe, the defendant and Augustine would give the leases. And there was a proviso that, if the plaintiffs should fail to comply with the conditions, within two months from the date of the agreement, the agreement should be null and void. Immediately after the agreement was made, the defendant and Augustine paid the plaintiffs $200, received the gas pipes from the plaintiffs, laid them so as to continue the plaintiffs' main line along the road in front of the dwellings of the two men, and connected the line thus continued with their dwellings. Thereupon the plaintiffs supplied the two men with gas and continued to do so until shortly before the commencement of the action. Some time after the date of the agreement, the plaintiffs sank two gas wells on the land of the defendant, and found gas in paying quantities, from which they ran pipes to their mains; but they did not attempt to bore any wells on the lands of Augustine. From November, 1903, down to 1911, the plaintiffs did not ask leases from the defendant and Augustine, or either of them, and neither of the men tendered leases. In June, 1911, the plaintiffs entered on the lands of Augustine, severed the pipe, and cut off the supply of gas which he had been receiving. Soon after this, the plaintiffs asked the defendant to give them a lease; but he refused to do so unless Augustine was included. Soon after the plaintiffs had cut off Augustine's supply, Augustine and the defendant cut the plaintiffs' pipe on the defendant's land which connected the wells thereon with the plaintiffs' mains. Thereupon, on the 15th July, 1911, the plaintiffs began this action. SUTHERLAND, J., allowed the defendant to amend his defence by pleading the Statute of Frauds; but he held that the terms of the agreement were sufficient to satisfy the statute. He also held that the agreement was a joint one only in the sense that the defendant and Augustine joined in the payment of the money and the work of laying the pipes; that it was contemplated that

each of the men should execute an oil and gas lease in respect of his own farm; that the covenants of the two men were to be regarded as imposing separate duties in respect of their several estates (Addison on Contracts, 11th ed., p. 316); and the position taken by the defendant, that he would sign no lease unless Augustine was a party to it, was an unwarranted one. Judgment for the plaintiffs requiring the defendant to carry out the terms of the agreement and execute a lease to the plaintiffs in the form in which gas and oil leases were framed in 1903, without prejudice to the rights, if any, that Augustine may have against the plaintiffs; the plaintiffs to be at liberty to take gas from the wells on the defendant's lands pending the execution of the lease. Reference to the Master at Welland to settle the form of the lease, if the parties cannot agree. The plaintiffs to have the costs of the action. If there is a reference, costs of it reserved. W. M. German, K.C., and H. R. Morwood, for the plaintiffs. S. H. Bradford, K.C., and L. Kinnear, for the defendant.

MANLEY v. YOUNG—SUTHERLAND, J.—DEC. 16.

Fraudulent Conveyance—Action by Execution Creditor to Set aside—Evidence—Finding of Fact—Goods seized under Execution—Interpleader Issue—Finding on.]—Action by an execution creditor of the defendant William Young to set aside conveyances of land to the defendants Isabella Young and Ellen Young, as fraudulent and void as against the plaintiff, or, in the alternative, to have it declared that the defendant Ellen Young held the lands in trust for the defendant William Young, and that the lands should be sold to satisfy the plaintiff's judgment; and an interpleader issue to determine the ownership of certain chattels seized by the Sheriff, under an execution against the goods of the defendant William Young, and claimed by the defendants Ellen Young and Robert J. Young. SUTHERLAND, J., after reviewing the evidence, finds and declares that the defendant Ellen Young is the owner of the land in question, subject to a mortgage, and that the defendant William Young has no interest therein; also that the goods seized by the Sheriff are not available for the purpose of satisfying the judgment of the plaintiff. Action dismissed with costs. Interpleader issue found in favour of the defendants Ellen Young and Robert J. Young. W. H. Wright, for the plaintiff. A. G. MacKay, K.C., for the defendants.

PITZE v. COOK—MASTER IN CHAMBERS—DEC. 19.

Venue—Change—Proper Place for Trial—Con. Rule 529 *(b)—Fair Trial.*]—Motion by the defendant to change the venue from Hamilton to Welland. The Master said that the statement of claim itself shewed that the venue should have been laid at Welland under Con. Rule 529(b); and the only ground on which the motion was resisted was, that the plaintiffs thought they could not get a fair trial at Welland, because they are Germans and have not been on friendly terms with their English-speaking neighbours at Port Colborne, where they and the defendant reside. They say that the defendant's cousin is Reeve of Port Colborne, and there is a very wide family connection throughout the county of Welland. In these circumstances, the Master said, and for reasons given on similar motions in Brown v. Hazel, 2 O.W.R. 783, and cases cited and referred to, the motion must be allowed with costs to the defendant in any event. J. F. Boland, for the defendant. E. C. Cattanach, for the plaintiffs.

DIETRICH v. GODERICH WHEEL RIGS CO.—TEETZEL, J.—DEC. 19.

Master and Servant—Contract of Hiring—Salary—Interest —Shares in Company—Wrongful Dismissal—Termination of Contract—Notice—Repurchase of Shares—Costs.]—The plaintiff, who was secretary and accountant for the defendants, sued for arrears of salary, the amount of a promissory note, money lent, damages, etc. The learned Judge stated that he had arrived at the following conclusions: (1) That the resignation of the plaintiff as the defendants' secretary and accountant, in April, 1909, was based upon an agreement between the plaintiff and one Lloyd, who was president of the company, making provision for another position and for taking off the plaintiff's hands $3,000 of stock in the company, which agreement, through no fault of the plaintiff, was not carried out by Lloyd; and, with full knowledge of this fact by the defendants, the plaintiff continued in his office of secretary and his position of accountant, with the intention of both parties that the original contract of hiring should govern; and, therefore, the plaintiff is entitled to salary at the rate of $1,100 for the third year and $1,200 for the fourth year of his service. (2) The plaintiff is entitled, under agreement proved, to be paid interest at the rate of 7 per centum per annum upon the promissory note, the additional

loan of $350, and his undrawn salary until paid. (3) The plaintiff cannot complain of wrongful dismissal, for, though he was probably right in objecting to have the entry made in the books as directed by Brandt, the company's manager, his unreasonably violent language at that time and his general refusal to obey the orders of the manager justify his dismissal. (4) The defendants not having given notice of termination of the contract, which would entitle the plaintiff to require them to take the stock off his hands, and his dismissal having been warranted, he is not entitled to compel the defendants to repurchase his shares. Judgment for the plaintiff for the amount of his promissory note, the $350 loan, his salary as above determined up to the 13th July, 1911, when he was dismissed, and interest on those amounts at 7 per cent. per annum to the date of judgment, and upon which will be applied the money paid into Court. If the parties cannot agree upon the amount for which the plaintiff is entitled to judgment under the findings, Mr. Macdonald, the Registrar at Goderich, is to ascertain the correct amount, on the basis of the findings, and to enter the same in the indorsement upon the record. The plaintiff will also be entitled to recover his general costs of the action, less the additional costs incurred by reason of two claims dismissed; and the defendants' additional costs incurred by them in respect of the said two claims beyond their general costs of defence are to be taxed and paid by the plaintiff, or deducted pro tanto from his claim and costs. C. Garrow, for the plaintiff. W. Proudfoot, K.C., for the defendants.

WALBERG v. A. C. STEWART & CO.—BRITTON, J.—DEC. 20.

Master and Servant—Injury to and Death of Servant—Dangerous Work—Defect in Plant—Negligence—Foreman—Workmen's Compensation for Injuries Act—Absence of Contributory Negligence—Damages.]—Action by the widow of John Walberg, a workman employed by the defendants, contractors, to recover compensation or damages for his death, by reason, as the plaintiff alleged, of the defendants' negligence. The defendants were constructing bridges across the Kaministiquia and McKellar rivers at Fort William. The deceased was one of a gang of men working a derrick and pile-driver under the direction of one Hancock as foreman, on the 13th January, 1911. The derrick was used for the first time on that day. The work was commenced by attempting to raise one pile to put it in

position for being driven. In the hoisting the collar came off, for want of the necessary holding-key or safety-pin. The pile fell, and in falling possibly struck the deceased, causing him to fall on the ice, whereby he fractured his skull and died immediately. If the pile did not in fact strike the deceased, he fell as the direct consequence of the collapse of the derrick and in an attempt to get out of the way. BRITTON, J., who tried the action without a jury, said that, in either case, the death was attributable to the defective condition of the derrick. The deceased was put in jeopardy by the negligence of the defendants. He did what was considered best by him at a time when he had instantly to act, and in so doing fell and was killed. There was no evidence of any contributory negligence on his part. The death was due to the negligence of Hancock in not seeing that the derrick was finished and safe before attempting to use it. The defendants were negligent in not seeing that the derrick was complete and in good and safe working order before putting it in charge of Hancock to be used. Then Hancock was a person in the service of the defendants to whose orders the deceased, at the time of the injury, was bound to conform and did conform, and the injury resulted from his having so conformed. The defendants were, therefore, liable to the plaintiff. Damages assessed at $3,000, apportioned among the plaintiff and her four children, with costs. F. R. Morris, for the plaintiff. F. H. Keefer, K.C., for the defendants.

JOHNSTON v. OCCIDENTAL SYNDICATE LIMITED—MASTER IN CHAMBERS—DEC. 21.

Security for Costs—Motion for—Refusal of Previous Motion.]—Judgment for the plaintiff (after trial without a jury) was given in this action on the 27th September, 1911: 3 O.W.N. 60. It afterwards appeared that on the 28th February, 1911, the judgment of the Yukon Court (sued on) had been assigned by the plaintiff to F. J. McDougall. The defendants thereupon moved before FALCONBRIDGE, C.J.K.B., for directions and for security for costs. The only order made was, that the action be forthwith revived at the instance of either party. The Chief Justice's written memorandum was: "Motion for directions—practically for security for costs. The only direction which I deem it necessary or proper to give is, that an order of revivor shall issue." The defendants, having given notice of

appeal to the Court of Appeal from the trial judgment, now moved for an order requiring McDougall, the plaintiff by revivor, to give security for costs. The Master said that the motion was, in substance, an appeal from the Chief Justice's order refusing security, and could not be entertained. The Master said also that, so far as he had considered the question, he was against the application on the merits, though he did not express any decided opinion. H. W. Mickle, for the defendants. Glyn Osler, for the plaintiff by revivor.

CORRECTION.

In Re Dale, ante 329, the appeal was from the order of the Surrogate Court of the County of York, not Essex as stated in the note.