THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING MAY 19TH, 1906.)

VOL. VII. TORONTO, MAY 25, 1906. NO. 19

MARCH 30TH, 1906.

DIVISIONAL COURT.

FEDERAL LIFE ASSURANCE CO. v. STINSON.

Assignments and Preferences—Execution Creditors—Claims Proved in Mortgage Action not affected by Mortgagor's Subsequent Assignment for Creditors.

In an action for foreclosure pending in the office of the local Master at Hamilton, 4 execution creditors of the mortgagor were joined as parties and proved claims. The Master directed these execution creditors to redeem the plaintiffs on 29th November, 1905. A few days before the time appointed for redemption, one Swanson acquired the claims of the 4 execution creditors, and on his application was added as a party defendant. On 29th November Swanson redeemed plaintiffs, pursuant to the terms of the report, paying the redemption money into Court, and plaintiffs' mortgage was assigned to him. The Master then took a new account, and directed the defendants by writ (the mortgagor and his wife) to redeem on 12th January, 1906, Swanson both as assignee of plaintiffs and as assignee of the execution creditors. On 2nd January, 1906, the mortgagor made an assignment for the benefit of creditors to one C. S. Scott, who then applied to be added as a party and for an extension of time for redemption, alleging on the application that plaintiffs had received rents which had not been credited in their mortgage account, and also contending that the claims of the execution creditors had been cut out by the assignment for the benefit of creditors. Scott's application was heard before MABEE,

J., in Chambers, on 9th January, 1906, and an order was made adding Scott as a party, and referring the action back to the Master to appoint a new day for redemption, leaving open for decision by the Master the questions as to the receipt of rents and the effect of the assignment for the benefit of creditors. The Master thereupon ruled that Scott was entitled, as against Swanson, to open the mortgage account, and to go into the question of rents, and also to redeem Swanson, on paying only the amount which might be found due under plaintiffs' mortgage, irrespective of the amount due to him as assignee of the execution creditors.

An appeal by defendant Swanson from this ruling was allowed by FALCONBRIDGE, C.J., on 22nd February, 1906; and defendant Scott appealed to a Divisional Court from the order of Falconbridge, C.J.

D. L. McCarthy, for defendant Scott.

H. Cassels, K.C., and R. S. Cassels, for defendant Swanson.

The question as to the right to open the mortgage account in respect of rents alleged to have been received was disposed of on the argument adversely to the appellant. The appellant also asked for a sale in lieu of foreclosure.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—By report of 29th May, 1905, the Master under the order of reference found what was due to plaintiffs in respect of the mortgages, and also what was due to the 4 execution creditors who came in pursuant to notice (Rule 746, form 7), and proved their claims. He also settled the priorities as between all the parties to the action who had proved claims—these 4 ranking in order after plaintiffs. He certifies that these are the only incumbrances upon the mortgaged property. He also appoints a day for the 4 subsequent incumbrancers to pay off the claim of plaintiffs on the footing of the mortgage. All this matter is res judicata, and puts the creditors who have proved in a different position from the status they once occupied as judgment or execution creditors. Their claims now attach upon the property, and they are entitled to redeem and share the benefits of the action, to the exclusion of all other creditors who have failed

to come into the litigation, and whose claims are not established before the Master.

W. J. Swanson acquired the claims of the 4 subsequent incumbrancers, and paid the redemption money to the mortgagee plaintiffs within the time limited, and thereupon the Master made his subsequent report of date 12th December, 1905, and took the subsequent account of what was due in respect of the redemption money and the 4 claims proved, and appointed the aggregate sum to be paid by the mortgagors on 12th January, 1906.

This matter was also res judicata before the transfer of interest occurred on 2nd January, when the appellant Scott was appointed assignee of Stinson under R. S. O. 1897 ch. 147, sec. 11, as amended by 3 Edw. VII. ch. 7, sec. 29 (O.)

It is now urged that Scott should be entitled to redeem quoad the mortgage money, but that the 4 assignments of the claim of the subsequent incumbrancers should be dealt with under the footing of the Assignments Act, ch. 147, as being claims of judgment or execution creditors whose executions have not been completed by payment.

This position appears to me quite untenable. These claims have passed beyond the judgment and execution stage, and are not within the meaning of the Act. The assignment takes precedence of the various varieties of process mentioned in the new section, including "orders appointing receivers by way of equitable execution;" but it cannot operate as to parties in this mortgage action whose priorities have been determined by the Court to the exclusion of all other creditors, including those represented by the assignee. These claimants have taken advantage of the litigation, and have taken steps in faith thereof, and are entitled to be secured by the Court in any benefit thus obtained. The assignee can get no relief in this action other than that claimable by his assignor—the right to redeem all these securities as consolidated in the report of the Master. The estate came to the hands of the assignee (as to this part of it) burdened by the various incumbrances so declared by the action of the Court, and the transfer of interest in the equity of redemption to the assignee pending litigation, and, at this stage of it, cannot revolutionize what has been done.

If a deposit of $300 is made, to answer expenses of sale, and the assignee undertakes to pay further expenses of sale, if any, the judgment may go for sale instead of foreclosure

on a day and upon the terms to be settled by the Master at Hamilton.

The costs of appeal to be added to redemption money to be paid by the assignee.

ANGLIN, J. MAY 12TH, 1906.

CHAMBERS.

RE TOLHURST.

Husband and Wife—Wife Living apart—Release of Claim to Alimony—R. S. O. 1897 ch. 164, sec. 12—Right of Husband to Order to Convey Land Free of Dower—"By Law"—Construction of Statute.

Motion by one Tolhurst, for an order under sec. 12 of R. S. O. 1897 ch. 164, dispensing with the concurrence of his wife to bar dower in a conveyance of a parcel of land which he was desirous of selling.

E. H. Cleaver, Burlington, for applicant.

C. A. Moss, for the wife.

ANGLIN, J.:—The wife has lived apart from her husband for several years, the cause of separation being his alleged intimacy with another woman. The applicant makes no charge of impropriety or desertion against his wife, but relies . . . upon an agreement made in 1899 whereby, he alleges, his wife "released and relieved him of all claims of every kind and nature both present and future," in consideration of a transfer then made to her of some household furniture and real estate. The transfer of the furniture and real estate was undoubtedly made. . . . I am satisfied that no formal document of release was ever executed by her.

The husband's bill of sale to his wife, produced, is made in consideration of her releasing and discharging all claims for alimony present and future; his deed of real estate is in consideration of $1 and natural love and affection. There never was, in my opinion, anything in the nature of a release or an agreement for a release of dower by the respondent.

The question for determination, therefore, is, whether, having by contract disentitled herself to claim alimony from the applicant, Mrs. Tolhurst's concurrence in his conveyance

of land, subsequently acquired by her husband, may be dispensed with under the statute, which enables a Judge . . to make such an order "where the wife of an owner of land has been living apart from him 2 years under such circumstances as by law disentitle her to alimony." . . .

[Reference to Re King, 18 P. R. 365, 366, 367, as to the care to be taken to see that the case made by an applicant comes clearly within sec. 12.]

It is a cardinal rule of construction that, if possible, effect must be given to every word of a statute: Stone v. Corporation of Yeovil, 1 Q. B. D. 691, 701. If the contention of the applicant should prevail, no effect whatever would be given to the words "by law" in the section in question. It is not in every case where the wife is living apart "under such circumstances as disentitle her to alimony" that jurisdiction is conferred, but only where the circumstances are such as "by law" disentitle her. We must assume that the legislature had some purpose in the insertion of these qualifying and, I think, restricting words. Though it is not necessary to ascertain what that purpose was, reasons for such a restriction readily suggest themselves. For instance, it is to be expected that persons entering into a formal arrangement for separation, and contracting for the extinguishment of the wife's right to alimony, will provide for the release of her dower or otherwise to enable the husband to convey his lands freed from such incumbrance. Moreover, the legislature, in interfering with the wife's common law right to dower, is apparently in some degree punishing the woman for living apart from her husband under such reprehensible circumstances that she thereby forfeits her right to alimony, and is, at the same time, easing the hardships entailed upon the man by a separation which his conduct has not justified. But, whatever its motive, the legislature has seen fit to restrict the exercise of this very special statutory jurisdiction to cases in which the circumstances are such as "by law" disentitle the wife to alimony. The fact that the common law right to dower is seriously interfered with requires that this section shall be strictly construed.

A right which is barred by contract is not usually spoken of as a right to which a person is disentitled "by law." Indeed, this result of contractual stipulation has been more than once contradistinguished in the construction of the

statutes from the like result attributable to the mere operation of law, where the meaning and effect of the phrase "by law" has been presented for the consideration of the Courts: Wilkinson v. Calvert, 3 C. P. D. 360; Barlow v. Teal, 15 Q. B. D. 501; . . . Percival v. The Queen, 33 L J. Ex. 289. . . .

This application must be refused, the case being, in my opinion, not within the statute. The motion will be dismissed with costs.

CARTWRIGHT, MASTER. MAY 14TH, 1906.

CHAMBERS.

CANADIAN PACIFIC R. W. CO. v. HARRI.

Pleading—Statement of Claim—Amendment—New Causes of Action—Allowance of, on Terms—Statute of Limitations—Costs.

Motion by defendant to set aside amended statement of claim.

W. C. Hall, for defendant.

Shirley Denison, for plaintiffs.

THE MASTER:—The action was begun on 30th October, 1905. The claim indorsed on the writ of summons was to recover possession of land in the town of Port Arthur and a sum for rent and use and occupation. The statement of claim did not go beyond this. It was delivered on 17th February, 1906. The statement of defence was delivered on 24th February, and subsequently about 7th March an amended statement of defence was delivered claiming a lien for improvements.

To this plaintiffs pleaded on 7th March; and on 21st April delivered an amended statement of claim asking relief in respect of other lands and water lots adjacent, which had not previously been mentioned either in the writ or the original statement of claim.

The defendant has now moved to set this aside.

The amended statement of claim seems to go beyond anything covered by Rule 244, especially in now asking an

injunction to restrain defendant from trespassing on lands not in any way mentioned in the writ.

At the same time what plaintiffs have assumed to do without leave they would certainly have been allowed to do on a motion for that purpose, as it is desirable that the whole matter in controversy should be disposed of in one action.

The question, therefore, is one as to the terms on which the amended statement of claim should be allowed to stand.

As it brings in new causes of action, defendant must have the full time for delivering an amended statement of defence, to be computed from the service of this order.

If for any reason defendant so desires, the order will provide that he shall have the same right to plead the Statute of Limitations to the new claims as if the action as to them had been begun on 21st April.

The costs will be disposed of as in Hunter v. Boyd, 6 O. L. R. 639, 2 O. W. R. 1055.

ANGLIN, J. MAY 14TH, 1906.

CHAMBERS.

PIGGOTT v. FRENCH.

Default Judgment—Motion to Set aside—Service of Process —Nullity—Acquiescence—Waiver—Estoppel—Costs.

Appeal by defendant French from order of Master in Chambers (ante 679), dismissing appellant's motion to set aside the service of notice of writ of summons upon her abroad, and all subsequent proceedings in this action.

C. A. Moss, for defendant French.

F. E. Hodgins, K.C., for H. W. Allan.

ANGLIN, J.:—Treating the service and the judgment for default based upon it as nullities (Hewitson v. Fabre, 21 Q. B. D. 6), the Master held, nevertheless, that defendant French had, by appearing on a motion to set aside a sale of the property in question to one Allan, made pursuant to the judgment entered against her, and on appeal from the order made by the local Judge who heard such application, so far

acquiesced in the proceedings upon which such judgment was based, and had, by delaying her present motion from the time of service of the impeached notice (September, 1904), until April, 1906, been guilty of such laches that she is debarred from relief.

If the impeached proceedings were mere irregularities, there may be evidence of waiver sufficient to cure them. But it is said that no delay and no acquiescence suffice to cure a nullity: Hoffman v. Crerar, 18 P. R. 473; Appleby v. Turner, 19 P. R. 145, 175. That the service on Mrs. French and the judgment founded upon it were nullities cannot, I think, be controverted. Of such there can be no waiver. Unless, as suggested in Hewitson v. Fabre, the conduct of defendant has been such as raises an estoppel against her, which requires the Court to refuse to hear her when alleging the nullity of the proceedings had against her, I know of no ground upon which her present application can be refused.

It does not appear when this defendant became aware that no concurrent writ for service out of the jurisdiction had been issued. That she took any step whatever after becoming aware of the fact that no concurrent writ for service abroad had been issued, is certainly not proven. Nor is it shewn that any step taken by her induced other parties to this litigation to alter their positions to their prejudice. The necessary basis for an estoppel against her, therefore, appears to be lacking.

I do not think I can give effect to Mr. Hodgins's statement that this application is not made on behalf of Mrs. French or by her instructions, based upon the fact of a transfer of her interest to one Hudson. Neither should I dismiss this motion and appeal because the order for judgment of the local Judge, or his order allowing service on defendant, has not been formally set aside. To do so would merely invite an application to set aside those orders, to be followed by a new motion for the relief now asked. If she be entitled to the latter relief, the orders must fall, as of course, on the application of defendants; and, to avoid circuity and waste of money and energy, they should, if necessary, be now set aside.

But the long delay and the course taken by defendant, coupled with an apparent entire lack of merit in her application, require that while allowing her appeal, I should

withhold from her costs both of the appeal and of the motion before the Master.

MULOCK, C.J. MAY 14TH, 1906.

TRIAL.

ADAMS v. FAIRWEATHER.

Way — Private Right of Way — Easement—Prescription — Presumption of Lost Grant — Evidence—Interruption— Inconsistent User by Others—Jus Publicum.

Action for a declaration that plaintiff was entitled by prescription to a right of way appurtenant to his premises, being lot 119 on the east side of Bleecker street, in the city of Toronto, over a strip of land, part of the rear end of defendant Angus Fairweather's property, known as street numbers 610, 612, and 614, on the west side of Ontario street.

MULOCK, C.J.:—The properties of plaintiff and defendant abut on a narrow street, 12 feet in width, called Darling avenue, running north and south, which at its southerly end joins a lane running easterly along the southerly limit of premises No. 610 to Ontario street.

Adjoining number 610 on its north side is number 612, and next to 612 is 614. The total width of these three premises on Darling avenue is 50 feet.

The strip in question is about 10 or 12 feet wide, and extends a distance of 33 feet wholly across the rear ends of 610 and 612, and also in triangular shape for a few feet into 614, the total length of the Darling avenue side of this strip being about 40 feet, and of the easterly side of it about 33 feet. The shorter side does not extend into 614. The rear end of plaintiff's premises is about opposite the rear end of Nos. 612 and 614.

Plaintiff's wife acquired the property now owned by plaintiff in 1880, and in 1881 she with her husband and family took up her residence upon it, residing there until her death in 1900, when she devised it to plaintiff, who has ever since continued to be the owner and occupant thereof.

About the time that Mrs. Adams first occupied the property, she had a stable built on the rear part of the property, at a distance of about 20 feet back from the westerly limit of Darling avenue, but in 1890 or 1891 it was moved to within 4 or 5 feet of Darling avenue.

Some years before Mrs. Adams purchased the property, a fence had been erected along the rear end of Nos. 610, 612, and 614, on the east limit of Darling avenue, and a stable stood at the rear of No. 610, just inside the fence, but prior to such purchase this fence and stable had disappeared, and a stable had been erected further in on the lot, the west side thereof being about 11 feet east of Darling avenue. From the north-west corner of this stable a fence had been constructed northerly, keeping at about 11 feet easterly of Darling avenue, and upon its reaching the northerly limit of No. 612, it proceeded in a north-westerly direction until it reached the easterly limit of Darling avenue, at a point about half way across No. 614. The portions of premises 610, 612, and 614, westerly of the line thus formed by the stable and fence, constitute the strip in question. They were never thereafter enclosed, and, except as hereinafter mentioned, from May, 1881, until December, 1905, there was nothing to prevent the public, including plaintiff and his predecessor in title, from using the strip as a way.

Much traffic passed along Darling avenue, and the strip was freely used by the public, especially in order to allow vehicles to pass each other.

Plaintiff testified that when his wife purchased the property, the strip was unenclosed; that he thought it formed part of Darling avenue; and that he remained under that impression until December, 1905, when defendants commenced to build upon it.

It was shewn at the trial that plaintiff's wife during her occupancy, and plaintiff since, had continuously kept a horse and carriage, using therefor the stable on plaintiff's land, and that the way to and from this stable was by Darling avenue, and that it was their habit to drive in and out by Darling avenue.

Plaintiff testified that from May, 1881, until the commencement of this action, it was his daily practice when returning to approach the stable from Ontario street by the land referred to, to turn the corner of Darling avenue close

to the stable, driving northerly along the strip, keeping as close as possible to its easterly limit, until about opposite to his stable, in order to get a wider turn into his stable, and that in driving out of the stable he drove across Darling avenue upon the strip. He also testified that only by following such a course could he conveniently drive in and out of his stable. There was some conflicting evidence as to this latter point . . . but the fair inference . . . is . . . that from May, 1881, until the commencement of this action, plaintiff was in the habit of driving to and from his stable, using the strip in manner and under the conditions and circumstances hereinafter mentioned.

It appears that a stable had also been erected on premises No. 612, and that in 1885 or 1886 one Arthur Wilby, a carter, rented first this stable, and later the southerly stable on premises 610, occupying them in all for about 3 years; that plaintiff himself in 1890 rented the stable on 610 for a year; that one Alfred Tourgis on 1st June, 1894, rented and occupied the stable on 610 for 3 years and a half; and that in 1898 or 1899 one Alexander Wilby rented and occupied this stable for 4 or 5 years. It was the practice of these tenants, other than plaintiff, to make use of this strip as an adjunct to the stables, storing their vehicles there, and otherwise using it as if the right to do so passed to them under the demise of the stables.

Mrs. Hogg, who leased the stable to Tourgis in 1894, objected to his cleaning his horses and storing his vehicles in the yard to the east of the stables, giving him to understand that the strip was available for that purpose. Tourgis accordingly so used and occupied it during a considerable portion of his tenancy.

Thus it would seem that during the 20 years prior to the commencement of this action, omitting the year of plaintiff's tenancy of the stable on premises 610, the strip had been so used by various tenants for periods amounting in all to about one-half of the period of 20 years during which plaintiff contends that he and his predecessor in title had been enjoying a way over it as of right.

During this period of about 10 years there were many circumstances to interrupt plaintiff's passage over this strip. The doors of the stable opened outwards. The tenants were in the habit of cleaning and feeding their horses upon it and storing their vehicles thereon for long periods. This

user constantly obstructed plaintiff when desiring to drive over the strip. For about 2 years one tenant, Albert Tourgis, stored his vehicles on the strip, not always in the same place, but leaving them wherever he chose. He had an express waggon, a large covered waggon, and a run-about, all of which at one time or another were stored on this strip of under 11 feet in width. Plaintiff drove past daily, saw these obstructions, which must have interfered with his passage over the strip, but at no time protested or made any objection of any kind to such user. . . .

Frequently whilst the strip was being so used, plaintiff would arrive, and his passage over it being interfered with by Wilby's vehicles, he would, in a friendly, neighbourly way, ask Wilby to move his waggon so as to allow him to pass. This Wilby would do.

Plaintiff, however, at no time raised any objection to the use Wilby was making of the strip, or claimed any right to use it himself. In the absence of the occupants, plaintiff, in order to be able to pass, would move the vehicles out of his way and then replace them.

Thus it appears that for about 10 years of the 20 immediately preceding the commencement of this action, various tenants of the stables now the property of defendant were in occupation of the strip, and making such use of it as to interrupt plaintiff's driving over it, unless the obstruction were removed; that sometimes, in response to his friendly request, the person in occupation would remove such obstruction and allow him to pass; at other times plaintiff would remove the obstruction, and on passing it, replace it; and that on no occasion did he remonstrate with any one of the persons causing such obstructions, or claim . . . a way as of right.

The only case sought to be made out at the trial on behalf of plaintiff was an enjoyment of the easement in question by himself and his predecessor in title from May, 1881, until December, 1905, a period of less than 25 years, and he claims to have shewn such enjoyment as, under R. S. O. 1897 ch. 133, establishes a right in him to the easement in question. Section 35 of the statute enacts that "no claim which may be lawfully made at common law, by custom, prescription, or grant, to any way . . . to be enjoyed upon, over, or from any land . . . when such way . . . has been actually enjoyed by any person claiming right thereto, without interruption, for the full period of 20 years, shall be defeated

or destroyed by shewing only that such way . . . was first enjoyed at any time prior to the period of 20 years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated."

This section applies to a claim at common law, and does not change the common law characteristics of the prescriptive enjoyment necessary in order to create a right: Sturges v. Bridgeman, 11 Ch. D. 863. And the question therefore is, whether the nature of the enjoyment by plaintiff and his predecessor in title was such as at common law would, if of sufficient duration, have created a right in him, and, if so, whether such enjoyment has existed for a period of 20 years next before the commencement of this action, as required by secs. 35 and 37 of the statute: Goddard's Law of Easements, 5th ed., p. 212, and cases cited in notes (g) and (h). The words "enjoyed by any person claiming right thereto" in sec. 35, and "the enjoyment thereof as of right" in sub-sec. 2 of sec. 38, following the language of the Imperial statute 2 & 3 Wm. IV. ch. 71, secs. 2 and 5, have been the subject of frequent judicial interpretation. . . .

[Reference to Bright v. Walker, 4 C. M. & R. at p. 219; Monmouth Canal Co. v. Harford, 1 C. M. & R. 631; Tickle v. Brown, 4 A. & E. 382; Earl de la Warr v. Miles, 17 Ch. D. 591; Hollins v. Verney, 13 Q. B. D. 315; Union Lighterage Co. v. London Graving Dock Co.,[1902] 2 Ch. at p. 570; Dalton v. Angus, 6 App. Cas. 805.]

Construing plaintiff's conduct, which also binds his wife, in the light of these decisions, it appears to me impossible to reconcile it with that of a person enjoying an easement as of right. For a period of about 10 years he allowed his daily passage over the strip to be interrupted, in manner above described, by occupants of stables on the lands now owned by defendants. If one of the occupants were present, and his horse or vehicle were in the way, it was his practice to request him to remove it sufficiently to enable him to pass, and his requests were complied with. On these occasions he was enjoying the privilege not as of right but by leave and license of the occupant, without which he would have been a trespasser. At other times, in the absence of the occupant, it was his practice to remove and replace any vehicle that interrupted his passage, thus recognizing the right of the occupants to the use which they were making of the strip, and at no time during all these years, when the strip was being

used practically as a private yard, did he raise any objection to such user, or intimate that he was entitled to a right of way which was being unlawfully interfered with. Thus acquiescing in the user these various occupants were making of the strip, his enjoyment was not open and notorious, manifest to the world, and would not have conveyed to the mind of the owner of the servient tenement the fact that plaintiff was asserting a claim that would, if acquiesced in, ultimately ripen into a right. Rather it was calculated to create the opposite impression, that plaintiff made no claim, but by the favour of others was willing to enjoy a privilege which might at any moment be terminated, if he were to manifest an adverse attitude. Such conduct appears to me wholly irreconcilable with the theory of a lost grant, presumption of which is necessary in order to his succeeding, but lost grant is presumed only where the circumstances are such as would have existed if, in fact, there had been a grant; per Field, J., in Dalton v. Angus (supra) 756.

When the circumstances are not such, or when it appears very improbable that a grant ever was made, then in either case the presumption does not arise: Goddard's Law of Easements, 5th ed., p. 191; and title by prescription to a way resting upon the legal fiction of lost grant, the absence of such presumption defeats the claim.

To give rise to such presumption it was necessary for plaintiff to have shewn continuous actual enjoyment "as of right" for a period of 20 years next before the commencement of this action. Having failed to do so, he has failed to establish a title by prescription, and his action fails.

Further, plaintiff's testimony was to the effect that he used the strip in the belief that it formed part of the public street.

Therefore he was enjoying it as one of the public, and not as of right, within the meaning of the statute, which applies only to a case of dominant and servient tenement.

His form of action, as at present constituted, being based upon the statute and the doctrine of lost grant, he is not entitled to set up a case resting upon a different kind of enjoyment: Shuttleworth v. Le Fleming, 19 C. B. N. S. 709. Even if this difficulty in plaintiff's way were removable by amendment, I am unable to see such merit in his case as entitles him to leave to amend.

For these reasons the action should be dismissed with costs.

The plaintiff may, I think, overcome the comparatively trifling inconvenience occasioned to him by exclusion from defendants' land by a slight re-arrangement of his own premises, and therefore, even if I had reached a different conclusion on the merits, damages, instead of relief sought, would have fully met the requirements of the case.

MAY 14TH, 1906.

DIVISIONAL COURT.

SMITH v. TRADERS BANK OF CANADA.

Banks and Banking — Cheque — Indorsement to Order of Plaintiff—Forgery of Plaintiff's Name — Payment by Bank on Forged Indorsement—Possession of Cheque—Action to Recover Cheque or Amount—Failure because of Non-presentation and Non-indorsement by Plaintiff.

Appeal by defendants from judgment of senior Judge of County Court of Bruce, in favour of plaintiff for $438.71, the amount of a cheque (with interest) sued for by plaintiff.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.

A. H. Clarke, K.C., for defendants.

H. J. Scott, K.C., for plaintiff.

MABEE, J.:—The facts are not in dispute, and no questions turn upon any conflict of evidence at the trial.

On 10th August, 1905, W. J. Pulling & Co., of Windsor, issued their cheque for $425.99, payable to Captain J. W. Williscroft, and delivered it to him. This cheque was in payment of freight owing to plaintiff by Pulling & Co., which had been earned by plaintiff's boat, of which Williscroft was the captain; he was the agent of plaintiff, and had authority to collect freight, cash cheques, and make payments connected with his boat. Williscroft indorsed the cheque payable to the order of plaintiff, took it to defendants' bank, upon which it was drawn, where it was stamped "certified,"

and the amount charged to Pulling & Co.'s account. Williscroft then enclosed it in a letter addressed to plaintiff, and delivered it to one Kitchen to be mailed, but the latter, instead of mailing it to plaintiff, opened the letter, forged plaintiff's name, and obtained, on 18th August, payment of the cheque at the private bank of Cook & Co. at Sarnia, who transferred it to the Bank of Toronto in Sarnia, which bank in turn forwarded it to the Traders Bank at Windsor, which latter bank paid the amount to the Bank of Toronto on 19th August. On 21st August Williscroft, finding, upon his return to Windsor, no acknowledgment of the cheque from plaintiff, telegraphed to him, and receiving his reply, went to defendants' bank on 22nd and was shewn the cheque and told it had been paid by defendants to the Bank of Toronto at Sarnia. Williscroft told defendants' manager that the indorsement of plaintiff's name was a forgery, and was told by him that defendants would make a draft on the Bank of Toronto at Sarnia, which latter bank would probably repay in a few days; on the same day defendants returned the cheque to the Bank of Toronto at Sarnia, without any objection upon the part of Williscroft, and without the latter making any demand upon them that the cheque should be delivered to him or sent to plaintiff. Rennick, defendants' accountant at Windsor, says he told Williscroft they would have to send the cheque back to Sarnia, and this is not contradicted by Williscroft, it apparently being expected that the money would have to be refunded by the Bank of Toronto, as Williscroft says he saw defendants' manager again and was told that the Bank of Toronto were probably looking into the legal position of the matter, and that the money would probably be along in a few days. Williscroft says he asked defendants for the cheque, upon instructions from plaintiff, but that this was after defendants had returned it to Sarnia; he also says that when he first saw defendants' manager at Windsor he cannot say that he told him to whom the cheque belonged, but that he had indorsed it to Geo. H. Smith, Southampton, and he wanted him to get the money. On 23rd August both plaintiff and Williscroft were in Sarnia, and Williscroft says that "Mr. Cook offered to settle the matter; when Mr. Smith asked for the money, Mr. Cook offered to pay the half." At this time the cheque was in either the hands of Cook & Co. or the Bank of Toronto at Sarnia. Plaintiff says: "I went to see Cook and I said, 'you cashed a cheque belonging to me,' and I said, 'that was

forged, and I want the money, some one has to pay me the money.' "

Plaintiff made no attempt to obtain the cheque either from Cook & Co. or the Bank of Toronto. On 24th August plaintiff's solicitors wrote defendants for payment of the amount of the cheque; defendants replied advising that the cheque had been sent by them to the Bank of Toronto on 22nd August, and that they (defendants) were ready to pay it "on presentation by the proper holder." The writ was issued upon the same day. The man Kitchen who caused all the trouble was prosecuted for forgery, and, doubtless, the cheque was used upon his prosecution, as it was produced upon the trial of this action by the clerk of the County Court of Bruce, who was called by plaintiff, and who says he got the cheque from the local registrar at Sarnia, under some authority from the Attorney-General. It has never yet been indorsed by plaintiff.

Defendants take the position that this cheque has never been presented for payment by plaintiff and indorsed by him; the only answer suggested by plaintiff is that the cheque having been in defendants' possession, they were wrong in sending it back to the Bank of Toronto at Sarnia, and thereby waived any further presentation, or estopped themselves from setting up want of presentation; but it is clear from the undisputed evidence that the cheque was returned to Sarnia with the knowledge and assent of Williscroft, plaintiff's agent, no demand for payment being made at that time, and no request that the cheque should not be returned being made. Plaintiff then could have applied to the Bank of Toronto at Sarnia, or to Cook & Co., for his cheque—it was the step of his agent Williscroft in placing the cheque in the hands of an unreliable person, that set matters going wrong,—but, instead of following up his property, he makes demand upon the bank for payment without producing the document, and, for all the bank knew, at the time this demand was made, the cheque might have been indorsed by plaintiff to some third person to whom they would have been liable to again make payment, if they acceded to plaintiff's demand, without production of the cheque. It, of course, is not the case of a lost or destroyed cheque—the plaintiff knew where it was, and could have obtained possession of it at any time.

The County Court Judge seems to have treated the case more upon the pleadings than upon the evidence—the only issue is whether plaintiff can recover without shewing that he presented the cheque for payment. The money lies in the bank awaiting his sending the cheque, so the whole matter involved is one of costs—each side standing upon its strict rights. Plaintiff's action was launched upon the assumption that defendants had the cheque in their possession when the solicitors' letter was written asking for payment; this was an error. It seems perfectly clear upon the authorities, as well as upon established custom, that a bank cannot be expected to pay the cheque of a customer without its production, when it can be produced, and defendants in this case are entirely justified in taking the position they did, and refusing to pay the solicitors until the cheque was presented or sent in to them in due course.

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

Magee, J., gave reasons in writing for the same conclusion, basing it upon the assent of plaintiff's agent to the return of the cheque by defendants to the Bank of Toronto.

Boyd, C., agreed in the result, for reasons given in writing, in which he referred to Hansard v. Robinson, 7 B. & C. 90, 94; Gaden v. Newfoundland Savings Bank, [1899] A. C. at p. 285; Keene v. Beard, 8 C. B. N. S. 372; Barough v. White, 4 B. & C. 325; Smith v. Mercer, 6 Taunt. 76; Wilkinson v. Johnson, 3 B. & C. 428; Coolidge v. Brigham, 1 Metc. (Mass.) 547; Brockmeyer v. Washington National Bank, 19 Pac. R. 855; and suggested that, to avoid further misunderstandings, the cheque should be properly authenticated by the signature of plaintiff as his property and delivered to the bank, upon payment of the amount of what is due upon the cheque (without interest, for no proper demand has been made for payment), less the costs of action and any reserved costs and costs of appeal, and that the satisfied cheque should then be returned in due course to the drawers, Pulling & Co., according to the usual practice of banks.

CARTWRIGHT, MASTER. MAY 15TH, 1906.

CHAMBERS.

McDONALD v. CRITES.

Costs—Right to Tax—Interlocutory Costs Payable "in any Event"—Settlement of Action.

Motion by plaintiff to set aside appointment issued by defendant for taxation of certain interlocutory costs.

Grayson Smith, for plaintiff.

W. E. Middleton, for defendant.

THE MASTER:—On 14th December last this action was settled by an agreement in writing. This provided "that each party shall pay all their own costs." Certain interlocutory costs had been given to defendant in any event, and, notwithstanding the settlement, defendant's solicitor has taken out an appointment to tax them.

Plaintiff moves to set this aside, relying on Campbell v. Dunn, 19 C. L. T. Occ. N. 382.

Defendant relied on Walter v. Bewicke, 90 L. T. J. 409.

I think the motion must succeed. The distinction is plain between these cases. A judgment of the Court at the trial does not interfere with interlocutory costs, and they can be recovered even if the action is dismissed without costs. But where such a judgment is by consent, then there are no costs recoverable. To hold otherwise would be to go counter to the express agreement of the parties.

The appointment should be set aside with costs.

TEETZEL, J. MAY 15TH, 1906.

WEEKLY COURT.

RE INTERNATIONAL MERCANTILE AGENCY, LIMITED.

Company—Winding-up—Creditors—Preferred Claim—Trust —Moneys Collected and Deposited in a Bank.

Appeal by the liquidator from the report of the referee in a winding-up, whereby the Snowball Co., creditors of the

"agency" or company in liquidation, were found entitled to be paid their claim, in preference and priority to the general creditors of the company, in respect of moneys collected by the agency for the claimants and deposited by the agency in a bank.

J. A. Macintosh, for the liquidator.

A. W. Holmested, for the claimants.

TEETZEL, J.:—The relationship between the Snowball Company and the International Mercantile Agency was clearly that of principal and agent, not that of banker and customer; consequently the money collected was impressed with a trust in favour of the principal. There was no such dealing with it by the agent with the concurrence of the principal as could affect the rights of the principal against the liquidator. The money, being trust property, when collected was deposited in a bank account, where it now remains as part of a balance to the credit of the agent. Such balance is entirely made up of money collected for persons employing the agency as collector, and the sum in question is therefore easily identified and traceable, and, consequently, is subject to a charge in favour of the beneficiary, under the authorities cited by the learned referee, in addition to which the following cases may be referred to: Foley v. Hill, 2 H. L. Cas. 28; Frith v. Cartland, 2 H. & M. 417; Hancock v. Smith, 41 Ch. D. 456; Mutton v. Peat, [1900] 2 Ch. 79; Re Oatway, [1903] 2 Ch. 356; Long v. Carter, 27 A. R. 121, 26 S. C. R. 430.

Appeal dismissed with costs.

TEETZEL, J., MAY 16TH, 1906.

WEEKLY COURT.

RE RUTHERFORD.

Will—Construction—Joint Life Estate—Remainder in Fee in Common—Rule in Shelley's Case—Gift to Class.

Motion by executors under Rule 938 for order declaring construction of will of William Rutherford, deceased.

J. B. Dalzell, Galt, for executors.

E. P. Clement, K.C., for John Rutherford and others.

F. W. Harcourt, for infants.

TEETZEL, J.:—The clause of the will to be construed is as follows:—"It is my will that upon the death of my wife Mary the whole of my real estate above described and the whole of my personal estate then remaining shall belong to my sons George and James conjointly, to have and to hold the same for their use during their lifetime, and at their death to their children, their heirs and assigns forever. But if my sons George and James both die without issue, then the said real and personal estate shall be equally divided among my grandchildren then living share and share alike."

James died in 1897, after the testator, a bachelor and intestate. George died in 1902, leaving a widow and five children.

Two questions arise: first, whether the estate given to George and James is a joint estate tail or a joint life estate only; second, whether, if the latter, after the death of both life tenants the children of George take the whole estate or only one-half, leaving the other half undisposed of.

As to the first question, I think the testator's intention was to give the sons a joint life estate only, with remainder to their children, if any, in fee, and failing children his other grandchildren would take under the executory devise in their favour in the second sentence above quoted.

This construction was placed upon a devise in similar words in Chandler v. Gibson, 2 O. L. R. 442, approved of in Grant v. Fuller, 33 S. C. R. 34.

The words "their children" are a specific description of individuals who are to take the fee upon the death of the surviving life tenants, and are not intended as a general term including all who could inherit at that time, so that the rule in Shelley's case does not apply.

The words "without issue" in the second sentence do not, I think, referentially control the word "children" in the previous sentence in such a way as to make it equivalent to "issue" or "heirs of the body," and thus make the rule applicable. . . .

[Reference to Jarman on Wills, 5th ed., pp. 1298, 1307; Theobald, 5th ed. pp. 617 and 652; Underhill & Strachan, p. 154 et seq.]

As to the other question, I think the gift of the remainder to the children of George and James was a gift to such children as a class, who take the whole estate per capita.

The fact of James dying without children would not prevent the children of George taking the whole. In other words, there would be no lapse or intestacy by reason of only one of the sons leaving children. The testator makes no provision for any such contingency; but I think the second sentence evidences his intention that both should die without children as a condition of the gift ever taking effect, and thus supports the view that the testator's intention was that if only one son had children they should take the whole estate.

The subject of construction of gifts to a class is fully discussed in Kingsbury v. Walter, [1901] A. C. 187.

The declaration will therefore be that the children of George are entitled to the property in question in fee simple as tenants in common. Costs of all parties out of the estate.

MEREDITH, C.J. MAY 16TH, 1906.

TRIAL.

McKENZIE v. GRAND TRUNK R. W. CO.

Railway—Farm Crossing—Overhead Bridge and Under-pass—Depriving Owner of—Damages—Measure of—Reference.

Action for damages for injury to plaintiff's land by substituting for the farm crossing to which he was entitled upon the severance of his farm by defendants' railway, a different means of crossing.

T. G. Meredith, K.C., and A. E. Taylor, London, for plaintiff.

W. R. Riddell, K.C., for defendants.

MEREDITH, C.J.:—Since the trial a similar action, Dickie v. Grand Trunk R. W. Co., has been disposed of by the Chancellor, and I have had an opportunity of reading the reasons for his judgment in favour of the plaintiff which were given by that learned Judge.

Following that case, I must hold that plaintiff was entitled, of right, to the overhead bridge and way and the under-pass which are in question, and that defendants were wrong-doers in removing them or altering their condition without the authority of the Dominion Board of Railway Commissioners.

The existence of the unsigned agreement in the Dickie case, and the absence of that feature in this case, do not seem to me to make less applicable what I understand to be the principle of the decision in the Dickie case, viz., that after the lapse of the very long period during which the plaintiff had enjoyed as of right the overhead crossing, and the circumstances under which it was dealt with during that period, the presumption arose that the enjoyment of the right was a part of the arrangement under which the predecessors in title of defendants acquired their right of way through the lands of plaintiff.

The result of this conclusion is, that plaintiff is entitled to damages for the injury done to him by the acts of defendants which I have held to be wrongful. These damages are not to be confined to the loss sustained up to the present time, but, if plaintiff is in a position to shew that the value of his land is lessened by the substitution of the means of crossing which defendants have provided, for the means to which he was entitled, that will be one of the elements making up the damages which are to be awarded to him, and there will be a reference to the Master at London to assess the damages.

Defendants must pay the costs of the action, including those of the motion for injunction.

May 16th, 1906.

DIVISIONAL COURT.

HAVERSTOCK v. EMORY.

Negligence—Injury to Bicyclist by Motor Car—Evidence for Jury—Setting aside Nonsuit—New Trial.

Motion by plaintiffs to set aside judgment of nonsuit pronounced by ANGLIN, J., at the trial, in an action for

damages for injuries to plaintiff M. G. Harverstock, the wife of plaintiff Ambrose G. Haverstock, by being run into by defendant's motor car in College street, in the city of Toronto, and for a new trial.

The motion was heard by BOYD, C., MAGEE, J., MABEE, J.

J. M. Godfrey, for plaintiffs.

G. T. Blackstock, K.C., for defendant.

MAGEE, J.:—Plaintiff Mrs. Haverstock says she was riding at a moderate speed eastward on a bicycle along the roadway close to the south curb on College street, about 7 p.m. on 19th September. She overtook a street piano, which was being pushed by a man and also going eastward, but which was somewhat nearer the centre of the road than she was, it being about half way between the curb and the street car tracks. As she approached it, she rang her bell, and the man paying no attention she rang again, and then he turned slightly to the right nearer the curb. She deflected her course to the left, and went round the piano to the north between it and the southerly street car track, and after passing it she again turned to the south side of the roadway, and was riding along about a foot from the curb, when suddenly she heard a "sizzling" noise . . . and turning her head to see what it was, she found that the left front light of the automobile driven by defendant was at her left elbow, and at the same instant its right wheel struck the hind wheel of her bicycle and shoved it from under her, and she fell to the left between the two wheels of the automobile. The latter was stopped before it ran over her, but her foot was caught under the wheel, which had to be lifted off, and she was injured. She says she had not a second's warning, no horn was blown, and the machine must have come behind or almost directly behind her, and she had not seen or heard it coming, nor seen any light or shadow of the light. Before she overtook the street piano she had seen the lights of the automobile at the north side of the road, and as she passed the piano the automobile was then standing still, almost directly north of her and at the north curb and facing westward. She could not say if there was any person in it, as it stood under the trees in the shade, but she says the light shone plainly on the side she was on. To the

question, "When you were hugging the curb, a person might look over in your direction without seeing you?" she answered, "They might." She says the street was quiet and free from noise.

There was also evidence as to a statement by defendant that he, meaning apparently his automobile, was standing on the north side of the street, and plaintiff passed down past him as he supposed, but he did not see her until he began to turn round and come half way over the devil strip, and as he came on that strip he saw her ahead of him, and he ran into the hind part of her wheel down at the rear.

The trial Judge on the motion for nonsuit said that if the accident had happened in the broad daylight he could not have taken it from the jury, and in acceding to the motion he said: "Even had the horn been sounded, plaintiff herself admits that she saw the motor car when on the devil strip; it was then probably too late to avoid it." I do not find that plaintiff gave any evidence to that effect, and it would seem that the Judge had in mind defendant's statement as to when he saw the bicycle.

The position, then, on the existing evidence, is that plaintiff had rung her bell twice as she was approaching; that the automobile was standing at the north curb, facing west, when plaintiff, on the south part of the roadway, passed it, and that she subsequently, when proceeding eastward at the south curb, was suddenly overtaken by it, at a place where the light shone plainly, and her wheel was struck at an angle from behind—no warning of any kind being given by defendant, although he saw her when he came on the devil strip in making his turn, and had not only the direct distance between that and the curb, but also the length of the curve in turning and in overtaking her—in which he might have warned her or stopped or turned away his motor.

If these assertions be true and unexplained, there seems to be quite sufficient evidence for the jury to find negligence on defendant's part.

It was urged for defendant that the automobile must have struck the bicycle almost squarely on the side, and consequently that plaintiff must have ridden directly in front of it when defendant was in the act of turning it; but that is inconsistent with the evidence, and if plaintiff was going

along close to the curb, as she says, it is difficult to understand how the machine at such a point would be facing south in making a turn if driven without negligence.

The case should go to the jury, and the appeal be allowed with costs of first trial and this motion to plaintiff in any event.

The trial Judge desires it to be stated that had defendant's admission as to seeing plaintiff been present and called to his attention, he would not have withdrawn the case from the jury.

BOYD, C., gave reasons in writing for the same conclusion.

MABEE, J., agreed in the result.

CARTWRIGHT, MASTER. MAY 17TH, 1906.

CHAMBERS.

PIGOTT v. BANK OF HAMILTON.

Venue—Motion to change—Venue Improperly Laid—Rule 529 (b)—Onus — Reasons for Retaining Venue where laid.

Motion by defendants to change venue from Toronto to Hamilton.

H. E. Rose, for defendants.

Grayson Smith, for plaintiff.

THE MASTER:—It is conceded that the case comes within Rule 529 (b), and that the onus is therefore on plaintiff to keep the venue as laid, if he can.

As long ago as November last defendants gave notice of their intention to make this motion if the case actually went to trial, and it was agreed that they should not be prejudiced by delay in the meantime. Since then negotiations for settlement have been going on, which are not yet concluded. But the points in dispute have been largely reduced.

If the case goes to trial, it would seem from the subpœna served on Mr. Turnbull, defendants' chief manager, that many books and other documents in the possession of defendants will be required at the trial. Mr. Turnbull also swears to 6 or 7 witnesses being necessary for defendants' case, and that they all reside in Hamilton.

In the first case on the Rule, Pollard v. Wright, 16 P. R. 505, it was said by a Divisional Court that "a very strong case would have to be made to have the trial in another county."

The only ground here set up by plaintiff is a speedier trial and relief to him of heavy interest payments. Assuming that this would be so (though it is very doubtful if any such result would follow), I do not think this is what is meant by "a very strong case."

The order will go to change the venue with costs to defendants in any event.

[Affirmed by MEREDITH, C.J., 18th May, 1906.]

CARTWRIGHT, MASTER. MAY 17TH, 1906.

CHAMBERS.

JOHNSON v. BURTIS.

Writ of Summons—Order for Service out of Jurisdiction—Foreign Defendant—Service on Agent in Jurisdiction—Irregularities—Proceedings Set aside.

Motion by defendant to set aside order allowing issue of writ of summons for service out of the jurisdiction and allowing service on one Bice in Ontario, as agent for defendant, who was a foreigner residing out of the jurisdiction, and to set aside the service of the order and the writ upon Bice.

Grayson Smith, for defendant.

W. E. Raney, for plaintiff.

THE MASTER:—Defendant is not a British subject. The order directed issue of a writ for service out of the jurisdiction, and provided that "service of said writ and of this order upon Joseph H. Bice," defendant's manager at Thessalon, should be good service, and gave 20 days for appear-

ance. Nothing was said in the order as to service of statement of claim, but the writ directed appearance to be entered and defence to be delivered within 20 days. The writ itself, and not a notice, was served on Bice. . . .

It was contended that Rule 147 was authority for what has been done here. In the absence of any judicial interpretation, I do not think this is so. That Rule seems to be intended to give power to apply the provisions of Rule 159 as to service on corporations to cases where a non-resident individual or firm is carrying on business in Ontario. It would have been proper to have made an order directing service on Mr. Bice, and in that case it would not have been necessary to have made any order for service out of the jurisdiction. Or if the latter had been made, then substituted service might have been directed on Bice, who would have been served with the notice, etc., just as if he had been the defendant.

What was done was neither the one nor the other, but a combination of both, and therefore irregular. The power to serve process outside the jurisdiction is limited to the provisions of the Rules, which are to be strictly construed; otherwise the proceedings are null and void. See Piggott v. French, ante 679, 783.

The only order that can be made is setting aside the proceedings with costs.

CARTWRIGHT, MASTER. MAY 17TH, 1906.

CHAMBERS.

CLIFF v. NEW ONTARIO S. S. CO.

HEYDER v. NEW ONTARIO S. S. CO.

Third Pary Procedure—Indemnity or Relief over—Negligence—Joint Tort-feasors—Motion for Directions as to Trial—Setting aside Third Party Notice.

Motions by defendants for directions as to trial of issues, a third party notice having been served in each action.

W. A. Logie, Hamilton, for defendants.

Casey Wood, for third party.

T. D. Delamere, K.C., for plaintiff Cliff.

T. L. Monahan, for plaintiff Heyder.

The Master:—These actions were begun in September last, and were at issue before the end of the year. At defendants' request the trial was postponed in November last (see 6 O. W. R. 579), and must not be further delayed.

The third party notices were served only on 23rd February, and the present motions only on 10th May. The notices are not sufficiently explicit to require the third party to plead thereto. If defendants were now required to deliver a proper statement of their claim against the third party, it would be almost impossible to have this issue ready for trial on 11th June. The motion might, therefore, be disposed of on that ground.

In any case it seems clear that this is not a case for the application of the third party procedure.

The statement of defence alleges that the loading was being done under the supervision of Carney, the third party, who is called "the boss grain trimmer" or foreman of the train moving gang at Fort William, "for whose acts the said defendants are in no way responsible. The said defendants had a contract with the said Carney to load the said vessel, and the said defendants had no control over the said plaintiff in any way."

If this is so, then defendants are not liable, and there would not seem to be any room for bringing in Carney as a third party: see McCann v. City of Toronto, 28 O. R. 650; and also Miller v. Sarnia Gas Co., 2 O. L. R. 546, and cases there cited and discussed, especially The "Englishman" and the "Australia," [1895] P. 212.

The statement of defence is inconsistent with any right to claim relief against Carney; and it may be fairly assumed that if plaintiffs had joined Carney and defendants as joint tort-feasors, defendants would at once have required them to elect against which of them they would proceed, alleging that they were not properly made defendants in one action.

If defendants have any right against Carney for want of skill or negligence, that must be pursued in a separate action, and would not depend on the result of the pending actions.

Here defendants have said in their statement of defence that plaintiff should have sued Carney, which a defendant can never say where a third party notice is properly allowed.

The orders allowing the third party notice to issue will, therefore, be set aside, and the present motions will be dismissed with costs to plaintiffs in each action in any event and to third party forthwith after taxation.

CARTWRIGHT, MASTER. MAY 18TH, 1906.

CHAMBERS.

LEVY v. MANES.

Security for Costs—Residence of Plaintiff—Adoption of Permanent Residence—Rule 1198 (b)—Burden of Proof.

Motion by defendants under Rule 1198 (b) for an order requiring plaintiff to give security for plaintiff's costs.

W. J. Elliott, for defendants.

Samuel King, for plaintiff.

THE MASTER:—On 17th March last plaintiff was engaged by defendants to come to Toronto, on an engagement for one year. At that time he was and had always been a resident of Montreal. Plaintiff was dismissed on 26th April, and has brought this action for wrongful dismissal. . . .

For the motion reliance was placed on Nesbit v. Galna, 3 O. L. R. 429, 1 O. W. R. 218, and Kavanagh v. Cassidy, 5 O. L. R. 614, 2 O. W. R. 27, 143, 303, 391. But the facts of these cases were very different. Here plaintiff has been cross-examined on his affidavit. He states that he has accepted another position in Toronto, and is residing here with his wife in rooms which they have furnished, and that he intends to make Toronto his permanent place of residence. On leaving Montreal plaintiff disposed of nearly all his household effects, and has bought others here.

From this it is clear that the cases cited above, as well as Barry v. Oshawa Canning Co., 3 O. W. R. 190, are not in point. Here the onus is on defendants to shew that they are entitled to an order which in all probability would render it impossible for plaintiff to proceed.

In my opinion, that onus has not been satisfied, and the motion is dismissed with costs in cause to plaintiff.

MEREDITH, C.J. MAY 18TH, 1906

CHAMBERS.

THOMAS v. IMPERIAL EXPORT CO.

Trial—Separate Trial of Preliminary Issues—Settlement of Action—Rule 531—Consent.

Appeal by plaintiffs from order of Master in Chambers, ante 745, directing, upon plaintiffs' application under Rule 531, and upon the agreement of both parties, the preliminary trial of an issue raised by the pleadings, as to whether there was a binding settlement between the parties, but refusing to direct an issue as to whether defendants had in law accepted the goods in question.

J. Bicknell, K.C., for plaintiffs, stated that their counsel before the Master had not intended to consent to the one issue only being tried, and contended that both issues should be tried, or neither.

C. W. Kerr, for defendants.

MEREDITH, C.J., set aside the order directing the issue, but made the costs of the appeal costs to defendants in any event.

MEREDITH, C.J., MAY 18TH, 1906.

CHAMBERS.

WOOSTER v. CANADA BRASS CO.

Security for Costs—Plaintiff out of Jurisdiction—Property in Jurisdiction—Shares in Company.

Appeal by plaintiff from an order of Master in Chambers, ante 748, requiring plaintiff to give security for costs of defendant Menzie.

Z. Gallagher, for plaintiff.

W. N. Tilley, for defendant Menzie.

MEREDITH, C.J., dismissed the appeal with costs to defendant Menzie in any event.

TEETZEL, J. MAY 19TH, 1906.

WEEKLY COURT.

RE MOODY.

Will—Specific Devise—Residuary Devise—Bequest of Personal Estate — Provision for Payment of Debts and Funeral and Testamentary Expenses "out of my Estate" —Incidence of Debts, etc.—Devolution of Estates Act, sec. 7—Gift of Chattels—Exoneration.

Motion by executors under Rule 938 for order determining questions arising upon the construction of a will as to the administration of the testator's estate.

E. G. Graham, Brampton, for executors.

R. T. Heggie, Brampton, for William Moody.

F. W. Harcourt, for infants.

TEETZEL, J.:—The principal question is as to the order of assets for payment of debts.

The testator bequeathed all his personal estate to his son William, to whom he also specifically devised a farm, and he devised the residue of his real estate to his executors upon certain trusts. The debts and funeral and testamentary expenses are directed to be paid "out of my estate."

It was held in Re Hopkins, 32 O. R. 315, that, excepting in cases coming within sec. 7 of the Devolution of Estates Act, R. S. O. 1897 ch. 127, the order in which different classes of property are applicable for payment of debts before the passing of that Act, has not been disturbed by its provisions.

In the absence, therefore, of anything in this will either expressly or by necessary implication exonerating the personal property not specifically bequeathed from liability to pay debts, it remains the primary fund for that purpose.

There is nothing in this will to shew any intention to exonerate the personal property, so it must be first applied, as far as it will go, in payment of debts.

No doubt, the effect of the direction in the will is to charge payment of the debts, etc., on the testator's land,

in aid of the personal estate, but not in relief of its primary liability, except as regards any specifically bequeathed, of which there is none. See cases collected at p. 728 of Theobald on Wills, 5th ed.; also Irvin v. Ironmonger, 2 Russ. & My. 531.

Mr. Heggie argued that the bequest, embracing as it does all the testator's personal property, is in its nature residuary, and that, as there is also a residuary devise of land, sec. 7 of the Devolution of Estates Act applies, and that the debts should be borne by the personalty and residuary estate ratably.

Section 7 reads as follows: "The real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto) be applicable ratably, according to the respective values, to the payment of his debts."

In the first place, I think it quite clear that this section does not apply where there is not *both* real and personal property comprised in a residuary gift.

The term "residuary bequest" implies that something has been taken out of the personal estate by the testator, and that the bequest applies only to a balance as distinguished from the whole. See Stroud's Jud. Dict., tit. "Residue."

The bequest here not being residuary in the ordinary sense, the Act does not apply to this will. The lands comprised in the specific residuary devise must bear proportionally the burden of paying any balance of debts after the personal estate is exhausted.

The charge created by the will affects all the testator's lands, and Lancefield v. Iggulden, L. R. 10 Ch. 136, establishes that specific and residuary devises of land are on the same footing in regard to liability to pay debts. See also Jarman, 5th ed., p. 1431.

At testator's death he was in possession of a threshing machine and engine under the usual conditional sales agreement, subject to liens for unpaid purchase money, and on behalf of the legatee of the personal property it was argued that he was entitled to these articles freed from the liens. I understand that the total balance of the personal property is less than the debts, so that this question is not material, but, if it were, I think it clear that, as the gift is in no sense a specific legacy (see Bothamley v. Sherson, L. R. 20 Eq.

304), the said chattels are not exonerated at the expense of the real estate. See also Re Banks, [1895] 1 Ch. 547.

The order will, therefore, be that the whole personal estate is primarily chargeable with the payment of debts and funeral and testamentary expenses, and that the balance remaining unsatisfied shall be borne by all the real estate pro rata.

If the parties cannot agree upon the respective values, there will be a reference to the Master at Brampton to fix the same as a basis for the apportionment.

Costs out of the estate.

CLUTE, J. MAY 19TH, 1906.

TRIAL.

WAMPOLE & CO. v. F. E. KARN CO., LIMITED.

Contract—Sale of Goods—Agreement as to Prices on Re-sale —Illegal Combination or Conspiracy Unduly to Enhance Prices and Lessen Competition—Refusal to Enforce Contract—Criminal Code, sec. 516.

Action for damages for breaches of contracts and an injunction restraining defendants from further breaches.

H. R. Frost, for plaintiffs.

J. M. Godfrey, for defendants.

CLUTE, J.:—Plaintiffs' statement of claim sets forth that they are manufacturing chemists, and are the sole owners and manufacturers of certain proprietary medicines and preparations which are manufactured by them under their private formula, among them being "Wampole's Tasteless Preparation Extract of Cod Liver Oil," "Wampole's Antiseptic Solution Formoloid," and "Wampole's Formoloid Tooth Paste."

On 2nd November, 1905, plaintiffs entered into two separate agreements with defendants. One of the agreements was on a form of contract used by plaintiffs in connection with their wholesale trade, and provided that, in consideration of plaintiffs supplying to defendants the preparations therein mentioned, and being those above referred to, at a schedule of prices set out in the said agreement, defendants covenanted not to sell wholesale any of the said preparations at a price below those mentioned in the said agreement.

The second agreement is on a form used by plaintiffs in connection with the retail trade, and provides, amongst other things, that defendants, in consideration of plaintiffs' covenant to supply them with the above mentioned preparations at a schedule of prices therein set out, agree not to sell such preparations to any retailer except at the schedule of prices mentioned in the said agreement, and then only when such retailer had signed an agreement with plaintiffs to the same effect as the said agreement with defendants.

Plaintiffs allege that they have supplied defendants with their preparations, in accordance with the agreement, and in every way have carried out their part of the contracts.

Plaintiffs charge that defendants have not complied with their covenants contained in the said agreements, and have sold the preparations of plaintiffs at lower prices than those agreed to be observed, as set out in the schedule to said agreements, and defendants refuse to observe and be bound by their covenants in the said agreements. . . .

Defendants plead that the contracts are null and void by reason of being in restraint of trade. Defendants further say that if any such agreements existed, as referred to in plaintiffs' statement of claim, they were procured by an unlawful conspiracy between plaintiffs and other manufacturing chemists and the Association of Wholesale and Retail Druggists, and that the said conspiracy was entered into for the purpose of unduly enhancing the prices of certain medicines, and are contrary to the provisions of the Criminal Code relating thereto, and are null and void.

Plaintiffs' manager was examined for discovery, and it was agreed between the parties that his examination should be put in as evidence.

It appeared from the evidence that the goods covered by the contracts had been supplied to defendants; that defendants had been advised that the contract was illegal and void, and had refused to be bound by it, and had, in fact, sold goods purchased at prices less than the prices fixed by the schedules in the said agreements, in breach of their contracts with plaintiffs. Plaintiffs were in fact paid their prices for the goods. The breach charged was that defendants were selling at less than the schedule prices. Plaintiffs' manager explained how this injuriously affected their business . . . indirectly. . . .

He further stated that there was fierce competition between the large dealers and some retailers, and that the object of this agreement was to do away with that competition. . . .

It further appeared that in the present case defendants paid for the cod liver oil preparation 57 cents a bottle, and the offence was that they sold at 79 cents instead of $1—that their profit was 22 cents a bottle instead of 43 cents. . . .

The effect of these contracts is, to fix the prices at which these preparations will be sold to the wholesale trade, and the prices at which the same articles will be sold by the wholesale trade to the retail trade, and lastly to fix the prices at which they will be sold at retail.

Competition, therefore, in these articles is not only affected, but entirely destroyed. The agreement exists not simply between the parties to this action, but affects the entire trade in the article. No one can buy an article for re-sale, whether wholesale or retail, unless he enters into one or other of these agreements, as the case may be.

Is this agreement contrary to the Criminal Code?

Section 516 of the Code defines a conspiracy in restraint of trade to be "an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade." Every one is guilty of an indictable offence, under sec. 520 of the Code, "who conspires, combines, agrees, or arranges with any other person, or with any railway, steamship, steamboat, or transportation company—(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any article or commodity which may be the subject of trade or commerce; or (b) to restrain or injure trade or commerce in relation to any such article or commodity; or (c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, or supply of any such article or commodity, or in the price of insurance upon person or property." . . .

[Reference to Rex v. Elliott, 9 O. L. R. 648, 5 O. W. R. 163.]

In the present case the evidence shewed that the commodities in question could not be furnished by defendants or by any one else unless and until they had signed the agreement in question.

An injunction is asked for upon the ground that, although defendants have paid the full price agreed upon for the goods purchased, yet they have sold at a less price than that fixed by the agreement.

This agreement is used not simply in relation to these commodities between plaintiffs and their various customers, but is the form adopted by the committees representing a large part of the wholesale and retail trade of Canada. It means that nearly every commodity in common use is to be subject to a hard and fixed contract which fixes the manufacturer's price, the wholesale price, and the retail price, below which none can sell and no one can purchase who is not a member of the association and agrees to sign the contract in question. It means that competition is not only unduly prevented or lessened in the purchase, barter, or sale of this article, but is absolutely destroyed. In the present case the evidence also shewed, I think, that the price was unreasonably enhanced by reason of this agreement. . . .

[Reference to Elliman v. Carington, [1901] 2 Ch. 275; Garst v. Harris, 177 Mass. 72; Walsh v. Dwight, 58 N. Y. St. R. 91; Whitwell v. Continental Tobacco Co., 125 Fed. R. 454; Hulse v. Bonsack Machine Co., 65 Fed. R. 869; Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A. C. 535.]

These cases are decisions where there is no law corresponding to our statute, and therefore can aid very little in the decision of the present case.

I think the statute was intended to provide against agreements similar to the one in question. The history of the law shews that it was passed at a time when the law relating to the protection of native industries was being introduced. As an objection to the protective tariff it was argued that combinations might be formed which would destroy competition and so enhance the price—that while, upon the one hand, foreign goods were excluded, the introduction of which might moderate the price of the article in question, upon the other hand trade combinations might be formed which would destroy competition and greatly raise the price of the commodity to the consumers. To meet that objection the law against restraint of trade was passed. It was intended to prevent the very thing that was aimed at in the present contract, and it is difficult to conceive of a scheme more effective to destroy competition and to enhance prices than the contract sued on. It is the form adopted by the Association of

Retail Merchants in Canada and by the Association of Wholesale Merchants in Canada. It thus included, to the extent of the membership of these various associations, a very large part of the trade in Canada. The result is that, to the extent that these associations are able to reach the persons engaged in the manufacture and trade, they will be able to absolutely control the prices of the various commodities and articles of trade; not only to limit but to destroy competition, and in effect to declare that no one will be permitted to deal in their commodity who will not first of all bind himself to sell the same only at a fixed price.

I find as a fact from the evidence that the agreements in question, and each of them, were procured by an unlawful conspiracy between the plaintiffs, defendants, and other manufacturing chemists, and the Association of Wholesale and Retail Druggists, and that the conspiracy was entered into for the purpose of unduly preventing or lessening competition in the purchase, barter, and sale of the articles in question, being articles of trade and commerce, and for the purpose of unreasonably enhancing the price of said commodities, and are contrary to the provisions of the Criminal Code, and are null and void.

Plaintiffs' action must be dismissed with costs.

CLUTE, J. MAY 19TH, 1906.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. GRAND TRUNK R. W. CO.

Railway—Crossing Line of another Railway—Branch Line or Siding Crossing under Viaduct—Trespass—Justification—Reservation in Deed of Right of Way—Construction of Deed—Application to Board of Railway Commissioners—Ex Parte Order Approving Construction of Siding — Affirmance on Application to Rescind or Vary — Jurisdiction of Board—Crossing Order—Powers of Board —Forum for Determining Jurisdiction—Exclusive Jurisdiction—Filing Plan.

Action for damages and an injunction in respect of an alleged trespass.

E. D. Armour, K.C., and Angus MacMurchy, for plaintiffs.

W. M. Douglas, K.C., and A. W. Ballantyne, for defendants.

CLUTE, J.:—Plaintiffs are lessees of the lands of the Ontario and Quebec Railway, including the right of way over lot 13 in the 2nd concession of the township and county of York, subject to certain reservations.

The Don valley is bridged by a viaduct built on and over the said lot.

Defendants are lessees of the Toronto Belt Line Railway Company, incorporated by 52 Vict. ch. 82 (O.) Section 2 of this Act empowers the Belt Line Railway Company to construct their railway from some point on the line of the Grand Trunk Railway in the eastern part of the city of Toronto, passing to the north of the city, and connecting with the Grand Trunk to the north-west of the city.

The Grand Trunk constructed a branch line about 1892 from the Belt Line Railway easterly to Taylor's brickyard, under agreement with the owner of the land over which it passed. This line approached but did not cross plaintiffs' right of way.

In 1901 the branch on this line was slightly changed, and in order to get more room was extended on to plaintiffs' right of way, under the viaduct.

In 1902 it was extended through the viaduct. This branch line was used by the Grand Trunk Railway Company for conveying freight for the owners of the brickyard and paper mills further north.

Defendants from time to time received plaintiffs' cars for delivery at defendants' siding, and the same passed over the lands in question, and were unloaded sometimes under the viaduct, and, later, on land across the viaduct owned by one Davies, the present owner of lot 13, whose predecessor in title originally owned the lot and conveyed the right of way to the Ontario and Quebec Railway Company.

On 30th December, 1904, the solicitor for defendants sent the following application to the Dominion Board of Railway Commissioners:— ". . . I inclose two blue prints of plan, profile, and book of reference, which this company, under agreement with Robert Davies, Toronto, desire to

make in the siding leading to the brick works of Robert Davies, on the east side of Bay View avenue, in the township of York. I also forward copy of a resolution passed by the township council consenting to the construction of the new track across Bay View avenue. You will note that this resolution practically gives permission covering both the old track, which has been laid for some time, and the proposed track of the new siding or extension. The book of reference shews that the only lands affected are those belonging to this company and Mr. Davies. I beg to make application for an order authorizing this company to make the changes and extensions referred to, and submit a draft of the order. You will notice I have added a clause at the end approving and ratifying the construction of the old siding, shewn on the blue print in white. I presume there will be no objection to the order being issued without publication of a notice, as all interests affected have given their consent. I will forward a tracing on linen of the plan, within a day or two, but meantime perhaps the matter may be considered. . . ."

And on 5th January, 1905, the following ex parte order was made by the Board: "In the matter of the application of the Grand Trunk Railway Company of Canada . . . upon the recommendation of the chief engineer of the Board approving of the said plan, profile, and book of reference, and the consent of the municipality of the township of York to the laying of the said tracks across Bay View avenue . . . :—It is ordered that the said Grand Trunk Railway Company of Canada be and it is hereby authorized to make said changes and extensions of said sidings by constructing a siding from a point on their railway on lot 18 in the 2nd concession from the Bay in the township of York, across Bay View avenue to their tracks at present laid on the brick works property of Robert Davies, on lot 13 in the 2nd concession of the said township, and by extending their tracks as at present laid on said lot 13 across the river Don to the paper mills of the said Robert Davies, on the east side thereof, according to said plan, profile, and book of reference; that the construction, maintenance, and operation by the Grand Trunk of the sidings already laid, and the crossing of Bay View avenue thereby, as shewn on the said plan, is hereby approved and ratified."

It will be observed that the application upon which this order was made states that all interests affected have given their consent. As a matter of fact, this statement was

erroneous; the interests of the James Bay Railway Company, whose main line would be crossed, was affected by this order, and plaintiffs assert that their interests were also affected.

On 16th February, 1905, plaintiffs wrote defendants complaining of the trespass from October, 1902, and claiming compensation at the rate of $100 a year, explaining that the rate was high, but that the defendants "have been guided in making this charge by what your company forced us to pay for right of way across your tracks at St. Constant and St. Johns."

A correspondence ensued, and in a letter to plaintiffs, dated 15th April, 1905, defendants state that "the track referred to was put in under an agreement with Mr. Robert Davies. Mr. Davies, successor of the Taylors, claims the privilege of using the land under a reservation in the deed from J. F. Taylor and others to the Ontario and Quebec Railway Company, in view of which we must decline to accept your bill for the use of the land upon which the track is located."

To this plaintiffs replied on 21st April that "the reservation in the deed from Taylor, which is dated 1st March, 1890, is of the right of way under the said bridge as now enjoyed by the vendors." At that time (1890) the only use made of the reservation was by persons on foot or with horses, carts, etc. It is quite clear that such right of way could not extend to a use for railway purposes, and the track was not laid on our land until 1902, almost 12 years later. We shall have to insist upon payment being made for past occupation, and the track being removed forthwith, unless a satisfactory agreement is made with us for it to remain."

The James Bay Railway Company and plaintiffs applied to the Board for an order under sub-sec. 4 of sec. 25 and sec. 32 of the Railway Act, 1903, to rescind the order of 5th January, 1905. In support of the application it was stated: "1. The rails of the said siding are laid across the lands and under the railway of the applicants, known as the Don branch of the Ontario and Quebec Railway. The railway of the applicants has been carried over the said lands by means of a steel bridge or viaduct. 2. The said siding was constructed across the said lands of the applicants without their permission and without any authority obtained under sec. 137 or sec. 177 of the Railway Act, 1903. 3. The

said Grand Trunk Railway did not comply with the provisions of sec. 75 of the Railway Act, 1903, before commencing the construction of the said siding or at any time since. 4. The said order was made ex parte and without notice to the applicants. 5. The said Grand Trunk Company did not at any time prior to 12th December, 1905, disclose to the applicants the fact that the said order of 5th January, 1905, had been made. On 14th December, 1905, the applicants, through their solicitors at Toronto, received . . . a copy of the said order, and then for the first time became aware of its contents. 6. The applicants thereupon examined the proceedings before the Board which led to the said order being made, and ascertained the facts as above stated. The applicants ask that, if necessary, the time for making this application be extended by the Board. 7. The applicants also rely upon and repeat the grounds taken in a similar application made by the James Bay Railway Company to the Board, dated 16th December, 1905, in so far as the same are relevant to their position. The applicants, therefore, ask that the said order should be rescinded in so far as it affects the applicants' lands and railway, and that the said Grand Trunk Railway Company be ordered to remove its tracks or other obstructions laid by it upon the said lands."

Both applications were heard on 31st January, 1906, and, after hearing counsel for all parties, the Board allowed the application of the James Bay Railway Company, and rescinded the order in so far as it affected that company, but dismissed the application of plaintiffs.

The Chief Commissioner in his judgment says: "As this order was made without the notice required by sec. 175 of the Railway Act and without the filing of the plans; as it was also made on a misrepresentation, which I have not the least doubt was unintentional, but which was, nevertheless, a misrepresentation in fact, that the consent of all parties had been obtained; and the James Bay Railway Company having applied within the time limited in sec. 32 to have the order rescinded, and limiting their application to so much of it as affect their location—I think an order should be made setting aside the order authorizing the siding to be built, to the extent that it affects that portion of the line of the James Bay Co. But that is as far as we will go at the present time. Let the James Bay Co. take such steps as

it sees fit otherwise to cross. If the land belongs to the Grand Trunk Co., or if it has a lease of it, the James Bay Co. can proceed in the method required by the Railway Act. So far as the Canadian Pacific Co.'s application is concerned, it does not seem to me that any order should be made. The company did not apply within the time provided in sec. 32; the line has been there for years; it does not affect the track of the C. P. R.; it goes under it; and, so far as we have any reason to believe, it cannot affect it in any way. There does not seem to be any ground on which to make any further order in that respect. The application of the James Bay Co. is granted; the application of the C. P. R. Co. is dismissed."

There is no doubt that defendants have built their railway upon and across plaintiffs' right of way under this viaduct.

Defendants contend that they had a right to do so and to continue the same there—(1) under the reservation contained in the deed conveying the right of way to plaintiffs, defendants claiming title through Robert Davies, who claims through plaintiffs' vendors, the Taylors; and (2) under the order of the Board of Railway Commissioners dated 5th January, 1905.

Plaintiffs' deed reserves "to the said vendors, their successors and assigns, the right of way under the said bridge as now enjoyed by the vendors, subject to the right of the said company at any time to fill up such part of the said bridge as may be done without interfering with the privilege hereby reserved."

The company covenant "that they will forthwith carry out and execute or cause to be carried out and executed the accommodation works particularly specified in the second schedule hereunder written, and will at all times hereafter maintain the same in a good and sufficient state of repair."

The second schedule, in so far as it affects the question, is as follows:—"Two under-crossings for farming purposes, one near the boundary line between lots 12 and 13 in said 2nd concession, and the other about midway between the Denison line of lots 13 and 14 in said 2nd concession, and as shewn on the sketch thereof hereto annexed."

On referring to the sketch forming part of the deed, it is clear that neither of these farm crossings corresponds with the line of railway laid down by defendants.

But Mr. Douglas contended that the reservation was not limited either by the covenant, schedule, or plan, and "the right of way as now enjoyed" meant the right to use any of the arches under the viaduct for any purpose, including that of a railway, just as the owner would have the right to do prior to the sale.

I do not think that is the meaning of the reservation. The deed must be read as a whole, and so reading it, the meaning is, I think, plain. "As now enjoyed" means "as now used," i.e., for farm purposes. The covenant on the company's part ensures that the right of way will be maintained at all times in an efficient state of repair; the schedule shews that the crossings are for farm purposes, and the plan clearly locates the same at points entirely different from the way located for the railway. This reservation was subject to the company's right to fill up such part of said bridge as may be done without interfering with the privilege reserved. There would be no sense in this if the vendors reserved the right under the whole length of the bridge. . . .

[Dand v. Kingscote, 6 M. & W. 174, and United Land Co. v. Great Eastern R. W. Co., L. R. 17 Eq. 158, 10 Ch. 586, considered and distinguished.]

Here, I think, the right reserved is controlled by the express terms of the deed, which, on my construction, limits its use to that of a farm crossing.

Defendants fail, in my opinion, on this branch of the case, because the user claimed is at a point other than that reserved, and for a purpose different from that intended.

Then we come to the effect to be given to the order of the Board of Railway Commissioners dated 5th January, 1905.

The order authorizing defendants to make the changes and extensions asked, approves and ratifies the construction, maintenance, and operation of the sidings already laid.

Whatever may have been the effect of this ex parte order in the first instance, plaintiffs having moved against it under

sub-sec. 4 of sec. 25 and sec. 32 of the Railway Act, and having raised on that application all the objections that are now raised to it, it stands affirmed and must be taken to be as effective in its scope and bearing as if notice had been given and plaintiffs heard when it was first obtained.

It was argued by Mr. Armour that the effect of the order obtained by the James Bay Railway Company rescinding the order of 5th January as to that company, annulled the sanction given by the Board under the first order. But this view cannot, I think, be supported. The order of rescission is effective only so far as it affects the James Bay Railway Company, and plaintiffs' application having been dismissed, it is affirmed as to them.

It is further urged that assuming the order to stand, defendants never obtained what is called a "crossing order" under sec. 177 of the Act.

Section 177 provides for one railway crossing another, by leave of the Board, when a plan or profile of such crossing must be submitted, and the Board may make such order as may be deemed expedient. It was argued that the order as made only authorized the line of location from one point to the other, and was not intended to provide for a crossing nor impose terms in respect thereof; that this was the subject-matter for another application, which had not been made; and that until such order was made defendants were trespassers; and that the parties even cannot waive this provision; citing Credit Valley R. W. Co. v. Great Western R. W. Co., 25 Gr. 507. . . . That case is distinguishable.

By sec. 8 of the Railway Act the Board of Railway Commissioners is constituted and made a court of record, and invested with the powers and duties of the Railway Committee of the Privy Council, which is thereby abolished.

Section 23 declares that the Board shall have full jurisdiction to inquire, hear, and determine any application by or on behalf of any party interested, in respect of the matters therein defined, with power to make mandatory and injunction orders, to hear and determine all matters of law and fact, and to have within its jurisdiction all the powers, rights, and privileges which are vested in a superior court.

Sub-section 2 declares that its decisions upon questions of fact, or whether the party is interested, shall be binding

and conclusive upon all companies and persons and in all the courts.

Section 25, sub-sec. 4, provides that the Board may review, rescind, change, alter, or vary any rule, regulation, or order, and all decisions made by it, whether previously published or not.

Section 32 provides that the Board may make an order notwithstanding the want of notice, and such order shall be valid and take effect in all respects as if made on due notice, but any person entitled to notice may, within 10 days after becoming aware of such order, or within such further time as the Board may allow, apply to vary, amend, or rescind such order, and the Board may on the hearing either amend, alter, or rescind such order, or dismiss the application.

I am of opinion that the subject matter of this action is within the jurisdiction of the Board; that the order of 5th January, 1905, was a valid order, notwithstanding the want of notice; that under sec. 25, sub-sec. 4, and sec. 32, of the Act, the plaintiffs had the right to apply to vary or amend the order; that in applying they submitted to the jurisdiction of that Court, and are concluded by its judgment; that, whether the application may be considered as one made under sec. 177 of the Act or sec. 137, in either case the essential thing is that the crossing should have the sanction of the Board. In the present case it has that sanction—not obtained in the usual way—but that is the effect—in my judgment—of the two applications.

The Chief Commissioner points out as a reason for not disturbing the order that the line has been there for 3 years, that it does not affect the track of the plaintiffs; that it goes under it; and "so far as we have any reason to believe, it cannot affect it in any way." . . .

On their application to rescind, plaintiffs might, if they would, have had all questions of compensation for the past and future occupation of their lands determined by the Board. If they desire the order to be more specific in this regard, they may still apply to that Court to amend the order, and for such relief as they may be entitled to. That Court is the proper forum, and, in my judgment, the only forum to which application should be made for redress.

For years plaintiffs must have known that defendants were using their right of way for the delivery of their own

freight and that of plaintiffs, and made no objection, but acquiesced in its user. I am inclined to think that plaintiffs' letter of 16th February, 1905, explains their present action.

Mr. Armour urged further that in the present case the Board had no jurisdiction because, this being a branch line, the plans were not filed in the registry office pursuant to sec. 175, sub-sec. 2, and sec. 122, of the Act.

There are, I think, two answers to this objection. The order made in this case, in so far as it affects plaintiffs, is governed by secs. 137 and 177. The sections say nothing about the filing of plans in the registry office, but do expressly refer to the "profile and book of reference on file" and "the recommendation of the chief engineer of the Board approving of the said plan, profile, and book of reference," etc.

It may be that the want of a plan filed in the registry office could be taken advantage of by a private owner: see West v. Parkdale, 12 App. Cas. 605; Hendrie v. Toronto, Hamilton, and Buffalo R. W. Co., 26 O. R. 667, 27 A. R. 46; but these cases do not apply, I think, where one railway crosses another.

The Board deals exclusively with cases that come under secs. 137 and 177. The question of jurisdiction, however, should be raised by appeal to the Supreme Court. Section 44 provides that, subject to the provisions of that section, every decision of the Board shall be final. It expressly provides that an appeal shall lie from decisions of the Board to the Supreme Court of Canada upon questions of jurisdiction, but such appeal shall not lie unless the same is allowed by a Judge of the said Court upon application, and hearing the parties and the Board. An appeal shall also lie from the Board to that Court on any question which, in the opinion of the Board, is a question of law, upon leave therefor having been first obtained from the Board, which leave is in the discretion of the Board. It is, I think, the plain intendment of the statute that the Board shall deal with all questions of the kind involved in this suit—that the question of jurisdiction shall not be disposed of without the Board being heard. In the present case plaintiffs, having appealed to the Board and being dissatisfied with their decision, now seek to open up the matter de novo, on a question of jurisdiction, which they might have had disposed of by

the mode authorized. Not having done so, I think they are not entitled to come to this Court and raise that question.

Mr. Armour cited Montreal Street R. W. Co. v. Montreal Terminal R. W. Co., 36 S. C. R. 369. It is enough to say that that case was an appeal from an order of the Board to the Supreme Court, upon the ground that the Board had no jurisdiction. It confirms, I think, the view above expressed that the Supreme Court is the proper forum in which to raise the question of jurisdiction.

It was further urged by Mr. Armour that the line in question was not a branch line of the Grand Trunk, but of the Toronto Belt Line, over which they have a lease only, and therefore they have no authority to build this branch line. Section 2 of the Act to incorporate the Toronto Belt Line Railway Company, 52 Vict. ch. 82 (O.), expressly authorizes the company to build "a branch line up the valley of the Don in the said township of York." This right passed to defendants. But it is said that this is a right given by the provincial legislature, and under the present Railway Act, sec. 7, the Parliament of Canada has control of it only in respect of connections or crossings, and therefore the provisions of the Dominion Railway Act do not apply to this crossing. The answer to this . . . is, that the Belt Line Railway, crossing plaintiffs' railway, is brought expressly within the Act by sec. 7, "in respect of such crossing," that is, in respect of the subject matter here involved.

In Grand Trunk R. W. Co. v. Perrault, 36 S. C. R. 671, it was held that the establishment of farm crossings over railways subject to the Railway Act, 1903, is exclusively within the jurisdiction of the Board, and it follows that where one railway crosses another which is subject to the said Act, the Board has exclusive jurisdiction.

Action dismissed with costs.