The
Ontario Weekly Notes

VOL. VII. TORONTO, DECEMBER 4, 1914. No. 13

APPELLATE DIVISION.

NOVEMBER 9TH, 1914.

COWPER-SMITH v. EVANS.

Master and Servant—Wages—Assault—Wrongful Dismissal—Agreement of Hiring—Construction—Notice — Damages—Counterclaim—Costs.

The plaintiff was employed by the defendant for a year, and was dismissed without notice after serving for about four months. The plaintiff claimed $315 as the balance due to him for his services; $1,500 damages for wrongful dismissal; and $500 damages for assault.

The defendant counterclaimed from the plaintiff the value of certain articles alleged to have been taken away by the plaintiff; and also $1,500 for negligence of the plaintiff in the performance of his work.

By the written agreement between the plaintiff and the defendant it was provided that if the work of the plaintiff was not satisfactory to the defendant, "this agreement will become null and void upon the party of the first part" (defendant) "giving 30 days' notice in writing to the party of the second part" (plaintiff), "and upon payment to the party of the second part of the amount of salary due at the time the notice is given, and, in addition, one month's salary, for which the party of the second part agrees to give a month's work."

The trial Judge, FALCONBRIDGE, C.J.K.B., gave judgment for the plaintiff for $200.81, the balance due for wages; $125 damages for dismissal—one month's wages in lieu of notice; and $10 damages for assault: total, $335.81. Upon the counterclaim, the learned Chief Justice allowed the defendant $73.25 for a grinding attachment taken by the plaintiff; $39.50 for a saw-table; and $2 for a counter-sink: total, $114.75. Judgment was given for the plaintiff for the difference between the two totals—$221.06—with County Court costs, and a set-off of costs in favour of the defendant. See Cowper-Smith v. Evans, 6 O.W.N. 722.

Both parties appealed from the judgment of FALCONBRIDGE, C.J.K.B.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. C. Mikel, K.C., for the plaintiff, contended that, when the agreement was broken, instead of being terminated according to its provisions, the plaintiff was entitled to recover as damages the difference between the amount he could have earned under the contract for the period of hiring and the amount he actually earned. The agreement does not give the employer the option of paying the month's salary in lieu of notice, but requires that he shall do both. Two of the articles which the defendant counterclaims have been returned by the plaintiff.

E. G. Porter, K.C., for the defendant, opposed the appeal and supported the cross-appeal.

At the close of the argument the judgment of the Court was delivered by MEREDITH, C.J.O.:—We think we cannot, upon the appeal by the plaintiff, interfere with the judgment except as to the value of the saw-table and the counter-sink, which were returned three weeks after they were taken away by the appellant—after the action but before the trial. It is not suggested that any damage was done to them while in the appellant's custody. Therefore, the $41.50 allowed for these articles should be deducted.

Mr. Mikel's argument upon the main branch of the appeal—that is, as to the damages awarded for breach of contract in dismissing the appellant—eliminates altogether the provision of the agreement which entitles the respondent to put an end to the hiring upon giving 30 days' notice to the appellant, and paying him the wages then due, the appellant being bound to work that month.

Upon the question of damages, this right of the respondent was properly considered by the learned Chief Justice in finding as to what the appellant really lost by his dismissal without notice, which he fixed at the month's wages which he would otherwise have received, in addition to the arrears of wages which were allowed to him by the judgment. In that respect the appeal fails.

We think also the cross-appeal fails and should be dismissed.

No costs of the appeal or cross-appeal to either party.

[A short note of the result of the judgment of the Appellate Division was previously published: see ante 179.]

NOVEMBER 27TH, 1914

*H. H. VIVIAN CO. LIMITED v. CLERGUE.

Execution—Judgment for Part of Purchase-money of Land—Inability to Convey Land if Money Realised by Execution—Agreement—Construction—Assignment—Merger—Surety—Withdrawal of Execution except as to Costs.

Appeal by the plaintiffs from the order of KELLY, J., ante 109, declaring that the plaintiffs were not entitled to enforce their judgment and execution against the defendant except as to costs.

The appeal was heard by MEREDITH, C.J.O., FALCONBRIDGE, C.J.K.B., MAGEE and HODGINS, JJ.A.

A. H. F. Lefroy, K.C., for the appellants.

G. F. Shepley, K.C., and H. S. White, for the defendant, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—The circumstances under which this judgment was recovered are set out in H. H. Vivian Co. Limited v. Clergue (1908), 16 O. L.R. 372, and Clergue v. H. H. Vivian & Co. (1909), 41 S.C.R. 607, where the facts are all detailed. The additional feature is that, since judgment was pronounced in the Supreme Court of Canada, the appellants have sold the mining property for $75,000, after having forfeited it under a power in that behalf contained in the agreement of the 10th March, 1905, the terms of which are discussed in the reports already referred to.

Undoubtedly, prior to the act of forfeiture mentioned, if the respondent had paid the amounts for which judgment has been recovered, he would have paid them as the person originally liable for the purchase-money as purchaser of the mining property. The assignment of that agreement, according to the previous judgment, did not release him; in fact, the right to assert that he remained liable is expressly preserved in the assignment. So long as the same situation existed as formed the foundation of the judgment mentioned, the respondent's position did not differ from that of a mortgagor who, being liable on covenant to the mortgagee, sells his lands to a third party. His conveyance does not prevent the mortgagee from holding him liable for the

*To be reported in the Ontario Law Reports.

debt, and that notwithstanding that the mortgagee takes a covenant from the third party to pay it. But in the latter case the mortgagee is unable to enforce against the original mortgagor his covenant unless he is prepared to convey the property to him subject to the right of the third party. See Kinnaird v. Trollope (1889), 42 Ch. D. 610; Stark v. Reid (1895), 26 O.R. 257.

The sole question here is, does the forfeiture under the agreement of the 10th March, 1905, and the sale pursuant thereto, work such a destruction of the appellants' right against the respondent as disables them from further pursuing him in respect of the debt? The argument is, that the forfeiture and sale were something done under the agreement, and that it was expressly agreed therein, inter alia, that "this agreement and anything that may be done hereunder shall not affect or prejudice" the appellants' claim in respect of the $24,000, and part of the subsequent instalment, i.e., the sum for which judgment was recovered in this action, nor shall it prejudice the rights of the respondent with respect thereto.

But that clause concludes in a way which indicates that it was meant to preserve those rights during a period in which it was open to the purchaser to pay the instalment and for which, if the respondent pays, he obtains a lien. The final words in the clause in question are: "But until the purchaser shall pay the first two instalments of $24,000 each, with interest as aforesaid, the rights of the vendors and the party of the third party shall remain as they now are in respect of said instalments and interest." This is supported by the provision, found later on, that all moneys paid under the agreement were in the first place to be applied (after paying an earlier judgment) "in and to the discharge of the claims of the vendors against the party . . . of the third part in respect of which their rights have been hereinbefore reserved."

It appears from the notice of forfeiture that, unless within one month the overdue instalments were paid, the appellants intended to forfeit the agreement and any moneys paid thereunder, and that the said agreement was to become null and void. The forfeiture was carried out about July, 1909, owing to default not only on subsequent instalments, but on account of the instalment for which judgment had been recovered in 1907; and the property was sold on the 4th July, 1912.

The forfeiture deprived the purchasers of the right to make payment and demand the property. Treating the liability of the respondent as having continued down to that time, and his right

as one requiring the payments by the purchaser to be applied in discharge of that liability, and it appearing that the rights and liabilities of the parties to this appeal were preserved expressly until payment of the first two instalments, it seems to follow that the forfeiture worked a serious change in the rights of the respondent. The appellants themselves put an end to the situation during which their rights against the respondent were preserved, and, by precluding payment by the person primarily liable, rendered the protection provided by the agreement to the respondent of no value.

Such a radical change as putting an end to the agreement itself, and therefore to all its provisions, does not seem to come within the true meaning of the words "anything that may be done hereunder," notwithstanding that they may seem literally applicable. Retention of the rights now set up ought to be clearly and definitely expressed: Arnold v. Playter (1892), 22 O.R. 608.

Upon the best consideration that I can give to the argument of Mr. Lefroy, I think that the true intent and meaning of the agreement was, that the respondent should remain liable, notwithstanding the assignment, for the moneys due by him before, but that otherwise the old agreement was merged in the later one, and that the respondent, when sued upon that old liability, was entitled to rely upon the merger as having changed his position from that of a simple purchaser to that of surety, quoad the land, for the purchase-money: Muttlebury v. Taylor (1892), 22 O.R. 312.

There is a further ground upon which the judgment in appeal may be supported, namely, that the effect of the agreement between the appellants the Standard Mining Company of Algome Limited and the respondent was merely to substitute for the respondent that company as the purchaser of the property, and to relieve the respondent from his obligation to purchase, but not from his liability to pay the overdue instalments of the purchase-money, the amount of which paid by the respondent was to be credited upon the purchase-money. In either view, the principle of the cases referred to by my brother Kelly was applicable.

The appeal should be dismissed with costs.

NOVEMBER 27TH, 1914.

RE NEAL AND TOWN OF PORT HOPE.

Municipal Corporation—Closing of Street—Injury to Neighbouring Lands—Compensation—Award—Amount of—Appeal—Value of Property Dependent upon Existence of Access by Closed Street.

Appeal by the Corporation of the Town of Port Hope from the order of KELLY, J., 6 O.W.N. 701, dismissing the corporation's appeal from an award of two of three arbitrators appointed to fix the amount of money to be paid by the corporation as compensation for injury to the lands of E. B. Neal and Eliza Jane Neal by the closing of Hope street, in the town of Port Hope. The two arbitrators awarded the respondents $900. The arbitration and award were under the Municipal Act.

The appeal was heard by MEREDITH, C.J.O., FALCONBRIDGE, C.J.K.B., MAGEE and HODGINS, JJ.A.

Grayson Smith, for the appellant corporation.

W. F. Kerr, for the respondents.

The judgment of the Court was delivered by HODGINS, J.A.: —Since the argument, there has been filed a statement by the arbitrators who joined in making the award, that they fixed the compensation awarded, not on the basis of the depreciation of the lots for the purpose for which they were used, but on the basis of the value of the property, irrespective of the particular use which may be made of it, being so dependent upon the existence of access by Hope street as to be substantially diminished by its obstruction.

It was determined upon the argument that the amount awarded was not excessive, provided the arbitrators had arrived at it upon a proper basis. The above memorandum shews that no exception can be taken to the principle adopted.

In re Tate and City of Toronto (1905), 10 O.L.R. 651, and Re Taylor and Village of Belle River (1910), 1 O.W.N. 608, 15 O.W.R. 733, decide that the closing of a portion of the street at a distance from where the property in question actually abuts upon it, may give rise to damages when the value of the property is affected.

It was argued that The King v. MacArthur (1904), 34 S.C.R.

570, was opposed to the right here claimed. It is clear, I think, that it was not intended by the decision in that case to lay down anything contrary to the rule expressed in Caledonian R.W. Co. v. Walker's Trustees (1882), 7 App. Cas. 259. Mr. Justice Nesbitt, who delivered the judgment of the Court, recognises that rule, but deprecates its extension to cases where the person injured is being injured as one of the public. . . . As the arbitrators have viewed the respondent's property as one substantially diminished in value by the exercise of the corporate powers, irrespective of any particular uses which may be made of it, that case has no application.

Appeal dismissed with costs.

NOVEMBER 27TH, 1914.

RE FOWLER AND TOWNSHIP OF NELSON.

Municipal Corporation—Expropriation of Land—Severance of Farm by Taking Strip for New Road—Part of Old Road Conveyed to Land-owner—Arbitration and Award—Compensation for Land Taken—Value of Trees in Orchard—Damage by Severance—Injurious Affection—Appeal from Award—Evidence—Increase in Amount—Municipal Act, 1913, *sec.* 325 (1).

Appeal by the township corporation and cross-appeal by Robert C. Fowler, the claimant, from the order of LATCHFORD, J., 6 O.W.N. 409, increasing the amount allowed by arbitrators in respect of land of the claimant expropriated by the corporation for the purpose of a road.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. T. Evans, for the township corporation.

C. A. Moss, for the claimant.

The judgment of the Court was delivered by HODGINS, J.A.:—The learned Judge increased the award of compensation by $400, additional value upon the apple trees taken, and by $1,000 for damage by severance over and above the benefit derived by the respondent from the work.

The appellants are closing a road running through the respondent's farm and expropriating from his lands a new road running about parallel to the old one.

Upon the new road are about 40 to 45 apple trees, the land taken being slightly less than an acre. The arbitrators allowed $600 for the trees taken and those damaged. . . .

The dispute appears to resolve itself into a valuation of the trees, having regard to their production and probable life. . . . The allowance made by the learned Judge is not so excessive that this Court can say that he is clearly wrong. . . . I think that no sufficient case has been made for disturbing the amount fixed by the order appealed from.

Nothing has been allowed by the arbitrators for damage by severance, their view apparently being that the value gained by the closing of the old road and the opening of the new one equalled or exceeded the damage. The damage to the owner, in this case a farmer, is very clearly detailed in the judgment appealed from.

The appellants' by-law No. 591, dated the 2nd June, 1913, recites the reason for closing the old Lake Shore Road through eight properties, and the expediency of stopping it up and selling it to the various property-owners in exchange for conveyances of the portions required for the new road, and payment of varying sums to each, and the taking of the necessary steps under the Municipal Act of 1903 for these purposes. The by-law then enacts the stopping up of the old road, the sale and conveyance of its various portions to the proprietors on each side of it for the aforesaid prices, together with the conveyances from them of the lands required for the new road.

By-law No. 593 was passed on the 23rd August, 1913, providing for taking the necessary lands, for arbitration in case of disagreement as to the purchase-money, and compensation for the damages suffered, the deposit of plans, and in the case of the respondent for the payment of $400 and the conveyance to him of the old road. Notice pursuant thereto was duly served on him.

The Municipal Act of 1913 was assented to on the 6th May, 1913, and came into force in July, 1913; so that it applies to these arbitration proceedings. The provision for setting off the benefit against the damage and the injurious affection caused by the exercise of the powers of the corporation is in these words: "The corporation shall make due compensation . . . for the damages necessarily resulting therefrom, beyond any ad-

vantage which the owner may derive from any work for the purposes of or in connection with which the land is injuriously affected'' (sec. 325 (1)).

It was argued that this provision permitted the advantage resulting from this new road being what is known as a good road, or as part of a through and well-made highway from Hamilton to Toronto, being set off.

Whether or not the change in the wording of the Act, which formerly read, ''beyond any advantage which the claimant may derive from the contemplated work,'' made any difference in favour of the respondent, is not necessary to be decided now. The work contemplated by the by-law is the closing of the old and the providing of the new road; and so the advantage of the latter could have been taken into account under either Act.

But I am unable to see any reason for increasing the amount beyond the figure allowed by the learned Judge, or for saying that the advantage gained by the closing of the old road is not sufficiently real to allow some set-off. The proceedings result in providing a ten-acre block fronting upon the lake, and a good road is always an advantage, provided it affords practically the same access and outlet as was formerly enjoyed. Beyond these benefits, I do not see that the respondent has gained anything, nor, on the other hand, can I see any reason for holding that the disadvantages pointed out by the learned Judge do not outweigh the advantages I have mentioned to the extent he has determined. I have no doubt that the arbitrators were influenced by the prospective rise in values due to a through highway made upon modern lines, and intended to render more speedy the traffic to and fro upon it, and made that element decisive in reducing the damages. I think that the judgment appealed from more correctly appreciates the true situation in this particular case.

Appeal and cross-appeal dismissed with costs.

NOVEMBER 27TH, 1914.

CASSAN v. HAIG.

Surgeon—Negligence—Malpractice — Evidence — Expert Witness—Finding of Fact of Trial Judge—Appeal.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 6 O.W.N. 437.

The appeal was heard by MEREDITH, C.J.O., GARROW, MAGEE, and HODGINS, JJ.A.

E. F. B. Johnston, K.C., for the appellant.

E. G. Porter, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by GARROW, J.A.: — . . . At the close of the evidence, the learned Chief Justice withdrew from the consideration of the jury the issues other than the quantum of damages, and reserved them to be determined by himself. The jury assessed the damages at $1,200; and . . . the learned Chief Justice delivered judgment in favour of the plaintiff. . . .

The facts are not in serious conflict, unless it be in respect of the inferences to be drawn from the evidence given by the experts who were called as witnesses. . . .

On the 24th June, 1913, the plaintiff and defendant, who appeared to be very good friends, were out fishing together. The plaintiff complained of having a particle, he thought of sawdust, in his left eye, and the defendant (a physician and surgeon) undertook to remove the particle. They returned together to the defendant's office, where the defendant, after placing the plaintiff in the chair, removed the particle with a swab. The particle, evidently very small, seemed to be pointed and to be composed of wood, and upon its removal a drop of blood followed, indicating that the conjunctive had been punctured by it. He also found a slight muco-purulent discharge in the eye. After the removal, the plaintiff expressed an intention to go to his place of business to work, and the defendant said he would insert a little cocaine in the eye to relieve the irritation. He accordingly did insert in the eye a small crystal of some substance, he says cocaine; and the plaintiff admits that that was the article which the defendant said he was going to insert; but what it really was seems to have become the main question between the parties; the defendant contending that it was cocaine, and the plaintiff that it could not have been, because of the apparent consequences which immediately followed upon its use. These consequences . . . were sudden and violent pain in the eye, swelling and inflammation, and as a sequel keratitis and permanent injury to the sight.

It is not disputed by the plaintiff that it was according to orthodox practice to use cocaine on the occasion in question; and, on the other hand, it is not disputed by the defendant that the

condition of the eye immediately after he used what he did use was not what usually follows upon the use of cocaine.

The direct evidence, it is admitted, is all one way—in favour of the defendant's contention— . . . and, there being no question of credibility apparently involved, would, I think, reasonably require for its overthrow by the opinions of experts, however eminent, something very explicit and definite and at least equally convincing. It would not, for instance, it seems to me, be too much to expect from it that it should explicitly shew affirmatively that the condition of the eye immediately after the defendant's treatment was really caused by that treatment, excluding any other cause, and that such condition could not reasonably have been produced by the use of cocaine, but was produced by the use of some other ingredient, known or unknown.

Five physicians in all were called, three by the plaintiff and two by the defendant, who also gave evidence on his own behalf. Doctor Loucks, the plaintiff's family physician, but, as he himself stated, by no means a specialist, described the condition and appearance of the eye eight days after the event. Doctors Buchanan and McCullough both saw and treated the eye at later periods. Both are specialists in diseases of the eye; and in their evidence, if at all, one would expect to find the scientific certainty of which I have spoken. But, after repeated perusals of their evidence, I have been quite unable to find any such certainty, or indeed anything which seriously contradicts the evidence given by the defendant's two experts, Dr. Reeve and Dr. MacCallum, well-known and eminent specialists. . . . These witnesses concurred in saying that, upon the evidence, there were two causes which would reasonably account for the results described: one, idiosyncracy on the part of the plaintiff; the other, a sudden invasion of infection on the removal of the little splinter or particle of wood. . . .

Upon the whole evidence . . . I am, with deference, quite unable to see in it any good reason for declining to accept the defendant's statement that he used cocaine on the occasion in question; and, as it is conceded on all hands that its use was not negligent, but quite regular and proper, it follows that, in my opinion, the plaintiff's action fails, and should have been dismissed.

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

NOVEMBER 27TH, 1914.

WASYLISZYN v. CANADA CEMENT CO.

Master and Servant—Injury to Servant—Negligence—Defective System—Evidence—Findings of Jury—Liability at Common Law.

Appeal by the defendant company from the judgment of LENNOX, J., upon the findings of a jury, in favour of the plaintiff, in an action tried at Belleville.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., and CLUTE, J.

W. N. Tilley, for the appellant company.

E. G. Porter, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The respondent's action is brought to recover damages for personal injuries sustained by him while employed by the appellant as a labourer, owing, as he alleges, to the negligence of the appellant, and he claims to recover both at common law and under the Workmen's Compensation for Injuries Act; although in his pleading he does not claim specifically under the Act.

The facts are simple, and there is very little dispute as to most of them, although there is as to the inferences to be drawn from them.

The appellant is an incorporated company, carrying on, at the village of Point Ann, in the county of Hastings, the business of manufacturing cement. The company's works are situate on the line of the Thurlow Railway, which passes through its premises and brings into them coal for use in the business. When the coal is brought into the appellant's premises, the cars are usually backed in from the line of the Grand Trunk Railway, with which the Thurlow Railway connects, this operation being performed by the servants of the Thurlow Railway Company, and the cars are then unloaded by employees of the appellant. It is sometimes necessary to move the cars from the place at which they have been left by the railway company; and, for the purposes of this operation, a crowbar is sometimes used for "pinching" the wheels of the cars. When cars are left on the track to be unloaded, the usual course, as I understand the evidence, is for the railway company's servants to set the brakes; and, when

the cars are moved by the appellant's servants, the usual practice is to block the wheels by placing blocks of wood, or boards, in front of them.

There was evidence that sometimes cars which had been put in position for unloading got into motion owing to there being a slight down grade from the appellant's premises towards the Grand Trunk line; and sometimes, perhaps, owing to the cars being jarred after, or in the course of, being detached from the locomotive.

The respondent, a lad 18 years of age, who had been in the employment of the appellant for about a month, and did not speak English, was injured on the 19th September, 1913. He and three other employees of the appellant, one of whom was William Dockstader, were sent to where two cars laden with coal had been brought in and left on the Thurlow line, the duty assigned to them being to unload these cars. For some reason, when they were about to unload them, the cars commenced to move towards the Grand Trunk line. Seeing this, Dockstader attempted to block the cars, using for that purpose a block of wood, or, as he testified, a board. He appears to have failed to bring the cars to a stop, and called and motioned to the respondent, who was standing about six feet away from him, and about the same distance from the cars, to stop them. The respondent had a crowbar in his hand, and, seeing no block in his vicinity, nor anything else more suitable for blocking the cars than his crowbar, picked it up and attempted with it to block the car.

According to his testimony, the pressure of the wheels on the crowbar twisted it around, with the result that his leg was pressed over the bar, and under the wheel, which severed the leg between the ankle and the knee, or so crushed it that amputation was necessary; and, in his attempt to get his leg free, he crushed off two fingers and the thumb of his left hand.

There was a conflict of testimony as to the position of the respondent when using the bar, and two witnesses deposed that he was not, as he testified, standing outside the rails, but astride of one line of them and in front of the moving car.

According to the testimony of the respondent, there were on this occasion no blocks provided for blocking the cars, and I gather from his testimony that there was no proper arrangement for having blocks at hand to be used if it became necessary to block a car.

The main contention at the trial was as to whether any order or direction had been given by Dockstader to the respondent to

block the car; whether Dockstader was a foreman over or had entrusted to him any superintendence over the respondent, or a person whose orders or directions the respondent was bound to obey, and whether the accident was not due entirely to the fault of the respondent; and it was also contended that at all events he was guilty of contributory negligence disentitling him to recover. It was apparently taken for granted that, if the order or direction had been given, the person giving it was guilty of negligence, and little attention appears to have been given to the question of the appellant's liability at common law.

The following are the questions put to the jury and their answers to them:—

Q. 1. Were the plaintiff's injuries caused by the negligence of the defendant? A. Yes.

Q. 2. If you say, yes, what negligence of the defendant do you refer to? A. By not having proper appliance for stopping the cars and holding them.

Q. 3. Was Mr. Dockstader, at the time of the accident, a person in superintendence of the work of the plaintiff, and were the injuries of the plaintiff incurred in the effort by the plaintiff to carry out Dockstader's instructions as the plaintiff understood them? A. Yes.

Q. 4. Did the plaintiff voluntarily incur the danger, knowing and appreciating the risk he was then exposing himself to? A. No.

Q. 5. Could the plaintiff, by reasonable care, have avoided the accident? A. No.

Although in their answer as to the damages, the jury say, "Under the statute $1,850," they, in reply to a question by the learned trial Judge, said that the damages were the same at common law.

If there was evidence to support the answers to the 1st, 2nd, 3rd, and 5th questions, the respondent was, in my opinion, entitled to recover at common law.

The finding of the jury in answer to the 2nd question is a finding that the system which the appellant employed at its works for stopping moving cars when brought on to the railway track on their premises was a defective and negligent system; and, if it was, the respondent, as the jury have acquitted him of contributory negligence, and have found that his injuries were caused by that negligent system, is entitled to recover at common law.

The evidence as to whether or not any provision had been

made, or any appliance had been provided, for stopping the cars, is, no doubt, conflicting; but there was evidence to go to the jury which, if believed, warranted a finding that such a provision had not been made, and that such appliance had not been provided. There was evidence that cars, after having been detached from the locomotive, upon occasion got into motion owing to the down grade, and possibly to other causes, and that when this occurred it was necessary to stop them. That this was known to King, the appellant's yard foreman, appears from his own testimony; and he testified that a supply of blocks to be used for blocking the wheels was provided for use when occasion required. There was evidence that this was not the case, and that, when it became necessary to block a car, the workmen had to depend upon finding a piece of wood or plank lying about the yard, with which to do what was required.

The jury evidently accepted this evidence in preference to that of King, and were, therefore, in my opinion justified, upon the principle upon which Smith v. Baker, [1891] A.C. 325, was decided, in finding that the system was a defective one, and that the appellants were negligent in adopting it.

It was apparently not disputed at the trial that it was the duty of the respondent, when a car which was to be unloaded began to move, to block it, and that was admitted by King, who objected only to the means which the respondent adopted to block the wheels: and the case is, therefore, one in which the respondent was required to perform a duty in the performance of which he was subjected to an unnecessary risk because of the defective system which had been adopted, and was in use, by the appellant.

Having come to this conclusion, it is unnecessary to consider whether, upon the other findings of the jury, the respondent is entitled to recover under the Act; or whether there was evidence to warrant the conclusion of the learned trial Judge that there was a reasonable excuse for the respondent not having given the notice of his injury which the Act requires.

I would affirm the judgment and dismiss the appeal with costs.

NOVEMBER 27TH, 1914.

*RE MONARCH BANK OF CANADA.

Bank—Winding-up—Contributories — Subscribers for Stock—Order for Winding-up Made before Allotment of Shares—Contribution to Preliminary Expenses—Provisional Directors—Powers of—Bank Act, secs. 11, 12, 13 (4), 18, 27—*Winding-up Act, secs.* 2 (*g*), 20, 60, 93.

Appeal by four persons, whose names were placed by an Official Referee upon the list of contributories in the winding-up of the bank, from the order of MIDDLETON, J., dismissing an appeal from the Referee's order so placing them.

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

W. M. Douglas, K.C., for the appellants.

C. A. Masten, K.C., and W. K. Fraser, for the liquidator, the respondent.

The judgment of the Court was delivered by MACLAREN, J.A.:—The bank was incorporated on the 20th July, 1905, by ch. 125 of the Dominion statutes of that year, which is in the short form prescribed by schedule B of the Bank Act. The bank not having secured within a year the $500,000 stock necessary to enable it to obtain the certificate of the Treasury Board to begin business, the time was extended to the 20th July, 1907, by ch. 127 of the statutes of 1906; default still continuing, a winding-up order was taken out and a liquidator named on the 29th May, 1908.

Mr. Douglas based his appeal on the ground that the appellants never became shareholders, and consequently could not be made contributories.

The four appellants, Murphy, Choat, Foster, and Beasley, signed separate applications under seal for 30, 5, 3, and 32 shares respectively, promising to pay $125 in certain instalments for each share of $100 which the provisional directors might allot to them. The whole number were allotted, and the parties notified. All the instalments were payable before the charter expired on the 20th July, 1907. Murphy paid no cash, but gave a demand note, bearing interest, for the full amount, $3,750; Choat paid $125 and gave a note for $500; Foster paid up in full, $375; and Beasley paid $800 and owed $3,200.

*To be reported in the Ontario Law Reports.

These four claims were selected as typical of the different classes of subscribers to the stock of the bank, and by the direction of the Official Referee they were consolidated in one test case in order to equalise the position of the different subscribers *inter se* with reference to their contributing to the preliminary expenses of the bank, so that those who had paid nothing or less than their share might be compelled to contribute, and those who had paid more than their share might be recouped.

Mr. Douglas contended that the appellants, not being shareholders, were consequently not liable to be placed upon the list of contributories, even though they might each be liable in an action brought against them to recover their proper share of the preliminary expenses of the bank. He referred to sec. 51 of the Winding-up Act, R.S.C. 1906, ch. 144, as the only section under which it could be claimed that they should be placed upon the list. . . .

[Reference to the definition of "contributory" in the Winding-up Act, sec. 2 (*g*); and to secs. 60 and 93 of the Act.]

It is quite true that the word "shareholder" is not used in the Bank Act until a later stage in the history of a bank than that attained by the Monarch Bank. The term used in the preliminary stage is "subscriber." And yet there is no magic in the mere name; one should look at the real substance of the matter. On the 20th July, 1905, by ch. 125 of the statutes of that year, the six persons named as provisional directors were constituted a corporation. In addition to the powers conferred upon them in the Bank Act, they had, by virtue of their incorporation, those conferred by the Interpretation Act, R.S.C. 1906 ch. 1, sec. 30, such as the "power to sue and be sued, to contract and be contracted with by their corporate name, to acquire and hold personal property," etc. Their special Act provides that later the corporation shall be composed of the six persons named and "such other persons as become shareholders in the corporation." The Bank Act, sec. 13, sub-sec. 4, provides that at the first meeting of subscribers, they shall, *inter alia*, elect directors, and thereupon "the functions of the provisional directors shall cease." Now, if the theory of the appellants be correct, the corporation could not possibly be composed as the Act says it shall be, as the subscribers, according to their view, would not become shareholders until after the provisional directors had ceased to exist as such.

Again, sec. 18 of the Bank Act provides that no person shall be elected a director at such meeting unless he holds stock on

which $3,000 or more has been paid-up. If he holds such stock, he is surely a stockholder or shareholder within the meaning of the Act, and every other subscriber who has been allotted stock by the provisional directors is in the same position.

The Bank Act, as it stood while the charter of the Monarch Bank was in force, contained singularly few provisions as to the powers and duties of provisional directors. They are all practically comprised in secs. 11, 12, and 13. They are appointed "for the purpose of organising the bank," and are authorised to cause stock-books to be opened at the head office and elsewhere at their discretion, and to keep them open as long as they deem necessary. As soon as $500,000 had been subscribed, and $250,000 paid theron and remitted to the Finance Minister, they might by public notice call a meeting of the subscribers, at which they would fix the date of the annual meeting, determine the number of directors (not less than five), and elect these from the qualified subscribers. For anything that appears in the Act, these six provisional directors, or any five of them, might, if they were financially able and so chose, subscribe the whole $500,000, pay in $250,000, and elect themselves directors. Of course banks are not organised in this way; but it shews what power has been put into the hands of the provisional directors and how much is left to their discretion.

This would seem to be pre-eminently a case for the application of the rule or maxim as to implied powers, viz., that where a certain result is authorised to be attained, and the means are not clearly indicated, the power of doing all such acts, or employing such means as are necessary to its execution, is impliedly granted. . . .

[Reference to Small v. Smith, (1884), 10 App. Cas. 119, at 129; Attorney-General v. Great Eastern R.W. Co. (1880), 5 App. Cas. 473.]

It is not necessary in the present case to go so far . . . because the usual procedure for the organisation of a joint stock company is so well understood. In my opinion, what is declared in sec. 12 to be the purpose of that portion of the Act, and which is authorised to be done in sec. 13, could not properly be carried out unless the directors had power to allot stock and to make the subscribers members of the corporation. Does not the right to choose the directors of the bank of itself imply that they are members?

It is also worthy of note that there is nothing in the Act to suggest that the directors have any right to interfere with the

list of subscribers or shareholders prepared by the provisional directors for the first meeting, or that they require to do something in order to change subscribers into shareholders. Indeed their power over the original stock of the bank is very circumscribed. They have no power over it except such portion as may not have been subscribed, and even this they must allot *pro rata* to the existing shareholders, that is, to the original subscribers and their transferees: sec. 27.

Sections 20 and 93 of the Winding-up Act would appear to have been designed to meet such a contingency as has arisen in this case, and they appear to have been admirably adapted to do justice to all parties.

The appellant Foster was properly placed upon the list of contributories, although he had paid for his shares in full, and there is no question of double liability: In re Anglesea Colliery Co. (1866), L.R. 1 Ch. 555. He is placed on the list simply in order that he may receive what he has paid over and above his proper share in accordance with secs. 20 and 93 of the Act, and I fail to see why he appeals.

In my opinion, the appeal should be dismissed.

NOVEMBER 27TH, 1914.

*COLLIER v. CITY OF HAMILTON.

Negligence—Injury to Servant of Municipal Corporation—Explosion of Gas—Duty to Take Reasonable Care—Evidence—Res Ipsa Loquitur—Inference—Case for Jury—Nonsuit.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Waterloo withdrawing the case from the jury and dismissing the action (brought in that Court) at the close of the plaintiff's case.

The action was brought to recover damages for injuries sustained by the plaintiff owing, as he alleged, to the negligence of the defendant the Corporation of the City of Hamilton.

The appellant was employed by the defendant corporation as a labourer in its waterworks department, and, by the direction of his foreman, went to a concrete chamber on the corner of Cannon street and Belmont avenue, through which a 30-inch water-main ran, for the purpose of removing from it some lum-

*To be reported in the Ontario Law Reports.

ber. The chamber was below the level of the street, and the entrance to it was by a man-hole. The cover of the man-hole was taken off, and the plaintiff descended into the chamber. Being unable to see about him, owing to the insufficiency of the light, the plaintiff lighted a match to enable him to do so; the light went out; and he then lighted another match, when an explosion occurred, and the plaintiff was somewhat severely burned. It was for the injuries thus sustained that the action was brought.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., and CLUTE, J.

C. W. Bell, for the appellant.

F. R. Waddell, K.C., for the defendant corporation, respondent.

S. F. Washington, K.C., for a third party, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after setting out the facts):—No evidence was given of any defect in the concrete chamber, which, as I understand it, was watertight, and, as far as appeared from the evidence, with no opening into it except by the man-hole. There was no evidence of there being any gas-main in proximity to the chamber; and, from the affidavits that have been filed upon the motion, there was none within a block of it. . . .

At the trial and upon the argument before us, the appellant contended that the maxim res ipsa loquitur applies, and that the case made at the trial was sufficient to call for an answer from the respondent corporation.

The highest ground upon which the appellant's case can be rested is, that it was the duty of the respondent corporation to take reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on its operations as not to subject those employed by it to unnecessary risk: per Lord Herschell in Smith v. Baker, [1891] A.C. 325, 362; that the respondent corporation neglected that duty; and that the appellant's injuries were occasioned by the neglect of it.

No case was made which would warrant that conclusion being drawn; there was no evidence that this reasonable care was not taken. There was nothing to warrant the conclusion that the gas which escaped came from the mains of the third party; and, as I have said, it is now shewn that the nearest gas-main was a block distant from the concrete chamber; and there was, therefore, no reason to anticipate that gas from that source would

or might enter the chamber; and, in addition to this, there was nothing to indicate that there was any opening in the walls or floor of the chamber through which, if gas were present in the soil owing to an escape from the main, it could enter.

Had it been shewn that there were gas-mains near the chamber, it may be that the jury might have drawn the inference that it was the escaping gas which was ignited, and possibly have inferred, in the absence of any evidence to the contrary, that it entered the chamber through some opening that had been left in its walls or floor.

If such a case had been made, such cases as McArthur v. Dominion Cartridge Co., [1905] A.C. 72, might have been applicable. . . . .

[Reference also to Winnipeg Electric R.W. Co. v. Schwartz (1913), 49 S.C.R. 80.]

In the case at bar there was no evidence of any defect in the concrete chamber; and it was shewn that, although there were many of these chambers in the city's streets, no accident of the kind, or indeed of any kind, had happened in connection with any of them, nor was there anything to indicate the nature of the gas which exploded or to prove whence it came.

The result is, that, in our opinion, the ruling complained of was right; and the appeal must be dismissed with costs.

NOVEMBER 27TH, 1914.

HEDGE v. MORROW.

Title to Land—Devise—Will—Revocation by Marriage — Void Marriage by Reason of Previous Marriage — Evidence of Previous Marriage—Sufficiency—De Facto Marriage—Presumption from Cohabitation—Proof of Death of Testatrix —Presumption from Grant of Probate—Onus—Jurisdiction of Surrogate Court—Judicature Act, R.S.O. 1897 *ch.* 51, *sec.* 38—*Conveyance under Power of Attorney—Alteration of Sealed Instrument — Presumption as to Time of Making—Witnesses and Evidence Act, R.S.O.* 1914 *ch.* 76, *secs.* 45, 46—*Possession of Land—Mesne Profits—Declaration of Title—Damages—Costs.*

Appeal by the plaintiff from the judgment of LENNOX, J., 5 O.W.N. 903, 6 O.W.N. 224.

*To be reported in the Ontario Law Reports.

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

G. A. Stiles, for the appellant.

D. B. Maclennan, K.C., for the defendant, the respondent.

The judgment of the Court was delivered by MEREDITH, C. J.O. (after setting out the facts) :—The testatrix (Isabella Margaret Gilchrist), by her will, which is dated the 15th January, 1897, devised her lands in Manitoba and all her real and personal estate in Ontario to the appellant, whom she appointed her executrix.

The will was admitted to probate by the Surrogate Court of the Central Judicial District of the Province of Manitoba on the 18th November, 1911, and administration of the estate and effects, rights and credits, of the testatrix, in any way concerning the will, was granted to the appellant.

The probate states that the testatrix died on the 31st October, 1905, at Cape Nome, in the district of Alaska, and that at the time of her death she had a fixed place of abode at the township of Roxborough, in the Province of Ontario. This Manitoba probate was, on the 2nd March, 1912, sealed with the seal of the Surrogate Court of the United Counties of Stormont Dundas and Glengarry, under the authority of sec. 74 of the Surrogate Courts Act, 10 Edw. VII. ch. 31, and thereupon became of the like force and effect in Ontario as if it had been originally granted by that Court.

Many questions of law and fact were discussed upon the argument before us.

It was contended by counsel for the respondent that the will under which the appellant claims was revoked by the subsequent marriage of the testatrix with Johnston; and it was answered by counsel for the appellant that that was no marriage, because Johnston had a wife living when he went through the form of marriage with the testatrix; to this the respondent's counsel replied that there was no evidence to prove the former marriage; and that is the first question with which I shall deal.

It was proved by the testimony of Cora M. Johnston that she had gone through a ceremony of marriage with Johnston at Omaha, in the State of Nebraska, on the 28th January, 1903, and that she and Johnston after this ceremony lived together and believed themselves to be man and wife. She also testified that she had been informed that no marriage license was ever issued for the marriage, and that no trace could be found in

Omaha of a minister bearing the name of Peterson, which was the name claimed by the man by whom the marriage ceremony was performed, and who professed to be a minister.

I am of opinion that this evidence is sufficient to prove the previous marriage of Johnston; and, if it be, the contention of the respondent that the will of the testatrix was revoked by her marriage to Johnston falls to the ground, there being no question that his first wife was living when he went through the ceremony of marriage with the testatrix. It is well-established that, except in cases of bigamy and actions for criminal conversation, there is a strong presumption in favour of the validity of a marriage proved to have been celebrated de facto: Phipson on Evidence, 5th ed., p. 644, and cases there cited, which fully support the statement of the text-writer; and to these cases may be added: O'Connor v. Kennedy (1887), 15 O.R. 20; Hunt v. Trusts and Guarantee Co. (1905), 10 O.L.R. 147; and De Thoren v. Attorney-General (1876), 1 App. Cas. 686, which, though the case of a Scotch marriage, is applicable upon the question of this presumption.

The cases also establish that mere cohabitation may suffice to raise a presumption of valid marriage: Phipson, p. 644, and cases there cited, to which may be added Regina v. Wilson (1862), 3 F. & F. 119.

It was also contended by the respondent's counsel that there was no proof as to the date of the death of the testatrix, and that all that the appellant was entitled to rely on to establish the fact of the death was the presumption that, not having been heard of for seven years, she was dead; and that, as the seven years did not elapse until the expiration of seven years from October, 1905, the action, which was begun on the 14th March, 1912, must fail for want of proof that the testatrix was then dead.

As I understand the case of Allen v. Dundas (1789), 3 T.R. 125, it was there held that probate of a will is conclusive until revoked, and that no Court of Law can admit evidence to impeach it; though it was pointed out that, if probate was granted of a proposed will of a living person, it was otherwise, as the Ecclesiastical Court has jurisdiction only to grant probate of the wills of deceased persons.

The onus of establishing want of jurisdiction on this ground rested upon the respondent, and in order to shew want of jurisdiction it was necessary to prove that the testatrix was living at the date of the grant of the probate; and in this he has failed.

There is no presumption of law as to the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health at a certain time was alive a short time after; and it has been held that this inference might be drawn after the lapse of eleven or even seventeen years from the time at which it was shewn that the person was alive. Being an inference of fact, whether it ought to be drawn must depend upon the particular facts of the case in which the question arises; and the facts in this case do not, in my opinion, warrant the inference that the testatrix was alive at any time later than the beginning of 1906, but rather justify the inference being drawn that she was then dead. That the presumption of death, not as a matter of law, but as a matter of fact, may arise, is undoubted; and it has frequently been held to have arisen although the seven years had not elapsed, and of this the cases of In re Mathews, [1898] P. 17, and In re Winstone, ib. 143, are instances.

I am not unmindful of the fact that the proposition in Allen v. Dundas as to the powers of a Court of Law is not in its entirety applicable to this Province, because by the Judicature Act, R.S.O. 1897 ch. 51, sec. 38, the Supreme Court of Ontario has jurisdiction to try the validity of last wills and testaments as to real and personal estate, whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud or undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.

For these reasons, I am of opinion that the appellant proved her title to the lands in question, unless, as the respondent contends, he is entitled to them by virtue of the conveyance under which he claims. . . .

The conveyance was executed by the testatrix by Johnston, purporting to act as her attorney under a power of attorney. . . . . It is clearly established . . . that the power of attorney, as drawn and executed by the testatrix, did not contain any provision authorising Johnston to deal with lands in Canada, but expressly limited his authority to lands in the district of Alaska, and that the provision extending his authority to lands in Canada was subsequently added.

It was contended by counsel for the respondent that it must be presumed that the alterations which were made in the power of attorney were made before it was executed, and that it is also to be presumed that, if subsequently made, they were made

with the assent of the appointor. I do not understand that the presumption has as wide a range as this. It is, no doubt, to be presumed that alterations appearing in a deed were made before it was executed; but it is not, in my opinion, the law that where that presumption has been rebutted by proof to the contrary there is still a presumption that the alterations were made with the assent of the grantor, and no authority was cited in support of the contention of the learned counsel in that regard.

Sections 45 and 46 of the Witnesses and Evidence Act, R. S.O. 1914 ch. 76, do not help the respondent, as the prima facie evidence of the original which is afforded by the production of a copy of the instrument certified as sec. 46 provides, if indeed the section has any application to a case in which not the original but a copy of it has been registered, is rebutted by the evidence which . . . rebuts the presumption with which I have just dealt.

The appellant is, in my opinion, entitled to judgment for the recovery of possession of the land in question, but I would not allow anything for mesne profits or for damages for the cutting of wood and timber, as these claims may be fairly set off against the value of improvements which the respondent has made.

The appeal will, therefore, be allowed, and the judgment of the trial Judge vacated, and judgment entered for the appellant for the recovery of possession of the lands in question, with a declaration that as against the respondent she is the owner of them.

Under the very exceptional circumstances of the case, and there being no doubt that the respondent bought the lands and paid for them in good faith, believing that Johnston had authority to sell and convey them to him, there should be no costs to either party of the action or of the appeal.

NOVEMBER 27TH, 1914.

ELLIS v. ELLIS.

Fraudulent Conveyance — Action by Judgment Creditor of Grantor to Set aside—Agreement—Consideration—Lien for Services — Evidence — Finding of Fact of Trial Judge — Appeal.

Appeal by the defendants from the judgment of LATCHFORD, J., 6 O.W.N. 671.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. M. Douglas, K.C., for the appellants.

J. Rowe, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The action was brought by the respondent as an execution creditor of the appellant Austin D. Ellis, who is her husband, to set aside as fraudulent and void, as against creditors, a conveyance from her husband to the appellant Martha E. Bowman, dated the 29th April, 1913, of lots numbers 15 and 16 on the west side of Stover street, in the village of Norwich, in the county of Oxford, and assignments made by her husband to the appellant Bowman of two mortgages to him.

The claim to set aside the conveyance as to lot number 16 and the assignments of the mortgages was abandoned at the trial, but judgment was given declaring that the conveyance of lot number 15 was fraudulent and void as against the respondent, setting it aside, and vacating the registration of it.

The amount of the respondent's claim in respect of which the execution was issued is $2,594.52, exclusive of interest, for which she recovered judgment. . . .

Upon lot number 15 is situate the residence of the appellant Ellis, and the lot with the house upon it is of the value of about $4,000.

An action for alimony was brought by the respondent against her husband, which resulted in judgment being entered declaring that the respondent was entitled to an allowance of $400 per annum from the 21st November, 1910, from her husband by way of alimony so long as she should continue to live separate and apart from him.

By a deed of separation executed by the husband and wife, and dated the 21st November, 1910, the husband agreed to pay to his wife $400 per annum for alimony and to consent to the judgment in the alimony action, which was pronounced on the 8th December following, and he also agreed that he would pay to his wife one-third of the proceeds of the sale of lot number 15 when the lot should be sold, and the wife agreed that upon this payment being made she would release and convey her dower in the lot.

The consideration stated in the conveyance to the appellant Bowman is "one dollar and other valuable consideration," and

the conveyance was made while the action which resulted in the judgment for $2,594.52 was pending. . . .

The conveyance was not registered until the 8th September, 1913.

The learned Judge found that this conveyance was the result of a scheme conceived by the husband for the disposal of the property to the appellant Bowman "in such a manner that when its value was $4,000 there would be no proceeds out of which the stipulated third" (i.e., the one-third agreed to be paid to his wife) "could be paid," and the learned Judge points out that the husband, when asked upon his examination for discovery by the respondent's solicitor, "Why did you convey this property?" answered, "Because I do not think that you and she are any better than thieves."

The learned Judge found that, so far as the husband was concerned, a fraudulent purpose and design was undoubtedly formed and carried out to prevent his wife from realising a cent out of the sale of lot 15 or upon a judgment in the suit which had been determined against him, if not when he made, at least when he registered, the conveyance now impeached. . . .

The agreement between them, which bears date the 1st December, 1910, . . . is set up by the appellants as the reason and justification for the conveyance of the 29th April, 1913. . . .

The conclusion of the trial Judge upon the evidence was, that the testimony of the appellant Bowman was not to be relied on except where corroborated by some other than the appellant Ellis or by the circumstances of the case, and that there was no such corroboration; but that, on the other hand, there were many circumstances, in addition to her familiarity with the affairs of the appellant Ellis and her hostility to his wife, to lead to the conclusion that the appellant Bowman was a party to the scheme of the appellant Ellis, "not only to deprive his wife of any share out of the proceeds of lot 15, but also to prevent her from recovering under the judgment obtained against him in June, 1913." . . .

I am unable to say that the findings of fact of the learned Judge are not warranted by the evidence. It is to be borne in mind that in such cases as this much depends upon the demeanour of the parties in the witness-box and their manner of giving their testimony; and the trial Judge was, therefore, in a much better position than an appellate Court to determine what weight should be attached to their evidence.

The agreement upon which the appellants rely is an extra-

ordinary document, and it appears to me that it contains internal evidence that the appellant Ellis, who was the draftsman of it, desired that it should evidence an agreement which, while providing that the property with which it deals should be conveyed to the appellant Bowman when required by her, should enable him to use a conveyance made under its provisions as a shield to protect the property against his wife's claim, and that it should at the same time enable him practically to retain the same control over the property as if it had not been conveyed. It could never have been really intended that the appellant Bowman might the next day insist upon the property being conveyed to her; and yet that is her right according to the terms of the agreement. A curious provision of the agreement is that the respondent Ellis is to have quiet occupancy of the property "while he desires to live in Norwich," and another is that no sale of it is to be made within five years without the consent of both parties. . . .

This peculiar agreement was never registered, and appears to have been kept secret. Harry Herrick, the subscribing witness to it and to the impeached conveyance, was not called as a witness. In view of the suspicion cast upon the dates being the true dates upon which they were executed, it would have been more satisfactory if he had been called as a witness.

It is a circumstance making against the reality of the transaction that the value of the land would be a very extravagant remuneration for the services which the appellant Bowman was to perform; so is the fact that in the statement of the consideration for the conveyance no reference is made to the agreement; and it is also a circumstance indicating fraud in the transaction that the conveyance contains no reference to the rights which the appellant Ellis was to retain and to have under the agreement, and that its effect is to release to the grantee any and all rights of the appellant Ellis in the property. If the conveyance was a sham, and, as has been found, intended to defraud the respondent, there was nothing singular in this, but the contrary.

It was suggested by the appellant Ellis in his testimony that he owed nothing when the agreement with the appellant Bowman was made; but that is not the fact; and there is evidence that warrants the conclusion that the respondent had before then made a claim against him larger than that which she eventually established; and it is, I think, a fair conclusion that the agreement was entered into for the purpose of heading off that claim if his wife should attempt to enforce it.

Upon the whole, I am of opinion that the judgment is right and should be affirmed, and the appeal from it be dismissed with costs. Indeed, as I understood Mr. Douglas's position, he did not claim that the appellant Bowman is entitled to hold the land as against the respondent, but claimed that she was entitled to a lien upon it for the value of her services as housekeeper of the appellant Ellis. There is, in my opinion, no foundation for any claim to a lien. It has been found that the transaction between the two appellants was the result of a scheme entered into between them to defraud the respondent. The whole transaction must fall, and the appellant be left to her claim, if any, against the appellant Ellis for her services.

Appeal dismissed with costs.

NOVEMBER 27TH, 1914.

PICKERING v. TORONTO AND YORK RADIAL R.W. CO.

Negligence—Injury to Bicyclist on Highway — Negligence of Driver of Lorry—Evidence—Verdict of Jury—Questions not Submitted—Quantum of Damages.

Appeal by the defendant company from the jugdment of BOYD, C., upon the verdict of a jury, in favour of the plaintiff, a boy, in an action for damages for injury sustained by the plaintiff, when travelling upon a bicycle along a highway by a collision with a team of horses and a lorry owned by the defendant company, and driven by their servant, owing to the negligence of the driver, as the plaintiff alleged.

The appeal was heard by MAGEE and HODGINS, JJ.A., BRITTON and MIDDLETON, JJ.

C. A. Moss, for the appellant company.

T. N. Phelan, for the plaintiff, respondent.

HODGINS, J.A.:—The action in this case was a simple one, and the learned Chancellor put the matter to the jury thus: "If the wheel skidded and the boy upset in time enough to let the driver stop before he came there, the defendants are to blame. If there was not time to stop after the wheel skidded, the company are not to blame, and it was an accident which the

boy must suffer without getting damages from anybody. That is the whole question.''

The respondent's case was, that his wheel skidded after he had got 12 feet ahead of the team; while the appellants contended that the wheel skidded while the boy was just beside the horses' heads, and that he fell off and hit the horses' front legs.

The evidence of the driver of the lorry was, that he could stop his horses, which were walking, within 6 feet, at the rate they were going, and that he took his eyes off the boy, thinking he had got past.

Mr. Moss contended that there was no evidence to go to the jury, and that questions should have been put to them, instead of leaving it to them generally, and that the damages were excessive.

The admission of the driver that he could stop his horses within 6 feet, and the evidence of the boy that the accident happened 12 feet ahead of the team, raised a question which could not be withdrawn from the jury. Besides this, the position of the boy in relation to the horses provided a distinct issue proper for their consideration.

There being no complicated facts, but merely a question whether the accident happened in one or other of two ways, it does not appear that the appellants were in any way prejudiced by the course adopted by the learned Chancellor.

It is not necessary to assert that it is always the duty of the driver to keep looking ahead continuously. He says that he thought the boy was in safety before he lost sight of him. And, if his version of the accident had been accepted by the jury, this point would have been immaterial, for he saw him up to the point of danger, which, he says, was at the side, and not in front. On the other hand, the jury's finding involved the notion that he failed to see the boy when he was 12 feet ahead of and directly in front of his team—a neglect of duty at that juncture which might be quite consonant with a reasonable look-out in other directions during all times previous to the accident.

It cannot be said that the damages ($750) are so excessive as to necessitate a new trial.

The appeal should be dismissed with costs.

BRITTON and MIDDLETON, JJ., concurred.

MAGEE, J.A.:—The only question which appeared to be open for consideration was, whether, if the accident happened during an interval in which the driver of the defendants' lorry was not

looking at the plaintiff, there was evidence from which the jury could infer negligence upon the driver's part either in not seeing the plaintiff or not preventing the injury to him. But a perusal of the evidence shews that the driver himself, though admitting that he took his eyes off the plaintiff for a very short interval after the latter passed his seat upon the lorry, yet claimed to have looked at him again in time to see the bicycle skid and both boy and bicycle fall against the horse, which thereupon reared and started forward, requiring the driver's attention. It, therefore, became a question of fact for the jury whether the skidding of the bicycle and the plaintiff's dismounting occurred at the horse's head, as the driver said, or 12 feet in advance of that, as sworn by the plaintiff at the trial, though on his examination for discovery his statements would not seem to have been quite in accord with that. The driver admitted that he could easily have stopped the horses within 6 feet, if the plaintiff had fallen 10 or 12 feet in front of them. If, therefore, the jury preferred the plaintiff's account, they would be justified in finding negligence of the driver, who claimed to have seen the fall.

The issue was a simple one, not calling for the submitting of questions to the jury. It was a question of fact entirely for them; and, whatever opinion one might form from reading the evidence, their finding cannot be disturbed, nor is there ground for interfering with their assessment of damages.

Appeal dismissed with costs.

NOVEMBER 27TH, 1914.

*RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

Ontario Railway and Municipal Board—Jurisdiction—Appeal from Decision of District Court Judge on Appeal from Court of Revision—Statutes—Assessment Act and other Acts and Amending Acts—Interpretation of—Application for Leave to Appeal to Supreme Court of Ontario, Appellate Division.

Motion by the company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, dated the

*To be reported in the Ontario Law Reports.

16th June, 1914, dismissing an appeal to the Board by the company from the decision of the Court of Revision of the Town of Fort Frances, upon the ground that the Board had no jurisdiction to hear the appeal.

The company appealed to the Court of Revision against its assessment for 1913, and its appeal was dismissed on the 20th June, 1913.

The company gave notice of its intention to appeal to the Board from its assessment as confirmed by the Court of Revision; the notice of appeal was addressed to the Board, and was received by it on the 4th July, 1913; a copy of the notice was served upon or filed with the clerk of the municipality between the 23rd and the 28th June, 1913. The appeal came on to be heard before the Board on some day prior to the 16th June, 1914; and the further consideration of it took place on the 16th June, 1914, when the decision from which the company desired to have leave to appeal was given.

The view of the Board was, that the result of subsequent legislation was to take away the right which previously existed of a person assessed to appeal directly from the Court of Revision to the Board, and that the only appeal which the Board had jurisdiction to hear and determine was an appeal from the decision of the Judge of the District Court on an appeal to him from the Court of Revision.

The motion was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Glyn Osler, for the company, the applicant.

E. E. A. DuVernet, K.C., for the town corporation, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O., who, after setting out the facts as above, referred to the Act respecting the Establishment of Municipal Institutions in Territorial Districts, R.S.O. 1897 ch. 225, secs. 40-59; the Assessment Act, R.S.O. 1897 ch. 224, sec. 75, sub-secs. 2 and 7, and sec. 84; the Assessment Act of 1904, 4 Edw. VII. ch. 23, sec. 76; the Act of 1904, 4 Edw. VII. ch. 24, by sec. 5 of which sec. 40 of R.S.O. 1897 ch. 225 was repealed and a new section substituted for it, and secs. 43 and 45 were amended; the Act of 1905, 5 Edw. VII. ch. 24, by sec. 1 of which sec. 45 of R.S.O. 1897 ch. 225 was repealed and a new section substituted; by sec. 2 of which secs. 46, 48, and 49 were amended; and by sec. 3 of which there

was added to ch. 225 a new section, 48(a); the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, sec. 52; and the Act of 1910, 10 Edw. VII. ch. 88, sec. 19, repealing sec. 76 of the Assessment Act of 1904, and substituting for it a new section.

The learned Chief Justice then proceeded:—

The result of this legislation was, that a person assessed in a municipality in a territorial district had the right to appeal in respect of his own or any other person's assessment to the council of the municipality or the Court of Revision, and the right of a further appeal to the District Court Judge, whose decision was final; but, if the person desiring to appeal from the council or the Court of Revision was assessed upon one or more properties to an amount aggregating $10,000, he had the right, instead of appealing to the District Court Judge, to appeal to the Ontario Railway and Municipal Board; but, notwithstanding this right of appeal to the Board, a ratepayer had the right, according to the decision of the Court of Appeal in Re Fort Frances Assessment (1913), 27 O.L.R. 622, to appeal to the District Court Judge, as provided by sec. 43 of R.S.O. 1897 ch. 225, as amended by 4 Edw. VII. ch. 24, sec. 5(2), and there was a further appeal to the Court of Appeal from the decision of the Board upon a question of jurisdiction or law, if leave to appeal should be given by the Court (6 Edw. VII. ch. 31, sec. 43).

I apprehend that the effect of the amendments to ch. 225 was impliedly to repeal sec. 76 of the Assessment Act of 1904; but whether it did or not is immaterial, as the only part of the section which was applicable to territorial districts was sub-sec. 2, which provided for an appeal to the Judge of the County Court of the county to which the district was attached for judicial purposes; and the district in which the applicant's land lies is not so attached to any county.

It was, I have no doubt, intended by sec. 13 of the Assessment Amendment Act of 1913 (3 & 4 Geo. V. ch. 46), and by the repeal by the Municipal Act of 1913 (3 & 4 Geo. V. ch. 43) of ch. 225, and the repeal of the Ontario Railway and Municipal Board Act of 1906 and the re-enactment of it, omitting sec. 52, by 3 & 4 Geo. V. ch. 37, to get rid of the anomaly which resulted in the Fort Frances case and to provide that there should be no right of appeal directly from the Court of Revision to the Ontario Railway and Municipal Board; but, unfortunately perhaps, while the Assessment Amendment Act, 1913, and the new Ontario Railway and Municipal Board Act came into force on

the 6th May, 1913, the new Municipal Act did not become law until the 1st July, 1913.

Section 13 of the Assessment Amendment Act of 1913 repeals sec. 76 of the Assessment Act as enacted by sec. 18 of ch. 88 of 10 Edw. VII., and substitutes for it a new section, which provides that the appeals for which the section makes provision, both in municipalities in territory without county organisation and in other municipalities, shall lie from the decision of the Judge to the Ontario Railway and Municipal Board, and until ch. 225 was repealed the effect of this was merely to provide that an appeal should lie from the decision of the Judge to the Board—in other words, that where the person assessed appealed to the District Court Judge he should have a further appeal to the Board.

It is unnecessary, in the view I take, to decide whether the section has the effect of impliedly repealing the provisions of ch. 225 as to appeals and the amendments to that Act to which I have referred; for, assuming that they are not repealed, there remains in the way of the applicant the fact that sec. 52 of the Ontario Railway and Municipal Board Act of 1906, which provided for the appeal to the Board, was repealed before the decision of the Court of Revision was given, and that this resulted either in taking away altogether the right to appeal directly from the Court of Revision, or in leaving the right as it existed before that Act was passed, that is, to appeal to a Judge of the High Court in Chambers.

It follows from this that the appeal to the Board was not competent, and that the Board rightly determined that it had no jurisdiction to hear it; and the result is that the application must be dismissed, and with costs.

NOVEMBER 27TH, 1914.

SHIPWAY MANUFACTURING CO. v. LOEW'S THEATRES.

Mechanics' Liens—Building Contract—Sub-contractor — Value of Work Done—Recovery from Main Contractor—Provisions of Sub-contract—Waiver of Lien—Benefit of Owner—Architect's Certificate.

Appeal by the defendants from the judgment of a Referee in a proceeding to enforce a mechanic's lien.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J.

A. McLean Macdonell, K.C., and A. Bicknell, for the appellants.

George Wilkie, for the plaintiffs, respondents.

The judgment of the Court was delivered by HODGINS, J.A.:—There is no reason shewn for disturbing the judgment of the Referee. He heard the evidence of all those who might properly be supposed to know the facts, and then, in company with representatives of the conflicting views, inspected the work. No specific errors having been pointed out, it would be impossible to set aside his judgment as to the value of the work done; and it should stand.

The respondents endeavoured to uphold their lien notwithstanding the agreement which they had signed. But that lien is a purely statutory one, and exists only in favour of those who do not sign an express agreement to the contrary. The agreement in terms covers any lien arising under any lien law; and, therefore, includes that on the land.

The appellant contractor can insist on this express waiver being given effect to; and, if the owner is thereby protected, though not a party to the agreement, that is in no sense any answer to the contractor's plea.

The respondents must be taken to have furnished their materials and done their work upon the footing that no lien was to arise therefrom. The judgment cannot be supported upon this point.

It is unnecessary to decide whether the learned Referee is right in holding that the conditions in para. 15 of the contract apply only to the contemplated work outside the main contract.

While the contract names two architects as "associated architects" and speaks of a certificate from "the architect," an examination of the language of para. 15 throws some light on the method pursued under the whole agreement. Instead of the usual provision that the immediate sub-contractor shall procure a certificate, what is stipulated for is a certificate from the architect and the main contractor, to be signed and delivered to the main contractor, certifying that not only the work under the contract, but the entire building, is complete to the satisfaction of the architect and of the main contractor. No duty is cast on the respondents to get and furnish these certificates. From

the evidence of Harding it appears that neither he nor the architect recognised any duty towards the sub-contractors, and that he would, therefore, have refused to give the respondents any certificate at all. It may be observed that the letter from Harding dated the 18th March, 1914, asks the respondents only for a certificate from the City Architect "before the final settlement of your contract is made." In view of the fact that no duty is cast upon the respondents to procure any certificate, and as any certificate by the architect would not bind the main contractor (para. 17), who is himself required to deliver a similar one to himself, the failure to procure what is now demanded lies as much at the main contractor's door as at that of the respondents.

And, in view of the whole course of dealing between the parties under the contract, I think that the respondents were not bound to do more than they did.

The result is, that the appellants succeed to the extent of being entitled to have the lien discharged, and the respondents in holding their judgment against the main contractor. The Referee's judgment should be varied accordingly. No costs of appeal.

Appeal allowed in part.

NOVEMBER 27TH, 1914.

WAUCHOPE v. HOBBS.

Vendor and Purchaser—Agreement for Exchange of Lands—Validity of—Married Woman—Professional Advice—Approval of Husband—Evidence—Findings of Trial Judge—Appeal — Misrepresentations — Evidence — Pleading — Amendment—New Trial.

Appeal by the defendant from the judgment of FALCONBRIDGE. C.J.K.B., of the 29th April, 1914, in favour of the plaintiff in an action for specific performance of a contract for sale, purchase, and exchange of lands.

The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., and BRITTON, J.

R. S. Robertson, for the appellant.
A. F. Lobb, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by MAGEE, J.A.:—The defendant, as against the plaintiff's claim for specific performance of her agreement to buy his land, subject to incumbrance, he agreeing to take her land, which was also incumbered, and to give her a mortgage back for the difference, alleged in her statement of defence, inter alia, that the agreement was never assented to by her, but that, being without independent advice, she was induced to sign it without it being read or explained to her, and under the belief that she was thereby only obtaining particulars of the plaintiff's property and the incumbrances thereon, to be submitted to her husband for his confirmation and approval, and that it was to be subject to the condition of his approval, which he refused, and that the agreement was obtained from her by misrepresentation that the difference in exchange would be paid to her in money instead of by a security, and that the written agreement does not contain the true bargain.

The learned Chief Justice who presided at the trial found that the defendant had had professional advice; that the agreement was read over and properly explained to and understood by her; and was not intended to be subject to her husband's approval.

As the evidence was contradictory, there does not seem to be any ground for interfering with these findings; and, in view of the new trial which, in my opinion, should be ordered, it is not desirable to comment further upon the evidence.

But on this appeal it was urged that misrepresentations by the plaintiff, other than those set up in the statement of defence, were proved, namely, that the defendant was told by the plaintiff that his house had gas and electric light throughout and a cellar under the whole house, whereas it had no electric light, had not gas throughout, and had only a small cellar under a part of it. These statements, she said, had been made to her by the plaintiff before she signed the agreement and after she had been with him at the house and had gone through part of it, but not making a thorough examination, there being a sick inmate, and the tenant being apparently displeased with the visit. She discovered the untruth of these statements only when informed of the facts by her husband, on his examination of the house after she had signed the agreement. She was allowed at the trial to

give the evidence of herself and another witness as to these representations. No objection was made to the reception of the evidence; and, on the other hand, perhaps because of the absence of such objection, no application was made to amend the statement of defence. No denial was made of her statements in these respects, although the plaintiff was called in reply as to other matters; and, although upon the argument of the appeal counsel for the plaintiff denied that such representations were made, and stated what he was instructed was said on the subject, yet that carried with it the admission that there was at least some conversation on the subject of electric light on the occasion on which the defendant alleges the misrepresentations were made.

As these alleged misrepresentations, thus sworn to by the defendant without objection, are in regard to important matters upon which the learned Chief Justice has made no finding beyond the fact that he has given judgment for specific performance, and as they are left wholly without contradiction or explanation, it would seem that with regard to them her uncontradicted evidence should not here be disregarded, nor yet should be accepted as if unchallenged, in the absence of such allegations in her statement of defence. The justice of the case would seem to require that, on account of these alleged misrepresentations, the case should go down again for trial, with liberty to both parties to amend the pleadings and to offer such proper evidence as they may be advised; the costs of the appeal and of such new trial and of the action to be in the discretion of the Judge presiding at the new trial.

NOVEMBER 27TH, 1914.

CANADA PINE LUMBER CO. v. McCALL.

Contract—Sale of Timber—Formation of Contract—Consensus—Delay in Delivery of Timber—Inspection—Time of Shipment—Evidence—Findings of Trial Judge—Appeal.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 6 O.W.N. 483.

The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., and BRITTON, J.

I. F. Hellmuth, K.C., and W. E. Kelly, K.C., for the appellant.

G. H. Watson, K.C., and Fleming, for the plaintiff company, respondent.

MEREDITH, C.J.O.:— . . . The action is brought to recover the balance which the respondent alleges to be due to it by the appellant of the purchase-price of ten cars of waney pine timber, 10,193 cubic feet at 66 cents per cubic foot, sold and delivered to the appellant, and the Chief Justice gave judgment for the respondent for this balance, but disallowed the claim which the respondent made for interest, and he also gave judgment dismissing the appellant's counterclaim for the recovery of the $1,000 mentioned in the agreement . . . and $3,000 which he paid on the 15th July, 1912, on account of the purchase-price of the timber and for the freight on the timber and other expenses in connection with it while at Quebec, together with interest on these sums.

A memorandum of the terms of the agreement for the sale and purchase of the timber was drawn up and signed by the parties on the 9th July, 1912. By it the respondent agreed to sell and the appellant agreed to buy "what waney timber" the respondent "made in Butt last winter," on the following terms: "The grade of the timber to be accepted as made, except that the Canada Pine Lumber Company are to keep out what they consider the poorest ten pieces: the timber below 14-inch girth to be kept out, that is, timber of 14 inches and over is to go. The timber is to be measured the full size it now is without the deductions for defects; an allowance of 45 cubic feet is to be made to cover bad ends and other defects; the Government culler's measurement to be accepted, provided they measure the full size of the timber. Price to be 66 cents net cash f.o.b. cars Kearney. Terms, $3,000 by 15th, balance when timber has been measured at Quebec. If timber freights for less than eight cents, the Canada Pine Lumber Company is to receive the difference. The Canada Pine Lumber Company is to allow Mr. A. McCall the sum of $1,000 in full settlement of all past dealings between Mr. A. McCall and it, or between Mr. A. McCall and the M. Brennen & Sons Manufacturing Company."

The respondent relies on this agreement and alleges that the terms of it were complied with on its part.

The appellant contends that it was part of the agreement, although not expressed in the writing, that delivery was to be

made "at once" or within two weeks after the making of the agreement; and one of the grounds on which he bases his right to refuse and accept and pay for the timber is, that it was not so delivered.

The other ground of defence is based on the allegation that what he bought was not all the timber that had been made in Butt in the previous winter, or all of it that was then bagged or boomed in a bay near Kearney, but only so much of it as was shewn to him when he went to Kearney on the day the agreement was made, for the purpose of inspecting the timber; or, in the alternative, that he agreed to purchase relying upon the representation made to him by the respondent that the timber which had been shewn to and inspected by him was all that was included in the sale.

The evidence on both of these points was conflicting, and the Chief Justice accepted the testimony of the respondent's witnesses in preference to that of the appellant as to each of them; and I am unable to say that the conclusion to which he came was wrong. . . .

I would affirm the judgment and dismiss the appeal with costs.

BRITTON, J.:—I agree that the appeal should be dismissed with costs.

HODGINS, J.A.:—I find it difficult . . . to accept the respondent's account that the examination was confined to about 75 per cent. of the timber because the appellant did not ask to see any more. . . . I think . . . that both parties understood that all the waney timber the respondent had was to be sorted out and put by itself where it could be inspected carefully stick by stick, so that the appellant might form his opinion of the grade. . . .

I do not think that the minds of the parties ever met; the written contract . . . dealt in fact with a different bulk of timber, though in words covering the entire cut in Butt. I cannot see any disclosure of the extra quantity till Gibson's report was received. It was nowhere brought to the appellant's notice by the respondent before that date, and he promptly repudiated. This is not a case of self-deception. It cannot be said that the respondent neither said nor did anything to contribute to the appellant's deception: Smith v. Hughes (1871), L.R. 6 Q.B. 597. The respondent did two things: first, giving instructions to shew

only what was asked for, instead of all the sticks; and then answering a question whether this was all, by replying "yes." . . .

It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. "The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it. And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promiser made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances:" per Hannen, J., in Smith v. Hughes, at p. 610.

Upon the circumstances of this case, the appeal should succeed.

It is unnecessary to consider at length the other defences raised. If the case had to depend upon late delivery, I should see great difficulty in finding in the appellant's favour. If, as he says, he was assured the timber was to be shipped in two weeks, there appeared to be nothing to prevent it, as it was then ready to be moved. He may well, therefore, have thought it unnecessary to mention it in the contract. But in that event the respondent may take advantage of the law and claim a reasonable time, which, applying the principle of Hick v. Raymond, [1893] A.C. 22, would be extended during the time the water remained held up by the Government.

It may not be out of place to remark that in . . . McArthur Export Co. v. Klock, decided by the Judicial Committee on the 24th January, 1908, C.R. [1908] A.C. 293, it was held that, dealing only with the question of quantity, delivery of 240 short logs in 2278 pieces and of 408 in 1294 logs was so great as to allow the purchaser to reject the whole. The percentage there was 10 per cent. and 31 per cent. Here it would be over 10 per cent. on culls alone on the whole; and it is clear from the contract that culls were not being bought.

I think the appeal should be allowed with costs, and the action dismissed with costs, and judgment entered for the appellant on his counterclaim with costs and with interest, but without the loss of profits claimed.

MAGEE, J.A., agreed with HODGINS, J.A.

The Court being divided, appeal dismissed with costs.

NOVEMBER 27TH, 1914.

JACKSON v. HAWLEY.

Contract—Formation—Sale of Goods—Correspondence — Failure to Arrive at Concluded Bargain or Consensus ad Idem —Evidence—Findings of Trial Judge—Appeal.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Norfolk in an action in that Court tried without a jury.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

D. Inglis Grant, for the defendant.

N. W. Rowell, K.C., and J. M. Langstaff, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The action is brought to recover $17.86 alleged to be the balance due by the appellant to the respondent on the purchase-price of 250 cases of eggs sold and delivered by the respondent to the appellant, and damages for the refusal of the appellant to accept and pay for 250 additional cases alleged to have been bargained and sold by the respondent to the appellant.

The learned Judge disallowed the claim for $17.86, but gave judgment for the respondent for $332.57 as damages for the breach of the contract as to the 250 cases which the appellant had refused to accept.

The appeal is by the defendant from this judgment, and the respondent cross-appeals, on the ground that he was entitled to recover the $17.86, and also on the ground that he should have been awarded a larger sum than was allowed as damages for the appellant's breach of his contract.

The cross-appeal should, I think, be dismissed with costs. Upon the evidence the learned Judge was justified in disallowing the claim for $17.86, and there is no reason for differing from his conclusion as to the damages, upon the assumption that the contract was proved as alleged, and that there was a breach of it, the amount at which the damages were assessed being what they were claimed by the respondent to be when, on the 27th January, 1913, his solicitor wrote to the appellant making the claim and asking for payment of it.

The contest is as to there having been a contract at all, and,

if there was, as to what kind of eggs formed the subject of the bargain as to the 500 cases which, on the assumption that there was a contract, the appellant agreed to buy. The contention of the appellant is, that what he agreed to buy was Canadian eggs of first class stock, with not more than six eggs to the case unfit for use (paragraph 4 of the statement of defence); and the respondent's contention is, that the eggs were not agreed to be Canadian, and that they were sold according to sample, and that the 250 cases which he was ready and willing and offered to deliver to the appellant were equal to the sample.

The negotiations between the parties as to the eggs were partly by correspondence and partly oral; some of the latter being by telephone. . . .

The proper conclusion upon the evidence is, in my opinion, that there never was any concluded bargain between the parties. The telegram of the appellant of the 1st October was an offer to take "500 cases same as sample, delivery as required," and there was no acceptance of that offer. The respondent's letter of the 1st October is clearly not an acceptance of it. What that letter purports to do is to "confirm sale of 500 cases selected storage eggs at 26 cents f.o.b. Simcoe, cases to be returned and eggs not to exceed six to the case bad;" and that was not the offer that had been made. I am inclined to think that, if there ever was a concluded bargain, it came about by the delivery of 50 cases after the appellant's letter of the 1st October was received, which was an offer to take 500 cases number one selected Canadian eggs, same as sample, "as per your quotation of 26 cents f.o.b. Simcoe, cases to be returned prepaid, eggs to be delivered as required by January 1st, 1913;" and that the delivery of the 50 cases was an acceptance of the terms thus proposed.

If, however, neither of these two views is the correct one, putting the case most favourably for the respondent, there was, I think, no *consensus ad idem*: the respondent thought that he was agreeing and intended to sell the eggs according to sample, irrespective of whether they were Canadian or American eggs, and the appellant thought he was buying and intended to buy only Canadian eggs, and believed that the eggs sent as a sample were Canadian eggs, though there are circumstances that warrant the suspicion, if not the conclusion, that the respondent all along knew that the appellant thought he was agreeing to buy Canadian eggs and allowed him to go on under that impression; and it is certain that, when the appellant's letter of the 1st October, following his telegram of the same date, was received, the

respondent knew that what the appellant intended to buy was "500 cases number one selected Canadian eggs same as sample," and not American eggs.

There is no contradiction of the testimony of the appellant's son as to what occurred when the offer to sell eggs to the appellant was first made, and the respondent therefore knew that the appellant would not buy American eggs, and it is not an unfair inference from this that the respondent must have known all along that what the appellant was bargaining about was Canadian eggs; and yet, according to his own testimony, he made no effort to undeceive the appellant, but acted, as I think, in a way that, whether purposely or not, had the opposite effect. . . .

The fact that the appellant had taken out of the cases eggs which had marks upon them which indicated that they were American eggs, and put them aside, shews, I think, that he thought that, although he had bargained for Canadian eggs, he was getting American eggs; and that, when these were shewn to the respondent, and the suggestion was made to him that the eggs that had been received were American, not Canadian, instead of at once saying that, as he well knew, they were American eggs, and that he had not agreed to sell Canadian eggs, the respondent's statement, according to his own account, was: "They may be. It is a question of quality." According to the testimony of the appellant and his son, as I have also mentioned, so far from saying this, the respondent sought to explain the presence of the eggs that had been identified as American eggs by saying that there "might be a couple or three odd cases went in by mistake, but they are all Canadian eggs;" and that he said "that a few might have been slipped in by mistake," is testified to by John J. Cracknell, who was present on the occasion when this discussion took place.

The learned Judge gave no reasons for his judgment, and it may well be that his conclusion was based upon the view that the respondent's telegram of the 1st October, and the respondent's letter of the same date, evidenced a contract for the sale and purchase of 500 cases of eggs according to the sample that had been sent, and such a view was, for the reasons I have given, erroneous; and we may, therefore, properly deal with the case upon the assumption that the judgment was not based upon findings adverse to the appellant on questions of fact as to which the evidence was conflicting.

I would allow the appeal with costs, and substitute for the judgment that has been entered a judgment dismissing the action with costs.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. NOVEMBER 24TH, 1914.

MILNER v. BROWN.

Water—Agreement Affecting Land — Easement or License—Notice—Finding of Fact — Construction of Agreement—Duration of Right under—Injunction—Costs.

Action for a declaration of the rights of the plaintiff and defendant in regard to a well of water, under a certain agreement; for a mandamus requiring the defendant to restore the well and a pumping outfit to proper working condition; and for an injunction and damages.

The action was tried without a jury at Chatham.

R. L. Brackin, for the plaintiff.

J. G. Kerr, for the defendant.

MEREDITH, C.J.C.P.:— . . . I find that the defendant had actual notice of the agreement in question. There is no direct testimony to support such a finding; but the circumstantial evidence is, in my judgment, so strong that there is no escape for the defendant from it. To his dull and dogged denial of actual notice I cannot give credit: though in saying that I must add, for his benefit should the case be carried further, that I do not reach this conclusion because of anything especial in his demeanour in the witness-box that may not be as apparent in the shorthand reporter's notes of the trial, as well as the shorthand report of his testimony upon examination for discovery in this action. As to the other witness for the defence, at the trial, I then made an unfavourable note also, a note to some extent based upon demeanour.

Richards, the first taker of the water privileges, under the agreement in question, and the defendant, are brothers-in-law; and, when that agreement was made, the defendant was the "hired man" of Richards, and continued in that capacity until he purchased from McDowell—who was the grantor, under that agreement, of such privileges—the land in question: and Richards, when he sold to the plaintiff his land in the agreement also set out, assigned that agreement to the plaintiff, after having held it out as an inducement to buy: and Richards, when the agreement was made, put in the water-pipes and did the other

work necessary for him to obtain the benefit of the agreement, as provided for in the agreement; the defendant taking part with him in the performance of that work, and of the work subsequently done by Richards under that agreement, as long as the defendant remained his "hired man," that is, until he became the owner of the land subjected under the agreement to these water privileges. Then there is the circumstance that Richards—after enjoying these privileges for many years, during which he, with the defendant's assistance, paid to McDowell the price of them as provided in the agreement—until the defendant's purchase from McDowell—sold his rights to the plaintiff, and that since that time the price was paid to the defendant himself as owner of the land in question; and, though the price was not money, but only work done and materials provided, it was none the less the price; and the circumstance, before mentioned, of Richards, the brother-in-law, assigning to the plaintiff the agreement in question after holding it out to him as an inducement to buy; and also the circumstance that the brothers-in-law are yet good friends, Richards doing all, and saying all, he could to support the defendant's efforts to defeat the plaintiff's claim to the benefit of the agreement so sold and assigned to him. Then too there is the fact—at all events I find it to be a fact—that the agreement was in duplicate, and one part of it was handed over to the defendant with the title-deeds of the land in question when the purchase was completed: the defendant testified to the receipt of it a few months afterwards, but I do not give credit to that; and the fact that it has ever since been in his possession. The distressful inability of the defendant to read or write, which he made prominent for his own benefit, may perhaps lose some of its poignancy in the fact that he has notwithstanding been a public school trustee, and that no one has suggested that his wife—Richards's sister—was not quite able to protect the family interests from suffering acutely from the man's inability in this respect.

From the time when the agreement was made until the time when the defendant purchased the servient tenement, if so it may accurately be called, two and a half years, the defendant as "hired man" took part in carrying out the terms of the agreement on the part of the owner of the dominant tenement, if so it may be accurately described; and after that, for more than thirteen years, he, as owner of the servient tenement, has been carrying out on the other side the terms of the agreement; until, according to his story, the plaintiff, in the month of February

last, adopted too domineering an attitude, putting the windmill in action, against his will and orders, when the pipes were frozen; the consequence of which was the usual neighbours' quarrel, and, for the first time in nearly sixteen years, an interruption of the rights under the agreement.

In all the circumstances of the case, the contention that the defendant had not actual notice of the agreement impels me to say, "Tell that to the Marines."

As this question is purely a question of fact, other cases dealing with the same or a like question of fact, are not very helpful—circumstances differing always: and they have, of course, no sort of binding effect.

In Ross v. Hunter (1882), 7 S.C.R. 289, the question was a different one: it was a question of equity only, involving a fraudulent intention or effect. In this case the statute expressly excludes the defendant from its shelter, if he had "actual notice" of the agreement.

In the case of Gray v. Richford (1877-8), 1 A.R. 112, 2 S.C.R. 431, upon evidence much less impelling, as it seems to me, actual notice was found.

But my finding upon this question of fact is not conclusive, as it seems to have been thought at the trial, of the rights of the parties in this action.

The question of the true meaning and effect of the agreement is quite as important a question as, and to my mind a more difficult one than, the question of fact with which I have dealt: and that question is: What interest, if any, did Richards take in the land now owned by the defendant, under the agreement in question: and what interest, if any, did the plaintiff acquire under the assignment of that agreement by Richards to him?

It is sometimes difficult to determine to what particular interest in land some particular and acknowledged right, of the character of that in question, belongs: whether it is an easement appurtenant; or that which is often called, rightly or wrongly, an easement in "gross;" or a profit *à prendre;* or a license; or a license coupled with an interest; or a demise; or whether the right is not one in land, but is merely a personal obligation arising out of a contract; and that difficulty may beset this case; but it is not needful to consider it, for, whatever may be the proper designation of the interest or right, the relief would be the same: all that is substantially in any doubt is the duration of that right; whether it was to be perpetual or for a limited period, and, if the latter, for how long.

The words which the parties to the agreement employed to express their intention are not by any means clear and certain as to that; they need very much the light which the material surrounding the circumstances of the case can throw upon them; and it is proper, and indeed necessary, that that light be employed in finding the true meaning of them: see Cannon v. Villars (1878), 8 Ch. D. 415.

That the right was not intended to be a perpetual one, the writing itself, as well as the surrounding circumstances, shews. Nowhere in the agreement is the usual word "power," or any like word, employed: and the right, whatever its character, is not given to Richards and "his heirs and assigns," but is conferred upon him and "his executors administrators and assigns," as if a chattel interest only. And in the assignment of the agreement, by Richards to the plaintiff, not only are the same words used, but the assignment is of the agreement only, as if it embraced a personal obligation only, not as if it were intended to pass an interest in land inheritable.

In such cases as Wood v. Waud (1849), 3 Ex. 748, Greatrex v. Hayward (1853), 8 Ex. 291, and Rameshur Pershad Narain Singh v. Koonj Behari Pattuk (1878), 4 App. Cas. 121, it is said that the right to artificial watercourses must depend on the character of the watercourse, whether it be of a temporary or permanent character, and upon the circumstances under which it is created. These were cases of a character quite different from this case, but, of necessity almost, the like considerations must apply to a case such as this, in which the question is, how long was the right to last, the parties having failed to make any express provision on the subject?

It is quite too improbable that it was intended to be permanent: too improbable, as it seems to me, to warrant any serious argument in favour of permanency.

The present advantage to each was, if they continued good neighbours, the saving of a little cost to each, a very little to the owner of the servient tenement, if such it is. In time it could not but become advisable, if not practically necessary, that the agreement should come to an end. Neighbours, not too infrequently, quarrel; in which case the arrangement would prove, or might prove, a fruitful fighting ground: a nuisance to each: and, though it may be that every farmer in this Province may not have his own vine and fig tree, he is unquestionably handicapped without his own well of water. It was said that the cost of "driving" a well there is about $50; and, as I understood it,

one "drive" had proved unsuccessful: but with abundant water so near it would be strange if another attempt, well directed, should not prove successful: in such circumstances, I cannot imagine that either party to the agreement intended it, against the ultimate interest of each, to have perpetual effect.

And beside these and other circumstances tending the same way, the water had to be carried across a public road; and no right to lay pipes there was proved to have been even sought: so that, although it is improbable that they would be disturbed, the right must always have remained in law a precarious one, as the parties must have known, and knowing could hardly have meant their agreement to be perpetual.

Then for how long was the agreement to last?

If it have developed into a tenancy from year to year, it is determinable on six months' notice, ending on the 24th June in any year: if a license coupled with an interest, it would be determinable on reasonable notice, and until the 24th June next would, having regard to the winter season intervening, as well as to all other material circumstances, be reasonable notice; and, if a reasonable time is the measure of the parties' rights, by their conduct they proved that a reasonable time had not expired on the 23rd February last; and, having regard to all the circumstances properly bearing upon the question, I hold that a reasonable time has not elapsed and shall not elapse until the 24th June next.

The results are: this action was properly brought, but quite too much was sought in it; the defendant should be enjoined from interfering with the rights conferred in the agreement until the 24th June next: and the action, in so far as anything more than that is claimed, should be dismissed; the plaintiff should have his costs as of an action brought for the relief which he gets only; and the defendant should have his costs of his defence of this action in so far as they are in excess of what the costs of his defence would have been if the action had been brought for the relief granted only. I deal with the whole question of costs now; and, after making all due allowances, on the principle indicated, in my discretion, the plaintiff will be allowed his costs of action, to be paid by the defendant, at $50, free from any further set-off; and judgment may be entered accordingly.

MIDDLETON, J. NOVEMBER 25TH, 1914.

RE HARDY AND LAKE ERIE AND NORTHERN R.W. CO.

Arbitration and Award—Misconduct of Arbitrator — View of Premises—Evidence—Setting aside Award—Costs.

Motion by the railway company to set aside an award of compensation to the land-owner, Hardy, under the Railway Act of Canada, upon the ground of misconduct on the part of the land-owner's arbitrator, who viewed the land in company with the land-owner, without having given notice to the railway company.

A. C. McMaster, for the railway company.
W. T. Henderson, K.C., for the land-owner.

MIDDLETON, J.:—I think the case of Rex v. Petrie, 20 O.R. 317, shews that a view is one method of taking evidence, and that it is not permissible to take evidence, even of this kind, ex parte. Although that is a criminal case, a precisely similar view was taken with reference to an arbitration in In re Gregson and Armstrong, 70 L.T.R. 106.

In this case I quite appreciate that there was no intentional wrongdoing. There had been a view. The land-owner's arbitrator, before making his award, desired a further view. He communicated with the chairman, who told him to go and see. He then communicated with the land-owner, who met him and took him over the property. Both the arbitrator and the land-owner state that the evidence was not discussed, and that nothing more was done than what was necessary to enable the arbitrator to have the inspection that he desired.

The danger of the course adopted is obvious; and, even though in this case I cannot suppose that the result is in any way affected by what took place, the award must fall.

The question of costs has given me anxiety. The mistake originated with the arbitrator, but it was acquiesced in by the land-owner, and, when the award was attacked, he did not assent to its being set aside, but resisted. He must, I fear, bear the costs of the motion.

LATCHFORD, J. NOVEMBER 25TH, 1914.

RE FOWLER AND VILLAGE OF WATERDOWN.

Schools—High School District Composed of two Municipalities —Cost of Erection of School Building—Payment in Proportion to Equalised Assessment—Municipal By-law Providing for Raising Excessive Amount — Order Quashing — High Schools Act, R.S.O. 1914 *ch.* 268, *secs.* 6, 38(4), (8).

Motion by a ratepayer of the Village of Waterdown for an order quashing by-law 198B, passed by the municipal council of the village on the 13th October, 1914, providing for the issue of debentures amounting to $12,500 required to be raised as one-half the cost of construction of a new high school building, situate, not in Waterdown, but in the adjoining township of East Flamborough.

The motion was heard by LATCHFORD, J., in the Weekly Court at Toronto.

J. G. Farmer, K.C., for the applicant.

W. T. Evans, for the village corporation.

LATCHFORD, J.:—The municipalities of Waterdown and East Flamborough together constitute a high school district, known as the Waterdown high school district, organised under the provisions now to be found in the High Schools Act, R.S.O. 1914 ch. 268, sec. 6.

The high school board made application to the two municipalities, under sec. 38 of the Act, for the amount required to erect the school, asking, it would appear, one-half the cost, or $12,500, from each municipality.

The councils approved of the application. Then, as provided by sub-sec. 4 of sec. 38, the council of the municipality of East Flamborough, in which this high school was situate, was under obligation to raise the sum required by the issue of debentures. An alternative was, however, given by the amendment of 1914, 5 Geo. V. ch. 21, sec. 60, under which, if it so desires, the council of any municipality may raise its *proportion* of the sum required, by the issue of its own debentures.

The council of the village municipality regarded as "its proportion" the $12,500 which the high school board had required it to raise, and accordingly passed the by-law now attacked.

Mr. Fowler says that the proportion which the village municipality must raise is that, and that only, prescribed by sub-sec. 8 of sec. 38 of the Act, which—so far as material—is as follows: "Where a high school district comprises more than one municipality or parts of more than one municipality, each municipality shall be liable for such proportion of the principal and interest payable under and of the expenses connected with the debentures as the equalised assessment of that part of the high school district which is within such municipality bears to the equalised assessment of the whole district."

The equalised assessment of Waterdown is $235,601, and of East Flamborough $2,265,433, a proportion, approximately, of 1 to 10.

I am of the opinion that the village municipality could not be required to raise more than the proportion fixed by the statute—in this case a little less than $2,500. The demand of the school board was, therefore, greatly in excess of what it had a right under the statute to require. The school board had no right higher than that given it by the statute, and the municipality exceeded its powers in assuming to comply with a demand illegally exercised.

The by-law is quashed with costs.

MIDDLETON, J., NOVEMBER 25TH, 1914.

*MILLIGAN v. THORN.

Negligence—Injury to Boy under 16 *Permitted to Drive Horse in Streets of City—Infraction of City By-law Authorised by Municipal Act, R.S.O.* 1914 *ch.* 192, *sec.* 400, *sub-sec.* 49—*Protection of Public—Cause of Action—Costs.*

Action by an infant to recover damages on account of an injury sustained by him as the result of a runaway accident on the 8th May, 1913, by reason, as the plaintiff alleged, of the negligence of the defendants or one of them.

The action was tried without a jury at Toronto.

George Wilkie, for the plaintiff.

Frank Denton, K.C., for the defendant Thorn.

W. N. Anderson, for the defendant Squire.

*To be reported in the Ontario Law Reports.

MIDDLETON, J.:—The defendant Thorn is a grocer, carrying on business in a small way in Toronto. The plaintiff, a lad of 15, was employed in connection with Thorn's grocery business after school hours and on holidays. Thorn had in connection with his business an old horse, which the plaintiff sometimes drove, both in delivering orders and in calling at the houses of regular customers for the purpose of obtaining orders.

The plaintiff was apparently fond of horses, and was by no means satisfied with this staid animal, and used to hire and drive horses from the livery stable of the defendant Squire. In this amusement he was joined by other lads of similar age, and this course of conduct was not only in violation of the by-laws of the city, but was regarded as dangerous by the boy's father and by the police, to whom the exploits of the plaintiff and his companions were reported. The result was that Squire was forbidden, not only by the father but by the police, to intrust horses to the boy.

On the day in question Thorn's horse was sick, and at about half past one the plaintiff turned up at the store, instead of going to school. Thorn sent him to Squire's livery stable to make some inquiries with reference to the possibility of obtaining a horse. There was some difference between the parties as to whether the plaintiff was to confine himself to making inquiries only, or whether he was to get a horse. This difference is not material, for Squire refused to give a horse to the boy, reminding him of his instructions; and finally Squire telephoned to Thorn, who said that the horse was intended for his own use and would be driven by him. Thereupon a horse was given to the boy, with a halter, and the boy led it to Thorn's stable. There he met a companion, and the horse was harnessed.

It was suggested that the horse was of a vicious disposition. This accusation is in no way supported by the evidence. The horse was quiet and well behaved. Though the plaintiff had had much experience in the harnessing of horses, he did not properly harness this horse on this occasion; he failed to adjust the crupper around the tail. The plaintiff then took the horse, as he says, to the store. Again there is a conflict upon the evidence. The boy says he was told to take the horse out for the purpose of soliciting an order; Thorn says that he did not see the boy and did not hear of him after he had sent him to Squire's stable until after the accident had taken place. However, the boy went to the customer's house, and was returning to the store, having with him one of his companions. While going south on Huron

street, by reason of the failure to harness the horse properly, the breeching strap fell about the horse's legs and frightened it. The horse then ran away, and at College street ran into another rig, and was killed. The boy's companion had dropped from the waggon and escaped; the plaintiff was thrown, and sustained some injury.

The whole accident was the direct result of the plaintiff's own carelessness in the harnessing of the horse, and he cannot maintain the action unless the defendants have been guilty of a breach of a by-law of the city, and this breach confers upon the plaintiff some right of action. I do not think that there was any negligence in intrusting the horse to the boy. He was quite competent to harness it; and, if the horse had been properly harnessed, he was quite competent to drive and manage it.

At the trial of the action it was plain that no case existed as against the defendant Squire, and I dismissed the action as to him.

The main contention is, that the municipal by-law number 5770, intituled "a by-law to regulate traffic in the public streets," and which, inter alia, enacts that "no vehicle shall be driven upon any street in the city in charge of any driver less than 16 years of age," was violated by intrusting the horse and waggon in question to the plaintiff. The defendant Thorn denies that he intrusted the horse to the boy. I feel compelled, after considering the evidence carefully, to determine this question against him. I think he either expressly instructed the plaintiff to take the horse out and canvass for orders, or acquiesced in his so doing. . . .

I have, however, come to the conclusion that this finding of fact does not entitle the plaintiff to succeed. Undoubtedly the violation of a statutory obligation may often confer a right of action, and, as is said by Sir Charles Moss in Fahey v. Jephcott, 2 O.L.R. 449, whether this liability is to be classed as negligence, or as breach of a statutory duty resulting in an injury, does not appear to be material. In each case it is necessary to establish that the damage in respect of which relief is sought was within the mischief against which the law intended to provide. In Fahey v. Jephcott it was plain that the provision of the Factories Act prohibiting the employment of a girl under 18 to work between the fixed and traversing parts of a self-acting machine while in motion was a statute passed primarily for the protection of young and inexperienced workers. . . .

[Reference also to Hagle v. Laplante, 20 O.L.R. 339; Fowell v. Grafton, 22 O.L.R. 550.]

Here, however, the object of the legislation is entirely different. Under the Municipal Act, now R.S.O. 1914 ch. 192, sec. 400, sub-sec. 49, a municipality is authorised to pass by-laws to regulate traffic in the public streets. The by-law in question purports to be passed under this authority. The prohibition of the driving of vehicles by those under 16 years of age is not for the protection of the driver, but for the protection of the public.

The action, therefore, fails against both defendants.

I can see no reason for refusing the defendant Squire his costs, as he appears to have been in no way in fault; but I do not give Thorn costs, because he was guilty of an infraction of this salutary provision of the by-law

It is perhaps convenient, in case the action is carried further, that I should assess the damages the plaintiff is entitled to recover if I am wrong in thinking that he fails. . . . I would think that $250 would be a liberal amount to allow, in view of the medical evidence. Of this I would give $100 to the father and the balance to the boy.

BRITTON, J., IN CHAMBERS. NOVEMBER 28TH, 1914.

J. A. GUILMETTE CO v. PARISIEN.

Jury Notice—Motion to Strike out—Action to be Tried at Sittings for both Jury and Non-jury Cases—Practice—Rule 398.

Motion by the plaintiffs to strike out a jury notice filed and served by the defendants.

C. A. Seguin, for the plaintiffs.

N. A. Belcourt, K.C., and C. G. O'Brian, for the defendants.

A. E. Fripp, K.C., for a third party.

BRITTON, J.:—This is a case to be tried at L'Orignal, at which place there are only two sittings each year for the trial of actions, and at each sittings cases are entered for trial with and without a jury.

In this case the defendants have served a jury notice; the plaintiffs apply to have this notice struck out.

Rule 398 is as follows: "When an application is made to a

Judge in Chambers for an order striking out a jury notice, and it appears to him that the action is one which ought to be tried without a jury, he shall direct that the issues shall be tried and the damages assessed without a jury."

There is not the same reason now, as before the Rule in its present form, for applying to a Judge in Chambers before the opening day of the sittings as to cases to be tried in places where there are no separate sittings for jury and non-jury trials. Clause 2 of the Rule provides: "The refusal of such an order by the Judge in Chambers shall not interfere with the right of the Judge presiding at the trial to try the action without a jury, nor shall an order made in Chambers striking out a jury notice interfere with the right of the Judge presiding at the trial to direct a trial by jury."

The defendants are entitled to a trial by jury, unless a Judge in Chambers or a Judge presiding at the trial otherwise orders. It must appear to the Judge that the action is one which ought to be tried by a Judge without a jury. The onus is upon the party asking to have the jury notice struck out to make it appear to the Judge that the action is one that should be tried without a jury.

As I am not clearly of opinion that the action is one that should be tried without a jury, I decline to make the order asked. I do this the more readily because an order striking out the notice might embarrass the plaintiff in this way: with the jury notice struck out, the case would require to be entered as a non-jury case, and should the case be so entered, and if no case is entered as a jury case at the next sittings at L'Orignal, the Sheriff would be bound to notify the jurors not to attend. See R.S.O. 1914 ch. 64, sec. 63, sub-sec. 3.

In that event, if the learned trial Judge should, in the exercise of his discretion, decide that a jury be required, the trial might have to be postponed.

The motion is, therefore, dismissed; costs in the cause, unless the trial Judge otherwise orders.

LENNOX, J. NOVEMBER 28TH, 1914.

*MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Constitutional Law—School Laws of Ontario—Regulations of Department of Education for Ontario with Regard to Separate Schools—Intra Vires—British North America Act, sec. 93—"Denominational Schools"—"Class of Persons"—Use of French Language in Schools—Disobedience of Regulations—Resolutions of School Board—Personal Liability of Trustees for Costs.

Action to compel the defendants to conduct their schools according to the regulations of the Department of Education for Ontario and for other relief as stated in a former opinion of LENNOX, J., in this case, noted ante 35.

J. F. Orde, K.C., and W. N. Tilley, for the plaintiffs.

N. A. Belcourt, K.C., and A. C. McMaster, for the defendants.

McGregor Young, K.C., for the Province of Ontario.

LENNOX, J.:—There are only two classes of primary schools in Ontario—public and separate schools. "Public school," or "separate school," simply imports an English school. For convenience, the Department of Education annually designates certain schools attended by French-speaking pupils as English-French, and these may be either public or separate schools. The defendants have under their charge 192 Roman Catholic separate schools, of which 116 are English-French.

The main issue to be determined in this action is the validity or invalidity of certain provisions of the School Laws of Ontario, and particularly of Instructions or Regulations numbers 17 of the Department of Education, issued in June, 1912, and August, 1913. I will deal with this issue first.

Under our constitution, the power to make educational laws and the control of education is for the most part committed to the Provinces. It is not an unfettered power or unlimited control. There is power vested in the Governor-General in Council and the Dominion Parliament by which they may, if they will, prevent the effective exercise of the jurisdiction conferred upon the Provincial Legislatures: sub-secs. 3 and 4 of sec. 93 of the

*To be reported in the Ontario Law Reports.

British North America Act, 1867. But, notwithstanding the strenuous argument of counsel for the defence, these sub-sections in no way affect the issues in this case, for the manifest reason that the jurisdiction of the Dominion is supervisory or remedial only, and the powers conferred have not been exercised or even invoked; and until invoked and acted upon they in no way impair or encroach upon Provincial jurisdiction. Neither, on the other hand, is the objection that notice has not been given to the Minister of Justice, well taken. There is no Act or action of the Dominion Government or Parliament attacked; no question arises as to conflicting jurisdiction. If the Ontario Legislature had not power to enact the laws complained of, the Dominion Parliament would be equally powerless so to enact.

The question to be determined, and the only question, is, to my mind, a very simple one: Have the constitutional rights and privileges guaranteed by sub-sec. 1 of sec. 93 of the British North America Act, 1867, been contravened? If they have not, there is an end to the defendants' whole contention; there is no other possible argument open to them. If they have, the law is ultra vires and nugatory; for no legislative body in Canada has power to make any law which "shall prejudicially affect any right and privilege with respect to denominational schools which any class of persons have (had) by law in the Province at the Union:" sub-sec. 1 of sec. 93.

The outstanding difference between this and the provisions of sub-secs. 3 and 4 is manifest, even on a casual reading of sec. 93. This is a distinct and positive limitation upon legislative action, and, subject to this, and to this limitation only—and in default of the exercise of federal jurisdiction—the unfettered direction and control of education within the Province is committed to the Legislature of Ontario.

This is the conclusion I come to upon a close and thoughtful reading of the relevant provisions of the British North America Act, and, so far as I can judge, does not conflict with any thing decided in City of Winnipeg v. Barrett, [1892] A.C. 445, Brophy v. Attorney-General of Manitoba, [1895] A.C. 202, Maher v. Town of Portland (1874), 2 Cart. 486 (note), or any other of the cases referred to, or of which I have knowledge, decided under the Act.

The defendants must justify under the limitations above quoted, if at all. Have they done this?

The Roman Catholic separate schools of Ottawa are undoubtedly "denominational schools" within the meaning of this limitation. I am of opinion, too, that the French-Canadian sup-

porters of the separate and public schools of Ontario are a "class of persons," within the meaning of that clause; and, if they are not concluded by the Barrett case—and I am sure that they are —the defendants may, I think, fairly argue that denial of the use of the French language in the way insisted upon by the defendants prejudicially affects the French-Canadian supporters of these schools. But this, at the most, is all that has been shewn, and this is not enough.

I have not overlooked that it was shewn, or attempted to be shewn, by verbal testimony and records of the Department, that, prior to Confederation, in isolated instances here and there, the use of the French language was permitted (or not actively opposed) to an extent not sanctioned by the law of the Province as it now is; but it is not pretended that this right or quasi right or privilege or indulgence was secured to any class of persons by any law whatever of the then Province of Upper Canada at the Union.

The result is that the defendants have wholly failed to shew that Instruction or Regulation 17 of June, 1912, or of August 1913, of the Department of Education for Ontario, or the manner in which these instructions have been or are being administered by the Department, prejudicially affect any right or privilege with respect to denominational schools which the defendants as a class of persons had by law in the Province at the union; and the result is, too, that it does not appear that these Instructions or the manner of their administration or the statutes upon which they are founded are ultra vires of the Provincial Legislature. It follows. as a consequence, of course, that they must be obeyed. That they have been flagrantly disregarded, defiantly and ostentatiously repudiated and set at naught, by a majority of the Ottawa Separate School Board, is not and could not be denied. It would serve no useful purpose to particularise the evidence of this. It is for the Department, the law being declared, to see that the law is obeyed. . . .

The other issues to be dealt with are, in a sense, subordinate to the question just disposed of, but not wholly so.

As to the passing of the money by-law and the disposal of debentures under it, the defendants urge the need of money, but have not shewn any disposition to avail themselves of the suggestions I made at the trial to meet and overcome the suggested difficulties.

Leaving out of sight, of course, minor derelictions, a Board should not be permitted to mortgage the resources of the rate-

payers or launch out into heavy capital expenditure while refusing to conduct the schools according to law. However much may be said, and a great deal can be said, in excuse for men who feel, as no doubt some of these defendants conscientiously felt, that the use of their mother tongue was being unfairly denied them, the weapons they used, the persistent engagement of unqualified teachers, their attempt to discharge a large body of qualified teachers, to the great prejudice of the schools, their denial of the right of inspection, their unjustifiable treatment of Inspector Summerby—for, although they may not have directly initiated this flagrant act of insubordination, yet that their openly declared hostility to the Regulations undoubtedly conduced to it, that they knew it was contemplated, that they did nothing to prevent it, and that they condoned and concurred in it, is the least that can be said—their unseemly, unnecessary, and wholly unwarranted action in what amounted to "a declaration of war," by posting their defiance of the Department in the class-rooms to thousands of school children, and finally the arbitrary closing of the schools, are entirely different matters, and do not find ready justification or excuse. It is to be hoped that before long the Board may recognise the wisdom of resuming the exercise of its functions according to law; but in the meantime, or for so long as my judgment remains unreversed, the injunction restraining the passing of the by-law in question must be continued.

The injunction will also be continued and made perpetual to prevent the employment or payment of unqualified teachers or any departure from the course or method of instruction prescribed by the Department of Education, and from, directly or indirectly, preventing the regular and lawful inspection of the schools.

I have already by an interim judgment declared that the Chairman of the Board had no power to discharge teachers as he purported to do, and that these teachers were not legally discharged. In this connection I gave liberty to the parties to amend the pleadings, and this has been done. I was asked at the trial, and it was urged again upon the argument, to go further and declare that these teachers are entitled to be paid according to the terms of their contracts respectively. This I cannot do. These men are not parties to this action. Their contracts are not before me. With their salaries I have no concern.

I re-affirm my former judgment, and declare that the resolutions under which the Chairman purported to act conferred upon

him no right to dismiss or engage teachers. This is a function of the Board, and cannot be delegated. My former judgment, so far as it continues applicable, will be taken as repeated here.

In the pleadings the plaintiffs ask that the members of the Board who occasioned this action be made personally responsible for costs and any loss they have occasioned, with a reference to ascertain the amount; and, though this branch of the claim was not referred to upon the argument, I should consider it, and I have given it a good deal of anxious thought. There may be technical or legal objections; but, altogether aside from this, I am not disposed to make this somewhat unusual and drastic order. . . .

Except in the matter of closing the schools and attempting to discharge the teachers, it has not been shewn that these trustees did not act honestly, conscientiously, and in good faith; and, short of this, I am not prepared to penalise them by declaring a personal liability for costs and damages. I will make no order under this prayer of the statement of claim. The plaintiffs may withdraw it or have their rights, if any, reserved if they deem it necessary or desire to do so.

There will be judgment for the plaintiffs against the defendant Board with costs, declaring:—

(1) That the Instructions or Regulations in the pleadings mentioned and the Acts and proceedings sanctioning them are intra vires of the Provincial Legislature, apply to and bind the defendants, and have been and are being disobeyed.

(2) That the defendants have not been and are not conducting the schools under their charge according to law.

(3) That the resolutions of the defendant Board purporting to delegate to the chairman power to discharge, select, and engage teachers were ultra vires, that the notices to teachers in pursuance thereof were unwarranted, and that the agreements with these teachers were not thereby terminated.

(4) That it is a statutory duty of the defendant Board to see that the schools under its charge are conducted according to the provisions of the Separate Schools Act and the Instructions and Regulations of the Department of Education, to maintain order and discipline in these schools, and to permit and facilitate their inspection, and the defendant Board neglected and violated its statutory obligations in this regard.

(5) And there will be judgment for an injunction in the terms generally and to the purport and effect of the interim injunction granted in this action by the Chief Justice of the King's

Bench on the 29th April, 1914, and in addition restraining the defendant Board from directly or indirectly obstructing or retaining in its employment or paying the salary of any teacher who shall so obstruct the inspectors appointed by the Department from visiting and inspecting the schools in its charge, and ordering the Board to provide for and facilitate the orderly and efficient inspection of the schools from time to time according to law.

RENFREW MACHINERY CO. v. DEWAR—LATCHFORD, J., IN CHAMBERS—NOV. 23.

Venue—Application to Change—Convenience — Expense—Witnesses—Costs.]—Appeal by the plaintiffs from an order of the Master in Chambers changing the venue from Pembroke to Cornwall. LATCHFORD, J., said that, in his opinion, there was not established before the learned Master such a preponderating inconvenience to the defendant as justified changing the venue. It would doubtless cost the defendant more to have the trial take place at Pembroke if he should bring there all the persons whom he stated to be necessary and material witnesses than if Cornwall was the place of trial. But it was doubtful whether so many witnesses as the defendant mentioned were necessary and material witnesses. It had not been suggested that the plaintiffs were not responsible for any amount of costs that might be awarded against them in the event of the defendant's success. The primâ facie right of the plaintiffs to name the place of trial had not been displaced by the material filed, and the order appealed from should be reversed. Costs in the cause. James Hales, for the plaintiffs. Featherston Aylesworth, for the defendant.

CARDWELL v. BRECKENRIDGE—MIDDLETON, J., IN CHAMBERS—NOV. 24.

Costs—Scale of—Judgment of Trial Judge—Special Set-off—Ruling of Taxing Officer—Appeal—Rule 649.]—An appeal by the plaintiff from a ruling of one of the taxing officers, upon taxation of the plaintiff's costs of the action against the defendant. The action was in the Supreme Court of Ontario, and was tried by HODGINS, J.A., who gave judgment for the plain-

tiff with costs and with a set-off to the defendant of one-half of the counsel fees at the trial. The amount for which judgment was given being within the jurisdiction of a County Court, the taxing officer ruled that the plaintiff's costs should be taxed on the County Court scale with the set-off in favour of the defendant provided by Rule 649. MIDDLETON, J., after conferring with the trial Judge, said that the intention of the latter was that the plaintiff's costs should be taxed on the Supreme Court scale, with the set-off specifically directed—that is, to make an "order to the contrary" (Rule 649); and, therefore, the appeal should not be disposed of until after any application that might be made to HODGINS, J.A., to make his judgment as issued conform to his intention, had been heard and disposed of. Grayson Smith, for the plaintiff. C. W. Kerr, for the defendant.

RE M. A. HOLLADAY CO.—LENNOX, J., IN CHAMBERS—NOV. 21.

Company—Winding-up—Petition for—Discretion — Refusal —Assignment in Trust for Creditors.]—Petition for the winding-up of the company under the Dominion Winding-up Act. The learned Judge said that sufficient had not been shewn to justify an order for the winding-up of the company under the direction of the Court, at this time. It appeared that the company's affairs were being wound up by a trustee for creditors; that a pending action against the trustee had been dismissed; and that, as a consequence, a dividend of 20 per cent. had been paid. Motion dismissed without costs and without prejudice to a new motion. This order was made in the exercise of a judicial discretion; and the question whether the petitioners were technically entitled to succeed was not considered. Reference to Re Strathy Wire Fence Co. (1906), 8 O.L.R. 186, and Re Cramp Steel Co. (1908), 16 O.L.R. 230. R. C. Levesconte, for the petitioners. J. A. Macintosh, for the trustee. J. R. L. Starr, K.C., for the company.

FITZGERALD v. CANADA CEMENT CO.—FALCONBRIDGE, C.J.K.B.—NOV. 26.

Private Way—Obstruction—Damages—Reference.]—Action for damages for depriving the plaintiff of a right of way over a marl deposit to water cattle at Dey Lake. The learned Chief

Justice gave judgment for the plaintiff for $1,500—either party may take a reference to reduce or increase the damages. W. C. Mikel, K.C., for the plaintiff. W. B. Northrup, K.C., for the defendants.

FINDLAY v. HYDRO-ELECTRIC COMMISSION OF ONTARIO—FALCONBRIDGE, C.J.K.B.—NOV. 27.

Master and Servant—Death of Servant—Negligence—Damages under Fatal Accidents Act—Apportionment—Allowance to Widow for Maintenance of Infants.]—Action by the widow and children of James Findlay for damages for his death caused by his coming into contact with a live wire while working for the defendants, by reason of the defendants' negligence, as the plaintiffs alleged. Judgment was given for the plaintiffs for $3,000, without costs, and was apportioned among the plaintiffs. Annual allowance out of the infants' moneys to be paid to the widow for maintenance, with the privity of the Official Guardian. J. Reeve, for the plaintiffs. W. F. Langworthy, K.C., for the defendants.

LAKE VIEW CONSOLS LIMITED v. FLYNN—LATCHFORD, J.—NOV. 27.

Misrepresentation—Purchase of Mining Claims—Undertaking to Return Purchase-money.]—The plaintiffs, an incorporated body, of London, England, brought this action against Charles B. Flynn and John Philip Flynn, mining brokers, to recover $15,000 which was paid in March, 1911, by the plaintiffs, for the purchase of three mining claims known as the Felton claims, in the Porcupine district, in Ontario. The action was based on misrepresentations inducing the plaintiffs to purchase the claims and an undertaking by the defendant Charles B. Flynn to return the money if the claims were not as represented. The learned Judge made a careful examination of the evidence in a written opinion of some length, and made findings against the defendants. Judgment against both defendants for $15,000 with interest from the 1st March, 1911, and costs. R. C. H. Cassels, for the plaintiffs. J. M. Godfrey, for the defendants.