THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING APRIL 19TH, 1902.)

VOL. I. TORONTO, APRIL 24, 1902 NO. 15.

WINCHESTER, MASTER. MARCH 24TH, 1902.

CHAMBERS.

REX EX REL. ROSS v. TAYLOR.

Municipal Elections—Quo Warranto Proceeding—Cross-examination on Affidavits—Discretion as to Permitting.

Application by relator for an order allowing him to proceed and cross-examine the several persons who had made the affidavits filed by respondent in answer to the affidavits filed by relator in support of his motion in the nature of a *quo warranto* to void the election of respondent as reeve of the village of Port Dover.

W. M. Douglas, K.C., for relator.

S. C. Biggs, K.C., for respondent, opposed the application on account of the great expense, which would exceed the amount of the relator's recognizance.

THE MASTER IN CHAMBERS.—I have read all the affidavits filed, and, in my opinion, the application should not be granted. In Regina ex rel. Piddington v. Riddell, 4 P. R. 80, the late Mr. Justice Morrison in delivering judgment said, at p. 85: "On the argument I was pressed by counsel for the relator to order further proceedings with a view to the oral examination of the parties and the production of their books for the purpose of impeaching the facts sworn to by Clinkinbroomer and the defendant. I could only be warranted in doing so upon the ground that I considered the facts sworn to, to be untrue. I see no reason for my thinking so." In that case argument had taken place upon the affidavits filed; here no argument has been heard. I refer to the case to shew that it was a matter of discretion as to permitting the examination or not. In using this discretion I think that no examination would be helpful to me in considering the matter. The relator has the right to file affidavits in reply to those on behalf of the respondent. He will have an opportunity of doing so if he desires it, and the matter will stand adjourned for that pupose.

H. A. Tibbetts, Port Dover, solicitor for relator.

S. C. Biggs, Toronto, solicitor for respondent.

APRIL 12TH, 1902.

C. A.

MACLAUGHLIN v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Patent for Invention—Contract—Construction of—License—Right to Alter or Vary Patented Article — Main Consideration for License may be Proved, where not Inconsistent with Consideration Stated.

Appeal by defendants from judgment of MEREDITH, C.J., (2 O. L. R. 190), in favour of plaintiffs in action to restrain the infringement of a patent air brake invented by plaintiff MacLaughlin, who had assigned the patent to the plaintiff company, and for damages for infringement and misrepresentations made by employees of defendants respecting the brake.

W. Cassels, K.C., and A. W. Anglin, for defendants.

J. H. Rodd, Windsor, for plaintiffs.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held, ARMOUR, C.J.O., dissenting, that upon the proper construction of the agreement (set out in the report in 2 O. L. R.), the defendants were justified in making certain important changes in the mode of construction of the brake and in using the brake so altered, whether or not they were using and claiming to use it as the plaintiff MacLaughlin's invention and so describing it.

Fleming, Wigle, & Rodd, Windsor, solicitors for plaintiffs.

Blake, Lash, & Cassels, Toronto, solicitors for defendants.

BRITTON, J. APRIL 14TH, 1902.

WEEKLY COURT.

RE SALTER AND TOWNSHIP OF BECKWITH.

Municipal Corporation — By-law—Local Option—Posting in Public Places—Directions to Voters—Omissions not Cured by R. S. O. ch. 223, sec. 204.

Motion by a ratepayer of the township of Beckwith to quash local option by-law No. 328 passed under sec. 141 of the Liquor License Act

G. H. Watson, K.C., for applicant.

J. J. Maclaren, K.C., for corporation.

BRITTON, J.—It was objected that the council did not post up a copy of the by-law at four or more of

the most public places in the municipality. This is a serious objection in view of the facts. The affidavits shew that one copy was put up by Mr. McEwen, and one copy was put up by P. F. Sinclair, who was and is a member of the council; he says he has been informed and believes that five copies of the by-law were duly posted, etc., and that he himself personally posted one copy at Scotch Corners, in said township. Joseph Kidd, who was reeve of the township in 1891, swears as follows:—"Copies of said by-law with said notice appended were posted up in at least five of the most public places in the said township of Beckwith, namely, Franktown P. O., Deany School-house, Prospect P. O., Kemp's blacksmith shop at Black's Corners, Town Hall, Black's Corners, all of which said notices I did personally see. I have also been informed and believe that said by-law with said notice appended was posted at the said Scotch Corners in the said township."

It will be noticed that no time is mentioned. It is not attempted to be shewn who put any of these copies up, or when or by what authority, other than as above stated.

Apparently the matter was not discussed in council or by the councillors, either at or before or after any meeting. It is different in that respect from what appears to have been done in reference to publishing the by-law and notice in a newspaper. Mr. Kidd was active in desiring to get the by-law passed, and is now naturally and properly desirous to have it sustained, and he would (if he could) have given more particulars of these copies, when, by whom, and under what circumstances they were put up. The council apparently gave no authority to put them up, and what is a somewhat singular fact, the active workers for the by-law, while they say the by-law and voting were talked about, do not speak about the copies posted up.

It is also objected that directions to voters in the form of schedule L., as required by secs. 142 and 352 of the Municipal Act, were not furnished to the deputy returning officer. This is important. It is not pretended that this was done, but it is urged that no harm was done, because, if there had been, it would be evidenced by spoilt ballots. I hardly think that is the test. Voters are entitled to the information and direction which the statute provides, and ballots may have been wrongly marked and counted, although in no way spoilt.

It is also urged that the mistake is cured by sec. 204. I cannot say this omission did not affect the result. It perhaps did not. I cannot say, and ought not to be called upon

to say, in the absence of any record by the council of what they did or intended to do in regard to conducting the voting on this by-law in accordance with the principles laid down in the Act, how the result was affected. In so important a matter the council should have acted in carrying out details, and the action should have been recorded. It should not have been left to men, no matter how zealous and willing, to do of their mere motion what they thought necessary, and when the responsible corporate body neglected their duty, a by-law without such formalities as the statute requires in the particulars above mentioned ought not to be forced upon the minority, even if it so happens that in truth the majority of those who voted were really in favour of it.

This by-law, if allowed to stand, disturbs the existing order of things in a township as distinguished from all the other townships in the same county, and cannot be repealed for three years. The quashing of it will not prevent a new by-law being submitted, if the electors desire it and the council pass it, and if such a by-law is again submitted, it should be done with such care on the part of the council to comply with the statutory requirements that the will of the electors when once announced shall prevail.

These objections are fatal, and the by-law should be quashed with costs to be paid by the township, but the applicant is not to be allowed any costs upon the other objections on which his motion fails.

There are many affidavits in regard to the qualifications of voters. These affidavits are quite incorrect, although no doubt honestly made by deponents upon information and belief. Costs of these are not allowed against the township.

Colin McIntosh, Carleton Place, solicitor for applicant.

J. S. L. McNeely, Carleton Place, solicitor for corporation.

BRITTON, J. APRIL 14TH, 1902.

CHAMBERS.

REX EX REL. TOLMIE v. CAMPBELL.

Municipal Corporation—Election of Reeve—Voter Voting more than Once—Majority—Presumption as to Voter's Receiving a Ballot Paper after having once Voted.

Application by relator for order setting aside election of respondent D. Campbell as reeve of the township of Aldborough, in the county of Elgin, on the ground, amongst others, that each of thirty or more electors received a ballot

paper and voted for reeve at more than one polling place in the township at the election.

C. St. Clair Leitch, Dutton, for relator.

E. E. A. DuVernet, for respondent.

BRITTON, J., held, following Woodward v. Sarsons, L. R. 10 C. P. 744, that the general principle to guide the courts in such cases is, that the election should be set aside if a Judge, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate of their choice; he also held that there is not, in this case, reasonable ground for believing that the result would be different if all illegal votes could be struck off. There being no actual proof in this case that more than four persons voted more than once, it cannot be presumed, as against the respondent, that every elector who received a second ballot paper after having once voted actually deposited it in favour of respondent.

Motion dismissed, but without costs, as the facts were somewhat unusual, and as there was possibly double voting on both sides.

C. St. Clair Leitch, Dutton, solicitor for relator.

J. D. Shaw, Rodney, solicitor for respondent.

APRIL 14TH, 1902.

DIVISIONAL COURT.

SLINN v. CITY OF OTTAWA.

Municipal Corporation — Railway Embankment — Damages to Adjacent Property from Water caused by a Freshet—Liability of Corporation.

Motion by plaintiff to set aside judgment of nonsuit, and for new trial. Action in the County Court of Carleton to recover damages for injuries alleged to have been sustained by plaintiff, who carries on a bakery business on lots 16, 17, and 18 on the west side of Creighton street in Rideau ward in the city of Ottawa. At the rear of plaintiff's property there has been for a number of years, along the side of the Rideau river, a high embankment, upon which is the track of the Canadian Pacific Railway Company, and which has protected the adjacent property from being flooded in the spring of the year. The defendants O'Leary and Robillard, contractors, in the year 1899, constructed a section of the main drain in the ward, and in carrying the drain under the embankment, negligently, as alleged, left a

large excavation or opening in it, through which water flowed and caused the damage.

A. E. Fripp, Ottawa, for plaintiff.

G. F. Shepley, K.C., for individual defendants.

J. H. Moss, for defendant corporation.

The judgment of the Divisional Court (BOYD, C., FERGUSON, J., ROBERTSON, J.) was delivered by

FERGUSON, J.—The trial Judge having dispensed with the jury and grappled with the whole case himself, the question is not whether there was evidence to go to a jury, but whether the conclusion of the Judge was correct. After a persual of the evidence I am of opinion that the water that did the injury did not come through the cutting made under the railway in the construction of the sewer by defendants, but was water that flowed over the railway dyke owing to a freshet, and in such a case the defendants are not liable.

Appeal dismissed with costs.

A. E. Fripp, Ottawa, solicitor for plaintiff.

Christie & Greene, Ottawa, solicitors for individual defendants.

Taylor McVeity, Ottawa, solicitor for corporation.

APRIL 10TH, 1902.

C. A.

PENNINGTON v. HONSINGER.

Account—Items—Sale under Chattel Mortgage—Questions of Fact—Appeal—Reversal of Findings.

Appeal by defendants from order of a Divisional Court reversing order of FERGUSON, J., upon appeal from a Master's report.

Action for an account of dealings of defendants with property included in certain chattel mortgages made by plaintiffs. The property was brought to a sale under all the mortgages, conducted by defendant Honsinger, with the assent of defendant Baird. After the sale the former acquired all the rights and interests of the latter under his mortgages, and the proceeds of the sale, so far as they might be applicable to discharge and satisfy them.

The questions at issue were: (1) The right of defendant Honsinger to debit plaintiff with (*a*) $200 paid to discharge a distress upon the mortgaged chattels for rent of the farm on which they were kept; (*b*) the bailiff's charges, $20.76; (*c*) $100 for costs of a replevin action arising out of the

seizure; (*d*) a number of small charges for the maintenance of the mortgaged chattels. (2) Whether the defendant Honsinger was chargeable with the price of several of the chattels offered at the sale.

J. A. Robinson, St. Thomas, for appellants.

W. K. Cameron, St. Thomas, for plaintiff.

OSLER, J.A., delivered the judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) affirming the decision of the Divisional Court, after an examination of the conflicting evidence, holding that it was open to the Court below to form their own conclusions and to overrule the Master's finding and the order affirming them.

J. A. Robinson, St. Thomas, solicitor for appellants.

McLean & Cameron, St. Thomas, solicitors for respondents.

BOYD, C. APRIL 15TH, 1902.

TRIAL.

BROWN v. CITY OF HAMILTON.

Municipal Corporation — By-law—Prohibiting Fireworks in City—Discretionary with Corporation—Non-intervention by Corporation as to Enforcement is mere Non-feasance—Costs—Rule 373.

Action for damages for the permanent loss of the use of plaintiff's left eye, owing to the negligence of defendants, who, he alleges, contrary to sec. 34 of their by-law No. 30, allowed and licensed an unlawful and dangerous display and use of fireworks on the market square, and at the City Hall, and on the steps of the latter, and the streets and sidewalks. The plaintiff was travelling in a street car when he was struck by a portion of explosive substance, a roman candle, which was being set off by some one in a procession. The by-law was passed under the authority conferred by the Municipal Act

J. G. Farmer, Hamilton, for plaintiff.

F. Mackelcan, K.C., for defendants.

BOYD, C.—The passing of the by-law by the defendants was an exercise of the delegated sovereign power intrusted to municipalities—a function the exercise of which is discretionary. The city is free to enact or not to enact, and having enacted may repeal without any responsibility which can be examined by the Courts. Having enacted such a by-law, there is no duty cast on the municipality to see to its enforcement. That rests with any one and every one in

the locality who desires to have it enforced: Back v. Holmes, 56 L. T. 713. But, like all prohibitory enactments, if the popular sentiment is not in its favour, it will prove a dead letter. Such appears to be the fate of this by-law, for, though enacted in 1874, it has been periodically violated. The corporation remained quiescent. A different question would have arisen if the city authorities had sanctioned or licensed the display of fireworks in the streets; in the case of a public nuisance that might be regarded as a case of misfeasance as in Forget v. Montreal, 4 S. C. R. 77. In the present case, however, the non-intervention of the corporation is at the highest mere non-feasance, and it is well settled that mere non-feasance is not actionable. The argument of plaintiff is that when the city passed the by-law a cause of action arose and that the by-law was systematically disregarded, to the knowledge of the officers of the city, and that no steps were taken to enforce it. This novel proposition has its sole sanction in the decision of the Maryland Courts, but is opposed to all other American and English authorities. Very much in point are the observations of Gwynne, J., in Montreal v. Mulcair, 28 S. C. R. 469.

Action dismissed with such costs as would be taxed had the point been dealt with on demurrer under Rule 373.

Lee, Farmer, & Stanton, Hamilton, solicitors for plaintiff.

Mackelcan & Counsell, Hamilton, solicitors for defendants.

BRITTON, J. APRIL 15TH, 1902.

TRIAL.

WILSON v. HOWE.

Work and Labour—Statute of Limitations—Claim against Estate of Deceased Person—Corroboration.

Action by a son-in-law of Marvin Howe, deceased, against his executors, to recover $650 for work done and articles sold to Howe prior to his decease on 17th May, 1895. The plaintiff alleges that payment was not to be demanded, but deceased was to keep the money in trust to apply it on the purchase of a house for plaintiff or his wife. The plaintiff also claimed $100, part of the consideration to his wife for signing certain documents in connection with the estate.

J. P. Mabee, K.C., and J. C. Makins, Stratford, for plaintiff.

J. Idington, K.C., and R. S. Robertson, Stratford, for defendants.

BRITTON, J.—The plaintiff's evidence was sufficiently corroborated. Re Ross, 29 Gr. 385, is distinguishable. Deceased was not a trustee. This is not the case of a deposit of money for safety until demand as in Tidd v. Overell, 3 Ch. D. 154. There was a debt here due to plaintiff of $450, but it is barred by statute. The defendants are not indebted to plaintiff for the $100 claimed. The defendants are indebted to plaintiff in the sum of $5 paid into Court in respect of the claim for work done in 1899, and he is entitled to that sum, but the action is dismissed with costs.

BRITTON, J. APRIL 17TH, 1902.

TRIAL.

BENTLEY v. MURPHY.

Ship—Contract to Sell—Specific Performance—Discretion — Balance of Purchase Money Unsecured—Damages.

Action tried at Toronto brought for specific performance of a contract for the sale of the steamer "Island Queen."

L. G. McCarthy and A. M. Stewart, for plaintiffs.

R. T. Walkem, K.C., and H. T. Kelly, for defendant Craig.

T. Mulvey, for defendant Murphy.

BRITTON, J.—At the time of sale the defendants were the real owners of the steamer, and it is clear that the contract of sale was made by defendant Murphy on behalf of himself and his co-defendant Craig. It cannot be said that any advantage was taken of the vendors by reason of the balance of purchase money not being agreed to be secured by mortgage. The offer by letter to purchase was good under the Merchant Shipping Act of 1854, though before that Act it would be void because not reciting the certificate of registration: Hughes v. Morris, 2 DeG. M. & G. 349. But it is not a case for specific performance, a discretionary remedy which should be cautiously applied. In this case, though no fraud is shewn, the contract was not an ordinary one. It was close bargaining on the plaintiffs' part, paying only part of the purchase money, and giving no security for balance. Vessels are subject to marine risk and other casualty. The plaintiffs are seeking equity, but are not prepared to do equity by giving a mortgage, and though not required so to do by contract, it is a valid reason why specific performance should be refused: Mortloch v. Buller, 10 Ves. 292; Robinson v. Harris, 21 S. C. R. 39. Judgment for plaintiffs for damages. Reference to Master in Ordinary.

APRIL 17TH, 1902.

DIVISIONAL COURT.

McCLURE v. TOWNSHIP OF BROOKE.

BRYCE v. TOWNSHIP OF BROOKE.

Drainage Referee—Official Referee—R. S. O. ch. 226, secs. 88, 89—1 Edw. VII. ch. 30, sec. 4—Arbitration Act, sec. 29.

The Drainage Referee is an Official Referee within the meaning of sec. 29 of the Arbitration Act.

Appeals by plaintiff in each case from orders of Meredith, C.J., staying proceedings and refusing to direct references to J. B. Rankin, Drainage Referee, as a Referee under sec. 29 of the Arbitration Act. There was pending a drainage matter commenced by notice served and filed pursuant to the Municipal Drainage Act and amendment, 1 Edw. VII. ch. 30, sec. 4, wherein the plaintiffs in these actions were asking for damages and other relief, which would be heard in due course before the Drainage Referee. The plaintiffs alleged that the questions arising in this action, as well as those in the drainage matters, had each to do with the same lands and locality, which required local inspection and investigation, and a special or scientific knowledge, in order that a proper adjudication might be made, and they therefore applied to a Judge in Chambers for an order of reference. The Chief Justice refused the references on the ground that the Drainage Referee is not an Official Referee within sec. 29, and stayed proceedings until the conclusion of the drainage matter, so that thereafter, if necessary, the plaintiffs could proceed in these actions as to questions raised outside the scope of sec. 4 of the Act of 1901.

G. H. Watson, K.C., for plaintiffs.

J. H. Moss, for defendants.

The Judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J.) was delivered by

BRITTON, J.—Before the passing of ch. 30 there would have been no difficulty, as R. S. O. ch. 226, sec. 94, gave the Court or Judge power to refer, but that action has been repealed by sec. 4; and under the Arbitration Act, if the parties agree, the question may be referred to a special referee. Here they do not agree, but I think that the Drainage Referee is a referee within sec. 29. There is no statutory definition of Official Referee, but sec. 141 of the Judicature Act names persons by their office who are Official Referees, and the Drainage Referee is not there named.

The Drainage Act, R. S. O. ch. 226, secs. 88 and 89, makes the Drainage Referee (1) an officer of the High Court, (2) confers upon him all the powers of an Official Referee under the Judicature and Arbitration Acts. Official Referee is only "official" in the sense of being an officer of the High Court. The Drainage Referee, being such an officer, with all necessary powers, is an Official Referee for the purposes and within the meaning of the Arbitration Act. Rule 12 makes all officers auxiliary to one another. See also sub-sec. 22, sec. 8 of the Interpretation Act. I think therefore that the Drainage Referee being specially vested by sec. 89 of the Drainage Act with the powers of Referee under the Arbitration Act, the appeal should be allowed, and the case referred to him. Costs of appeal to plaintiffs in any event.

Moncrieff, Wilson, & Craig, Petrolia, solicitors for plaintiffs.

Cowan & Towers, Sarnia, solicitors for defendants.

MacMahon, J. April 17th, 1902.

TRIAL.

CHRISTIAN v. POULIN.

Deed of Land—Undue Influence—Full Disclosure of Facts.

Action tried at Ottawa brought to set aside a deed of land made by plaintiff to his son-in-law, defendant S. R. Poulin, or in the alternative that said defendant be ordered to pay plaintiff $60 a month, and discharge or satisfy a mortgage for $3,000 on the land in question.

W. H. Barry, Ottawa, for plaintiff.

G. F. Henderson, Ottawa, for defendants.

MacMahon, J.—The plaintiff knew perfectly well what he was doing, and full explanation was made to him at the time he signed the deed, and he knew defendant S. R. Poulin had to assume the mortgage on the property, and pay arrears of interest and taxes, and that, besides, S. R. Poulin had also lent a large sum of money, and that therefore there could not be any payment to plaintiff per month, for there was nothing out of which to pay it. Action dismissed with costs, which if not paid may be added to claim of defendant S. R. Poulin as a disbursement. Amount of interest and taxes may be regarded as a first charge on the land.

**

APRIL 12TH, 1902.

C. A.

ANDERSON v. MIKADO GOLD MINING CO.

Master and Servant — Violation of Rule by Servant — Master not Responsible for Injury Resulting therefrom—Onus on Servant to Shew Waiver of Rule by Master—Mine—Cage for Hoisting Tools—Ladders for Ascent and Descent of Workmen—Injury to Servant Using Cage.

Appeal by defendants from judgment of ROBERTSON, J., in favour of plaintiffs, for $2,250, in action by the widow and infant children of Oscar Anderson, deceased, for damages for injuries which caused his death. The deceased was engaged, with three others, to widen a drift at the bottom of 240 foot level of the defendants' mine, and was paid by the foot. The defendants owned and supplied the necessary tools, and agreed to transport them to and from the surface, where they had to be sharpened. Anderson was ascending, with three others, by the steam lift, when one of the tools, a steel 2 or 3 feet long, which was lying on the bottom of the cage, became projected a little beyond it, and coming in contact with one of the shaft timbers, struck Anderson and threw him between the cage and the timbers. Before the cage could be stopped he was so badly injured that he died in the hospital at Port Arthur 45 days afterwards. The trial Judge found the only way by which the tools were taken up to the surface was the cage, which had no guards and no devices for securing the steels while it was ascending with them, and that the men, as well as the other employees, and the manager, habitually went up and down by the lift, and disregarded, with the knowledge of the mine officers, the notice not to do so; that the ladders furnished by the defendants were defective, and did not comply with the Mines Act, sec. 69 (17); that deceased had not been warned not to use the lift, and had not said he would take all risks, and had not been guilty of contributory negligence; that the cage was unsafe; and that defendants had been guilty of negligence.

A. B. Aylesworth, K.C., and N. W. Rowell, for defendants.

R. C. Clute, K.C., and A. R. Clute, for plaintiffs.

THE COURT (ARMOUR, C.J.O., OSLER and MOSS, JJ.A.) held that the death of the deceased arose from his own act in going up by the cage in violation of the rule of the defendants, and they therefore could not be held responsible: Senior v. Ward, 1 E. & E. 385. The onus is on the servant

to shew that a rule, the application of which he wishes to get rid of, has been waived or abandoned by a course of conduct inconsistent with its existence, known to and tacitly or expressly assented to by the employer, and the onus has not been satisfied in this case. The cage was not constructed nor intended for the use of the workmen, but a safe, convenient, and usual way was provided for them by means of ladders. The injury which the unfortunate deceased met with arose from his deliberate disobedience of the rule, and it ought to have been held that on this ground the plaintiff had no right of action. Appeal allowed with costs and action dismissed with costs.

Boyce & Draper, Rat Portage, solicitors for plaintiff.

Moran & McKenzie, Rat Portage, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

PEAREN v. MERCHANTS BANK OF CANADA.

Malicious Prosecution — Reasonable and Probable Cause — Bank — Customer—Warehouse Receipts — Charge of False Statements made therein as to Grain—Nonsuit on Undisputed Facts.

Appeal by defendants from order of a Divisional Court setting aside judgment of nonsuit of FALCONBRIDGE, C.J., and directing a new trial of action for damages for malicious prosecution. The plaintiff was a member of the firm of Pearen Bros., millers, etc., Brampton, and had had an account with defendants for about 10 years before the proceedings complained of. Three charges were made against plaintiff by defendants. The first was that he had alienated between August 23rd, 1899, and March 2nd, 1900, certain wheat covered by warehouse receipts issued by him in favour of defendants. The police magistrate dismissed this charge, but committed plaintiff for trial on the second charge, viz., of withholding possession of the wheat from defendants, and the County Judge subsequently tried and acquitted him. The third charge was that plaintiff, between 2nd August, 1899, and 12th February, 1900, did issue warehouse receipts to defendants and wilfully make false statements therein, contrary to sec. 578 of the Criminal Code, and sec. 76 of the Bank Act. The magistrate dismissed this charge. The plaintiff then brought this action. The trial Judge held that absence of reasonable and probable cause was not shewn in respect of the first charge; and as to other charges the plaintiff, not having obtained the fiat of the Attorney-

General for the production of the information and the record of acquittal, and the clerk of the peace refusing to produce them without, the Judge held that the plaintiff had not established his case. The Divisional Court were of opinion that there were disputed facts upon which it was the province of the jury to pass, and until the facts were found the Judge was not in a position to determine the question of want of reasonable and probable cause.

W. Nesbitt, K.C., and A. McKechnie, Brampton, for defendants, appellants.

G. H. Watson, K.C., and J. F. Hollis, Brampton, for plaintiff.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held that the undisputed facts disclosed in the evidence (examined and referred to at length by the Chief Justice and OSLER, J.A.) shewed reasonable and probable cause for preferring all the charges, and therefore there should be a nonsuit as to the whole case, and it was unnecessary to consider the other questions raised.

Appeal allowed with costs and judgment of FALCONBRIDGE, C.J., dismissing the action with costs, restored.

Justin & Hollis, Brampton, solicitors for plaintiff.

McKechnie & Heggie, Brampton, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

RE TOWNSHIP OF NOTTAWASAGA AND COUNTY OF SIMCOE.

Assessment and Taxes—Equalization of Assessments—Appeal—County Judge—Limitation of Time within which Judgment to be Delivered—Imperative Enactment—R. S. O. 1897 ch. 224, sec. 88, sub-secs. 1, 7.

Appeal by the county corporation from order of a Divisional Court (FALCONBRIDGE, C.J., STREET, J., 22 C. L. T. Occ. N. 48), dismissing an appeal from an order of BOYD, C., in Chambers, refusing to prohibit the Judge of the County Court of Simcoe from proceeding with the hearing and determination of an appeal by the township corporation from the equalization by the county council of the assessment rolls for the year 1900 of the various municipalities within the county. The motion was made on the grounds that the township had not duly authorized the appeal, because a by-law was necessary for the purpose and one had

not been passed, and that the County Judge had no jurisdiction to proceed with the hearing of the appeal after the 1st August, sec. 88, sub-sec. 7, of the Assessment Act, providing that judgment shall not be deferred after that date.

C. E. Hewson, Barrie, and A. E. H. Creswicke, Barrie, for county corporation.

H. Lennox, Barrie, for township corporation.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) unanimously held that the section was imperative.

OSLER, J.A.—The object aimed at by the equalization of the assessment rolls is to correct, as nearly as may be, eccentricities and unreasonable differences in assessments as taken in the various local municipalities, so that the incidence of the county rates may be fairly distributed over the whole of the assessable property in the county. The aggregate of the valuation of the various local municipalities appearing upon their assessment rolls as finally revised and corrected is not to be disturbed; what is taken or deducted from the valuation of one is to be placed upon and distributed over the valuations of another or the others, and thus the whole assessment of the county is equalized. The proportion which each municipality is to contribute towards the "county rate" is therefore ascertained by the county by-law, to be passed when and not until the rolls have been equalized by the council: secs. 87-94. For this purpose, as it would appear from sec. 88, the council need not await the result of an appeal. The rolls for the current financial year could not be utilized, because they may not be finally completed until 1st August, and the township clerk has 90 days thereafter in which to send copies of them to the county clerk. Therefore, as sec. 87 provides, it is the revised rolls for the preceding financial year which are to be examined and equalized, and it is the amount of the property assessed and valued in these rolls as equalized, which forms the basis on which the apportionment of the county's requirements among the various local municipalities is made: sec. 91. The appellants rely upon sec. 8, sub-sec. 2, of the Interpretation Act, which enacts that the word "shall" shall be construed as imperative, but that is subject to the qualification of sec. 7 (1), "except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provision would give to any word, expression, or clause, is inconsistent with the context." It rests upon the respondents to shew that the word "shall" is to be read in sec. 88, sub-secs. 4 and 7, in

the permissive sense; and they have failed to do so. The only substantial argument is, that the Legislature has given an appeal which may become abortive if, by reason of delay of the parties, or of the time occupied in hearing it, or the delay of the Judge in giving judgment after argument, it is not disposed of by the 1st August. But the words of the sub-section are in the emphatic negative form, and there is an excepted case, "except as provided in secs. 58-61," in which it seems to be implied that judgment may be deferred. The force of this exceptive language as aiding the construction of what follows is not weakened by the fact that it may not be very easy to apply the exception. Then, as to the argument from inconvenience. The rolls have been in fact equalized by the county council. If the appeal drops, the council proceeds upon its own decision, which operates only upon the taxation of the present year. There is no such serious inconvenience involved in the loss of the appeal for a single year as to warrant the Court in giving the language of sub-sec. 7 less than its full force, and treating it as otherwise than an absolute prohibition against continuing the appeal after the date specified as the last day for giving judgment thereon.

Appeal allowed with costs here and below, and order made for prohibition.

Lennox, Ardagh, Cowan, & Brown, Barrie, solicitors for township corporation.

Hewson & Creswicke, Barrie, solicitors for county corporation.

APRIL 12TH, 1902.

C. A.

MYERS v. SAULT STE. MARIE PULP AND PAPER CO.

Master and Servant—Injury to Servant—Dangerous Machinery—Unsecured Ladder—Removal of, by other Workman causing Injury to Fellow-workman does not Relieve Master from Liability—Negligence — Proper Precautions for Guarding Machinery a Question for Jury—Excessive Damages.

Appeal by defendants from judgment for plaintiff for $4,500, entered by FALCONBRIDGE, C.J., upon the answers of a jury to seven questions submitted to them in action for damages. The plaintiff J. W. Myers is the father and next friend of the plaintiff Harry Myers, a lad 19 years old, who was employed by defendants in attending to a dryer and wet press, and whose duties consisted in taking pulp off the press-rolls,

tying it up, sweeping the floor, and keeping the machines running. In getting up to the press-roll the boy went up by a ladder with five steps, reaching to about a foot from a narrow board, which formed a platform for him to stand on, over the press. The press was close to a large moving cog-wheel, and at a quarter past 12 o'clock, midnight, on the 19th August, 1900, the lad, who had been taking off pulp, started to go down by the ladder, when a workman, named O'Meara, pulled it away, and the boy fell. His leg swung into the cog-wheel, and had to be amputated two days later. The jury, after visiting the premises, found that the boy had not been guilty of negligence; that the defendants were negligent in not guarding the machinery, which was dangerous, and in not fastening the ladder to the floor; and that, had the machinery been properly guarded, the boy would not have been injured, notwithstanding the pulling away of the ladder; and awarded $4,000 damages to the boy, and $500 damages to his father.

W. R. Riddell, K.C., and J. E. Irving, for defendants.

W. M. Douglas, K.C., for plaintiffs.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held that the findings of the jury as to negligence were amply supported by the evidence. The defendants were bound by common law to take all reasonable precautions for safety of their workmen, and it was for the jury to say what were those precautions: Smith v. Baker, [1891] A. C. 325; Webster v. Foley, 21 S. C. R. 580. The defendants were also bound by the Factories Act to guard dangerous parts of the machinery. The jury were warranted in their finding as to the ladder, and that the wheel was dangerous and not securely guarded; and the intervention of the workman in wrongfully taking away the ladder did not relieve defendants from the consequences of their negligence. According to Englehart v. Farrant, 1 Q. B. D. 240, the question whether the negligence of defendants was an effective cause of the workman's injury was a question for the jury, and they had by the 3rd and 4th answers in effect so found, and properly so found, and upon the law, the intervention of the workman did not relieve the defendants from the consequences of their negligence: Illige v. Goodwin, 5 C. & P. 190; Clark v. Chambers, 3 Q. B. D. 325; The B———, 12 P. D. 58. Mann v. Ward, 8 T. L. R. 699, cannot be regarded in view of Englehart v. Farrant, supra. The damages, however, were excessive. If plaintiffs elect to reduce the damages to $2,000 and $100 respectively, the appeal is dismissed with costs. Otherwise new trial directed

with costs of appeal to defendants and costs of last trial to abide the event.

Hearst & McKay, Sault Ste. Marie, solicitors for plaintiffs.

Hamilton, Elliott, & Irving, Sault Ste. Marie, solicitors for defendants.

APRIL 11TH, 1902.

C. A.

FISHER v. BRADSHAW.

Chattel Mortgage—Prior Agreement to Give—If Valid, Mortgagee may claim under it notwithstanding Defect otherwise Fatal in Mortgage.

Appeal by defendants from judgment of BOYD, C. (2 O. L. R. 128), in favour of plaintiff in an interpleader issue. The goods in question were seized under an execution upon a judgment recovered by defendants Bradshaw & Co., against Benor, Taylor, & Co., merchants, Alliston. The other defendants are also execution creditors. The plaintiff claims under a chattel mortgage dated 23rd January, 1901, executed by Benor, Taylor, & Co., pursuant to agreement dated 1st June, 1899, which was given pursuant to R. S. O. ch. 148, sec. 11, and duly registered. The mortgage was afterwards registered, and the Chancellor held that the Act did not operate to merge the registered agreement in the subsequently executed and registered mortgage, and therefore, as the affidavit of bona fides, made seven months before in the agreement, was regular, a defective affidavit of bona fides in the mortgage did not vitiate it. The latter affidavit did not state that the mortgagor "is justly and truly indebted" in the sum of $2,500.

G. C. Gibbons, K.C., A. J. Russell Snow, and L. F. Stephens, Hamilton, for defendants.

W. A. J. Bell, Alliston, for plaintiff.

MOSS, J.A.—Under sec. 11 of the Bills of Sale and Chattel Mortgage Act the plaintiff could have maintained under the agreement his claim to the goods, if before the subsequent execution of the chattel mortgage the seizure had been made. Absolute good faith and a bona fide advance having been established by the evidence and found by the Chancellor, the creditors can claim no higher rights in respect of the property covered by the agreement than can their debtor. The object of 59 Vict. ch. 34, from which comes sec. 11 and following sections, was to put an end to secret agreements. By the registration of the agreement in

question ample information was given to creditors, and there is no reason why the holder of it should not have the benefit of it as against an execution or other creditor to the same extent as if he held the legal property in the goods. The question in the issue is whether the goods are liable to be taken in execution as being the debtor's, and the creditor suffers no harm from the production of an agreement valid under the Act: Edwards v. English, 7 E. & B. 564; Shingler v. Holt, 7 H. & N. 65; Block v. Drouillard, 28 C. P. 107. There is no evidence of any intention to give up the agreement, and it must not be held that the mortgage is void as against creditors, but good for the purpose of superseding the agreement and thereby letting in the executions. There is no objection to the plaintiff acting in good faith holding more than one security for the goods: Boldrick v. Ryan, 17 A. R. 253. It is sufficiently shewn that plaintiff was entitled to take the security to himself and to make the affidavit of indebtedness to himself, as he has done. As between him and Mary Coley he is responsible to her for the money. She joined in making a cheque for the money, and thereby assented to the transaction and to the taking of the security as it was done, and that is sufficient for the creation of the relationship of debtor and creditor between Benor and Taylor and the plaintiff.

ARMOUR, C.J.O., and MACLENNAN, J.A., concurred.

Appeal dismissed with costs.

W. A. J. Bell, Alliston, solicitor for plaintiff.

Lees, Hobson, & Stephens, Hamilton, solicitors for defendants.

FALCONBRIDGE, C.J. APRIL 17TH, 1902.

WEEKLY COURT.

TAYLOR v. MACFARLANE.

Intoxicating Liquors — License and Goodwill of Hotel Business—Devise by Owner of Business or Sale after his Death—License does not Pass—Value of License Deducted from Purchase Money —Renewal by Devisee for Life Enures to her Benefit—Interest of Devisee for Life is Exigible.

Special case stated for the opinion of the Court as to whether Maggie Macfarlane, widow and executrix of Francis Macfarlane, was the owner of a license to sell liquor, and the goodwill of the hotel business carried on by her husband, at the time of the sale of the business to one O'Leary. The testator devised the hotel to his widow for her widowhood for the benefit of herself and four children. The widow

renewed the license in her own name each year after the death of her husband in 1896, but the business was not successful, and the question was, what was her interest in the license or the goodwill of the business, and, if she had any, whether it was exigible.

C. H. Ritchie, K.C., for plaintiffs.

A. C. McMaster, for defendants adult beneficiaries and executors.

W. E. Raney, for defendant company.

D. L. McCarthy, for official guardian.

FALCONBRIDGE, C.J.—No money of the estate went into the business which the widow carried on for her own benefit. There is no provision in the statute allowing an executor or trustee to carry on the business, which, with the license, is personal to the holder thereof: see the Liquor License Act, R. S. O. ch. 245, secs. 11, 12, 16, 37, 40. There is no pretence that the business was the property of the estate of the testator. There can be no conflict of interest and duty in the widow's position, inasmuch as there is no possibility of the beneficiaries getting any advantage out of it; nor is there any constructive trust: I refer to Theobald, 4th ed., 604; Allen v. Furness, 20 A. R. 34; Lambe v. Eames, L. R. 6 Ch. 597; Lister v. Stubbs, 45 Ch. D. 1; East v. O'Connor, 2 O. L. R. 355.

The license system in England is so different from ours, that the English authorities and cases have, for the most part, no application.

The following is the result: (1) At the time the agreement for sale was entered into with O'Leary, the license to sell liquors and the goodwill of the hotel business belonged to the defendant Margaret McFarlane personally. (2) She is entitled under the will to the income during widowhood exclusive of the value of the license and goodwill. The two infant defendants are entitled to maintenance out of the income until 21 years of age, and until then the income should be divided as directed in Allan v. Furness, 20 A. R. 34. If defendant Macfarlane marry again she will be entitled to receive $1,000, and balance of estate to be divided equally among her four children. (3) Reference to ascertain portion of purchase money representing value of license and goodwill of the business. (4) An execution creditor of defendant M. Macfarlane could reach her interest by procuring the appointment of a receiver. (5) Defendants the National Trust Company to distribute the money and securities according to the trusts, having regard to these findings. No costs. If any costs not provided for, they are to be paid by trust company out of the fund generally.

APRIL 19TH, 1902.

DIVISIONAL COURT.

HARRIS v. BANK OF BRITISH NORTH AMERICA.

Contract—Delivery of Deed in Escrow—Non-performance of Condition—Option—Trust—Deposit—Form of Action.

Appeal by defendants the Pioneer Trading Corporation from judgment of ROBERTSON, J., *ante* 76.

W. H. Blake, for appellants.

J. K. Kerr, K.C., for plaintiff.

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

BOYD, C.—The finding, undisputed and indisputable, that the money deposited with the bank was subject to a condition yet unfulfilled, appears to be conclusive of the case. That is *the* issue: was this money wrongfully withheld by the bank? That it was so may render the wrongdoer liable to an action either in damages or for the price of the land, but not liable in respect of this particular sum deposited with the bank—so that it should be recovered *in specie* or as if earmarked as a trust fund. The judgment for payment out of this particular money as a judgment *in rem* has gone beyond the limits of equity as recognized and administered by the Courts. This was not set apart by the purchaser to answer the price of this land absolutely—but only upon an unfulfilled condition. No lien, therefore, upon the doctrine of reciprocal trusteeship of the land and the money, could arise as to or attach upon this particular fund. It is to be paid out only when and as the purchaser became satisfied—though this may be, in the circumstances, an arbitrary and even unreasonable term, yet a man may do what he will with his own. No doubt upon a judgment against the Pioneer Trading Corporation this money might be seized or garnished by a creditor—but, other than in some such way as this, specific delivery of this money in the hands of the bank could not be obtained by course of law. Had the action been framed so as to claim a lien upon this money, that would have involved the larger question of specific performance of the option or agreement for sale, and, as the land is in British Columbia, difficult questions as to jurisdiction in the Ontario Courts would present themselves, which have been avoided in the present more limited statement of claim. The action should therefore be dismissed as against the trading corporation without costs. This because the case of the corporation in seeking to approbate and reprobate the option (or it may be the purchase) is not to be encouraged.

APRIL 19TH, 1902.

DIVISIONAL COURT.

REX EX REL. ROBERTS v. PONSFORD.

Quo Warranto—Notice of Motion for Tuesday 24th February, by Mistake for Tuesday 25th February, Valid—Amendment.

Order of ROBERTSON, J., *ante* 223, affirmed by a Divisional Court (BOYD, C., FERGUSON, J., MEREDITH, J.).

APRIL 10TH, 1902.

C. A.

RENNIE v. QUEBEC BANK.

Chose in Action—Assignment of—Notice of—Partnership—Interest of Partner — Sheriff — Execution—Banks—Creditor's Action on Behalf of Himself only.

Appeal by plaintiffs from order of a Divisional Court (2 O. L. R. 303) affirming judgment of MEREDITH, C.J., dismissing action to set aside an assignment by Hugo Block of a certain debt owing to him by the firm of Reid, Taylor, & Bayne, in which he was a silent partner, to the Quebec Bank. The plaintiffs are husband and wife. The husband is a judgment creditor of Hugo Block, and alleges that the assignment was a fraudulent preference. The wife claimed to be the owner of the interest of Block in the partnership assets, by virtue of a bill of sale from the sheriff of Toronto to her, made under the execution placed in his hands, on the 10th July, 1896, under the judgment held by her husband.

J. O'Donohoe, K.C., and W. Norris, for plaintiffs.

A. B. Aylesworth, K.C., and H. G. Kingstone, for defendants.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held (1) as to the action of the male plaintiff, that "debts" are not included in the expression "goods, wares, and merchandise," as used in the Bank Act, 53 Vict. ch. 31, and therefore there was nothing to prevent the bank from taking an assignment from Hugo Block of the debt due to him from his co-partners as security for the debt which he owed the bank, and the effect of it was to vest the property in the debts assigned, in the bank, and notice was not necessary to its validity, but was only necessary to prevent defences of set-off to the debts assigned arising after the assignment and before notice, and as against a subsequent assignee: R. S. O. 1887 ch. 122, secs. 11, 12. The sheriff could not have seized the book debts or goodwill, though

he could have seized the assets; but he did not do so, and all were sold and disposed of in due course, and the male plaintiff lost therefore any benefit which he might have derived from any seizure of the assets of the firm and the sale by the sheriff of the interest of Block therein; (2) and as to the female plaintiff nothing passed to her under the bill of sale from the sheriff: Holman v. Smith, 35 Ch. D. 436.

Appeal dismissed with costs.

J. O'Donohoe, Toronto, solicitor for plaintiffs.

Kingstone, Symons, & Kingstone, Toronto, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

JOHNSTON v. MACFARLANE.

Covenant — Restraint of Trade — "Not to Carry on, Engage, or be Interested, Directly or Indirectly, in Canada for One Year" in Business—Giving Advertising Space for Rival Advertisements—Breach.

Appeal by defendant from judgment of BOYD, C., directing a reference to ascertain the damages sustained by plaintiff by reason of a breach of a covenant made by defendant upon a dissolution of his partnership with plaintiff. The parties were mail order merchants in the city of Toronto, and upon the dissolution on 8th September, 1900, they divided the branches of their business, the selling of sweet pea seeds falling to plaintiff's share. The covenant is in the following terms:—"The said Macfarlane covenants with the said Johnston that he will not during the period of one year from the date hereof carry on or engage or be interested, directly or indirectly, within the Dominion of Canada, in the business of selling sweet pea seeds, and that he will not during the said period compete or interfere with the said Johnston in the business of selling the same." The plaintiff alleged that after dissolution defendant gave advice and assistance to a rival concern called the Seed Supply Co., started by defendant's brother, and allowed it to use space in newspapers for which he had large special contracts at reduced rates, taken over from the former partnership. The Chancellor held that by the intervention of the defendant, the Seed Supply Co. were able to get in advertisements at first without cash and at a low rate, which otherwise it could not have done; that, as the company's business was for the season of 1901, it was all important to get its advertisements out in February, and that it could not have taken any initial

step without the active intervention and influence of the defendant, and therefore in that way he was "indirectly," within the meaning of the covenant, engaged in the sweet pea business by helping the Seed Supply Co. to carry it on.

J. W. St. John, for appellant.

J. B. O'Brian, for plaintiff.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held, MACLENNAN, J.A., dissenting, that the covenant had been broken. What defendant did was an engaging in the business of selling sweet pea seeds, and was not the less so because the seed supply company paid the necessary disbursements. Good faith and the terms of his covenant required that he should not use the advertising space—the only effective means of interfering with the plaintiff's business—for his own benefit, and he was equally prevented from doing by another that which he could not himself do.

Per MACLENNAN, J.A.—Having regard to Smith v. Hancock, [1894] 2 Ch. 377, the judgment below cannot be maintained. The acts of the defendant do not constitute competition or interference with the plaintiff's business, upon the proper construction of the language of the covenant.

Appeal dismissed with costs.

J. B. O'Brian, Toronto, solicitor for plaintiff.

St. John & Ross, Toronto, solicitors for defendant.

APRIL 10TH, 1902.

C. A.

WITTY v. LONDON STREET RAILWAY CO.

Street Railways — Accident — Medical Evidence Evenly Balanced—Misdirection—Damages—New Trial.

Appeal by defendants from judgment of LOUNT, J., in favour of plaintiff upon a verdict of a jury for $5,500 in action for damages for injuries. The plaintiff was a passenger in a car of defendants on Dundas street. Another car ran into it and threw it across another track, and it was again there run into by another car. The plaintiff alleges that his back and spine are permanently injured.

I. F. Hellmuth and E. C. Cattanach, for defendants.

W. R. Riddell, K.C., and J. Cowan, Sarnia, for plaintiff.

THE COURT (ARMOUR, C.J., OSLER, MACLENNAN, MOSS, JJ.A.) held that the case upon the medical evidence as to the extent of the injuries was rather evenly balanced, and therefore it was misdirection for the trial Judge to tell

the jury that the medical experts for the defence did not adhere throughout their evidence to the opinion they had at first expressed as to the nature of the plaintiff's disorder and its cause; nor should he have told the jury that perhaps they would be justified in thinking that two doctors who had watched the progress of the plaintiff's health since the accident were better capable of forming a fair estimate of his prospects of complete recovery than those physicians who had not. Remarks such as these are calculated to minimize the evidence adduced by defendants and to dispose the jury not to give it the full consideration or weight to which otherwise they might have thought it entitled. The damages too are very large, and the jury were considerably affected by the charge.

New trial ordered. Costs of trial and subsequent proceedings to abide event. Costs of appeal to defendants.

Cowan, McCarthy, & Towers, Sarnia, solicitors for plaintiff.

Hellmuth & Ivey, London, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

RE VILLAGE OF MARKHAM AND TOWN OF AURORA.

Municipal Corporation—Bonus to Factory—By-law to Secure Removal of Industry—Determination of Proprietor of Established Industry does not make By-law Valid—Time—63 Vict. (O.) ch. 33, sec. 9, sub-sec. (e)—R. S. O. 1897 ch. 223, sec. 396.

Appeal by the village of Markham from order of LOUNT, J., refusing a motion to quash by-laws Nos. 192 and 193 passed by the town of Aurora in the county of York. In 1897 the firm of Underhill & Sisman established a boot and shoe factory in Markham, in the county of York. On January 30th, 1901, the by-laws were introduced. The first by-law granted the said firm a cash bonus of $10,000 to enable them to purchase land and equip a factory for carrying on their business in the town of Aurora; and the second by-law exempted them from taxes (except school rates) and water rates for ten years. The Judge below held that the case was not within 63 Vict. ch. 33, sec. 9, sub-sec. (*e*), amending sec. 591 of the Municipal Act, because the firm had decided to remove their business from Markham, and that being notoriously the case (the firm having been in communication with other municipalities) and the respondents, being so informed and believing, were quite within their rights in trying to secure the establishment of the business in their town.

W. E. Raney and A. Mills, for appellants.

A. B. Aylesworth, K.C., and T. H. Lennox, Aurora, for respondents.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held that the determination of Underhill & Sisman to remove their factory from the village of Markham did not relieve the respondents from the prohibition against passing by-laws granting bonuses to secure the removal of such an industry to Aurora, because that prohibition is by the Act plainly against the passage of a by-law to secure the removal of an industry already established elsewhere in the Province. The determination to remove when come to was not to remove to any particular locality, and the removal to Aurora was made afterwards by reason of the passage of the by-laws. Held, also, that the by-laws, which are *ultra vires*, having been attacked within three months of their registration under sec. 396 of the Municipal Act, the Court should not decline to set them aside. Appeal allowed with costs and by-laws quashed with costs.

Mills, Raney, Anderson, & Hales, Toronto, solicitors for appellants.

T. H. Lennox, Aurora, solicitor for respondents.

APRIL 11TH, 1902.

C. A.

MOORE v. J. D. MOORE CO.

Master and Servant—Injury to Servant—Moving Machinery—Guard—Factories Act—Negligence of Boy of 14 Years—Momentary Inattention—Question for Jury—Age Limit in Criminal Cases does not Apply to Civil Matters.

Appeal by plaintiff from judgment of STREET, J., dismissing action by Adam Moore, an infant 14 years of age (by his next friend), for damages, at common law and under Workmen's Compensation Act, for injuries sustained while at work in defendants' factory in the town of St. Mary's. The plaintiff when straightening some pieces of wood, as directed by the foreman, at the side of a machine called a dove-tailer, put his hand on it to rub off some dust and became entangled in it, and lost one of his arms. At the close of the plaintiff's case the defendants moved for a nonsuit. The jury in answer to seven questions found, that the boy put his hand in the machine above the plate; that the knives of the machine were not, as far as practicable, securely guarded; that defendants were negligent in not further guarding; that the cause of the accident was the

defendants' negligence in not securely guarding, and in the inattention of Ward, the operator of the machine; that the plaintiff had used reasonable care for a boy of his age; and assessed the damages at $500.

The trial Judge dismissed the action on the ground that the plaintiff had made out no case of negligence on the part of the defendants which caused the accident: Roberts v. Taylor, 31 O. R. 10; Beven on Negligence, 2nd ed., p. 190; Nagle v. Alleghany, 88 Pa. St. 35. He was of opinion that the single question for decision was whether, in the absence of any evidence to shew that a boy over 14 years is not capable of understanding so simple a question of danger as was here presented to him, and in spite of his own evidence that he did understand, the question whether he did or did not understand it, must nevertheless be submitted to the jury. The boy was over 14 years and a line on the question of capacity must be drawn somewhere. Here the boy put his hand on the machine designedly (though he says he had brushed the dust off on other occasions), and not by accident, though at the time the operator was a yard away looking out of a window.

J. Idington, K.C., for plaintiff.

J. P. Mabee, K.C., for defendants.

THE COURT (ARMOUR, C.J.O., MACLENNAN, MOSS, JJ.A.) held that the machine was a dangerous one, and was run at the rate of 3,000 revolutions a minute, and when running the knives would appear like a solid cylinder. The object of the Factories Act in providing that in every factory all dangerous parts of machinery should as far as practicable be securely guarded, was for the protection not only of those operating such machinery, but also of those whose business brings them in close proximity to it. The defendants neglected their duty in this respect, and were guilty of what may properly be called deliberate negligence, which was the effective cause of the accident. And the jury must pass upon the question which then arises, as to whether the lad was guilty of such negligence as severed the causal connection between their negligence and his injury. It cannot be said that a person exercising reasonable care, and, in a moment of thoughtlessness, forgetfulness, or inattention, meeting with an injury caused by the deliberate negligence of another, is deprived of his remedy for his injury. In all such cases it is a question of fact for the jury. There is no ground upon which the question of contributory negligence could in this case have been withdrawn from the jury had the plaintiff been an adult, and there is still less ground as

he is a boy of 15 years. The hard and fast rule in criminal cases as to the age of 14 is inapplicable to civil cases. In the latter, the age, capacity, and experience of the infant must be considered by the jury in ascertaining what measure of reasonable care must be exacted from him: Crocker v. Banks, 4 T. L. R. 324. The jury has negatived contributory negligence by finding that the plaintiff used reasonable care for a boy of his age.

Appeal allowed with costs and judgment for plaintiff to be entered below with costs on High Court scale.

Iaington & Robertson, Stratford, solicitors for plaintiff.

E. W. Harding, St. Mary's, solicitor for defendants.

APRIL 11TH, 1902.

C. A.

TOWN OF WHITBY v. G. T. R. CO.

Railways—Pleading—Amendment — Damages, Measure of—Breach of Statute by Removal of Railway Workshops—Construction of Statute—45 Vict. ch. 67, sec. 37 (O.)

Motion by plaintiff pursuant to leave given in the judgment of this Court (1 O. L. R. 480) on the appeal from the judgment of BOYD, C. (32 O. R. 99), for leave to amend so as to claim a remedy (if any) against defendants by reason of the breach of the prohibition contained in 45 Vict. ch. 67, sec. 37 (O.), which provides that "the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company without the consent of the council of the corporation of the town of Whitby."

A. B. Aylesworth, K.C., and J. E. Farewell, K.C., for plaintiffs.

W. Cassels, K.C., for defendants.

THE COURT (ARMOUR, C.J.O., MACLENNAN, MOSS, JJ.A.) held that the provisions of the above section were introduced to protect the plaintiffs against the removal of the workshops at the sole will of the Midland Railway Company, and the defendants have succeeded to the position of that company, and assumed and become liable to its obligations. The workshops having been removed partly by each company, and no injunction sought or obtained, the plaintiffs are not left without a remedy, but ought to be allowed to shew in this action such damages as have fairly resulted

from the breach, such as loss of taxes as long as the buildings would last, but those damages cannot be assessed upon the basis of the prohibition being against the shutting down of or the reducing the extent of the work carried on in the workshops. Some of the bases as to damages are indicated in Village of Brussels v. Ronald, 11 A. R. 605, City of St. Thomas v. Credit Valley R. W. Co., 15 O. R. 673, but the plaintiffs should not be tied down to these or claims of a similar kind, if there are any others that may appear to be fair and reasonable damages to them as a corporation.

Order made allowing plaintiffs to amend. Reference to Master at Whitby as to damages upon plaintiffs' election to take it within one month. Costs to and including judgment to defendants. Further directions and subsequent costs reserved. If election not made, motion dismissed with costs.

J. E. Farewell, Whitby, solicitor for plaintiffs.

Bell & Biggar, Belleville, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

BANFIELD v. HAMILTON BRASS CO.

Master and Servant—Contract — Exclusive Territory — Rescission—Continuance in Employment after Expiration of Contract—Evidence of Intention to Abandon—Part Payment of Commission.

Appeal by defendants from judgment of LOUNT, J., in action for an account under an agreement made in August, 1897, between the parties, whereby the plaintiff was assigned certain territory within which he was to be entitled to a commission on sales, whether made by himself or others, of defendants' cash register. The defendants alleged a rescission of the contract by a certain letter written to plaintiff, after an interview in Ottawa with defendants' manager, in November, 1897. The letter advised plaintiff that, in accordance with what was said at the interview, the contract was thereby cancelled, and that he could, if he chose, continue to sell registers for defendants, but without exclusive rights to any territory; and that they were to be at liberty to employ other agents in the territory formerly assigned to him. The trial Judge held that the agreement had not been cancelled at the interview which took place, and that the letter had not been sent to plaintiff, having regard to the

subsequent conduct of the parties, the correspondence between them, the condition of the fac-simile of the letter in the letter-book, and the variance between the testimony of defendants' manager on discovery and at the trial.

G. Lynch-Staunton, K.C., for defendants.

W. N. Ferguson, for plaintiff.

The Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held that the finding of the trial Judge on the question whether the agreement was or was not put an end to should not be disturbed; and moreover the subsequent conduct of the parties corroborates the plaintiff's denial of its termination. It continued therefore in force for a year, and there is no evidence that at the expiration of the year any change in the terms of the plaintiff's employment was contemplated. He continued to do business for them as before, and their letters appear almost conclusive that no change was made. Nor should the finding below be interfered with, holding that the plaintiff in cashing certain cheques of the company for amounts due to him, without making any claim for commissions on sales made by other agents in his territory, did not intend to abandon his right to commissions on other sales not specified in the statements accompanying the cheques. Looking at the correspondence, the plaintiff's employment and his authority to sell for defendants were terminated when they directed him to return his samples.

Judgment below varied by limiting the account directed to be taken to sales made between 27th August, 1897, and 26th February, 1899. In other respects judgment affirmed and appeal dismissed with costs.

Millar & Ferguson, Toronto, solicitors for plaintiff.

Staunton & O'Heir, Hamilton, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

BAKER v. ROYAL INSURANCE CO.

Fire Insurance—Proofs of Loss—Delay in Giving—13th Statutory Condition—Disputed Ownership of Lumber Insured—Estoppel.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., in action to recover amount of loss of certain lumber, etc., insured under policies issued by defendants. After

effecting the insurance with these defendants, certain loans were made by one Thompson, now deceased, upon the security of the lumber, and he insured, as owner, with other insurance companies, who, after the fire, paid the loss. The fire took place on 20th June, 1897. The Chief Justice held (1) that the plaintiff, not having furnished proofs of loss until March, 1898, and not having given sufficient excuse for the delay, had failed to comply with the 13th statutory condition: Atlas v. Brownell, 29 S. C. R. 537; (2) that upon the evidence the ownership of the lumber was really in Thompson; that Baker so admitted in the presence of defendants' adjuster, and the agents of the other insurance companies, who had paid Thompson; and that plaintiff was in effect estopped now from asserting ownership.

W. Nesbitt, K.C., and H. E. Rose, for plaintiff.

W. M. Douglas, K.C., and C. S. MacInnes, for defendants.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) was delivered by

OSLER, J.A., holding, upon a review of the evidence, that the judgment below should be affirmed. The ownership was in dispute, the parties claiming as owners and the insurers met, and the plaintiff conceded that the property was Thompson's, and his insurers accepted that situation and paid accordingly, and that is evidence in this action against the other insurers that he was not the owner, and these defendants are entitled to succeed, or it ought to be found upon the evidence that, when all parties met, an agreement was arrived at that the lumber was Thompson's, and not plaintiff's, and that his insurers and not the defendants should pay, and a case of estoppel thus arises. Disposing of the case on the merits, it is not necessary to consider the question of the violation of the 13th statutory condition, but the Court is not opposed to the view taken by the Chief Justice.

Appeal dismissed with costs.

Hewson & Creswicke, Barrie, solicitors for plaintiff.

McCarthy, Osler, & Co., Toronto, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

TUCKETT-LAWRY v. LAMOUREAUX.

Will—Legacy—Ademption—Admissibility of Evidence as to.

Appeal by plaintiff from judgment of FERGUSON, J., (1 O. L. R. 364) dismissing action to recover the balance of

an annuity alleged to be due to plaintiff under the will of her deceased father, George E. Tuckett. The defendants are the executors and trustees. The testator bequeathed annuities of $6,000 each to his two daughters. Subsequently, having transferred to one of the daughters securities producing $1,200 a year, he (by codicil) reduced, for that expressed reason, her annuity to $4,800. A few months later he assigned securities of similar value to the plaintiff, the other daughter, and, by private memorandum, intimated that there was to be a corresponding deduction from her share of his estate. Evidence was adduced of his having instructed his solicitor to alter the will accordingly, but he died almost immediately after giving such instructions, without having made the alteration. Ferguson, J., held that the evidence was admissible to shew, and did shew, that the assignment of the securities to plaintiff was intended to operate as an ademption *pro tanto* of the legacy to her.

E. Martin, K.C., and A. B. Aylesworth, K.C., for appellant.

G. F. Shepley, K.C., and E. H. Ambrose, Hamilton, for defendants.

THE COURT (ARMOUR, C.J.O., OSLER, MOSS, JJ.A.) held that the judgment was right.

MOSS, J.A.—The act of the testator in transferring the securities was an act of bounty as much as the provision in the will, and it was of the same nature. It must be held to fall within the rule stated by Kay, L.J., in In re Lacon, [1891] 2 Ch. at p. 501. It was urged that there was a substantial difference in the nature of the two gifts, sufficient, in the absence of evidence of intention, to rebut the presumption. The difference is, that as regards the sum producing the $1,200 the plaintiff has the absolute power of disposing of it at any time, and, if she chooses to disregard the testator's earnest wish to the contrary, she may deprive herself of the enjoyment of the income during the remainder of her life. But the circumstance that the limitations of the portions differ is not sufficient to prevent the application of the principle of ademption: Earl of Durham v Wharton, 3 Cl. & Fin. 146; Twining v. Powell, 2 Coll. 261. The oral evidence, so far from rebutting the presumption, fortifies the intrinsic evidence derived from the nature of the two provisions, and aids the view that the testator intended that the provision made in his lifetime should go in part satisfaction of the provision made by the will. Appeal dismissed with costs.

Mewburn & Ambrose, Hamilton, solicitors for plaintiff.

Martin & Martin, Hamilton, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

DOVER v. DENNE.

Trustee—Liability for Acts of Co-trustee—Executor becoming Trustee after Passing Accounts—Acting Honestly and Reasonably and Ought Fairly to be Excused—62 Vict. ch. 15, sec. 1 (O.)—Effect of Request of Testator to Trustee to let Co-trustee Manage Estate.

Appeal by plaintiffs from order of FERGUSON, J., dismissing appeal from report of Master at Peterborough finding that defendant Denne, one of the three trustees under the will of Stephen Wood, who died in 1892, was not liable to make good a loss of about $5,800 incurred by reason of a breach of trust by his co-trustee, Burnham, who died in December, 1897. The Master found that Denne had no reason to suspect that Burnham, whose reputation for honesty and integrity was very high in the community, would be guilty of misappropriation of the trust funds; that when the testator was about to make his will he asked Denne to become one of his executors and trustees, but Denne refused, because, as he said, he was old and did not know about such things, whereupon the testator told him he did not want him to act in any way, because Burnham would manage everything, as he had always been theretofore doing (Burnham having been the testator's solicitor), and that he (testator) merely wanted Denne's name, in order that, if anything should happen to Burnham, Denne would communicate with testator's son-in-law in England, the defendant Carruthers; that thereupon Denne consented, honestly believing that he was not obliged to take any part in the management of the estate. The Master also found that the beneficiaries and third trustee (Carruthers) acquiesced in the sole management of the estate by Burnham.

A. B. Aylesworth, K.C., and E. B. Edwards, K.C., for plaintiffs.

G. H. Watson, K.C., and Louis M. Hayes, Peterborough, for defendant Denne.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, JJ.A.) held that the report of the Master was right and the appeal should be dismissed.

MACLENNAN, J.A.—On the passing of the accounts, all debts and charges having been paid, and the residue ascertained, the executors became trustees of the testator's estate,

and the liability of the respondent must be determined in that regard: Re Willey, W. N. 1890, p. 1; Re Smith, 42 Ch. D. 302; Re Chipman, [1896] 2 Ch. 773; Philipps v. Munnings, 2 M. & Cr. 309, 314; Dix v. Burford, 19 Beav. 409, 412. Then, regarded as a trustee, was the respondent guilty of such default as to make him liable? There is no question of the honesty of his conduct. He trusted Burnham, and had no reason to suspect him, a circumstance considered material in such cases. See In re Gasquoine, [1894] 1 Ch. 476. Of course it cannot be contended that confidence in a co-trustee, or the absence of reason for suspicion, will or ought to excuse the omission of a plain, obvious duty; but there was no such plain, obvious duty omitted or neglected by the respondent. The respondent is not responsible for the money received and misapplied by Burnham, nor for the mortgages that he improperly assigned. Even if it were held that the respondent was guilty of a breach of trust, it ought also to be held that he had acted both honestly and reasonably, and ought fairly to be excused: 62 Vict. ch. 15, sec. 1 (O.) Although what passed between him and the testator would be no excuse independently of the statute, it is very material on the question whether, under the circumstances, his conduct was reasonable. See Re Smith, 18 Times L. R. 432. Appeal dismissed with costs.

E. B. Edwards, Peterborough, solicitor for plaintiffs.

Hall & Hayes, Peterborough, solicitors for defendant.

APRIL 12TH, 1902.

C. A.

MURRAY v. WURTELE.

Promissory Note—Agreement not to Negotiate—Notice of.

Appeal by defendants from order of a Divisional Court reversing judgment of BOYD, C., dismissing action to recover upon a promissory note for $1,975 made by defendants J. W. Wurtele & Co. in favour of defendant B. A. C. Wurtele, and indorsed by her and defendant J. Wurtele. The Divisional Court held that the note sued on had been given to the Sclater Asbestos Company partly to secure a debt due by defendants J. W. Wurtele & Co. and partly as indemnity against a note for the same amount made by the Asbestos Company and given by it to defendants J. W. Wurtele & Co.; that the plaintiff gave value for and received the note from the manager of the Asbestos Company, without notice of an

alleged agreement that the note was not to become negotiable unless Wurtele & Co. were able to discount the Asbestos Company's note, which they never were able to do; and that as a matter of fact such agreement had never been made.

M. J. Gorman, Ottawa, for defendants.

A. B. Aylesworth, K.C., for plaintiff.

THE COURT (MEREDITH, C.J., OSLER, MACLENNAN, MOSS, JJ.A.) held, after summarizing the facts which ought to be found upon the evidence, that when the plaintiff took the note from the Sclater Company's manager, Cass, on account of the debt they owed him, he had notice of the defective title of the company, and knew that they had no right to negotiate it, and could not do so without committing a breach of faith towards defendants, or otherwise than in fraud of their agreement with them. The plaintiff therefore acquired no better title than the company had, and cannot recover against defendants. Appeal allowed with costs and action dismissed with costs.

O'Brian & Hall, L'Orignal, solicitors for plaintiff.

M. J. Gorman, Ottawa, solicitor for defendants.

APRIL 16TH, 1902.

C. A.

MADILL v. TOWNSHIP OF CALEDON.

Municipal Corporation—Highway—Non-repair of Sidewalk—Corporation Liable whether or not Sidewalk was Constructed by Corporation or Voluntary Contribution and Statute Labour—Such a Walk is a Part of the Highway in the Keeping or Control of the Corporation.

Appeal by defendants from judgment of MEREDITH, J., in action for damages for injuries sustained by plaintiff, who fell, owing to a hole 13 inches deep, 9 inches wide, and 3 feet in length, which had existed for several months in the sidewalk upon the highway of the 3rd line, Caledon West, in the hamlet of Alton.

E. F. B. Johnston, K.C., and E. G. Graham, Brampton, for defendants.

E. E. A. DuVernet, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) was delivered by

MOSS, J.A.—The judgment below should be affirmed. The evidence establishes beyond question that the highway

is one for the maintenance of which, in good repair, the defendants are responsible. Their liability to keep it in repair is admitted as regards the central portion, or part on which vehicles travel, but it is contended that it does not extend to the side or portion on which the sidewalk is shewn to be; that part, however, is as much a part of the original road allowance as the centre part, and may be lawfully used by persons travelling on foot, and had been so used for 20 years, and it is impossible to say that it is not part of the public highway in the keeping or control of defendants. It is not necessary to determine the origin of the sidewalk. If placed there by defendants, or being there was assumed by them, their liability is clear. If not so placed or assumed by them, they allowed it to remain, and in its condition of non-repair it was an obstruction to the safe use of the travelled way, which it was their duty to remove, and by reason of their neglect the highway was out of repair.

Appeal dismissed with costs.

W. D. Henry, Orangeville, solicitor for plaintiff.

E. G. Graham, Brampton, solicitor for defendants.