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APPELLATE DIVISION.

MARCH 30TH, 1914.

*WASHBURN v. WRIGHT.

Master and Servant—Profit-sharing Enterprise—Statement of Master as to Servant's Share of Profits—Right to Impeach for Fraud—Master and Servant Act, 10 *Edw. VII. ch.* 73, *sec.* 3, *sub-secs.* 1(*a*), 2—*Finding of Fraud by Trial Judge—Reversal on Appeal.*

Appeal by the defendant from the judgment of LENNOX, J., 5 O.W.N. 515.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

R. McKay, K.C., for the appellant.

R. R. McKessock, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by RIDDELL, J.:—Benjamin Washburn had for a number of years carried on business in Sudbury as a merchant tailor, and he had the agency of the Semi-ready Tailoring Company. . . . The Semi-ready Company give exclusive "selling rights" to one "agent" only, in each town, but sell the goods out-and-out to the agent. . . . They made an arrangement with the defendant, Wright, to become their agent in Sudbury, advising him to have Washburn act as manager. An agreement was entered into by and between Washburn and Wright, whereby Wright employed Washburn as manager of Wright's business, known as "Washburn & Co.," and Wright agreed "to pay the employee one-half of the net profits of the said business, after deducting all rents, advertisements, and other expenses, the same to be divided

*To be reported in the Ontario Law Reports.

monthly, but not to be on any outstanding accounts, should there be such." Either party was to have the right to terminate the agreement upon three months' notice in writing, and "the employer shall have the right to terminate same at any time without notice on account of any misconduct of the employee." Washburn accordingly conducted the business as manager till his last illness, which terminated in his death on the 8th March, 1913. Thereafter the defendant conducted the business himself until May, 1913, when he sold out.

The plaintiff is the widow and administratrix of Washburn, and she, on the 2nd August, 1913, began this action, in which she claims an account of the partnership dealings between Wright and Washburn and a winding-up of the partnership under the direction of the Court; that for these purposes all proper directions be given and accounts taken; and she adds a prayer for general relief. The defendant pleads that the terms of the agreement have been complied with, sets out a statement of the account between him and Washburn in extenso, and says he furnished this to the plaintiff before action, and counterclaims for $585.41. The plaintiff joins issue.

Though the formal judgment, through some negligence or misapprehension, directs an account of the "partnership dealings between Benjamin Washburn and the defendant," the learned Judge expressly finds that there was no partnership (5 O.W.N. at p. 516). In this he is undoubtedly right: the statute (1910), 10 Edw. VII. ch. 73, sec. 3(1) (a), is perfectly plain.

That being so, sec. 3 (2) admittedly applies, and the statement by the employer is final and conclusive, and unimpeachable upon any ground whatever except fraud. The learned Judge has found fraud—in my opinion wrongly. No fraud is charged; the statement is set up . . . as a defence, and this is not met by a reply of fraud. We have recently said, "It is not too much to require any one who intends to charge another with fraud . . . to take the responsibility of making that charge in plain terms:" Caldwell v. Cockshutt Plow Co. (1913), 5 O.W.N. 589, at p. 596, citing Low v. Guthrie, [1909] A.C. 278; Badenach v. Inglis (1913), 4 O.W.N. 1495, 29 O.L.R. 165; and the person making the charge is confined to the particular fraud charged: Medcalf v. Oshawa Lands and Investments Limited (1914), 5 O.W.N. 797, per Boyd, C., with whom Middleton, J., agreed. . . .

Even if the plaintiff should get over this difficulty, we find

that during the trial . . . the question of fraud was not gone into at all.

Notwithstanding all this, if the facts proved established fraud, we might now allow an amendment, and, if all the facts were before the Court, permit the finding of fraud to stand, or, if all the facts were not or might not be before the Court, direct a new trial.

But here the facts, in my view, do not even indicate or suggest, much less establish, fraud. What the learned trial Judge relies upon as establishing fraud may be conveniently formulated thus:—

(1) Omission to credit Washburn with the amount received for goodwill of the business on sale by Wright after Washburn's death, and the proceeds of book-debts.

(2) Charging up freight and express charges.

(3) Also repairs and alterations, fixtures, etc.

A fourth will be mentioned later in its proper place.

(1) What, with great respect, I think the error of the judgment appealed from, arises from a misapprehension of what the deceased bargained for. He got no interest in the premises or the goods or in the "business." What he got was a right to receive from and be paid by the defendant "one-half of the net profits of the . . . business." There is much difference between the profits made by selling out a business and ceasing to carry it on and the profits of a business. A business may not make profit at all, but be sold out at a profit by reason of a desire to get rid of competition, or other reason. There is no justification for the proposition that the amount paid for goodwill to Wright when ceasing business is "net profits of the business." Sims v. Harris (1901), 1 O.L.R. 445, is conclusive authority upon that point, in the Court of Appeal. Even if otherwise to be considered part of the "net profits," this amount was not made during the employment of Washburn. The book-debts are expressly excluded.

(2) Remembering that the amount of which Washburn was to have one-half, "the net profits of the said business after deducting all rents, advertisements, and other expenses," the second ground of complaint is seen to be without solid foundation. Amongst the "other expenses" must necessarily be the cost of getting the goods in and out, however large these expenses may be. And I cannot see that charges for getting goods into the shop are any less to be charged against the month in which they are made because they may not realise profit dur-

ing the month, and the main advantage to be derived from them will come later, than the cost of advertisements would be, for the same reasons.

(3) The same reasoning applies to repairs and alterations, as well as fixtures. These are all to help the business, and they are none the less expenses that their full advantage is not realised immediately; while any profit made by the sale of the fixtures was not made till after the death of Washburn.

Some discussion took place on the hearing as to allowing interest to the defendant before the net profits should be ascertained; of course this would be improper in the absence of some special stipulation to that effect: Rushton v. Grissell (1868), L.R. 5 Eq. 326, at p. 331, per Page Wood, V.-C.; but, as no interest has been charged, no further attention need be paid to that question.

(4) An objection which seems not to have been made at the trial (at all events it is not mentioned by the trial Judge) is that a small amount, $31.60 in all, being the losses in January and August, 1912, was deducted from the profits in other months, and thereby Washburn's share was improperly diminished by $15.80. This may well be. It would seem that each month's business must stand by itself, and only net profits for the month taken into consideration, the defendant being obliged to stand all the losses.

But, suppose the defendant was wrong in this or in any other respect, there is absolutely no evidence of fraud. Fraud is not mistake, error, in interpreting a contract; fraud is "something dishonest and morally wrong, and much mischief is . . . done as well as much pain inflicted by its use where 'illegality' and 'illegal' are the really appropriate expressions:" Ex p. Watson, 21 Q.B.D. 301, per Wills, J. . . .

The finding at the trial, of fraud, cannot stand.

The statement is said by the learned Judge not to be a statement under the statute because of what he considers to be errors in charging expenses, etc., and not crediting money received for goodwill, etc. These objections have been dealt with, and I can see no reason why the statement is not "a statement . . . by the employer of the net profits of the . . . business . . . on which he declares and appropriates the share of profits payable . . ." and this, by the statute, sec. 3(2), is unimpeachable except for fraud, which does not here exist.

Much was attempted to be made of the alleged fact that the defendant had no need actually to "pay his own money," but

raised all required by the business by notes in the bank. This is of not the slightest importance; it was his money wherever and however he got it. . . . [Reference to Rushton v. Grissell, L.R. 5 Eq. 326, at p. 331.]

I think the appeal should be allowed.

The defendant counterclaims for $558.41, being money received by the deceased in excess of the amount to which he was entitled. This was the money of the defendant, money had and received by the deceased, and I can see no reason why the defendant should not have judgment for this sum if he desires. From what was said on the argument, I assume that he will reduce the amount by $15.80.

The defendant is entitled to his costs on the claim and counterclaim, and of this appeal, if he demands them.

MARCH 30TH, 1914.

*WESTON v. COUNTY OF MIDDLESEX.

Highway—Nonrepair—Injury to Traveller—Road "Assumed" by County Corporation—Act for the Improvement of Public Highways, 7 Edw. VII. ch. 16—Obligation to "Repair" and "Maintain"—Municipal Act, 1903, secs. 558, 606—Gravelling Done in Winter in Centre of Road—Negligence—Misfeasance—Dangerous Condition of Road—Absence of Protection or Warning—Damages—Discretion—Appeal.

Appeal by the defendants and cross-appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., 30 O.L.R. 21, 5 O.W.N. 616.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. C. Elliott, for the defendants.

T. G. Meredith, K.C., for the plaintiff.

The judgment of the Court was delivered by LEITCH, J.:—

. . . On the argument of the appeal, Mr. Elliott urged very strongly that, as the road in question upon which the accident happened was assumed by the County of Middlesex under the

*To be reported in the Ontario Law Reports.

Act for the Improvement of Public Highways, 7 Edw. VII. ch. 16, for the purpose of construction and rebuilding, and as the work had to be done according to the regulations of the Public Works Department, sec. 606 of the Municipal Act of 1903 did not apply. . . . In 1913 this section was re-drafted, and appears in the Municipal Act of that year as sec. 460, and is included in R.S.O. 1914 ch. 192, as sec. 460. . . .

I think it was the intention of the Legislature that, no matter what the work was that was undertaken and being done under the Act for the Improvement of Highways, 7 Edw. VII. ch. 16, the corporation were under an obligation, under sec. 606, and still are under the same obligation under sec. 460 of the present Act, to keep the road in "repair," that is, reasonably fit, suitable, and convenient for the travelling public. This duty and obligation is incumbent upon the corporation even while the work under 7 Edw. VII. ch. 16 is in progress. The word "repair," in the statutes that I have cited, is in full force and effect, and carries with it the same obligations and duties and gives the same rights of protection to the ratepayers that it always did, as has been expounded in a long line of decisions covering many years. No statute has been enacted which has changed the force or effect of the word "repair." Even after the completion of the work, though it may be done according to the regulations of the Public Works Department, the duty and liability of the corporation subsists. Repair is a question of fact. It is local; it is relative. What may be good repair in one locality may be positive nonrepair in another.

The accident by which the plaintiff received his injuries was caused by the defendants during the winter months placing in the centre of the road in question a large quantity of gravel in heaps or mounds about twelve or fifteen inches high, without levelling it down or rolling it, and leaving it in such a condition as to render the highway unsafe for traffic, in consequence of which people travelling in sleighs were forced to the side of the road, which was slippery and inclining to such an extent as to cause the vehicle to skid and in some cases upset. The gravel was placed on the road in defiance of sec. 558 of the Municipal Act of 1903. . . .

This section was re-drafted in 1913 and appears in R.S.O. 1914 ch. 192, as sec. 495. . . . It will be observed that the word "rebuilding" does not appear in sec. 558, which was in force when the accident happened, but does in sec. 495 of ch. 192 of R.S.O. 1914.

No matter what the defendants call the work on which they were engaged—they may call it construction or rebuilding or repair if they please—but it was certainly an Act of misfeasance or negligence to place heaps of gravel from twelve to fifteen inches high in the centre of the road, in the winter, at a time when the highway was being used or likely to be used for sleighing. The defendants were warned of the dangerous condition of the highway, but took no step to obviate it or protect the travelling public.

The appeal should be dismissed with costs.

The plaintiff cross-appealed to increase the damages. We think that the learned trial Judge assessed the damages on a moderate scale, and his discretion should not be interfered with. The cross-appeal should be dismissed without costs.

MARCH 30TH, 1914.

*DANCEY v. BROWN.

Husband and Wife—Voluntary Settlements—Conveyances of Lands by Husband to Wife—Action by Subsequent Execution Creditor to Set aside—Rights of Prior Creditors—Absence of Fraudulent Intent — Evidence — Insolvency — Hazardous Business.

Appeal by the plaintiff from the judgment of DOYLE, Co. C.J., dismissing an action, brought in the County Court of the County of Huron, by an execution creditor of the defendant David Brown, to set aside three conveyances of different parcels of land, made by the defendant David Brown to his wife, the defendant Rosa Brown, on the 22nd February, 1906, the 5th September, 1907, and the 6th January, 1910, respectively, as fraudulent and void against the plaintiff and other creditors of David Brown; the consideration stated in each conveyance being natural love and affection and $1.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

R. McKay, K.C., for the appellant.

C. Seager and R. C. H. Cassels, for the defendants, the respondents.

*To be reported in the Ontario Law Reports.

The judgment of the Court was delivered by MULOCK, C.J. Ex.:— . . . On the 9th September, 1911, the plaintiff recovered judgment against the defendant David Brown for $177.91 debt and $19.50 taxed costs, and on the 23rd September, 1911, caused a writ of execution for these sums to be issued and placed in the hands of the Sheriff of the County of Huron.

The debt for which the plaintiff's judgment was obtained was for solicitor's costs in an action wherein the plaintiff had acted as David Brown's solicitor. The retainer was given in September, 1910, some eight months after the last of the three conveyances.

There is no evidence of any present indebtedness by the defendant David Brown which existed prior to the year 1909. In that year, he and his wife became jointly indebted to the Bank of Montreal in the sum of $800, by the discount of their note for that amount. From time to time payments were made upon it, and at the date of the last conveyance, that of the 6th January, 1910, the unpaid balance was $200, for which the bank held the renewal note of the defendants. The wife being liable along with her husband, the bank was not prejudiced by the transfer to her of any of her husband's property, and is not objecting thereto.

The only other debts of David Brown now unpaid, and which existed prior to the conveyance of the 6th January, 1910, are: one of $41.27 owing to the Goderich Planing Mills Company and the other of $5 due to one Freeman; both of which claims were, however, disputed by the defendant David Brown.

At the trial, an unsuccessful attempt was made to shew that the defendant also owed his brother about $300, also $2,000 on a mortgage. Thus all of his debts or liabilities which originated prior to the date of the last conveyance are the three named sums, $200, $41.27, and $5. No one of these debts was owing when the conveyance of the 5th September, 1907, was made, and they represent the husband's total indebtedness to-day, outside of the plaintiff's claim.

The defendants, who are Austrians, came to the town of Goderich about the year 1902, when the husband established himself in the junk business in a small way, his brother and wife assisting him financially; and the explanation of his making the conveyance to his wife doubtless is, that she had given to him substantial sums of her own money wherewith he had been able to make money and acquire the property in question, whereupon his wife considered herself entitled to the properties, and

her husband, yielding to her wishes, conveyed the same to her. Nevertheless, they were made without valuable consideration, and the question is, whether they or any of them are void as against the creditors of the defendant David Brown. . . .

The plaintiff being a subsequent creditor in so far as his right to impeach the conveyances depends on the fact that there are prior creditors, the case must be dealt with as if either or both of those prior creditors were plaintiffs; and, if such prior creditors are not entitled to impeach the conveyances, neither is the plaintiff, who is a subsequent creditor, for his equity is no higher than that of the prior creditors: Jenkyn v. Vaughan (1856), 3 Drew. 419; Freeman v. Pope (1870), L.R. 5 Ch. 538.

Assuming, then, that these two prior creditors are plaintiffs in this action, are they entitled to impeach these conveyances, or any of them?

Brown contested those two claims, but on the 17th May, 1911, judgment was given against him in favour of the Goderich Mills Company for $41.27 and interest, making a total of $43.33, and execution therefor was placed in the bailiff's hands. On the 21st December, 1911, judgment was also obtained against him in respect of the $5 claim. For all that appears, these judgments may have since been paid. As against the wife, the plaintiff was bound to shew an unpaid debt. The recovery of judgment and the evidence of the Clerk of the Division Court that a writ of execution had been placed in the bailiff's hands does not, as against a person not a party to the action, prove that the debts are still unpaid.

On this ground alone the plaintiff's claim for relief, so far as it depends on proving the existence of debts prior to the settlement, fails.

But, assuming that those debts are still unpaid, are the facts such as to satisfy the Court that the settlements in question had the effect of hindering or delaying either of these two creditors? Ever since the husband's arrival in Canada he has been, and still is, carrying on the junk business in the town of Goderich. Beginning in a small way, his stock of junk has steadily increased until at the time of the trial, on the 22nd December, 1911, he had junk on hand worth at least $5,000. In addition thereto, he owned horses and vehicles required for carrying on his business. These circumstances rebut any presumption that the settlements were made with intent to defeat the trifling claims of $43.33 and $5, his only debts prior to the settlements, except that of the bank.

The existence of any debt prior to the settlement is not sufficient to induce the Court to set it aside: Townsend v. Westacott (1840), 2 Beav. 340; . . . Skarf v. Soulby (1849), 1 Macn. & G. 364, 375. . . .

Holmes v. Penney (1856), 3 K. & J. 90; Thompson v. Webster (1859), 4 Drew. 628; Freeman v. Pope, L.R. 5 Ch. 538; Godfrey v. Poole (1888), 13 App. Cas. 497, 503; and I think the authorities now establish the proposition that the mere proof of the existence of particular debts, prior to a voluntary settlement, does not, without more, establish fraudulent intent, and thus invalidate the settlement, but that it is not necessary to shew such a state of the settlor's affairs at the time of the settlement as would lead the Court to infer that the effect of the settlement was to defeat or delay creditors; and that, therefore, such was the settlor's fraudulent intent. . .

The settlement cannot have had the effect of defeating or delaying the two creditors in question in the recovery of their trifling claims, and it cannot be inferred that the settlor was guilty of any fraudulent intent to defeat or delay his creditors. Thus, if those two creditors were plaintiffs here, they would fail in the action, and the plaintiff's case, so far as it depends on his equity to set aside any of these settlements, must also fail.

The remaining question is, whether as a subsequent creditor the plaintiff is entitled to the relief sought. In his statement of claim he charges that at the time of the making of the three conveyances the defendant David Brown was in insolvent circumstances—unable to pay his debts in full; that he was at the time engaged in a hazardous business; that the conveyances were made for the purposes of putting his assets out of the reach of creditors; that, when those conveyances were made, David Brown had no other assets available for the payment of his creditors; and that, unless the conveyances are set aside, the plaintiff and other creditors will be unable to obtain payment of their just claims.

There is no evidence to support any of these charges. The learned trial Judge has found that the business was not a hazardous one (there is no evidence to shew that it was); and the fact that the settlor was practically free from debt negatives the charge of insolvency; and the further fact that subsequent to the conveyances he has incurred no debts justifies the inference that the settlements were made with no fraudulent intent towards creditors, past or future, but solely for the purpose of discharging what he considered to be a moral obligation on his part towards his wife.

The plaintiff, a subsequent creditor, has failed to shew any fraudulent intent on the settlor's part with reference to subsequent creditors, including himself; and, therefore, he is not in respect of his own claim entitled to impeach any of these settlements.

Appeal dismissed with costs.

MARCH 30TH, 1914.

*KELLUM v. ROBERTS.

Trial—Jury—Communication of Jurors with Plaintiff and Witnesses during Progress of Trial of Civil Action—Verdict for Plaintiff Set aside—Misconduct of Plaintiff and Jurors—Costs.

Appeal by the defendant from the judgment of BARRETT, Senior Judge of the County Court of Bruce, in an action in that Court, tried with a jury, in favour of the plaintiff, for the recovery of $270, upon the verdict of the jury.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

A. G. Slaght, for the defendant.

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

The judgment of the Court was delivered by MULOCK, C.J. Ex.:—The chief grounds of attack on the verdict are the misconduct of the plaintiff and a juryman, and the objectionable nature of the learned trial Judge's reference thereto in his charge to the jury, whereby, the defendant says, a fair trial was not had.

The action arose out of an agreement between the parties for the purchase by the plaintiff for the defendant of certain cattle. The terms of the agreement were in dispute, and the real issue was as to the nature of these terms.

The trial began on the 10th December, 1913, the taking of evidence being completed at six p.m., when the case was adjourned until the following morning, the jury being allowed to separate. On the following morning the case was concluded, resulting in a verdict for the plaintiff.

*To be reported in the Ontario Law Reports.

The defendant complains that John McDougal and Archibald McIntyre, two of the jurymen trying the case, were present at a discussion regarding it between the plaintiff, a witness named Linn, and a witness named Ackert, at the Hartley House, in the town of Walkerton, on the evening of the 10th December.

On the opening of the Court on the 11th December, the jury having apparently retired, the defendant's counsel reported the incident to the trial Judge, and moved that the jury be dispensed with. The learned trial Judge inquired what evidence there was as to the alleged misconduct, when the defendant's counsel stated that three of the witnesses of the incident were then in Court. Thereupon the trial Judge interrogated juror McDougal in regard to the matter, and then announced that, if the defendant's counsel desired it, he would dispense with that juryman, and try the case with the remaining eleven jurors.

The defendant's counsel was unwilling to accept this disposition of his motion, and the case was completed with the twelve jurymen. A number of affidavits have been filed in regard to the incident; and, although they differ on some points, there is no dispute as to the following facts:—

Jurors McDougal and McIntyre and John A. Ackert, one of the plaintiff's witnesses, were staying at the Queen's Hotel, in Walkerton, and in the evening proceeded together to the Hartley House, and there entered the sitting-room. William Linn, who had given evidence for the defendant, was a guest at the Hartley House, and was in the sitting room when jurors McDougal and McIntyre and the witness Ackert entered. There is a dispute as to whether the plaintiff came in with them, and I am inclined to think from the conflicting evidence that he did not, but preceded them by a few minutes. However that may be, the plaintiff was in this room along with the jurors, and precipitated a discussion with the defendant's witness Linn in regard to the case. The two jurors were present and attentive listeners during at least part of this discussion, though they may not have heard the commencement.

The controversy for a time was between the plaintiff and Linn; then the plaintiff's witness Ackert joined in it, and it grew animated, much feeling being manifested by the disputants, and juror McDougal in his affidavit says: "That the plaintiff in this case was not with us, nor did we know he was in said Hartley House when we went in; that, when we so went into said Hartley House, some one, I cannot say who, but not the plaintiff, said to John H. Ackert, who was with me, 'What do you

know about cattle?' or words to that effect. Ackert at once replied, and the discussion immediately became very hot, and to quiet the matter I said, 'Leave that to the jury—they will very soon settle that to-morrow.' And may have said, 'They will do so in a few minutes;' but I did not say that I had made up my mind in a minute, or tell Linn we would teach him to come up there to tell us the price of cattle, or anything to that effect; and that, after saying this, McIntyre and I immediately left the said Hartley House; that, when we went into said Hartley House as aforesaid the plaintiff and Linn, who gave evidence at the trial, were there talking.''

Whilst particulars of the statements or arguments of the plaintiff and witnesses Linn and Ackert in the presence of the two jurors are not given, it is clear from McDougal's version of his utterance, ''Leave that to the jury—they will very soon settle that to-morrow''—that these statements or arguments had reference to this case.

The plaintiff has not denied taking part in the discussion before the two jurors, nor has he offered any explanation of his conduct. The circumstance of his coming to the hotel and precipitating a discussion of the case, and the arrival in the room of the two jurors with Ackert in time to hear the discussion, and the plaintiff continuing the discussion in their presence, called for exculpatory explanation if the facts admitted thereof; but, none being forthcoming, I view his conduct as that of a litigant improperly endeavouring to interfere with the course of justice. . .

[Reference to Vanmere v. Farewell (1886), 12 O.R. 285, 294; Stewart v. Woolman (1895), 26 O.R. 714, 718, 719, 720, 721; Cameron v. Ottawa Electric R.W. Co. (1900), 32 O.R. 24, 26.]

To set aside the verdict of a jury because of any improper interference with it in the trial of a case, it is not necessary to shew that such interference had the effect of influencing the jury. It may be difficult or impossible to shew the actual effect, but, in my opinion, it should be and is sufficient ground for setting aside a verdict if such interference might be reasonably supposed to have deprived the innocent party of a fair trial. No verdict should be allowed to stand where the course of justice has been or may possibly have been interfered with by any improper conduct on the part of the successful party, irrespective of his motives, even though he was not actually guilty of intentional wrong-doing: Campbell v. Jackson, 29 C.L.J. 69.

The conduct of the plaintiff in discussing this case in the presence of two jurors was most improper. It may not have

affected the result, but it is impossible to say that it did not. If the decision were to turn on the question whether or not his conduct did in fact interfere with the course of justice, the onus was on him to satisfy the Court that it did not; and this he has not attempted to do, nor has he offered any satisfactory explanation of his conduct.

I think that where, as here, the conduct of a party has been so improper as to cast discredit on the fairness of the trial, public policy demands that the guilty party should not be allowed to retain the verdict obtained under such circumstances.

For these reasons, the verdict should be set aside with costs of the trial and of this appeal to be paid by the plaintiff to the defendant forthwith after taxation.

The conduct of jurors McDougal and McIntyre is also open to serious criticism. . . . The conduct of these jurors appears to me so unsatisfactory that it might properly, I think, have been the subject of thorough investigation at the time by the trial Judge with a view to the punishment of the jurors, if found guilty of punishable misconduct.

Dealing next with the learned trial Judge's offer that, if the defendant desired it, he would drop McDougal from the jury and take the verdict of the remaining eleven jurymen: as both McIntyre and McDougal were disqualified from continuing as jurymen, the learned Judge's offer to proceed with eleven jurymen did not get over the difficulty; but, even if the Judge had offered to proceed with a lesser number, a jury of less than twelve men cannot be forced upon an unwilling party, it being his right to have his case tried before a jury of twelve.

The learned trial Judge being unwilling to dispense with the jury, his proper course was to have discharged the jury and called a new one. . . .

New trial ordered.

MARCH 30TH, 1914.

WHITE v. ANDERSON.

Private Way—Lane—Trespass—Evidence—Injunction.

Appeal by the plaintiff from the judgment of the County Court of the County of Dufferin dismissing the action in so far as the plaintiff claimed an injunction to restrain the defendant from trespassing upon land in the town of Orangeville, and

particularly upon what was said by the defendant to be a private way or lane, and declaring the defendant entitled to the use thereof.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

J. L. Island, for the defendant, the respondent.

The judgment of the Court was delivered by SUTHERLAND, J. (after setting out the facts at length) :—The evidence does not expressly shew that, when Mary Ketchum conveyed to Wiggins, the defendant's predecessor in title, the lane was used in gaining access to the land conveyed. The stable was . . . not built at that time. The only registered plan produced was one dated the 21st July, 1856, and registered in 1877; and, while all the lots in block 8 are shewn upon it, the lane in question does not appear thereon. The only reference to the lane is in the conveyances. These consistently, in the various descriptions, refer to it down to the time of the defendant.

It is, perhaps, difficult to say just how far the reference in the description in the deed from Mary Ketchum to Wiggins . . . can be regarded as sufficient to convey a right of way by implification over the lane of 20 feet referred to therein. The following cases, namely, Roberts v. Karr, 1 Taunt. 495, Harding v. Wilson, 2 B. & C. 96, Randall v. Hall, 4 DeG. & Sm. 343, and Espley v. Wilkes, L.R. 7 Ex. 298, relied on by the trial Judge, seem to be authorities for the view that it would be sufficient.

It is contended, however, on behalf of the plaintiff, that such reference is only descriptive, and that something more is necessary to indicate the intention that the grantee should have a right of way over the lane than the mere mention of the lane in the description. This is not, it is argued, a case in which no access could otherwise be had by the defendant to the stable . . . He could move the doors to the other side of the stable and get to it over his own land from Second avenue. The reference in the deed would seem to indicate that the grantor had in mind a lane as existing at the time. As the land then was, the alleged lane would form part of the commons, and, being unfenced on either side, would not be indicated in any way unless there were then evidences of travel over it.

Mary Ketchum, however, continued to own the easterly part

of lot 5, and the use by Wiggins and Carrol down to the time she conveyed it to McDonald seems to have been consistent with the reference in her deed to a lane and the existence thereof, and to indicate that it was her intention that her grantee and his successors should have the right to use the lane. She seems to have acquiesced in the right of Wiggins and Carrol to use the alleged lane as a right of way, as also did McDonald, in so far as Carrol was concerned.

If the deed to McDonald is correct, and in reality she conveyed to him only the easterly 34 feet, it would seem that, while she did not reserve the lane of 20 feet, or expressly give Carrol. the successor to Wiggins, a right of way over it, she did keep 9 feet which might appear to be referable to it.

On the whole, I am of opinion that the evidence fully warrants the conclusion that the defendant is entitled as the owner of part of lot 5 to a right of way over the lane in question, which the plaintiff must not unnecessarily obstruct.

I would, therefore, dismiss the appeal with costs.

MARCH 30TH, 1914.

*CITY OF TORONTO v. ELIAS ROGERS CO.

Municipal Corporations—By-law Regulating Erection of Buildings—Municipal Act 1903, *sec.* 542—*By-law Going beyond Terms of Statute—Prohibition of Iron Buildings unless Approved of—Injunction—Damages Caused by—Costs*

Appeal by the defendants from the judgment of LATCHFORD, J., of the 3rd November, 1913, restraining the defendants from erecting a certain building within limit B. of the city of Toronto, upon the ground that the proposed building would be in contravention of the plaintiffs' by-law No. 6401.

The appeal was heard by MULOCK C.J.Ex., MAGEE, J.A., SUTHERLAND and LEITCH, JJ.

M. K. Cown, K.C., and J. W. Pickup, for the appellants.

Irving S. Fairty, for the plaintiffs, the respondents.

MULOCK, C.J.Ex.:—In the statement of claim the plaintiffs allege that the defendants are lessees of certain lands in that por-

*To be reported in the Ontario Law Reports.

tion of the city of Toronto known as limit B., and are proposing to erect thereon certain buildings, the outside walls of which are of frame covered with galvanized iron; that on the 1st April, 1913, the plaintiffs enacted a by-law number 6401, which provides, amongst other things, that the outside and party walls of all buildings in limit B. shall be constructed of brick, stone, concrete, or other approved of incombustible material; that the outside walls of the proposed building are to be frame, covered with galvanized iron, and not to be of brick, stone, concrete, or other incombustible material; and that, therefore, the defendants have no right to erect such buildings.

The plaintiffs further allege in their statement of claim that by-law 6401 provides that the erection of any building shall not be commenced in the said city until a permit for such erection shall have been first obtained from the plaintiff's inspector of buildings; that the defendants have no such permit; that they are erecting certain frame buildings upon the said lands without having first obtained such permit; and the plaintiffs ask that the defendants be restrained from erecting upon the said lands any buildings other than those of brick, stone, concrete, or other approved of incombustible material, and also that they be restrained from erecting any buildings on the said lands without having first obtained a permit from the said inspector.

The defendants in their statement of defence allege that on the 5th May, 1913, they applied to the plaintiffs' architect for a permit for the erection of certain buildings—plans and specifications of which were filed with the plaintiffs—and that, on or about the 21st May, 1913, they received a permit from the said architect authorising the construction of the buildings described in the said plans and specifications; that on the 22nd May, 1913, they located the site for the proposed buildings and commenced building operations and proceeded with the contemplated work until forced by the proceedings in this action to abandon the same. They also allege that the outside walls of the proposed buildings are to be of approved incombustible material, and that the said architect so certified by issuing the said permit.

They also set up that the said by-law is ultra vires.

There is no dispute as to the facts. The defendants filed with the city architect (who is also the inspector) the plans and specifications for the proposed buildings. Certain changes were made by the architect, and that officer issued to the defendants a building permit. Thereupon they began the work, and continued building operations until restrained by the injunction.

The learned trial Judge, considering himself bound by Badley v. Cuckfield Union Rural District Council (1895), 64 L.J.N.S. Q.B. 571, gave judgment in the plaintiffs' favour; and from such judgment the defendants appeal.

By the Consolidated Municipal Act, 1903, . . . sec. 542, by-laws may be passed by the councils of cities 1 (*a*) for regulating the erection of buildings; (*b*) for preventing the erection of wooden buildings, etc.; (*c*) for prohibiting the erection or placing of buildings other than with main walls of brick, iron, or stone, and roofing of incombustible material, within defined areas of the city, etc. . . .

The main point to determine is, whether the by-law is for any reason ultra vires. Section 542 of the Consolidated Municipal Act of 1903 authorises the council to pass a by-law prohibiting the erection of any building whose "main walls" are not of "brick, iron, or stone."

The by-law in effect prohibits the erection of any building whose "outside and party walls" are not "constructed of brick, stone, concrete, or other approved of incombustible material." It thus omits iron, one of the materials named in the statute, and adds "concrete or other approved of incombustible material," not named in the statute.

The council has no power to pass a by-law prohibiting the erection of a building whose main walls are to be of iron; but this they purport to do by their by-law, unless the words "other approved of incombustible material" unqualifiedly include iron. The by-law contemplates some one approving of the proposed incombustible material, and that his approval shall be necessary in order to the taking of the proposed building out of the prohibited class. It is not sufficient to say that such a person would in all human probability approve of iron. He is not bound to do so; and, if he withheld his approval, then the proposed building would, under the by-law, fall within the prohibited class.

So far as the material of the main walls is concerned, any one has the statutory right to erect a building whose main walls are of iron, and the council have no right to prevent him doing so; but, under their by-law, they do deprive him of his statutory right, and substitute therefor the arbitrament of some unnamed person.

In this respect the by-law is, in my opinion, ultra vires; and, therefore, the sections containing the unauthorised provisions should be set aside.

It may be that in other respects the by-law contravenes the

provisions of the statute; but, having reached the foregoing conclusion, it is not necessary to consider other possible objections.

I, therefore, think, with respect, that the judgment appealed from should be reversed.

The defendants, having obtained a permit from the City Architect authorising them to erect the proposed building, began its construction; but, on the ground that it would contravene the by-law in question, have been restrained, at the plaintiffs' instance, by interim injunction and judgment at the trial from continuing the work; and they are entitled to payment of any damages occasioned to them by such proceedings, and for such purpose it should be referred to the Master to ascertain what, if any, damages the defendants have sustained.

The defendants are also entitled to their costs of action, including their costs of the interim injunction proceedings, and of this appeal.

LEITCH, J., agreed in the result, for the reasons stated by MULOCK, C.J.Ex.

MAGEE, J.A., and SUTHERLAND, J., also agreed in the result, for reasons stated by each in writing.

Appeal allowed.

MARCH 31ST, 1914.

SCHOFIELD v. R. S. BLOME CO.

JOHNSTON v. R. S. BLOME CO.

Master and Servant — Injury to Servant — Improper Use of Hoist—Negligence of Foreman—Workmen's Compensation for Injuries Act—Operation of Hoist—Reasonable Safety from Accident—Building Trades Protection Act, 1 *Geo. V. ch.* 71, *sec.* 6—*Findings of Fact of Trial Judge—Damages—Appeal.*

Appeals by the defendants from the judgments of MIDDLETON, J., 5 O.W.N. 328.

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

R. McKay, K.C., and C. V. Langs, for the appellants.

T. Hobson, K.C., and A. M. Telford, for the plaintiff Schofield, respondent.

A. M. Lewis, for the plaintiff Johnston, respondent.

THE COURT dismissed the appeals with costs.

MARCH 31ST, 1914.

LINAZUK v. CANADIAN NORTHERN COAL AND ORE DOCK CO.

Master and Servant—Death of Servant—Negligence—Failure of Fellow-servant to Perform Statutory Duty of Master—Contributory Negligence—Evidence—Findings of Jury — New Trial.

Appeal by the plaintiff from the judgment of BRITTON, J., 5 O.W.N. 642, upon the findings of a jury, dismissing the action.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

W. N. Tilley, for the defendants, the respondents.

THE COURT set aside the judgment and ordered a new trial; costs of the first trial and of this appeal to be costs in the cause.

APRIL 1ST, 1914.

SMITH v. HAINES.

Fraud and Misrepresentation—Inducement to Buy Company-shares—Proof of Fraud—Onus—Evidence—New Trial.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., 5 O.W.N. 866, dismissing the action without costs.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

I. F. Hellmuth, K.C., and W. J. Elliott, for the appellant.

R. McKay, K.C., for the defendants.

THE COURT set aside the judgment and ordered a new trial; costs of the former trial and of the appeal to be costs in the cause.

HIGH COURT DIVISION.

LATCHFORD, J. MARCH 30TH, 1914.

CHADWICK v. TUDHOPE.

Master and Servant—Injury to Servant—Negligence—Defective Plant — Unguarded Machine — Contributory Negligence — Findings of Jury—Inconsistency—Reconsideration—Appreciation of Risk—Common Law Liability—Damages.

Action by a workman to recover damages for injuries sustained in the course of his employment in the defendants' factory by reason of the defendants' negligence, as alleged.

S. S. Sharpe, for the plaintiff.
J. M. Godfrey, for the defendants.

LATCHFORD, J.:—In answer to the questions submitted to them on the point of contributory negligence, the jury, in the first instance, found against the plaintiff, and stated that he had contributed to the accident by not complaining to his foreman that the guard was an improper guard. I thereupon instructed the jury that what they considered contributory negligence did not, in my opinion, fall properly within that category, as they had also found that he did not appreciate his risk, and requested them to reconsider their findings on the point. They retired from the court-room, and on returning presented the questions with their former replies as to contributory negligence struck out. They assessed the damages at $1,000 under the statutes and $2,000 at common law.

Their first findings on the question of the plaintiff's negligence seemed to me absolutely inconsistent and irreconcilable. The plaintiff was not a skilled factory hand. He had been brought into the factory but a short time prior to the accident from outside employment as a labourer, and had, as the jury found, no proper appreciation of the risk he was incurring in operating the jointer, provided as it was, according to their finding, with a defective guard. He could not be considered as contributing to an accident attributable to a defect of which he had neither knowledge nor appreciation. As the answers originally given could not be reconciled, the only course—short of a new trial—was to remit the questions to the jury, as I did.

Their final answers must now be considered as their verdict, and the only question to be decided is the amount for which the defendants are liable.

I think that they are liable at common law. It was their duty —apart from the Factories Act and the Workmen's Compensation for Injuries Act—to provide proper and suitable plant. It is negligence for which a master is liable if he knows or ought to know that the machinery used by the persons employed by him is improper or unsafe, and, notwithstanding that knowledge, sanctions its use: Halsbury's Laws of England, vol. 20, p. 129. The guard to the planer knives was improper and unsafe, as the defendants knew or ought to have known. They are, therefore, liable for the $2,000 damages found by the jury. Even under the statutes referred to, their liability would be $1,500, as damages greater than that amount were, upon the jury's finding, actually sustained. I direct that judgment be entered for the plaintiff for $2,000 damages and costs.

LATCHFORD, J. MARCH 30TH, 1914.

BALDWIN v. CANADA FOUNDRY CO.

Warranty—Contract—Sale and Installation of Gas Engine and Producer Plant—Guarantee as to Fuel Consumption and as to Loss Owing to Failure of Plant—Breach—Delay in Installation—Limitation of Liability—Consequential Damages—Construction of Contract—Defects in Material and Workmanship—Principle upon which Damages Allowed—Reference to Assess Damages—Costs.

Action for damages for breach of warranties or guarantees of a gas engine and producer plant installed by the defendants in the plaintiff's mill

McGregor Young, K.C., and T. Herbert Lennox, for the plaintiff.

J. A. Paterson, K.C., for the defendants.

LATCHFORD, J.:—The plaintiff, a manufacturer at Aurora, entered into a contract with the defendants in June, 1907, whereby, in consideration of $4,400, to be paid by him, they

were to install for him a gas engine and producer plant, within twelve weeks. The fuel consumption on full load, provided the plant was run not less than 12 hours a day, was guaranteed to be not more than 1 lb. per brake horse-power hour. There was a further express guarantee that the engine and producer would satisfactorily drive the machinery at the time installed in the plaintiff's mill, and that, in the event of their failure to perform the work as guaranteed, the defendants would remove them free of charge and reimburse the plaintiff for any loss he might have been put to owing to the failure.

Payments were to be made, 25 per cent. on delivery of the goods, 25 per cent. on the starting of the engine, and the balance when the plant was running to the plaintiff's satisfaction. This satisfaction was not to be unreasonably withheld, and was to be subject to arbitration, should the parties be unable to agree "as to the satisfactory performance of the plant."

There was delay in installing the plant, which arrived at Aurora only in December, and was not set up until July, 1908.

The first producer failed to work, and was removed by the defendants. The second producer failed, and was replaced by a third, which seems to have ultimately afforded satisfaction.

The plaintiff had in the meantime paid the defendants $2,220. He brings this action, not for the recovery of the moneys paid—in fact he concedes that the defendants are entitled to credit for the balance of $2,200—but for damages under the guarantee as to fuel consumption, and the further guarantee promising reimbursement for any loss he might be put to owing to the failure of the plant.

The defendants say that they are not responsible for any delay in installing the plant, as by the terms of the contract, they were entitled to an extension of the time for completion "equivalent to any delay caused by strikes . . . accidents, stoppages for want of material, either at their own works or at the works of any person supplying them with machinery or material . . . or by any other cause beyond their control." They were not to be held accountable for any delay caused by the purchaser in approving drawings, paying instalments, ordering alterations or extra work, "or otherwise howsoever," and their responsibility was "not to include consequential damages."

The defendants further allege that the plaintiff, by his own acts, delayed the installation, and that, consequently, they are not responsible for the delay. They say that whether the plant was or was not satisfactory should have been determined by

arbitration, and add, as constituting their principal defence, "that any damages which the plaintiff suffered were occasioned by causes beyond the control of the defendants, and moreover were consequential damages."

There is a counterclaim by the defendants for the balance of $2,200 alleged to be owing them under the contract.

The plaintiff does not assert any claim for the delay in the original installation. By agreement between counsel for the respective parties, the question for my determination was restricted to the principle on which damages under the contract should be computed.

I find as a fact that the first producer plant and gas engine did not conform to the defendants' guarantees. After protests on the part of the plaintiff, repeated again and again, and notification of the losses he was sustaining as a result of the inefficiency of the new plant, the second producer was substituted for the first in September, 1908. This also, I find, failed to drive the machinery of the mill satisfactorily. The plaintiff again protested, and again informed the defendants that he would hold them responsible for his losses. After much and unreasonable delay, the third producer was installed in November, 1909. The result was at first the same as in the former cases, and at all times the fuel consumption was greater than it was warranted to be.

The correspondence in evidence shews that, while great patience and forbearance were manifested by the plaintiff throughout the whole period between the failure of the first plant in July, 1908, and July, 1910, he at no time waived his rights under the contract. There was no release, express or implied, to the defendants of their guarantees. The evidence on the point is uncontradicted and convincing. The defendants recognised that the performance of the first two plants was not satisfactory. There was no question raised by them on this point, and accordingly there was no occasion for an arbitration to determine the matter under the clause of the contract providing for a submission to arbitrators.

The clause of the contract upon which the defence mainly rests is upon a printed page, headed, "Conditions of Contract," and is of a general character, evidently intended to be used in relation to contracts of every kind made by the defendants. After providing for an extension of the time for completion "equivalent to any delay caused by strikes . . . stoppages for want of material . . . or by any other cause beyond our

control, and also to any delay on the part of or caused by the purchaser''—all of which have no application—the following appears: ''Every effort will be made to ensure sound material and good workmanship, and we will replace, free of cost and under the same conditions of delivery as the original contract, any material which proves faulty, within six months of delivery or setting to work. Our responsibility, however, shall be limited to the above, and shall not include consequential damages.''

It is, therefore, argued that the liability of the defendants was thus limited to replacing or remedying defective materials or workmanship, and should not attach for the damages consequential to the installation of the plant which the plaintiff sustained.

On behalf of the plaintiff it is urged that this clause does not apply to the facts established in evidence, as the complaint is not that any materials or workmanship were defective. The materials may have been, and doubtless were, like the workmanship, the best that could be used; but the plant, notwithstanding, undoubtedly failed to do the work the defendants guaranteed it would do. As I read the restriction as to consequential damages, it has relation merely to such damages as might be sustained as a result of defective materials or faulty workmanship.

To give it any greater effect would be to render nugatory the typewritten provisions of the contract, upon which, coupled with the guarantees mentioned, the plaintiff rests his case: ''Should the gas engine and producer plant fail to satisfactorily perform the duties which the company'' (the defendants) ''guarantee it to perform, the company will remove the same, free of charge, reimbursing the party of the second part'' (the plaintiff) ''for the loss he may have been put to owing to its failure.''

If there was any real conflict between the two clauses cited, it might become necessary to determine which should prevail, and to that end invoke the principle stated in Glynn v. Margetson, [1893] A.C. 351, 358, based upon the judgment of Lord Ellenborough in Robertson v. French (1803), 4 East 130, 136, that to apply general printed words (which might in a particular case receive complete fulfilment) to a particular stipulation in writing expressed in the same contract would manifestly defeat the very object both of the parties had in view.

But I do not regard the general printed words, limiting the responsibility of the defendants, as conflicting in any respect

with the stipulation on the part of the defendants to remove the plant free of charge, should it fail to do what it was guaranteed to do; and to reimburse the plaintiff for any loss suffered by him owing to such failure. The limitation, in my opinion, has reference only to losses consequent upon defects in materials and workmanship—as to which no question arises—while the written provision to remove the plant and indemnify the plaintiff has no application to defective materials or poor workmanship, but manifestly and necessarily relates to the express guarantee that the plant and engine would, with a certain fuel consumption, satisfactorily drive the machinery installed at the date of the contract in the plaintiff's mill.

The plaintiff is, therefore, entitled to be reimbursed by the defendants for such damages as he may be able to establish that he has sustained by breach of the guarantees as to fuel consumption and satisfactory performance of the plant. On these points there will be a reference to the Master in Ordinary. The damages sustained will be subject to a reduction or set-off (as the case may be) of the $2,200, with interest from the date upon which the third plant can be shewn to have worked satisfactorily.

As the main issue has been determined against the defendants, the plaintiff is entitled to the costs of the action. Costs of reference and further directions reserved.

MIDDLETON, J. APRIL 1ST, 1914.

NATTRESS v. GOODCHILD.

Limitation of Actions—Possession of Land for Statutory Period —Sufficiency of Possession.—Cesser of Occupation during Winter of each Year — Acquisition of Statutory Title — Action of Ejectment—Costs.

Action for possession of an island, known as Middle Sister Island, containing about seven acres, situate in the western end of Lake Erie.

The action was tried without a jury at Sandwich on the 24th March.

E. C. Kenning, for the plaintiff.

M. Sheppard and A. B. Drake, for the defendants.

MIDDLETON, J.:—The original title of Andrew Ross to the island in question is admitted. Mr. Ross resided in Detroit. He died on the 10th January, 1906.

The island was originally regarded as chiefly valuable for a fishing station. There is a deposit of gravel which is also of value, and more recently the trees growing upon the island have given it value, not only for the wood, but as an attractive location for a summer residence. The plaintiff recently purchased it for $1,500 from those claiming title under Andrew Ross.

About eighteen years ago the defendant John R. Goodchild, a fisherman, made some arrangement with Mr. Ross, pursuant to which he entered upon the land. He alleges that he received a letter from Mr. Ross, which he kept until recently, and that it made over the island to him absolutely. It is suggested by the plaintiff that this letter was merely an authority to the defendant to occupy the land free of rent, he to act as a caretaker, preventing the removal of gravel or injury by trespassers. This suggestion commends itself to me as being extremely probable, notwithstanding the oath of the defendant and his son; but the onus is upon the plaintiff to establish such an arrangement. Mr. Ross is dead, and no one else can speak of the contents of the letter.

If the defendants' case depended upon their own evidence, I would be against them. As it is, they have held possession of the island for eighteen years, practically during the entire summer season, going there early in the spring and returning to the mainland late in the fall. They have used the island as a fishing station, occupying a small house that was upon it when they first went there, until its destruction by fire, when it was replaced by another house, erected by them. Trespassers have been excluded, and in every way the defendants have acted for these many years in precisely the same way that an owner would have acted.

It is said that possessory title has not been acquired because the property was left unoccupied during the winter season. To this the answer is made that the recent decision in Piper v. Stevenson, 28 O..LR. 379, has modified the law laid down in the earlier cases, and must be taken as establishing the proposition that the open, obvious, exclusive, and continuous possession of property necessary to bring the case within the statute is not destroyed simply because during the winter season the person acquiring title ceases to occupy the land. The possession, during the winter, of this island was precisely the possession that there would

have been by the actual owner. Such personal belongings as it was not desired to remove were left upon the island. The house was closed, and left ready for occupation in the following spring. Reluctantly I am compelled to accept this view. The pedal possession, required under some of the earlier cases to be absolutely continuous, is, I think, sufficiently shewn by possession such as I have described.

The action, therefore, fails, and I cannot regard my suspicion of the defendants' conduct as justifying a refusal of costs. Mr. Ross, if reasonably cautious, ought to have preserved some evidence of the nature of the occupation by the Goodchilds.

MIDDLETON, J. APRIL 1ST, 1914.

BECKERTON v. CANADIAN PACIFIC R.W. CO.

Master and Servant—Death of Servant—Action under Fatal Accidents Act—Failure to Establish Relationship of Master and Servant—Absence of Contract—Findings of Jury—Negligence—Release.

Action under the Fatal Accidents Act by the personal representative of a man who was employed by the defendants from time to time as a dock labourer, and who fell from the defendants' dock at Windsor and was drowned, to recover damages for his death, alleged to have been caused by the negligence of the defendants.

The action was tried with a jury at Sandwich on the 25th March.

J. H. Rodd, for the plaintiff.

Angus MacMurchy, K.C., for the defendants.

MIDDLETON, J.:—The deceased was a dock labourer, employed from time to time by the defendants to assist in unloading freight from vessels calling at the dock at Windsor and loading freight upon cars. When work was required to be done, any labourers applying were employed. They were paid by the hour; but the regular relationship of master and servant, of employed and employee, only existed during the time for which employment was given upon the particular matter in hand.

The deceased worked at the docks for some years in the manner described, and was recognised as an efficient and faithful labourer. Employment was given to him whenever there was work to be done and he made application; and probably in some instances, when assistance was needed, word was sent by the railway officials to the deceased, who lived across the road from the docks.

For some time the deceased had suffered from epileptic fits. He would fall down in a condition of unconsciousness, and remain in that condition for a few minutes, when he would recover consciousness without being aware of what had befallen him; in fact, he was ready to deny that he had any fit and to quarrel with those who stated the contrary.

This unfortunate malady in no way impaired his general usefulness, and, notwithstanding it, he was employed at the docks, those responsible seeing that he was given work in the sheds and away from the danger of falling into the water.

The railway officials finally became alarmed at the recurrence of the fits, which would sometimes happen as often as four or five times a day, and determined to cease employing him. The unfortunate man then found himself without any means of maintenance; and, finally, the railway officials agreed to allow him to work, upon his executing a release of all liability in respect of injury which might befall him. This document has been lost, but there is no doubt, upon the evidence, that it was a release of the nature described, and probably in the very words of the document set forth in the pleadings.

On the day before the fatal day, the deceased had been engaged at the docks in unloading flour. All the flour save a comparatively small quantity had been placed upon the cars. On the morning of the day in question, he went down again with the view of assisting in the loading of this remaining flour upon the cars. He was met by the foreman, who told him that all the men necessary had already been employed. Nevertheless, he went towards the office along the front of the dock outside of the sheds. This dock consisted of a narrow walk, eight feet in width with gangways opposite the different doors. These gangways sloped from the door to the edge, the slope being one foot in eight.

An eye-witness describes what took place, and the jury have expressly accepted his statement. This man had been bathing in the river, and was rubbing himself down on the dock when the deceased passed him. Some few words were exchanged; and,

just before the deceased reached the gangway in question, he staggered, fell forward upon the sloping gangway, and rolled into the water. No doubt he was then in a fit. Two or three men at once dived to rescue him, but he never rose. His hat and a pipe which he was smoking floated almost immediately. A boat was secured, but the body was not raised by grappling until long after life was extinct.

A motion was made for a nonsuit, and reserved. The jury have found that the deceased was in the employ of the company, and that the company were negligent in not having gates or guards across the gangway at the water's edge, and have assessed the damages at $1,600, a sum which is exactly equal to three years' wages.

Three questions were argued: first, it is said that there was no evidence upon which it can be found that the deceased was an employee; secondly, there was no evidence to justify the finding of negligence; and, thirdly, that the release bars the action.

I think the action fails, as there was no evidence to justify the finding that at the time of the accident the man was an employee. He was not a man going to work. He was a man going to seek work, even assuming that the evidence of the foreman, to which I have alluded, should not be accepted. There is no reason to suppose that this evidence was not absolutely reliable; and I think what the jury really meant by their finding was that, in their view, a man accustomed to seek work and going to the dock for the purpose of obtaining it ought to be regarded as an employee. The real test is, rather—was there any contract between the parties? Plainly, there was not. The deceased came and went at his own will, and he could not have sued if employment had been refused to him, nor could the company have maintained any action against him if he had chosen to stay away. This is sufficient to dispose of the action; but I think the action would also fail upon the ground that there was no evidence to justify the finding that a guard across the opening to these gangways would be either necessary or proper. This relieves me from considering the difficult question as to the validity of the release in view of the provision of the statute against "contracting out."

Under the circumstances, the company will, no doubt, not claim costs.

MIDDLETON, J. APRIL 4TH, 1914.

MASSIE v. CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO.

Arbitration and Award —Action to Enforce Award or Valuation Made by two of three Arbitrators or Valuers—Construction of Submission-agreement—Invalidity of Award—Claim for Reformation of Agreement—Absence of Agreement other than that Executed by Parties.

Action to enforce payment of $15,000 and interest under an award or valuation made by two of three arbitrators or valuers named in a submission bearing date the 2nd July, 1913; and, if necessary, for the reformation of the agreement or submission so as to make it plain that two of the arbitrators or valuers might make a valid award.

Hamilton Cassels, K.C., for the plaintiffs.
Shirley Denison, K.C., and W. N. Tilley, for the defendants.

MIDDLETON, J.:—At the close of the plaintiffs' case, a motion was made for a nonsuit; and, contrary to the practice which I deem proper in the great majority of cases, I thought it desirable to take this motion into consideration before calling on the defendants for their evidence. The defence sets up numerous issues, which promised a long and expensive trial, on which I thought it inadvisable to enter if the plaintiffs must in the end fail upon the grounds argued.

There is no doubt that where the submission is to three, a binding award cannot be made by the majority: United Kingdom Assurance Co. v. Houston, [1896] 1 Q.B 567; and I may adopt the language of Mathew, J.: "The question is not what the parties might reasonably be assumed to have intended, but what they have said they intended;" adding, as he did, "If the parties desired to have an effective arbitration, they should have framed their rule differently."

I have studied this submission with care to see whether it is possible to find in it any intention that the majority should govern. The operative clause is: "The amount of compensation . . . is hereby referred to the determination of"—then follow three names. This, as I have said, if standing alone, clearly makes it necessary for all to join. Then follow provisions re-

lating to the death of any of the valuers, as they are called. If the valuer appointed by either party dies, he may substitute a new valuer. If the third valuer dies, the other valuers may agree upon a third valuer in his stead, "and in that case the decision of any two of the valuers shall be conclusive and binding, without appeal." There is then a covenant that the decision of the valuers shall be observed, "and shall not be subject to appeal from the decision of the said valuers or any two of them." There is then a covenant to convey on receipt of the amount payable "as such compensation by the said valuers." In this, I think, there is nothing which is sufficient to modify the main and controlling clause of the agreement.

On the claim for reformation I much regret that I find myself unable to assist the plaintiffs. The only evidence given was that of Mr. R. S. Cassels, who conducted the negotiations with Mr. Spence, representing the railway company. His evidence I accept unhesitatingly, but it does not appear to me to carry the matter far enough. There were negotiations looking to a valuation rather than an arbitration. This was assented to. A draft submission was prepared and submitted. Mr. Cassels objected to the provisions contained in it. It provided for the appointment of two valuators, and then the appointment of an umpire in the event of their disagreement. If the umpire could not be agreed upon by the two valuators, then the County Court Judge was to appoint him. Mr. Cassels knew from what had taken place that a disagreement was certain, and insisted that the umpire should be selected in the first instance. This was assented to, and the umpire was finally agreed upon.

A new draft submission, in the form ultimately adopted, was then propounded by the railway solicitors. Mr. Cassels evidently did not criticise it carefully, and thought that its effect was to make the award of two binding; and I strongly suspect that this was also the view entertained by Mr. Spence. Nevertheless, the only agreement between the owner and the railway company was the document executed by the parties; and the claim for reformation fails, I think, for precisely the same reason as that assigned in Smith v. Raney, 6 O.W.N. 55, namely, that, apart from the deed which it is sought to reform, no concluded agreement binding upon the parties has been established.

As said by Esten, V.-C., in Kemp v. Henderson, 10 Gr. 56, "I am inclined to think that the parties meant that any two might make an award, but they have not said so."

There are other difficulties in the way of granting reformation, which need not now be discussed.

I should mention the contention based upon the Arbitration Act. Section K of the schedule applies only to a majority award when under a submission the majority have power to award. It does not purport to do more than to make the award binding.

The action fails and must be dismissed, but, under the circumstances, without costs.

MIDDLETON, J. APRIL 4TH, 1914.

BENNETT v. STODGELL.

Vendor and Purchaser—Agreement for Sale of Land—Option Contained in Informal Lease — Acceptance — Action by Lessee for Specific Performance—Sale by Lessor before Action to Third Person—Purchaser not before Court—Case for Damages not Made—Consideration for Option—Revocation—Statute of Frauds—Absence of Time-limit for Acceptance.

Action by the purchaser against the vendors for specific performance of an alleged agreement for the sale and purchase of land.

M. K. Cowan, K.C., and E. S. Wigle, K.C., for the plaintiff.
E. D. Armour, K.C., and J. Sale, for the defendants.

MIDDLETON, J.:—By an informal lease, not under seal, the defendants leased a house to the plaintiff for three years from the 1st November, 1910, at a monthly rental of $40. There followed this clause: "We hereby agree to give to W. M. Bennett an option to purchase the property for $7,300 cash." It is said that this option has been accepted; and the action is brought for specific performance.

Specific performance cannot now be granted, because, before action, the property was conveyed; and the purchaser is not before the Court. No case is made for damages. The vendors sold the property for the same price, although a false consideration is stated in the conveyance. It is not shewn that the property was worth more than the contract-price.

Other questions were argued. It is said that the option was without consideration and revoked. As to this, I would prefer the view of the Chancellor in Matthewson v. Burns, 4 O.W.N. 1477, to that expressed in Davis v. Shaw, 21 O.L.R. 481.

It is also said that the Statute of Frauds affords a complete answer, as the landlords are not named save by the signature, the document simply speaking of them as "we."

I do not think that White v. Tomalin, 19 O.R. 513, really determines this question. There, the uncertainty was in the purchaser. No one could tell to whom the offer was addressed, and the signature was held not to be sufficient; but the case seems to me to be quite different where the document says, "We hereby offer," and the signatures of the persons making the offer follow.

It is also contended that the offer contained no time-limit, and, therefore, was void. I would be inclined to hold as a matter of construction that the offer was one which was to be accepted during the currency of the lease, and that it was not void for that reason.

These matters, however, need not be investigated, in view of the opinion I have formed as to the impossibility of granting relief in this action.

I was not at all impressed with the conduct of the defendant; and, while the action fails, I do not give costs.

MIDDLETON, J. APRIL 4TH, 1914.

MARTIN v. PERE MARQUETTE R.R. CO.

Master and Servant—Death of Servant—Foreman of Railway Coal-sheds—Use of Gasoline — Explosion — Negligence — Findings of Jury—Defective Appliances—Duty of Foreman—Cause of Explosion—Carelessness of Deceased—Damages.

Action under the Fatal Accidents Act to recover damages for the death of Alexander Martin by reason, as was alleged by the plaintiff, of the negligence of the defendant, by whom the deceased was employed.

The action was tried with a jury at Sandwich on the 24th March, 1914.

J. H. Rodd, for the plaintiff.
R. L. Brackin, for the defendants.

MIDDLETON, J.:—The deceased Alexander Martin was foreman of the coal-sheds of the defendant company at Blenheim. These sheds were established for the purpose of coaling locomotives. The coal was hoisted into bins, at a considerable height from the ground, by means of a gas-engine. When a locomotive came, and the coal was needed, the coal was dropped into the tender through a chute.

A coal-shed was destroyed by fire on the 7th November, 1913, and Martin was so badly burned that he died the next day. At the time of the fire, no one else was in the shed; and, apart from the statement made by Martin, there was no evidence to shew how the fire originated or how Martin was injured. The defendant company obtained from Martin a statement in writing as to the cause of the accident, and this statement they put in evidence at the hearing. From the statement and from the evidence given on behalf of the plaintiff the whole occurrence is made abundantly plain.

The gas-engine was operated by natural gas, but sometimes there was difficulty in starting it up; so that a quantity of gasoline was kept for the purpose of priming the engine. This gasoline had usually been supplied in five-gallon lots, and until recently had been contained in a five-gallon can. For some reason, a short time before the accident, the five gallons had been supplied in a ten-gallon can. This can had a central neck from which the gasoline could be poured into a small vessel for use. During several years the gasoline required for immediate use had been poured from the large can through a funnel into a discarded beer bottle. The quantity contained in this bottle was sufficient to meet all the requirements of the engine for 24 hours. The gasoline itself was stored in this can in the corner of a shed underneath the storage bin. This was lighted by a window in the day-time. In the night, this storage room was entirely dark. The other parts of the premises were lighted by natural gas, the reason assigned being that the electric light plant of the town was only operated until one a.m., and the operation was not resumed again until the morning.

All the coal that had arrived at Blenheim had been hoisted into the bins, and there was nothing for Martin to do, save to be in attendance to give fuel to any engine which might arrive during the night. Some further coal was expected, but had not in

fact arrived. When the man in charge during the day left the place, the beer bottle was three-quarters full of gasoline, and the can had about two gallons left in it.

According to Martin's account, he went to fill up the bottle with gasoline. The reason for his doing so is by no means apparent, as he had more than enough gasoline, even assuming that the coal arrived, and that he undertook to hoist it in the night-time. However, he went into the dark storage-room, taking a lantern with him, which, according to his own statement, he set down upon the floor between two and three feet from the bottle which he was about to fill, and then commenced pouring the gasoline into the bottle, through the funnel. Some of the gasoline splashed upon the lantern, and the not unnatural result was that there was an explosion, and Martin was burned so badly that he died, whilst the entire coal-sheds were destroyed.

Martin was an experienced man, and it is quite clear that he must have known the risk he incurred when placing the lantern so close to the flowing gasoline. Another man, accustomed to work there and to fill up this bottle during the night-time, stated that he would put the lamp some ten feet away before attempting to pour out the gasoline. There was no conflict of evidence, and upon Martin's own story it appears to me that the accident was the direct result of his carelessness.

The jury, in answer to questions submitted, have found that the company were guilty of negligence in not supplying better cans and in not supplying better light; but it appears to me that all these things were not really the cause of the accident. Martin knew what the situation was; he knew what he was working with; and his own carelessness brought about his untimely death.

All this is quite apart from the fact that Martin was himself foreman in charge of the works; and, if he had desired other appliances, it was his duty to ask for them. It is also quite apart from the fact that there was no reason why the bottle should not have been filled up with gasoline during the day-time.

Under these circumstances, I think that I must dismiss the action. It is manifest from the verdict of the jury that they did not take at all a proper view of the case, as, if there is liability, the amount of damages awarded, $1,000, is entirely inadequate.

MIDDLETON, J. APRIL 4TH, 1914

CHADWICK v. CITY OF TORONTO.

Nuisance—Noise and Vibration from Operation of Electric Pumps—Evidence—Depreciation in Value of Neighbouring House—Acts Authorising Municipal Corporation to Construct Waterworks not a Justification of Nuisance—Necessity for Pumping Water for Municipal Purposes—Damages in Lieu of Injunction.

Action to restrain an alleged nuisance.

The action was tried without a jury at Toronto on the 20th and 21st March, 1914.

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

G. R. Geary, K.C., and Irving S. Fairty, for the defendants.

MIDDLETON, J.:—The plaintiff claims an injunction restraining the operation of certain electric pumps at the high level pumping station on Poplar Plains road, Toronto. The defendants have for many years owned and operated a high level pumping station at the place in question. Originally there were only two comparatively small pumps, capable of delivering three and one-half million gallons each per diem. These were reciprocating pumps, driven by reciprocating engines, and the noise produced was not sufficient seriously to interfere with the comfort of persons living in the neighbourhood.

Two much larger reciprocating steam pumps were added to the plant in 1906. These were capable of pumping six million gallons each. Although these made a good deal more noise, their operation is not sufficient to constitute a nuisance calling for legal interference.

Early in 1912, eight electrically-driven pumps were installed, capable of delivering a very much larger quantity of water. These are not all operated at once, but from the moment of their installation they have been found to interfere seriously with the plaintiff's comfort. Instead of the comparatively slow motion of the old pumps, these operate at a speed of between 721 and 750 revolutions per minute; the result being a vibration which is felt, as well as a humming or buzzing noise which is heard.

The different pumps are not run at precisely the same speed, so that the noise produced is a discord, resulting in pulsations

or waves of greater or less intensity, which is stated to be peculiarly trying. Numerous witnesses were called for the plaintiff, who describe this noise and its effect in different ways. The plaintiff's own experience is detailed in a diary which was kept for the purpose of recording her impressions, with a view to this litigation.

Although there is some conflict upon the evidence, I have no doubt that the noise and vibration occasioned in the operation of these electric pumps do constitute a nuisance, and seriously interfere with the comfort of the plaintiff and her family in the enjoyment of the house. It is true that in one sense the plaintiff may be said to have come to the nuisance; but the state of affairs which now exists could not reasonably have been anticipated from the condition of things when the land was bought and the house erected.

I need not repeat what was said in Appleby v. Erie Tobacco Co., 22 O.L.R. 533, as to what is necessary to constitute an actionable nuisance. What is complained of here is not, I think, fanciful, and does not arise from mere delicacy or fastidiousness, but is an inconvenience materially interfering with the ordinary physical comfort of human existence; and, therefore, materially depreciating the value of the plaintiff's house as a place of residence.

The defendants seek to justify the erection of the plant and its operation, under the Acts authorising the establishment of waterworks in the City of Toronto. These statutes, 39 Vict. ch. 39 and 41 Vict. ch. 41, while authorising the construction of the waterworks, do not justify the commission of a nuisance. The case in this respect does not differ widely from the action of Guelph Worsted Spinning Co. v. City of Guelph, 5 O.W.N. 761, in which I had recently occasion to review most of the authorities; and I need not here repeat what I there said. I may add to the cases therein referred to references to Price's Patent Candle Co. v. London County Council, [1908] 2 Ch. 526, and Knight v. Isle of Wight Electric Light Co., 73 L.J. Ch. 299.

The Quebec decision, Adami v. City of Montreal, Q.R. 25 S.C. 1, is in entire accord with this view.

There is no doubt that the defendants have acted in the best of good faith, endeavouring to minimise the amount of noise and vibration resulting from the operation of these pumps; and there is also no doubt that the condition of affairs as it exists to-day is nothing like as serious as before the change made in the pumps by which a new and different diffusion-ring was sub-

stituted. Even after all that is possible has been done, a nuisance still exists, and I think it may be taken for granted that it is impossible to do anything further, and that the nuisance will be more likely to increase than to abate when a greater number of pumps come to be operated at the same time.

Inasmuch as the pumping of this water is necessary for municipal purposes, the case, I think, falls under the provision of the Judicature Act empowering me to refrain from granting an injunction and to substitute damages.

For the reasons indicated in the case of Ramsay v. Barnes, 5 O.W.N. 322, these damages should be upon the basis of compensation for the injurious effect resulting in the depreciation of the plaintiff's land, and as a term of granting the defendants relief from an injunction, I think they should assent to damages being assessed upon this basis. The evidence indicates that the works established are a permanency, and in the assessment of damages it would be unfair to allow the damage to be dealt with on any other basis.

From the attitude of the plaintiff at the trial, I take it that she does not insist on damages for inconvenience suffered in the past, and that she is content with the damages now awarded. It was agreed that if damages were given there should be a reference to assess. This may be to the Master in Ordinary, unless the parties can agree upon some other referee, or desire to give evidence before me at some date which may be arranged, so that I may myself assess them.

WOOD v. BRODIE—BRITTON, J.—MARCH 30.

Costs—Motion for Judgment on Further Directions—Executor—Costs of Reference and Motion.]—Motion by the plaintiff and by certain of the defendants for judgment on further directions; for the disposition of subsequent costs, pursuant to a consent judgment pronounced by SUTHERLAND, J., on the 25th November, 1912; for an order that the defendant R. J. Brodie pay over the moneys in his hands due and owing to the estate of the late Alexander Wood; for payment by the defendants R. J. Brodie, Mary Chalmers Wood, and Beatrice Ferguson, of the costs of the reference and of this motion; and that the amounts used by the defendant Brodie, who was executor of Alexander Wood, which stood to the credit of the infant children, in order

to make up deficits in the payment of annuities, be credited to the infant children. See Wood v. Brodie, 4 O.W.N. 1190. BRITTON, J., said that the only subsequent costs for his consideration were the costs of the reference and of this motion. This was not a case for an order compelling the defendants R. J. Brodie, Mary Chalmers Wood, and Beatrice Ferguson to pay the costs of the other parties, or even their own costs. The order would be that all the costs of all parties of the reference and of this motion be paid out of the estate, except the costs of the defendant Brodie in reference to the claim against him in regard to the Judge mortgage, for which he was made liable; he is not to get costs specially applicable to that claim, but is not to be liable to pay any costs in respect of it. There will be an order for payment by Brodie of the amounts found due by him to the estate. No other order is made. C. A. Moss and W. McCue, for the plaintiff and certain defendants. H. M. Mowat, K.C., for the defendants Brodie, Wood, and Ferguson. E. C. Cattanach, for the Official Guardian.

RE SOLICITOR—MIDDLETON, J.—MARCH 30.

Solicitor—Moneys and Papers of Clients—Motion for Delivery to New Solicitors—Authority of Client for Application—Inquiry by Official Guardian—Peremptory Order upon Solicitor—Penalty in Case of Non-compliance.]—Motion by Mary McGrath and Michael McGrath for an order directing the solicitor to pay to the present solicitors for the applicants the amount due to the applicants, and directing him to hand over to the present solicitors all title papers and other documents in his hands, and, in the alternative, for an order striking the solicitor off the roll. The answer made by the solicitor was, that the applicant Michael McGrath, who was ill in St. Michael's hospital, did not desire this motion to be made, and that in an interview Michael had expressed his desire for the solicitor to retain control of his papers and funds. MIDDLETON, J., said that he did not think that this objection could be taken as an answer to the motion; as, in the absence of some direct attack, the applicants must conclusively be taken to have authorised the proceeding launched in their name by their present solicitors. But, as the matter was represented as urgent, he thought it better to have inquiry made by the Official Guardian to ascertain the real wishes

of this man, who was said to be in an extremely precarious condition of health. The Official Guardian reported that he had seen Michael McGrath; that he was apparently upon his deathbed, but was conscious, and had no hesitation in saying that he did not desire his funds or papers to remain with the solicitor, and that he had authorised the present proceedings. The learned Judge, therefore, made the order sought, directing the solicitor at once to hand over the papers and funds. He did not think it necessary to embody in the order the other direction sought; but, if the order made was not complied with, that would follow in due course. The solicitor must pay the costs of the application. A. L. Brady, for the applicants. The solicitor, in person.

ATTENBOROUGH v. WALLER—FALCONBRIDGE, C.J.K.B.—MARCH 30.

Conversion of Chattels—Detention — Damages — Scale of Costs—Set-off—Landlord and Tenant—Removal of Fixtures—Short Forms of Leases Act, 10 Edw. VII. ch. 54, sched. B., cl. 10.]—Action to recover $870 for contents of garage, goods, chattels, effects, and building material, and $1,000 damages for deprivation, detention, and use of goods, upon premises owned by the defendant. The learned Chief Justice said that the facts were set out in the statement of defence, which he finds to have been proved. Even if the defendant had accepted or recognised the plaintiff as his tenant, which he never did, the provision "that the lessee may remove his fixtures" means (Short Forms of Leases Act, 10 Edw. VII. ch. 54, cl. 10 of schedule B., now R.S.O. 1914 ch. 116) that "the lessee may at or prior to the expiration of the term hereby granted, take, remove and carry away . . . " The defendant had always been willing to give up the electric sign, on the plaintiff proving it to be his property. This the defendant, by his own memorandum, valued at $50. Judgment for the plaintiff for $50, with Division Court costs; the defendant to have a set-off of costs as provided by Rule 649. Execution whichever way the excess may lie. R. Holmes, for the plaintiff. W. G. Thurston, K.C., for the defendant.

MACDONALD V. BOUGHNER—KELLY, J.—MARCH 31.

Distribution of Estates—Inquiry as to Heirs-at-Law and Next of Kin—Master's Report—Motion to Confirm—Absentee—Failure to Advertise for—Declaration of Death not Justified—Reference back.]—Motion by the plaintiff for an order confirming the report of the Local Master at Cayuga. By an order of the 24th October, 1913, it was referred to the Local Master at Cayuga to determine and report who were the lawful heirs and heiresses-at-law and next of kin of Fanny Williams, deceased, entitled to share in the distribution of her estate. The Master found that Gertrude Boughner and John Paul Trotter the younger were not lawful heirs-at-law and were not entitled to share in the estate; that Charles William Williams, a son of the intestate Fanny Williams, was not now alive; and that the deceased's daughters Jane Kirk Macdonald (the plaintiff) and her sister Amelia Kirk Sanders (one of the defendants) were the only heirs-at-law entitled to share in the distribution of the estate. KELLY, J., said that the findings in favour of these two daughters as being heiresses-at-law of the deceased, and against Gertrude Boughner and John Paul Trotter the younger, were supported by the evidence, and to that extent the report should be confirmed. There was evidence that Charles William Williams had not been heard of for twenty-five years or more, and that the last known of him was that he was at or in the locality of Green Bush, Michigan. No attempt had been made to find him by advertising; and, in the opinion of the learned Judge, he should not have been declared not to be now alive until that means of ascertaining his whereabouts, if he were still alive, had failed to produce results. Reference back to the Master to make further inquiries about Charles William Williams. Featherston Aylesworth, for the plaintiff. J. R. Meredith, for the infants.

SHAW V. TORRANCE—MIDDLETON, J.—APRIL 1.

Contract—Exchange of Horses—Evidence—Finding of Fact of Trial Judge.]—The plaintiff was the owner of a stallion, "Black Benedict," which he desired to exchange, as it was well up in years and had travelled in the neighbourhood for many years, both of which facts rendered it desirable to make a change, as many of the mares to be served were his own progeny. The defendant was a dealer in horses, importing stallions from

Scotland. The parties met on the 15th April, 1913, and the plaintiff exchanged "Black Benedict" for "Feudal Chief," a young stallion, then two years old, giving as boot upon the exchange two notes of $350 each; "Feudal Chief" being valued at $1,300, and "Black Benedict" at $600. That there was some agreement for the return of "Feudal Chief," if he was not found satisfactory, was not denied. Upon delivery he was found to be unwilling to perform the duties required of him, possibly owing to youth and inexperience, and he was returned. The plaintiff then demanded the return of his notes and the value of "Black Benedict," or the substitution of another stallion of value equal to "Feudal Chief;" alleging that under the agreement he was to have another stallion of equal value at once, so that he might cover his accustomed route. The defendant denied this, and said that the bargain was, that, in the event of the horse being returned, another horse was to be imported in the fall, of equal value, which the plaintiff was to accept. MIDDLETON, J., said that the evidence of Ira Fountain, the groom, might be accepted as reliable; and, accepting this, he found in favour of the plaintiff, and gave him judgment for $1,300—$700 to be satisfied by the surrender to him of the notes, which were with the exhibits. Costs to follow the event. F. Arnoldi, K.C., for the plaintiff. W. Laidlaw, K.C., for the defendant.

RE KELLY AND GIBSON—MIDDLETON, J.—APRIL 1.

Will—Construction—Gift to Wife—"Best Advantage for herself and Son"—Precatory Trust—Application under Vendors and Purchasers Act—Notice to Guardian of Infant—Rule 602.]—Motion by the vendor, under the Vendors and Purchasers Act, to determine a question, as between vendor and purchaser, arising upon the construction of the will of the late J. J. Kelly. Pursuant to Rule 602, the learned Judge directed the guardian of the infant Joseph Charles Kelly to be notified. By the will of the testator, he gave all his real and personal property "to my wife Margaret Helena Kelly, to be used by her for the best advantage as she considers best for herself and our infant son Joseph Charles Kelly." The learned Judge said that this was an absolute gift to the wife. The case was very like Lambe v. Eames (1871), L.R., 6 Ch. 597. The whole modern tenedency was against the creation of a precatory trust,

unless the language was plain. Order declaring that a good title could be made; no costs as between vendor and purchaser. The vendor to pay the costs of the Official Guardian. G. R. Roach, for the vendor. Alexander Davidson, for the purchaser. E. C. Cattanach, for the infant.

DOWNEY v. BURNEY—MIDDLETON, J.—APRIL 2.

Contempt of Court—Disobedience of Injunction Order—Intentional Breach—Benefit of Doubt—Order for Payment of Costs.]—Motion by the plaintiff to commit the defendant for disobedience of an injunction order of the Court. MIDDLETON, J., said that he was not at all satisfied that the defendant did not intend to be guilty of some breach of the injunction. Technically he had undoubtedly been guilty of a breach. On the other hand, it appeared that there was a disposition on the part of the plaintiff to make too much of a comparatively small matter; and the learned Judge was disposed to give the defendant in one way the benefit of the doubt; intimating at the same time that nothing can justify even a technical violation of an order of the Court, more particularly when that order is based upon a consent. The Court should not go so far as to award imprisonment on the present occasion; and the ends of justice would be amply satisfied by directing the defendant to pay the costs of the motion. He should, however, understand that he must live up to the letter as well as the spirit of the injunction order, or take the consequences. Another Judge would perhaps not be as lenient. J. M. Langstaff, for the plaintiff. N. Somerville, for the defendant.

WILLIAMSON v. PLAYFAIR—LENNOX, J.—APRIL 2.

Contract—Transfer of Company-shares—Sale or Pledge—Evidence—Finding of Fact of Trial Judge—Liability of Pledgee to Account for Price of Shares Sold.]—Action to recover the amount received by the defendant for certain shares of the capital stock of the Marks-Williamson Mines Company, transferred by the plaintiff to the defendant and sold by the defendant, less the amount of the plaintiff's promissory note. The learned Judge finds, upon the evidence, that the transaction be-

tween the plaintiff and the defendant was a loan upon the security of the stock, and not a purchase of the stock. Judgment for the plaintiff for the balance of the $3,400 received by the defendant, after deducting the plaintiff's $1,000 note and interest, with interest on the balance from the date of the receipt of the $3,400, and the costs of the action. Counterclaim dismissed without costs. Hamilton Cassels, K.C., for the plaintiff. Leighton McCarthy, K.C., for the defendant.

BRODEY v. LE FEUVRE—LENNOX, J.—APRIL 3.

Principal and Agent—Account—Commission—Secret Dealings of Agent—Costs.]—Action for $3,832.48, moneys alleged to have been paid to the defendant for duties and services to be performed, but not performed, and moneys received by the defendant to the use of the plaintiff. LENNOX, J., said that, in the circumstances of this case, the defendant was not entitled to commission, and was bound to account to the plaintiff for his receipts beyond actual disbursements. He deceived the plaintiff and secretly dealt with the plaintiff's property as his own. Prima facie he was bound to account on the basis of the consideration, $23,500, stated in his agreement with Mrs. Hurwitz, but his actual net profits could only be ascertained by a reference. He admitted that, counting the $275 paid him by the plaintiff, he had net receipts to the amount of $466.33 at all events; and, the plaintiff's counsel not insisting upon a reference, there should be judgment for this amount, with costs according to the tariff of this Court. The learned Judge added that, even if the plaintiff were only entitled to recover the commission which he paid the defendant, $275, he would still direct the payment of costs on the Supreme Court scale. A. Cohen, for the plaintiff. R. B. Beaumont, for the defendant.

RE TAYLOR—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—APRIL 4.

Assignments and Preferences—Assignment for Benefit of Creditors—Order of County Court Judge Allowing Creditor to Sue in Name of Assignee—Leave to Appeal—Assignments and Preferences Act.]—Motion by the assignee for the benefit of creditors of J. G. Taylor, an insolvent, for leave to appeal from

an order made by a County Court Judge, under the Assignments and Preferences Act, giving one John A. Lawson, a creditor of the insolvent, leave to bring an action in the name of the assignee in respect of a transfer of property by the insolvent. The learned Chief Justice said that he was of the opinion that special leave ought to be granted to the assignee to appeal from the order of the County Court Judge. It was better that the question involved, which was manifestly one of great importance and one which ought to be definitely settled, should be disposed of in limine rather than that the creditor should be left, in the event of his succeeding in the contestation and of there being an appeal, to face the additional difficulty suggested in Campbell v. Hally (1895), 22 A.R. 217, at p. 226. Costs of this motion to be costs in the proceeding. W. R. P. Parker, for the assignee. W. H. McFadden, K.C., for Lawson.

CORRECTION.

In HAIR v. TOWN OF MEAFORD, ante 115, 116, the appeal was dismissed *without* costs.