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HON. MR. JUSTICE KELLY. JANUARY 10TH, 1913.

McCOUBREY v. CITY OF TORONTO.

4 O. W. N. 573.

Municipal Corporations—Early Closing By-Law—Barber Shops—Motion to Quash—R. S. O. 1897, c. 257, s. 44, s.-s. 3—4 Ed. VII. c. 10, s. 61—Petition for By-Law—Sufficiency of Signatures—Method of Computation of Number of Barbers in City—Drastic Legislation—Requirements Strictissimi Juris—Delegation of Duty by Council.

Application to quash a by-law for the early closing of barber shops in the city of Toronto purporting to be passed under the Ontario Shops Regulation Act, R. S. O. 1897, c. 257, as amended by 4 Ed. VII. c. 10, s. 61. The by-law was passed after the receipt of a petition purporting to be signed by three-fourths of the occupiers of barber shops in the city under sec. 44, s.-s. 3, of the Act.. The petition was referred to the City Clerk for report, who notified those in favour of the petition and those opposed to attend and make suggestions. The former attended but the latter did not and the Clerk found the number of shops in the city to be 363 and the number of names counted as 273, being precisely the number required. The by-law was attacked on the ground that the petition was insufficiently signed, that some of the names were obtained by misrepresentation and that the City Clerk and the Council erred in the method of computation.

KELLY, J. *held*, that the requirements of the statute had not been satisfied as at least one of the names counted should not have been so counted and that an attempted ratification after the date of this application was too late.

Bird v. *Brown*, 4 Ex. 786, and other cases referred to.

That the statutory requirements must be strictly complied with in the case of legislation of this character interfering with the right to carry on a legitimate business.

Re Robertson & North Easthope, 16 A. R. 214, and *Re Halliday & Ottawa*, 15, O. L. R. 65, referred to.

By-law quashed with costs.

T. J. W. O'Connor, for the applicant.

Irving S. Fairty, for the city.

HON. MR. JUSTICE KELLY:—Under the provisions of The Ontario Shops Regulation Act, R. S. O. 1897, ch. 257, as amended by 4 Edw. VII., ch. 10, sec. 61, the city council of

Toronto, on August 8th, 1912, passed a by-law (number 6167), enacting that "From and after the 19th of August, 1912, all barber shops in the city of Toronto shall be closed and remain closed on each and every day of each week throughout the year except Saturday and the day immediately preceding a public holiday . . . from the hour of eight o'clock in the afternoon of one day to the hour of six o'clock in the forenoon of the next day."

Sub-section 3 of sec. 44 of ch. 257, under which the proceedings were taken, is:—

"(3) If any application is received by or presented to a local council, praying for the passing of a by-law requiring the closing of any class or classes of shops situate within the municipality, and the council is satisfied that such application is signed by not less than three-fourths in number of the occupiers of shops within the municipality and belonging to the class or each of the classes to which such application relates, the council shall, within one month after the receipt or presentation of such application, pass a by-law giving effect to the said application and requiring all shops within the municipality, belonging to the class or classes specified in the application, to be closed during the period of the year, and at the time and hours mentioned in that behalf in the application."

By 4 Edw. VII., ch. 10, sec. 61, this sub-section was expressly made to apply to barber shops.

A petition was presented asking the city council to enact a by-law to have barber shops closed during the hours mentioned therein. The affidavits of execution of the original petition indicate that it was signed not later than June 6th, 1912.

From a letter of the city clerk to the president and members of the Board of Control, dated 4th July, 1912, I learn that on June 10th the Board requested the city clerk "to examine a petition signed by the barbers of the city asking that a by-law be passed to provide for the early closing of barber shops." The letter then explains the procedure adopted in checking over the signatures to the petition, and concludes by stating that the statute provides that "The council shall pass the by-law if satisfied that the petition in favour is signed by not less than three-fourths of the proprietors of barber shops in the municipality."

The city clerk, having communicated with those in favour of the petition and those opposed to it, was called upon by Leon Worthall, the representative of the Barbers' Union, and on the clerk explaining that he had no accurate list of the barbers doing business in Toronto, it was agreed between him and Worthall that the best method of checking the petition would be by using the list of barber shops as appearing in the last city directory, making any amendments thereto necessary by reason of changes of occupancy, etc. This method was adopted, and on it appearing to the clerk that the petition was probably not sufficiently signed, at Worthall's suggestion further time was obtained from the Board of Control to secure additional signatures.

Plaintiff, who had represented the opponents of the by-law, wrote the clerk on June 12th, in reply to a request for a conference, that he had decided not to attend any further meetings on the subject, and stating that he had the names of 105 master barbers, who had decided not to recognize any by-law that might be passed.

A supplementary petition was afterwards received by the city clerk, who, on examination of it, found the petition to be still not signed by the necessary three-fourths, his finding then being that the number of these shops named in the directory was 339, the number of proprietors of barber shops signing the petition, not in the directory, 21; in all 360, and that the number who had signed the petition was 254.

A still further supplementary petition was sent in; the city clerk made a further examination, and on July 19th, 1912, wrote as follows:—

"T. L. Church, Esq. (Acting Mayor) President,
and members of the Board of Control.

Gentlemen:

In compliance with the order of the Board, I beg to say that I have received and examined supplementary petition submitted by Mr. Leon Worthall, representative of the Barbers' Union, in favour of the early closing of barber shops.

I now find the number of barbers to be, as per the city directory, 339, the number signing the petition not in the directory, 24; making in all, 363.

Three-fourths of this number is 273

Number of names counted on the petitions 273

It appears to me that the petitions are signed by three-fourths of the proprietors of the barber shops doing business in the city.

I may add that there are a number of names on the petitions which have not been counted, as it has not yet been made clear to me that they had a right to sign. In several cases this could not be done owing to the absence of the parties from the city. If any of these names were counted, it would, of course, add to the number in favour of early closing.

I return herewith the petitions.

Your obedient servant,
W. A. Littlejohn,
City Clerk."

The city council passed the by-law on August 8th.

The present application is to quash the by-law on the following grounds:—

(1) That the petition was insufficiently signed.

(2) That certain of the signatures appearing on the petition were obtained by misrepresentation;

(3) That certain persons whose names appear on the petition, did not in fact, sign it;

(4) That the city clerk and the city council erred in the method adopted to ascertain the number of shops and the number of occupiers thereof, in determining whether three-fourths in number of the occupiers of such shops had signed the petition.

On the application there was filed an affidavit of the solicitor who represented the opponents of the petition, to the effect that on the day on which the by-law was passed, he requested the council to defer for two weeks the passing of the by-law in order that those opposing it might have an opportunity of shewing that the petition was not properly and fully signed, within the meaning of the statute; that no reply was given his request, and that later on the same day the by-law was passed.

The council may have been, and very probably was, influenced by the advice which one of the members thereof stated he had received from the city solicitor, namely, that the council had no option in the matter if the petition were sufficiently signed.

Referring to the statement of the city clerk in his letter of the 19th July, that there were a number of names on the

petition which were not counted, as it had not been made clear to him that they had a right to be signed, a number of instances occurred where the same person signed twice, and the duplicates of these signatures were properly rejected. Two names were signed, not by the proprietors themselves, but by others for them, and it was not shewn that the parties who signed, had any authority to sign. These signatures also were properly rejected. The city clerk also rejected the signatures of two, whose names do not appear among the names of barbers in the city directory; evidently he was not satisfied that they had any right to sign. In still another instance, the foreman of the shop, in the absence and without the knowledge or authority of the proprietor, signed his own name as foreman of the shop, but without even mentioning the name of the proprietor. In this case it was contended on the argument that the signing should have been allowed. The only evidence, however, to support the contention is an affidavit made by the proprietor, Beamish, on November 21st, 1912—months after the passing of the by-law, and about two weeks after these proceedings were begun—that he was absent at the time the petition was signed by his foreman, and that he is in favour of the objects asked for in the petition and ratifies the action of the foreman in signing the petition. This signature was properly rejected in the count made by the city clerk.

My view is that none of the signatures rejected in the count were entitled to be allowed.

This leaves to be dealt with the 273 names counted by the city clerk as being of persons entitled to sign.

The propriety of the method resorted to of arriving at the number of proprietors in the city—that is, by the use of the city directory—may well be questioned. While I do not now pass upon the question, I am not to be taken as approving of that procedure.

The actual number might have been ascertained by some more accurate method.

But assuming the correct number to be 363, as stated by the city clerk's report (and it is not shewn affirmatively that there were not then more than 363), it was necessary that at least 273 should sign in order to give authority to pass the by-law; if even one of the 273 was improperly allowed, then the petition fell short of having the required number of signatures.

One of the 273 signatures purported to be that of Thomas Rackstraw, an occupier or owner of a barber shop at 43 Jarvis Street. His signature was not signed by himself, but by his employee in his absence, and without the proprietor's instructions, authority, or sanction. Rackstraw was examined *viva voce* on November 14th, 1912, and his evidence is part of the material used on the motion. I quote the following from his examination:—

"7. Q. Do you remember signing a petition to the council of the corporation of the city of Toronto? A. No, I didn't sign it. I can explain that.

8. Q. You know a by-law has been passed by the city of Toronto recently for the closing of barber shops at the hour of eight o'clock on certain evenings during certain hours? A. Yes.

9. Q. Then I ask you if you signed a petition to the council of the corporation of the city of Toronto, and you said no. I am referring to a petition in the following words (Reads the heading of petition). Now I see on that petition appears the name Thomas Rackstraw, 43 Jarvis street. It is spelled T-o-m-a-s Rackstraw. Did you sign any such petition, Mr. Rackstraw? A. No, I didn't sign any such petition, but I would like to explain that.

10. Q. I will allow you, in a moment. I produce the original petition, handed me by counsel for the city of Toronto, and I ask you if the signature appearing there as being yours is your signature? A. Oh, no, I know it is not by looking at it, and I know it not as well.

10a. Q. Do you know who signed that petition? A. Oh, yes, I know who signed it.

11. Q. Who did it? A. It was my man.

12. Q. Did you tell him to do it? A. Oh, no."

Then in answer to counsel for the city he goes on to speak of his own practice of closing at 8 o'clock, and that the man who signed his name thought that he (Rackstraw) would be willing to sign the petition. He adds that he was not in the shop at the time; that he was not in favour of the petition, and that he told his man he would not have signed. Then he was asked:—

"16. Q. However, you were not there yourself? A. No, I was not in the shop, myself. I wouldn't have been in favour of it at all, but, of course, he signed the petition thinking it was all right, on account of my closing at 8 o'clock. We

never had a word on the subject at all; never spoke about it. Of course, he belongs to the Union, and naturally he would sign it on account of being there."

"27. Q. You still are opposed to it? A. I am opposed to shutting anybody else up. I believe in a man running his own business." And then he says the man signed honestly, and not thinking there was anything wrong.

On November 20th, 1912, Rackstraw made an affidavit which was filed by the respondents, in which, after referring to his having been examined, he says that since the examination he has been more fully apprised of the facts in relation to the petition, and its effect upon the outlying barber shops, and he states he is now in favour of the petition, and he attempts to ratify the action of his foreman in signing it.

It is urged, for the respondents, that the attempted ratification by Beamish and Rackstraw entitled them to be counted amongst the signers of the petition. In my opinion these acts of ratification were inoperative. Rackstraw, at the time the by-law was passed and as late as November 14th, 1912, was not in favour of the petition; he did not authorise any one to sign it for him, and not only did he not approve of it but he expressly disapproved. His name is not properly attached to the petition and should not have been counted amongst the 273 signers.

As was said by Hagarty, C.J., in *Taylor* v. *Aimslie*, 19 U. C. C. P. 78, at p. 85, "the doctrine of ratification is not without important qualifications." One such qualification is in respect of the time of the attempted ratification. In *Bird* v. *Brown* (1850), 4 Ex. 786, Rolfe, B., at p. 798, says:

"But the authorities . . . shew that in some cases where an act which, if unauthorised, would amount to a trespass has been done in the name and on behalf of another but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done to take advantage of it and to treat it as having been done by his direction. But this doctrine must be taken with the qualification that the act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies. Thus in *Lord Audley's Case*, . . . a fine with proclamation was levied of certain land, and a stranger within five years afterwards, in the name of him who had right, entered to avoid the fine. After the five years, and

not before, the party who had the right to the land ratified and confirmed the act of the stranger. This was held to be inoperative, though such ratification within the five years would probably have been good. The principle of this case . . . appears to us to govern the present. There the entry to be good must have been made within the five years; it was made within that time, but till ratified it was merely the act of a stranger and so had no operation against the fine. By the ratification it became the act of the party in whose name it was made, but that was not till after the five years. He could not be deemed to have made an entry till he ratified the previous entry, and he did not ratify until it was too late to do so." It seems to me that the acts of ratification relied on by the respondents were too late.

A further authority against ratification relating back, where persons other than the contracting party have acquired interests prior to ratification, is found in *Re Glocester Municipal Elections Petition*, [1901] 1 K. B. 683.

The same view of the law is also found in Lord Halsbury's Laws of England, vol. 1, p. 181, (sec. 389.)

And in Cyc., p. 1284, we find it stated that if a third person has a complete cause of action or defence when a suit is commenced, he cannot be deprived thereof by the subsequent ratification of an act without binding force without such ratification.

Following these authorities, the acts of ratification relied upon here are ineffectual.

The circumstances under which the names of Edward Harper and William Batte appear on the petition,—they being two of the 273,—make their allowance open to objection. It is evident from Harper's affidavit and his cross-examination thereon, that he at no time intended to sign the petition and that he absolutely refused to sign it. After this refusal, he was approached about signing a memorandum relating to the increase in prices which was submitted to him; this he agreed to sign, and his evidence is that what he read over before signing referred only to prices and not to early closing, and that if it turns out that his name appears as having been signed to the petition for early closing it is improperly there.

Worthall, an active promoter of the petition, and who presented it to Harper for signature, admits that at the

time Harper signed he (Worthall) had with him another petition relating to an increased scale of prices; that the two petitions were handed by him to Harper, one lying above the other, but not attached, and that on examination after Harper had signed he found Harper's signature to the petition for early closing. He admits, too, that it is possible, though not probable, that Harper signed the petition which he did sign in error; and he repudiates the suggestion in Harper's evidence, that any deceit was employed in obtaining the signature.

I find it difficult to escape the conclusion that Worthall did not act candidly towards Harper, and that as a result Harper was misled as to what he was signing, for I have no doubt that Harper never intended to sign the petition for early closing, and he signed in the belief that he was signing for quite a different object. Under such circumstances his signature should be rejected.

In the case of William Batte, there is such doubt as to the manner by which his signature was obtained, that I would hesitate to allow his name to be counted amongst the necessary 273.

It is apparent that there was difficulty in obtaining the signatures of the requisite number.

The by-law, if passed, would not only restrict the rights of the minority opposed to it, who, in many instances, would suffer financial loss in being deprived of the right to keep open after 8 p.m., but also would cause inconvenience to those who have but little opportunity of patronising barber shops during the hours permitted by the by-law. Others than the barbers would be affected by it. By this I do not mean that such a by-law should not be upheld if the proper and necessary means were adopted of bringing it into effect.

The right of the Legislature to give power to municipalities to pass such a by-law is not questioned: *Beauvais* v. *Montreal*, C. R. [1909] 459. But the necessary formalities should be strictly complied with.

In *Re Robertson & North Easthope*, 16 A. R. 214, an appeal from the judgment of Street, J., refusing to quash a by-law where the condition precedent necessary to give the council jurisdiction was that a petition be presented signed by a majority of those entitled to sign, Hagarty, C.J., at p. 216, said: "We cannot be too careful and we think the council should be equally careful in requiring that this

essential foundation should always exist before such very serious interference with the rights of owners of property should be undertaken. The majority is allowed the right of binding the minority, but there should be no reasonable doubt allowed to exist as well of the existence of such majority and of its being signified in the manner required by law," and, again, at p. 219,—"In all cases of this kind,—largely invading the rights of private property,—it should, I think, be incumbent upon the council to be certain beyond speculation or guess-work that a majority of those interested had clearly sanctioned the proposed work so as legally to found jurisdiction to bind a dissentient minority."

The passage of a by-law such as is now under consideration is a somewhat violent interference with the rights of a considerable body of persons engaged in a legitimate business. The promoters of the by-law and the city council have no cause for complaint if they are held to the strictest compliance with each and every of the conditions and terms imposed upon them by the statute; the rights of the minority should not be curtailed, nor inconvenience be imposed upon the public by such curtailment, if any reasonable doubt exists that the necessary three-fourths of the proprietors signed the petition, or that those who did sign signified their wishes as required by law.

I have no difficulty in arriving at the conclusion that the petition was not signed by the necessary three-fourths in number of the proprietors and that the by-law cannot be upheld.

Had I not reached this conclusion on the grounds I have stated, I would still feel bound to quash the by-law for the reasons on which the Divisional Court based its judgment in *Halliday* v. *Ottawa*, 15 O. L. R. 65, a case where the trial Judge quashed a by-law passed under the Ontario Shops Regulation Act, by which it was sought to provide for early closing of retail grocery stores in the city of Ottawa.

The procedure there adopted to ascertain if the petition was properly and sufficiently signed was much the same as in the present case, and what is said in that judgment may well be applied here.

The by-law is quashed with costs.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 28TH, 1912.

REX v. DORR.

4 O. W. N. 419.

Intoxicating Liquors—Liquor License Act, sec. 111-2, Geo. V. c. 55, s. 9—Motion to Quash Conviction—Plea of Guilty—Return of Magistrate—Alleged Misunderstanding—Matter for Crown.

MIDDLETON, J., *held*, on a motion to quash a conviction under sec. 111 of the Liquor License Act as amended by 2 Geo. V. c. 55, s. 9, that he was precluded by a return shewing a plea of guilty, but as there apparently had been some misunderstanding it was a matter for the Crown authorities to deal with.

Motion to quash a conviction of the police magistrate at Hamilton under sec. 111 of the Liquor License Act as amended.

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

J. Haverson, K.C., for the accused.

HON. MR. JUSTICE MIDDLETON:—This case was tried by the magistrate immediately after the case of *Rex* v. *Bevan, ante*, p. 510, 4 O. W. N. 400. From the statements of counsel and from memoranda produced by Mr. Haverson it appears that there has been some misunderstanding. Apparently counsel intended to admit that the evidence in this case would be similar to the evidence in the *Bevan Case* and to consent to the matter being disposed of on that basis. The return made by the magistrate shews a plea of guilty.

I am concluded by the return, and the motion therefore fails. Under the circumstances I do not order costs.

As stated upon the argument, if the Crown is satisfied that there has been any such mistake as I indicate, no doubt some arrangement will be made by which justice will be done to the accused.

DIVISIONAL COURT.

DECEMBER 30TH, 1912.

WOOD v. GRAND VALLEY RW. CO. AND A. G. PATTISON.

4 O. W. N. 556

Contract— Agreement to Extend Railway to Town—Breach—Personal Liability of President—Damages—Difficulty of Assessment—No Reason for Withholding.

Action for damages for breach of contract. Plaintiffs were merchants and manufacturers of St. George, a town with poor railway facilities. They entered into an agreement with defendant company and defendant Pattison, its president, to subscribe for $10,000 of the company's bonds on condition that the company should extend its line into the town. A memorandum embodying the agreement was drawn up and signed, the plaintiffs subscribed and paid for the bonds which were delivered to them, but the promised extension of the railway was never built. Defendant Pattison disclaimed personal liability under the agreement, claiming he merely acted in his capacity as president of defendant company.

MIDDLETON, J., *held*, that the facts shewed that the agreement was intended by all the parties to bind defendant Pattison personally and the fact that the memorandum of agreement was not executed by him in his personal capacity was no defence.

That damages should not be assessed as on a failure of consideration but that difficulty in assessment did not prevent substantial damages being awarded, which under all the circumstances should be fixed at $10,000.

Choplin v. *Hicks*, (1911) 2 K. B. 786, approved.

Judgment for plaintiffs for $10,000 and costs. Any sum realized by plaintiffs in respect to the bonds received under the agreement to be applied in reduction of the judgment.

DIVISIONAL COURT reduced the damages awarded to $3,980 for the plaintiff companies and $10 nominal damages for the other plaintiffs, and with this variation, affirmed above judgment with costs.

Wake v. *Harrop*, 6 H. & N. 774, affirmed; 1 H. & C. 202, approved on question of liability of defendant Pattison.

Appeal by defendants from judgment of HON. MR. JUSTICE MIDDLETON, 22 O. W. R. 269; 3 O. W. N. 1356, awarding plaintiffs $10,000 damages and costs.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE KELLY.

C. J. Holman, K.C., and T. H. Peine, for the defendant Pattison.

S. C. Smoke, K.C., for the defendant railway.

G. F. Shepley, K.C., and J. Hartley, K.C., for the plaintiffs.

HON. SIR JOHN BOYD, C.:—Of all the defences upon the record two only were brought before us on this appeal.

It was contended first that as to the defendant Pattison there was no personal liability, and (2) as to both defendants that the plaintiffs had no right to more than nominal damages and that therefore the $10 brought into Court was ample satisfaction, even if there had been a breach for which both defendants were liable.

The judgment in appeal is to be upheld on both heads though it should be reduced in extent and though the lines of support may be somewhat different from those of my brother Middleton.

The action is based on an agreement made on 29th June, 1906, set out in the pleadings. By it Mr. A. J. Pattison, president of the Grand Valley Rw. Co., undertakes and agrees on his own behalf and on behalf of the said Grand Valley Rw. Co. that he will make or cause to be made through a traffic arrangement with the Canadian Pacific Rw. Co. an extension of the Grand Valley Railway to St. George. This he undertakes in consideration of the purchase of bonds of the Grand Valley Railway by certain manufacturers and other citizens of St. George. These latter parties were then well known and they had in fact already made applications for bonds up to the extent of $10,000 which was the amount stipulated for by Mr. Pattison in the negotiations which ended in this agreement. The applications were in escrow and not to be operative till a personal guarantee from the president of the Grand Valley Rw. Co. had been secured. These applications according to date were one for $2,000 of bonds on 6th June, 1906, on behalf of the Jackson Waggon Co.; another of the same date for $2,000 signed by Dr. E. E. Kitchen; one on the 7th June for $2,000 by the Bell Foundry Co. and one on the 15th June for $4,000 signed by Dr. Kitchen, J. P. Laurance, E. G. Kitchen, F. K. Bell and W. B. Wood. This makes up $10,000 but by some adjustment not very clear on the evidence there was a further application by W. B. Wood for $2,000 on behalf of the Brant Milling Co.

The action is now brought by these plaintiffs W. B. Wood, the Jackson Waggon Co., J. P. Laurance, S. G. Kitchen, E. E. Kitchen, W. B. Wood and A. J. Wood, the latter two carrying on business as the Brant Milling Co. The three companies all doing business at St. George and

elsewhere who took stock on the faith of the undertaking embodied in the agreement of 29th June were the Jackson Waggon Co., the Brant Milling Co., and the Bell Foundry Co. The latter became insolvent and were not able to meet the payments for the bonds and were relieved by the others—but no transfer was taken of any rights under the agreement, although these bonds were as I understand delivered to some of the plaintiffs. The plaintiffs individually named W. B. Wood, S. S. Kitchen, E. E. Kitchen and J. P. Laurance were more or less interested in the said companies but they individually hold some of the bonds. The relative interest of the parties is somewhat cleared up by the delivery of particulars pursuant to an order made for that purpose. By these all the individual plaintiffs claim no more than nominal damages but substantial damages are claimed by the Jackson Waggon Co. to the extent of $5,000 and by the Brant Milling Co. to the extent of $8,000. The order of 13th November for these particulars of damages claimed provided that all evidence should be barred as to other damages and the particulars furnished should have been added to and made a part of the record. Perhaps the effect of that order and the response by the individual plaintiffs has been overlooked in the judgment. What the St. George people decided was to have freight connection by means of the Grand Valley Railway with the Canadian Pacific Railway at Galt and all the benefits expected to result appealed to the business men and the manufacturers by reason of competition rates and easier methods of carriage and shipment of goods. The appeal was specially and substantially to the manufacturers who are the plaintiffs and not to the other individual plaintiffs who could not expect any tangible benefit except those which would be common to the whole community. Wood lives at Montreal; Laurance at Toronto; the two Kitchens at St. George, one a retired farmer and the other a physician. Therefore the failure to construct the road may not have sounded in damages as to them in any way commensurable in a Court so that their claim for nominal damages merely is not improvident. Hence as it seems to me the inquiry should be as to what damages have been sustained by the two plaintiff companies each holding $2,000 in bonds of the defendants. Both parties agreed to the damages being disposed of by the Judge upon the evidence as taken at the trial.

The agreement contemplated a speedy completion of the work. Laurance gives the language of Mr. Pattison saying that he would bring the road into St. George before the snow flies if they bought the bonds (p. 46).

The first and immediate thing to be done was to extend the railway to St. George and then to make a through traffic arrangement with the Canadian Pacific Rw. Co. at Galt, the Grand Valley Rw. Co. supplying the necessary sidings and switches. The failure to construct the intermediate piece of the road was the breach of the contract and involved the loss of all the expected advantages. For this connection the plaintiffs were willing to buy and pay for the bonds and these were regarded as merely a collateral security for the performance of the undertaking. The very construction of a road operative up to St. George would have brought advantages to the merchants and manufacturers. This feature of the bargain was in the minds of both parties and is the benefit referred to in the writing of the 6th June as being the establishment of freight connection with the Canadian Pacific Railway at Galt (words used by the defendant Pattison). The proximate consequence of the breach complained of was within the contemplation of the parties a loss of benefits in the transaction of business at St. George. I do not feel pressed by any difficulty raised on the ground of remoteness of damage; nor is there any on the ground of directness. To use the words of Cleasby, B., in *Cundy* v. *Nicols*, 38 L. T. 227 (1870), "when there is common knowledge of a particular object then damages may be recovered for the natural consequence of the failure of that object." It does not become the defendant who has broken the contract to say that had he complied with the preliminary work of extending the line there might have been all sorts of difficulties and contingencies in carrying out and completing the work subsequently to be done. That is all beside the question as to whether there was an actionable wrong and a right to recover actual damages resulting from the failure of the defendant to do his part. The language used in Simpson v. Lamb, 1 Q. B. D. 277, seems appropriate here, i.e., "It is to be assumed that the plaintiff would get some benefit and though there may be some speculation as to the amount, it is not impossible to award more than nominal damages." Had the defendant done his part it is to be assumed that all the

rest would have followed in due course but yet the appraisal of damages is not to be made nor cannot be made absolutely and certainly, but as said by Mathew, J., in *Faulkner* v. *Cooper*, 4 App. Cases 215, the tribunal must take into account the chances of human life, the vicissitudes of trade, the probability of the plaintiff's customers ceasing to deal with him and various other considerations—many of which are set out by Mr. Holman in his reasons of appeal.

It may be that the English Courts have taken a distinct step in advance in the case relied on by the Judge of trial, *Chaplin* v. *Hicks*, 1911, 2 K. B. 786, but it is made only a point in the evolution of the law relating to damages. In a commercial country the obligations of contracts are strenuously enforced and a man cannot be allowed to escape the consequences of a broken contract by saying the damages are too remote. Against this the Courts are setting themselves and this latest decision has been commended by the leading law magazines as a neat illustration of the difference between the mere violation of a legal right without measurable damages and a breach which though the result be contingent and speculative is enough to be left to the appreciation of a jury. The intervention of a third person's judgment or discretion makes no difference in principle; 27 L. Q. Rev. 382. The doctrine laid down in the case is spoken of as a valuable guide in 37 Law Mag. 223, 4.

Each company paid $1,940 for the $2,000 bonds. This affords one approximation of the amount of damages sustained, as representing the amount practically lost by relying on the word of Pattison. I would not discard the method of getting at figures adopted by my brother Middleton but I would reduce the damages to both the company plaintiffs to the sum of $3,980; giving to the other plaintiffs the $10 paid into Court as nominal damages.

It remains to place the liability of Pattison as it appears to me on the evidence. When the paper of June 6th was proffered to the plaintiffs it was refused on the ground that it did not provide for personal liability. That was written out and signed by Pattison thus:—

"The Grand Valley Rw. Co.,

"Prest.

The agreement sued on was prepared by Wood to provide for the omitted factor of personal liability on the part of the president as the plaintiff found out he was of a person

of financial responsibility and they regarded the railway as of little worth as a security.

This was drawn providing for the purchase of the bonds on the terms of Mr. A. J. Pattison, president of the Grand Valley Rw. Co., agreeing on his own behalf to make or cause to be made the through traffic arrangement which involved the extension of the road at once and at the end of the terms of the agreement were to be binding upon the heirs, executors and assigns of Pattison. He signed that as in the former paper

"The Grand Valley Rw. Co.
"Prest."

And upon the "President" signing his own name at length A. J. Pattison, I think that in this gave the other parties to understand that he was signing not only as president but as an individual. A dual character was attached to the signature from which he should not be allowed to recede because he now says he did not intend to bind himself and that if he had been going so to bind himself he would not have signed without more time for consideration. He had time for consideration; it was known from the contract that his own personal liability was a *sine qua non* and I agree with the trial Judge as to his estimate of the evidence. No satisfactory explanation is given by Mr. Pattison of the words "on his part," and the clause as to heirs and executors and there is no explanation except that referable to his becoming personally liable. This defendant asks for a reformation of the contract if in its construction he is found to be so personally implicated. If reformation were needed it should rather the other way by declaring that the true bargain was that he should be bound and so declaring if the writing is to be read as halting in this respect. But I think sufficient appears as it stands to uphold the plaintiff's claim. Having taken the benefit of what was done though it may be for the primary benefit of his company, he cannot avoid giving effect to all the terms though as a formal thing he has not affixed an individual and independent signature to the writing in addition to the words and names he has used in authentication and verification of it.

With the reduction of amount the judgment should be affirmed with costs. It may be a proper term of the judg-

ment to direct the delivery up of the $9,000 bonds held by the two companies as originally subscribed by them.

HON. MR. JUSTICE KELLY agreed in the result.

HON. MR. JUSTICE LATCHFORD:—The writing subscribed "The Grand Valley Railway Company, A. J. Pattison, President," did not cover all that was agreed upon between Mr. Pattison and certain of the plaintiffs before the document was signed. The trial Judge so finds, and there is evidence to warrant his finding. It was open to the plaintiffs with whom the agreement was made, to shew—and they did shew—that the written instrument was not a complete record of what had in fact been agreed.

"It should be borne in mind that a written contract, not under seal, is not the contract itself, but only evidence—the record of the contract." Bramwell, B., in *Wake* v. *Harrop* (1861), 6 H. & N. at 774; affirmed, 1 H. & C. 202.

Here the record, though incomplete, is—as the trial Judge determined—conclusive that Pattison is personally bound. Pattison seeks to take advantage of the fact that he did not sign the writing otherwise than as president of the Grand Valley Rw. Co. The company, acting through him and only through him, subscribes to a document declaring that he has undertaken and agreed "on his own behalf" to make certain traffic arrangements; that is, as several of the plaintiffs desired, he personally would make such arrangements. The evidence outside the document—apart from Pattison's—which is not credited—is overwhelming that what such plaintiffs insisted on was the undertaking of Pattison himself, not only as to the rates to be charged by another railway but as to the all-important prerequisite—the construction of the link connecting the town of St. George with that railway.

The manufacturers of the town desired to have competition with the existing line for their inward and outward freight, because of the cheaper rates and consequently greater profits that such competition would insure. When Mr. Wood prepared the written agreement he manifested an intention to bind Pattison to all that Pattison had promised in return for the ten thousand dollars. Manifestly the construction of the line had been promised; otherwise, traffic arrangements for direct connection with the Canadian Pacific Railway at Galt would be absolutely futile.

I think the writing itself—considered apart from the testimony at the trial—is evidence that Pattison contracted "on his own behalf and on behalf of the Grand Valley Rw. Co. to proceed at once with the extension of his railway to St. George." Otherwise the proviso is meaningless that the terms, etc., of the agreement are to be "binding upon the heirs, executors and assigns of the said Pattison."

I do not regard as tenable the contention of Mr. Pattison that as he did not sign the document in his personal capacity its provisions are not binding upon him. When he subscribed his name to it as part of the signature of his company he attested the truth of what the document states when it declares that it is made on his behalf and is binding in all its terms upon his legal representatives.

When a person signs a writing in a particular capacity—as an officer of the defendant company, in this case—he cannot in my opinion be allowed to disclaim an obligation stated in that writing to have been assumed by him, on the ground that he did not sign his name a second time, in his personal and individual capacity. This is clear when Lord Bramwell's words in the case cited are recalled.

There the point for decision arose upon demurrer to the defendant's plea in answer to a declaration upon a charter-party drawn in a form which bound the defendants at law. Their signature was "For A. Davidson & Co., Messina, T. W. & J. C. Harropp & Co., agents." They pleaded that when the contract was signed it was agreed that the defendants were to sign only as agents to bind Davidson & Co., and were not to make themselves liable as principals for the performance of the charter—and that the plaintiff was inequitably taking advantage of the mistake in drawing the contract. The plea was held good in equity; and, according to Lord Bramwell, it seemed good also in law.

In the present case Pattison intended to bind himself, as the writing states; and upon the faith of his agreement that he was so bound the plaintiffs paid their money. I do not think there is any avenue of escape open to Pattison. The damages, however, as found by the trial Judge, after the parties by their counsel concurred in requesting that he should make the assessment, must be limited as stated in the judgment of my Lord the Chancellor—in the result of which I agree.

HON. MR. JUSTICE BRITTON. JANUARY 10TH, 1913.

HARRISON v. KNOWLES ET AL.

4 O. W. N. 595.

Sale of Goods—Express Warranty—Alleged Breach—Evidence—Onus—Acceptance—Counterclaim.

Action upon 12 certain promissory notes for $100 each, given by defendants to plaintiff in part payment of a second-hand printing press sold by plaintiff to defendants for $2,900. Defendant alleged that the press when received was in a defective condition and alleged breach of express warranty.

BRITTON, J., found as a fact that the press was in good condition when taken over by defendants and gave judgment for $1,200 and costs against defendants, but allowed them $80 and costs on their counterclaim for certain defective and missing equipment of a minor character.

Action upon twelve promissory notes made by defendants, payable to plaintiff, tried at Toronto without a jury.

A. C. McMaster, for the plaintiff.

T. Coleridge, for the defendants.

HON. MR. JUSTICE BRITTON:—The action is brought upon twelve promissory notes all made by the defendants payable to the order of the plaintiff. The notes are for $100 each with interest at 6 per cent., dated the 7th of June, 1910, and payable one on each of the following days, namely, 7th of February, March, April, May, June, July, August, September, October, November, and December 1911, and January, 1912. These notes were given in part payment for the purchase by the defendants of a "Harris Automatic lithographic off-set press," and attachments, including rollers thereto belonging. The making of the notes was proved. The plaintiff is the owner and holder of the notes. The purchase of the press was really made from the "Parker Process Company," for whom Mr. Parker acted. The plaintiff was the owner of the press, but was interested in that company, and at once conceded that he would be bound by anything Mr. Parker said, or that the company did, in making the sale. This press was a second-hand one, in possession of the Parker Process Co., at the city of New York, and by that company advertised for sale. The defendants either saw the advertisement or in some way heard of the press, and the defendant Thos. Knowles accompanied by his son Thos. Mel-

vin Knowles went to New York—saw the press and finally purchased it. The price asked was $3,500. The price finally agreed upon after negotiation was $3,000—and that price was further reduced to $2,900—by the defendants agreeing to take the press down—pack and ship it at their own expense. The terms of payment were all agreed upon—the press was taken down and packed ready for shipment by defendants. There was a great deal of negotiation before the actual purchase. There is some conflict in the testimony as to whether the press was started up by a motor in the saleroom or not.

I am of opinion that all the witnesses intended to be candid and truthful. Any discrepancy was from want of recollection. Mr. Parker in good faith strongly recommended the press, as to what it would do, and as to its condition, and he gave every opportunity to the defendants for inspection. Finally, when questioned further by defendants, said in substance that defendants need not take his word, merely, or that they need not run any risk as he would give his guaranty —and this he did—that is the plaintiff did at first and subsequently Parker did.

On the 17th May, 1910, the plaintiff wrote to the defendants, as follows: "In consideration of the sale by me to you of the Harris automatic off-set printing press, and as a part of the terms of the said sale, I hereby warrant and guarantee the said press and attachments to be in first-class order and repair upon delivery to you at office of the Parker Process Co., that same are sufficient to print from zinc plates in a proper and satisfactory manner all commercial work for the period of one year from this date, and that the said press and attachments are such as are suitable and necessary for doing satisfactory work of the class mentioned, and all other work of a like nature. I also warrant that the said press and machinery belong to me, and that the same are free from all liens and encumbrances."

The defendants do not appear to have objected to the form of this document, but wanted it signed by Parker—or wanted a guaranty by Parker. Pending that being arranged, the press had been sent forward and by some accident on the railroad—the packing was knocked from the press, and it was alleged that the press had been damaged. The plaintiff promptly offered to the defendants to "further warrant and guarantee that notwithstanding the said press and attachments have become damaged in transit, that on being repaired by your

experts at London, the said press will for the term of one year from the date of repair do all work in a satisfactory manner, which it was sold to you as being able to do." The defendants did not accept this—but the offer shews good faith on plaintiff's part. The defendants insisted upon getting Parker upon the guaranty, and one was given on the 31st May, 1910, in these words: "We hereby guarantee the press we are selling you to be in first-class order as a second-hand press, and that it will automatically print from zinc plates in a proper manner all commercial work. This guarantee is to extend for a period of one year from this date, it being understood, of course, that the press is reasonably and properly handled,"—signed by the plaintiff, and by Parker.

The defendants having stipulated for and having obtained the express warranty, I am of opinion that they cannot in the absence of fraud rely upon the alleged oral representation in regard to the press. While that is the case the evidence does not support any alleged misrepresentation as to any point not covered by the warranty—allowing the defendants to rely upon the warranty by plaintiff himself and the one signed by plaintiff and by Parker.

As to the warranty—it is alleged that the press was defective—that it was not in first class order—and that it would not do the work as represented. The main defect relied upon, was fully described by the witness William Thompson, whose expert evidence was accepted by plaintiff, and defendants.

The defect was damage to (an indentation in) the main cylinder, apparently made by a small screw, or screwhead which had been allowed to pass between the cylinders when in rapid motion. Mr. Thompson could give no opinion as to when or how this had happened. I think the defect was occasioned as suggested—namely by the screw or screwhead. Had this happened before the sale? Was this defect in the cylinder there at time of sale? It is wholly a question of fact, and one of considerable difficulty upon the evidence given by honest and honourable men.

I have come to the conclusion that Thos. Melvin Knowles was mistaken in thinking that he saw before the sale was completed—any screw or screwhead mark that would indicate the defect in question. Had it been seen—as Mr. Thompson describes it, it was altogether too serious a matter not to have been, then and there, thoroughly investigated.

On the part of plaintiff the press was traced from its being in good order—free from this defect—down to the time and place of sale. The witnesses who had the opportunity to see and who did see the press work and down to the time when not working, say that the defect did not exist. The screw or screwhead did the damage when cylinder in rapid revolution —if done by screw or screwhead. There is no evidence of where it came from or how it got upon or in, or under the blanket so as to do the damage.

The onus of shewing that this defect existed at time of sale was upon the defendants—they have not satisfied the onus.

A pair of rollers was not furnished.

The rubber blankets were not in first-class condition, even for a second-hand machine.

It was urged by counsel for defendants that as the rollers were part and parcel of the one purchase—the plaintiff by not delivering these was not entitled to succeed. He was not entitled to recover until delivery and not having delivered all —his action was at least premature. The defendants having accepted what was shipped—they themselves doing the packing and putting stuff upon car—and then having accepted the property at London—having treated it in every way as their own—and without objection at first—and having paid a considerable part of the purchase price cannot now set up the non-delivery of the rollers as a complete answer to the plaintiff's whole claim. The defendants are entitled to recover the value of rollers not delivered—and for rubber blankets which I find were not reasonably fit even for a second-hand machine and attachments. The plaintiff should pay in addition to cost of these, something for delay and for expense in procuring them.

For these rollers and rubber blankets the defendants should be allowed $80.

There is nothing in defendants' contention that the plaintiff cannot bring this action upon the notes because of the lien agreement executed by the parties by which the title remained in plaintiff until press paid for. The plaintiff has not taken possession nor attempted to do so. He has the right to sue upon the notes—notwithstanding that agreement.

The plaintiff is entitled to judgment for $1,200—with interest at 6 per cent. upon $1,120 from date of notes—to date of entry of judgment with costs of action.

The defendants are entitled to $80 upon their counterclaim—as this $80 may be set off against the plaintiff's claim as of date of notes—it is equivalent to allowing interest on the $80.

The defendants will get costs upon their counterclaim.

Thirty days' stay.

DIVISIONAL COURT.

DECEMBER 20TH, 1912.

CURRIE & STERRY v. HOSKIN.

4 O. W. N. 492.

Principal and Agent—Real Estate Brokers—Action for Commission—Authority Limited as to Time—Alleged Lapse—Evidence—Entries in Diary—Change of Reversal of Finding of Fact by Trial Judge.

Action by real estate agents for a commission. Defendant claimed that plaintiffs' authority, which admittedly had extended for ten days only, had lapsed before the introduction of the purchaser by them. WINCHESTER, Co. C.J. York, gave judgment for plaintiff for $525 and costs.

DIVISIONAL COURT holding that sufficient weight had not been given to the insertion of an advertisement in a newspaper in which plaintiffs claimed to be exclusive agents one day previous to the time they claimed that their agency commenced and that the trial Judge's finding of fact that the agency had not terminated must be reversed.

Appeal allowed and action dismissed with costs.

Authorities as to reversal of finding of fact by an Appellate Court reviewed.

Appeal by defendant from judgment of the Senior Judge of the County Court of the county of York, at the trial, awarding plaintiffs, real estate agents, $525 commission.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

J. E. Jones, for the defendant.

R. Honeyford, contra.

HON. MR. JUSTICE RIDDELL:—That the plaintiffs were authorized to sell is admitted; that they obtained a purchaser seems not to be disputed—and the only question is whether their authority had lapsed before they proffered the purchaser to defendant.

The plaintiffs say that their employment began 27th April; the defendant the 20th April, that it was to last for 10 days is agreed upon.

Then we find that the plaintiffs advertised in the Toronto Star this property for sale—on the 26th April—representing that they had exclusive sale of it—we require some very clear explanation before coming to the conclusion that they had no authority to deal with the property till the next day. To my mind the attempted explanations do not explain—and they are not consistent. Currie says: "We had a right to because we had a similar property running at the same time; that did not have any reference to Mr. Hoskin's property . . . not particularly." Then on being pressed and shewn that this property must be referred to he says: "Supposing I did; probably my partner did on his own accord; we almost thought we had it." His partner says that this property was what was meant, that it was advertised "just to draw the people's attention" before the defendant had authorised the plaintiffs to sell or offer the property for sale—that when they advertised they did not know what the plaintiff was asking for it, "nothing definite about prices," they did not know what the defendant was going to ask for the property.

The office diary is produced by the plaintiff to support their story—and, of course, wrongly permitted to be so used. Evidence of a more self-serving character cannot be thought of; and there was no pretence that the book was needed to refresh the memory of the witnesses. But even with the book we have the evidence of the plaintiff Sterry, that entries were made by him therein when he knew that he meant to go to law, that he took the book to his solicitor for that purpose and he adds: "When we were going over it, he (*i.e.*, the solicitor) said: 'You have got it (*i.e.*, a particular entry) on the Wednesday,' and I said, 'That is easy enough; I can strike it out?' And he did 'strike it out' 'on the Wednesday,'" the day which would not suit his case and entered it on the preceding day, which would.

Books kept by a person of such a conception of their value, I can place no dependence upon even if they were evidence. Moreover there are throughout circumstances of a most suspicious character which have not been explained.

We are always very loath to interfere with the finding of fact by a trial Judge.

Lodge Holes Colliery v. *Mayor, etc.*, Wednesday (1908), A. C. 323, at p. 326. *Bishop* v. *Bishop* (1907), 10 O. W. R. 177. But we must reaffirm the principle laid down in *Beal* v. *Mich. Cen. Rw.* (1909), 19 O. L. R. 502. "Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not and cannot abdicate its right and its duty to consider the evidence."

Where there is "some unmistakable document or something of that kind," which shews that the Judge has made a mistake or which he has failed to take into consideration or to which he has not given such effect as it deserves, an appellate Court should scrutinize the whole evidence with great care. *Nassar* v. *Equity* (1912), 23 O. W. R. 340. Where the Judge has misapprehended the effect of the evidence or failed to consider a material part of it, the case falls within *Beal* v. *Mich. Central* (*supra*), *Re Graham* (1911), 25 O. L. R. 5, at p. 9; *Leslie* v. *Hill* (1911), 25 O. L. R. 144; *Kinsman* v. *Kinsman*, 22 O. W. R. 979, and *Bateman* v. *Middlesex*, 22 O. W. R 685, are recent cases in which the findings of a trial Judge have been reversed.

The County Court Judge in this case has paid no attention whatever to the advertisement of the 26th April—to me a most cogent piece of evidence—and I think we cannot support his finding in this respect.

Nor does the defendant "claim that his memory is not very good"—the only time he is asked about his memory he denies that it is defective. He does not pretend to have an independent recollection of dates without tracing them back and comparing them with other dates which he can verify—probably the same thing would be said of (and by) 99 per cent. of reliable witnesses. And such a witness is in most instances to be preferred to one who boasts that he has the dates "by heart."

The period given to the plaintiffs was admittedly 10 days—that would expire 30th April—the time was extended "a few days," "a few more days," "no particular time mentioned, just a few more days," "You will have to hustle . . . you have got a few more days to work in, three or four days were the words he used," "the words he used 'a few more days.'" "Mr. Currie says 'we will get it through in three or four days," and he said "it was alright."

No offer was obtained by the plaintiffs and tendered to the defendant till at the earliest the 7th May—I think the

8th May. In the diary of the 8th May is an entry: "Hoskin. Sr., refuses to sell estate to client; says he sold property yesterday to his son." This is in ink and it is the entry "on the Wednesday," which would not suit the plaintiffs' case—it is scored through, and under Tuesday, May 7th, is inserted an entry in pencil "presented offer to Hoskin."

In any case, 7th or 8th, that was beyond the time for which the plaintiffs were authorized to sell—and their agency had come to an end.

I think the appeal should be allowed with costs and the action dismissed with costs.

HON. SIR. GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree.

HON. MR. JUSTICE BRITTON:—I agree in the result.

HON. MR. JUSTICE MIDDLETON. JANUARY 8TH, 1913.

COPELAND v. WAGSTAFF.

4 O. W. N. 567.

Principal and Agent—Real Estate Broker—Action for Commission—Authority—Evidence.

MIDDLETON, J., gave judgment for plaintiff for $1,125 and costs in an action by real estate brokers for commission upon the sale of certain lands, where plaintiff with authority had brought about the purchase, although the sale was not consummated until some months after the introduction, and in the absence of the agent, and neither vendor, nor purchaser thought a commission was payable.

Action to recover a commission, tried at Toronto, 4th January, 1913.

Hellmuth, K.C., for the plaintiff.

R. H. Greer, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The plaintiffs are real estate agents in Toronto. Prior to the circumstances giving rise to this action, the defendant owned a parcel of land on Queen street, Toronto. In the negotiations the plaintiffs were represented by Mr. Maclaren.

During the summer of 1910, Mr. Maclaren was employed in the office of the Assessment Department, and saw Mr.

Wagstaff with a view to arrange, if possible, for the purchase of part of his property to add to a city park immediately adjoining it. Nothing came of this negotiation.

Shortly thereafter, Mr. Maclaren left the service of the City, and joined the plaintiffs' firm. Being acquainted with Mr. Wagstaff and his property, Mr. Maclaren saw him with a view of obtaining authority to offer the property for sale. The accounts of this interview given by Wagstaff and Maclaren differ widely. Maclaren says that he then received authority to list the whole property for sale at the price of $45,000. This is denied by Wagstaff, who says that Maclaren only asked for authority to sell the east half of the holding, and that he only instructed Maclaren to offer the east half for sale, as he did not desire nor intend to sell the whole parcel.

Maclaren placed the property before Mr. Charles Millar, and the result was that in January Millar purchased the east half for $24,000. Upon this Wagstaff paid the plaintiff a commission, six hundred dollars. Millar subdivided this parcel of land, and, it may be assumed, made some profit.

Wagstaff had his residence on the west half of the land, fronting on Queen street. The land in the rear was not level, and there was some doubt as to the possibility of subdividing it with advantage, owing to the difficulty in securing fall for the sewers. Maclaren assumed that he had some right to sell this remaining property. He says that Wagstaff authorized him to sell it at $35,000. This is denied by Wagstaff.

Maclaren says that he tried to interest Millar, but that Millar would have nothing to do with the property at that price. Some time later, Maclaren desired to obtain a survey, so as to indicate how the land might be subdivided. He says that he saw Wagstaff, and asked him if he had a survey or plan, was told that he had not, and then offered to have a survey made at his own expense, to which Wagstaff assented. Wagstaff denies all this; but the fact is that Maclaren had a survey made and a sketch prepared, which he submitted to Mr. Millar.

Millar subsequently went to the property with Maclaren for the purpose of purchasing, if a price could be arranged. Some doubt and uncertainty exist as to whether there was more than one interview. Maclaren says that there was. Millar and Wagstaff agree that there was one interview only. There is also some doubt as to the date, but I do not think it

material. The one thing that is clear is that Millar offered to buy at $36,000 and Wagstaff refused to sell at that price.

Maclaren was present on that occasion; and, as far as I can see, Wagstaff must have understood that he was present because he supposed himself to be acting as agent in the negotiation. I cannot understand how Wagstaff could have any other impression. The agent who had sold the east half to Mr. Millar, and who had received a commission, brought Millar again to make an offer for the west half; and I do not think Wagstaff could have failed to suppose that Maclaren was contemplating the payment of further commission.

Shortly after this, Millar left Ontario for a trip, and did not return for several months. On his return the matter came again to his mind. He went out and saw Wagstaff, went with him over the property, and satisfied himself that there was no real difficulty connected with the drainage. He then attempted to buy, and ultimately did buy at $45,000. No doubt as an inducement to Wagstaff to sell, Millar pointed out to him that this sale was being made quite independently of any agent and that there would be no commission to pay.

I have no doubt that Mr. Millar believed this; but neither side asked him the foundation for his belief. I assume from what he did say that his belief rested upon the fact that he had gone to Wagstaff on this occasion, and made this offer, entirely apart from any real estate agent.

I have come to the conclusion that I must accept Mr. Maclaren's statement as to his employment as agent. All that he did is consistent with this. The statements he made to Millar, as testified to by Millar, agree with this. The preparation of the plan, and the endeavours to induce Millar to buy, would never have been undertaken if Maclaren had not believed himself to be authorized.

Maclaren is an intelligent and experienced agent. I do not think he would have undertaken to deal with the property without first satisfying himself as to his position.

I believe Wagstaff honestly thought when he sold to Millar that because the sale was being made without an agent being present there would be no commission to pay; and he now keenly resents a claim which he believes to be unjust. Yet I fear that he is liable for a commission.

In some respects Mr. Wagstaff's memory has proved itself treacherous. I think the original instruction applied to the whole lot. I have no doubt that at different times he thought

of subdividing the property and selling it himself; but I do not think that he ever went so far as to countermand the instructions given to Maclaren. He had given somewhat similar instructions to McLaughlin; he had given him a price upon the whole lot; and he never countermanded these instructions.

I do not think anything would be gained by a discussion of the cases. The law is plain enough: it is authoritatively expounded for me in *Burchell* v. *Gowrie*, C. R. [1910] A. C. 250, and in *Stratton* v. *Vachon*, 44 S. C. R. 395; with which must be read the equally important and authoritative judgment in *Toulmin* v. *Millar*, 58 L. T. 96.

I think there was here a contractual relationship and that Maclaren was instrumental in bringing about the sale by Wagstaff to Millar, although he had nothing to do with the actual making of the particular contract by which Millar purchased.

There will, therefore, be judgment for the plaintiff for commission at the ordinary rate of two and a half per cent.—$1,125—and interest from the date of the writ, 11th May, 1912; with costs.

DIVISIONAL COURT.

NOVEMBER 14TH, 1912.

WILKINSON v. CANADIAN EXPRESS COMPANY.

4 O. W. N. 290.

Contract—Express Company—Loss of Articles in Transit—Limitation of Liability—Only Binding on "Shipper"—Common Carrier.

Action for $500 damages for the loss of a magic lantern and outfit, lost in transit. Plaintiff had carried the same to Stratford as baggage and left them there by inadvertence. He notified the defendants and they received them from the Grand Trunk Rw. Co. for shipment to him, entering into their usual shipping contract with the railway as shipper, by which their possible loss was limited to $50.

WINCHESTER, Co.C.J., *held*, that plaintiff was bound by the terms of the shipping contract and could not recover above $50.

DIVISIONAL COURT *held*, that the contract in question was not with plaintiff but with the railway as shipper, and did not affect him and that therefore, he could recover from defendants the full amount of his loss.

Appeal allowed and judgment entered for plaintiff with costs.

Appeal by plaintiff from judgment of WINCHESTER, Co.J., York, awarding plaintiff $50 in an action for $500 damages for loss of a magic lantern and outfit, committed to defendants for carriage by them.

T. N. Phelan, for the appeal.

W. E. Foster, contra.

The plaintiff, a clergyman, living in Aylmer, had a magic lantern outfit, which had been carried on the G. T. R. to Stratford in a trunk, as baggage. He left this in the baggage-room at Stratford: he went to Woodstock. From that city he wrote a letter to the "Canadian Express Company, Stratford," instructing the company to ship it from Stratford to Galt. The letter is not produced: but there is produced a letter written immediately after as follows:—

"Canadian Express Co., Woodstock, June 5, 1911.

"Stratford.

"I, in my haste, dropped my previous letter in the office forgetting to enclose the cheque of my box. Find it enclosed with this.

Yours, etc.,

T. J. Wilkinson."

The agent at the depot at Stratford for the defendants received these letters in due course of mail: he took the check to the G. T. R. baggage room, paid 55 cents for warehousing charges, gave up the check, received the trunk, made out the usual receipt and gave it to the baggage man who probably threw it into the waste paper basket. The receipt read "Received of G. T. R. (herein called the shipper) 1 box said to contain not given valued at not given 100 dollars addressed Rev. Wilkinson, Galt, which the Canadian Express Company herein called the Company agrees to carry and deliver upon the terms and conditions on the back hereof to which the shipper agrees and as evidence of such agreement accepts this shipping receipt . . .

For the company,

A. Jones, Agent."

On the back were printed certain conditions of which the following seem to be material.

"2. This agreement shall extend to and be binding upon the shipper and all persons in privity with him claiming or asserting any right to the ownership . . of the shipment . . .

"3. The liability of the company upon any shipment is limited to the value declared by the shipper . . . If the shipper does not declare the value of the shipment, liability is limited to $50 . . ."

The trunk went astray and cannot be traced: and the defendants paid $50 into Court and claimed that they are not liable for more. The trial Judge Winchester, Co.J., gave effect to this contention.

HON. MR. JUSTICE RIDDELL:—Much argument was addressed to us to induce us to hold that the special contract did not apply in the present case and several cases were cited, amongst them: *Lamont* v. *Canadian Transfer Co.*, 19 O. L. R. 291; *Corby* v. *G. T. R. Co.*, 23 O. L. R. 318; *James* v. *Railway*, 6 Can. Rw. Cas. 309; *McMillan* v. *G. T. R.*, 12 O. R. 103; S. C. 15 A. R. 14; 16 S. C. R. 543.

I do not think it necessary to decide that point because assuming that the contract does apply it does not bind the plaintiff. The language is the language of the Express Company—they say in so many words that in that contract "shipper" means the G. T. R.—and the contract is in terms binding upon the shipper and his privies. The plaintiff for the purposes of the special contract is neither the shipper—that is the G. T. R.—nor a person in privity with him; the plaintiff is not therefore within the special contract at all. What has happened is that the defendants on being requested to carry certain goods for the plaintiff take it upon themselves to purport to carry them on a special contract with someone else.

They are liable in my view for the full value.

We are told that the Railway Board have approved of this form as the only form to be used. This must of course be read as meaning the only form of contract "impairing, restricting or limiting the liability of" the company, R. S. C. ch. 37, sec. 353—it does not mean that the company may not carry on its common law rights so long as no attempt is made to impair, restrict or limit its liability—e.g., there is nothing to prevent the express company agreeing to pay twice the value of the goods carried, the order of the Railway Board notwithstanding, and in this case what they have done is to take the plaintiff's goods as a common carrier, and lost them without limiting their liability to him.

The evidence justifies a verdict for $280, and I think the plaintiff should have judgment for that sum with costs here and below.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., agreed in the result.

HON. MR. JUSTICE LENNOX, also agreed.

HON. MR. JUSTICE MIDDLETON. DECEMBER 28TH, 1912.

BRISTOL v. KENNEDY.

4 O. W. N. 537.

Pleading—Statement of Defence—Embarrassing Paragraphs—Meaning of—Pleading Bad in Law—Demurrer.

MIDDLETON, J., on an appeal from the Local Judge at Hamilton striking out certain paragraphs of the statement of defence, restored them on the ground that although the defence sought to be set up by them was not clear, yet possibly they might aid in establishing a valid defence to the action and should have the benefit of any doubt.

Discussion as to circumstances under which a pleading is embarrassing with reference also to demurrers.

Appeal by defendant Mary Kennedy from an order of the local Judge at Hamilton, striking out paragraphs 1 and 2 of the statement of defence and setting aside the jury notice.

J. Mitchell, for the defendant, Mary Kennedy.

H. A. Burbidge, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—As the case is not one which in my opinion should be tried by a jury, I do not think I should interfere with what has been done by the learned local Judge in reference to the jury notice.

Under our present system of pleading it is difficult to maintain an order striking out a part of a pleading. As pointed out by Mr. Justice Bleckley, in *Ellison* v. *Georgia Railroad*, 87 Georgia 691, in every logical and well-constructed universe there must necessarily be much destructive work to be done. In the sphere of law this destructive work was assigned to the demurrer as a legal devil, always present and always ready, not having any particular claim upon

modern emotion, but still entitled to some measure of co-operation, and even of sympathy.

In Ontario we have advanced far beyond this stage; as by Rule 259 demurrers are forbidden, and there is substituted the procedure by which a point of law is raised in the pleadings which is to be disposed of at the trial unless a special order is made that it be earlier dealt with.

That destructive agent, thus forbidden access to the veritable paradise to be found in modern pleadings, is restless—like his prototype—and seeks to intrude himself, clothed in different garbs, yet intent on exercising his destructive energy. So we find him sometimes, as here, seeking to disguise himself in such wise that he shall not be recognized, in the garb of a motion to strike out a pleading on the ground "that the same tends to prejudice, embarrass, and delay the fair trial of this action."

The learned counsel for the plaintiff argued that such a motion was equivalent to a demurrer. In this I think he is not correct, because, prior to the passing of the Rule in question and while demurrers were still in vogue, there also existed the Rule authorizing a motion against pleadings as embarrassing.

The distinction between an embarrassing pleading and a pleading bad in law is not always easy to draw. This distinction is pointed out in *Glass* v. *Grant*, 12 P. R. 480, and in *Stratford* v. *Gordon*, 14 P. R. 407. Embarrassment is there defined as "bringing forward a defence which the defendant is not entitled to make use of."

Here, what is alleged is that the facts do not shew a defence at all; and although I am quite satisfied from what took place upon the argument that the defendant counsel is not at all prepared to define what defence is intended to be pleaded, and would be most embarrassed if driven to clothe his thoughts in language of precision, yet I am not sure that there is not something, as said by Armour, C.J., "obscured as it no doubt is by the verbosity which now passes for pleading"—some attempt, feeble and perhaps futile—to suggest such a case as was found adequate in *Adams* v. *Cox*, 35 S. C. R. 393, and *Bank of Montreal* v. *Stuart*, C. R. [1911] 1 A. C. 1; and I fear that the elimination of the paragraphs in question would prove to be a greater source of embarrassment at the trial than allowing them to remain; as they look like an attempt to set forth some facts which go to justify the allegation that the signature to the document in

question was procured by fraud and misrepresentation. The importance of avoiding anything like a determination of any question touching the merits of the action on a chamber motion, is emphasized, when it is borne in mind that there is a very limited right of appeal from Chamber order. The policy is to leave all questions both of law and fact disposed of at the trial.

I would, therefore, restore the paragraphs in question, and make the costs—both here and below—in the cause.

MASTER IN CHAMBERS. DECEMBER 10TH, 1912.

NIAGARA NAVIGATION CO. v. NIAGARA-ON-THE-LAKE.

4 O. W. N. 459.

Venue—Change—Toronto to St. Catharines—Alleged Trespass—Not a Claim for Recovery of Land—Con. Rule 529 (c)—Convenience.

MASTER-IN-CHAMBERS *held* that while an action for trespass and the defence thereto may involve the title to land it cannot be said to be for or to include a claim for the recovery of land so as to come within Con. Rule 529(c) providing that the trial must take place in the county where the land is situate.

Motion by defendants to change venue from Toronto to St. Catharines.

R. H. Parmenter, for the defendants.

T. L. Monahan, for the plaintiffs.

CARTWRIGHT, K.C., MASTER:—The motion was apparently made on the assumption that the action was one for the recovery of land and so coming within C. R. 529 (c). But on the pleadings this seems to be erroneous.

The statement of claim alleges a trespass by the defendants on the land of the plaintiffs and asks an injunction against any repetition of the acts complained of and a declaration that defendants had no right to enter on said lands or any part thereof.

The statement of defence alleges that the lands in question are part of a public street or highway known as Nelson street, which was opened by a by-law of the defendant corporation number 619; and that the trespass complained of consisted in the removal of a fence across the said highway erected by plaintiffs, on their refusal to remove the same

and give up possession of the said highway. There is no relief asked by defendants by way of counterclaim.

The plaintiff in reply set up title by possession. Though the title to land is involved the action cannot be said to be for or include a claim for the recovery of land. Had the defendants been plaintiffs then it could have been so framed as to come within Rule 529 (c).

The motion fails on this ground and there is no sufficient, if any, evidence to shew a preponderance of convenience.

At present the motion should be dismissed with costs in cause to plaintiffs. This will be without prejudice to a motion on further and better material if defendants still think it worth while to move. As there will be no sittings at St. Catharines until 3 months hence while the case could be heard here early in January, they may not improbably acquiesce in a trial here so that the matter may be disposed of as soon as possible.

HON. SIR G. FALCONBRIDGE, C.J.K.B. DEC. 31ST, 1912.

MAITLAND v. MILLS.

4 O. W. N. 557.

Negligence—Master and Servant—Workmen's Compensation for Injuries Act—Unguarded Circular Saw—Evidence.

FALCONBRIDGE, C.J.K.B., dismissed an action under the Workmen's Compensation for Injuries Act for damages sustained by reason of contact with a circular saw, where plaintiff had failed to prove negligence or defective machinery or system.

Action under the Workmen's Compensation for Injuries Act, tried at Port Arthur for injuries received, alleged to be due to negligence of the defendant and to the defective condition and arrangement of the ways, etc., by reason of which plaintiff's arm came in contact with a circular saw while he was piling, or throwing, wood, which had been operated on by the saw.

H. Keefer, for the plaintiff.

D. J. Cowan, for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—There was no evidence adduced by plaintiff to shew that it was practicable entirely to guard the saw, but there was evidence the

other way, of one Curtis, a carpenter and wood sawyer; and of the defendant, who further swears that it is a standard machine made in the United States. I saw the machine and made a suggestion about a hood at the back, which would be pushed backward by the wood being pushed forward into the saw. But two objections to this were pointed out by Curtis, viz., the difficulty about making the hood strong enough; and secondly, the probability of its interfering with an iron hoop which goes back as the saw progresses.

On every material point the plaintiff was contradicted—in most cases by independent witnesses. He swore that he was told to throw the blocks of wood over the top of the waggon, which constituted the platform holding the saw. Defendant swears that is not true; that it would be a most dangerous process. Curtis and Leavens both swore that that would be a most dangerous process; if the wood in progress touched the saw, it would be hard to say what might happen. Then plaintiff swore that he did not carry any of the wood around the back of the waggon, and that there was not room to do so. Mrs. Hamilton, wife of the person for whom the wood was being sawed, said she saw both plaintiff and defendant carrying wood around, and saw none thrown over the machine. Hamilton himself swears it would not be possible to throw these blocks of wood over the waggon all the afternoon, and that there was plenty of room—seven or eight feet—between the waggon and the ditch (plaintiff had sworn there was not). Defendant and his wife both swear (which plaintiff denied) that plaintiff said he blamed no one for the accident but himself. I don't attach very much importance to this last piece of evidence, as it is generally put forward in these cases.

The plaintiff entirely fails to establish every material fact which it is necessary for him to prove in order to succeed. He must fail, unless employing a man to work about a circular saw is a case of *res ipsa loquitur*. His action is, therefore, dismissed, but without costs.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. DECEMBER 4TH, 1912.
HON. MR. JUSTICE RIDDELL. DECEMBER 14TH, 1912.

RE STRATFORD FUEL, ICE, CARTAGE & CONSTRUCTION CO.

4 O. W. N. 414, 497.

Company—Winding-Up—Ranking as Creditor—Principal and Surety—Compromise of Claim—Subrogation—Rule Against Double Ranking—Leave to Appeal.

Appeal by liquidator from decision of Local Master at Stratford allowing certain claimants to rank as creditors of an insolvent company for the sum of $4,800, being the amount paid by them to the Traders Bank as guarantors of the indebtedness of the company. At the time of the winding-up the bank had been a large creditor of the company and the holder of certain securities, the validity of which was attacked by the liquidator. The action was compromised and the bank agreed not to rank on the estate in the hands of the liquidator, but expressly reserved its right against the guarantors of the indebtedness. As the bank was entitled to compromise under the terms of its guarantee it immediately collected the above sum of $4,800 from the guarantors, the claimants herein.

MIDDLETON, J., *held*, that the claimants were subrogated to the rights of the bank and to permit them to rank would be a violation of the rule against double ranking.

Appeal allowed with costs.

RIDDELL, J., gave leave to appeal from the above judgment to the Court of Appeal.

Appeal from the decision of the Master at Stratford, allowing the claimants Coughlin and Irwin to rank for the sum of $4,800, being an amount paid by them to the Traders Bank under a guarantee of the indebtedness of the company in liquidation. The claimants were admittedly entitled to rank for a further sum of $400.

R. T. Harding for the liquidator.

R. S. Robertson, for the claimants.

HON. MR. JUSTICE MIDDLETON:—At the date of the liquidation, the company was indebted to the Traders Bank for about $40,000. The bank held as security for its claim, *inter alia*, a mortgage upon the real estate and certain other assets of the company for $25,000. They also held a bond, executed by the present claimants and others, by which they jointly and severally guaranteed payment of the ultimate balance due by the company to the bank, and by which they agreed that the bank should be at liberty to compound with the company and to take and give up any security without discharging the claimants as sureties; in all of these matters the bank being at liberty to exercise its own discretion.

After the making of the winding-up order an action was brought by the liquidator attacking the validity of the securities. This action was compromised; and the rights of the parties depend altogether upon the true effect and meaning of this compromise.

At the time of the making of the compromise, by agreement between the parties the property covered by the mortgage attacked had been sold and had realized $25,000. This sum was held by the bank, subject to the litigation. By the compromise the bank repaid $1,000 of this to the liquidator, retaining $24,000. The bank also agreed not to rank upon the estate in the hands of the liquidator; and the bank further reserved its rights against the guarantors of the debt.

The learned Master has held that the effect of this agreement is that the bank retained $24,000 on account of its preferred claim, and that the agreement not to rank was personal to the bank, and that the effect of the reservation of the bank's right against the sureties was to reserve to the sureties the right, upon payment of the balance due, to rank against the estate. He has accordingly allowed the claim.

I do not think that this is the true meaning of the compromise made. It is elementary that there cannot be double ranking in a liquidation. The claim of the bank was entitled to rank once, and once only. If the sureties paid before the claim was filed, they might rank; but after the bank proved its claim the sureties could not also prove, but upon payment they would be subrogated to the bank's rights.

It is true that the agreement is an agreement not to rank; but this is a matter of form only. In substance the transaction was this: The bank had a claim of $40,000. Of this they claimed a preference to the extent of $25,000, and as to the balance they would be ordinary creditors. They agreed to accept $24,000 in full of all their claims against the liquidator, both as preferred creditors, and as unsecured creditors. Under the terms of the guarantee they had the right to make this compromise, and the sureties could not complain. The bank reserved its right against the sureties, but upon payment they can only be subrogated to the rights of the bank at the date of payment, and as the bank had agreed to compound the claim against the liquidator, the sureties can have no higher rights than the bank itself had; and as the $24,000 was paid in satisfaction of all the claims against the funds in the liquidator's hands, to permit the

sureties now to rank would be to violate the rule against double ranking.

The appeal should, therefore, be allowed; and the liquidator should be entitled to his costs against the respondent. There should be no costs of the proceedings in the Master's office, as there success was divided.

The claimants on December 14th, 1912, moved before RIDDELL, J., for leave to appeal to the Court of Appeal from the above judgment.

The same counsel appeared.

HON. MR. JUSTICE RIDDELL:—I am asked to allow an appeal to the Court of Appeal under R. S. C., ch. 144, sec. 101 (c), from a judgment of Mr. Justice Middleton of December 4th, 1912.

There is no such stringent rules laid down for such a motion as this, as in the new C. R. 770 (1278); and I think the creditor should be allowed to substantiate his claim in the Court of Appeal if he can. The case is of importance, and not wholly clear.

Costs in the appeal.

HON. MR. JUSTICE MIDDLETON. DECEMBER 11TH, 1912.

RE HUNTER.

4 O. W. N. 451.

Interpleader—Execution Creditor—Seizure by Sheriff of Daily Proceeds of Business—Claim of Administratrix of Debtor—Lien—1 Geo. V. c. 26 s. 52.

MIDDLETON, J., held, that where a sheriff had seized the daily proceeds of a business under an execution that the execution creditor had a lien on such moneys in priority to the claim of the administratrix of the execution debtor.

Judgment of Local Master at Port Arthur reversed with costs.

Appeal by Dominion Brewery from the decision of the Master at Port Arthur, awarding certain sums of money seized by the sheriff under appellants' execution to the administratrix of the execution debtor.

W. R. Smyth, K.C., for Dominion Brewery.

H. E. Rose, K.C., for administratrix.

HON. MR. JUSTICE MIDDLETON:—The proceedings in this matter appear to be in a state of great confusion. An interpleader issue was directed, and apparently in some way referred to the Master for adjudication. The Master seems to have dealt with the question between the parties in the administration action, and it is very doubtful whether he had any jurisdiction. Counsel, however, shewed their good sense by agreeing that the real question at issue between the parties should now be determined, quite irrespective of questions of form and practice.

On the 5th of September, 1908, the Dominion Brewery recovered a judgment against the late George Hunter, who was carrying on business under the name of Hunter & Co. Execution was duly issued and placed in the hands of the sheriff. At that time another execution was in the hands of the sheriff at the instance of the Soo Falls Brewery. That company had also a chattel mortgage upon the property of the debtor. Apparently there was a great deal of difficulty in ascertaining what the position of the Soo Falls Brewery Company was; but this has now disappeared, as the claim of the Soo Falls Brewery Company has been satisfied, its execution withdrawn, and it now makes no claim to the money in question.

Instead of proceeding to sell under the execution, the sheriff placed his bailiff in possession, and the receipts were turned over by the cashier every day to the sheriff. The situation is indicated by this extract from Youill's evidence:—

"The sheriff's man took mem. of sales made during the day, and at night he and I took the money from the cash register, and he took the money and gave me receipt. That continued daily until June 25th—date of sale to the Western Liquor Company. I do not know the amount of sale to this company. I went out of possession when the sale to the Western Liquor Company was completed and license transferred."

Youill, whom I have called the cashier, occupied an anomalous position. He was a clerk of Hunter's. An arrangement had been made by which a trustee was placed in possession for the benefit of creditors. This arrangement probably never was operated, owing to the fact that the creditors had not assented. The trustee ceased to act, and Youill purported to succeed him. In reality he was probably the bailiff of the Soo Company under its mortgage.

The one thing which is certain is that the sheriff received this money; and as he then had two executions in his hands, he received it by virtue of his execution, and I do not know whether it is material, but I think that each time that he received the money must be regarded as a levy made upon it.

After the death of Hunter his administratrix claimed this money. The Master by his report has found in favour of her claim. This ignores the provision of the Trustee Act, 1 Geo. V., ch. 26, sec. 52, which provides that the distribution among the creditors in the case of an intestate, being insolvent, shall be *pari passu* "but nothing herein shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal property."

I think it is clear that the execution creditor had a lien upon the moneys received by the sheriff and that this lien is entitled to prevail over the claim of the administratrix.

Where the Legislature has intended that upon the happening of any event the right of the execution creditor shall be defeated, it has said so in language free from ambiguity. An assignment and a winding up order are both given priority over executions not completely satisfied by payment. Here, on the other hand, the statute protects the existing liens.

The appeal should, therefore, be allowed, and the execution creditor should have his costs against the administratrix.

Some question was raised upon the argument as to the exact balance due upon the execution. If this cannot be arranged between counsel, I may be spoken to again about it.

HON. MR. JUSTICE KELLY. NOVEMBER 22ND, 1912.

PIGDEN v. PIGDEN.

4 O. W. N. 391.

Cancellation of Instruments—Deed from Mother to Daughter—Action by Aged Father—Duress and Undue Influence—Refusal of Costs.

KELLY, J., dismissed an action by a father eighty years of age to set aside a deed of certain lands to his daughter made by his wife, defendant's mother, a month before her death, on the ground of duress and undue influence, but refused defendant costs on account of her unfilial conduct.

Action by a father against his daughter to set aside a deed to her of certain lands made by plaintiff's deceased wife and for a declaration that he is the owner of the said lands.

E. J. Butler, for the plaintiff.

E. G. Porter, K.C., for the defendant.

HON. MR. JUSTICE KELLY:—Plaintiff is the father of the defendant. Plaintiff's wife, the mother of the defendant, died on December 2nd, 1911. Plaintiff is in his eighty-first year; the defendant is forty-seven years old and is unmarried.

Until about ten years ago, defendant lived in her parent's home as a member of the family, receiving, as she says, her board and clothing and occasionally a small sum of money, principally around Christmas time. From that time until nine months before the death of her mother, defendant was away from home working and earning money for herself, coming home, however, from time to time, and remaining for short periods. There is no evidence that she contributed anything during that time to the funds of the parents.

During the last nine months of her mother's life, defendant lived at home and cared for her mother, who was then in a weak state of health; the mother and daughter appear to have been on amicable terms.

In October, 1903, the purchase was made of the property now in question, and the conveyance by the vendor was made to the plaintiff's wife.

On November 2nd, 1911, just one month before her death, plaintiff's wife made a conveyance to the defendant of this property. This was done without the knowledge of the plaintiff, who did not become aware of it until a couple of weeks after his wife's death.

Plaintiff has brought this action to have the deed to the defendant cancelled, for a declaration that he is the owner of the lands, and to restrain defendant from dealing therewith, and that she be ordered to account for the rents and profits thereof. He alleges that though standing in his wife's name, the property was and is his, and that defendant obtained the conveyance from her mother through coercion, duress and undue influence.

A personal representative of the estate of plaintiff's wife has not been appointed, and the estate is not represented in the action. All the necessary parties are therefore not before the Court, but notwithstanding this, and in the hope of bringing to an amicable conclusion the difference between the parties, I heard the evidence adduced by plaintiff, at the close of which a motion was made for non-suit both by reason of want of parties and on the evidence.

The nonsuit is granted, but without costs.

I think it proper that I should state why costs are refused to defendant. The evidence reveals not only lack of consideration on the part of the defendant towards her father but a harshness of treatment which one cannot well understand.

Plaintiff is evidently a man who has fulfilled his duties towards his family and his employers. He has now attained the age when he is unable to work as he did in his earlier years, and the only means he is possessed of is cash to the amount of a little more than $200.

Defendant soon after her mother's death ordered her father out of the house on the property in question and locked him out of it, and she is now in receipt of the rents. She holds a position by which she supports herself, but she is unwilling to give sufficient consideration for her aged father to accede to the request made by him when giving his evidence, that he be allowed to remain in the house while he lives. He states that this is all he wants.

If I allowed defendant costs against the plaintiff, it would go a long way towards exhausting the little means he has and thus hastening the day when he will be penniless, unless he can earn something towards his support.

For these reasons, therefore, there will be no costs against the plaintiff.

HON. SIR JOHN BOYD, C. DECEMBER 7TH, 1912.

STORIE v. HANCOCK.

4 O. W. N. 459.

Vendor and Purchaser—Specific Performance—Authority of Agent.

BOYD, C., gave judgment for plaintiff in an action for specific performance, holding that the agreement for sale had been duly established.

Action for specific performance of an agreement to sell plaintiff a farm for $3,000.

J. F. Grierson, for the plaintiff.

W. C. Chisholm, K.C., for the defendant.

It is plain from all the correspondence and is vouched for by the oath of Meharry, not contradicted by the defendant, who was in Court, that the said Meharry was acting as agent for the vendor and was recognised as so acting and authorised so to act in the sale of the farm at Oshawa—now in question (50 acres.)

In letter of June 7th, 1911, Meharry asks Hancock as to his price of the lot. The defendant writes on 10th June: "I will accept $3,000 if sold at once."

Meharry writes to him on 25th June in a letter not produced but which is referred to in the answer from Hancock dated 29th July; speaking of this land he says: "My object in selling is that I am too far away to look after it and I would much rather make a cash sale and can give a purchaser the very best terms. My price is $3,000. I will accept $500 cash and the balance to suit the purchaser. If I do not sell within the next year I will set out the whole 50 acres in an orchard."

It is to be noted that this letter written from British Columbia did not reach the agent in due course but was received by him some time before 30th August. Meanwhile on 30th July Mr. Meharry offered the place for $3,000 to Mr. Grierson for a client of his: and on 23rd of August Mr. Grierson for his client wrote that his client had decided to buy the place at $3,000 subject to a good title and free from incumbrances. The letter of 29th July reached Meharry about this time and he wired the defendant at

Lethbridge, "Your letter delayed: sold farm your price. Answer before Friday." It appears that 3 messages had been sent in search of the defendant before he was reached with this one. To this Hancock makes reply on same date (30th August.)

"I do not fully understand your message. If the price you have sold it is $60 per acre I will accept subject to mortgage of about $900 Canada Permanent."

Meharry advised Grierson by letter of same date that Hancock had accepted the $3,000 offer and that there was a mortgage of $900 against the place and the balance to be cash.

On September 6th Meharry writes to Hancock asking him to make out the deed to the purchaser F. Storie (the plaintiff) and asking for privilege of paying all in cash or the option of having the mortgage remain.

On 18th September, 1911, Hancock answers this letter of the 6th saying that he is not sure as to the description of the property and asking that the purchaser prepare the deed . . . "If you will send the papers through I will sign and return as soon as possible."

Meharry had a conveyance prepared after the receipt of this letter and sent it off to Hancock for signature to an address furnished by the defendant: but the letter was returned unopened. The deed was prepared by Mr. Harris the solicitor named in the correspondence with Hancock as making sale and was returned to him. The same deed was again forwarded in September or October to the defendant's address in Winnipeg and has not come back to the sender, nor is it produced by the defendant. He has not denied having received it.

The next letter is entered: is one from Hancock to Meharry (undated but probably about end of October) to this effect: "It being now six weeks since I authorised you to accept a net price of $60 per acre for my farm and I have had no further word from you I presume the deal has fallen through and accordingly withdraw my offer." This was answered by a telegram of 27th October by Meharry "Letter received: sale closed as instructed six weeks ago: deed forwarded and returned here, sent back to you ten days ago. Please sign and return: part of money paid to me, presume you have received deeds: if not reply." There was no reply and the action was brought in March, 1912, for specific per-

formance. The defence is a denial of any contract, and of any valid contract by a competent agent, sufficient to satisfy the Statute of Frauds. The defence is not proved and in my opinion the plaintiff is entitled to the relief he seeks by way of specific performance with costs to be deducted from the price.

HON. SIR G. FALCONBRIDGE, C.J.K.B. DEC. 28TH, 1912.

TRIAL.

McGREEVY v. HODDER.

4 O. W. N 536.

Vendor and Purchaser—Specific Performance—Laches—Moneys Paid as "Deposit"—Return of—Costs.

FALCONBRIDGE, C.J.K.B., dismissed action for specific performance of an agreement to sell land where the plaintiff had made default for some four years in his payments and the property had been resold, but he gave judgment for plaintiff for $200 moneys paid on account of the purchase-price.

No certificate as to costs.

Trial at Port Arthur.

An action for specific performance, or in the alternative, damages.

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

M. J. Kenny, for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:— By four several agreements dated 16th January, 1907, made between the defendant (vendor) and the plaintiff (purchaser) defendant agreed to sell four lots in the River Park addition, Port Arthur, for $100 each, payable $25 on the date of the agreement, (receipt of which was acknowledged), and the balance in four, eight and twelve months with interest at seven per cent. per annum. The last portion of each agreement is as follows:—

"The purchaser to be allowed five days to investigate the title at his own expense, and if within that time he shall furnish the vendor in writing with any valid objection to the title, which the vendor shall be unable or unwilling to remove, this agreement shall be null and void, and the de-

posit money returned to the purchaser without interest. Time to be of the essence of this agreement. The vendor to pay the proportion of insurance premiums, taxes, local improvements, assessments, sewer rates, etc., of whatever kind, to this date, after which date the purchaser will assume them."

The plaintiff paid the second instalment of purchase money on the 18th of May, 1907, being in all another payment of $100.

This was a speculative property. There was what defendant calls a "little flurry" in 1907. It was supposed that a certain industry was about to be established in the neighbourhood, but that did not take place, so there were no sales for four years but the property "came up" in 1911. The defendant paid taxes for the five years—about $2 a year on each lot. Defendant says he usually notifies purchasers that their payments are due, and he supposes that was done in this case, that is by simply mailing a "little bill" of the amount. About the autumn of 1911 defendant assumed to rescind the agreements and sold the lots to the Alberta Land Company.

I am of the opinion that the laches of the plaintiff entitled the defendant to come to the conclusion that plaintiff had abandoned the agreement and to resell, and I do not decree specific performance. I do not, however, think that the defendant is entitled to retain the money paid on account of the property. It is true that in the clause which deals only with investigation of the title, the expression used is "the deposit money;" but the sums paid constitute one-half of the whole purchase money and I think both payments ought to be treated as payments on account, and not as mere deposits. Plaintiff will have judgment for $200 with costs. The law will take its course as to the scale of costs and right of set-off. I do not give any certificate one way or the other.

Thirty days' stay.

HON. MR. JUSTICE SUTHERLAND. JANUARY 10TH, 1913.

STRONG v. CROWN FIRE INS. CO.

4 O. W. N. 584.

Insurance—Fire—Action on Policies—Retrial—Consolidation of Actions—Value of Stock-in-Trade—Evidence—Former Fire Loss—Non-Disclosure of—Materiality—Time for Bringing Action—Variation of Statutory Condition—Unreasonableness—Insurance Act 1912. 2 Geo. V. c. 23—Retroactivity—Interest—Proofs of Loss—Costs.

Actions upon certain policies of fire insurance sent back to the Trial Judge for re-hearing upon the evidence already in and new evidence to be tendered, by the Court of Appeal (22 O. W. R. 734). The judgment at the previous trial is reported at 20 O. W. R. 901.

SUTHERLAND, J., *held*, that non-disclosure of a previous trivial fire some years previous to the making of the policies in other premises in another town, where the company holding the risk had continued to do so after payment of loss was not a fact material to the risk.

Re Universal Non-Tariff Fire Ins. Co., L. R. 19 Eq. 485, referred to.

That a provision in a policy that action shall be brought within six months after the occurrence of the loss is unjust and unreasonable.

Merchants Fire Ins. Co. v. *Equity Fire Ins. Co*, 9 O. L. R. 241, followed.

That provisions of the Insurance Act 1912 (2 Geo. V., c. 23) dealing with proofs of loss and time for bringing action applied to this action, as the provisions in question dealt solely with matters of procedure and therefore were to be given a retroactive effect, the result being that the actions which were formerly held to have been brought prematurely must now be held to have been brought in time.

Review of authorities.

Judgment for plaintiff for the full amount of the policies with interest from the statutory sixty day period and costs.

Action on certain policies of insurance against fire.

N. W. Rowell, K.C., and G. S. Kerr, for the plaintiff.

E. E. A. DuVernet, K.C., A. H. F. Lefroy, K.C., and A. C. Heighington, for the defendants.

This action was tried before and my judgment previously delivered is reported at 20 O. W. N. 901.

An appeal was made to the Court of Appeal and upon the argument exception was taken by the defendants to a paragraph in the judgment as formally settled.

After the argument before the Court of Appeal and while judgment was still pending, an application was made to me to strike out of said judgment the paragraph in question. Under the circumstances, I declined to make any order, see 22 O. W. R. 309.

In consequence of the point so raised before the Court of Appeal a new trial was ordered, 22 O. W. R. 734.

Clause 3 of the formal certificate of that Court is in part as follows:—

"And it is further ordered and adjudged that the parties in the secondly above intituled action shall be entitled to deliver pleadings in the said action and that both the above said intituled actions shall be re-heard or re-tried . . . upon the evidence already given . . . and such further evidence (if any) as the parties hereto may offer without prejudice to any order which the trial Judge may make as to consolidation under sec 158 of the Ontario Insurance Act, 1912, upon the completion of the pleadings in the later action."

Pleadings were then delivered in the said secondly intituled action and a motion under said sec. 158 made by plaintiffs to consolidate the actions. In consequence I made an order on the 17th October, 1912, from which I quote as follows:—

"It is ordered that the above actions be and they are hereby consolidated and that they be hereafter carried on as one action, that the pleadings in the secondly above intituled action, including any defences raised in the first intituled action, and not included in the secondly intituled action, do stand as the pleadings in the consolidated action, and that the action do proceed to trial in the manner provided in said certificate."

The action then came on again for trial on the 12th, 13th and 24th days of December, 1912.

While there has been a considerable amount of new evidence offered at the second hearing, I am unable, after a careful perusal and consideration thereof, to see that the defendants' case has been made substantially stronger.

A main ground on which I based my previous judgment was that the stock-taking in August, 1910, was well and accurately done and its results carried honestly and carefully into the three books constituting exhibit 6, and that following the business down from that date it was reasonably established that at the time of the fire there was in the store approximately $25,000 worth of goods estimated at cost prices.

Some additional evidence was given to shew that a less amount of stock was transferred from Kingsville to Dresden

than the evidence offered for the plaintiffs seemed to indicate. This additional evidence was not of a very satisfactory character.

There was also some additional evidence dealing with the rate of profits in the business throughout and as to the amount of wages paid the employees, the probable personal and living expenses of Jeffrey, and some other minor matters. Both parties put in additional evidence as to the probable value of the stock at the time of the fire. For the plaintiff, one Markle, a commercial traveller, whose firm had an account with Jeffrey and who was in the habit of calling on him at Dresden every two weeks, testified that in July or August, 1910, he had occasion to look through the stock roughly for the purpose, as he says of "sizing up the stock and comparing it with what he (Jeffrey) happened to have remarked to me before." He says as to the amount of stock, "As I mentioned before, I thought it might be twenty-three or twenty-five thousand dollars; something around those figures." And he further says that he did not notice any "observable change" in the amount of stock after that date up to the time of the fire.

One Heyland, a merchant at Dresden, who carried a stock of from $4,300 to $4,500, stated he would "certainly say that Mr. Jeffrey must have had five times the amount of my stock, while I never went through his stock for the purpose of estimating." He said the few times he was in it was nearly always for the purpose of getting something from Mr. Jeffrey that he was out at the time. Elsewhere, he puts it that his estimate was that it would probably be four times as large. This would make his estimate run somewhere from $18,000 to $22,000.

For the defendants, one Watson, who was apparently a clerk, though not in the employment of Jeffrey, said that he was in and out of the store before the fire, and his estimate of the amount of stock therein was $12,000 to $14,000. He said he had been in the store in December, 1910, two or three times. Elsewhere he said that $14,000 he would put as the outside.

One McKim, who had apparently been a merchant in Dresden, said he saw the stock on Saturday before the fire, having gone in to make a purchase. He was in probably fifteen minutes; just walked through the store and went out,

not being able to get what he wanted. His estimate was $11,000.

This general and indefinite class of evidence is not very satisfactory. The evidence of Markle appeared to me to be perhaps the most reliable of those mentioned, for the reason that he was in the habit of estimating stocks in the interests of his employers and had in a somewhat casual way gone through this stock for that purpose, and apparently to see if some estimate which Jeffrey had given him were reliable.

None of the evidence adduced at the second trial led me to think that I was not justified in commencing with the stock-taking in August, 1910, as the best and safest point at which reasonably definite figures could be arrived at, and from which the business could, with tolerable accuracy, be traced to the time of the fire.

Perhaps the most important additional evidence called on behalf of the defendants was that of a chartered accountant named Gordon, who had, since the former trial, been employed by the defendants and had made a careful examination of the books and documents which had been utilized by the witnesses for all parties in giving evidence at the former trial, and who had also made certain further investigations as to invoices of goods supplied to Jeffrey while carrying on his business. While Gordon's figures as to the amount of stock taken from Kingsville to Dresden, and the amounts on hand at the time of the stock-taking in August, 1910, and at the time of the fire, differed very materially from the estimates made by the assignee and the accountants who gave evidence on behalf of the plaintiffs, he was obliged to admit (see page 170, new evidence) that if the stock sheets were correct there was on hand at the time of the fire $21,000 or more of stock, and that the statement of Strong, the assignee, was practically correct within a thousand dollars.

In the same way, at the former trial Grant, an important witness for the defendants, admitted (see page 148) that assuming that the stock taking set forth in Exhibit 6 was a true stock taking there would be on hand on the date of the fire in the neighborhood of some twenty-three or twenty-four thousand dollars.

On the whole evidence I see no reason to modify my former findings as to the reliability of the stock-taking and its accurate record in Exhibit 6, and to the effect that at the

time of the fire there was in the store approximately $25,000 of goods estimated at cost prices, and I accordingly re-affirm those findings. Nor am I able, from the new evidence offered, to come to the conclusion that my previous findings, that 25 per cent. was a reasonable deduction on cost for estimated profits on sales for the assignee to make in arriving at the amount of merchandise sold and for the purpose of making a valuation thereof, and that ten or twelve per cent. was a fairly liberal reduction on the $25,000 for depreciation of stock, should now be varied. I also re-affirm them.

As to the question of depreciation, Charles D. Cory, a man of much experience in such matters, testified that if he were satisfied in the case of an average stock that it had been written down fairly well at the starting-point he would say 10 per cent. on the whole would be a fair deduction to make for depreciation.

Some evidence was given at the second trial tending to shew that Jeffrey had had in his possession, after the fire, a ledger which would have thrown further light on the questions at issue. The evidence of one Booth was relied on to prove that such a ledger was taken from the safe in the premises after the fire. The other evidence discloses that the purchase ledger (Exhibit 7) and the three stock books, numbers 1, 2 and 13, forming Exhibit 6, were put into the safe over night while the business was being carried on, and were taken from it after the fire. Booth assisted Jeffrey in opening the safe and taking its contents out. On being shewn Exhibits 6 and 7 he says he did not see them at all. He speaks, however, of a much larger and thicker ledger as one of the books taken from the safe. I cannot help thinking he is mistaken in this. Some of the books used in connection with the Kingsville business were apparently destroyed at the time of the fire, and there is a little confusion in the evidence as to a loose leaf ledger and the way in which the credit slips were kept in it or on a file.

An attempt was also made upon the second trial to otherwise discredit the testimony of Jeffrey. In forming my opinion as to the accuracy of the stock-taking and the entries in Exhibit 6, while I place some reliability on the statements of Jeffrey, I also attach some weight to the evidence of the various employees who had a hand in that stocktaking.

Upon the second trial considerable evidence was given as to the place in the store at Blenheim where a former fire

had occurred, and which it was contended on behalf of the defendants that Jeffrey had concealed from the defendant companies when applying for insurance by answering a question as to whether he had or had not had a former fire, in the negative. It was sought to shew that in his former evidence Jeffrey had made inaccurate statements both as to the amount he had claimed he had been paid in connection with that fire, and as to the character of the fire and the place in the store where it had occurred. His evidence at the former trial was to the effect that he had received for his damages from the insurance company in connection with the former fire something over $200, he was not sure of the amount (see page 65). At the second trial he was shewn to have claimed $800 for damages for smoke, and to have received $375 in settlement. I was asked to find from the new evidence that the former fire was something material to the risk, which was undisclosed and would have affected the question of the defendants issuing the policies in question. It was, however, also disclosed that the company which then had the insurance upon Jeffrey's stock had sent a representative to Blenheim to look into the question of the fire, and the amount, if any, to be paid by it to the insured and that having done so the amount of $375 was fixed upon and promptly paid, and that the insurance company continued "on the risk" as it was called in the evidence.

Under these circumstances I cannot help thinking that if these facts had been known to the defendant companies they would not have considered the former fire as a matter which would have materially affected the risk. That view is in accordance with important expert evidence given at the trial. I find, therefore, that under the circumstances, it was not material to the risk. See in *Re Universal Non-Tariff Fire Ins. Co.*, L. R. 19 Equity 485, at page 493.

There is also the fact that the previous fire occurred in connection with other property than that in question. This was dealt with in my former judgment. See *Scott* v. *London & Lancashire*, 21 O. R. 312.

This is one of four actions tried together against insurance companies. Two of the other companies are the Anglo-American Fire Insurance Company, and the Montreal-Canada Fire Insurance Company.

In the "Variations in Conditions" in each of their policies this clause is found: "Condition No. 22 is varied to

read: Every suit, action or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred unless commenced within the term of six months next after the loss or damage shall have occurred.

The fire in question in these actions occurred on the 25th December, 1910. The writs in the original actions were issued on the 26th April, 1911, and in the new actions on the 20th December, 1911. The defendants, therefore, contend that the new writs being issued more than six months after the loss occurred the aforesaid condition of the contracts applies and the plaintiff's cannot recover as to these two companies. In the case of the *Merchants Fire Ins. Co.* v. *Equity Fire Ins. Co.* (1905), 9 O. L. R. 241, at page 247, Meredith, C.J., held that "Statutory Condition No. 22 allows a year after the loss has occurred in which to bring the action, and I am not only unable to hold the variations which the defendants have attempted to impose upon the assured by reducing the time allowed for bringing an action to six months to be just and reasonable, but I am clearly of opinion that on the contrary it is both unjust and unreasonable." Following that authority, I find to the same effect in this case. See also *May* v. *Standard Fire Ins. Co.* (1880), 5 A. R. 605, at 622; *Peoria Sugar Refinery Co.* v. *Canada Fire & Marine Ins. Co.* (1885), 12 A. R. 418; *Marshall* v. *Western Canada Fire Ins. Co.*, 18 W. L. R. 68.

The plaintiffs also claim interest from the 1st April, 1911. In my former judgment I said nothing about any allowance for interest. Before the judgment was settled, on being spoken to about the matter, I intimated to counsel that I thought that I would make no order for the allowance of interest. The Insurance Act, R. S. O. ch. 203, sec. 168, sub-sec. 17, prescribes that "the loss shall not be payable until sixty days after the completion of the proofs of loss unless otherwise provided by the contract of insurance." That was the statute in force when the former action was commenced and tried and when judgment was pronounced on the 2nd January, 1912.

Subsequently, the Ontario Insurance Act, 1912, 2 Geo. V., ch. 33, was passed. Section 247 is as follows: "Sections 162 to 201 of this Act shall come into force on the 1st day of August, 1912, and the remaining sections of this Act shall come into force forthwith." Section 194 sub-sec. 22 is as

follows: "The loss shall be payable in sixty days after the completion of the proofs of loss unless a shorter period is provided by the contract of insurance."

It was contended before that the proofs of loss referred to in sec. 168, sub-sec. 13 (a, b, c), of R. S. O. 203, above referred to, were the proofs of loss relied on by the plaintiffs dated 1st April, 1911, and apparently furnished to defendants on the 4th of that month and did not include proofs which the defendants might require under (d and e).

I dealt with this before, and came to the conclusion that that was not the true view of the matter, and that I could not find that the proofs were reasonably complied with until the 17th March, 1911. That finding was based largely on the fact that up till that time certain invoices and a commissioner's certificate, which, if required by the defendants under d and e., were to be produced had not been. I had thought before and determined that it would be inequitable under sec. 172 (1) for the insurance contracts to be held to be void or forfeited in consequence of the original actions being prematurely brought, or the companies effectually discharged from their liability otherwise under the contracts. If it is necessary I repeat that finding. It is, however, to be noticed that the last portion of section 199 of the present Act goes farther than the old sec. 172 (1), in that it enacts that "no objection to the sufficiency of such statement, or proof, or amendment, or supplemental statement, or proof, as the case may be, *shall be allowed as a defence by the insurer*, or a discharge of his liability on such policy whenever entered into."

The defendants were also objecting to the loss on other grounds than imperfect compliance with the conditions as to proofs of loss. It is now contended by the plaintiffs that the Act of 1912 applies to the present action, and that the result of the variations in the sections referred to by the Act of 1912 is that the original actions were not prematurely brought.

I am inclined to think that this contention is sound and that I must, upon the statute and authorities, allow the claim for interest as from the 4th April, 1911, being sixty days after the date when the initial proofs were supplied to the defendant companies.

The contention is that the amendments referred to, being matters of procedure, the sections, though coming in force after the actions were commenced, were retroactive and applic-

able at the time of the trial. 'The general principle, indeed, seems to be that alterations in the procedure are always retrospective unless there be some good reason against it." Maxwell on Statutes, 5th ed., 1911, 367; *Gardner* v. *Ducas*, 3 A. C. 603; *Kimbray* v. *Draper*, L. R. 3 Q. B. 160.

In *Wright* v. *Hale*, 6 H. & N. 226 it was held that an English Statute which provided that "if the plaintiff in any action for an alleged wrong recovers by the verdict of a jury less than 5 pounds he shall not be entitled to any costs, if the Judge certifies to deprive him of them," enabled a Judge to certify in an action commenced before the passing of that Act. At page 230, Pollock, C.B., says: "There is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in Courts of Justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts." And Wilde, B., at page 232: "But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act." See also the *King* v. *Chamdray*, [1905] 2 K. B. 355 (a): "The prisoner was convicted under sec. 5, sub-sec. 1, of the Criminal Law Amendment Act, 1885, of an offence committed on July 15th, 1904. The prosecution was not commenced until December 27th, more than three months, but less than six months after the commission of the offence." Lord Alverstone, C.J., at page 339 says, "It is a mere matter of procedure and according to all the authorities it is therefore retrospective." *The Ydun*, [1899] P. 236; *Leroux* v. *Brown*, 12 C. B. 800, at pp. 803, 826 and 827. See also Maxwell, further, at pages 373 and 364, and *Hilliard* v. *Lenard*, Moo. & M. 297, and *Towler* v. *Chatterson*, 31 R. R. 411.

It would seem that in such a case it is appropriate to allow interest and perhaps, indeed, incumbent upon me to do so. See *Toronto Rw. Co.* v. *Toronto*, C. R. [1906] A. C. 286.

Upon the former evidence I came to the conclusion that I could not find that any misrepresentation had been made by Jeffrey as to the value of the stock. I repeat that finding.

There will, therefore, be judgment against the Rimouski Fire Insurance Company on their two policies for $3,000 and $5,000, in all, $8,000; against the Anglo-American Fire Ins. Co., and the Montreal-Canada Fire Ins. Co., for $4,000 each,

and against the Crown Fire Ins. Co., for $5,000, and in each case with interest from the 4th April, 1911.

As in the former judgment, so in this, I have come to the conclusion that I should make no order as to costs up to the time of the delivery of the judgment on the 2nd January, 1912.

The plaintiffs will have the costs of all proceedings subsequent thereto.

DIVISIONAL COURT.

JANUARY 3RD, 1913.

WARD v. WRAY.

4 O. W. N. 562.

Mistake—Cancellation of Promissory Note—Renewal Note Accepted—Mistake as to Identity of Maker—Action to Set Aside Cancellation—Suretyship—Extension of Time—Lack of Knowledge of Suretyship.

DIVISIONAL COURT *held*, that where the holder of a promissory note cancelled the same and accepted a renewal note under an honest and natural mistake of identity from defendant's son's wife instead of defendant's wife, he was entitled to have the cancellation of the former note set aside.

Judgment of Co. J. Lambton, affirmed.

Appeal by defendant, George Wray, senior, from the judgment of the Co. Ct. Judge Lambton in favour of plaintiff in an action against George Wray, senior, and George Wray, junior, father and son, to set aside the cancellation by mistake of a promissory note made by the defendants in favour of the plaintiff and discounted by him, and to recover the amount owing on the note, viz., $141. Judgment was given for the plaintiff and from that judgment defendant George Wray, senior, appeals.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, C.J.EXD., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE SUTHERLAND.

A. Weir, for the defendant, George Wray, Sr.

R. J. Towers, for plaintiff.

HON. SIR WM. MULOCK, C.J.EX.D.:—The plaintiff conducts a banking business at the town of Sarnia and the defendant, George Wray, senior, resides there. His son resides in the United States. The note sued on bears date the

21st of April, 1910. It was made by the two defendants, payable to the plaintiff's order six months after date. A day or two before its maturity the father called upon the plaintiff and paid the interest which had accrued on the note, and told him that he had not heard from his son about the matter, but expected to hear shortly. The note became due on the 24th October, 1910, and not having been attended to, the plaintiff on the 11th November, 1910, wrote to the father as follows:

"Sarnia, November 11th, 1910.

"George Wray, Esq., Senior,
Sarnia, Ontario.

Dear Sir,—The other day when you paid the interest on that note of your son and yourself you did not say what you wished done with the note. If a renewal is wanted I herewith enclose one for six months, which please send to your son and have him sign it, and get it back as quickly as possible signed by yourself and son, and oblige.

Yours truly,
(Signed) W. H. Ward."

In this letter the plaintiff enclosed a renewal note. The father received this letter with the intended renewal note, and her or his wife at his instance mailed it to the son for his signature. The letter, if any, which accompanied it was not produced. The son and his wife Laura signed this renewal note and sent it to the father or his wife, and the latter, with the knowledge of her husband, mailed it in Sarnia to the plaintiff, no letter accompanying it. On receipt of this renewal note the plaintiff called his clerk's attention to the fact that it was not signed by the father, when the clerk informed him that the father's wife had signed it. The plaintiff was under the impression that the son was an unmarried man, and was satisfied with his clerk's assurance that the signature was that of the father's wife, and acting upon this belief accepted this renewal and shortly thereafter his clerk returned to the father the original note marked "cancelled" accompanied by a letter worded as follows:

"Sarnia, December 3rd, 1910.

"George Wray, Esq.,
Sarnia, Ontario.

"Dear Sir,—I herewith enclose you cancelled your note $132.50 retired by renewal note yourself and Mrs. Wray just received."

This letter was evidently intended for the father, it being directed to Sarnia, whilst the son as the plaintiff knew at that time resided in the United States. By some error the plaintiff refers to the renewal note as signed by the father and Mrs. Wray. He knew it was not signed by the father and must have intended in dictating the letter in question to have described the renewal as made "not by yourself" but "by your son," and Mrs. Wray, meaning the father's wife.

Shortly before the maturity of the renewal note the plaintiff's clerk sent a notice to the father's wife reminding her of the due date of the note, and to which she sent the following answer:

"April 19th, 1911.

"Mr. W. J. Ward,
Banker.

"Dear Sir,—I sent your note to George Wray himself last time you sent it here, and him and his wife both signed it themselves so you had better send this notice to George himself, and he will attend to it. His add. is Warroad, Minn., c/o E. Grovell.

Yours, (Signed) Mrs. Wray."

Then, for the first time the plaintiff discovered the mistake which had resulted in the cancellation of the original note, and from which cancellation he now seeks relief. That the plaintiff never intended to accept a note by the son and his wife in exoneration of the father's liability is abundantly clear. He knew that the son was not a resident in Canada and supposed him to be an unmarried man, thus readily accepting his clerk's assurance that the signature of Mrs. Laura Wray was that of the father's wife. In his letter of the 11th of November to the father the plaintiff requests the father to have the renewal note signed by himself and his son, but when it came back signed by the son and Laura Wray, he knowing that the father's wife was a woman of property was content to accept her in lieu of her husband as one of the makers.

It was argued by the defendants that the father was a surety for his son, and was relieved by the giving of time without his consent. There is no evidence that the plaintiff knew him to be a surety. It is true that the son first discussed with the plaintiff the proposed loan and that the plaintiff said he would require his father's signature, at the same

time the plaintiff thought the father had some interest as principal debtor in the transaction, and the form of the note sustains that view, the father being one of the makers. Thus, *quoad* the plaintiff the father was one of the principals, not a surety. Further, even if he was in fact and to the plaintiff's knowledge a mere surety he was a consenting party to the renewal.

Thus, in brief, the facts of the case are that under an honest mistake of fact the plaintiff accepted the renewal note signed by a woman of whose existence he had no knowledge, mistakingly believing her to be the appellant's wife, and in consequence cancels the note sued upon. But for the mistake he would not have cancelled it.

Under these circumstances I think the plaintiff is entitled to be relieved from his mistake, and that this appeal should be dismissed with costs.

HON. MR. JUSTICE CLUTE and HON. MR. JUSTICE SUTHERLAND, agreed.

HON. MR. JUSTICE KELLY. JANUARY 7TH, 1913.

RE MCGILL.

4 O. W. N. 565.

Will—Construction—Absolute Bequest—Later Restrictions on Enjoyment—Discretion of Executors—Invalidity of Restrictions.

KELLY, J., *held*, that a testatrix having given a sum of money absolutely to a legatee could not by a later clause provide that the executors should exercise control over the investment of and payment over to the legatee of the same.

Re Johnston, [1894] 3 Ch. 204; *Re Rispin*, 25 O. L. R. 633, and *Re Hamilton*, 23 O. W. R. 549, followed.

Motion for construction of will of Jane McGill, deceased.

W. R. Meredith, for Margaret McGill.

H. B. Elliott, K.C., for the executors.

HON. MR. JUSTICE KELLY:—Jane McGill by her will dated August 21st, 1903, bequeathed to her daughter Margaret McGill, $645; she also made bequests to each of five other daughters, and directed that in the event of the death of any of her daughters during the lifetime of the testatrix her share should be divided amongst the others in proportion to the bequests specifically made.

Following this, there is this provision:—

"I hereby direct that my executors herein named shall exercise control over the bequest herein contained in favour of my said daughter, Margaret McGill, and shall invest the same as to them seems best and pay the income thereof to my said daughter Margaret McGill until such time as they consider that she can control the corpus of the said bequest providently and well."

The residue of the estate (amounting to between $200 and $250 without deducting the executors' compensation), is given to the daughter Margaret. She is over twenty-one years of age.

Testatrix died January 25th, 1912; the only payment made to the daughter Margaret from the corpus of her bequest is $25.

The question raised on this application is whether Margaret McGill has a present right to payment of the corpus of the bequests, notwithstanding the control and discretionary powers attempted to be given to the executors by the provision quoted above.

The executors, relying on that provision, have refused to pay over the corpus.

My view is that they have not that right. The bequest is not made dependent on the discretion of the executors; it is an absolute bequest followed by an indication of the mode in which it should be enjoyed. There is no gift over to any other person, nothing to shew that any one but Margaret McGill is entitled in any way to the bequest; and moreover she is the residuary legatee.

In *Re Johnston*, [1894] 3 Ch. 204—a case much resembling the present one—Stirling, J., at p. 208, said:—

"Does the law permit the testator to vest such a discretion in his trustee or executor? I have no doubt that the discretion was intended to be conferred by the testator for most excellent reasons, which, indeed, seem to be justified by the events, and I should be very glad to uphold it if I could; but it does seem to me that it is really an attempt by the testator to fetter the enjoyment by a person of a benefit to which he has become absolutely entitled under the will. The testator might (if he had been well advised) have effectually provided for the same object by making the gifts entirely dependent upon the discretion of the trustee. For example, he might have given to the legatees such sums only as the trustee, in the absolute exercise of his discretion, thought

ought to be given to them. That would be one way. Another mode of effectually doing it would have been to make in some shape or form a gift over, so as to benefit other persons beside the sons, and in such a way that the legatees in question could not be deemed to be the sole persons interested in the funds. He has not chosen to take advantage of any such mode of gift, but has in each case made the son in question the sole person to take the benefit of the fund which he has directed to be set apart. Under these circumstances, the case seems to me to fall within the class of cases which have been referred to, in which the law has been laid down that a testator is not to be allowed to fetter the mode of enjoyment of persons absolutely entitled to a fund; and, "When the words of the will are looked at, the testator is simply pointing out the mode in which these sums, which he had actually given to his sons, should be enjoyed by them. In that class of cases, of which *Re Skinner's Trusts*, 1 J. & H. 102, is an example, the Court has said that it will not insist on the benefit intended for the legatee being taken by him *modo et forma* as the testator prescribes."

This view of the law has been followed in our own Courts in recent cases, such as *Re Rispin*, 25 O. L. R. 633, and *Re Hamilton*, 23 O. W. R. 549. In the latter, his Lordship the Chancellor points out the methods by which only a bequest such as this can be made subject to the discretion of the trustees as to the time and mode of payment. Neither of these methods was adopted by the testatrix in this instance.

The restriction attempted to be put on the bequest to Margaret McGill, by virtue of which the executors seek to defer or withhold from her payment of the corpus of these bequests are, in my opinion, inoperative. The costs of the application will be paid out of the estate.

DIVISIONAL COURT.

JANUARY 2ND, 1913.

PORTLANCE v. MILNE.

4 O. W. N. 589.

Negligence—Master and Servant—Personal Injury—Workmen's Compensation for Injuries Act—Findings of Jury—Defective System—Stop Log and Chain—Contributory Negligence.

DIVISIONAL COURT affirmed judgment of Dist. Ct. Judge Sudbury awarding plaintiff damages for personal injuries sustained while in defendant's employ where the jury had found defendant's system to be faulty and where they had expressly found that plaintiff was guilty of no contributory negligence.

Appeal by defendants from judgment of the Judge of Dist. Ct., Sudbury, in favour of plaintiff upon the answers of a jury.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE MIDDLETON.

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

A. G. Browning, contra.

SIR WM. MULOCK, C.J.Ex.D.:—The plaintiff, a servant of the defendants, was injured in their saw-mill, when on duty there and brings this action under the Workmen's Compensation for Injuries Act.

The evidence shews that it was the plaintiff's duty to assist in the operations connected with the drawing of logs from the water by an endless chain into the mill, and until they reached the saw carriage. A stop board was suspended a short distance from the head of the inclined plane, up which the logs were being drawn. When the log in question was being drawn by the chain up this inclined plane, the plaintiff endeavoured to cant it off towards the "kicker," but failed to do so, and it passed under the bounce board, where it got wedged in. The plaintiff then pulled a rope thereby stopping the chain, and then tried to free the end of the log from the bounce board. Whilst thus engaged, the free end of the log slipped down and came in contact with the saw carriage,

which was then in motion, whereby the other end swung around violently and struck the plaintiff, inflicting the injuries complained of.

The plaintiff's contention is that the bounce board should not have been so high as to have permitted the log to pass under it, and that its being so was a defect in the condition or arrangement of the ways, works, etc.

In answer to the second question: "What was the cause of the accident, and was there any defect in construction in the machinery that caused the same?" the jury's answer is "stop log too high from chain."

In view of the evidence the meaning of this answer is, I think, that the accident was caused by the bounce board being too high from the chain, and that its being too high was a defect in the arrangement of the ways, works, etc.

The jury find that the plaintiff was not guilty of contributory negligence. There is evidence upon which they might properly find as they did, and I see no reason for disturbing the judgment.

The appeal should be dismissed with costs.

HON. MR. JUSTICE SUTHERLAND:—The plaintiff was at the time of the accident, as a result of which he claims damages from the defendants, in their employ, and engaged in their saw-mill in rolling off logs from an inclined plane up which they were carried from the water by an endless chain. He used a cant hook for the purpose. Beyond the point where he worked was what is called a stop board suspended above the inclined plane in such a way that when the log was carried forward and pressed against it the machinery driving the chain was "thrown out of gear" and the chain stopped.

The plaintiff says that a slippery log coming up his hook failed to grip it and it passed on, but owing to the stop board not being low enough, went under it, and became wedged before the chain could be stopped.

The plaintiff undertook to free it, and while doing so says it swung violently around against his left leg, breaking it. He claims that the injury was caused by the stop board being too high from the plane, and that this was a defect in the condition of the defendants' ways, works, machinery, etc.

The case was tried before the Judge of the District Court of Sudbury and a jury on the 5th June, 1912. The jury, in answer to the question, "What was the cause of the accident,

and was there any defective construction in the machinery that caused same?" said, "stop block too high from chain," and in an explanatory memorandum prepared by themselves they add: "That the stop block in Milne's mill was too high from chain, therefore causing accident at that time."

The contention of the defendant on the appeal was, in short, as follows: The proper course to liberate the log was to roll it back on the log deck. The plaintiff was doing this, but proceeded in such a careless way that one end of the log swung round and came in contact with the moving log carriage, and the other was thus thrown against the plaintiff's leg and the injury caused; that this was an accident almost unthought of, the result of the plaintiff's manner of taking off the log and in no way connected with its stoppage by the stop board or caused thereby or by any defect therein.

The jury was also asked whether the plaintiff was guilty of any negligence, and answered that he was not. It was his duty to release the log which had been stopped by the defective stop board, and it was in the discharge of this duty that the accident occurred without negligence on his part, as the jury has found.

There was evidence on which their findings might well be based. I am unable to see how, under the circumstances, the judgment can be disturbed.

I would dismiss the appeal with costs.

HON. MR. JUSTICE MIDDLETON:—My lord and my brother have no doubt in this case. To me there is much room for uncertainty, but as there is no further appeal, and a dissenting voice is of no avail, I say nothing.

MASTER IN CHAMBERS. JANUARY 9TH, 1913.

SPITZER BROS. v. UNION BANK.

4 O. W. N. 594.

Pleading—Particulars—Production of Books—Defective Affidavit—C. R. 518.

MASTER-IN-CHAMBERS, in an action to recover the proceeds of certain cheques the proceeds of which were alleged to have been wrongfully converted by defendants to their own use, made an order on defendant's motion for particulars but refused plaintiffs' counter-motion for the production by defendants of all books, etc, appertaining to the questions at issue between the parties.

Townsend v. *Northern Crown Bank*, 14 O. W. R. 727, distinguished.

The statement of claim alleges that during 1912 and two preceding years the bank "came into possession of certain cheques express orders and post office orders which were the property of the plaintiff—to which defendant acquired no right or title whatever (and) wrongfully collected amount of same and have refused to account or give any credit to plaintiff for the said cheques, etc."

"The total loss to plaintiff—so far as it can ascertain—has been the sum of $3,000."

The defendant before pleading demanded particulars of this definite sum of $3,000.

This was met by a motion by plaintiff for "production by defendant of all books, etc., appertaining to the questions at issue between the parties."

Thomas Moss, for the motion.

D. W. Saunders, K.C., contra.

CARTWRIGHT, K.C., MASTER:—The motion was supported only by an affidavit of plaintiffs' solicitor. The absence of one by an officer of the plaintiff company is not to be commended. After stating the facts out of which the present claim arose, he says that plaintiff has "a certain number of the cheques," but that "the majority are in the possession of the drawees, who refuse to turn them over to the plaintiff, and there are a further number of cheques which the plaintiff has not been traced (sic)." (It may be assumed that this means "has not been able to trace.")

The affidavit then proceeds in violation of Consolidated Rule 518 to say: "I am informed and verily believe" with-

out stating grounds of such belief that defendant has a record of all cheques in question, shewing all the particulars of same —and that this must be produced to enable plaintiff to give the particulars asked. This part of the affidavit must be disregarded following the authorities give in H. & L. 3rd ed., at p. 729."

"In any case it is met by the affidavits of defendants' superintendent (and of their solicitor) stating in the first of these that there was no such record in existence—and in the second that defendant has demanded inspection of the cheques, etc., spoken of in statement of claim, but that this has been refused.

The motion was supported on the argument by the judgment in *Townsend* v. *Northern Crown Bank*, 14 O. W. R. 727.

That, however, was very different in its main factor from the present. There the plaintiff being merely an assignee for benefit of creditors could have no knowledge of the transaction between his assignor and the defendant which he was impeaching. Here the plaintiffs must be supposed to know their own loss when they put it at a precise sum of $3,000 on their present information.

The plaintiffs should give now such particulars as they are able to furnish, with leave to serve further particulars as they may come to their knowledge, and defendants should be allowed inspection of such of the cheques, etc., as are in plaintiffs' possession. Time for delivery of statement of defence to run from such inspection. Costs of this motion to defendants in the cause.