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DIVISIONAL COURT.

MAY 22ND, 1912.

ERICSSON MFG. CO. v. ELK LAKE TELEPHONE & TELEGRAPH CO.

3 O. W. N. 1309.

Sale of Goods—Conditional Sale of Manufactured Goods by Manufacturer—Name and Address of—Abbreviation of—Conditional Sales Act, R. S. O. (1897), c. 149, s. 1—Bonâ Fide Purchaser without Notice of Lien—Agreement between Purchaser and Manufacturers—Liability on.

Action by manufacturers of Buffalo, N.Y., against defendants for payment of $420, alleged to be due plaintiffs in payment of two telephone switchboards, type B, and two 100 line wall protector frames as per compromise agreement between the parties, for a lien, for possession and sale, and for injunction and receiver.

DENTON, Co.C.J., at the trial, gave plaintiffs judgment declaring them entitled to the lien, for $400 and interest and for possession.

DIVISIONAL COURT reversed above judgment (SUTHERLAND, J., *dissenting*) holding that the onus was on the plaintiff to establish the alleged agreement and the evidence failed to prove any concluded agreement.

That plaintiffs were not entitled to a lien as the Conditional Sales Act, R. S. O. (1897), c. 149, s. 1, had not been complied with, as the statute does not permit of any abbreviations in the name of the manufacturers.

An appeal of the defendants from a judgment of HIS HONOUR, JUDGE DENTON, of York County Court, declaring the plaintiffs entitled to a lien on certain goods, viz., two telephone switchboards.

Plaintiffs also appealed from that portion of his Honour's judgment, which found the defendants not personally liable.

Defendants in partnership operated a telephone system in the Elk Lake District. Plaintiffs were manufacturers of telephone supplies in Buffalo, N. Y., and as such made and sold the switchboards in question partly for cash and partly on credit to the Norton Telephone Co., of Toronto. Part of

the purchase-money remained unpaid and this action was brought to recover the same, and in default of payment for a declaration that the switchboards were the property of the plaintiff company.

The Norton Co. sold the switchboards to the Silver Belt Co., who gave back a mortgage upon them for the unpaid purchase-money. Default having been made by the Silver Belt Co., one Seymour bought them under the mortgage, and in turn, sold them to defendants, who became *bona fide* purchasers for value, without notice of the plaintiffs' alleged lien.

The Norton Co. having failed, the plaintiffs through their solicitors notified the defendants of the alleged lien. This was the first intimation that defendants had of any lien or other claim against the property which they had bought and paid for. A balance was claimed of $516. Thereupon Mr. Reece, one of the partners in the defendants' firm, proceeded to Buffalo and there had an interview with certain of the plaintiffs' representatives and it was contended on the part of the plaintiffs that on that occasion an agreement was reached between the parties whereby the plaintiffs agreed to reduce the amount of their claim to $400, and that Reece for the defendants agreed to pay the same and to recognize the plaintiffs' alleged lien.

On the evening of 29th plaintiffs wrote the letter now much relied on. It was as follows:—

"Mr. A. J. Reece, Manager,
Elk Lake Tel. & Teleg. Co.,
Elk Lake, Ont., Canada.

Dear Sir:—

We wish to confirm the understanding which we came to this morning with you in regard to both our general account against you, and the matter of the switchboards against which we hold a lien at the present time:—

General Account: Your general account, as per statement herewith, amounts at the present time to $324.90. We will extend the time on this account, permitting you to pay $150 on April 15th, and the balance, $174.90, on May 15th, thus balancing this account.

Switchboard Account: In view of our compromise of this morning and of your acknowledgement of our lien against the two switchboards which you now have, we will accept, in full settlement of our lien against the switchboards,

$400. This amount is to be paid as follows: $150 July 15th, $125 Sept. 15th, and $125 on Nov. 15th, all this year, 1910.

As per your advice this morning, you may send us notes covering the above, drawn with interest at 6 per cent. from date. On receipt of the payments represented by such notes we will release all claim on the switchboards.

With best wishes for the future success of your company, we remain,

Very truly yours,

L. M. Ericsson Tel. Mfg. Co."

A.F. Treasurer.

The defendant company denied any concluded agreement on the occasion in question.

His Honour Judge Denton (February 8th, 1912, found as follows):—"It is clear on the evidence that during these months the defendants had ample opportunity of making all enquiries possible, and knew or ought to have known their exact position. The plaintiffs still pressing for payment, Reece, "(one?)" of the defendants, went to Buffalo on the 28th March, 1910, with a view to reaching some kind of a settlement. At that time the plaintiffs had two claims, one on the general account for which the defendants were personally liable to them, and the other the unpaid purchase-money, which they were claiming on their lien on the switchboards. Reece wanted to retain possession of the switchboards and wanted to make the best bargain he could. I find on the evidence that an agreement was arrived at upon that day, whereby the general account was fixed at $324.90, and the time for payment extended as follows: $150 on April 15th, and the balance $174.90 on May 15th of that year. The plaintiffs claimed over $500 balance on the switchboards, and an agreement was come to whereby the amount unpaid on this lien was fixed and settled at $400, and the plaintiffs agreed to allow this sum to be paid as follows: $150 on July 15th, $125 on September 15th, and $125 on November 15th, all in 1910. . . . On the day of the settlement, Reece was asked to give notes covering these various sums as agreed upon, but he wished first to see his partner before doing so. The defendants never gave these notes, but put off the defendants from time to time in a way that does not do them much credit except as shewing that Reece is a master at inactivity

and delay when driven into a corner for money. Upon the evidence I am satisfied of this, that on the 29th of March at Buffalo, Reece, in consideration of an extension of time, did agree with the plaintiffs that the amount still unpaid on the lien should be $400, and did acknowledge and recognize the plaintiffs' lien on the switchboards then in the defendants' possession for that sum."

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

F. Arnoldi, K.C., for the plaintiffs, appellants.

G. Wilkie, for the defendants, respondents.

HON. SIR WM. MULOCK, C.J.Ex.D.:—The onus is upon the plaintiffs to establish the alleged agreement, but a careful examination of the evidence fails to satisfy me that Reece made any concluded bargain with the plaintiffs. I, therefore, agree with his Honour that the defendants did not become personally liable, and, therefore, the plaintiffs' appeal should be dismissed.

As to defendants' cross-appeal that the plaintiffs are not entitled to a lien, reliance is placed upon the Conditional Sales Act, R. S. O., ch. 149, which enacts that a condition that the ownership in a chattel shall not pass "shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration in the case of manufactured goods or chattels, which, at the time possession is given to the bailee, have the name and address of the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto." The name of the plaintiffs, the manufacturers of the switchboards, at the time of their sale was "The L. M. Ericsson Telephone Manufacturing Company," and when possession of them was given to the Norton Company there was attached to them a metal plate having stamped thereon the following words, "Patented in United States, Canada, England, France, Germany, Russia, Austria-Hungary, Belgium, Spain, Italy, Sweden, Norway, Australia.

L. M. Ericsson Tel. Mfg. Co.,
Buffalo, N. Y."

If it were permitted to speculate as to the meaning of the words "Tel. Mfg. Co." here used, it might with reason-

able certainty be assumed that they were intended as abbreviations of the words "Telephone Manufacturing Company," part of the company's name, although the word "Tel." is equally an abbreviation of the words "Telegraph" and "Telephone." But the statute does not permit synonymous words to be used in lieu of the actual name of the manufacturer, etc., but requires a literal compliance with its provisions. This the plaintiffs have not done and have, therefore, failed to secure to themselves the benefit of R. S. O., ch. 149, sec. 1. Thus the title in the switchboards passed to the Norton Company on the sale to them, and is now in the defendants. I, therefore, think the defendants' appeal should be allowed and this action dismissed with costs here and below.

HON. MR. JUSTICE CLUTE:—There is no pretence that the defendants were originally liable for the claim or liable at all except under an alleged new agreement, which is said to have been made on the 29th March, 1910. At the time Seymour sold the property to the defendants Reece, who it is said made the new agreement, was not a member of defendants' firm, but became such after the purchase of the property in question.

The case turns largely upon what took place on the 29th March, 1910, at Buffalo, when Reece went there to see what terms could be made in respect of the lien claimed against the switchboards, and also to make some arrangement in respect of a general account held by the plaintiffs against the defendants, which is not in question in this action.

It is alleged by the plaintiffs that the defendants obtained further time as to the general account, and that they also acknowledged the existence of the lien and agreed to give their notes for the same.

Reece saw Hemenway, the manager of the company, and was taken by him to the office of the vice-president, Mr. Smith. Smith in his evidence states that time was given the defendants on the general account, and with reference to the switchboards the plaintiffs agreed to accept $400. The terms of payment of the $400 were finally arrived at as satisfactory, and he then proceeds: "I reached for a blank note supposing that he would make the notes and he said that he would like to go back and talk it over with his people, at least, but that he would see that the notes were executed immediately

and forwarded." Smith was recalled, and denies that the arrangement was "tentative" as alleged by Reece, and states that he supposed it was a completed agreement.

"Q. I understand you to say that he wanted to consult someone? A. Yes, when I reached, as I have already testified, I reached for the blank notes to have him sign them, supposing that he would sign them right here, and he said that he wanted to consult someone and would see that the notes were signed and sent back to us as soon as he got back."

Hemenway's evidence is much to the same effect:

"Q. He said he wanted to consult his partner and probably his solicitor when he went back? A. He said nothing about talking it over with his partner or his solicitor except to advise with them of the settlement he had made, and then we wanted further signatures on the notes."

It cannot, I think, be said upon this evidence that there was a concluded arrangement made at Buffalo, although no doubt it was expected both by the plaintiffs and Reece that the arrangement would be concluded upon his consulting his partner and solicitor.

The evidence of Reece is important. He states that he had paid for the equipment, including the switchboards in full; that on the 10th of January, he received a letter from the plaintiffs' solicitors claiming a lien for $516; not having obtained any satisfaction from the plaintiffs' solicitors he decided to visit Buffalo with a view of arriving at some settlement in regard to the general account, and the alleged lien. The defendants' business had been seriously affected by fires destroying portions of their property, and in this way making it impossible for the defendants to meet their obligations to the plaintiffs upon the general account. He says the terms were discussed as mentioned in the above letter, but that he had to consult his partner and he desired also to consult his lawyer before signing any notes. He says, "My intention was to eventually carry out the agreement, that is conditionally. The arrangement had to be completed and only completed by the giving of the notes. My intention was to give the notes. And if I did not give the notes the switchboards were subject to the same conditions as they were prior to my visit to Buffalo. It had not affected their lien in any way. The lien was quite as much in effect." He says that the reason he did not answer the letter of the 29th

was that his affairs were entirely in the hands of his lawyer, and when he returned his lawyer handled them and advised him not to enter into the agreement or any agreement of that kind. He says he admitted the plaintiffs' claim throughout, and intended that their claim should be satisfied; that he intended to give the notes when he was able to meet them, but he did not consider that he was bound to give the notes; that he had tentatively agreed to give the notes; that the object of delaying payment of the notes was to reach a point where they were able to take care of the notes. He admits that he believed he was liable on the lien, but on his return he was advised that he was not.

I think it reasonably clear that what took place was a tentative arrangement on the basis of the letter of the 29th of March, subject to Reece consulting his partner, and his legal adviser, and signing the notes. In this connection it is of importance to remember that the plaintiffs' manager required some other signatures than Reece's to the notes, as he states himself. It does not seem to me probable that Reece having bought into the company after the goods in question were purchased would make an arrangement rendering his firm liable for an account, which had been paid in full without consulting his partner, and this taken with the evidence of Smith, that the notes were not signed because he desired to consult his partner, and the evidence of Hemenway that the plaintiffs required a signature other than the defendant Reece to the notes renders it exceedingly probable in my judgment that no binding agreement was made by the defendants' firm to become personally liable for the amount claimed by the plaintiffs as a lien.

I should have arrived at this conclusion independently of the findings of the trial Judge, upon reading the evidence, and I agree with him upon this branch of the case. I think that the plaintiffs' appeal should be dismissed with costs.

Then as to the defendants' appeal. It is contended that the plaintiffs' lien is invalid, relying on the *Toronto Furnace Co.* v. *Ewing,* 15 O. W. R. 381, and the cases there cited. The plaintiffs are manufacturers in Buffalo. The switchboards are patented and there was fastened to the boards a plate containing the following words: "Patented in United States, Canada, England, France, Germany, Russia, Austria-Hungary, Belgium, Spain, Italy, Sweden, Norway, Australia; L. M. Ericsson Tel. Mfg. Co., Buffalo, N.Y."

It is urged by the defendants that this plate with its printed matter is a compliance with the patent laws of the United States and not with the Ontario Act. Treating the names of the countries where the article has been patented as surplusage, are the words "L. M. Ericsson, Tel. Mfg. Co., Buffalo, N.Y.," a compliance with the Ontario Act? There is no doubt that with the knowledge of the information there given the plaintiffs' place of business could be found, but under the strict construction which the Act has received, I am of opinion, that it is not a compliance with the Act, and if the case rested here I should feel compelled to hold that the plaintiffs had no lien; but it is further urged by the plaintiffs that in the original sale to the Norton Company, it was declared that the right of property should not pass, and that irrespective of the lien claimed the property remained in the plaintiffs, but I think R. S. O. (1897), ch. 149, sec. 1, is an answer to this contention. A conditional sale is only valid as against subsequent purchasers, without notice, in good faith for valuable consideration where the Act is complied with. Here it is clear, I think, that the plaintiffs are *bona fide* purchasers for value, without notice of the lien and are not, therefore, bound by the condition. There is nothing, in my opinion, that took place subsequent to the 29th of March, which would create a lien if the alleged agreement of that date cannot be supported, as I think it cannot. The defendants' appeal should be allowed with costs.

HON. MR. JUSTICE SUTHERLAND (*dissenting*):—By this letter, *ante* p. 162, the plaintiffs indicate that under the agreement which they claimed to have made with Reece the defendants were to get time on their general account as they desired, that the plaintiffs' lien on the switchboards was acknowledged, that the plaintiffs had substantially reduced their claim in connection with the switchboards and fixed the amounts and time when the sum agreed upon was to be paid. They also intimate that according to the defendants' own "advice," notes were to be sent covering said amount with interest at 6 per cent. from date, and that on receipt of the payments represented by the notes they would release all claim on the switchboards.

No reply having apparently been meantime received, the plaintiffs again wrote to the defendants addressing them in the same way on the 29th April, 1910, which letter con-

tains the following: "Not having heard from you in reply to our letter of March 29th, we take the liberty of writing you again as we wish to have you send the notes covering the terms agreed upon so that we may close the matter with our attorneys in Toronto."

On the 29th June, 1910, the defendants wrote to the plaintiffs, a letter which contains the following: "I have this date addressed a formal letter to the company regarding the outstanding general account. I regret that we were unable to make payment on June 15th as promised, but found it absolutely impossible." And "I am not trying to make excuses for not making settlement as promised, but believe if you fully understand conditions in this wooden country it would be to our advantage. Cannot promise just what date we will make a remittance, but it will be early in July, and for as much as we can possibly send."

On the 14th July the defendants again wrote to the plaintiffs, and I quote from this letter: "Regarding switchboard account. Until we have completed payment of general account it will be impossible for us to do anything regarding same. There would be no use our giving you notes as until we pay our already outstanding paper, I would not know how to make same so as to meet them when due. Our entire revenue and more is going towards the settlement of accounts incurred under other management, and everything will be paid as promptly as possible. In the meantime you hold lien as security, and trust you will try to view matters from our standpoint and not insist upon notes which given at the present time might only embarrass us when due. Will send cheque covering balance of general account as soon as possible, and will then arrange switchboard matter, I trust to our mutual satisfaction."

To this letter the plaintiffs replied on July 18th, in part, as follows: "We will, therefore, not insist upon notes, but will wait until you have settled your general account so that you can determine when you can take care of the switchboard account, and send us notes accordingly."

On the 27th September Reece wrote to the plaintiffs a letter, from which I quote as follows: "What I wish to ask might better be done verbally, but as we cannot afford the expense of trip at present, must resort to a letter. The question is, to what further extent are the Ericsson Tel. Mfg. Co. willing to assist the Elk Lake Tel. & Tel. Co? Without re-

ferring to the past; wherein they have shewn a desire to be as lenient and fair as possible, what arrangements can we hope to make for payments in future on switchboard account? It simply amounts to this—if we cannot make such terms of payment that will not only allow us to meet those payments when due, but also provide for other amounts which we were compelled this summer to borrow, on account of exceptional expense (from sources already explained in former letter), and which fall due now and six months hence. If we cannot make such arrangements, then it were better for the Ericsson Company to exercise the authority they possess, with the object of repossessing switchboards. . . . I realize that some time ago, I asked you not to press us for notes on switchboard account, until settlement was made on general account, and that the above looks like side-stepping, but at that time it appeared reasonable to suppose, that in perhaps October, make a note with reason to believe it would be met when due."

On October 11th, 1910, the plaintiffs wrote to Reece in part, as follows: "The situation as you remember Mr. Reece is this. When you were in Buffalo you agreed for your company with Mr. Smith, and with me for our company, to pay us $400 on the switchboard, we in turn on receipt of this payment to release our lien against the board. Now, you were to give us notes in payment of this, due at certain periods. From time to time you have written us about this and we have extended the time of payment and not demanded notes. This has run on a long time, however, and we feel that now you should give us the notes asked for. In fact, this is insisted upon by the company. Now, as stated before, the company wants to give you every opportunity to take care of this without embarrassment, therefore, what we propose to do is that you sign the enclosed note for $400 in this instance we have made it one note instead of several—which you will note is due in ninety days from date of this letter, although the note is dated at the time we reached this conclusion," etc.

Getting no reply the plaintiffs wrote to Reece, care of the defendant company, again on 19th October, and again on November 1st. I quote from this letter: "The matter of your company's account has just been called to my attention, and I am at a loss to understand why you do not carry out your agreement and send us the notes as promised. Mr.

Hemenway and Mr. Smith say that they acceded to your request only on your positive promise to send those notes immediately, and I cannot understand why you failed to carry out your word."

On November 4th the defendant company, per A. E. Taylor, presumably the other partner, wrote Mr. Hemenway of the plaintiff company in reply apparently to the last mentioned letter, as follows: "Replying to your letter re notes, Mr. Reece is engaged at present connection with matters on account of death of his father who died in Toronto recently. As soon as possible—which will be in a very few days, the matter of switchboard notes will be taken up."

And on December 3rd the defendant company, per Reece, wrote to the general manager of the plaintiff company, and in his letter appears the following statement: "I realize and appreciate your past liberality and leniency, but you cannot appreciate the efforts and sacrifices we have made, in order to remit to the company, the amount you have already received. I have just returned to Elk Lake, and am now prepared to do what is possible in connection with switchboard matters. Will be glad if you will outline a plan to the company, and if possible we will meet with it."

The plaintiff wrote further letters on December 9th, and 21st, 1910, and again on January 19th, 1911. No replies to these letters were put in at the trial.

Throughout this long period of time and correspondence there is no repudiation by the defendant company or Reece or Taylor of the plaintiffs' statement that part of the agreement made at Buffalo as mentioned was that the defendants were to pay the $400 and give notes.

The trial Judge has found as follows:

"The letter from the defendants to the plaintiffs of July 14th, 1910, read in connection with the other letters make it perfectly clear that they recognized the plaintiffs' lien for this amount. The other question as to whether or not the defendants have made themselves personally liable to the plaintiffs for this $400 is not so clear. I think I must find on the evidence that while Reece was perfectly willing to do so, he did not, at Buffalo, wish to assume personal liability for his firm without seeing Taylor. I formed the impression at the trial that he wanted to see Taylor only for the purpose of deciding upon the giving of the notes, but a careful reading of the correspondence since the trial has led me to

conclude that the giving of the notes and the assumption of personal liability, were in the eyes of the defendants, synonymous terms. I have not been able to find anywhere in the correspondence a direct promise on the part of the defendants to give these notes or assume personal liability. There is no doubt that the defendants were putting the plaintiffs off and gaining more time by leading them to think that these notes would be given, and that personal liability would be assumed, but that they did make themselves personally liable to the plaintiffs is very doubtful."

With respect I am unable to agree with the trial Judge in his view of the effect of the correspondence. It discloses that the defendants, knowing that the plaintiffs had a claim on general account, which they were pressing for settlement, and alleging that they hold a lien on the switchboards, which were in the possession of the defendants and which the latter were desirous of retaining, approached the plaintiffs and made an arrangement with them by which the matters in question and dispute were arranged in such a way as that the plaintiffs did give the defendants time in connection with the payment of the general account; the defendants did acknowledge the plaintiffs' lien on the switchboards; a reduced sum, viz., $400, was discussed and arranged between them on payment of which by the defendants the lien on the switchboards, which the defendants acknowledged, was to be released in full by the plaintiffs, and the giving of notes to represent said reduced sum was discussed. I am not at all sure that a promise in writing is necessary under the statute in these circumstances.

I quote from the Encyclopaedia of Law and Procedure, vol. 20, 167: "Even though when the oral promise is made the primary debt is still subsisting and may have been antecedently contracted, such promise is original and valid if it is supported by a new consideration moving to the promissor and beneficial to him and is such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor."

But it seems to me that where the bargain is so definitely stated by the plaintiffs in the correspondence as here and letters received from the defendants referring thereto without any repudiation of such a promise, the principle recently discussed by Mr. Justice Riddell in *Meikle* v. *McRae*, 20 O. W. R. 308 at 310-311 is applicable: "Silence is some-

times conduct," says Bramwell, B., in *Keen* v. *Priest,* 1 F. & F., 314 at p. 315; and where, from the relations of the parties, a reply might naturally and ordinarily be expected, silence is strong evidence of acquiescence." In *Wiedemann* v. *Walpole* (1891), 2 Q. B. 534, this principle is discussed. Lord Esher, at p. 537, says: "Now there are cases—business and mercantile cases—in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, 'but you promised me that you would do this or that,' if the other does not answer the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement." Kay, L.J., at page 541, says: "There are certain letters written on business matters, and received by one of the parties to the litigation before the Court, the not answering of which has been taken as very strong evidence that the person receiving the letter admitted the truth of what was stated in it. In some cases that is the only possible conclusion which could be drawn, as where a man states, 'I employed you to do this or that business upon such and such terms,' and the person who receives the letter does not deny the statement and undertakes the business. The only fair way of stating the rule of law is that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission."

On the question of the cross-appeal, of the defendants against the finding of the Judge in favour of the plaintiffs' lien, a finding I think clearly warranted by the evidence and correspondence, I would have had some doubt in the face of the strict construction which has been given to the Conditional Sales Act in such cases as the *Toronto Furnace Co.* v. *Ewing,* 15 O. W. R. 381, that the plaintiffs had complied with the Act with sufficient definiteness to entitle them to succeed. I agree, however, with the trial Judge that an agreement has been shewn to have been entered into on the part of the defendants to recognize the lien of the plaintiffs. I would allow the appeal of the plaintiffs and hold

the defendants personally liable for the $400 and interest, and dismiss the defendants' appeal, each with costs.

DIVISIONAL COURT.

MAY 23RD, 1912.

MARGARET CAIN ET AL. v. PEARCE.

THOMAS CAIN v. PEARCE.

BONTER v. PEARCE.

McGRATH v. PEARCE.

McMILLAN v. PEARCE.

3 O. W. N. 1321.

Water and Watercourses—Mill Privileges—Dam Across Stream — Raising Height of—Easement—Flooding Neighbour's Lands — Statute of Limitations—Laches — Injunction — Reference—Log Driving—R. S. O. (1897) c. 142, s. 1—Costs.

Defendant mill owners, having mill privileges on Crow river, built a new dam across the river. Plaintiffs brought actions claiming damages for flooding their several properties, claiming that the new dam was considerably higher than the old dam. Evidence was received as to the height of both the old and the new dam.

TEETZEL, J., 16 O. W. R. 846; 1 O. W. N. 1133, found in favour of defendants on the evidence that the new dam was in fact no higher than the old dam, but that the old dam was in a very leaky condition, therefore, the new dam raised the level of the water on the neighbours' lands. Reference ordered to ascertain the damages sustained by plaintiffs. Having regard to the great delay of which all plaintiffs were guilty, and in their failure to establish that defendants raised the height of their dam, injunction was refused.

DIVISIONAL COURT, 18 O. W. R. 595, 2 O. W. N. 887, affirmed above judgment as to three of the plaintiffs and ordered a new trial as to the fourth.

TEETZEL, J., at the re-hearing, *held*, 19 O. W. R. 904, that plaintiff had exaggerated the amount of damages which he had suffered. Plaintiff was given reasonable compensation. Damages assessed as to the other three cases.

DIVISIONAL COURT dismissed the appeals with High Court costs. Pursuant to the arrangement of counsel the trial judgments were entered up as a Divisional Court judgment.

Actions for damages for overflowing lands.

The four first named were tried before HON. MR. JUSTICE TEETZEL, at Belleville, March, 1910, 16 O. W. R.

846; 1 O. W. N. 1133, and formal judgments were taken out accordingly declaring:

(2) That the defendants had wrongfully caused the waters of Crow River, etc., to overflow the lands of the plaintiffs.

(3) This Court doth declare that the defendants through themselves and their predecessors in title have by continuous user during the twenty years immediately prior to the commencement of this action acquired an easement by prescription to pen back and flow the waters of Crow River, etc., over and upon the said lands of the plaintiff to the extent and for the period during each year exercised and enjoyed by them with the old dam in the main channel and other dams then used by them in the three eastern channels in the condition they were in during the five years immediately preceding the building of the new dam in 1893, but this Court is unable to define either the limits upon the plaintiffs' land to which this right to flow has accrued or the length of time each year that such flooding could be maintained."

(4) That the waters do not flow away so quickly as they did before the improved dam of the defendants.

(5) That the plaintiff is entitled to damages from six years before the teste of the writ, "but in ascertaining such damage no allowance shall be made for any damage for flooding the plaintiffs' land occasioned by the defendants or others in exercising the right of driving logs down Crow Lake or Crow River under the Revised Statutes of Ontario (1897), chapter 142, section 1.

(6) That the defendants pay said damages.

(7) Reserving the question of the amount of damages to be ascertained by Hon. Mr. Justice Teetzel or a referee to be appointed.

(8) Reserving leave to apply for injunction.

(9) Further directions and costs reserved until after damages ascertained.

An appeal was taken to Divisional Court, 18 O. W. R. 595, 2 O. W. N. 887, which directed the *McGrath Case* to be opened up and retried. The other three cases were struck out of the judgment in the third clause, all the words "but this Court is unable, etc.," to the end of the clause. In the written reasons for judgment it was said (18 O. W. R. at p. 597): "the Referee will determine the extent of the ease-

ment upon the evidence already given and such further evidence, if any, as any party may adduce upon the reference" —but neither party saw fit to have this direction inserted in the formal judgment.

In the *McGrath Case* it was directed the costs of the first trial, of the appeal and of the new trial to be in the discretion of the Judge or Referee before whom such new trial should be had.

The four cases come on again before Hon. Mr. Justice Teetzel and also the fifth case, *McMillan* v. *Pearce*. In the *McMillan Case* the learned Judge found cause of action proven, and having assessed the damages at $80, he directed judgment to be entered for the plaintiff for $80 and High Court costs. In the *McGrath Case*, 19 O. W. R. 904, he found damages $110 in respect of lot 8, and directed judgment to be entered for $110 and High Court costs, including the costs of appeal less the sum by which the costs have been increased by reason of the claim for lots 9 and 10. The learned Judge found damages to the amount of $150 in respect of part of lot 9, and $225 in respect of lot 10, and the rest of lot 9; but did not consider that the plaintiff was entitled to these sums.

In the three first named cases, an assessment of damages was had and the Judge found $600, $250 and $65—and directed judgment for these sums with costs on the High Court scale.

The defendants now appealed to Divisional Court composed of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE RIDDELL.

E. F. B. Johnston, K.C., and E. G. Porter, K.C., for the defendants.

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

HON. MR. JUSTICE RIDDELL:—A difficulty arose at the outset of the argument as to the propriety of the appeal being brought before a Divisional Court, and it was agreed by all parties that the findings, etc., of Hon. Mr. Justice Teetzel should be considered findings, etc., made by him after a trial, that the matters might be heard by the Divisional Court and the proper judgment entered up as a Divisional Court judgment.

I have read with care and considered all the material before my learned brother, and can find nothing of which the defendants can complain.

Much of the argument before us consisted of a complaint that the trial Judge did not define the easement of the defendants. But this is not asked for in the pleadings; it was not asked in the argument, voluminous as it was, addressed to the trial Judge, when he made a direction in the Divisional Court, "the Referee will determine the extent of the easement," neither party had it inserted in the judgment, it is not asked in the notice of the present motion, and we were not asked either to allow an amendment of the pleadings or to make a declaration without an amendment.

I think the defendants were well advised in not having the Divisional Court direction made part of the formal judgment—had they done so, no doubt the trial would have taken a different course not at all to their advantage.

From my examination of the evidence I think that taking the easement at the very highest that the evidence would at all justify, the learned Judge has been far from generous in his estimate of damages, particularly as under C. R. 552 they are assessed to the date of the assessment.

The right to damages at all in the *McGrath* and *McMillan Cases* is in my view clear.

As to costs, in the first place leave to appeal has not been given and my learned brother informs me that he would not give it. But in any case, the ownership of the land is not admitted, and judgment is properly ordered with costs on the High Court scale.

Pursuant to the arrangement the judgments will be entered up as Divisional Court judgments—and the appeals will be dismissed with costs on the High Court scale.

HON. MR. JUSTICE BRITTON:—The learned trial Judge found (1) that there was a liability on the part of the defendants to the plaintiffs Cain, Cain et al. and Bonter, for flooding their lands—a general reference was directed as to these; (2) that as to McGrath's lots 9 and 10 there was no damage—but there was some damage as to lot 8 and so a reference would be directed in the *McGrath Case* as to lot 8; (3) subject to the learned Judge's special findings—"the damages to be ascertained upon the reference will be confined

to the damages occasioned by flooding in excess of the extent to which the defendants were entitled by prescription when their new dam was constructed."

From this judgment defendants in the four cases appealed to a Divisional Court.

The Divisional Court judgment was given on the 14th March, 1911, 18 O. W. R. 595.

That judgment re-opened the *McGrath Case*—so McGrath was placed in the same position as the plaintiffs in other three actions.

The judgment of the trial Judge was varied by directing that the Referee should determine the extent of the easement acquired by the defendants, upon the evidence already given —and such further evidence, if any, as any party may adduce upon the reference.

The learned trial Judge undertook the reference. In other words, he continued the trial—no objection was taken to this—in fact it was the wish of all parties, and with the consent of all that the learned Judge should see the defendants' dam—the plaintiff's lands and the streams of water which it is alleged occasioned the damage.

The *McMillan Case* was not tried with the others at Belleville. The record was entered for May sittings in March, 1910—and at that sittings jury notice was struck out but time was postponed to autumn non-jury sittings, 1910, at Belleville. It stood until spring sittings, 1911, and then adjourned until 4th July, 1911—to be tried with the others—or to be dealt with upon the reference. On the 4th August, 1911, judgment was given for $80. On the 5th August, 1911, judgment was given in the other cases—for damages as follows:

.McGrath, $110; T. Cain, $250; M. Cain et al., $600; Bonter, $65.

The judgment in the *McGrath Case* is reported, 19 O. W. R. 904, and the other cases follow.

From these judgments appeal is now taken by the defendants. The reference was really a trial of the McMillan claim, but from what took place with his consent and consent of the defendants his case may be considered with the others. The reference was a new trial as to McGrath. The position then is this:—Liability of the defendants has been found by the trial Judge, and this liability has been affirmed by a Divisional Court. The only question is as to amount to each plaintiff, if any amount can be ascertained.

All the legal defences as to liability have been swept away, except so far as applicable in determining the amount for which defendants are liable.

The *McGrath Case* was opened so that if the evidence would warrant it plaintiff could recover for damage to lots 9 and 10.

The learned trial Judge has adhered to his former finding, disallowing anything for 9 and 10 and assessing the damages for lot 8 at $110. He assessed contingently the damages for 9 and 10, but there is no case made for recovery as to the latter amount. In assessing damages for any of the plaintiffs the learned Judge had a most difficult task, and especially difficult by reason of the restrictions and limitations laid down by himself in his trial judgment—an easement was found— as to flooding parts of lands in question. Damages were limited to certain years, and damages were further limited to those which were occasioned by the improved condition of defendants' dam, by which water was permitted to flood lands to a greater extent and to retain longer upon the land than before the improved condition of the dam, etc., etc. To me the evidence as to the damages is vague, indefinite, uncertain and unsatisfactory. There is no possibility upon the evidence as presented by the stenographer to the Court to determine with any reasonable certainty the amount of damage sustained from the causes mentioned. Defendants are wrong in thinking as apparently they do think that stopping leaks in a dam will not affect higher lands after the water has risen above the top—but they are quite right in their argument, and the evidence is very strong in support of the argument that the defendants ought not to be held liable, if after the dam was tightened—after all leaks stopped, there were openings in the dam made by removal of stop logs, more than sufficiently to make up for the tightening.

The sum of the matter is this: there was evidence of damage. The learned Judge has accepted this as sufficient to enable him to find in each case a specific sum. The learned Judge saw the dam—saw the lands in reference to which the alleged damage was said to have been done. He saw and heard the witnesses. The learned Judge apparently disregarded evidence that seems to me strong in favour of defendants' contention, and vice versa. That was his right. To disturb the finding, it is not enough that upon the evidence I would have reached a different conclusion. Could the trial

Judge, upon the evidence, making such selections as he was entitled to, make by reason of the qualification the appearance and the demeanour of the witnesses reasonably have come to the conclusion now attached. The findings of a Judge are entitled to at least as much weight as those of a jury, and so I reluctantly, upon my view of the evidence, agree that the motions must be dismissed and with costs as mentioned by my brother Riddell.

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

COURT OF APPEAL.

MAY 15TH, 1912.

JACOB v. TORONTO RW CO.

3 O. W. N. 1255.

Negligence—Street Railway — Passenger Alighting — Injury by Car Starting with Jerk—Findings of Jury—Judgment for Plaintiff.

Plaintiff's action was in respect of injuries sustained while attempting to alight from a street car of defendants which he alleged and which the jury found had been started with a jerk as he was about to alight.

COURT OF APPEAL dismissed with costs an appeal from a judgment of SUTHERLAND, J., in favour of plaintiff for $2,000 damages entered upon the findings of the jury.

An appeal by the defendants from a judgment of HON. MR. JUSTICE SUTHERLAND at trial.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

D. L. McCarthy, K.C., for the defendants.

J. E. Jones, for the plaintiff.

Their Lordships' judgment was delivered by

HON. MR. JUSTICE MEREDITH:—This case was, I think, one for the jury: and whether they have well or ill done their duty in it is not for this Court to determine, there being

evidence adduced in it upon which reasonable men might find as they have found.

The weight of the testimony favours the defendants' contention that the plaintiff did not attempt to get off the car until it was running at considerable speed after leaving the place where his companions got off without injury.

But the plaintiff very positively testified that such was not the case; that the car was started again with a jerk just as he was in the act of getting off; and there is other evidence that the car was started with a jerk before time had been given for passengers to alight.

Again, it seems to have been well proved that the plaintiff and one of his companions started at the same time with the purpose of alighting from the rear platform, but were directed by the conductor to go to the front platform and alight there, and that they thereupon proceeded to obey that direction, his companion alighting in that way before the car was put in motion. No reason is given, or reasonable suggestion made, which would account for the very considerable delay of the plaintiff in following his companion if the defendants' contention be true that the plaintiff did not attempt to get off until after the car had started again and had gone some distance and acquired such speed that it would be very dangerous to attempt to alight from it then: the strong probability is that he closely followed his companion, and if so, his story of the occurrence is quite probable. All the incontrovertible circumstances are in accord with the plaintiff's story, though it may be that they are not inconsistent with the defendants' contention.

The testimony that some person pushed his way to the front of the car, as if with the intention of alighting, after the car was put in motion is very strong; but there is, of course, the possibility—however slight or otherwise—that this person was not the plaintiff; possibly someone getting to the front of a crowded car so as to be able to alight quickly at the next stopping place; a possibility gaining weight from the fact that not one person but two—the plaintiff and his companion—went to the front together, the companion alighting before the car was put in motion; and no attempt was made to identify this pushing person as the plaintiff.

I am unable to say that the verdict can in any way be disturbed here.

HON. MR. JUSTICE KELLY. MAY 20TH, 1912

GRICE v. BARTRAM.

3 O. W. N. 1312.

Contract — Breach — Purchase of Assets of Company — Liabilities Assumed by Stockholder — "Without Corresponding Value"— Transfer of Shares — Damages — Reference — Rectification of Contract.

Two actions in respect of certain transactions arising out of agreements relating to dredging operations, which actions had been consolidated. Defendant, who was heavily interested in a dredging company which was selling its assets to a new company in which plaintiff was interested, undertook to pay all liabilities of the old company assumed by the new company "without corresponding value." Plaintiff in his first action claimed $34,436.83 of the old company's liabilities to be assumed by defendant under this clause had not been so assumed, and also claimed $50,000 damages for breach of contract. In his second action he claimed delivery over 100 shares of the new company's stock to plaintiff by defendant under a contract to make such delivery.

KELLY, J., *held* that defendant was liable to the new company for $11,561.18 less certain credits as to which a reference was directed if needed. He was also liable to deliver over the stock sued for, not having shewn circumstances which would warrant rescission or rectification of the contract.

Tried without a jury at Toronto, January 9th to 16th.

W. M. Douglas, K.C., and J. R. L. Starr, for plaintiff.

F. E. Hodgins, K.C., and W. R. Wadsworth, for defendant.

HON. MR. JUSTICE KELLY:—Plaintiff, who is a contractor residing in London, England, brought two actions against the defendant in respect of certain transactions arising out of agreements relating to dredging operations in which the parties were interested. One of these actions was commenced on July 10th, 1911, and the other on July 13th, 1911. By order of November 7th, 1911, these actions were consolidated.

Prior to and in the early part of 1909 the plaintiff was engaged on a contract for railway construction in Nova Scotia, and the defendant was interested in a company known as the Cape Breton Dredging Company, Limited, which was engaged chiefly in carrying out dredging contracts made with the Government of the Dominion of Canada. Early in 1909 it became known to the plaintiff that the defendant was desirous of extending the dredging operations. At that time the Cape Breton Dredging Company, Limited, was the

owner of two dredging plants, one of which was at Fourchu, in Nova Scotia, and the other at Rondeau, on Lake Erie. The plaintiff instructed James S. Thompson, who was his representative in the railway operations in Nova Scotia, to examine these two plants and the assets and affairs of the Cape Breton Dredging Company, Limited, with a view to plaintiff investing money in the enterprise, and to report to him, he being then in England.

Thompson made the inspection and examined the books of the company, which were at the company's office, in Toronto. As a result, an agreement was entered into between the plaintiff and defendant, on the 26th April, 1909, the plaintiff having come from England to Toronto for that purpose. The general purport of this agreement was that defendant was to incorporate and organize a new company, to be known as The General Construction and Dredging Company, Limited, and to have transferred to it the assets, etc., of the Cape Breton Dredging Company, Limited, the plaintiff agreeing to invest a large amount of money in the enterprise, for which he was to receive certain shares of the capital stock of the new company.

This agreement was on the 1st May, 1909, cancelled by the parties and a new agreement of that date was substituted therefor.

The new agreement recited that the parties thereto proposed to enter into an agreement by which defendant was to organize a company for the purpose of carrying on dredging, etc., and that defendant was "to turn in to the said company fully paid and free from all encumbrances the entire assets of the Cape Breton Dredging Company, Limited," consisting of certain articles and dredging equipment and appliances (enumerated in the agreement) "and also all contracts for carrying on dredging for the Dominion Government," at the places therein named, "together with the entire goodwill of the Cape Breton Dredging Company, Limited," and, amongst other things, the parties agreed that defendant should forthwith organize the proposed company, for the purposes set forth, and should transfer or have transferred to the company the assets above mentioned.

The General Construction and Dredging Company, Limited, was incorporated on May 4th, 1909, and on May 11th, 1909, an agreement was entered into between the defendant and the Cape Breton Dredging Company, Limited,

for the purchase by the defendant of "the plants of the party of the first part" (the Cape Breton Dredging Company, Limited), consisting of the articles therein enumerated constituting the two dredging plants, "together with all contracts of the company for carrying on dredging for the Dominion Government at" the several places therein named. The consideration for this was stated to be the transfer by the defendant to the Cape Breton Dredging Company, Limited, of "fourteen hundred and fifty-five (1,455) fully paid up shares of stock in the General Construction and Dredging Company, Limited, and all existing liabilities of the Cape Breton Dredging Company, Limited."

On the same date another agreement was entered into by which the defendant agreed to sell to the General Construction and Dredging Company, Limited, the dredging plants, "together with all contracts of the Cape Breton Dredging Company, Limited, for carrying on dredging for the Dominion Government" (at the places named), the consideration for which was to be the transfer by the purchasing company to the defendant of $2,500 fully-paid up shares of the capital stock of that company "and the assumption by the party of the second part (the purchasing company) of all existing liabilities of the Cape Breton Dredging Company, Limited."

During the season of 1909, dredging operations were carried on by the General Construction and Dredging Company, Limited, with the plants so purchased. Misunderstandings, however, arose between plaintiff and defendant relating to the liabilities of the Cape Breton Dredging Company Limited, and there were other troubles as well between them, arising out of the agreement.

In February, 1910, after attempts had been made to arrive at an understanding about these liabilities and to settle these differences, plaintiff and defendant met in London, England, where plaintiff had consulted his English solicitor, and a new agreement was made between them, bearing date February 23rd, 1910.

It is admitted that this agreement was made for the purpose of settling and disposing of the differences which had arisen between plaintiff and defendant in respect of the company and the dredging operations prior to that time.

This agreement, after referring to and reciting the agreement of May 1st, 1909, and the agreement of 11th May, 1909, by which defendant agreed to sell to the General Con-

struction and Dredging Company, set forth, amongst other things, that—

"1. Mr. Bartram undertakes and agrees with Mr. Grice that the assets referred to in said agreement of 1st May, 1909, shall be turned into the said company fully paid and free from all encumbrances, and that any liabilities of the Cape Breton Dredging Company, Limited, assumed by the company without corresponding value shall be paid and discharged by Mr. Bartram and shall not in any way fall on the company."

The main dispute between them arises from their failure to agree upon the proper construction of this part of the agreement, in so far as it relates to the liabilities which are payable by defendant. Plaintiff claims that liabilities of the Cape Breton Dredging Company, Limited, to the amount of $34,436.83, were paid by the General Construction and Dredging Company, Limited, which under the above quoted clause of the agreement of February 23rd, 1910, the defendant should pay to the latter company, and he asks judgment directing defendant to make such payment; he also claims $50,000 damages for breach of the agreement.

Defendant, on the other hand, claims that in respect of the amount claimed, or for part of it, at least, there was corresponding value received by the General Construction and Dredging Company, Limited, within the meaning of the clause quoted.

The $34,436.83 is made up chiefly of an over-draft of the Cape Breton Dredging Company, Limited, in the bank, various accounts incurred by that company before the close of the dredging operations of 1908, and other accounts for maintenance, wages, repairs, and improvements to the dredging plants from the time of the close of dredging operations of 1908, shortly before the end of that year.

Amongst the assets of the Cape Breton Dredging Company, Limited, were the dredging contracts which it had entered into with the Government of the Dominion of Canada, and which were not then completed. When these contracts were being entered into there were deposited by that company with the Government sums amounting to $9,000, which its contracts declared were for the purpose of protecting the Government against any default on the part of the contractors in the payment of wages, or for material, the Government having the right to use the same for paying any such

wages or for such material as the contractors might fail to pay for.

This $9,000 was still in the hands of the Government for such purposes at the date the parties entered into the agreements in April and May, 1909.

Defendant claims, first that in arriving at what liabilities are payable by him it should be held that this $9,000 was value that the General Construction and Dredging Company, Limited, received as against the liabilities assumed when taking over the assets of the Cape Breton Dredging Company, Limited, and that it should be treated as separate from the contracts, and, secondly, that all debts and liabilities incurred by the Cape Breton Dredging Company, Limited, and particularly those from the time that it ceased dredging operations for the season of 1908, should be assumed to be liabilities with 'corresponding value' to the General Construction and Dredging Company, Limited, within the meaning of the agreement, as having been incurred in maintaining the dredging plants and in repairing and improving them and fitting them up for the operations of the season of 1909, which began soon after the making of the agreements in April and May of that year.

What strikes one as being remarkable is that though plaintiff and defendant with their accountants and bookkeepers had spent much time between the agreement of May 1st, 1909, and that of February 23rd, 1910, in endeavouring to come to an understanding about the accounts and liabilities, and though they must have realized the importance of putting an end to the difference between them, they did not when making the latter agreement define clearly what they meant by liabilities assumed by the General Construction and Dredging Company, Limited, "without corresponding value" which they intended were to be paid and discharged by defendant.

The language of that part of the agreement is not of itself such as to make it possible to arrive at the intention of the parties. It is, therefore, proper to consider what the circumstances were with reference to which the language was used and what was the object appearing from these circumstances which the parties had in view. *River Wears Commissioners* v. *Adamson* (1877), 2 A. C. 743, at page 763.

In support of defendant's contention in respect of the $9,000, it was attempted to be shewn that this sum was with-

drawn by the company from the bank, thus increasing the amount of the overdraft by that sum.

To the extent of $6,000, at least, the evidence does not bear this out. Even had it been so, I am unable to agree with the defendant that the $9,000 should be considered as a set-off to the liabilities which, by the agreement, are to be paid and discharged by defendant. Had the $9,000 been withdrawn from one place of deposit and deposited with the Government as a deposit in the same manner and on the same terms on which it had been in the former place of deposit, there might have been some force in defendant's contention; but that is not what happened here.

The deposits with the Government were an essential and material part of the contracts made by the Cape Breton Dredging Company, Limited, with the Government, and could not have been withdrawn at the will of the depositors. The "entire assets" of that company, including the contracts, were sold to the new company, and there is no evidence of any agreement or understanding that the deposits were to be treated otherwise than as part of the contracts.

I do not agree with defendant's second contention, namely, that the General Construction and Dredging Company, Limited, obtained "corresponding value," for the unpaid accounts of the Cape Breton Dredging Company, prior to March 18th, 1909.

Down to the time of the negotiations which ended with the taking over of the assets and business of the latter company, there was no sale in contemplation, and it cannot be said that the accounts and liabilities which were then being incurred for maintenance of and repairs and improvements to the dredging plants, wages, supplies for the crews, insurance premiums, etc., were, or were intended to be, at the time they were incurred, for the benefit of any other person or body than that company.

When Thompson, in March, 1909, made the inspection, he undoubtedly based his judgment of the assets and plant and their value, on what he saw them then to be. He says that in making his inspection and report plaintiff gave him a free hand and did not dissent from anything he did in the matter; and this evidence is uncontradicted. He says, too, that when making the inspection and report on which plaintiff entered into the transaction with the defendant he recognized and understood that the liabilities and accounts of the

former company would be borne by the purchasing company from the time of his inspection, and he made certain suggestions for repairs to the plants, evidently intending these repairs to be for the new company of which plaintiff was to be a large shareholder. That being the case, the view I entertain is that if any affect or meaning is to be given to the words "without corresponding value," in the agreement of February 23rd, 1910, it may reasonably be held that it was contemplated that the liabilities from the time Thompson's inspection was completed would be assumed by the General Construction and Dredging Company, Limited, and that the liabilities down to that time were liabilities assumed by that company "without corresponding value," and which should be paid and discharged by the defendant. There is nothing in the agreement or in the evidence or in the circumstances surrounding the plaintiff's embarking in the enterprise from which to draw any different conclusion.

If my view is correct, then the General Construction and Dredging Company, Limited, received "corresponding value" for the liabilities of the Cape Breton Dredging Company, Limited, from the time of Thompson's inspection, namely, March 18th, 1909, and defendant should pay the accounts and liabilities down to that date on a proper apportionment and adjustment thereof being made as of that date, and he should be credited with any parts of these accounts and liabilities from that date which are included in the amount sued for. He is also entitled to other credits. The minutes of the meetings of the directors and shareholders of the General Construction and Dredging Company, Limited, shew that that company, in November, 1911, was largely indebted to the defendant. On the 21st November, 1911, defendant released that company from $5,484.30, part of this indebtedness, and on December 1st, he released it from $1,000, a further part of the indebtedness; on November 21st, 1911, he paid the company $8,591.35; and on December 1st, a further sum of $7,800. For these sums so released and the payments so made, amounting altogether to $22,875.65, he claims and is entitled to credit as against the amount sued for. I find, therefore, that what defendant should pay to the General Construction and Dredging Company, Limited, is the amount sued for less the $22,875,65, and less such parts of the accounts and liabilities of the Cape Breton Dredging Company, Limited (included in the

$34,436.83 sued for), as under a proper apportionment and adjustment are applicable to the time beginning March 18th, 1909. Defendant should also pay interest from February 23rd, 1910, on any amount payable by him, until the respective times of payment.

During the course of a very lengthy trial, much evidence was given respecting these accounts and liabilities, but it is not sufficient to enable a proper apportionment to be made; if the parties fail to make a proper division and apportionment, as of March 18th, 1909, and to arrive at the amount of interest payable by defendant, there will be a reference to the Master in Ordinary for that purpose.

At the trial it was stated, though not appearing in the pleadings, that the General Construction and Dredging Company, Limited, had assumed and paid other liabilities of the Cape Breton Dredging Company, Limited, in addition to and not included in the moneys sued for, and defendant set up that he had made other payments on the liabilities assumed by the General Construction and Dredging Company, Limited for which he claimed credit. If either party desire it, the reference will extend to and include the making of an apportionment and adjustment (as of March 18th, 1909), of such other liabilities, if any, so assumed by the General Construction and Dredging Company and of such other payments, if any, made by defendant.

In the second of the two actions which were consolidated, plaintiff asks for an order directing the defendant to transfer to him 100 shares of $100 each, fully paid up, of the capital stock of the General Construction and Dredging Company, Limited, which he claims to be entitled to under the following term of the agreement of 23rd February, 1910:—

"Mr. Bartram shall transfer to Mr. Grice 100 shares of $100 each, fully paid up in the company, which said shares Mr. Grice shall be entitled to hold for himself absolutely, subject to the right of Mr. Bartram to call upon Mr. Grice to retransfer up to 100 shares in the company one-half the number of any shares that Mr. Bartram may be ordered to transfer to Mr. Alfred Rigby."

Defendant sets up that the contract does not express the true agreement between him and the plaintiff in respect of these 100 shares, and he asks for a rectification of it. On the other hand, plaintiff asserts that the true agreement between them is as set forth in the contract.

Defendant has not shewn that there was mutual mistake or misrepresentation or any other ground for having the contract rectified or modified, nor has he established any right to be relieved from the obligation to transfer these 100 shares. Plaintiff is, therefore, entitled to an order directing that they be transferred to him.

The only damage I find plaintiff has suffered by reason of the defendant's non-payment of the liabilities payable by him was in the loss of dividends, the evidence being that had the defendant paid the company the liabilities he was bound to pay it, the company would have been able to pay a dividend. That damage will be satisfied, so far at least, as the defendant is responsible for it, by the payment of the amount of liabilities which he is liable to pay and interest thereon as above directed.

By counterclaim, defendant makes certain claims, amongst them, for an injunction restraining a sale by plaintiff of shares of the capital stock of the General Construction and Dredging Company, Limited. This claim is the subject of another action between these same parties and is therein disposed of. The counterclaim is therefore dismissed.

Further directions and costs are reserved until the Master has made his report.

HON. MR. JUSTICE KELLY. MAY, 20TH, 1912.

BARTRAM v. GRICE.

3 O. W. N. 1296.

Pledge of Shares as Security — Agreement — Power of Sale Improperly Exercised — Sale at Undervaluation — Collusion — Sale Set Aside.

Action to set aside sale made by defendant Grice to defendant Naylor of 500 shares of a company's stock which had been transferred by plaintiff to Grice as security for payment of certain dividends on other stock subscribed for by Grice under an agreement between plaintiff and Grice. The agreement provided that if the dividends should not be paid on a certain date, after proper demand Grice could sell, firstly the 500 shares subscribed for by him, and secondly the 500 shares transferred under the agreement to the person submitting the highest tender in response to advertisements inserted at least three times "with a week between each time" in a London, Eng., newspaper and The Toronto Globe. Naylor was the highest tenderer, but the shares transferred as security were offered for sale before those subscribed for by Grice; the advertisements were inserted on the same day of the week for three successive weeks; the sale was at a gross undervaluation, and the same solicitor acted for Naylor and Grice.

KELLY, J., *held*, that the sale should be set aside with costs on the grounds: (1) that the power of sale should have been strictly observed, and therefore the second block should not have been offered for sale first; (2) that the advertisements inserted did not comply with the power of sale; (3) that the sale was at a gross undervaluation and there was evidence of collusion; (4) that the knowledge of his solicitor was the knowledge of Naylor and therefore he was not a purchaser for value without notice.

Where there is to be an interval of a week between two events, the days on which those events occur must be excluded in the computation of the week.

R. v. *Justices of Shropshire*, 8 Ad. & E. 173. and *Young* v. *Higgon*, 6 M. & W. 49, followed.

Tried at Toronto without a jury, January 17th.

F. E. Hodgins, K.C., and W. R. Wadsworth, for the plaintiff.

W. M. Douglas, K.C., and J. R. L. Starr, for the defendants Grice and Naylor.

MacGregor Young, K.C., for the defendants The General Construction and Dredging Company, Limited.

HON. MR. JUSTICE KELLY:—Plaintiff has brought this action to set aside a sale made by defendant Grice to defendant Naylor of 500 shares of the capital stock of the General Construction and Dredging Company, Limited.

By an agreement made between plaintiff and defendant Grice, on February 23rd, 1910, plaintiff agreed to transfer

to Grice 500 shares of the capital stock of that company as security in respect of another 500 shares which had been purchased and paid for by defendant Grice. The agreement also provided that plaintiff should transfer to defendant Grice a further 100 shares of such capital stock, which Grice was to be entitled to hold for himself absolutely, subject to certain rights of plaintiff in respect thereto. There is a further provision that in the event of Grice not having before April 1st, 1911, received in dividends upon the 500 shares so purchased by him $50,000, he was to be entitled up to, but not after, April 15th, 1911, to call upon plaintiff to pay him $50,000 and interest at 6 per cent. from May 1st, 1909, till the time that such sum should be paid to him, less any dividends received by him prior to such repayment; and on payment of such sums plaintiff was to have the right to call on defendant Grice to transfer to him the 500 shares purchased by Grice, the 500 shares transferred to Grice as security and the other 100 shares above referred to. Further, if plaintiff failed to pay the sums mentioned within 30 days after being called upon by Grice to do so, Grice was to be entitled to realize on "first, the 500 shares now held by him in the said company and paid for by him, and secondly, the 500 shares in the company to be transferred by Mr. Bartram to Mr. Grice as security as aforesaid; thirdly, the 100 shares," etc.

The manner in which the shares were to be disposed of was this; "Mr. Grice shall dispose of the shares as follows, that is to say, he shall call for tenders by advertisement to be inserted three times with an interval of a week between each time in the Globe, Toronto, and in some well known London newspaper, and Mr. Grice shall accept the highest tender for cash for the said shares or shall himself purchase the said shares at the amount of the highest tender, but in no event shall Mr. Bartram be personally liable for the repayment of the $50,000 purchase-money."

There was a still further provision that "in the event of Mr. Grice not calling on Mr. Bartram for repayment of the $50,000 prior to the first day of April, 1911, and offering to retransfer to Mr. Bartram the full 1,000 shares then in such event Mr. Grice shall retransfer to Mr. Bartram the 500 shares held as security before the first May, 1911."

Mr. Grice not having received in dividends the $50,000 and interest he, by his solicitors, issued a notice, dated 28th

March, 1911, to plaintiff, requiring him to pay $50,000 and interest thereon at six per cent. per annum from May 1st, 1909, to date of payment, and offering to transfer to plaintiff upon such payment 1,000 shares of the capital stock of the defendant company; and on April 5th, 1911, a similar notice was issued.

There was some contention between the parties as to whether these notices were properly served on plaintiff within the time required by the agreement. With this aspect of the case I shall not deal at present; but even if the notices were duly served, I am of opinion that the sale, for other reasons, cannot be upheld.

The only method of realizing on the shares on default in payment, was that given by the power of sale in the agreement.

Advertisements for tenders for the sale of the first 500 shares (that is the shares which had been purchased by defendant Grice), were inserted in the Toronto Globe, on the 15, 22nd, and 29th July, 1911, and in the London Globe on the 1st, 8th, and 15th, August, 1911, and advertisements for tenders for the sale of the other 500 shares were inserted in the Toronto Globe on the 21st and 28th July and the 4th August, 1911, and in the London Globe on the 1st, 8th, and 15th August, 1911.

On October 27th, 1911, defendant Naylor made an offer of $100 for the purchase of the second block of 500 shares, namely, the shares held by Grice as security, and his offer was accepted, and the defendant company was called upon to have the transfer to the purchaser entered in its books, but was restrained by injunction from doing so.

I find that the power of sale was not properly exercised. The power required the advertisements for tenders to be inserted "three times with an interval of a week between each time." While this language shews want of care in its preparation, there cannot be any doubt that it means that there was to be an interval of a week between the date of one insertion and the date of the insertion next succeeding it. Inserting the advertisements on July 21st, and 28th, and August 4th, and on the 1st, 8th, and 15th August, was not a compliance with the provisions of the agreement, inasmuch as an interval of a week did not elapse between the date of one insertion and the date of the insertion next succeeding it.

In *R.* v. *Justices of Shropshire* (1838), 8 Ad. & E. 173, it was decided that where an act is required to be done so many days at least before a given event the time must be reckoned excluding both the day of the act and that of the event.

"'An interval of not less than 14 days' is equivalent to saying that fourteen days must intervene or elapse between the two dates." in *Re Railway Sleepers Supply Company* (1885), 29 C. D. 204.

Chitty, J., in that case says "I do not see any distinction between 'fourteen days' and 'at least fourteen days.'"

In *Chambers* v. *Smith* (1843), 12 M. & W. 2, it was held that the words "not being less than fifteen days" meant fifteen full days or clear days.

In *Young v. Higgon* (1840), 6 M. &. W. 49, Baron Alderson said, "Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to ensure to him the whole of that space of time."

These authorities make it clear that a full week should have elapsed between the dates of any two insertions, that is, that the days on which the two insertions appeared must in the calculation of the week be excluded.

In another respect also the sale was irregular. The agreement provided that defendant Grice should first realize on the 500 shares owned and held by him, secondly on the 500 shares transferred to him as security, and, thirdly, on the 100 shares; but the sale attempted to be made by Grice to Naylor was of the second 500 shares before a sale of the first 500 shares had been effected. Down to the time of action the first 500 shares had not been sold.

It has been contended that defendant Naylor is a purchaser for value without notice and is not affected by any irregularities in the manner of exercising the power or conducting the sale.

I think he cannot thus protect himself or uphold the sale. He made his offer of $100 to Grice's solicitor, who, acting for Grice, had issued the advertisements for tenders, and who was conducting the sale proceedings. This same solicitor acted for Naylor in the transaction and prepared for him the offer of $100, and Naylor left with him or paid him the $100 offered, which at the time of the trial had not been paid to Grice.

Naylor's solicitor has full knowledge of the requirements of the power of sale, and was familiar with the sale proceedings. The solicitor's knowledge was Naylor's knowledge, and he cannot successfully contend that he was not affected and bound by it.

Even in a case where a power of sale is so framed as to relieve the purchaser from all obligation to make inquiries, yet if the circumstances which put in question the propriety of the sale are brought to his knowledge and he purchases with that knowledge, he becomes a party to the transaction which is impeached. *Jenkins* v. *Jones*, 2 Giff. 99, at pp. 108-9.

There are other reasons, too, which lead to the conclusion that the sale cannot be upheld.

Naylor's evidence shews that he knew practically nothing about the defendant company, that he knew nothing about its assets, its contracts or its operations, and he says defendant Grice told him its stock was of little value.

Naylor's occupation was that of a plasterer, working at his trade for other people. He had never before been engaged in a transaction of this nature. His brother-in-law, Lawson, was Grice's representative on the Board of Directors of the defendant company, and consulted with Grice about the company's affairs, and was to some extent in Grice's service.

Grice's duty was to take reasonable means of preventing the sacrifice of the shares, and to act as a provident owner would have acted (*Latch* v. *Furlong* (1866), 12 Gr. 303). It is not clear to my mind that he discharged that duty. Added to all this is the allegation that the sale was at a gross under-value. While mere inadequacy in price is not of itself a sufficient reason for setting aside a sale, still, in this instance, taken in conjunction with the other circumstances, the price was so small in proportion to the value of the shares sold as to afford some evidence of the impropriety of the sale, and to lead to the assumption that the purchase by Naylor was made at the suggestion of Grice and for his benefit.

Considering, therefore, the want of regularity in the insertion of the advertisements for tenders, the attempt to sell the 500 shares pledged before selling the 500 shares owned by Grice, as required by the agreement, the relationship of Grice, Lawson, and Naylor toward each other, the fact that both vendor and purchaser were represented by the same

solicitor, and the price paid, which was but a nominal one as compared with what the evidence shews was the real value of these shares, I am clearly of opinion that the sale cannot be upheld.

I, therefore, direct judgment to be entered declaring invalid and setting aside the sale of the 500 shares by the defendant Grice to the defendant Naylor, cancelling any transfer of these shares and of certificate number 61, representing them made by Grice to Naylor, restraining defendant Naylor from transferring or otherwise dealing with these shares and certificate, restraining defendant Grice from doing any act towards completing such sale and transfer, and restraining the defendant company from transferring or consenting to any transfer of these shares and certificate to defendant Naylor, and from recording him in the company's books as the owner thereof.

The costs of the plaintiff and of the defendant company will be paid by defendants Grice and Naylor. The counterclaim of defendant Grice is dismissed with costs.

HON. MR. JUSTICE RIDDELL IN CHRS. MAY 21ST, 1912.

MACMAHON v. RAILWAY PASSENGERS INSURANCE COMPANY (No. 2.)

3 O. W. N. 1301.

Discovery — Examination of Plaintiff — Action on Life Insurance Policy—Question as to Age of Assured — Marriage Certificate—Relevancy of Production—Indirect Method of Cross-examination upon Affidavit on Production.

Motion by defendants for an order that plaintiff do attend a further examination for discovery and answer certain questions relating to his mother's marriage certificate and produce the same and for a further affidavit on production. The action was on a policy of insurance on the life of the plaintiff's mother, and one of the issues raised was as to her correct age, on which her marriage certificate might have thrown some light. The plaintiff on his examination refused to answer if such a document existed on the ground that an attempt was being made to cross-examine him on his affidavit on production.

MASTER IN CHAMBERS *held*, 22 O. W. R. 32; 3 O. W. N. 1239, that as it had not been shewn that the certificate was in existence, the motion for a further affidavit was premature.

That plaintiff should answer the question as to the existence of the certificate.

RIDDELL, J., dismissed with costs plaintiff's appeal from above order, holding that the exception of an affidavit on production from liability to question by cross-examination thereon was due to a desire to prevent two examinations and to save costs.

That it never was intended to prevent any examination being had or questions asked which could be had or asked otherwise than on an examination on such an affidavit.

Standard v. *Seybold*, 1 O. W. R. 650, discussed.

An appeal from an order of the Master in Chambers, directing the plaintiff to answer certain questions which he refused to answer upon his examination for discovery. See 22 O. W. R. 32.

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

S. Denison, K.C. contra.

HON. MR. JUSTICE RIDDELL:—The action is upon a life insurance policy—one of the defences is misrepresentation as to age. Upon the examination for discovery, the plaintiff refused to say whether the marriage certificate of the deceased (which would or might, as it is admitted, assist in proving the age of the deceased), was in the possession of his solicitors.

The ground of the objection is that the plaintiff had already made an affidavit on production in which he did not mention this document, and it is contended on his behalf that the question which he objected to answer was an indirect method of cross-examining upon that affidavit.

I may say at once that I cannot understand the refusal of the plaintiff or his solicitors to make full disclosure of this document, if it exists—if the claim is an honest one. But that does not disentitle him to take full advantage of the law if it is as he claims.

The practice which never obtained in England of cross-examining on an affidavit on production was introduced into the Upper Canada Chancery practice shortly after the reorganization of the Court of Chancery in 1849 by 12 Vict. (Can), ch. 64. Before that time the Court of Chancery had been as at first constituted in 1837, by 7 Wm. IV. ch. 2, with a Vice-Chancellor—but thereafter the Court was equipped with a Chancellor and two Vice-Chancellors. Before this the English orders passed before March, 1837—the date of the Act, 7 Wm. IV, ch. 2—and a few orders passed by the Upper Canada Court of Chancery were in force. In 1850 (7th May), new orders were issued by the Upper Canada Court of Chancery, amongst them No. 50 "Any party to a suit may be examined as a witness by the party adverse in point of interest . . . without any special order for that purpose . . ." This provision was continued by the C. G. O. of 1853, ch. 22, sec. 1 (sec. 3, Gr. at p. 28, and became in the C. G. O's of 1868, C. G. O. 138.

In 1852 this was considered to justify cross-examination on an affidavit of documents. *Nicholl* v. *Elliott* (1852), 3 Gr. 536, at p. 545 per Blake, C.: "Where the affidavit fails to furnish the discovery to which the plaintiff may be entitled it will be competent for him, of course, to cause the defendant to be examined *viva voce* . . ."

And in 1877 under the C. G. O. 1868, Spragge, C., in *Dobson* v. *Dobson* (1877), 7 P. R. 256, following the former case, held that an examination upon the affidavit of documents was warranted by the G. O. The Chancellor points out the danger of two examinations, one for discovery, one upon the affidavit, but says, p. 258, "the question of costs . . . the Court might deal with in the case of two examinations without any reason for it . . ."

This overruled *Paxton* v. *Jones* (1873), 6 P. R. 135, in which Mr. Holmested (Referee) had held that O. 138 did not justify cross-examination on an affidavit on production and pointed out that G. O. 268 did not refer to affidavits on production: "Any person having made an affidavit to be used or which shall be used on any motion, petition or other proceeding before the Court shall be bound to attend for the purpose of being cross-examined . . ."—this was O. 40, sec. 7 of the Order of 1853.

In the Rules of 1888, it was specially provided for C. R. 512: "The deponent in every affidavit on production shall be subject to cross-examination," but this was abrogated June 23rd, 1894, by R. 1345, which in 1897, became C. R. 490. "A person who has made an affidavit to be used in any action or proceeding other than on production of documents may be cross-examined thereon"—still in force.

No doubt the exception of the affidavit on production from liability to question by cross-examination thereon was due to a desire to prevent two examinations and to save costs. See the remarks of the Chancellor in *Dobson* v. *Dobson* (1877), 7 P. R., at p. 258, cited above.

It never was intended to prevent any examination being had or question asked which could be had or asked otherwise than on an examination on such an affidavit—that it prevented cross-examination on an affidavit on production is beyond question. And in *Dryden* v. *Smith* (1897), 17 P. R. 500 an attempt was made to get around the rule by taking out an appointment for examination of the plaintiff upon a pending motion made for the defendant for a better affidavit

on production from the plaintiff. Mr. Cartwright, M.C., set this aside, and his judgment was confirmed on appeal by Moss, J.A. The learned Judge (Hon. Sir. Chas. Moss, C.J.O.), pointed out p. 504: "The usual practice of examining the plaintiff for discovery has not as yet been adopted in this case," and p. 505: "this appears to me to be in substance an attempt to cross-examine the plaintiff upon his affidavit on production under cover of a motion which, if made at all, should follow and be based upon the outcome of the means usually adopted under the Rules and practice for obtaining from a party information and discovery as to documents in his possession or power beyond that already furnished by the affidavit on production."

So far is this from deciding that the opposite party cannot obtain by an examination for discovery information as to documents supposed to have been left out of the affidavit—that is (as it seems to me), certainly approves of the "usual practice of examining . . . for discovery," and of an application for a better affidavit based upon the outcome of such practice.

In *Standard* v. *Seybold* (1902), 1 O. W. R. 650, the defendant had filed an affidavit on production sufficient in form; he was then examined for discovery, and asked whether he had signed a document Exhibit 6, then produced to him. He said that according to his recollection he had never signed any such document; the plaintiffs then "deliberately closed their examination," and moved for an order (1) that the defendant should file a further and better affidavit on production, and (2) that he should attend again for further examination. The Local Master at Ottawa refused to make the order; on appeal the Chancellor reversed the decision and made the order asked for—the defendant then appealed to the Divisional Court which Court allowed the appeal. The grounds—wholly sufficient ground as must be admitted—are these. As to making a better affidavit, the deponent did not admit that he had or ever had had the document—as to the other part of the motion, the plaintiffs had deliberately closed their case. In the report in 1 O. W. R., at p. 661, the C. J. C. P., who gave the judgment of the Court is represented as saying "as was determined by Mr. Justice Moss in one of the cases referred to (*Dryden* v. *Smith*, 17 P. R. 500, 17 Occ. N. 262), the opposite party may not indirectly, by means of an examination for discovery do that which he may

not do directly—cross-examine upon an affidavit on production." It is quite plain that this is an *obiter dictum*, and not a decision—moreover, it would seem to be either a misprint or an inadvertence. Mr. Justice Moss was not dealing with an examination for discovery at all, but an examination for use upon a motion for a better affidavit. But whether *dictum* or decision, inadvertence or not, it is far from deciding that information which would otherwise be compellable on an examination for discovery becomes privileged if and when an affidavit on production is made and the information sought would contradict the affidavit—or if not contradict form a basis for a motion for a better affidavit. It is admitted that such document could be called for at the trial—and also (unless the affidavit on production interfered), at the examination for discovery.

I think the appeal should be dismissed with costs to the defendants in any event.

I must again express my astonishment at the attitude of the plaintiff, if his claim is honest.

HON. MR. JUSTICE MIDDLETON. MAY 18TH, 1912.

RE HART.

3 O. W. N. 1287.

Infant — Custody — Habeas Corpus — Application by Father against Maternal Aunt.

Father of a girl, aged 14 years, applied by way of *habeas corpus* for an order for the custody of his daughter, from her maternal aunt, who had cared for the girl since the death of her mother 8 years before.

MIDDLETON, J., *held* that, having regard to the father's rather unfavourable record and the welfare of the child, the application should be refused with costs.

Motion upon return of a writ of *habeas corpus* for delivery of an infant to her father.

R. D. Moorehead, for John Hart, the father.

T. A. Gibson, for Elizabeth Hyde-Powell, maternal aunt.

HON. MR. JUSTICE MIDDLETON:—On the return of this motion it became quite apparent that it was impossible to determine the matter upon affidavit evidence; and the parties

consented that I should hear oral evidence and summarily dispose of the case. I accordingly heard the parties and their witnesses. It was then consented to by counsel that I should ask Mr. Kelso, the superintendent of the Children's Aid Society and of the Government Department having charge of neglected and dependent children, to make personal inquiry into the matter and report to me. This course was suggested by the fact that proceedings had already been had both in the Police Court and in the Juvenile Court concerning this child. The evidence taken before the Commissioner of the Juvenile Court was also put in before me.

In addition to this, I have had two interviews with the child; and, at the request of the father and with the consent of the aunt, have received verbal and written statements from the employers of Hart, respecting his habits and the charge made against him of intoxication.

The matter has caused me much anxiety, because I recognize the importance of giving the greatest possible effect to a father's wishes and desires concerning his child, and his *prima facie* right to her custody. At the same time, as the result of all this, I am firmly convinced that the welfare of the child renders it imperative that I should leave her with her aunt.

The mother of the infant, the first wife of John Hart, died in June, 1904. Shortly after her death his present wife became his housekeeper. Her husband was then living, but the husband died in April, 1905. Hart then married the widow; and there has been no issue of this marriage. The second wife had children by her former husband, who are now of age and married, and who do not live with Hart and his wife.

Ever since the death of her mother, the infant has been cared for by her mother's sister, her present custodian. She has from time to time resided with her father and stepmother. There is some conflict as to the length of these visits; but I am satisfied that for the last eight years she has been almost entirely in the charge of this aunt, and that the father has contributed nothing towards her support and up-bringing, except possibly one sum of ten dollars.

Much is made by the father of the supposed difficulty of locating his child owing to a change of residence of the aunt and her family. As a matter of fact there is absolutely nothing in this story; because the father has always known where

to reach the brother of the respondent, who has been the financial mainstay of the family where the child has been brought up. This family consists of her grandmother, of the present respondent, of another aunt who is an invalid, and this uncle.

The child is now just fourteen years of age, and is very bright and intelligent. She does not appear to be strong physically; and she is exceedingly nervous. She has an impediment in her speech, apparently resulting from her nervousness, and which has prevented her from receiving as good an education as she otherwise would have had; and this impediment in her speech has evidently made her very shy and diffident. She was, however, able to tell me her story very well; and it is quite plain that she fears her father and has the greatest possible aversion to her step-mother. She complains of having been cruelly used while with them; and she seems to have a clear recollection of her life at home during her mother's life-time, and she thinks that her father was then most unkind to her mother, particularly when he was intoxicated.

It appears that in November, 1911, the infant ran away from her aunt. The aunt, fearing some accident or worse, spoke to the police, and the child was found in the home of a friend. She was then, strange to say, taken before the police magistrate on a charge of vagrancy; and the record of The Children's Aid Socteiy states that as she appeared to act in an eccentric manner she was remanded for a week, so that The Children's Aid Society might make enquiries. Finally, she was returned to her aunt. The record of The Children's Aid Society contains statements very damaging to the father.

I asked the child about this episode, and she told me that she ran away because her aunt was going away on a visit and she feared that her father would get her. The fact that the aunt contemplated a visit appears in the evidence given; and I am convinced that this was the real reason for the child's conduct, and that the eccentric manner noted was merely the result of her nervous condition and of the impediment in her speech; as, apart from this, I find no trace of any eccentricity.

I do not think it desirable to set forth at length the reasons which convince me that the father and the step-mother are not the proper custodians of this young girl. The con-

temporaneous record of The Children's Aid Society of the occurrence in November, 1911, the fact that the father has a strong will and a temper none too well under control, and the tenor of his two recent letters—April 5th and April 8th, 1912—indicate his mental attitude, and, with the almost abject terror of the child when the possibility of her being placed in the custody of her step-mother was suggested, compel me to the conclusion that she should be allowed to remain where she now is. This course is that recommended by Mr. Kelso.

I pointed out to her that apparently her father was much better off financially than her aunt; to which she at once replied, "I have come to see that money is not everything." I quite believe that she will be properly cared for and brought up by her aunt and her family, who have sufficient affection for her to be ready to care for her without remuneration.

The motion will, therefore, be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. MAY 18TH, 1912.

THE ONTARIO ASPHALT BLOCK CO. LTD. v. COOK.

3 O. W. N. 1289.

Account — Reference — Book-accounts — Credits — Absence of Surcharge or Falsification — Payment — Onus on Defendants — Amounts Received in Excess of Those for Which Credit Given.

Appeal by defendants from report of Local Master at Welland upon a reference to ascertain if plaintiffs were creditors of defendants, and if so, in what amount. On the reference, plaintiffs brought in accounts shewing amounts owing to them by defendants as well as certain credits verified by the affidavit of their bookkeeper. Defendants filed no surcharge or falsification and on appeal took exception to the statement of credits furnished and verified by plaintiffs' bookkeeper, claiming that onus was not on them to attack the account.

MIDDLETON, J., *held* that onus was on defendants, and moreover no surcharge had been filed as required by Rules. Appeal dismissed with costs.

An appeal by the defendants from the report of the Master at Welland, dated 21st February, 1912.

By the judgment of HON. MR. JUSTICE LATCHFORD, dated the 18th May, 1909, it was referred to the Master at Welland to ascertain the state of accounts between the plaintiff and the defendant B. A. Cook, and between the plaintiff and the firm of Langley & Cook, or the agent or agents of that firm.

F. W. Griffiths, for the defendants.

D. L. McCarthy, K.C., for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The pleadings are not before me; but from what was said I infer that the action is one to set aside certain conveyances; and the reference is for the purpose of ascertaining whether the plaintiffs were creditors, and if so, the amount of the indebtedness to them. The judgment provides that the trial should stand adjourned until after the Master should have made his report.

Pursuant to this judgment the parties went before the Master, and the plaintiff brought in accounts based upon a number of different transactions or contracts in pursuance of which they had supplied the firm of Langley & Cook with asphalt block and other materials, and giving credit for various sums of money received on account. These accounts were verified by the affidavit of one Carson, the bookkeeper in charge of the plaintiff's accounts during the period in question. Mr. Carson was not cross-examined upon this affidavit, and no surcharge or falsification was filed; but a document called "requisitions" appears to have been lodged in the Master's office. This document states shortly the defendants' contention with respect to the different accounts. With reference to one particular section of the account—that called St. Boniface Job No. 2—the statement is made that the plaintiff itself took over and completed this contract and must give a complete account of all moneys received and paid out in connection therewith.

Upon return of an appointment to hear and determine, Mr. Fleming, the secretary-treasurer of the company, was called, and it was made to appear that a judgment had been recovered against Langley & Company for some $4,000; and it was stated that this covered only a portion of the indebtedness, which, as shewn by the accounts, amounted to upwards of $16,000. Counsel for the defendants then cross-examined Mr. Fleming at length as to different items in the account; and when the St. Boniface transaction was reached it appears that an assignment had been made by Langley & Cook to the plaintiff of the money supposed to be due by the town of St. Boniface and that the work done by Langley & Cook was not in accordance with the contract, and that the plaintiff had received from the town as much as the town was willing to pay, and had given credit for the money re-

ceived. One Bangham, formerly in the employ of the plaintiff, had assisted Langley & Cook in the second contract with the municipality, and appears to have had some contractual relationship with Langley & Cook; but the agreement between him and that firm was not filed.

After this, Carson the bookkeeper was sent to St. Boniface to assist in the adjustment of the accounts with the municipality. The town required wages to be paid, as Langley & Cook had deserted the contract; and it is suggested that part of the moneys passed through Carson's hands. It is not made to appear that he received any more money than was transmitted to the plaintiff, for which credit is given. It is suggested that the municipal accounts shew that he received some larger amount and out of it paid the wages; but this is mere suggestion; it is not proved. See questions 154 to 157. Carson is not now available, and the defendants have tendered no evidence whatever going to shew that Carson received a dollar more than the amount for which credit is given.

The defendants now appeal upon several grounds, but before me only argued that relating to the moneys said to have been received and disbursed by Carson; counsel for the defendants stating that the onus was not upon him to attack the account.

In this I think he is entirely in error. I think that the onus is upon him to shew that the plaintiff has received more than the amounts for which credit has been given. Payment is and always has been a defence; and the onus is upon the defendants; this quite apart from the fact that no surcharge has been filed as required by the Rules, and possibly, according to strict practice, this issue was not open before the Master. No application is now made for indulgence; the defendants being content to base the appeal entirely on what they concede to be their strict rights.

The appeal is dismissed with costs.

DIVISIONAL COURT.

MAY 22ND, 1912.

THAMER v. JUNDT.

3 O. W. N. 1307.

Will — Testamentary Capacity — Delusions — Appeal from Findings of Surrogate Judge.

Appeal by defendants from order of Surrogate Court of Perth County admitting will of Henry Thamer to probate. Defendants alleged want of testamentary capacity.

Divisional Court dismissed appeal, defendant to pay her own costs.

Per BOYD, C.—Granted or proved that insane delusions exist in a man's mind, the question is whether the general faculties of his mind have been so far affected as to render him incompetent to make a testamentary disposition of his property as a whole or of that part in respect of which a delusion exists.

A greater scope of general capacity is needed where the whole of a man's property is being dealt with (as, *e.g.*, by a will) than when he deals with a single and separate piece of it by way of contract (as in the leading case of *Jenkins* v. *Morris*, 14 Ch. D. 674 (1880)).

An appeal by the defendant from a judgment of the Surrogate Judge of Perth county, admitting to probate the will of the late Henry Thamer made 3rd February, 1911.

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

J. C. Makins, K.C., for the defendant.

G. G. McPherson, K.C., for the plaintiff executors.

HON. SIR JOHN BOYD, C.:—Granted or proved that insane delusions exist in a man's mind, the question is whether the general faculties of his mind have been so far affected as to render him incompetent to make a testamentary disposition of his property as a whole or of that part in respect of which a delusion exists. That is a practical question depending upon the facts proved, and it is for the tribunal of trial (whether Judge or jury), to come to the proper conclusion upon the evidence. The learned County Court Judge has in this case found in favour of the testator's capacity—having regard to all the mass of testimony for and against—and the rule is that unless he is manifestly and clearly wrong, so much so indeed as to amount to a miscarriage of justice,

the appellate Court ought not to interfere. I think all the above propositions are established by the case cited for the respondent of *Jenkins* v. *Morris*, 14 Ch. D. 674 (1880), which represents the modern reading of the law on this difficult subject. See also *In re Walker* (1905), 1 Ch. 172, 173.

A greater scope of general capacity is needed where the whole of a man's property is being dealt with (as, e.g., by a will), than when he deals with a single and separate piece of it by way of contract (as in the case cited). Where testamentary capacity is being investigated the testator should be of reasonably sound mind, memory, and understanding if the disposition he makes is to be sustained. More matters have to be weighed and considered in dealing with the one case of a part than with the other as to the whole of a man's estate. But always the result arrived at by the first tribunal has to be shewn to be decidedly wrong before it will be disturbed.

Having read over carefully all the evidence taken, including the examination of the parties before an examiner—the whole forming a very large mass of testimony—I see no ground upon which to disturb the carefully considered conclusions of the Judge who heard and saw the witnesses. I would myself have come to the same conclusion that he did upon the merits and upon the capacity of the testator. He has accepted as truthful the account given by the grandchild, who drew the will, and that of the son who heard the contents of the will afterwards from his father; from these sources it is evident that the testator wished to change his will and appreciated what he was doing before, at, and after the date of execution. A natural and reasonable account is given of the way in which it came to be made at the hotel kept by one of the witnesses, and a reasonable account is given of why it was not made public at the time. The total value of the estate is said to be about $3,000, which will be considerably diminished by the drain of this litigation—the costs of which are given to both parties out of the estate.

The changes made by this will from the earlier one, made about three years before 1911, are only in minor details and are referable to the desire of the testator to make these changes as shewn in various parts of the evidence. Just before this will was made he had a quarrel with the defendant and told her that he was not going to keep her husband in his will as executor, and he also told Mr. Weir and spoke to

the witness Bardy about wanting to have all Mrs. Weir's children share, as one had been left out in the former will. In the new will this was made right and a change was made in the executors, leaving out Jundt. The testator also wished to leave out his daughter, the defendant, but on talking it over with Weir, who drew the will, her name was mentioned as legatee for $100.

In the earlier will his wife was to get $100 a year for life, but in the new will she was only to get $300 as a lump sum, in both, the adopted son is to get $150. In the new will, after the payments of $300 and $150 and $100 to the defendant, the residue is to be divided among the son William, the daughter Annie, and the children of his deceased daughter Elizabeth. The former will provided for payment to the adopted son of $150 and payment to the widow of $100 for life, and after her death division equally among the family (except, as I understand, one son of Mrs. Weir, who had been omitted). So that financially little change was made, and the changes made are explained by the situation. He had not got along well with the Normans and was going to assert his power by changing his will. His wife had been married before and had a family and some land and a house in which he lived, and she was by no means in destitute circumstances. The daughters had all been married and had left home for years; so that the will is in all respects officious.

The learned County Court Judge has dealt liberally with the defendants in allowing solicitor and client costs out of the estate—but I do not think this should be followed as to the costs of an unsuccessful appeal. The appeal should be dismissed and the defendant left to pay her own costs.

HON. MR. JUSTICE TEETZEL:—I agree.

HON. MR. JUSTICE KELLY:—After a careful perusal of the whole evidence, I see no reason why the conclusion arrived at by the learned trial Judge should not be sustained.

Whatever may be said about the testator's mental condition in the latter part of 1910, and in January, 1911, when he is said to have had delusions, the evidence does not shew that when he made the will of February 3rd, 1911, he was not of sound mind and testamentary capacity. Stress was laid on the happenings about a week prior to the will, as

tending to shew his unfitness to make a disposition of his property, but his conduct at that time can be accounted for, to some extent at least, by his excitement over what he evidently thought was an attempt to oppose his wishes and subject him to control. He was a man of strong will, who had been accustomed to have his own way. He had so far recovered, however, from the delusions as to be quite capable of understanding and appreciating what he was doing when on February 2nd, he expressed his intention of making a new will, and on the following day when he gave instructions therefor and discussed the changes he desired to make and the reasons for these changes. That he did so understand and appreciate his acts is shewn not only by the evidence of Weir, who drew the will, and of the witnesses, but by his having on the same day repeated the terms of the will to his son, whom he had appointed one of his executors, and who had no previous knowledge of its contents.

The appeal should be dismissed; costs to be disposed of as directed by the learned Chancellor.

DIVISIONAL COURT.

MAY 22ND, 1912.

HOLLAND v. HALL.

3 O. W. N. 1304.

Trial — New — Slander Action — "Held Town up" — Not Actionable per se.

Motion by defendant for a new trial of action for slander. Plaintiff, a real estate dealer and general merchant, had been a candidate for a municipal office in the town of Walkerville, and the alleged slanders had been uttered by defendant during the election campaign. The statement of claim alleged five distinct counts, and all were left to the jury, which returned a general verdict against defendant for $1,000 damages. Defendant contended that only the first count should have been submitted to jury, none of the others being actionable without proof of special damage and none being alleged.

DIVISIONAL COURT *held*, that expressions used, "held the town up" and "another of his hold-up games," were not actionable *per se*, and that only first count should have been left to jury.

New trial ordered, costs of appeal to defendant in any event.

Motion by the defendant for a new trial in an action tried before HON. MR. JUSTICE KELLY, and a jury on the 13th of March, 1912.

The action was for slander. Five distinct counts were set out in the statement of claim. At the trial the case was submitted generally to the jury, and they returned a verdict in favour of the plaintiff for $1,000. The defendant had throughout contended that the slanders set forth in paragraphs 4, 5, 6, and 7 of the statement of claim were not actionable without proof of special damage. He moved before the Master in Chambers to have these paragraphs struck out. This was refused, 20 O. W. R. 114, and at the opening of the trial the motion was renewed. Again, before the case went to the jury, the same objection was taken; and after the charge of the learned trial Judge the charge was objected to upon the same ground.

The plaintiff was a candidate for re-election to the office of municipal councillor for the town of Walkerville, in January, 1911. At a meeting of the electors the defendant spoke; and all the slanders complained of but one consist of statements said to have been made in the course of that address. The slander contained in the third paragraph of the statement of claim was admitted to be capable of the meaning attributed to it by the innuendo; and was clearly actionable *per se*.

The statement complained of in the fourth paragraph was as follows: "Holland held the town up for an exorbitant price for his property when the town wanted to open up Assumption street. He swore that his lot that the town wanted was worth $850, when it was only assessed for $360, and which he bought for $350 the year before, because he heard the town was going to open up the street and wanted that property."

The innuendo was: "That the plaintiff had falsely sworn to the value of his property for the purpose of cheating the municipality of Walkerville and getting money he was not entitled to."

At the time of the transaction referred to the plaintiff was not a municipal councillor. He owned certain property which the town required for the purpose of opening a street. Expropriation proceedings were taken, and $750 was awarded. During the course of the arbitration the plaintiff stated on oath that the property was worth $850.

The appeal to Divisional Court was heard by Hon. Sir John Boyd, C., Hon. Mr. Justice Latchford, and Hon. Mr. Justice Middleton.

R. McKay, K.C., and Coburn, for the defendant.

Wigle, K.C., and Rodd, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—It is clear that the last slander complained of is not capable of the meaning charged in the innuendo. Perjury is not in any way implied in the statement. The fair meaning of the statement is that the plaintiff, owning land required by the municipality, which had cost him $350 the year before, sought an excessive price from the municipality, and in support of this claim stated on oath that the property was worth $850.

Upon the argument counsel sought to support the claim by the suggestion that the use of the expression "held the town up," implied some criminal act. We cannot assent to this. It is true that this Americanism has now received recognition in standard dictionaries as being equivalent to "stop and rob upon a highway;" but it is obvious that in this context the words were not used with that significance, but as a figurative expression to indicate that the plaintiff had availed himself of the necessities of the municipality to drive a hard and perhaps unconscionable bargain. The words taken in their natural significance are not capable of a meaning actionable *per se*.

The same remarks apply to the fifth count. What is there complained of is the statement—somewhat modified in the evidence—that the plaintiff had appealed from the assessment of certain property as being too high and afterwards sold the property for a much larger sum than it had been assessed for. This is described as being "another of his hold-up games." Clearly this is not actionable *per se*.

What is complained of in the sixth paragraph is a statement that the plaintiff desired "to get back into the council so that he could sell the town some more of his dry goods as he did in the past. He sold the town all the goods they needed for the Elks' celebration and decorations for the King's funeral, at handsome profits, and now he wants to be mayor."

It may well be that this charges the plaintiff with misfeasance in office; but the plaintiff's own evidence discloses that what is charged is substantially true. The municipal council voted a certain sum to be used for the purpose of decoration. The plaintiff was in charge on behalf of the municipality. He made a contract with a third person. That

third person purchased certain of the goods used for the decoration from the plaintiff. This is the very thing prohibited by sec. 80 of the Municipal Act; and it is quite immaterial whether the plaintiff made a profit or not; although it appears from his own evidence that he did sell at a profit.

The truth of the statement complained of being thus established by the plaintiff's own evidence, this count ought not to have been allowed to go to the jury.

The seventh paragraph charges the making on another occasion of substantially the same statement as that already referred to with reference to the street opening.

For these reasons we think that the learned Judge ought not to have allowed the action to go to the jury except upon the first slander charged—that contained in the third paragraph—and that as to the slander charges in paragraphs 4, 5, 6, and 7, the action should be dismissed; and as the damages were not separately assessed there must be a new trial with reference to the remaining charge.

The defendant should have the costs of this appeal in any event, and there should be no costs of the abortive hearing. The other costs of the issues upon which the defendant has now succeeded will be reserved for the trial Judge.

It is to be hoped that the parties will now see the wisdom of adjusting their differences and avoiding the necessity of any further hearing.

HON. MR. JUSTICE LATCHFORD and HON. SIR JOHN BOYD, C., agreed.

HON. MR. JUSTICE MIDDLETON. MAY 20TH, 1912.

HOUSE v. SOUTHWOLD.

3 O. W. N. 1295.

Negligence — Obstruction on Highway — Telephone Pole Erected by Unauthorized Person—Liability of Municipality—Municipal Act (1903), s. 606.

Action for damages sustained by plaintiff by collision with a telephone pole on the highway belonging to a company which had no statutory or other right to erect it there.

MIDDLETON, J., *held* that the omission of the municipality to remove an obstruction in the roadway placed there by a stranger was mere nonfeasance, and the action not having been brought within 3 months, plaintiff could not recover.

A question of law argued by consent of counsel before the trial of the action upon a stated case.

On 27th of June, 1911, plaintiff, while driving along the north branch of Talbot road, near Shedden village, came in contact with a telephone pole erected upon the highway, and was injured. The telephone pole was erected in 1906, by an association incorporated under the Co-Operative Companies Act, R. S. O. 1897, ch. 202 (now repealed). This company had no statutory or other right to erect poles upon the highway.

A resolution of the township council was passed 5th March, 1906, in the words following:—

"This council grants the Southwold and Dunwich Telephone Company the privilege of constructing their telephone lines, as long as they do not cause or have any obstruction in or on the roads and highways of this township."

The action was not brought within three months as prescribed by the Municipal Act (1903), sec. 606.

J. D. Shaw, for the plaintiff.

S. Denison, K.C., for the defendants.

HON. MR. JUSTICE MIDDLETON:—The above resolution, it is to be observed, does not purport to authorise the erection of any pole upon the highway. Moreover, a resolution is not an authorised method of municipal action. A by-law is necessary.

The Municipal Act of 1897, conferred upon councils of cities, towns and villages the power of regulating by by-law the erection and maintenance of electric, telegraph and telephone poles and wires within the municipal limits. See sec. 559, sub-sec. 4. This provision was carried forward unchanged in the revision of 1903; and it was not until 1906 that townships first received any authority to deal with the erection of poles and wires upon highways, when the statute was amended by 6 Edw. VII., ch. 34, sec. 20. This statute came into force on the 14th of May, 1906, more than two months after the passing of the resolution in question; so that in whatever way the resolution is looked at it appears to be entirely invalid.

This action is unfortunately not brought within the time limited by sec. 606 of the Municipal Act, and so cannot be maintained if the municipality is only liable by reason of its failure to discharge its statutory duty to keep the highway

in repair. In other words, the plaintiff, to succeed, must establish misfeasance and not nonfeasance.

I have not been referred to any case which would justify me in holding that the mere failure to remove an obstruction placed upon the highway by a third person constitutes misfeasance. In Judge Denton's very careful review of the cases (Denton on Municipal Negligence, pp. 28 to 31), it is stated that where the obstruction is placed upon the highway by a stranger and not by the corporation the omission of the municipality to remove the obstruction, where there has been a sufficient period of time to justify a finding of negligence against the corporation, constitutes mere nonfeasance, and the action is governed entirely by the provisions of sec. 606. With this I agree.

Atkinson v. *Chatham*, at 26 A. R. 521, though reversed on another ground in the Supreme Court, places the liability of the municipality substantially upon this ground. *Pow* v. *Oxford*, 11 O. W. R. 115, 13 O. W. R. 162, is much relied upon by the plaintiff. I do not think it turned at all upon the question which is now to be considered, but rather upon the question whether the municipality, in the light of the agreements and legislation therein referred to, remained responsible for that portion of the highway occupied by the railway. The action was brought within the statutory time, and, unless this legislation had relieved the municipality from its duty to repair, non-repair was abundantly made out. The fact that the condition of non-repair was caused by the erections of a third party was in itself quite immaterial.

I rest my decision entirely upon the ground that there is no liability on the part of municipalities arising from the placing of obstructions upon the highway by third parties, save the liability arising from the failure to repair imposed by sec. 606.

So holding, I answer the question submitted by finding that the plaintiff's right of action, if any, is barred by reason of the action not having been brought within three months; and it follows that the action must be dismissed, with costs if demanded.

HON. MR. JUSTICE RIDDELL IN CHRS. MAY 20TH, 1912.

PRINGLE v. STRATFORD.

3 O. W. N. 1293.

Costs — Illegal Exchange of Land Contemplated by Municipal Council —Action by Ratepayer to Prevent — Scheme Abandoned—Right of Ratepayer to his Costs of Action.

Appeal by plaintiff from order of local Judge refusing him costs of proceedings taken to restrain defendant municipality from illegally purchasing the plant and buildings of a manufacturing industry without submission of the agreement to the ratepayers.

RIDDELL, J., *held* that, as plaintiff had good reason to believe an illegal act was contemplated, he was justified in taking action, and should not be deprived of his costs.

On March 20th, 1912, a proposition was made to the city council of Stratford, that the city should buy the property, land, buildings, and machinery of the McD. Thresher Co. for $2,000, and convey to that company a parcel of land in the city. The proposition was referred to a special committee and the council met March 25th to consider the report of the committee. The committee submitted an agreement that the city should convey to the company the said land, in payment for which the company would convey to the city the equity of redemption (subject to a mortgage for $20,000), of the lands of the company and also the factory premises and plant. The council passed a resolution at the meeting adopting the agreement.

An alderman of the city informed the plaintiff, a ratepayer of Stratford, that it was not the intention of the council to submit the agreement to the people nor to pass any by-law, but that it was the intention to buy the land for transfer to the company at once and carry out the agreement forthwith. Thereupon the plaintiff applied to the Local Judge at Stratford and obtained an injunction—serving notice of motion to continue the injunction, he took out an appointment to examine, etc.

Pending the motion, the city solicitor wrote the plaintiff's solicitor that the McD. Co. had declined further to proceed with the matter of the agreement—that the agreement had not been executed and would not be executed. "We assume, therefore, that you will not find it necessary to proceed further with your injunction proceedings." The plaintiff's solicitor then replied saying amongst other things

"our client must be assured of his costs if you wish him to drop this at the present juncture"—whereupon the city solicitor said "When there is nothing left to litigate about except costs, it is improper to proceed with the action. The question of costs can be determined, if not agreed upon, in Chambers."

The plaintiff moved for his costs before the Local Master at Stratford, who did not allow costs to either party. He gave leave to appeal; and the plaintiff now appealed.

W. H. Gregory, for the plaintiff.

C. A. Moss, for the defendant municipality.

HON. MR. JUSTICE RIDDELL:—The defendants file an affidavit upon the motion setting out that no action was taken by the council except the passing of a resolution adopting the agreement—but there is no denial of the intention to proceed forthwith with the illegal arrangement, although it must have been the allegation of such intention which influenced the Local Judge in granting the injunction order and although the plaintiff's affidavit sets this up as the reason for moving.

It must be taken then that such was the intention. It was argued that the plaintiff cried out before he was hurt—but where a council contemplates an illegal act, a motion for an injunction should be made at the earliest possible moment. Had the plaintiff delayed after receiving the information of the council's act and intention, he might well be found fault with if he came for relief after the council had expended money and labour upon the scheme *vigilantibus non dormientibus*.

The appeal will be allowed and the defendants directed to pay the costs of action, application to the Local Master and this appeal.

HON. MR. JUSTICE MIDDLETON. MAY 18TH, 1912.

RE MERCER ESTATE.

3 O. W. N. 1292.

Surrogate Courts — Jurisdiction — Payment of Infant's Money into Surrogate Court by Administrator—No Power to Receive—Trustee Act, 1 Geo. V. c. 26, s. 37.

Appeal by Official Guardian from order of Surrogate Judge of Oxford county directing certain moneys of an infant to be paid into the Surrogate Court to be paid out on his attaining majority.

MIDDLETON, J., *held* that moneys should be paid into High Court, as Surrogate Court has no machinery for nor power to receive moneys paid into Court.

Appeal allowed, no costs of appeal.

An appeal by the Official Guardian from an order of his HONOUR JUDGE FINKLE, Surrogate Judge of Oxford county, dated 20th April, 1912, directing payment of money into the Court to be paid out to the infant on his attaining his maturity.

F. W. Harcourt, K.C., as Official Guardian to the infant, John H. Mercer.

C. A. Moss, for the administrator.

HON. MR. JUSTICE MIDDLETON:—Upon the appointment to pass the administrator's accounts it appeared that the administrator had in his hands $214.33 belonging to the infant; and, the administrator desiring to be discharged from his trust with respect thereto, the Surrogate Judge directed that the administrator do pay this sum into the Surrogate Court to the credit of the infant, less ten dollars allowed for the cost of payment in; this sum to be paid out to the infant upon his obtaining his majority.

This direction was made against the protest of the Official Guardian, who contended that the money should be paid into the High Court under the provisions of the Trustee Act, 1 Geo. V., ch. 26, sec. 37, sub-sec. 2; which provides that a Surrogate Judge, where in passing accounts before him he finds that an executor or administrator, guardian or trustee, has money or securities in his hands belonging to an infant or lunatic, may make a "like order;" that is, an order similar to that referred to in sec. 37, sub-sec. 1, permitting the payment into the High Court of the moneys in question.

The Surrogate Court is a Court of probate only; it has no inherent jurisdiction. It is a creature of the statute; its jurisdiction and powers are found in the Surrogate Act. It can grant probate, letters of administration and letters of guardianship, and can hear and determine questions arising in all causes and matters testamentary; but neither it nor the Court of Probate which it succeeded over had the right to the custody of the property of the infants or lunatics; and although new jurisdiction has recently conferred upon it, enabling it to pass executors' accounts and deal with certain matters ordinarily arising in administration suits, no such power as that suggested has yet been conferred.

There is not to be found in the Surrogate Rules any machinery for payment into Court. The Surrogate Court has no accountant and no officer who is entitled to receive and hold the moneys.

I asked counsel what was meant by "paying money into the Surrogate Court;" and he told me that the procedure adopted was the payment of the money into a bank. He did not know whether it was paid to the credit of the person entitled either solely or jointly with the Surrogate Registrar or the Surrogate Judge. The bank pass-book is then deposited with the Surrogate Registrar. Upon this deposit being made, the bank allows three per cent. interest.

Apart from the question of the absence of jurisdiction, the practice is most inconvenient and is not in the interest of the infant. The expense of paying money into the Surrogate Court in this way is fully as great as upon payment into the High Court; and the money carries three per cent. interest instead of four and a half per cent. as now allowed by the High Court. The funds are subject to no supervision or control. There is no audit, and no one is responsible in any way.

The appeal should be allowed, and the order varied by directing payment into the High Court. No costs.

MASTER IN CHAMBERS. MAY 21ST, 1912.

GROCOCK v. EDGAR ALLEN & CO., LIMITED.

3 O. W. N. 1315.

Particulars — Statement of Claim — Action for Breach of Contract with Company—Accounting for Commission.

Motion by defendants for particulars of certain paragraphs of statement of claim. Plaintiff alleged certain representations by certain directors of the defendant company which caused him to enter upon a contract with the defendant company; alleged certain wrongful conduct of the defendant's manager towards him and alleged neglect of defendant to account to plaintiff for commissions due him.

MASTER-IN-CHAMBERS ordered particulars of above allegations, followed, as to the last-named, *Blackley* v. *Rougier*, 4 O. W. R. 153.

Action brought to recover $15,000 damages for alleged breach of a contract made in September, 1910, at Sheffield, England, where the defendant company had its head office but also carried on business in Ontario.

The defendant company moved for particulars of statement of claim in certain respects before pleading, after a request for same had been refused.

H. E. Rose, K.C., for defendant's motion.

C. A. Moss, for plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—The statement of claim sets out in paragraph 2 that plaintiff was appointed representative of the defendant company for Ontario on the terms set out in a letter from the company to plaintiff dated 16th September, 1910. Prima facie therefore all the contract must be found there.

In paragraph 3, however, it is said that plaintiff accepted the engagement "upon the representations made by the directors of the defendant company that the company then had a very large number of customers in Ontario"—"which was untrue as the directors knew,"—"and that the commission to be allowed him on sales in Ontario would, with the monthly salary of $85, amount to such a substantial sum as to warrant the plaintiff accepting the engagement which he accordingly did."

As this paragraph seeks to enlarge and vary the terms of the letter of 16th September the plaintiff should state (1) who are the directors who made the representations; (2) whether verbally or in writing; (3) what minimum was

stated which would increase the salary to a substantial sum and stating what that was. In paragraph 4 it is alleged that on his arrival here the company's manager (1) refused to allow the plaintiff to act as its representative in or over a large part of Ontario; (2) interfered with him in his negotiations for business; (3) refused and delayed to fill orders he procured; (4) finally ordered him to cease work for the company, and seven and a half weeks thereafter dismissed plaintiff from its employ.

Particulars should be given under this paragraph as to the various alleged wrongdoings of the company's manager to shew:—

(1) If the refusal was in writing or verbal. If the latter what was said and where it was spoken.

(2) This may be left for discovery.

(3) One or two at least of the most important instances should be given.

(4) If this dismissal was in writing or by parol, and if the latter then where and in what terms.

In paragraph 5 it is said that the company has not accounted to plaintiff for all sales made or contracts taken in Ontario, for which plaintiff is entitled to commission, and has refused to pay the amount due to plaintiff to him. Of this paragraph it seems that particulars should be given such as were ordered in the similar case of *Blackley* v. *Rougier*, 4 O. W. R. 153. In paragraph 6 it is said that the company in breach of its agreement did not give the plaintiff the necessary assistance and support which he was to have in order to make sales of defendants' goods.

Particulars of this (if really required) can be had on examination for discovery.

An order will, therefore, go as above set forth to be complied with in two weeks. Costs will be in the cause. Time for delivery of statement of defence will run only from the delivery of the particulars ordered.

MASTER IN CHAMBERS. MAY 21ST, 1912.

RAINY RIVER NAVIGATION CO. v. ONTARIO AND MINNESOTA POWER CO. AND MINNESOTA AND ONTARIO POWER CO.

3 O. W. N. 1314.

Process — Writ of Summons — Service on Foreign Company—Motion to Set Aside — Assets in Ontario — Con. Rule 162—Conditional Appearance.

Motion by Minnesota and Ontario Power Company to set aside service of writ of summons and statement of claim and order therefor.

MASTER-IN-CHAMBERS *held* that, as there were conflicting affidavits as to whether applicants had assets in Ontario, motion should be dismissed, costs in cause, leave being given applicants to enter conditional appearance.

Farmers Bank v. *Heath*, 21 O. W. R. 403, followed.

In an action against two companies, the Ontario and Minnesota Power Company and the Minnesota and Ontario Power Company, the latter company moved to set aside service of writ of summons and statement of claim and order therefor.

Glyn Osler, for the defendants' motion.

F. Aylesworth, for the plaintiffs, contra.

CARTWRIGHT, K.C., MASTER:—The order was made on the ground that the Minnesota Company was a necessary party to the action against it and the Ontario Company. The argument on the motion was confined to the question of whether the Minnesota Company had any assets in Ontario either as being part owners of the dam or doing business in this province.

In confirmation of the latter ground a letter is exhibited from the defendant company dated 5th March, 1912. On it is found the following heading:

"Plants located: International Falls, Minnesota, Fort Frances, Ontario."

That letter is signed by Mr. Backus as president. He being admittedly also the president of the Ontario & Minnesota Company.

Whether or not the dam and the works served thereby are to any extent the property of the Minnesota Company is denied by their solicitor speaking from information given to him by Mr. Backus. But even if that is so still there remains

the fact that the Minnesota Company holds itself out as having a plant located at Fort Frances. How far this is true and if true would justify the order now sought to be set aside cannot be decided at this stage on conflicting affidavits.

Following the decision in *Farmers Bank* v. *Heath*, 3 O. W. N. 805, 21 O. W. R. 403, an order will go dismissing the motion with costs in the cause and allowing the defendant company to enter a conditional appearance. This should be done in four days.

It is not improbable that when the matter has been further elucidated the action as against the Minnesota Company may be discontinued. It may then appear that the foreign company is not a necessary party to the action (nor within any other provisions of Rule 162). That was the ground on which the order was made and one which, if true, would support that order apart from any question of clause (h) of Rule 162.

HON. MR. JUSTICE MIDDLETON. MAY 27TH, 1912.

RE McGILL CHAIR CO.

RE MATTHEW GUY CARRIAGE CO.

3 O. W. N. 1326.

Appeal — To Court of Appeal — From Single Judge — Company— Winding up — Contributories — Policy as to Granting or Refusing Leave to Appeal — Winding-up Act, R. S. C. (1906), c. 144, s. 101.

MIDDLETON, J., granted leave to appeal from an order of Meredith, C.J.C.P., 21 O. W. R. 921, on ground that the decision was on a matter of importance and other cases were affected thereby, but he refused leave to appeal from his own order, 21 O. W. R. 842, on the ground that no other cases nor future rights were involved and the amount in question, while nominally above $500, was in reality very uncertain. R. S. C. (1906) c. 144, s. 101, considered.

In each of these cases an application was made for leave to appeal to the Court of Appeal from judgment of a Judge in Court upon an appeal from the decision of the Master in Ordinary during the course of a liquidation.

The first case was for leave to appeal from a judgment of HON. SIR WM. MEREDITH, C.J.C.P., 21 O. W. R. 921, and the second case was for leave to appeal from a judgment of HON. MR. JUSTICE MIDDLETON, 21 O. W. R. 842.

The cases had nothing in common save that they involve the consideration of the circumstances under which such leave ought to be granted.

J. A. McIntosh, for the application of Munro.

George Wilkie, for the liquidator, contra.

G. H. Kilmer, K.C., for the application of the liquidator.

F. S. Mearns, for the directors, contra.

HON. MR. JUSTICE MIDDLETON:—The statute itself, R. S. C. (1906), ch. 144, sec. 101, indicates the policy of the Dominion Winding-up Act, viz., that the decision of a single Judge should be final unless the question to be raised upon the appeal involves future rights or is likely to affect other cases of a similar nature in the winding-up proceedings. Leave may also be granted if the amount involved exceeds five hundred dollars. This policy is, no doubt, based upon the view that in cases not falling within the lines indicated it is better that there should be an end of the litigation, and a speedy distribution of the estate, rather than the delay and expense necessarily incident to an appeal. There is not, so far as I know, any reported decision in which the principles to be applied have been the subject of any discussion.

In the *McGill Case* the judgment in question is reported in 21 O. W. R. 921. The decision does affect other cases in the particular winding-up, all the stock of the company having been issued as bonus stock.

The appeal is sought by the shareholder who thus assumes the risk of costs; and the point involved is certainly of importance. The amount actually in question in all is said to be very considerable. I think it is a proper case in which to permit the further appeal sought.

In the *Guy Case*, the judgment in question is reported in 22 O. W. R. 34. No other cases are involved in this liquidation; no future rights are involved; and the amount in question, while nominally, just beyond five hundred dollars, is really very uncertain, as the parties upon whom liability was imposed by the Master are said to be financially worthless, except in the case of one whose financial position is problematical.

The order in question having been pronounced by myself, my inclination is to give the freest possible right of appeal. I suggested to counsel the propriety of having the motion

enlarged before some other Judge, for this reason; but counsel preferred that I should deal with the matter myself. As a matter of precaution, I discussed the circumstances with one of my brother Judges. He agreed with me in thinking that this is not a case in which a further appeal ought, in the interest of the liquidator and creditors, to be allowed.

The order sought will, therefore, be granted in the first case (costs in the appeal) and will be refused in the second with costs.

HON. MR. JUSTICE MIDDLETON. MAY 25TH, 1912.

RE SMITH AND PATTERSON.

3 O. W. N. 1324.

Vendor and Purchaser — Objections to Title — Will — Construction —Devise of Lands—Power to Dispose of—Title Valid.

Application by vendor to determine validity of an objection taken by purchaser to vendor's title. Vendor had real property left her by will "to be disposed of by her as she may deem just and prudent in the interest of my family."

MIDDLETON, J., *held* that this devise gave her power to convey a good title to a purchaser, without deciding whether the purchase-moneys would be subject to any trust.

McIsaac v. *Beaton*, 37 S. C. R. 143, followed.

Semble, however, that testator's words do not import a trust.

Lambe v. *Eames*, 6 Ch. 597, referred to.

Order that objection not well taken, no costs of application.

Application by the vendor to determine the validity of an objection taken by the purchaser to the vendor's title.

T. A. Gibson, for the vendor.

F. W. Carey, for the purchaser.

HON. MR. JUSTICE MIDDLETON:—The title of the vendor is derived through a will. The testator died on the 8th February, 1892, and devised all his property to his wife, "to be disposed of by her as she may deem just and prudent in the interest of my family." The widow, assuming that this gave her a fee simple, purported to sell the property to the vendor's predecessor in title. The purchaser objects that the words quoted are not sufficient to give the widow a fee simple in the lands or any power to convey them in fee.

Upon the argument the purchaser placed his contention thus: The gift is a gift to the wife of the property "to be

disposed of . . . in the interest of my family" and that this constitutes an express trust. If the gift had been to the widow in fee, and a power to dispose of the same in the interest of the family had been superadded, this would not reduce the fee.

The case is thus distinguished from most of the authorities dealing with precatory trusts; as, if the argument is well founded, this is an express trust.

After the most careful consideration I do not think it necessary to deal exhaustively with this argument, because I am convinced that the words "to be disposed of" give the widow a right to sell. It may be that she held the proceeds of the sale in trust for the family, but this would not prevent the title passing by the sale.

The nearest approach to the precise words that I have been able to find is in *Countess of Bridgewater* v. *Duke of Bolton*, 6 Mod. 106; where, at page 111, it is said:

"A devise to a man 'to dispose at will and pleasure' is a fee, and this is 'to dispose as he pleases.' A devise was made of lands to his wife 'to dispose thereof upon herself and her children,' and it was held that she had a fee subject to the particular trust for the children."

The power to dispose of property gives the widest possible right to alienate, and must be taken to "comprehend and exhaust every conceivable mode by which property can pass," (Lord Macnaghten, in *Northumberland* v. *Attorney-General*, 1905, A. C. 406) and enables the party having that power "to sell out and out," per Farwell, J., *Attorney-General* v. *Pontypridd*, 1905, 2 Ch. 450.

This is sufficient to warrant me in holding that the objection to the title is not well founded.

I am inclined to think that upon the construction of the will there is not a trust, and that the words used cannot be successfully distinguished from the words construed in the case *Lambe* v. *Eames*, 6 Chy. 597. The words there used, following the gift of the widow, were, "to be at her disposal in any way she may think best for the benefit of herself and family." This was held insufficient to cut down the absolute gift.

The whole tendency of the more recent cases is in favour of restricting the doctrine of precatory trust rather than ex-

tending it. See, for example, *Re Williams* (1897), 2 Chy. 12; *Re Oldfield* (1904), 1 Chy. 549.

Since writing the above I have found the case of *McIsaac* v. *Beaton*, 37 S. C. R. 143, where the words are almost identical with the words here used. The property was given to the wife "to be by her disposed of among my beloved children as she may judge most beneficial for herself and them;" and the Court, affirming the Nova Scotia Courts, held that the widow took the real estate in fee with power to dispose of it whenever she deemed it was for the benefit of herself and her children so to do.

An order will, therefore, go declaring that the objection to the vendor's title is not well taken, and that under the will and the conveyance in question, the vendor's predecessor-in-title took the land in fee simple.

Costs are not asked.

HON. MR. JUSTICE BRITTON. MAY 22ND, 1912.

OTTAWA—SINGLE COURT.

RE GALLAGHER.

3 O. W. N. 1302.

Charge on Land — In Favour of Absentee — Sale Free from Charge —Payment into Court — Amount of Charge — Will — Terms— Payment out.

Application by owners of certain lands to pay money into Court and have the said lands freed from a charge thereon. The charge was made by a former owner of the lands in favour of one P. G., whose present whereabouts were unknown.

BRITTON, J., *held* that upon payment into Court of the amount of the charge and interest, less the costs of the application, the lands should be released from the charge. Order accordingly.

An application by Martha O'Reilly and Elizabeth Waterston to pay money into Court and have part of lot 13 on the east side of Nicholas street in the city of Ottawa freed from a charge thereon.

John R. Osborne, for the applicants.

HON. MR. JUSTICE BRITTON:—Margaret Gallagher was the owner of the above described land. She devised this

land, particularly describing it by metes and bounds, to her daughter Anna Mary Gallagher, but subject to a charge of $300 in favour of each of her sons, namely, Philip, Stephen, and Ambrose. The will directed that these sums should be paid to the sons respectively at the expiration of 5 years from the death of the testatrix if the property had not been sold in the meantime, but if the property should be sold within 5 years from such death, then the sums mentioned should be paid forthwith after such sale. The will further provided that in the event of the death of any one of said sons before such sale, or before the expiration of said term of 5 years, "the share hereinbefore devised to him out of the said lands, shall not be payable, and shall lapse."

The will was made on the 24th day of August, 1899, and the testatrix, Margaret Gallagher, died on the 19th day of July, 1900. No part of the land was sold by Anna Mary Gallagher within 5 years from the death of Margaret Gallagher. On the 30th day of April, 1904, Anna Mary Gallagher settled with Stephen Gallagher and procured a release from him. On the 3rd day of May, 1904, she settled with Ambrose Gallagher and procured a release from him. Both of these releases were duly registered. In 1906 Anna Mary Gallagher sold parts of these lands to the applicants. As Philip Gallagher could not be found—his relations not knowing whether he was then living or not—these parcels were sold subject to any claim Philip, if living, might have to the sum of $300.

These applicants now desire to sell and the purchasers are not willing to accept the title unless the lands are freed from the charge mentioned in favour of Philip, for the $300. If Philip Gallagher was alive on the 19th day of July, 1905, he would on that day have been entitled to receive the $300, and so he as to his interest in the land will be fully protected by the payment into Court by the applicants of the sum of $383.13. That sum is made up of the $300 charged; interest on that sum at five per cent., from 19th July, 1905, say 6 years and 10½ months to the 4th day of June, 1912, $103.13 less costs of this application, and of payment in, which costs I fix at $20. Under the circumstances no claim having been made for the money and the owners of the land having no knowledge of where Philip Gallagher is, if living, I deem it right that the costs should be deducted from full amount of claim.

Upon payment of the said sum of $383.13 into Court in this matter on or before the 4th day of June, 1912, there will be a declaration that the said lands above mentioned, being all the lands charged by Margaret Gallagher with the payment of $300 to Philip Gallagher, shall be freed from that charge and incumbrance.

It will be reserved to the said applicants, Martha O'Reilly and Elizabeth Waterston and to each of them, the right to make an application at any time for payment out of Court to them or either of them, of the said money or any part thereof, whether by reason of the death of the said Philip Gallagher or for any other cause, upon such facts and material as they may be advised may warrant any such application.

HON. MR. JUSTICE SUTHERLAND. MAY 23RD, 1912.

ALBERTA DILTS v. DAVID WARDEN.

3 O. W. N. 1319.

Husband and Wife — Marriage — Action for Declaration of Nullity —Consent of Minutes of Judgment—Refusal of Judge to Give Judgment—Amendments to Marriage Act—7 Edw. VII. c. 23, s. 8—9 Edw. VII. c. 62.

Action for declaration that defendant was not lawful husband of plaintiff and for order against his interfering with her or her children. The statement of claim alleged that plaintiff had gone through a form of marriage with defendant, relying on his statement that he had a legal divorce from a former wife which she had subsequently found to be untrue. Defendant pleaded that divorce was legal. At trial counsel for parties submitted a memorandum signed by each agreeing that the marriage should be declared a nullity.

SUTHERLAND, J., *held* that on material before him he should not make declaration asked.

Lawless v. *Chamberlain*, 18 O. L. R. 296 at p. 300 and statute 7 Ed. VII. c. 23, s. 8, as amended by statute 9 Ed. VII. c. 62, referred to.

Plaintiff asked for a judgment or order declaring that defendant was not her lawful husband and other relief against his interfering with her and in connection with the custody and control of their children.

In her statement of claim she alleged that relying on the defendant's representation that he had obtained a divorce from a woman to whom he had been previously married, she went through a marriage ceremony with him on or about 26th October, 1896, and that subsequently they lived together and cohabited. There were four children.

She alleged further that she had learned that defendant was not divorced before his marriage to her. In his statement of defence the defendant alleged that he did obtain such divorce.

At the trial a paper writing endorsed minutes of judgment was filed, in which it was stated that the parties to the action have agreed that their "pretended marriage" should be "adjudged and declared a nullity upon the grounds set out in the plaintiff's statement of claim." There were other terms as to the custody of and access to the children and as to further interference with the plaintiff by defendant, and the latter also agreed therein to pay the costs of the action fixed at $75. This writing purported to be signed by the parties to the action and to be witnessed by their respective solicitors.

W. D. Swayzie, for the plaintiff.

H. Carpenter, for the defendant.

HON. MR. JUSTICE SUTHERLAND:—No oral testimony was offered at the trial. In these circumstances a counsel appeared and stated that he had been instructed by the solicitors for both parties to do so and ask for judgment in terms of said agreement. Without expressing an opinion as to what relief, if any, could be given in this Court in a case such as this, if formal proof were given by evidence under oath that the defendant had gone through a form of marriage with the plaintiff while still the lawful husband of another woman then living, I am of opinion that I should not in any event be asked on the material before me to make any such order as is desired. In the written consent or agreement there is not even an acknowledgment on the part of the defendant of the truthfulness of the allegations of the plaintiff.

In *Lawless* v. *Chamberlain,* 18 O. L. R. 296, at 300, the Chancellor points out the care to be taken in matters of this kind, as follows: "Mr. Justice Butt also alludes to the great care and circumspection which should be exercised in dealing with questions affecting the validity of marriage. This is emphatically so as regards the character and quality of the evidence. The rule has long been recognized in cases of annulling marriage that nothing short of the most clear and convincing testimony will justify the interposition of the Court." This principle is recognized in the Ontario Statute of 1907, ch. 23, sec. 8, as amended by 1909, 9 Edw. VII. ch.

62, and in connection with the restricted jurisdiction thereby conferred. I quote from the latter statute:

"1. Section 31 of the Marriage Act as enacted by the Statute Law Amendment Act, 1907, is hereby amended by adding thereto the following sub-sections:—

(6) No declaration or adjudication that a valid marriage was not effected or entered into shall be made or pronounced under the authority of this section upon consent of parties, admissions, or in default of appearance or of pleading or otherwise than after a trial.

(7) At every such trial the evidence shall be taken *viva voce* in open Court, but nothing in this sub-section shall prevent the use of the depositions of witnesses residing out of Ontario or of witnesses examined *de bene esse*, where, according to practice of the Court, such depositions may be read in evidence."

I therefore decline to ratify the consent or agreement in question, or to make a declaration as asked.

I do not think in the circumstances I can make any order as to costs.

MASTER IN CHAMBERS. MAY 25TH, 1912.

CANADIAN OIL CO. v. CLARKSON.

3 O. W. N. 1331.

Discovery — Examination of Defendant — Motion by Plaintiff for Order Requiring Defendant to Answer Questions Which He Declined on Advice of Counsel.

MASTER-IN-CHAMBERS *held* that where defendant counterclaimed, he was really a plaintiff asking damages from his vendors, and they were entitled to information such as was ordered in *Ont. Fruit Co.* v. *Hamilton, G. & B. Rw. Co.*, 21 O. W. R. 82 at 86.

Plaintiffs claimed $1,130 for goods (chiefly oil) sold and delivered to defendant. The statement of defence alleged that the oil supplied was not in accordance with the plaintiffs' contract, and that defendant had sustained damages on this account to over $3,000, of which $165 was loss of profit on sales and $2,000 for injury to his business.

In paragraph 7 of the statement of defence it was said that after defendant had sold large quantities of the oil so supplied to numerous customers he was obliged to take back a large portion of said oil and make a large reduction on the price of what was kept by the customers.

On examination for discovery defendant was asked to give particulars of these sales, but declined to do so on advice of counsel.

Plaintiffs moved to have these questions answered.

W. N. Tilley, for plaintiffs.

R. B. Henderson, for defendant.

CARTWRIGHT, K.C., MASTER:—No doubt the general rule is that parties are not required to give the names of their witnesses. Here, however, it seems that defendant is claiming about $1,000 as damages arising out of the rejection of the oil supplied by plaintiffs after it had been sold by defendant to his customers on the assumption that it was of the quality to be supplied by plaintiffs.

The point seems to be covered by the decision in *Ontario Fruit Co.* v. *Hamilton, Grimsby & Beamsville Rw. Co.*, and *Ontario Fruit Co.* v. *Grand Trunk Rw. Co.*, 21 O. W. R. 82, at p. 86. See, also, *Scott* v. *Membery*, 3 O. L. R. 252.

Here the defendant who counterclaims is really a plaintiff asking damages from his vendors They, in my opinion, are entitled to the information such as was ordered in the *Ontario Fruit Case*, supra.

The motion is entitled to prevail, the costs should be to plaintiffs in the cause.

HON. MR. JUSTICE RIDDELL IN CHRS. MAY 20TH, 1912.

BROWN v. ORDE.

3 O. W. N. 1312.

Appeal — Leave to Appeal — To Divisional Court — From Judge in Chambers—Action for Slander—Discovery.

RIDDELL, J., refused leave to appeal to Divisional Court from order of Middleton, J., 22 O. W. R. 38; 3 O. W. N. 1230. No reason to doubt soundness of order.

Motion for leave to appeal from a judgment of HON. MR. JUSTICE MIDDLETON, dismissing an appeal from the judgment of HIS HONOUR JUDGE MCTAVISH, directing the plaintiff to answer certain questions which he had refused to answer upon his examination for discovery. See 22 O. W. R. 38.

J. King, K.C., for the plaintiff's motion.

H. M. Mowat, K.C., for the defendant, contra.

HON. MR. JUSTICE RIDDELL:—Upon a careful consideration of the whole case, I can see no reason to doubt the soundness of the judgment from which it is desired to appeal, and I refuse the application with costs.

An unreported case in the Queen's Bench Division of *McDonald* v. *Sheppard* is nearly in point; but I do not think any authority is necessary.

This will be without prejudice to any motion the plaintiff may be advised to make for the amendment of the pleadings, etc.

HON. MR. JUSTICE RIDDELL. MAY 28TH, 1912.

PATTISON v. ELLIOTT.

3 O. W. N. 1327.

Surrogate Court — Removal of Cause into High Court — Difficulty and Importance of Questions Arising—Value of Estate—R. S. O. (1897) c. 59, s. 34 (2).

RIDDELL, J., *held* that where a fair case of difficulty has been made out so that there will be a real contest, the case should be removed from the Surrogate Court to the High Court, if the amount of the estate brings the case within R. S. O. (1897) c. 59, s. 34 (2).

Re Wilcox v. *Stetter*, 7 O. W. R. 65,

Re Graham v. *Graham*, 11 O. W. R. 700, and

Re Leith v. *Leith*, 16 O. L. R. 168, 11 O. W. R. 883, specially referred to.

The late Ann Jane Anderson left an estate of about $3,000. The executor named in a will said to have been made by her presented it for Probate in the Surrogate Court of the county of Huron, but the defendants entered a caveat setting up a former will.

Pleadings were delivered in which the execution of the will propounded was disputed, as was the capacity of the deceased—undue influence was also alleged—and the former will set up.

The plaintiffs moved for an order transferring the action from the Surrogate Court of Huron county to the High Court.

W. Proudfoot, K.C., for the plaintiff's motion.

H. S. White, for the defendant, contra.

HON. MR. JUSTICE RIDDELL:—Until the decision of Mr. Justice Mabee in *Re Wilcox* v. *Stetter* (1906), 7 O. W. R. 65, it was considered almost as of course that a cause would be removed into the High Court where the value of the property was over $2,000, and there was a real dispute. In that case a halt was called to this practice, and a rather more stringent rule was supposed to be laid down. This case I followed in *Re Graham* v. *Graham* (1908), 11 O. W. R. 700 "without expressing any independent opinion of my own" and the Chancellor in *Re Reith* v. *Reith* (1908), 16 O. L. R. 168, says: "It is enough if it appears from the nature of the contest and the magnitude of the estate that the higher Court should be the forum of trial. No doubt, much is left to the discretion of the High Court Judge as to the disposal of each application."

I have had an opportunity of consulting a number of my judicial brethren, and the general consensus of opinion is that where a fair case of difficulty is made out so that there will be a real contest the case should be removed if the amount of the estate brings the case within the statute. There is one reason which has its influence on my own mind as it has on the minds of some of my brethren—if the case is removed the opinion of the highest Provincial Court may be taken, while if the matter remain in the Surrogate Court, this cannot be done.

The only objection to removal is the costs, but the trial Judge has full power to award if he sees fit, only Surrogate Court costs.

An order will go in the usual form, removing the cause into the High Court of Justice. Costs in cause unless otherwise ordered.

MASTER IN CHAMBERS. MAY 28TH, 1912.

MADILL v. GRAND TRUNK RW. CO.

3 O. W. N. 1333.

Particulars — Statement of Claim — Negligence Action — Death in Railway Accident—Res Ipsa Loquitur—Discovery.

Action brought to recover damages for the death of plaintiff's husband through an accident on the defendant company's railway on 16th June, 1911.

In the 4th and 5th paragraphs of the statement of claim the accident was alleged to have been caused by the negligence of the defendant company's servants or agents.

The defendants moved before pleading for particulars of the negligence alleged.

F. McCarthy, for motion.

J. A. Paterson, K.C., shewed cause.

CARTWRIGHT, K,C., MASTER:—The deceased was killed by the car in which he was seated running off the track and falling on its side. He was so seriously injured that he died almost immediately.

It was stated on the argument by their counsel that the defendants have not been able to ascertain the cause of the accident. And the plaintiff makes affidavit, as was to be expected, that she is unaware of the cause, which, if known by anyone must be in the possession of the company's servants.

Her counsel cited and relied on *Smith* v. *Reid*, 17 O. L. R. 265, and *Young* v. *Scottish Union and National Insurance Co.*, 24 Times L. R. 73; *McCallum* v. *Reid*, 11 O. W. R. 571.

The conclusion to be derived from these cases is that the motion is at least premature. The defendants can safely plead, as was done in *Smith* v. *Reid, supra*. On examination for discovery they can find out if plaintiff intends to rely solely on the principle of *res ipsa loquitur*. If not, she can be required to give particulars of any specific acts of negligence to be adduced at the trial.

The motion should be dismissed without prejudice to its renewal later if desired.

Costs will be to plaintiff in the cause.

HON. SIR JOHN BOYD, C. MAY 29TH, 1912.

WELLAND COUNTY LIME WORKS COMPANY v. AUGUSTINE.

3 O. W. N. 1329.

Contract — Breach — Action for Damages — Injunction — Supply of Natural Gas — Non-fulfilment of Conditions—Joint Contract —Relief from Forfeiture — Parties — Judgment in Previous Action—Res Judicata.

An action for an injunction to restrain defendants from interfering with certain gas wells claimed by plaintiffs and damages for alleged wrongful taking possession of said wells by defendants. The plaintiffs' rights in this case depended upon an agreement made between them and the defendants on Nov. 20, 1903. By this the defendants agreed to give to the plaintiffs the usual oil and gas leases of their respective farms "to continue so long as the plaintiffs continue to comply with the conditions agreed upon." That condition was mainly to supply free of charges sufficient gas to heat the defendants' houses. In *Welland Co. Lime Works* v. *Shurr*, Divisional Court, 21 O. W. R. 481, 3 O. W. N. 775, reversed judgment of Sutherland, J., 20 O. W. R. 637, 3 O. W. N. 398, holding that the agreement was a joint one and not severable as to Shurr. The Court also held that the company had by its own act forfeited its rights under the agreement and had no *locus standi* in Court.

BOYD, C., *held* that the plea of *res judicata* relied on was a sufficient defence. The company must by some means if possible get rid of the forfeiture declared by the Court before they could be rightly in Court as to the gas well. The present action was not well advised and should be dismissed with costs.

Action to recover damages in respect of an alleged breach of an agreement and for an injunction.

W. M. German, K.C., and H. R. Morwood, for the plaintiffs.

S. H. Bradford, K.C., and L. Kinnear, for the defendants.

HON. SIR JOHN BOYD, C.:—The plaintiffs' rights in this case depend upon an agreement made between them and the defendants on the 20th November, 1903. By this the defendants agreed to give to the plaintiffs the usual oil and gas leases of the respective farms "to continue so long as the plaintiffs continue to comply with the conditions agreed upon." That condition was mainly to supply free of charge sufficient gas to heat the defendants' houses.

A well was made and gas procured from it on the lands of one of the defendants, Shurr. From this source gas was supplied by the company to both defendants down to June, 1911, when the company cut off the supply of gas to the houses of the defendant Augustine, and thereafter called upon

Shurr to execute a lease of the gas well as to his land. The defendant Shurr refused, and, in conjunction with Augustine, cut off the company's pipes on the defendants' land and so stopped the supply of gas from the well in question so far as the company was concerned. Then an action was brought by the company in July, 1911, against Shurr alone to restrain him from interfering with the gas well, and that he be ordered to carry out the terms of the agreement (*i.e.*, as to the granting of a lease).

This action was tried before Mr. Justice Sutherland, who granted the relief sought and referred it to the Master to settle the terms of the lease (see case reported, 20 O. W. R. 637). Upon appeal to the Divisional Court this decision was reversed and the action dismissed (see report in 21 O. W. R. 481). The Court held that the agreement was a joint one and not severable as to Shurr; that both were entitled to be supplied with gas; that the plaintiffs had no right to cut off Augustine and retain a right of claim as against Shurr; and it was further held that the company had no right to demand a lease from Shurr because the company had ceased to supply gas to Augustine, and therefore the term for which the lease was to be granted had been ended by the action of the company. This last ground of decision clearly indicates the opinion of the Court that the company had by its own act forfeited its rights under the agreement and had no locus standi in Court. That judgment of the Divisional Court has been taken to the Court of Appeal, but it has not yet been argued.

In this state of affairs the present action was brought by the company against both defendants on 9th April, 1911, based as the other upon the written agreement between the parties as to the gas, made in 1903. There is the further allegation that on the first March last the defendants, without legal authority, took possession of the gas wells and have since prevented the plaintiffs from taking gas therefrom. This is explained in the evidence as being done upon faith of the judgment in the Divisional Court by the defendants. The relief asked is by way of injunction and damages. No evidence was given materially affecting the situation other than that taken on the first trial, which was put in as evidence in this case. Among other defences the plea of res judicata is relied on.

That appears to be a sufficient defence, for substantially what was determined by the Divisional Court is that the plaintiffs have forfeited their contract by non-compliance with its conditions, and the former decision did not simply decide that the action could not be maintained on account of the absence of parties. Non-joinder was pleaded in the former action, but the three Judges held upon the merits that the company had lost its right to claim a lease from the defendant Shurr of the oil well on his premises. Apart from a lease or the right to a lease the company has no right to or ownership over the well sunk on Shurr's land, though the company may have been at several thousand dollars expense in sinking it.

While the forfeiture declared by the Court continues it is not competent for the company now to litigate as if it was the aggrieved party. They must by some means if possible get rid of this disability before they can be rightly in Court as to the gas well. It may be that a proper application to the Court of Appeal would result in opening up the controversy by adding the co-contractor, Augustine, on that record and by obtaining relief from the forfeiture upon proper terms. But this is, of course, merely a suggestion; for if that former judgment stands it is a complete bar to the relief now sought by the plaintiff company, and if it is reversed the company will obtain all that is sought permanently which they had only temporarily under the judgment of Mr. Justice Sutherland. In either view the present action seems to be not well-advised, and I see no other course but to dismiss it with costs.

DIVISIONAL COURT.

MAY 31ST, 1912.

HAMILTON v. VINEBERG.

3 O. W. N.

Contract — Building Contract in Writing — Provide Materials and Perform All Work — Specifications for Dwelling House — Costs.

An action by contractors to recover $1,627.49 on account of work done for defendant in erecting a dwelling-house.

SUTHERLAND, J., 21 O. W. R. 75; 3 O. W. N. 605, gave plaintiff judgment for $1,544.04, and D. Burnham, defendant, by counterclaim $60 against Ellis Vineberg.

DIVISIONAL COURT dismissed appeal from above judgment by defendant Vineberg, but with a direction that the costs to be allowed Burnham against Vineberg should be on Division Court scale without a set-off. Cost of appeal to be on scale of an appeal to High Court from a Division Court judgment.

An appeal by defendant from a judgment of HON. MR. JUSTICE SUTHERLAND, 21 O. W. R. 75; 3 O. W. N. 605.

Action by Hamilton and Walker, a contracting firm, to recover amount agreed upon for the erection of a house for the defendant Vineberg, and for extras.

Plaintiffs entered into a written building contract with defendant Vineberg to build according to the plans of D. Burnham, an architect. After they had finished their work as they claimed they assigned all moneys due under it to one Grey and with Grey as a co-plaintiff sued Vineberg. Vineberg defended and added a counterclaim, himself being therein plaintiff, and Hamilton and Walker, Grey and the architect Burnham being the defendants claiming that the work, etc., was done badly by Hamilton and Walker with the "connivance" of Burnham, and so the amount paid was more than enough. He claimed also against Hamilton and Walker and Burnham for breach of contract, and against Hamilton and Walker for $250 liquidated damages for delay. Further that Burnham acted with such gross carelessness and negligence and so ignorantly as well as collusively with Hamilton and Walker that the certificates given by him should be set aside and cancelled.

D. Burnham (by the same solicitor as Hamilton and Walker) set up a counterclaim against this counterclaim for $60 on account of contract $48.72, being 3 per cent. of extras in all, $108.72 and interest thereon. Upon this Vineberg joins issue.

The action came on for trial before HON. MR. JUSTICE SUTHERLAND at the non-jury sittings at Toronto; and he gave judgment, 21 O. W. R. 75, for the plaintiffs for $1,544.04, being $1,453.49 and interest with costs and for Burnham, defendant, by counterclaim upon his counterclaim to the counterclaim of Vineberg for $60 and costs. The counterclaim to the original action was dismissed with costs. A small claim by the architect was allowed to him, Vineberg appealed.

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.

H. Cassels, K.C., for defendant Vineberg, appellant.

E. C. Cattanach, for the respondents.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I do not think that in view of the finding (which is not attacked), that the architect was not guilty of fraud or collusion with plaintiff, this appeal can succeed on any of the grounds put forward. As to the extras the architect certainly took a great deal for granted in favour of the plaintiffs. The evidence of plaintiffs, leaving out the architect's extraordinary acquiescence in plaintiffs' demands, and his apparent indifference to his client's interests, was, I think, so vague, sketchy, and unsatisfactory that I should have been better satisfied if we could have seen our way to direct this branch of the case to be re-tried.

But as the architect was defendant's own agent and the evidence satisfied the trial Judge, and as my learned brothers agree in thinking that on principle the course above suggested ought not to be adopted, I have not a sufficiently strong opinion to justify me in recording a dissent.

HON. MR. JUSTICE BRITTON:—As to many of the grounds taken by the defendant in his notice of appeal, he must fail. The learned Judge was quite right in finding that there was no collusion between the plaintiffs and the architect. Upon the evidence the architect appears to have acted honestly, and he intended to be fair, but his mode of dealing with the contractor was simple, confiding and unbusinesslike. He was, however, the agent for the defendant, and if the plaintiffs were willing to have their accounts treated in the way the

architect states, so long as there was no fraud or deceit or collusion the defendant cannot successfully complain.

The trial Judge has found in effect, that all the extras were ordered by the defendant, that the defendant knew and apparently approved of what was going on. That being the finding and upon evidence, it is difficult to interfere much as my inclination would prompt, owing to the amount of extras saddled upon the defendant, an amount which seems unreasonable, and excessive.

The contract provides that as to the value of the work added, or omitted, the architect is to decide and his decision is to be final. The architect was of defendant's choosing. He was easy going and unbusinesslike, but he was honest, and as the plaintiffs have not been guilty of any fraud, it should not be assumed that they have wilfully made false or excessive charges.

The statements made by the architect on his examination for discovery, and which were put in at the trial as against him, were most damaging. He admitted that in passing plaintiffs' accounts, he did not make any measurements, get any accounts or statements of quantities, etc., etc. Even in the face of all that it may be that the defendant was not overcharged, but there is the feeling that perhaps the defendant is being asked to pay too much. I cannot say that it was the duty of plaintiffs to furnish invoices and statements of quantities and time and wages, when not asked, but it is manifest that to a contractor, not honest, who found the owner's architect so easy a mark as Burnham was, there would be a temptation to over charge. The contractors' accounts were taxed by having a lump sum knocked off, on the general principle that a contractors' account might be excessive.

As to the defendant's claim of $25 per week for the time, after time mentioned for completion of contract—until house ready—the defence is that plaintiffs were delayed by the extras ordered. That is a question of fact and the trial Judge has found against defendant.

The case of *Dodd* v. *Churton*, [1897] 1 Q. B. 562, is an authority against the defendant on this point. The head note of that case is:

"Where in a contract for the execution of specified works it is provided that the works shall be completed by a certain day, and in default of such completion the contractor shall be liable to pay liquidated damages, and there is also a provi-

sion that other work may be ordered by way of addition to the contract, and additional work is ordered, which necessarily delays the completion of the works, the contractor is exonerated from liability to pay the liquidated damages unless by the terms of the contract he has agreed that whatever additional work may be ordered, he will, nevertheless, complete the works within the time originally limited."

In my opinion the appeal must be dismissed, and with costs, as indicated by my brother Riddell.

HON. MR. JUSTICE RIDDELL:—It is well established that a third party brought in, as Burnham was, by counterclaim, cannot, himself, set up a counterclaim against the plaintiff by counterclaim: *Street* v. *Grover*, 2 Q. B. D. 498; *Alcoy Ry.* v. *Greenhill*, 1896, 1 Ch. 19; *Gen. Elec. Co.* v. *Vict. Elec. Co.* (1895), 16 P. R. 476, 529, unless what is called a counterclaim is in reality but a set off or a defence: *Green* v. *Thornton* (1889), 9 C. L. T. Occ. N. 139; *General Electric Co.* v. *Vict. Elec.* (1895), 16 P. R. 476, at pp. 481, 534. That a claim for wages can be neither set off nor defence to an action founded upon tort such as this requires no authority.

But the plaintiff by counterclaim has joined issue on the counterclaim by Burnham and gone on to trial without objection, and I think he cannot now complain of the irregularity. In *Hyatt* v. *Allen*, the Divisional Court thought that an irregularity not unlike the present might be waived. Here Burnham might have brought his action against Vineberg and possibly that action, while not consolidated with the present, might have been ordered to be tried at the same time. If the claim be considered well founded we might say something as to the scale of costs as the learned trial Judge has not passed upon that matter.

The first claim set up by Vineberg is that for $250 claimed for delay, and he appeals to cl. 6 (fully set out in the judgment below).

It seems to be settled that language such as appears in this clause does not bind the contractor to complete not only the work set out in the contract but also the "extras" which may be ordered within the time set.

In *Dodd* v. *Churton* (1897), 1 Q. B. 562, the contract provided that the work should be completed within a certain time and default liquidated damages, also a provision that other work might be ordered, and if ordered must be done by

the contractor. Certain additional work was ordered to complete which necessarily delayed the work beyond the time set. It was held that the contractor in such a case is exonerated from the liability to pay liquidated damages unless by the terms of the contract he has agreed that whatever additional work may be ordered, he will, nevertheless, complete the works within the time originally limited.

And this is so even if the contract contain a clause giving the architect power to extend the time for completion in case of extras being ordered "if by reason thereof he shall consider it necessary to extend the time for the completion of the tug-vessels, such extension of time shall be given in writing . . . otherwise the time of completion shall be deemed to be not extended . . ."

In *Westwood* v. *Secretary of State* (1863), 7 L. T. N. S. 736, in a contract containing this clause (see p. 737), the engineer did not extend the time, but the Court (Wightman, Crompton, and Mellor, JJ.), held nevertheless, that the defendant having by his own act rendered it impossible to perform the work in time, the builder was relieved.

In the report in 11 W. R. 261, it is said, p. 262: "The Court . . . expressed so strong an opinion that the set-off for penalties could not be supported that the argument on that head was not pressed."

A not dissimilar case is *Roberts* v. *Bury Commissioners, etc.* (1869), L. R. 4 C. P. 755 (1870), L. R. 5 C. P. 310, in which Kelly, C.B., giving the judgment of himself and Blackburn and Mellor, JJ., says, (L. R. 5 C. P., pp. 326, 327): "Where the effect of giving such a construction to the contract would apparently be to put one party completely at the mercy of the other we ought not to give that construction to the contract unless the intention is pretty clearly expressed."

Jones v. *S. John's College* (1870), L. R. 6 Q. B. 115, is a different kind of case. There, as is pointed out by Mellor, J., at p. 123, "there is an express provision made in the contract for an extension of time in case the clerk of the works shall consider it necessary, but the contractors contract positively and absolutely to do the work and the alterations within the given time unless an extension be made under that particular stipulation;" and in the face of that stipulation the Court held that they could not imply a condition at variance with it. *Expressum facit cessare tacitum.*

In *Gray* v. *Stephens* (1906), 16 Man. 189, there was a provision for time allowance in case the plaintiff was delayed in the prosecution or completion of the work, but that "no such allowance shall be made unless a claim therefor is presented in writing to the architect within 36 hours of the occurrence of such delay." The plaintiff without his default and within the meaning of the clause was prevented from beginning his work, and after beginning from completing it —he did not present any claim to the architect, and the Manitoba Court held that he had no right to an allowance. But there nothing done by the owner or his architect made it impossible for the contractor to make a claim, and the case is not at all in point so far as I have quoted it. But the remainder of the decision is in point—the owner was to be paid $20 a week in case of delay beyond the time fixed. The time fixed for completion was September 15th, 1903, but the owner ordered some extra work done which was commenced only January 14th, 1904. The Court held that the allowance of $20 was payable only up to January 14th, because the defendants, having ordered the work to be done which only began January 14th, was estopped from claiming damages for delay beyond that date, following and applying *Holme* v. *Guppy*, 3 M. & W. 387, and cases cited in this judgment. The delay allowed must give time to do the whole of the work including the extras, which the owner is responsible for the ordering of.

The learned trial Judge, upon evidence which wholly justifies such a finding, as he says that he believes the evidence of Hamilton and Burnham, finds that Vineberg gave a verbal assent to order for the alterations; and the architect gave a written order which is set out in the reasons for judgment below.

The defendant Vineberg now complains that the direction in this order, "all work done as an extra where owner and contractor have not agreed on price before commencing said work the contractors must keep an account of all materials and time spent in said work, so that price of said work may be given by the architect as per agreement" was not followed by the builder. But this is not either in contract or in order a prerequisite either to doing the work or to being paid for it —it is a direction given by the architect (who is in this particular matter the agent of Vineberg) given in order that he may the more easily and accurately fix and ascertain the price

to be paid. The omission to keep track does not disentitle the contractor to be paid—although it would justify the architect in allowing as little as he could.

From a perusal of all the evidence I can see nothing to indicate that the architect acted other than honourably, nor is there any indication of collusion between architect and contractor. Under these circumstances the certificate of the architect must be final.

Moreover, the finding of the trial Judge that the delay was caused by the owner himself, I think is wholly justified, as are the other findings made by him.

I think the appeal should be dismissed with costs, but with a direction that the costs to be allowed Burnham in his judgment against Vineberg are to be costs on the Division Court scale without a set-off, the costs of the appeal to be on the scale of an appeal to the High Court from a Division Court judgment. In other words Burnham is to be put in the same position as though he had brought his action in the Division Court, but that Vineberg should pay on the appeal costs as though he had unsuccessfully appealed to the Divisional Court from a Division Court judgment.

HON. SIR WM. MULOCK, C.J.Ex.D., MAY 31ST, 1912.

FOX v. ROSS.

3 O. W. N.

Trespass to Lands — Injunction — Title to Land — Grant from Crown — Question if it Covered Island Adjoining Main Land—Title by Possession—Damages for Trespass—Failure to Establish Title.

An action by plaintiff, who claimed to be the owner in possession of the westerly part of Cotter's Island, said to be also called Bernhardt's Island, situate in the Bay of Quinte, in the County of Prince Edward, for an injunction against trespassing and damages for trespass by defendants.

MULOCK, C.J.Ex.D., *held* that the land in dispute was not covered by the Crown Patent to plaintiff's predecessors in title and that plaintiff had no paper title thereto. That plaintiff had failed to establish a title by possession and action should be dismissed with costs.

Plaintiff claimed to be the owner in possession of the westerly part of Cotter's Island, said to be also called Bernhardt's Island, situate in the Bay of Quinte in the county of Prince Edward, and complained that the defendant had tres-

passed and threatened to continue to trespass thereon, and asked for an injunction and damages.

It was admitted that the plaintiff was the owner of the northerly portion of lot No. 47, and the north-easterly portion of lot No. 48 in the first concession of Sophiasburg, deriving title thereto through the respective grantees thereof from the Crown, viz., James Cotter, Wait Ross and R. B. Conger.

The plaintiff contended that the land in dispute was included in the grants to Cotter, Ross and Conger. This the defendant denied and the plaintiff's paper title depended on whether the west part of Cotter's Island was covered by the patents in question.

Cotter's Island lies a short distance northerly of the main land. The intervening space gradually became filled up with sediment deposited by lake currents and washings from the main land, and what at one time was open water is now marsh, which at places may be crossed by vehicles, and the plaintiff and those through whom he claims title have for many years cultivated the portion of the island now in dispute, together with the land opposite thereto on the main land.

He also claimed title by possession.

The descriptions of the parts of lots numbers 47 and 48 in the first concession west of Greenpoint in the township of Sophiasburg, as set forth in the patents thereof, were as follows:—

Description of the easterly three-quarters of lot No. 47, patented, 9th January, 1834;

Commencing in front upon the Bay of Quinte at the north-east angle of the said lot; then south 31 degrees 30 minutes east 59 chains more or less to the allowance for road in the rear of the said concession; then south 58 degrees 30 minutes west 14 chains 25 links; then north 31 degrees 30 minutes west to the Bay of Quinte; then north-easterly along the water's edge to the place of beginning; containing 75 acres more or less.

Description of the west quarter of lot No. 47, patented, 9th January, 1834:—

Commencing in front upon the Bay of Quinte at the north-west angle of the said lot; then south 31 degrees 30 minutes east 58 chains, more or less to the allowance for road in rear of the said concession; then north 58 degrees

30 minutes east 4 chains, 75 links; then north 31 degrees 30 minutes west to the Bay of Quinte; then south-westerly along the water's edge to the place of beginning; containing 25 acres more or less.

Description of the easterly quarter of lot 48, patented, 13th November, 1833:—

Commencing in front upon the Bay of Quinte at the north-east angle of the said lot; then south 31 degrees 30 minutes east 58 chains, more or less to the allowance for road in rear of the said concession; then south 58 degrees 30 minutes west, 4 chains 75 links; then north 31 degrees 30 minutes west 58 chains, more or less to the Bay of Quinte; then north-easterly along the water's edge to the place of beginning; containing 25 acres more or less.

Description of the west part of the east part of lot No. 48, patented, 1st August, 1845:—

Commencing at the water's edge of the marsh on the Bay of Quinte in the centre of the said lot; then south 31 degrees 30 minutes east 58 chains, more or less to the allowance for road in the rear of the said concession; then north 58 degrees 30 minutes east 4 chains 75 links, more or less, to the lands granted to Wait Ross in the said lot; then north 31 degrees 30 minutes west 58 chains, more or less, to the aforesaid edge of the marsh; then westerly along the same to the place of beginning; containing 28 acres, more or less.

Description of the westerly half of lot 48, patented, 29th January, 1808:—

Commencing in front on the Bay of Quinte at the centre of the said lot; then south 31 degrees 30 minutes east 58 chains, more or less, to the allowance for road in the rear of the said concession; then south 58 degrees 30 minutes west 9 chains 50 links, more or less, to the limit between lots Nos. 48 and 49; then north 31 degrees 30 minutes west to the Bay of Quinte; then north-easterly along the water's edge to the place of beginning; containing 50 acres more or less.

M. R. Allison and P. C. MacNee, for the plaintiff.

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

HON. SIR WM. MULOCK, C.J.Ex.D.:—The records of the Crown Lands Department contain a plan of the township of Sophiasburg, dated in the year 1797, made by Deputy Sur-

veyor Alexander Aitkins. This was apparently the only plan in existence when the said patents were issued, and it shews an island lying opposite lots 47, 48, and 49. This was, doubtless, Cotter's (otherwise called Bernhardt's) island. According to this plan the distance from the concession road, which forms a southerly boundary of lots Nos. 47 and 48 to the water's edge of the Bay of Quinte, was 58 chains and corresponds with the distance given in the patents. The distance from the road allowance to the northerly limit of the island opposite lot No. 47 is, according to this plan, 70 chains and that of lot No. 48 is 78 chains. If it had been intended to include the west portion of the island in the patents, the distances should have read 70 and 78 chains respectively.

Further, the plan shews open water opposite the main-land, and the northerly limit of these lots, as described in the patents is (except as to the west part of the east part of lot No. 48), stated to be the water's edge of the Bay of Quinte. The northerly limit of the island would not be the water's edge.

The description in the patent of the westerly limit of the west part of the east part of lot No. 48 thus begins, "Commencing at the water's edge of the marsh on the Bay of Quinte." It then runs 58 chains more or less south to the road allowance. Its easterly limit runs 58 chains more or less northerly from the road allowance to "the aforesaid edge of the marsh," and the northerly limit is described as being along the edge of the marsh. The marsh here referred to undoubtedly means the shallow, marshy water lying between the island and the shore; not the open water to the north of the island. The only marsh of which there is any evidence is that between the island and the shore. This last-mentioned patent was issued on the 23rd January, 1808, and gives the distance from the water's edge of the marsh to the road allowance as being 58 chains, and it is clear that the distance of 58 chains mentioned in the subsequent patents also meant the distance reaching to the water's edge of the marsh, or, in other words, of the main-land.

For these various reasons I am of opinion that the land in dispute was not covered by the patents in question and that the plaintiff has no paper title thereto.

The other question to determine is whether he has acquired a title by possession. The fee in the island remained

in the Crown until granted to Peter Williams, through whom the defendant claims by patent, dated 14th August, 1900.

The plaintiff claims to have acquired title by possession as against the Crown, but if this contention fails says that he has by ten years possession since patent issued acquired title as against the defendant.

The evidence shews that from the year 1834 until the year 1911, the plaintiff by himself and others, of whose possession he is entitled to the benefit, have each season cultivated the land in dispute. No one ever resided upon it and no buildings were ever erected upon it. There is some vague evidence as to fencing, but the only fence of which there is any proof is a fence running northerly across the island to the north side. The course of this fence is the boundary line produced northerly between lots 46 and 47, and the fence was doubtless intended to prevent persons who used the east part of the island from trespassing upon the west part. The user of the land was limited to cultivating and cropping during the summer season. There is no evidence shewing possession by anyone except in connection with these operations, so that for at least one half of each year no one was in possession. During the winter seasons throughout the whole period from 1834, there was at most only constructive, but no "actual, exclusive, continuous, open, or visible and notorious possession," on the part of the plaintiff or his predecessors. *Sherren* v. *Pearson*, 14 S. C. R. 585. The lawful owner was not prevented from taking peaceable possession, and there was no trespasser against whom he could have maintained an action to recover the land. For about one-half of each year the possession was vacant, and on each such occasion the right of the true owner would attach and the Statute of Limitations cease to run, beginning again, but only from a new starting point, when the plaintiff took possession each spring. His withdrawal during each winter lost to him the benefit of his possession up to the time of such withdrawal. *Coffin* v. *North American Land Company*, 21 Ontario 81. I, therefore, think that the plaintiff has failed to acquire title by possession, and that this action should be dismissed with costs.

HON. MR. JUSTICE BRITTON. MAY 30TH, 1912.

RAWLINGS v. TOMIKO MILLS LIMITED.

3 O. W. N. 1335.

Negligence — Master and Servant — Injury to Servant — Findings of Trial Judge—Accident not Negligence—Action Dismissed.

An action by Harry Rawlings, a former employee of defendants, to recover $5,000 damages for injuries caused by a tramcar of lumber falling on him, which plaintiff alleged to be due to negligence of defendants. Defendants denied that plaintiff was in their employment or under their control, but alleged that he was in the employment of one Boyd, and that plaintiff was guilty of contributory negligence in acting contrary to express orders of his employer.

BRITTON, J., found that plaintiff's injuries were due to accident not negligence. Action dismissed without costs. Damages assessed at $1,000 in case of appeal.

Tried at North Bay, without a jury.

G. A. McGaughey, for the plaintiff.

A. E. Fripp, K.C., for the defendants.

HON. MR. JUSTICE BRITTON:—The plaintiff was in the employ of one Boyd, who had a contract with the defendants for piling their lumber in their mill yard at Tomiko. The plaintiff was hired by defendants' foreman—but for Boyd, and plaintiff's wages although paid by defendants were paid for and charged to Boyd. I allowed the plaintiff to amend his statement of claim so that the facts could be set out as established by the evidence. The defendants owned and supplied to Boyd the ways, works, machinery, plant, and premises for the purpose of moving and piling the lumber mentioned. The defendants were responsible for the condition of the tracks and the whole plant as used by Boyd at the time of the accident to the plaintiff. On the 27th October last, a tram car was being used to transport lumber from the defendants' mill to places in the mill-yard where this lumber was to be piled. The floor of the car was about 7 feet above the rail—and lumber was piled from the car to a considerable height—10 feet or more above floor of car. The car laden to its full capacity was moved to the first piling place—and there one-half the lumber was taken off. The load was bisected longitudinally from top to bottom—and as the plaintiff stood at rear of car and facing the car—the half of the car to plaintiff's left was empty—and the half to plaintiff's right was full. The car was then to be

moved to the next piling place to leave the remaining half of the lumber—the distance for the car to go was only about 16 or 17 feet—and there was to this place a slight down grade. The defendants had in their yard a locomotive with steam up and ready for use to move any car from point to point as required. On this occasion the car was in charge of plaintiff and another workman. The plaintiff was as much in charge as the other. Both men were in same grade of employment, considering the short distance to go, and that the grade was down toward the next stopping point the plaintiff did not ask for the locomotive, but with a "punch bar" started the car. The car started more easily and went more rapidly than the plaintiff expected, and then the plaintiff, intending to stop the car and prevent its going beyond the piling place—went from behind, going to the right of the car toward the front—on his way picking up a piece of board—he intended to use this piece of board to stop the car —but he has no recollection of actually using it, and would not swear positively one way or the other. His recollection is that as he got to the front he saw the flange of the front wheel on the right hand side of the car upon the rail, and in an instant, by the jolt of the car wheel coming to the ground or tie, the lumber was precipitated from the car upon the plaintiff, and the plaintiff was very badly injured. His right leg was broken; his left knee and right shoulder were dislocated—and he was otherwise injured.

The plaintiff charges the defendants with negligence in very many respects. At the trial, the assignments of negligence relied upon by plaintiff were:—

(1) that the car in question should have been supplied with brakes; (2) that one of the rails, where the accident happened was twisted and bent, and had been so for a considerable time to the knowledge of the defendants; (3) that at the place where the front wheels of the car left the tracks, there was a curve, and the resisting rail or outer rail should have been higher than the other rail, instead of that, both rails were of equal height, and (4) that there was no sufficient system of inspection of roadbed, track, and cars.

The defendants, while denying negligence on their part, allege contributory negligence on the part of plaintiff:—

(1) In not using locomotive to haul the car—when ready to be moved; (2) in moving the car with its half load standing high and unsupported, instead of having the lumber dis-

tributed more evenly upon floor of car, and (3) in plaintiff attempting to stop the car with the piece of board.

The lumber was thrown upon the plaintiff by reason of the front wheels of the car leaving the track.

I have reached the conclusion that the wheels left the track, because of the board thrown by the plaintiff in front of one wheel. It is not an unfair inference from the evidence of the plaintiff himself that he did throw the board or block in front of the wheel.

A witness named Arthur Crouche, who was on the spot where the accident happened, and almost immediately after it happened, picked up a piece of board—the one beyond question that plaintiff had in his hand, and it bore upon it marks, apparently of the car wheel having passed over it. That being so, whatever negligence there was, if any, on the part of defendants, that negligence did not occasion this accident—because from all that appeared at the trial—the car would have kept to the rails—although it might have gone beyond the point at which the plaintiff desired the car to stop.

As to the want of brakes. The evidence did not disclose how brakes could be placed, so as to be of use on such a car carrying lumber. They could be operated only by a person upon the top of the load, or when walking or standing or running alongside the car. This car once had brakes—but not for use in carrying lumber to be piled.

One rail was slightly bent—and the other rail was not any higher, or if higher, only very little higher than the other—but upon the evidence, I am of opinion, that neither of these things contributed to the accident.

It must be borne in mind that this railway was not for passengers—or anything but lumber piled high on the cars—and for cars moving slowly upon it. Of course, it should be safe, and the inspection should be sufficient to prevent as far as possible, accident to employees in the yard, using the cars or road. No negligence on the part of the defendants which occasioned the accident has been shewn.

In my opinion—considering the short distance the car was required to go it was not negligence on the part of the plaintiff to move the car—without the aid of the locomotive—nor was it negligence to move it without lowering the pile consisting of the half load on the car.

All the circumstances as they existed must be taken into consideration in determining negligence. The same may be said of putting the piece of plank in front of the wheel of the car. What the plaintiff did is what a reasonably prudent man might under the circumstances have done.

It follows that the accident was a mere accident not necessarily attributable to negligence, and so the plaintiff cannot recover.

If the case should go further with the result that an assessment of damages would be necessary, I would allow the plaintiff $1,000 with costs.

As I have said the plaintiff was very badly hurt. The plaintiff has been for over six months unable to work, is still unable, and will be so for a considerable time yet. The medical gentleman's account is $88, and allowing for pain and suffering the sum of $1,000, would be moderate.

Before action the plaintiff told defendants that his doctor's bill was $88, and that he the plaintiff had paid $53.20 for 10 weeks and 6 days in the hospital. In reply to this the defendants sent to plaintiff a check for $88, but the plaintiff did not use this check, as it had upon its face "for final settlement of claim and in full of all demands in connection with injuries received in October, 1911." The defendants did not ask to withdraw that check—and I trust that in the event of the case going no further the defendants will not stop payment, but will allow the plaintiff to receive at least the $88, amount of check.

The action will be dismissed without costs. Thirty days' stay.

MASTER IN CHAMBERS. MAY 29TH, 1912.

SHAPTER v. GRAND TRUNK RW. CO.

3 O. W. N. 1334.

Discovery — Affidavit on Production — Railway Accident — Reports for Information of Solicitor — No Special Direction — Reports Made to Railway Board of Commissioners—Claim of Privilege—Sufficiency—Examination of Servant of Company.

In this case an affidavit on production was filed by defendants which admittedly was not adequate. Another affidavit

was filed. It, however, was still objected to and plaintiff moved for a better affidavit.

A. Ogden, for the plaintiff's motion.

F. McCarthy, for the defendants, contra.

CARTWRIGHT, K.C., MASTER:—The second part of the first schedule shewing documents which defendants object to produce mentions two reports made to their solicitor by their claims agents. In the affidavit privilege is claimed because "the reports were made solely for the information of the defendants' solicitor and his advice thereon and under a reasonable apprehension of an action or claim being made."

It was objected to this that it should have said that these reports were made after a special direction to that effect from the solicitor, and that a general order to that effect was not sufficient to make such reports privileged. No authority was cited for this proposition which seems to go further than any decided case. The decision in the analogous case of *Swissland* v. *Grand Trunk Rw. Co.*, 3 O. W. N. 960, seems to approve of the claim of privilege made as has been done in the present case. See p. 962.

The second schedule shewing documents at one time in defendants' possession mentions only reports of the engineer and conductor of the train on which the plaintiff's husband was killed, "made for the purpose of obtaining necessary details for information of Board of Railway Commissioners under sec. 292 of the Railway Act and subsequently destroyed." Section 292 (2) says that the board "may declare any such information so given to be privileged." There is nothing in the material to shew if any such declaration either general or special, has been made by the board. Counsel for the defendants seemed to think that if this had not been done then the reports could be seen at the office of the board.

In any case he conceded that the engineer or the conductor or both, if necessary, and if still in the service of the defendants could be examined for discovery, when they would have to make full disclosure as to their knowledge, recollection, information and belief as to the cause of the fatal accident in question.

This will give the plaintiff all that can be of any service at this stage. This motion will be dismissed, but with

costs to the plaintiff in the cause as the first affidavit was admittedly irregular.

HON. MR. JUSTICE SUTHERLAND. MAY 27TH, 1912.

TEAGLE & SON v. TORONTO BOARD OF EDUCATION

3 O. W. N. 1332.

Building Contract—Extras—Counterclaim — Refusal of Contractors to Execute Contract for another Building — Contract Let at Higher Rate — Neglect to Re-advertise after Rejecting Lower Tenders—Tender not Accepted by Corporation under Corporate Seal—Costs.

Action by contractors to recover a balance of $1,194 on a contract for the mason work upon the school-building of the Harbord Collegiate Institute, and $561.20 for extras. Included in the extras was an item for $150 for "additional thickness to reinforced concrete floor and alterations made by City Architect before granting permit."

The defendants conceded the plaintiffs' claim for $1,194; but counterclaimed for $1,161 in respect of a contract for the mason work on the Earlscourt school-building. The plaintiffs tendered for that work at $13,200, and their tender was accepted, but they refused to execute a contract or do the work; and the defendants said that they were compelled to make a contract at $14,361 with Hewitt & Son. The $1,161 was the difference. The defendants admitted the plaintiffs' claim for extras to the extent of $414.26, being the whole claim, less the $150 item, which was in dispute; and, pending the action, paid the plaintiffs $414.26 and $33 for the difference between $1,194 and $1,161.

The plaintiffs at or before the trial sought leave to amend by increasing the $150 item to $684. They said that they did not know, when tendering, that the work was to be done on the Kahn system, which was more expensive.

Shirley Denison, K.C., for the plaintiffs.

F. E. Hodgins, K.C., for the defendants.

HON. MR. JUSTICE SUTHERLAND:—Upon the evidence, I have come to the conclusion that the plaintiffs did not know that the Kahn system was being required, or should have known in time to make a complaint before going on

with the work; and, having allowed it to proceed without doing so, they can not now be heard to make the claim.

The plaintiffs, in reply to the counterclaim, alleged that the tender for the Earlscourt school-building was put in as part of the tender for the Brown school-building, and that by reason of the defendants' course of dealing with the Brown school tender (which was said to have been unfair to the plaintiffs) they were relieved from any liability with respect to the Earlscourt school tender. As to this, the tenders were not combined, but separate; and I refuse to give effect to the plaintiffs' contention in this regard.

Another contention of the plaintiffs in regard to the counterclaim was, that the tender accepted by the defendants for the Earlscourt building, after the plaintiffs had refused to sign the contract, was not the lowest tender, and that there was improper conduct and irregularity on the part of the property committee of the defendants in giving the contract to Hewitt & Son. As to this I am unable to find, upon the evidence, that the members of the property committee were guilty of any actual impropriety. But, after the plaintiffs refused to execute the contract, the defendants had made up their minds to endeavour to hold the plaintiffs good for any loss sustained, and it was the duty of the defendants to treat the matter with proper care and consideration; and, after new tenders were asked and received, and when they saw fit to reject two of them, each lower than the plaintiffs' original tender, it would have been only fair, before accepting that of Hewitt & Son, which was $1,161 higher than the plaintiffs', to advertise again; and upon this ground the defendants' counterclaim fails.

The plaintiffs also contended that their tender was never accepted by the defendants under seal, as it should have been to make it binding. This was an executory contract, and the acceptance of the tender was not under seal, nor was the contract tendered to the plaintiffs for execution executed by the defendants under their corporate seal.

The plaintiffs declined to execute the contract so tendered, and thus in effect withdrew their tender before any binding acceptance. There was no contract which the defendants could enforce or in respect of which they could seek to recover damages either by way of counterclaim or of deduction from moneys due by them to the plaintiffs upon another contract. Reference to Halsbury's Laws of Eng-

land, vol. 3, p. 168; *Garland Manufacturing Co.* v. *Northumberland Paper and Electric Co.*, 31 O. R. 40.

Judgment for the plaintiffs for $1,161, with interest from the 6th February, 1912, and costs of the action down to the time when they received from the defendants a cheque for $414.26. The plaintiffs' claim for additional extras dismissed without costs; and the defendants' counterclaim dismissed without costs.

MASTER IN CHAMBERS. MARCH 12TH, 1912.

McINTOSH v. GRIMSHAW.

3 O. W. N. 848.

Trial — Order to Expedite — Plaintiff not in Default—Con. Rule 243—Costs.

Motion by the defendant under Con. Rule 243 for an order expediting the trial of an action begun on 21st February, 1912, by vendor for cancellation of an agreement for sale of land and for possession of the land.

A. J. Russell Snow, K.C., for the defendant's motion.

Kenneth F. Mackenzie, for the plaintiff, contra.

CARTWRIGHT, K.C. MASTER:—It was open to defendant to have commenced an action for specific performance of the agreement nearly three months ago. There is no reason given for this not having been done.

Counsel for plaintiff stated that he had been expecting this to be done and had only commenced the present action in order to have the matter brought to a termination.

He was not in any way averse to a speedy trial—and offered to have the case tried by a referee—an offer which counsel for defendant was not prepared to accept.

The case of *Armstrong* v. *Toronto & Richmond Hill St. Rw. Co.*, 15 P. R. 449, shews that an order such as is asked for here may be granted in a proper case. But when the plaintiff is not in any default, it cannot lightly be made against his protest. Here, however, the plaintiff does not object and so an order can be made for delivery of statement of claim in a week or ten days and with such other terms as plaintiff may concede.

Costs of this motion should under its facts be to plaintiff only in the cause.