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COURT OF APPEAL.

APRIL 12TH, 1910.

*O'REILLY v. O'REILLY.

Husband and Wife—Marriage Contract—Quebec Law—Sum of Money Payable to Wife after Death of Husband—Right of Wife to Rank as Creditor upon Insolvent Estate of Deceased Husband—Construction of Contract—Onerous or Gratuitous—Consideration—Renunciation of Dower — Insolvency—Intent to Defraud.

Appeal by the defendants Garland and other creditors of the estate of Edward O'Reilly, deceased, from the order of a Divisional Court, 13 O. W. R. 967, affirming the judgment of BRITTON, J., 12 O. W. R. 688, finding in favour of the plaintiff, the widow of Edward O'Reilly, upon an issue directed by order of the Court, that the marriage contract between Edward O'Reilly and the plaintiff entitled the plaintiff to rank as a creditor of his estate.

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

G. F. Henderson, K.C., for the appellants.

F. H. Chrysler, K.C., for the plaintiff.

J. E. Jones, for the executors of Edward O'Reilly.

MOSS, C.J.O.:—Upon the best consideration that I have been able to give to this case, I have reached the conclusion that the judgment ought to be affirmed.

I confess to having experienced much difficulty in arriving at a conclusion entirely satisfactory to my own mind.

* This case will be reported in the Ontario Law Reports.

The solution of the question in issue depends upon a proper appreciation of the law of the province of Quebec governing it. What that law is falls to be determined upon the testimony of persons skilled in it, but I agree that, where their evidence is conflicting, and for that reason unsatisfactory to the determining tribunal, it may examine for itself the decisions of the foreign Courts and the text-writers in order to arrive at a conclusion upon the question of the foreign law.

In this case there is a conflict, not only between the learned advocates from Quebec who testified at the trial, but also between the learned Judges who have been called upon to deal with the question.

In the diversity of opinion, I have not been free from doubt, but upon the whole I am prepared to give my adhesion to the conclusion reached by the learned trial Judge, and affirmed, though upon different grounds and for different reasons, by the Divisional Court.

My doubts are not sufficiently strong to lead me to dissent from the result.

And I would, therefore, affirm the judgment appealed from and dismiss the appeal.

MACLAREN, J.A., in a written opinion, considered the questions raised very carefully; and said that, even if the contract were a gratuitous one, as contended by the appellants, it could not be attacked by subsequent creditors; and he advanced reasons for supporting the finding of the trial Judge that the contract was an onerous one. He concluded as follows:—

While the French authors who have written on the subject are divided as to whether such a contract as this is gratuitous or onerous, yet, as stated by Dorion, C.J., the French Courts, which were also formerly divided on the subject, have uniformly since 1845 upheld the doctrine of their being onerous. The reports shew that the decisions of the Quebec Courts have not been uniform or consistent. The strongest case in favour of the claim of the appellants is Behan v. Erickson, 7 Q. L. R. 295. But in that case the report does not state whether or not there was a renunciation of dower, although it must be admitted that this is a very common clause in Quebec contracts. That case, however, is not an authority for the claim of the present appellants, as the report shews that the contract there in question complied with the provisions of both the Articles 1039 and 1040; while the present case complies with neither.

I am of opinion that the appellants have not presented such a case as would justify us in reversing the judgments of the two Courts that have decided in favour of the plaintiff.

OSLER and GARROW, JJ.A., agreed in dismissing the appeal.

MEREDITH, J.A., dissented, being of opinion that the single point in dispute was the question of fact, whether there really was any consideration other than that of marriage for the obligation which the plaintiff was seeking to enforce; that, upon the evidence, that question should be answered in the negative; and the plaintiff's case failed.

MAY 12TH, 1910.

*REX v. YORKCMA.

Criminal Law—Conviction for Abduction of Girl under 16—Evidence to Sustain—Motion for Leave to Appeal.

Motion by the prisoner for leave to appeal from a conviction.

The motion was heard by MOSS, C.J.O., GARROW, MEREDITH, and MAGEE, JJ.A.

W. A. Henderson, for the prisoner.

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

MOSS, C.J.O.:—The prisoner, upon his election and consent, was tried without a jury by the Judge of the County Court of Ontario, and convicted of the offence of unlawfully taking an unmarried girl out of the possession and against the will of her mother, then having the lawful care and charge of her, she being under the age of 16 years, contrary to sec. 315 of the Criminal Code. And this is an application on his behalf for leave to appeal from the conviction, on the ground that it was against the evidence and the weight of evidence, and for an order requiring the learned Judge to state a case for the opinion of the Court as to whether the evidence disclosed that the prisoner committed the offence or substantiated the charge, or that the girl's action was her own individual act, and not induced by persuasion or coercion on behalf of the prisoner.

I am of opinion that this is not a case on which we should grant leave to appeal or direct a case to be stated.

* This case will be reported in the Ontario Law Reports.

The real question is, whether there was evidence upon which the learned Judge could properly find as he did against the prisoner, and of that, I think, there can be no doubt.

The girl's mother was dissatisfied with the relations which had sprung up between the prisoner and her daughter, and was strongly opposed to their continuance, and of this the prisoner was aware. He appears to have left Oshawa, where the girl resided with her mother, but was shewn to have returned and been in the town once or twice in the interval between his first leaving and the day when the girl left her mother's house and joined him at Toronto. There is evidence leading to the inference that communications by letter and post-cards passed between them. He had taken a room in a boarding-house in Toronto, stating that it was for himself and wife, and, when the girl joined him, he took her there and occupied the room with her, and presented her to the proprietor as his wife. It is true that the girl in her evidence did what she could to shield him, and endeavoured to take all the blame to herself, but it was for the learned Judge to attach to her testimony such weight as he considered proper, having regard to the other evidence in the case, and having regard also to sub-sec. (2) of sec. 315 of the Code.

As regards the prisoner's own intentions in the matter, it is to be borne in mind that—as pointed out by Osler, J.A., in Rex v. Holmes, 14 O. W. R. at p. 421—under this section the object or intention with which the girl was taken, be it innocent or wicked, is unimportant. No question of the mens rea can arise, for the statute is prohibitive, and any one dealing with an unmarried girl under 16 does so at his peril.

The application must be refused.

MEREDITH and MAGEE, JJ.A., concurred, for reasons stated by each in writing.

GARROW, J.A., also concurred.

MAY 12TH, 1910.

*REX v. FRANK.

Criminal Law—Evidence—Testimony of Accomplice — Necessity for Corroboration.

Case reserved and stated under secs. 1014 and 1015 of the Criminal Code by the Junior Judge of the County Court of Wentworth.

* This case will be reported in the Ontario Law Reports.

The accused was tried before him, at a sittings of the County Court Judge's Criminal Court, on the charge of unlawfully conspiring with one Morden to defraud the Hamilton Steel and Iron Company by falsely increasing the weight of scrap-iron sold by the accused to the company.

The case stated that the principal evidence against the accused was given by Morden, that the learned Judge believed his evidence, and was of opinion that it was sufficient to convict without corroboration.

It further appeared from the stated case that the learned Judge was of opinion that Morden's evidence was corroborated in material particulars, and there was some evidence in support of this view.

Two questions were submitted by the learned Judge: 1. Had I the power to convict the prisoner on the evidence of an accomplice alone? 2. If not, was there sufficient corroborative evidence?

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

E. E. A. DuVernet, K.C., for the prisoner.

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

Moss C.J.O.:—A perusal of Morden's evidence . . . . leaves little question as to the sufficiency of his testimony to prove the offence, if given by a witness as to whom no question of corroboration could be raised. It was argued on behalf of the accused that according to modern views no conviction can be had on the uncorroborated evidence of an accomplice. But that does not appear to be the rule of law. An accomplice is a competent witness, and there is no rule or statute which says that his evidence must be corroborated. The consequence is inevitable that if credit be given to his evidence it may be sufficient of itself to convict the accused. And certainly the case is not to be withdrawn from the jury because there is no corroboration.

In the case In re Meunier, [1894] 2 Q. B. 415, the rule was stated by Cave, J., as follows: "It is not the law that a prisoner must necessarily be acquitted in the absence of corroborative evidence, for the evidence must be laid before the jury in each case. No doubt, it is the practice to warn the jury that they ought not to convict unless they think that the evidence of the accomplice is corroborated; but I know of no power to withdraw the case from the jury for want of corroborative evidence, and I know of no power to set aside a verdict of guilty on that ground."

This statement of the law was approved of by the Court of Criminal Appeal in The King v. Tate, [1908] 2 K. B. 680, 21 Cox C. C. 693. In the former report Lord Alverstone, C.J., is reported as saying (p. 681): "I agree that there is no definite rule of law that a prisoner cannot be convicted on the uncorroborated evidence of an accomplice, and probably Cave, J., did not state the law too strongly . . . in In re Meunier."

The only qualification the Lord Chief Justice made was that, after quoting the above passage from In re Meunier, he proceeded to state as follows: "But I think he ought to have added 'assuming that the jury was cautioned in accordance with the ordinary practice.' In my opinion it is of the highest importance that the jury should be so directed;" and in support of that view he read extracts from Taylor on Evidence, 10th ed., and Russell on Crimes, 6th ed. vol. 3, p. 646. From the report in 21 Cox it may be gathered that the nature of the crime charged, coupled with dissatisfaction with the evidence of the alleged accomplice and the curt direction of the trial Judge to the jury, materially influenced the decision. But it is far from disaffirming the proposition that a conviction may be made upon the uncorroborated testimony of an accomplice. At the utmost it only affirms, in stronger language, perhaps, than previously used, the propriety of the trial Judge cautioning the jury on the point. There is not the least hint of doubt as to the rule that under proper direction a jury may find an accused person guilty upon the uncorroborated evidence of an accomplice.

In neither of the reports of the case of The King v. Warren, [1909] 2 Criminal Cases 194, 25 Times L. R. 633, does it appear that The King v. Tate was cited to the Court. And there does not appear in the books anything to shew that in the short time which elapsed between the two decisions there had been such a marked change in the rule of law as to justify the statement of Channell, J., that the rule is now quite clear that the evidence of an accomplice must be corroborated.

In Regina v. Beckwith (1859), 8 C. P. 274, the Court, sitting under authority of the statute 20 Vict. ch. 61, was called upon to grant a new trial on the ground of misdirection by the trial Judge in charging the jury that they might convict upon the evidence of the accomplice alone. It was held that the failure of the Judge to caution the jury against convicting without corroboration was not a matter of law but of practice; and the rule was discharged, following Regina v. Stubbs, 7 Cox C. C. 48. But in doing so, Draper, C.J., said (p. 280): "I think it is to be regretted that there should be an omission to submit his evi-

dence to the jury coupled with a caution which the practice and authority of the most eminent Judges in England recommend."

In the case at bar there was no jury, and the learned Judge appears to have been alive to the law and practice, and there is no reason to doubt that he properly charged himself when forming his conclusions upon the evidence, and, there being no question of his power, there appears also to be no objection to his practice.

The first question should, therefore, be answered in the affirmative, and, that being so, the second question calls for no answer, but, if it did, I should not be inclined to disagree with the learned Judge.

The conviction should be sustained.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. MAY 5TH, 1910.

McMULKIN v. COUNTY OF OXFORD.

Municipal Corporations—Repair of Highway — Construction of Watercourses—Flooding Land Adjoining Highway — Absence of By-law—Diverting Water from Highway not under Control of Corporation—Right of Action — Remedy by Arbitration — Damages—Injury to Land.

Appeal by the defendants from the judgment of TEETZEL, J., ante 410, in favour of the plaintiff for the recovery of $450 damages for diverting water from highways upon the plaintiff's farm.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

W. M. Douglas, K.C., and G. F. Mahon, for the defendants.

J. B. Clarke, K.C., for the plaintiff.

BOYD, C.:—I do not find the cases in a harmonious condition. Upon the findings of fact, that more surface water is discharged on the plaintiff's land than would naturally flow upon it before the work was undertaken, and that this excess of water gives ground for an action as distinguished from a right to compensation by way of arbitration, I think there are authorities binding on us which support the judgment. At the same time I am inclined to

a belief that the preferable doctrine is that the work, being skilfully and properly done, and the danger from extra surface water being a condition incident to the proper construction and preservation of the highway, should be dealt with as one in which the benefits here alleged should be taken into account as well as the drawbacks. The proper course would in such case be by arbitration. At the same time there are judgments holding that the penning back or the overflow of surface water, even for the time being, is a taking and user of the land adjoining the highway—the taking of which calls for a by-law to expropriate. My doubts are not sufficient, considering the state of the authorities, to say that the judgment in appeal should be reversed.

I would, therefore, dismiss with costs.

But I desire to say that I place my judgment on the allegations in evidence that the defendants diverted water from an adjoining township road over which they had no legal control into their deepened ditches, and so increased the volume of water which came into the pond on the plaintiff's land. The learned trial Judge examined the place by personal view, and finds as a fact that the work of the defendants, though skilfully done, brought more surface water down than would have naturally discharged upon the plaintiff's land. This, as I understood, was by their cutting through the natural watershed to the south-west of the diagonal county road, and letting down thereby water which before flowed to the south on the township road as delineated on the plan. That, I think, was without justification, and formed an actionable wrong.

MAGEE, J.:—I agree.

LATCHFORD, J.:—From an engineering point of view, the highway and culverts were, as found by the learned trial Judge, constructed without negligence. But, by cutting through the height of land to the south-west, the defendants brought down and discharged upon the lands of the plaintiff water which naturally flowed away from the property. They have, to the damage of the plaintiff, committed a breach of a duty which they owed to him, not to bring upon his property water which was not wont to flow upon it. In the words of Hagarty, C.J., in McGarvey v. Strathroy, 10 A. R. 631, at p. 635, "the defendants have, in the exercise of their municipal powers, caused a larger quantity of water to flow on the plaintiff's land than would naturally have flowed thereon. From the early days of our municipal system, I think it has been held that such proceedings give a cause of action."

I would dismiss the appeal with costs.

RIDDELL, J. MAY 6TH, 1910.

*SCHWENT v. ROETTER.

Gift — Money in Bank — Transfer to Joint Credit of Donor and Daughter—Death of Donor—Right of Daughter as Survivor—Claim of Executor of Donor—Issue—Evidence—Corroboration —R. S. O. 1897 ch. 73, sec. 10—Judgment Disposing of Issue—Con. Rule 1114—Costs.

Interpleader issue.

John Schwent and his wife Magdalena had money deposited in the Canadian Bank of Commerce at Dunnville to their joint credit. On the 27th April, 1908, the wife died. John Schwent thereupon, on the 22nd May, 1908, delivered a document to the bank in these words: "The Canadian Bank of Commerce, Dunnville. May 22nd, 1908. This is to certify that I transfer the money in my name John Schwent and Magdalena Schwent in our savings bank account number S. 27 in your bank to the joint credit of myself, the sole survivor, and my daughter Magdalena Schwent to be drawn by either of us. John Schwent."

The money lay wholly undisturbed in the bank until the death of John Schwent on the 5th July, 1909. He had on the 25th September, 1900, made his will, whereby he appointed his daughter Magdalena and his son Christian executors.

After the death Christian claimed this money in the bank as being part of the estate. Magdalena, who had married one Roetter, claimed it as her own.

The bank were allowed to pay the amount into Court, less the costs, and this issue was directed, with Christian Schwent as plaintiff and Magdalena Roetter as defendant, to determine the question "which of the said parties is entitled to the above-mentioned sum of money paid into Court," amounting to $1,285.18. The real question to be decided was whether the money belonged to the executors as assets of the estate of John Schwent, deceased, or to the defendant as her own private property.

The deceased had one son, the plaintiff, and four daughters, one of them the defendant.

R. S. Colter, for the plaintiff.

W. M. Douglas, K.C., and J. A. Murphy, for the defendant.

RIDDELL, J.:— . . . As the plaintiff must claim in this matter, whether the issue may be technically so framed or not, as executor of the deceased John Schwent, I considered that practic-

* This case will be reported in the Ontario Law Reports.

ally all he said, which consisted of statements made by his father at a time far removed from the date of the transfer, should be considered self-serving evidence, and therefore should be excluded. But, lest I should be wrong, I thought I should take all this evidence, subject to the objection. And, even if it should be taken, I do not find anything which at all changes the effect of the transfer or which shews that at the time of the transfer the deceased intended anything but the legal effect of the words used. . . .

The manner of the defendant was all that could be desired; her candour was manifest; and her story, as given in the witness-box, deserves all credit. But she, too, is in the difficulty that she is "an opposite or interested party . . . in an action or proceeding by . . . the executor . . . of a deceased person . . . " and "in respect of" a "matter occurring before the death of the deceased person." And she cannot obtain a judgment on her own evidence "unless such evidence is corroborated by some other material evidence:" R. S. O. 1897 ch. 73, sec. 10.

The material evidence she points to is the document itself—and, if that is material evidence, no doubt it is corroboratory of her story. If I assume that it is such corroboration, then her story must be taken (and I wholly believe her) that her father intended that this money should be at the call of either her or himself, and that, if any were left at his death, she should have it all. . . . But, if her evidence cannot be taken, the document itself is to the same effect. While both lived, the money was to be drawn by either; at the death of either, that one ceased to have the power to draw, but that is all.

The plaintiff's case was ably argued by Mr. Colter, and was wholly based upon the doctrine that a gift of a chattel is ineffective unless delivery is made or a deed given. There is no doubt that a delivery of possession was as necessary to the transfer of a chattel (at the common law) as a delivery of seisin was to the transfer of a freehold interest in land. . . . .

[Reference to Cochrane v. Moore, 25 Q. B. D. 57, 6 Times L. R. 296; Irons v. Smallpiece, 2 B. & Ald. 551; Pollock & Wright on Possession in the Common Law, p. 198; Cain v. Moon, [1896] 2 Q. B. 283; Kilpin v. Ratley, [1892] 1 Q. B. 582; In re Weston, [1902] 1 Ch. 680; Travis v. Travis, 12 A. R. 438; Payne v. Marshall, 18 O. R. 488; Re Ryan, 32 O. R. 224; Law v. Carter, 1 Beav. 426; Dummer v. Pitcher, 2 My. & K. 262, 5 Sim. 40; Talbot v. Cody, Ir. R. 10 Eq. 138; Gosling v. Gosling, 3 Drew. 335; Grant v. Grant 34 Beav. 623; Marshal v. Crutwell, L. R. 20 Eq. 328; In re Evkyn's Trusts, 6 Ch. D. 115; In re Young, 28 Ch. D. 705; In re Whitehouse, 37 Ch. D. at p. 693.]

The cases cited by the Chancellor in Re Ryan, 32 O. R. 224, are, it seems to me, conclusive of this case. . . .

It would seem that the defendant should succeed unless there is some difference between the case of a wife and that of a daughter, and such a distinction has not been suggested.

The plaintiff, however, relies upon Hill v. Hill, 8 O. L. R. 710. . . . The distinction between that case, on the one hand, and Re Ryan, 32 O. R. 224, and the present, on the other, is the exclusive control for life of the deceased.

I do not think it necessary to consider the effect of the deceased making the defendant an executor, as to which In re Griffin, [1899] 1 Ch. 408, is of interest.

I think the plaintiff wholly fails, and the issue must be decided in the defendant's favour, not only in form but also in substance.

Apparently there is no necessity for another action, as Con. Rule 1114 gives the trial Judge the power to dispose of the interpleader proceedings. It will, however, be sufficient to adjudge that the defendant has succeeded in the issue.

As to costs, the defendant should have them, and the plaintiff should pay them. He should not pay them out of the estate in such a manner as that the defendant would be in fact paying part of them herself. . . . There may be circumstances which justify the plaintiff being reimbursed by the remaining portion of the estate—these circumstances the Surrogate Judge can, and no doubt will, take into consideration in passing the accounts of this executor and fixing his remuneration; and the direction now made will not prejudice the right of the Surrogate Judge so to do. Consequently, in directing the plaintiff to pay the costs of the defendant, and in declining to direct that the plaintiff's own costs be paid out of the estate, the discretion of the Surrogate Judge will not be interfered with.

DIVISIONAL COURT. MAY 6TH, 1910.

*BENNETT v. HAVELOCK ELECTRIC LIGHT CO.

Company—Shares—Agreement—Sale of Property to Company—Payment by Allotment of Shares—Action by Shareholders to Set aside—Directors—Control of Company—Secret Profits—Fraud on Future Shareholders—Laches—Liability—Class Action—Costs—Lien—Salvage.

Appeal by the plaintiffs from the judgment of BRITTON, J., ante 352, dismissing without costs an action brought by certain

* This case will be reported in the Ontario Law Reports.

shareholders in the defendant company for the cancellation of 200 shares of stock allotted by the company to the other defendants, or to set aside a sale of property by the defendant Mathieson to the company, or for payment by the defendants other than the company into the company's treasury of the value of the shares allotted the these defendants, and for an account of secret profits retained by them.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

D. O'Connor, for the plaintiffs.

E. G. Porter, K.C., and W. S. Davidson, for the defendants Holcroft and Rose.

W. F. Kerr, for the defendants Bryans and Curtiss.

S. T. Medd, for the defendant company.

R. Ruddy, K.C., for the defendant Mathieson.

MIDDLETON, J.:—What appears to be the real point in this case does not seem to have been presented to and is not considered by the learned Judge whose decision is now in review.

When the property was conveyed by Mathieson to the company for $5,000, there was some understanding or agreement by which a secret profit was provided for the directors. They each received from him a cheque for $1,000, which was applied in payment of the liability of the respective directors to the company for stock subscribed. The exact nature of the agreement cannot be made out from the confused, contradictory, and in some particulars incredible statements of the different parties concerned. This much is clear: each received this sum from the vendor, Mathieson, and there was no disclosure of that fact to the shareholders who had been or were thereafter invited to take stock in the defendant company. No stock had been, at the date of the transaction in question, subscribed, but it was from the outset understood that the public were to be invited to subscribe, and it is not clear when the actual canvass was undertaken. This is such misconduct on the part of the directors as to render them liable to account for the money received. . . .

[Reference to In re Hess Manufacturing Co., 23 S. C. R. 640, 659.]

These directors, by their counsel, seek to put the case upon the footing that they had themselves acquired an interest in the property, and were in truth "vendors." This is in conflict with the weight of evidence and the oath of the directors themselves, and

I do not feel inclined to sanction the adoption of a theory which will not free the directors from liability, but will make their conduct appear, if possible, still more discreditable.

It may be, and probably was, the fact that the defendants failed to realise that their conduct was objectionable. Probably their position was well put by one of their counsel—"They could not be expected to go in unless there was something in it for them." The desire to make money, while the root of the evil in this case, is not the gist of the offence. The real offence is the receiving of this money while occupying a fiduciary position and the concealing of the benefit received from those whose interests they were bound to protect. It would be well for these who accept positions of public or quasi-public trust to realise that they cannot, while occupying such positions, receive any personal advantage without the fullest possible disclosure and assent of all concerned.

It has been argued in this case that the defendants are not liable, as they were in fact the only shareholders of the company at the time of the transaction, and because they as shareholders assented to what was done. This ignores the fact that when there is intended to be an invitation to others to come in and take stock, the future shareholders are entitled to the protection of an absolutely independent directorate and to full disclosure of the actual facts. There is no distinction between the positions of promoters and directors in this respect; if any can be drawn, it must impose a more stringent obligation upon one occupying the position of director. The principles laid down in the decided cases accord with the dictates of honesty and fair play.

[Reference to In re British Seamless Paper Box Co., 17 Ch. D. 471; In re Leeds and Hanley Theatres, [1902] 2 Ch. 809; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392, 432; Hood v. Eden, 36 S. C. R. 476; Re Innes & Co. Limited, [1903] 2 Ch. 254; The Soloman case, [1896] A. C. 33; Gluckstein v. Barnes, [1900] A. C. 249.]

As the conduct of the directors in receiving their secret advantage was fraudulent, a class action can be maintained: Burland v. Earle, [1902] A. C. 93; and the right to compel the defendants to account for the advantage so obtained cannot be lost by any delay short of the appropriate statutory limitation.

The appeal should be allowed with costs as against the defendants the directors other than Mathieson, and judgment should be entered against them severally for $1,000 and costs subsequent to the date of the amendment.

As to Mathieson, the action and appeal should be dismissed without costs.

The judgment should direct that the money be paid into Court, and the plaintiffs should be given a lien upon it for the amount of their costs, as between solicitor and client, properly incurred in this action, over and above party and party costs, and for so much of the party and party costs as may not be recovered under the personal order; and, subject to this, the money when recovered should be paid out to the company.

No order is made as to the costs of the company.

In taxing costs for which a lien is given above, the officer will bear in mind that the principle applicable is one of "salvage," and will not allow the costs of any proceedings which did not go to create this fund for the company.

BOYD, C., gave reasons in writing for the same conclusion. He referred as to the nature of the transaction to Hay's Case, L. R. 10 Ch. 593; and as to the form of action to Hichens v. Congreve, 4 Russ. 562.

LATCHFORD, J., concurred.

DIVISIONAL COURT. MAY 6TH, 1910.

*RUSHTON v. GALLEY.

Way—Private Lane or Place—Dedication—Acceptance by Municipality—Sidewalk Placed and Repaired by Former Owner—Defect in—Injury to Person Using Sidewalk—Liability of Owner — Negligence — Contributory Negligence — Private Liability—Notice of Defect—Constructive Notice—Time — Findings of Jury.

Appeal by the plaintiff from the judgment of LATCHFORD, J., dismissing the action.

The plaintiff on the 24th October, 1908, met with an accident, as he alleged, by stepping into a hole in a defective sidewalk at what is called "Madeira Place," being an open space extending easterly from Parliament street, in the city of Toronto. The plaintiff alleged that the defendant was the owner of Madeira Place, that it was open to the public, and that the defendant was guilty of negligence in allowing this sidewalk to become and to continue out of repair, so much so that, by reason of its bad condition, the accident happened to the plaintiff, and he claimed damages for his injuries.

* This case will be reported in the Ontario Law Reports.

The action was in part tried with a jury, who answered questions as follows:—

1. When did the defendant or her husband first have knowledge of the hole in the sidewalk? A. Saturday night.

2. When did the sidewalk become out of repair? A. Thursday.

3. Of what negligence, if any, was the defendant guilty? A. The defendant was negligent in not repairing the sidewalk, having sufficient time to do so before the accident.

4. Could the plaintiff by exercise of reasonable care have avoided the accident? A. No.

The jury assessed the damages at $1,000.

The Thursday mentioned was the 22nd October, 1908.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

John MacGregor, for the plaintiff.

H. H. Dewart, K.C., and F. J. Dunbar, for the defendant.

BRITTON, J. (after setting out the facts as above):—As the defendant did not know of the defective condition of the walk until after the accident, the only negligence which the jury could find, and what they probably intended to find, was that the defendant did not keep such a watchful eye over the walk as to prevent its remaining in a defective condition for any longer time than was reasonably necessary actually to do the work of repair.

If the defendant was the owner, there was an invitation by her to the public to use the place for any purpose of walking or driving upon and over it, and she would be liable if she placed upon it, or allowed to remain upon it, after knowledge of its being placed by others, anything in the nature of a trap, dangerous to the users of the place. This hole in the walk was not a trap—the plaintiff was not using the walk as an ordinary person on foot would use it; so, as I view the case as presented by the plaintiff and upon the evidence, he is not entitled to recover.

On the other branch of the case, I agree with the trial Judge that Madeira Place is a public street which ought to be kept in repair by the city corporation. So far as appears, it is not a street established by by-law of the corporation, but it has been "otherwise assumed for public user by such corporation," within the meaning of sec. 607 of the Municipal Act.

The plaintiff contends that, even if this is a public street, the defendant, having done the work of repair, assumed the duty, and is therefore liable for neglect of such duty. I do not agree that

the voluntary doing and doing continuously up to a certain date something that another ought to do, creates a liability for neglect or refusal to continue; and further, if there could be liability for neglect to repair, it could only arise after knowledge of want of repair. Here there was no knowledge. Merely not knowing the want of repair before the accident happened is not sufficient to warrant a finding of negligence. The defendant was not as against the plaintiff bound to see that the walk was in a constant state of reasonable repair. It would be quite different if the defendant constructed a dangerous walk or placed an obstruction or caused a pit to be dug near the walk or a hole to be made in it —in such a case there might be liability.

In the present case, in my opinion, the defendant is not liable, and the appeal should be dismissed with costs.

RIDDELL, J., was of opinion, for reasons stated in writing, that the trial Judge was right in finding that the owner of the land intended to dedicate this lane, and that the corporation had accepted the dedication long before the defendant became owner of the property adjoining; that the lane was a public highway; that the plaintiff had a right there; that he was not guilty of contributory negligence, the jury having so found; that the defendant placed the sidewalk upon the lane, and, if she could be called a trespasser, she was liable irrespective of negligence: Dygert v. Johenck, 23 Wend. 446, 447; Calder v. Smalley, 66 Iowa 219; Congreve v. Morgan, 18 N. Y. 84; Dillon on Municipal Corporations, secs. 1031, 1032; Hadley v. Taylor, L. R. 1 C. P. 53; Place v. Reynolds, 53 Ill. 212; Portland v. Richardson, 54 Me. 46; Osborne v. Union Ferry, 53 Barb. 629; Jennings v. Van Schaich, 108 N. Y. 530; that the defendant had not proved any express permission or license from the corporation to place or repair, but sufficient appeared to shew that the corporation tacitly licensed and permitted what was done: Robins v. Chicago City, 4 Wall. S. C. 657; and in such a case the private liability to repair is co-extensive with that of the city corporation, and not more onerous, that is, there must be ordinary care and diligence and absence of negligence: Drew v. New River Co., 6 C. & P. 754, 756; Peoria v. Simpson, 110 Ill. at p. 301; Hopkins v. Owen Sound, 27 O. R. 43; Weller v. McCormick, 47 N. J. Law 397, 398; and here, the jury having negatived all negligence except the failure to repair from Thursday, the day of the breaking, to Saturday, the day of the accident, it must be assumed that there was no defect in the original construction of the sidewalk; the jury could not be allowed to infer constructive notice or to charge negligence in not repairing what

was not known to be defective: McNiroy v. Town of Bracebridge, 10 O. L. R. 360; Denton, pp. 243 et seq.; Biggar, p. 835, note (e); and a jury cannot be allowed to find negligence in not repairing within a time which would not justify a Court in inferring notice; and, therefore, the judgment was right, and the appeal should be dismissed with costs.

FALCONBRIDGE, C.J., agreed in the result.

RIDDELL, J. MAY 7TH, 1910.

RE NICOL AND REARDON.

Will—Construction—Devise—Life Estate—"Balance or Remaining Portion of Estate"—Remainder—Title by Possession — Vendor and Purchaser.

Application by J. Nicol and A. Nicol, the daughters of William Nicol, deceased, under the Vendors and Purchasers Act, for an order declaring that they could make a good title to certain lands under the will of their father.

Grayson Smith, for the vendors.

W. A. Skeans, for the purchaser.

RIDDELL, J.:—William Nicol, a farmer, made his will in January, 1889, which provided: (1) for payment of debts, etc.; (2) devise and bequest to his wife "all my real and personal property together with all my household furniture for her absolute use and control during her natural life." Then comes an extraordinary provision: 3. "After the decease of my beloved wife . . I will and devise to my elder daughter, J. Nicol, one-third of the residue of my real and personal estate, the remaining two-thirds I leave to my younger daughter, A. Nicol; but, in the event of my second daughter, A. Nicol, marrying, then her share shall only be one-third, the remaining two-thirds shall go to my elder daughter, J. Nicol, but, should the latter marry, then her share shall be only one-third, the remaining two-thirds shall go to my younger daughter. In the event of the marriage of both of my

daughters the elder's shall (sic) be one-third and the younger's shall be two-thirds. Should any of my daughters before (sic) marriage, her share of my estate shall go to my surviving daughter. Should my two daughters die without issue, the balance or remaining portion of my said estate shall go to my two sons, R. and W. Nicol, share and share alike."

The will then named the wife and the two daughters executors and trustees.

The widow died in 1899; neither of the daughters has married. The testator was the owner of the land in question; the two daughters have made an agreement to sell the land; and the purchaser objects to their power to give a title in fee.

It is clear that, as both the daughters are to join in the conveyance, the only difficulty in the way is the provision, "Should my two daughters die without issue, the balance or remaining portion of my said estate shall go to my two sons, R. and W. Nicol, share and share alike."

It is argued that this means to dispose only of what the daughters may not have consumed or dealt with, so that their power of disposition of the land is complete.

I cannot agree with this contention. The testator first gave all his estate, real and personal, together with all his household furniture, to his wife for her absolute use and control during her natural life. Of course the furniture, &c., would be expected to wear out, some perhaps destroyed. What was left at the death of his wife and after the life estate he calls the "residue;" and disposes of that. No other meaning can be given to the word; there was no residue in the usual sense; all had been disposed of for the wife's lifetime. So, when we come to the death of the daughters, whatever is left after their life estate he calls "the balance or remaining portion of my said estate." I am unable to give the words any other meaning.

There are several events not provided for; but the one event of the two dying without issue is definitely and specifically provided for; and the two daughters cannot give an estate in fee.

The possession by the vendors is immaterial; that possession must be referred to the will.

None of the cases cited by counsel has any application in the peculiar wording of this will.

BRITTON, J. MAY 7TH, 1910.

RE HERRIMAN AND TOWN OF OWEN SOUND.

Municipal Corporation—Expropriation of Land—Waterworks — Compensation—Municipal Act, 1903—R. S. O. 1897 ch. 235—Arbitration and Award—Constitution of Board of Arbitrators —Irregularity — Waiver — Appearance of Parties and Taking Part in Arbitration Proceedings—Amount Allowed—Evidence —Percentage for Compulsory Taking—View by Arbitrators— —Disregarding Evidence as to Value — Appeal — Increase in Amount—Interest.

Appeal by Angus A. Herriman, Nathaniel Herriman, and George Herriman from an award of three arbitrators, so far as that award related to the claims of the appellants for rights in land expropriated or injuriously affected by the extension and improvement of the waterworks system by the town corporation.

W. H. Wright, for the appellants.

A. G. MacKay, KC.., for the corporation.

BRITTON, J.:—On the 14th June, 1909, the Corporation of Owen Sound passed by-law 1360 for the expropriation of certain lands for the waterworks improvement and extension scheme. The land which is the subject of the present appeal was included in lands to be taken. Angus A. Herriman resided in the county of Grey, Nathaniel Herriman . . . in Michigan, and George Herriman, in the city of Toronto. On the 28th June, 1909, the corporation by by-law appointed John M. Kilbourn arbitrator on behalf of the town to adjudicate on the several claims arising under the expropriation by-law 1360. On the 30th June, 1909, formal notice of expropriation was personally served upon Angus A. Herriman. On the 3rd July, 1909, an order was made by the Judge of the County Court of Grey, upon the application of the town corporation, appointing George A. Ferguson, under sec. 444, subsec. 2, of the Municipal Act, to act for George Herriman, Nathaniel Herriman, and Russell B. Herriman, in respect to their interests in these lands, and on the same day Mr. Ferguson was served by the corporation with notice of expropriation. On the 30th August, 1909, Mr. Ferguson gave formal notice to the corporation for these persons, claiming $4,000. On the 27th October, 1909, the corporation tendered to Mr. Ferguson $1200 for the land and $25 each for Russell B. Herriman and Angus A. Herriman, as dam-

ages. These amounts were not accepted. On the 9th December, 1909, on the application of the town corporation, an order was made by the Judge of the County Court of Grey nominating C. H. Widdifield, Junior Judge of the County Court, as arbitrator for John Herriman, Harry Herriman, Angus A. Herriman, Russell B. Herriman, Nathaniel Herriman, and George Herriman, to determine the compensation to which they were entitled. On the 20th December, 1909, C. H. Widdifield, and John M. Kilbourn appointed William J. Hatton, Judge of the County Court of Grey, as third arbitrator.

The arbitration then proceeded. Mr. R. W. Evans and Mr. Grosch appeared for the town corporation, and Mr. W. H. Wright appeared for the claimants. No objection was then taken to the constitution of the board of arbitrators.

The award was made on the 15th January, 1910, and by it the sum of $1,200 was awarded as compensation for the Herrimans' land and for all riparian rights and water flowing over it, and including all damages of every nature and kind sustained by them or any of them incidental to and arising from the exercise by the corporation of their powers over, upon, and in respect of the lands. This sum of $1,200 was over and above the further sum of $25 each, awarded to Russell B. Herriman and Angus A. Herriman as special damages.

The appeal is upon the grounds: (1) that the proceedings in the arbitration were irregular—that they were really under sec. 444 of the Municipal Act, 1903, instead of sec. 7 of R. S. O. 1897 ch. 235, as they should have been; (2) that the amount awarded is not in accordance with, but is contrary to, the evidence, and is not reasonably adequate for the lands taken.

As to the legality of the appointment of arbitrators, the town corporation acted as if the case were one within the terms of sec. 7 of R. S. O. 1897 ch. 235. If really within that section, by reason of Nathaniel residing out of Ontario, then the statute is imperative that the proper constitution of the Board would be by the Judge of the County Court of Grey appointing three indifferent persons as arbitrators. That section is to be invoked only on the application of the corporation and upon proof of notice of the application having been served or given as provided by sec. 9, sub-sec. 2, of the last-mentioned Act. The County Court Judge was not applied to, nor did he appoint three arbitrators. The corporation proceeded under the Municipal Act, 1903, asserting their right to do so by virtue of sec. 6 of R. S. O. 1897 ch. 235. Section 444, sub-sec. 1, of the Municipal Act gives to trustees power to act for the cestuis que trust. Sub-section 2 of sec. 444 is practically

to the same effect as sec. 7 of ch. 235, R. S. O.; and the corporation, under it, in reference to the absentee, had Mr. Ferguson appointed. For the purpose of the argument I will consider this as unnecessary and as if not done, and as if, upon the corporation having named their arbitrators, it was the duty of the claimants to name an arbitrator on their behalf: sec. 453, sub-secs. 1 and 2.

Then, under sec. 454, the County Court Judge, upon proper notice, etc., could appoint an arbitrator. This was done; C. H. Widdifield was appointed on the 9th December, 1909. Then the two arbitrators agreed and nominated the Judge of the County Court of Grey as the third arbitrator. . . . Apart from any irregularity in serving notice, what was done was authorised by the statute, and any irregularity in the order or mode of procedure was cured by the appearance of the parties and continuing the arbitration proceedings. It does not appear that any objection was taken; no doubt, all was done by Mr. Wright and Mr. Ferguson, representing the parties, that could be done.

The appellants contended that the amount allowed, as compensation for the land, etc., taken, is entirely inadequate. . . .

In every case where there is a decision by an arbitrator, Judge, or jury, upon evidence more or less conflicting, some evidence must be disregarded, if that effect is not given to it. An arbitrator is not obliged to accept as true and to give effect to the evidence of any particular witness. He may disregard it because he does not think the witness truthful or thinks the witness mistaken or not qualified to speak on the particular matter. The arbitrators did have before them and presumably they considered what was alleged by the appellants in regard to this property being a null privilege. As to the suitability of the property for a waterworks system, that must have been considered more or less, as it was because of suitability in a certain sense that the corporation were taking it over.

There is no ground for the contention that, in such a case as this, there should be an arbitrary addition of 10 per cent. because of compulsory taking.

I assume that the arbitrators did not, by reason of their view, and by the exercise of their own judgment after view, reach their conclusion. If they did, they should have so stated in their award.

There is a grave difficulty to face in dealing with this award, and it has given me considerable trouble. If the arbitrators did not accept as reliable, upon the question of value, the evidence of the appellants' witnesses, what was there left? What was the evidence that enabled them to fix the value at $1,200? That is the exact amount that the corporation tendered; but it can hardly

be said that naming a sum and tendering it is in itself evidence of value. I quite realise that an award should not be set aside because if an honest mistake as to the evidence or weight of evidence. It is not enough merely that I should have come to a different conclusion. This is a case where all the evidence of value seems to have been disregarded, without leaving anything but the bare fixing of the amount by the corporation. In the circumstances, the award should not stand.

There is a way, I think, of arriving at the value which will be very fair to the corporation and which will do justice to the owners.

The sum of $4,000 is too large. The offer once made of $4,000 for it is hardly a test of its value. The value should be arrived at by considering it as property held by owners willing to sell but not obliged to sell, being bought by a person willing to buy but not obliged to buy. . . . This property had a rental value, before expropriation proceedings, of $150 a year. That represents 5 per cent. on $3,000, but rental is not something that can be depended upon as permanent. It was given in evidence that there was an offer of $200 a year for 20 years if accompanied by an option to sell at $4,000. This was some years ago, and the property has not been improved since. Its non-improvement is evidence in reduction of so large a value. Upon the whole evidence, I think that the amount of $1,200 should be increased to $2,000, and that sum should be paid with interest at 5 per cent. from the 14th June, 1909, the date of passing the by-law: see Re Macpherson and City of Toronto, 26 O. R. 558.

I think the award must be dealt with under sec. 464 of the Municipal Act, 1903, as an award mentioned in sec. 463, sub-sec. 1, relating to property to be entered upon and used as mentioned in sec. 451, sub-sec. 1, of that Act; and, if an award not requiring adoption by the council, sec. 462, sub-sec. 1, applies, and, by sec 464, the Court shall consider not only the legality of the award, but the merits as they appear from the proceedings so filed, and the Court may increase or diminish the amount awarded or otherwise modify the award as the justice of the case may seem to require.

In my opinion, justice requires the increase mentioned. In other respects the award should stand. The corporation of Owen Sound should pay the costs of this appeal.

RIDDELL, J. MAY 9TH, 1910.

*VANO v. CANADIAN COLOURED COTTON MILLS CO.

Infant—Action Brought in Name of Next Friend—Compromise—Payment of Sum to Solicitors—Neglect to Obtain Approval of Court—Retention by Solicitors of Part for Costs—Payment of Part to Next Friend for Services—Ratification of Settlement by Infant at Majority — Claim against Solicitors and Next Friend—Payment into Court—Delivery and Taxation of Bill of Costs—Claim of Next Friend to be Subject of Action—Interest—Adjustment of Rights.

Motion by the plaintiff for an order for directions or for such other order as may seem just, in the circumstances set out below.

M. Malone, for the plaintiff.

Featherston Aylesworth, for the defendants.

H. S. White, for the next friend and former solicitors of the plaintiff.

RIDDELL, J.:—The plaintiff, a young Greek, then 17 years of age, and in the employ of the defendants at Hamilton, on the 12th October, 1906, suffered an accident whereby he lost part of his right hand. This action was begun on the 27th November, 1906, Budimir Protich, a compatriot acting as next friend, by Messrs. Bruce, Bruce, & Counsell, to recover damages for the plaintiff's injuries. The action was set down for trial, and on the 14th January, 1907, a settlement was arrived at, by the solicitors and counsel at least, whereby the defendants were to pay $800 in full of claim and costs and were to give employment to the plaintiff, as set out in the minutes of settlement signed by the solicitors. Neither party obtained the consent and approval of the Court; but the record was withdrawn. The defendants paid the $800, through their own solicitors, to the solicitors for the plaintiff. No part of this was paid into Court. . . .

On the 13th September, 1909, the plaintiff brought an action in the County Court of Wentworth, by another next friend, Kotarunnin, against Messrs. Bruce, Bruce, & Counsell, claiming $500 and interest. He alleges that he was to receive the whole $800, and that the solicitors had retained $300 for their own costs and paid Protich, the next friend, $200. The defendants in that action admitted the retention of $300 as their costs and the pay-

* This case will be reported in the Ontario Law Reports.

ment of $200 to Protich "for his services in boarding Vano and going security for the costs of his action against the company and other services." That action came on for trial on the 14th December, 1909. . . . At the close of the evidence, the Judge reserved the whole case for argument and decision later, but indicated that he then thought that Protich would have to give back the $200 and the solicitors render a bill to be taxed.

Pending decision and on the 25th January, 1910, notice of this motion was served. . . . All proceedings in the County Court remain in statu quo in the meantime.

The plaintiff . . . came of age on the 30th April, 1910, and at once proceeded to take out an order changing solicitors in this action from Messrs. Bruce, Bruce, & Counsell to Mr. Malone, his solicitor in the County Court action. . . . I asked Mr. Malone if his client now ratifies and confirms the settlement made for him at the trial, and Mr. Malone expressly affirmed this settlement. The defendants, therefore, had no further interest in the matter except on the question of costs. . . .

Mr. Malone also expressly submitted all the rights of his client to be disposed of upon this application; all the other counsel did the same for their clients.

It will be necessary to consider the position of the next friend, a well as that of the solicitors. . . .

[Reference to Hargr. Co. Litt. 135 b. n. (1); Statute of Westminster I. (1275), 3 Edw. I. ch. 48; Statute of Westminster II. (1285), 13 Edw. I. ch. 15; Morgan v. Thorn, 7 M. & W. 401, 404; Tidd's Prac., vol. 1, pp. 95 et seq.; Tidd's Supp. 2, p. 5; 2 Archbold's Prac., 7th ed., p. 889; Daniel's Prac., 3rd ed., p. 7; Story's Eq. Pl., sec. 57; 15 & 16 Vict. ch. 86 (Imp.); Con. Rule 198; Waltham v. Pemberton, 8 Jur. 291.]

Both in law and in equity the prochein amy or next friend was an officer of the Court: Morgan v. Thorn, 7 M. & W. 400, 406.

The practice of the common law Courts of appointing a next friend continued until the . . . Judicature Act, a comparatively late instance being Campbell v. Mathewson, 5 P. R 91. . . .

[Reference to Rule 96 of the Ontario Judicature Act, 1881; and Rule 198 of the Con. Rules of 1897.]

None of the changes made in the practice either in England or in Ontario has at all affected the position of the next friend as an officer of the Court. . . .

It may not be without value to examine into the powers of the next friend. . . .

[Reference to Knatchbull v. Fowle, 1 Ch. D. 604; Fryer v. Wiseman, 24 W. R. 205, 45 L. J. Ch. 199; Piggott v. Toogood,

[1904] W. N. 130; In re Birchall, 16 Ch. D. 41, 42; Holmested & Langton, p. 349 ad fin.; Mattei v. Vautio, 78 L. T. R. 682; Rhodes v. Swithinbank, 22 Q. B. D. 577.]

The next friend is an officer of the Court, and is amenable to the order of the Court; his conduct in receiving the $200 from the proceeds of the compromise is complained of, and, in my judgment, rightly so. The conduct of the solicitors in paying him this sum is also complained of, and, in view of the provisions of Con. Rule 840 and of the facts, there can be no pretence that this can be justified. . . . The solicitors, then, are liable for this sum of $200, as well as the next friend.

As to the remuneration of the next friend, there are many jurisdictions in which such a remuneration or compensation is allowed, but this right depends upon the statutes. . . . While a next friend is sub modo a trustee, and in much the same position as a trustee in some respects, our statute giving compensation to trustees, 37 Vict. ch. 9, R. S. O. 1897 ch. 129, sec. 40, does not cover his case. . . . The next friend, however, stands in the same position as a trustee in respect of costs, charges, and expenses properly incurred before the action was brought: Palmer v. Jones, 22 W. R. 909; not simply solicitor and client costs in the action itself: Fearns v. Young, 10 Ves. 184. . . . I do not know whether any claim of this kind is made by the next friend—if so, the amounts claimed may be added to the solicitors' bill. . . .

Under the circumstances, the solicitors having received the whole amount . . . a bill of costs must be rendered, and, if the plaintiff desires it, taxed. . . .

It has been said that, if the infant, on attaining full age, elect to continue the suit, he becomes liable for the costs from the beginning, as though the suit had been begun by him as an adult: Bligh v. Tredgett, 21 L. J. Ch. 204. This, however, does not mean that he is liable for costs in any event and even if he would not have been liable had he been an adult. The same rule must apply where, as in the present case, the plaintiff adopts and ratifies a settlement—he is liable for such costs, if any, as he would have been liable for had he been an adult when he began the action. It will, therefore, be open to him to prove, if he can, that the services of the solicitors were to be gratis or on any special terms. Nor is he estopped by the terms of the settlement—" Defendants to pay $800 in full of claim and costs." All that this means is that, as between the plaintiff and defendants, the sum of $800 is all that is to be paid by the defendants. The plaintiff is not thereby to be held to say that any particular costs or any costs were to be paid thereout, or at all, to his solicitors.

Upon a bill of costs interest is not chargeable until the bill is taxed, as a general rule: West v. West, 17 L. R. Ir. 49; but it would be wholly unjust, if the solicitors are found to be entitled to any costs, to order them to pay interest upon the whole sum of $300 and disallow them interest upon the amount to which they were actually entitled. The same considerations do not apply to the $200 paid the next friend—that must be paid with interest from the day it was received from the defendants.

The plaintiff having expressly elected to have his remedy by an order in this Court rather than in the County Court, there is no reason why the defendants in the County Court action should not plead this election under Con. Rule 289, puis darrein continuance; the plaintiff then would be entitled to his costs under Con. Rule 295, unless the Court should otherwise order. I have no power . . . to interfere with the discretion of the County Court Judge. . . .

The next friend and the solicitors must pay into Court forthwith $200 and interest since the 14th January, 1907; the solicitors must pay into Court, in addition, forthwith, the further sum of $200 and interest and deliver a bill of costs and charges to the plaintiff. . . . This bill will be taxed by the Local Registrar at Hamilton—the plaintiff to be at liberty to contend that no costs are payable . . . The taxing officer will certify by how much the amount of costs, etc., properly chargeable is more or less than $100; if the amount is in excess of $100, the excess without interest will be payable to the solicitors out of Court from the sum paid in; if the amount is less than $100, the balance with interest will be paid into Court by the solicitors. The taxing officer will deal with the costs of taxation under sec. 40 of the Solicitors Act. . . .

The money paid into Court will remain there (except such as may be paid out to the solicitors) for the period of 6 weeks to allow the next friend to bring an action against the plaintiff to establish his claim (to be paid for services), and, if such action be brought, the money will remain in Court until the conclusion of that action. Any party may apply at any time for further or other order.

No costs to the defendants. The solicitors to pay the costs of the other parties served with notice of motion, including the official guardian. . . .

There is no imputation of any want of good faith and honest intention on the part of the solicitors—but they, at their peril, left the well-trodden path known to them and all solicitors to be safe; and having gone astray, they must pay the penalty. . . .

TEETZEL, J. MAY 9TH, 1910.

GRAHAM v. DRIVER.

Promissory Note—Procurement of Signatures of Makers by Fraud —Discount by Bank—Payment Made on Account by Perpetrator of Fraud before Maturity — Holders in Due Course — Acquisition by Plaintiffs from Bank—Liability of Makers Confined to Balance Paid to Bank by Plaintiff—Notice of Fraud—Circumstances Putting Plaintiffs on Inquiry — Liability of Payee to Indemnify Makers—Costs.

Action upon a promissory note for $1,500.

After the trial at Barrie and before judgment, the defendants other than Fawcett applied to amend their statement of defence by claiming indemnity from Fawcett against their liability, if any, to the plaintiffs, which amendment was granted, and the trial as between the defendants took place at Toronto.

The note sued on was obtained by the plaintiffs from the Traders Bank of Canada at North Bay, where it had been discounted by the defendant Fawcett, to whose order it was made.

The defence was that the note was obtained from the defendants by Fawcett through fraud, and that, although the plaintiffs became the holders of the note before it fell due, the plaintiffs were affected with notice of the fraud.

Fawcett was the owner of a stallion which he was endeavouring to sell to a syndicate of farmers, and obtained their signatures to the note in question upon the false and fraudulent representation in each case that they were signing an application for one share of $100 in a syndicate of 15 to be formed for the purchase of the horse.

W. A. J. Bell, K.C., and W. G. Fisher, for the plaintiffs.

T. C. Robinette, K.C., for the defendants other than Fawcett.

E. F. B. Johnston, K.C., and R. G. Agnew, for the defendant Fawcett.

TEETZEL, J.:—I find upon the evidence that all the defendants (other than Fawcett) were induced to sign the paper in question upon the false and fraudulent representation of Fawcett, and that none of them was aware that he was signing a promissory note for $1,500, and that by reason of the fraud practised by Fawcett, the paper which purports to be a promissory note was not a valid promissory note in his possession as against any of the defendants.

Almost immediately after Fawcett had obtained the signatures to the note, he discounted it in the Traders Bank at North Bay, and received the proceeds thereof. Some of the defendants learned of this fact the next day after the note was discounted, and immediately thereupon caused an information to be laid against Fawcett, charging him with obtaining the note by fraud and false pretences. Fawcett was brought before the magistrate at North Bay, and, after some evidence had been given, the case was adjourned, and his counsel proposed to take up the note at the bank and have it surrendered to the defendants, and on the 9th July, 1904, the note being dated 27th June, 1904, payable 10 months after date, Fawcett paid to the bank on account of the note two sums of $599.25 and $200, which payments were indorsed upon the note over the initials of the acting manager, and Fawcett promised that he would, in a few days, pay the balance to the bank, so that the note could be returned to the defendants.

The criminal proceedings were adjourned from time to time, and were eventually dismissed.

Instead, however, of Fawcett paying the balance upon the note, he proceeded to arrange to have it taken up by the plaintiffs. In September, 1904, the plaintiffs paid to the bank the balance of the note, less the two sums of $599.25 and $200, and paid the $799.25, less the discount charges, to Fawcett. . . .

The bank were undoubtedly holders in due course, within the meaning of sec. 56 of the Bills of Exchange Act.

Section 57 of that Act provides that "a holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder."

There is no pretence for saying that the plaintiffs were parties to the fraud practised upon the defendants by Fawcett, so that undoubtedly whatever rights the bank possessed at the time of the delivery over of the note to the plaintiffs, the plaintiffs thereupon acquired. The only interest that the bank had in the note at the time was the balance of $700.75 remaining unpaid. . . .

The plaintiffs, however, claim to recover . . . not only the amount they paid to the bank, but the $799.25 paid to Fawcett. I think their right to claim the latter sum depends on whether or not they were affected by notice of the infirmity of Fawcett's rights under the notes, as it does not appear to me competent for the plaintiffs to rely upon the title of the bank to the note for any amount beyond the balance due to the bank at the time the note was delivered to the plaintiffs.

It was Fawcett, and not the bank, who induced the plaintiffs to take over and rediscount the note, and, when the note was presented to the plaintiffs through the agent of the bank at Alliston, it bore the indorsement of the two payments above mentioned; and the examination of the plaintiff Knight discloses that he was made aware that these payments had been made by Fawcett in consequence of some trouble that had arisen between himself and the makers, and that the payments and indorsement had been made after the note was discounted. He said that Fawcett had explained that there had been some dissatisfaction by the makers, that he knew the note was given in payment for a horse, and that, with the knowledge that the payments had been made in consequence of some trouble between Fawcett and the makers, he caused his solicitors . . . to inquire what the trouble was . . . and . . he learned, as he says, that they were trying to go very far with Mr. Fawcett in the matter—"I understood the makers were taking some action against Mr. Fawcett." He does not say that he heard Fawcett had been arrested, but I think the fair inference is, that both he and his solicitors were aware of this fact before he paid over any money on the note. . . .He believed there was no foundation for the trouble, as he had confidence in Mr. Fawcett.

I think the facts and circumstances . . . establish that the plaintiffs, before they acquired the note, were aware that the defendants had charged Fawcett, in a criminal proceeding, with having obtained the note by false pretences and fraud, and if, after that, the plaintiffs, without communicating with the alleged makers of the note, chose to acquire it, I think it must be held that they acquired it under such circumstances as to affect them with knowledge of the facts destroying the validity of the note as against the defendants. . . . The plaintiffs, when they took the note, were, under the circumstances, necessarily put upon inquiry as to the facts and circumstances under which the note was given, and they, therefore, were affected with notice of the illegality of the note, and therefore as to the interest in the note acquired from Fawcett, the plaintiffs are not holders in due course.

It was urged by Mr. Johnston that the $799.25 paid by Fawcett was paid as security for his bail, and was intended to be held as bail for his appearance before the magistrate; but I find . . . that the money was not paid as bail, but was paid directly to the bank on account of the note, and was intended to be credited on the note as payment in part discharge of it.

Whether the payment was made under such circumstances as would amount to duress does not seem to me to affect the question of the plaintiffs' right to disregard it as a payment actually made

by Fawcett. . . . He never pretended to them that the payment was void because of duress, or that it was a deposit for bail.

As between the plaintiffs and defendants, the judgment will, therefore, be in favour of the plaintiffs for $700.75 and interest from the 27th June, 1904, at 6 per cent. per annum until the 30th April, 1905, and at 5 per cent. per annum since that date. . . .

Now as to the claim by the defending defendants against Fawcett, who suffered judgment in favour of the plaintiffs by default, I am of opinion that, the defendants' loss having been occasioned solely by the fraud of Fawcett, they are entitled to judgment against him indemnifying them against the amount recoverable against them under this judgment by the plaintiffs, and also against their costs of defending this action, together with costs of the issue between them and him.

As between the plaintiffs and the defending defendants, I think there should be no costs of this action, as each has only had a partial success.

DIVISIONAL COURT. MAY 9TH, 1910.

*RE GOOD AND JACOB Y. SHANTZ & SON CO. LIMITED.

Company—Transfer of Shares—Refusal of Directors to Allow—Dominion Companies Act, sec. 45 — By-laws of Company — Approval of Directors.

Appeal by the company from the order of TEETZEL, J., ante 508, ordering the company to transfer on their books five fully paid-up shares of their stock assigned by Isaac Good to the applicant J. S. Good.

The company justified their refusal by their by-law, providing "that shareholders may with the consent of the board, but not otherwise, transfer their shares. . . . But no person shall be allowed to hold or own stock in the company without the consent of the board, and all transfers of stock must first be approved by the majority of directors before such transfer is entered."

The appeal was heard by MULOCK, C.J. EX.D., MACLAREN, J.A., and CLUTE, J.

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

W. E. Middleton, K.C., and H. S. White, for the applicant.

The judgment of the Court was delivered by MACLAREN, J.A.: — . . . The company were incorporated in 1895 by letters patent under the Dominion Companies Act, and the by-law in question was adopted at the organisation of the company on the

* This case will be reported in the Ontario Law Reports.

13th March, 1895. The five shares in question form a part of one hundred and twenty-four shares for which Isaac Good holds a certificate dated the 15th July, 1901.. . .

Section 45 of the Dominion Companies Act, R. S. C. 1906 ch. 79, provides that "the stock of the company shall be personal estate, and shall be transferable in such manner and subject to all such conditions and restrictions as are prescribed by this Part (of the Act) or by the letters patent or by the by-laws of the company." The sections of the Act relating to transfers are from 64 to 68 inclusive, and provide that no transfer of shares not fully paid-up shall be made without the consent of the directors; that no share shall be transferable until all previous calls are fully paid; and that the directors may decline to register any transfer of shares belonging to a shareholder who is indebted to the company. The letters patent do not appear to have anything on this point.

The refusal of the directors is based upon the by-law above quoted, which purports to have been passed under the authority of sec. 80 of the Act, providing that the directors may make by-laws not contrary to law, or to the letters patent of the company, as to matters therein named, one of them being, "the regulating of . . . the transfer of stock."

By-laws passed under the provisions of a statute cannot go beyond the express or implied power conferred upon the body authorised to pass them, and, in addition, they must be reasonable.

The object of a by-law authorised by sec. 80 is "the regulating of . . . the transfer of stock." Section 65 of the Act had already given the directors power to prevent the transfer of shares only partly paid-up, and the by-law now in question purports to confer upon the directors the same power as to fully paid-up shares as the statute had done with reference to shares only partly paid-up, when the same reason does not exist. Instead of being a by-law to regulate, it might be more properly intituled a by-law to prevent or prohibit the transfer of stock. For a discussion of this point, even when the word "govern" was added to "regulate," see the remarks of Lord Davey in the judgment of the Privy Council in City of Toronto v. Virgo, [1896] A. C. at p. 93, where he closes by saying, "An examination of other sections of the Act confirms their Lordships' view, for it shews that when the legislature intended to give power to prevent or prohibit, it did so by express words."

The cases mentioned by Teetzel, J., as being against the claim of the present plaintiff, and which were strongly pressed

upon us by counsel for the defendants, may, I think, be distinguished from the present case.

In In re Gresham Life Assurance Society, L. R. 8 Ch. 446, the restriction was contained in the deed of settlement which had been executed by the party desiring to transfer, so that it was a matter of contract, which would not be subject to the same conditions and tests as a by-law under our Act. . . . In In re Coalport China Co., [1895] 2 Ch. 404, the restriction in question was in the articles of association, which had been signed by the transferror, and sec. 16 of the Act of 1862, under which the company were incorporated, provided that the articles "shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles." The grounds on which the directors might refuse a transfer were set forth in the articles, and the Court held that the applicant had not proved that the case did not come within these. This again was in reality a case of contract, and the test of reasonableness, which is the proper one under our Act, does not apply.

Re Macdonald and Mail Printing Co., 6 P. R. 309, being under our own statute, is more nearly applicable; but in this the manager of the company stated in his affidavit that the company was formed for political purposes, and that the directors considered it inimical to these purposes to allow the transfer. Hagarty, C.J., said in his judgment that the reasons suggested in the affidavits seemed amply to justify the refusal to allow the transfer. And see, contra, the judgment of Richards, C.J., in Smith v. Canada Car Co., 6 P. R. 107, under the Companies Act of 1864, which in this respect was similar to the present Act.

In the United States the course of the jurisprudence has been varied, but on the whole not very dissimilar to our own. The general result of the authorities appear to be fairly summed up as follows: "Shares of stock in a corporation being personal property, and the jus disponendi being incident to the very nature of property, it follows that a by-law which undertakes to prohibit a shareholder from freely transferring his shares is ordinarily void, as being in restraint of trade and against common rights:" 10 Cyc. p. 359.

On the whole I am of opinion that the by-law in question in this case goes beyond the spirit and intent of the Act, and is invalid and not binding upon the transferror and transferee. The appeal should be dismissed with costs.

RIDDELL, J., IN CHAMBERS. MAY 10TH, 1910.

*DURYEA v. KAUFMAN.

Pleading—Statement of Defence and Counterclaim—Inconsistency —Embarrassment — Breach of Contract — Infringement of Patent for Invention—Invalidity—License—Rules of Pleading —Estoppel.

An appeal by the plaintiff from the order of the Master in Chambers, ante 738, dismissing the plaintiff's motion to strike out or compel an amendment of some portions of the defence and counterclaim of the defendants the Edwardsburg Starch Co.

Casey Wood, for the plaintiff.

D. L. McCarthy, K.C., for the defendant company.

RIDDELL, J.:— . . . The case was argued by the plaintiff's counsel as though there were some special rule as to pleadings in an action by a patentee against one whom he alleges to be using his patented methods. There is no difference in the Rules governing pleadings in the High Court in cases of patents and in those governing pleadings in any other ordinary action.

Nor are the rules of pleading in our Courts a thing of darkness and mystery, difficult to be grasped by the ordinary mind, and based upon arbitrary or whimsical principles. These principles are clear and simple and plain common sense. The pleadings must disclose what is to be tried; every pleader is at liberty to allege any fact which would be allowed to be proved, but only such facts. And the facts are to be set out in an understandable form, and not left to be inferred by mere conjecture. No pleading can be said to be embarrassing if it alleges only facts which may be proved—the opposite party may be perplexed, astonished, startled, confused, troubled, annoyed, taken aback, and worried by such a pleading—but in a legal sense he cannot be "embarrassed." But no pleading should set out a fact which would not be allowed to be proved—that is embarrassing: Stratford Gas Co. v. Gordon, 14 P. R. 407; Hough v. Chamberlain, 25 W. R. 742; Knowles v. Roberts, 38 Ch. D. 263.

Even if a pleading set out a fact that is not necessary to be proved, still, if it can be proved, the pleading will not be embarrassing. Anything which can have any effect at all in de-

* This case will be reported in the Ontario Law Reports.

termining the rights of the parties can be proved, and consequently can be pleaded—but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result: Rock v. Russell, 84 L. T. J. 45.

Now, when a patentee knows of another person using his patented methods, he may say that that other is either (A) right or (B) wrong. He may say that he is (A) right because (1) the patent is invalid and the processes are open to the world, or (2) the user has been licensed by the patentee or has in some manner, directly or indirectly received the right so to use the patented methods from the patentee. In the former case, A (1), of course no action lies; in the latter, A (2), an action will or will not lie according as the user has or has not agreed expressly or by implication to pay the patentee or do something which is equivalent to paying for the right to use the patent.

If an action is brought for payment, the user may, of course, deny that he is using the patent under any agreement to pay, etc., or that he is using it at all. But, if he admits the use under the agreement, unless there be an express or implied warranty of the validity of the patent, or fraud is alleged, it is obvious that the validity of the patent is wholly immaterial—he has promised to pay, and the action is on the promise.

He may, of course, plead fraud, which is at the common law a form of non-assumpsit (though since the Common Law Procedure Act, at least, it must be specifically pleaded), because, when a contracting party discovers the fraud and repudiates the contract for that cause, he asserts that the contract is not in existence—whereas, if he does not repudiate, but goes on under the contract, he is considered to have waived the fraud and ratified the contract. The ordinary plea of fraud, therefore, contains an averment by implication that the defendant repudiates the contract on discovery of the fraud: Dawes v. Harness, L. R. 10 C. P. 166. Such a plea was made in Lovell v. Hicks, 2 Y. & C. Ex. 46, 481 . . . , Hayne v. Maltby, 3 T. R. 438 . . . Chanter v. Leese, 4 M. & W. 295. Or the defendant may set up an express warranty of the validity of the patent. That would go to the basis of the contract, and, of course, the invalidity of the patent would require to be proved. In both these cases, the invalidity of the patent could be pleaded as a defence. Cases of an express warranty are such as Mills v. Carson, 10 R. P. C.; Wilson v. Union Mills Co., 9 R. P. C. 57; Nadel v. Martin, 20 R. P. C. 735.

As to an implied warranty . . . the Courts early decided that in the ordinary case of the sale or license of a patent there is no implied warranty . . .

[Reference to Hall v. Conder, 2 C. B. N. S. 22, 54; Taylor v. Hare, 1 N. R. 260; Hayne v. Maltby, 3 T. R. 438; Smith v. Buckingham, 21 L. T. N. S. 819; Liardet v Hammond Electric Light Co., 31 W. R. 710, 711.]

In actions for royalties due for patents where there is no fraud or express warranty, the law is well settled. . . .

[Reference to Noton v. Brooks, 7 H. & N. 499; Lawes v. Purser, 6 E. & B. 930; Hall v. Conder, 2 C. B. N. S. 22; Gray v. Billington, 21 C. P. 288; Vermilyea v. Canniff, 12 O. R. 164; Dorab Alley Khan v. Abdool, L. R. 5 Ind. App. 127; Owens v. Taylor, 29 Gr. 210; Beam v. Merner, 14 O. R. 412; Green v. Watson, 2 O. R. 627, 634; African Gold Co. v. Sheba Co., 14 R. P. C. 663; Crossley v. Dixon, 10 H. L. C. 293; Clark v. Adie, 2 App. Cas. 423; Doe d. Nanton v. Austin, 9 Bing. 41; Elliot v. Mayor, etc., of Bristol, 71 L. T. R. 659, 663.]

That there is any general estoppel of a vendee or licensee of a patent may, perhaps, be doubted. . . .

[Reference to Frost, 3rd ed., vol. 2, p. 148; vol. 1, p. 409; Wilson v. Union Oil Mills Co., 9 R. P. C. 57, 63; Terrell, 4th ed., p. 218.]

That the estoppel is not general and absolute is seen in . . . Pidding v. Franks, 1 Macn. & G. 56.

[Reference to Baxter v. Cowlie (1850), 1 Ir. Ch. R. 284; Dangerfiield v. Jones, 13 L .T N. S. 143.]

There are, however, cases in which the doctrines of estoppel are more properly applicable and the name applied: for instance, where one, holding himself out to be a patentee under a valid patent, sells the patent or gives a license to use it, he is not permitted thereafter, as against his vendee or licensee, to set up that the patent is invalid. . . .

[Reference to Oldham v. Langmead (1789), referred to in Hayne v. Maltby, 3 T. R. at pp. 439, 441; Chambers v. Crichley, 33 Beav. 374, 376; Whiting v. Tuttle, 17 Gr. 454; Gillies v. Cotton, 22 Gr. 123, 129, 182; Walton v. Lavater, 8 C. B. N. S. 162; Gonville v. Hay, 21 R. P. C. 49.]

I pass on to the other case (B.) The defendant is said to be a wrongdoer—he is charged with using the patented methods without the license of the patentee — in short, the defendant is charged with infringement. The defendant cannot be charged with infringement unless either he never had a license or his license has come to an end by revocation, lapse of time, or other methods. There is some authority for the proposition that in case of the termination by lapse of time of the license the patentee can sue either for royalty or for infringement: Walker on Patents,

4th ed., sec. 309. But in such a case the defendant has the same rights and may interpose the same defences as if he never had a license. . . .

In respect of patent No. 74297 the plaintiff says that the defendant company, without the license, permission, or consent of the plaintiff, has since the 1st January, 1909, made use of the processes of this patent (sec. 32), and that they will continue to infringe unless restrained.

In respect of patent No. 106081 the allegation is, perhaps, not quite so plain, but I cannot read the statement of claim as not claiming infringement.

In respect of patent No. 82771 (Maltose) the plaintiff alleges that the defendant company never acquired the right to use this, and have none, and he asks an injunction restraining infringement.

In respect of patent No. 106082 he says that, while they were trying to embody an agreement in writing, the company repudiated the oral agreement, and are now infringing.

Such being the claim, the defendants are at liberty to attack the validity of the patents.

It is quite true that if at the trial it is proved, as apparently the defendant company desire to do, that there is an existing and valid license to the company, the plea of invalidity of the patents will not be of any avail, as turned out to be the result in the Vermilyea case, 12 O. R. 164. But there is no reason why at present the company may not set up inconsistent defences. See Holmestead & Langton, p. 440, and cases cited; Allen v. Canadian Pacific R. W. Co., 19 O. L. R. 510, at pp. 516, 517. . . .

In the defence the company may allege the invalidity of the patents; and . . . they may counterclaim for a declaration to that effect. If the company have added other claims in the counterclaim which are inconsistent and embarrassing, it is possible that the Court may deal with these defendants as the Court did with the plaintiff in Evans v. Davis, 27 W. R. 285, in the way of costs.

The pleadings are in general intended to shew the facts upon which the party relies, and the Court will grant only the relief to which the facts proved are applicable and justify. While it would be going too far, perhaps, to say that in no case would the Court upon motion strike out a paragraph of the prayer, such a case must be rare. No doubt, Con. Rule 273 provides that in a counterclaim, as in a statement of claim, the relief claimed is to be either simply or in the alternative; but it is well decided that a prayer for general relief will justify the Court in granting any relief warranted by the facts: Watson v. Hawkins, 24 W. R. 884;

Slater v. Canada Central R. W. Co., 25 Gr. 363. No harm can accrue to the defendant in the counterclaim from the company asking too much, where the facts upon which the company rely are set out, and the evidence to prove such facts is admissible in another part of the case.

Moreover, the express words of Con. Rule 273 allow the relief to be claimed in the alternative, which is what has been done in this case.

The appeal will be dismissed with costs to the defendant company in any event of the action.

DIVISIONAL COURT. MAY 10TH, 1910.

*LAURIE v. CANADIAN NORTHERN R. W. CO.

Railway — Carriage of Goods — Failure to Deliver — Refusal of Connecting Carrier to Complete Carriage—Return of Goods and Money Paid for Freight — Contract—Shipping Bill — Conditions Relieving Railway Company—Common Carriers—Arrangement with Transport Company—Remedy in Tort — Railway Act, sec. 284.

Appeal by the plaintiff from the judgment of MAGEE, J., dismissing the action with costs.

The plaintiff, a lumber manufacturer of Parry Sound, delivered to the defendants at their siding at James Bay Junction, in the district of Parry Sound, a car of dressed lumber, to be forwarded by the defendants to Gowganda station, "subject to the terms and conditions . . upon the other side of the shipping bill which is delivered by the company and accepted by the consignor . . . as the basis upon which this receipt is given for the said property, and it is agreed to by the consignor as a special contract in respect thereof."

The freight to Gowganda—$643.45—was paid by the plaintiff to the defendants.

Among the conditions indorsed on the shipping receipt were the following:—

"3. The company is not to be liable for damages occasioned by delays caused by storms, accidents," etc.

* This case will be reported in the Ontario Law Reports.

"6. The company's obligation to carry and deliver lumber . . . carried by the car-load shall be fulfilled and the company's responsibility in respect thereof shall cease upon the car in which they are carried being detached from the train at the station on the company's lines to which it is consigned, or at the station where, in the usual course of business, it leaves the company's lines. The expression 'the company's lines' in this document means one or more of the lines of railway operated by the company, and the expression 'other lines' means a railway or railways operated by some other company or companies."

"10. It is hereby expressly agreed that the company does not contract for the safety or delivery of any goods, except on the company's lines, and where a through rate is named to a point on other lines, it is on the understanding that the company is to act only as agent of the owner of the goods as to that portion of the said rate required to meet the charges on such other lines; and if any goods be consigned to a place on other lines, then, unless some connecting carrier be named on the other side of this document, the goods are to be handed over by the company for further conveyance to such carrier, and at such place on the company's line as the company may select; if one be so named, the company will hand over such goods to the one so named, if practicable; in either case the company, in so handing over the goods, shall be held to be the agent of the owner, it being expressly agreed that the responsibility of the company in respect of any loss, misdelivery, or detention of or damage or injury, by any means whatsoever, to any goods carried under this contract, shall cease as soon as the company shall deliver them to the next connecting carrier for further conveyance, or notify such carrier that it is ready to do so."

"15. The company shall not in any case, or under any circumstances, be liable for loss of market or for claims arising from delay or detention of any train in the course of its journey, or any of the stations on the way, or in starting, and the company does not undertake to load or send goods upon or by any particular train, if there is an insufficient number of cars at any station, or if the cars cannot be conveniently used for the purpose, or if, from any cause, cars loaded at a station are unable to be sent off by the train passing or starting from such station, and any loss or damage for which the company may be responsible shall be computed upon a value or cost of the goods or property at the place and time of shipment under this shipping bill"

The car of lumber was conveyed to Selwood—the station nearest to Gowganda on the defendants' line—having been shipped

on the 11th and arriving on the 12th March, 1909. The only transportation possible from Selwood to Gowganda was by the Gowganda Transport Co., by teams over a sleigh road, impossible except during the winter season. The transport company was an independent organisation.

On the arrival at Selwood the car containing the lumber was detached and left on the siding ready for transshipment, and the agent of the transport company was notified by the delivery to him at Selwood of the shipping bill, but, owing either to accommodation of more freight at Selwood than the transpart company could handle, or other cause, the lumber was not forwarded to Gowganda. The defendants reshipped it to the plaintiff without delay, and returned the freight paid to them.

This action was brought for breach of contract for non-delivery and damages for loss of profits.

The defendants relied upon the above conditions as a defence to the action.

MAGEE, J., dismissed the action with costs.

The appeal was heard by MULOCK, C.J. Ex.D., CLUTE and SUTHERLAND, JJ.

H. H. Dewart, K.C., and H. E. Stone, for the plaintiff.

I. F. Hellmuth, K.C., and G. F. Macdonnell, for the defendants.

The judgment of the Court was delivered by CLUTE, J., who, after stating the facts as above, said that neither clause 3 nor clause 6 of the conditions applied; but that clause 10 applied, "the next connecting carrier" not being limited here to a railway company operating "other lines," but meaning any connecting carrier. Clause 15 also applied; and, in this case the lumber on its return to the plaintiff's siding had not in fact depreciated in value.

It was strongly urged that the law applicable to common carriers applied . . . McGill v. Grand Trunk R. W. Co., 19 A. R. 246; . . . Jenckes Machine Co. v. Canadian Northern R. W. Co., 14 O. W. R. 307, 311. . . .

If my construction of the contract is correct, there was a limitation under the contract itself, and the numerous cases referred to where no such limitation exists are inapplicable. . . .

It was further contended that there was no effective arrangement binding the transport company to receive and deliver, and

therefore the defendants had no right to hold out the transport company as a company who would deliver the lumber. The evidence, I think, displaces this contention. . . .

Neither is the plaintiff entitled to succeed as in an action for tort, as the defendants received the lumber for carriage under the terms and provisions of a special contract: Lake Erie and Detroit River R. W. Co. v. Sales, 26 S. C. R. 663, 667; and by this special contract, if I am right in the construction I have placed upon it, the defendants have expressly limited their obligations both as to liability and damages so as to exclude the plaintiff's right to recover.

It was also urged that the defendants were liable under sec. 284, clauses (b), (c), and (d), of the Railway Act, R. S. C. 1906 ch. 37. . . . There was and could be no complaint of the prompt and safe receipt and carriage of the lumber on the defendants' line. It was also clear, I think, from the evidence, that the defendants did all things necessary for its delivery to the Gowganda Transport Co.

If the conditions in the contract apply, as above indicated, then I find nothing in the evidence to shew that the defendants did not fulfil the same, and by returning the freight charges and the lumber they did all that they were called upon to do, in the circumstances.

The appeal should be dismissed with costs.

DIVISIONAL COURT. MAY 10TH, 1910.

*REX v. ACKERS.

Liquor License Act—Conviction—Jurisdiction of Justices of the Peace—Information Laid before and Summons Issued by Police Magistrate—Oral Request to Justices to Act—Jurisdiction not Appearing on Face of Conviction—Warrant of Commitment—Imprisonment—Habeas Corpus—Amendment of Conviction under sec. 105—Other Defects in Warrant—Costs of Conveying to Gaol.

Motion on behalf of the defendant for his discharge from custody, on the return of a writ of habeas corpus. See ante 585, 672.

* This case will be reported in the Ontario Law Reports.

The motion was heard by MULOCK, C.J. EX.D., CLUTE and SUTHERLAND, JJ.

J. B. Mackenzie, for the defendant.

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

The judgment of the Court was delivered by CLUTE, J.:—The information was laid by Hugh Walker, license inspector, against James Ackers, before Stewart Masson, police magistrate in and for the city of Belleville and the south part of the county of Hastings, for an offence under the Liquor License Act.

Upon the information the police magistrate issued a summons to Ackers to appear at the town hall of the village of Sterling, before him, as such police magistrate, or before such other justices of the peace having jurisdiction as may then be there, to answer to the said complaint, and be further dealt with according to law. The intention was that the case should be dealt with by the local magistrates.

The police magistrate did not attend on the return of the summons, but verbally requested Magistrate Bird to get another magistrate to sit with him, which he did, and the case was heard by these two justices of the peace, at the village of Sterling, and before them the prisoner appeared and pleaded guilty to the charge, and thereupon, on the 3rd March, 1910, he was convicted and ordered to pay a fine of $100, or, in default thereof, to be imprisoned for three months.

The objections taken in the notice of motion are as follows:—

"(1) That the convicting magistrates had no jurisdiction to convict the prisoner, the initiatory proceedings having been taken before a police magistrate, and no request to act for him or his illness or absence appearing.

"(2) That the magistrates, having drawn up and returned to the Clerk of the Peace an order for the payment of money, could not afterwards file any conviction with him, and no minute of such order was served before commitment.

"(3) That an amended conviction could not be put in after the enforcement of the fine and costs by imprisonment.

"(4) That it cannot be learned from the proceedings whether the informant was a license inspector or a private individual, so that the rightful distribution of the penalty should ensue.

"(5) That the warrant of commitment recites a bad conviction, and does not conform with either of the convictions returned.

"(6) That no minute appears to have been made out, and the contingent punishment is unauthorised."

By R. S. O. 1897 ch. 87, sec. 22, it is provided that "no justices of the peace . . . shall adjudicate upon or otherwise act until after judgment in any case prosecuted under the authority of any statute of Ontario, where the initiatory proceedings were taken by or before a police magistrate, except at the general sessions of the peace or in the case of illness or absence or at the request of the police magistrate," &c.

In the present case no request in writing was made to the magistrates who convicted Ackers. The police magistrate did, however, request by telephone the magistrates who heard the case to act, and it may be inferred from the summons and what took place that he so desired them to act. Nor does it appear that the magistrate was ill or absent, unless that be implied from the fact that it does not appear that he took part in the trial and the conviction of the accused.

The first conviction drawn up did not give the name of the accused, shewing who was convicted of the offence. The second corrected this error, and adjudged that the said James Ackers for his said offence forfeit and pay the sum of $100, to be paid and applied according to law, and also to pay to the said Hugh Walker the sum of $7.90 for his costs in this behalf, and, if the said several sums are not paid forthwith, then we adjudge the said James Ackers to be imprisoned in the common gaol for the southern part of the county of Hastings, in Belleville, in the said county, and there to be kept for the space of three months, unless the said sums and the costs and charges of conveying the said James Ackers to the said common gaol shall be sooner paid.

These costs are not mentioned in the conviction, but are mentioned in the warrant of commitment. It would appear that the first form of conviction drawn up and signed by the magistrates, called an order for the payment of money, and in default of payment imprisonment, stated the fact that the complaint was made before the police magistrate for the city of Belleville and the southern part of the county of Hastings. This reference to the police magistrate is not made in the other amended convictions which were drawn up. It nowhere appears upon the face of the proceedings that the magistrate acted at the request of the police magistrate or in his absence or owing to his illness. . . .

[Reference to The Queen v. Lyons, 2 Can. Crim. Cas. 218; Rex v. Duering, 2 O. L. R. 593; The Queen v. Inhabitants of the Parish of St. George's, Bloomsbury, 4 E. & B. 520; Paley on Summary Convictions, 8th ed., p. 32; In re Peerless, 1 Q. B. 143; and The Queen v. McKenzie, 23 N. S. R. 6.]

I do not think the second and third objections are well taken.

As to the fourth ground, it does appear from the information that Hugh Walker is a license inspector, and the amended conviction declares that the fine imposed shall be paid and applied according to law. This, I think, is quite sufficient.

It is true that the amendment does not conform to the conviction, because the conviction does not state the costs and charges of conveying the prisoner to the common gaol. But this, I think, is no ground of objection. The amount for conveying him to the common gaol is stated in the commitment, which is, I think, sufficient.

The last point mentioned in the notice of motion was not argued except as covered by the other points.

Although the conviction as it stands cannot, I think, be supported, for the reason that it does not disclose upon its face, what was undoubtedly the fact, that the magistrates were acting at the request of the police magistrate, yet the prisoner ought not to be discharged, but should be detained under the commitment, and the conviction should be amended under the Liquor License Act, sec. 105, which, I think, was passed to cover a case of this kind.

. . .

[Setting out sub-secs. 1 and 2.]

In my opinion, the proper order to be made is, that this Court directs that the prisoner be further detained under the present proceedings, and that the magistrates before whom he was convicted do amend the conviction that it may shew upon its face that the magistrates acted at the request of the police magistrate.

BROWN v. GILBREATH—RIDDELL, J.—MAY 9.

Dismissal of Action—Con. Rule 434.]—Motion by the defendant to dismiss the action for want of prosecution. Order dismissing the action under Con. Rule 434, with costs, including all costs reserved. J. J. Gray, for the defendant. No one appeared for the plaintiff.

RE SOVEREIGN BANK AND KEILTY—DIVISIONAL COURT—MAY 9.

Mortgage—Collateral Security—Exercise of Power of Sale—Demand—Vendor and Purchaser.]—An appeal by the purchaser from the order and decision of TEETZEL, J., ante 456, upon an

application under the Vendors and Purchasers Act, was dismissed by a Divisional Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) Britton, J., gave reasons in writing for agreeing with the result reached by TEETZEL, J., and referred to Berry v. Halifax Banking Co., [1901] 1 Ch. 191. Appeal dismissed with costs. W. S. Morden, for the purchaser. Shirley Denison, for the vendors.

BELL v. CITY OF HAMILTON—DIVISIONAL COURT—MAY 12.

Highway—Non-repair of Sidewalk—Snow and Ice.]—An appeal by the defendants from the judgment of BRITTON, J., ante 644, was dismissed with costs by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and MIDDLETON, JJ. H. E. Rose, K.C., for the defendants. W. M. McClemont, for the plaintiff.