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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. JANUARY 3RD, 1913.

GUISE-BAGELEY v. VIGARS-SHEIR LUMBER CO.

Contract—Construction—Agreement for Lease of Lands—Lessee in Possession—Forfeiture of Lease—Rights of Lessee—Option of Purchase—Pre-emption—Termination on Forfeiture of Lease—Vendor and Purchaser—Specific Performance

Appeal by the plaintiff from the judgment of the Junior Judge of the District Court of the District of Thunder Bay dismissing an action for specific performance of an agreement for the sale of certain lands.

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

C. A. Moss and Featherston Aylesworth, for the plaintiff.

N. W. Rowell, K.C., for the defendants.

The judgment of the Court was delivered by MULOCK, C.J.:—The plaintiff and his father owned the lands in question, subject to a mortgage thereon in favour of one James Bergin. The father was also indebted to the defendants in the sum of $809.20, for which a judgment had been recovered. Default having been made under the Bergin mortgage, the mortgagee was proceeding to sell the lands under the power of sale contained in it, when the plaintiff and the defendants entered into an agreement bearing date the 27th October, 1908, whereby the plaintiff granted to the defendants his equity of redemption in the lands, and which instrument provided that the defendants should purchase the lands when sold under the mortgage, and, upon obtaining a conveyance thereof, should lease the same to the plaintiff "for a term of five years at the annual rent of," etc., "the said

lease to contain all the usual clauses, provisoes, and conditions, including a power of re-entry upon non-payment of rent for one calendar month after the same becomes due, and a covenant by the lessee to pay all taxes and other outgoings and to insure the buildings in their full insurable value in the names of the lessor and lessee, and also a covenant to keep the buildings on the said lands in good and substantial repair, and a proviso that in default the lessors may pay the same taxes and insurance and do repairs; and the said lease shall also contain a covenant and proviso on the part of the lessors that the lessee may at any time during the said term exercise his right of pre-emption of the said premises . . . at the fixfied price of," etc., "and that thereupon the lessors will convey the same respectively to him in fee simple free from incumbrances, and also a proviso that after the first three years the lessors may sell the said premises free from the said lease, on giving one calendar month's notice in writing of their intention so to do, but that the lessee shall have the option of becoming the purchaser at the price and terms agreed to be paid by the proposed purchaser, on signifying his intention so to do in writing before the expiration of the said month and on proceeding without delay to complete his purchase."

The defendants become purchasers of the said lands sold under the Bergin mortgage, and on the 30th November, 1908, obtained from the mortgagee a conveyance thereof. Thereupon it became the duty of the parties, in pursuance of the agreement between them, to enter into a written lease of the lands, but they did not do so. When the agreement of the 27th October, 1908, was entered into, the plaintiff was in possession, and so remained until March, 1909, when he abandoned possession, refused to pay rent, and the defendants took possession and leased the property to a third party.

It must be assumed that the plaintiff was in possession by virtue of the agreement, that is, as lessee. The rights of the parties must be determined as if a formal written lease, within the meaning of the agreement, had been actually entered into; and under such a lease the conduct of the plaintiff would have operated as a forfeiture; so that, as a matter of law, the term provided for by the agreement came to an end in March, 1909.

The question then is, whether the plaintiff's option to purchase the lands also then ceased?

The plaintiff contends that, nothwithstanding the determination of the lease, his right of pre-emption continues throughout the period of five years from the time when the defendants

acquired their conveyance, subject to the qualified right of the defendants, after the three years, to sell to a stranger.

The question is, what did the parties mean when by the agreement they said that the "lease shall contain a covenant and proviso on the part of the lessors that the lessee may at any time during the said term exercise his right of pre-emption," etc.? It does not say during five years, but during the said term—that is, whilst the said term is still subsisting.

If the plaintiff's contention is adopted, then at any moment during the five years, although the lease had ceased to exist, the plaintiff, on exercising his option, would be entitled to a conveyance of the lands in fee, and, with it, immediate possession.

In the meantime what use could the defendants make of the property? They or their tenants could hold it only on sufferance, being liable to be ejected at a moment's notice. It is inconceivable that the parties contemplated a tenure so precarious and destructive of the value of the use of the property. Practically it would mean that during the continuance of the option the defendants should not be in a position to make any reasonable use of the property, that is, the plaintiff might abandon its user as lessee, and yet the owners could not, either by themselves or others, make a reasonable use of it. In the meantime the defendants would be obliged to pay the taxes, insurance, and upkeep, with no income to meet these charges, and with no right under the contract to add interest to the purchase-money. This result is wholly inconsistent with the scheme of the parties. Practically, though not as a matter of law, the right of re-purchase was intended to give to the plaintiff the benefit of redemption, the purchase-price being the amount of the defendants' judgment, the prior mortgage, and the disbursements which the defendants might properly incur for taxes, insurance, and upkeep—the rental payable by the plaintiff taking the place of interest on the defendants' claim until the plaintiff purchased.

If, notwithstanding these consequences, the parties contracted to the effect contended for by the plaintiff, then we have nothing to do with consequences; but, when an ambiguous set of words is used, the circumstances assist in making clear the sense in which both parties so expressed themselves.

Then the proviso that "after the first three years the lessor may sell the premises free from the said lease," etc., shews that they contemplated the lease as subsisting.

Then further on it is provided that "the lessee shall have the option of becoming the purchaser at the price," etc.—not that the plaintiff shall have the option, but the "lessee."

Thus, throughout the whole instrument dealing with the option there runs the prevailing idea that the plaintiff qua lessee only is to be entitled to exercise the option.

I, therefore, am of opinion that the proper interpretation to place upon the instrument in question is, that the plaintiff's right of pre-emption ceased when the lease came to an end; and, therefore, this appeal should be dismissed with costs.

DIVISIONAL COURT. JANUARY 3RD, 1913.

WARD v. WRAY.

Mistake—Cancellation of Promissory Note—Acceptance of Note in Renewal—Mistake as to Identity of Signatory—Relief from Consequences of Mistake—Liability on Note—Surety—Discharge—Extension of Time for Payment by Principal—Absence of Knowledge of Suretyship—Request for Extension.

Appeal by the defendant George Wray senior from the judgment of the Judge of the County Court of the County of Lambton, in favour of the plaintiff, in an action against George Wray senior and George Wray junior, father and son, to set aside the plaintiff's cancellation, made by mistake, of a promissory note made by the defendants in favour of the plaintiff and discounted by him, and to recover the amount owing on the note, viz., $141.

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

A. Wier, for the appellant.

R. J. Towers, for the plaintiff.

The judgment of the Court was delivered by MULOCK, C.J.:—The plaintiff conducts a banking business at the town of Sarnia, and the defendant George Wray senior resides there. His son resides in the United States. The note sued on bears date the 21st April, 1910. It was made by the two defendants, payable to the plaintiff's order six months after date. A day or two before its maturity, the father called upon the plaintiff and paid the interest which had accrued on the note, and told him that he had not heard from his son about the matter, but expected to hear shortly. The note became due on the 24th October, 1910,

and, not having been attended to, the plaintiff on the 11th November, 1910, wrote to the father as follows:—

"Sarnia, November 11th, 1910.

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

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

"Yours truly,

"W. H. WARD."

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

"Sarnia, December 3rd, 1910.

"George Wray, Esq., Sarnia, Ontario.

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

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

Shortly before the maturity of the renewal note the plaintiff's

clerk sent a notice to the father's wife reminding her of the due date of the note, to which she sent the following answer:—

"April 19, 1911.

"Mr. W. J. Ward, Banker.

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

"Yours, Mrs. Wray."

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

It was argued by the defendants that the father was a surety for his son, and was relieved by the giving of time without his consent. There is no evidence that the plaintiff knew him to be a surety. It is true that the son first discussed with the plaintiff the proposed loan, and that the plaintiff said he would require his father's signature; at the same time the plaintiff thought the father had some interest as principal debtor in the transaction, and the form of the note sustains that view, the father being one of the makers. Thus, quoad the plaintiff, the father was one of the principals, not a surety. Further, even if he was in fact and to the plaintiff's knowledge a mere surety, he was a consenting party to the renewal.

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

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

KELLY, J.

JANUARY 7TH, 1913.

RE McGILL.

Will—Construction—Absolute Bequest—Inoperative Restriction—Discretion of Executors.

Motion by Margaret McGill, upon originating notice, for an order determining a question arising upon the construction of the will of Jane McGill, deceased.

W. R. Meredith, for the applicant.
H. B. Elliott, K.C., for the executors.

KELLY, J.:—Jane McGill by her will dated the 21st August, 1903, bequeathed to her daughter Margaret McGill $645; she also made bequests to each of five other daughters, and directed that, in the event of the death of any of her daughters during the lifetime of the testatrix, her share should be divided amongst the others in proportion to the bequests specifically made. Following this, there is this provision: "I hereby direct that my executors herein named shall exercise control over the bequest herein contained in favour of my said daughter Margaret McGill and shall invest the same as to them seems best and pay the income thereof to my said daughter Margaret McGill until such time as they consider that she can control the corpus of the said bequest providently and well."

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

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

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

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

My view is, that they have not that right. The bequest is not made dependent on the discretion of the executors; it is an absolute bequest, followed by an indication of the mode in which it should be enjoyed. There is no gift over to any other person,

nothing to shew that any one but Margaret McGill is entitled in any way to the bequest; and, moreover, she is the residuary legatee.

In In re Johnston, [1894] 3 Ch. 204—a case much resembling the present one—Stirling, J., at p. 208, said: "Does the law permit the testator to vest such a discretion in his trustee or executor? I have no doubt that the discretion was intended to be conferred by the testator for most excellent reasons, which, indeed, seem to be justified by the events, and I should be very glad to uphold it if I could; but it does seem to me that it is really an attempt by the testator to fetter the enjoyment by a person of a benefit to which he has become absolutely entitled under the will. The testator might (if he had been well advised) have effectually provided for the same object by making the gifts entirely dependent upon the discretion of the trustee. For example, he might have given to the legatees such sums only as the trustee, in the absolute exercise of his discretion, thought ought to be given to them. That would be one way. Another mode of effectually doing it would have been to make in some shape or form a gift over, so as to benefit other persons beside the sons, and in such a way that the legatees in question could not be deemed to be the sole persons interested in the funds. He has not chosen to take advantage of any such mode of gift, but has in each case made the son in question the sole person to take the benefit of the fund which he has directed to be set apart. Under these circumstances, the case seems to me to fall within the class of cases which have been referred to, in which the law has been laid down that a testator is not to be allowed to fetter the mode of enjoyment of persons absolutely entitled to a fund. . . . When the words of the will are looked at, the testator is simply pointing out the mode in which these sums, which he had actually given to his sons, should be enjoyed by them. In that class of cases, of which Re Skinner's Trusts, 1 J. & H. 102, is an example, the Court has said that it will not insist on the benefit intended for the legatee being taken by him modo et forma as the testator prescribes."

This view of the law has been followed in our own Courts in recent cases, such as Re Rispin, 25 O.L.R. 633, and Re Hamilton, 4 O.W.N. 441. In the latter, the Chancellor points out the methods by which only a bequest such as this can be made subject to the discretion of the trustees as to the time and mode of payment. Neither of these methods was adopted by the testatrix in this instance.

The restriction attempted to be put on the bequests to Margaret McGill, by virtue of which the executors seek to defer or withhold from her payment of the corpus of these bequests, is, in my opinion, inoperative.

The costs of the application will be paid out of the estate.

MIDDLETON, J. JANUARY 8TH, 1913.

COPELAND v. WAGSTAFF.

Principal and Agent—Agent's Commission on Sale of Land—Employment of Agent—Contractual Relationship—Instrumentality in Bringing about Sale—Want of Connection with Actual Contract of Sale.

Action by land agents to recover a commission upon a sale of the defendant's land.

I. F. Hellmuth, K.C., for the plaintiffs.
R. H. Greer, for the defendant.

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

During the summer of 1910, Mr. Maclaren was employed in the office of the Assessment Department of the City of Toronto, and saw Mr. Wagstaff with a view to arrange, if possible, for the purchase of part of his property to add to a city park immediately adjoining it. Nothing came of this negotiation. Shortly thereafter, Mr. Maclaren left the service of the city corporation and joined the plaintiffs' firm. Being acquainted with Mr. Wagstaff and his property, Mr. Maclaren saw him with a view of obtaining authority to offer the property for sale. The accounts of this interview given by Wagstaff and Maclaren differ widely. Maclaren says that he then received authority to list the whole property for sale at the price of $45,000. This is denied by Wagstaff, who says that Maclaren asked only for authority to sell the east half of the holding, and that he instructed Maclaren to offer only the east half for sale, as he did not desire nor intend to sell the whole parcel.

Maclaren placed the property before Mr. Charles Millar, and the result was that in January Millar purchased the east half for $24,000. Upon this Wagstaff paid the plaintiffs commission, $600. Millar subdivided this parcel of land, and, it may be assumed, made some profit.

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

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

Millar subsequently went to the property with Maclaren for the purpose of purchasing, if a price could be arranged. Some doubt and uncertainty exist as to whether there was more than one interview. Maclaren says that there was. Millar and Wagstaff agree that there was one interview only. There is also some doubt as to the date, but I do not think it material. The one thing that is clear is, that Millar offered to buy at $36,000, and Wagstaff refused to sell at that price.

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

Shortly after this, Millar left Ontario for a trip, and did not return for several months. On his return, the matter came again to his mind. He went out and saw Wagstaff, went with him over the property, and satisfied himself that there was no real difficulty connected with the drainage. He then attempted to buy, and ultimately did buy at $45,000. No doubt as an

inducement to Wagstaff to sell, Millar pointed out to him that this sale was being made quite independently of any agent, and that there would be no commission to pay.

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

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

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

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

In some respects Mr. Wagstaff's memory has proved itself treacherous. I think the original instructions applied to the whole lot. I have no doubt that at different times he thought of subdividing the property and selling it himself; but I do not think that he ever went so far as to countermand the instructions given to Maclaren. He had given somewhat similar instructions to McLaughlin; he had given him a price upon the whole lot; and he never countermanded these instructions.

I do not think anything would be gained by a discussion of the cases. The law is plain enough; it s authoritatively expounded for me in Burchell v. Gowrie and Blockhouse Collieries Limited, [1910] A.C. 614, and in Stratton v. Vachon, 44 S.C.R. 395; with which must be read the equally important and authoritative judgment in Toulmin v. Millar, 58 L.T. 96.

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

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

BRITTON, J. JANUARY 9TH, 1913.

*LINDSEY v. LE SUEUR.

Contract—Permitting Access by Author to Private Documents—Implied Undertaking as to Use to be Made of Documents—Breach of Faith—Delivery up of Copies and Extracts—Restraint of Publication—Injunction—Damages—Counterclaim.

Action to compel delivery by the defendant to the plaintiff of certain documents and extracts and copies of documents in the possession of the defendant, obtained by him from the collection of the late William Lyon Mackenzie, and for an injunction restraining the defendant from publishing or making public any of these documents or contracts from them. Counterclaim for damages for interference with the publication of the defendant's book. See Le Sueur v. Morang & Co. Limited, 20 O.L.R. 594.

I. F. Hellmuth, K.C., for the plaintiff.
G. F. Shepley, K.C., and H. P. Hill, for the defendant.

BRITTON, J.:—The late Charles Lindsey was the son-in-law of the late William Lyon Mackenzie. The plaintiff, George G. S. Lindsey, is the son and sole executor of Charles Lindsey. . . .

In February, 1906, Charles Lindsey resided with the plaintiff, and at that time the defendant sought and obtained an introduction to the plaintiff, and requested to be allowed access to the Mackenzie collection. It is alleged that the defendant represented to the plaintiff that he, the defendant, had undertaken to write the "Life" of Mackenzie for the Morang & Co. series; that the "Life" so written would be to the satisfaction of Morang & Co.; and that it would be published in the series called "The Makers of Canada." It is further alleged that the defendant represented that the work would be entered upon by him in sympathy with the character he was to depict, exhibiting . . . Mackenzie as one of "The Makers of Canada." Upon this representation, the plaintiff, acting for his father, allowed the defendant free access to the collection to make copies of and extracts from documents, and generally to obtain such information as was available.

*To be reported in the Ontario Law Reports.

The defendant for months resided in the plaintiff's house, and while there obtained the information sought. The defendant completed his manuscript, sent it to Morang & Co., and it was rejected.

The plaintiffs says that, by necessary implication from what took place, the agreement was, that the defendant, in writing such "Life" of Mackenzie, as one of the class mentioned, would make fair use of the material he found. The plaintiff charges that the defendant did not do so, and for that reason the "Life" written by the defendant was partisan and unfair; and, in consequence thereof, the manuscript was rejected. . . .

It seems to me clear that the plaintiff and the late Charles Lindsey supposed that the defendant intended to write of Mackenzie as one of . . . "The Makers of Canada." The conduct of the defendant and what he said warranted the plaintiff and Charles Lindsey in so thinking. I must find as a fact that the defendant gave the plaintiff and Charles Lindsey to understand that the views and feelings of the defendant towards Mackenzie were friendly; that his attitude in presenting Mackenzie to the public was a fair one; that he had no bias against Mackenzie; and that he had no feeling or opinion which would prevent him as a writer from truly presenting the facts and circumstances of Mackenzie's life and character. The defendant, in my opinion, intended that the plaintiff and Charles Lindsey should believe as they did in reference to the defendant's feeling and attitude.

At the time of the defendant's arrangement with the plaintiff, the defendant did hold strong views against Mackenzie. At that time the defendant intended to write the life of Mackenzie on other than "conventional lines." He intended to write of Mackenzie not as one of "The Makers of Canada," in the general acceptation of that term, but as a "puller down," as was stated during the trial. . . .

I am of opinion, upon the evidence, that the defendant made a use of the Mackenzie collection . . . other than one which was in accord with the understanding between him and the plaintiff and Charles Lindsey. The use made was contrary to the wish, and contrary to what was known to be the wish, of the plaintiff and his father. . . . It is plain to me that the defendant knew that he could not have obtained access to the collection had he revealed his true feelings or declared his real intention. . . .

It is a question of getting access to the house of another and using the property therein for personal purposes different from what was consented to by the owner.

It has been held that to permit publication of musical compositions in "volume form" did not amount to a permit to publish one by one in a serial form: In re Jude's Musical Compositions, [1907] 1 Ch. 651. . . .

The plaintiff is entitled in his own right to maintain this action. He is . . . now the absolute owner of the Mackenzie collection, and is seeking to protect it from its unauthorised use by the defendant. . . .

The defendant has no right, as against the plaintiff, to have a book—the one written or another book using extracts or copies from the plaintiff's collection—published elsewhere than at Morang & Co.'s. . . .

The plaintiff, before action, demanded from the defendant a return of the extracts and copies and an assurance that he would not publish them or make use of information derived from the collection. The defendant refused to deliver up the extracts and copies, and expressed his intention of publishing them in book form.

By counterclaim the defendant alleges that shortly before the commencement of this action he was entering into arrangements for the publication of his book, and claims damages because of the plaintiff's interference. As to the "information" said to have been obtained by the defendant from the collection, it will be difficult, if not impossible, for even the defendant at this stage to say just what particular fact was learned there instead of from the book of Charles Lindsey or some other work or elsewhere.

The plaintiff is entitled: (1) To an order requiring the defendant to deliver up to the plaintiff all of the extracts from and copies of any documents in the . . . collection . . . (2) To an order restraining the defendant, his servants and agents, from publishing or causing to be published any book which contains any of said extracts or copies, or that contains information avowedly obtained from the Mackenzie collection.

The plaintiff has not sustained any substantial pecuniary damages, but a legal injury will be done if the collection, without his consent, is interfered with; and he is entitled at least to nominal damages, say $5.

The judgment will be with costs payable by the defendant to the plaintiff.

The counterclaim will be dismissed with costs.

KELLY, J.

JANUARY 10TH, 1913.

RE McCOUBREY AND CITY OF TORONTO.

Municipal Corporations—Early Closing By-law—Ontario Shops Regulation Act, R.S.O. 1897 *ch.* 257, *sec.* 44(3)—*Application to Barbers' Shops*—4 *Edw. VII. ch.* 10, *sec.* 61—*Petition—Signatures of Members of Class Affected—Ascertainment of Numbers and Majority—Duty of Council—Delegation to Clerk—Signatures Improperly Appended to Petition—Inquiry—Attempted Ratification.*

Motion to quash by-law 6167 passed by the Council of the City of Toronto on the 8th August, 1912, under the provisions of the Ontario Shops Regulation Act, R.S.O. 1897 ch. 257, as amended by 4 Edw. VII. ch. 10, sec. 61. The by-law provided as follows: "From and after the 19th day of August, 1912, all barber shops in the city of Toronto shall be closed and remain closed on each and every day of each week throughout the year except Saturday and the day immediately preceding a public holiday . . from the hour of eight o'clock in the afternoon of one day to the hour of six o'clock in the forenoon of the next day."

Sub-section 3 of sec. 44 of the Shops Regulation Act provides that if any application is received by or presented to a local council, praying for the passing of a by-law requiring the closing of any class or classes of shops situate within the municipality, and the council is satisfied that such application is signed by not less than three-fourths in number of the occupiers of shops within the municipality and belonging to the class or each of the classes to which such application relates, the council shall pass a by-law giving effect to the application, etc.; and by 4 Edw. VII. ch. 10, sec. 61, this sub-section was expressly made to apply to barber shops.

The council acted upon a petition which was duly presented and found by the city clerk to contain 273 names, that is, three-fourths of the names of all the barbers having shops in the city.

The application to quash was on the grounds: (1) that the petition was insufficiently signed; (2) that certain of the signatures appearing on the petition were obtained by misrepresentation; (3) that certain persons whose names appeared on the petition did not in fact sign it; (4) that the city clerk and the city council erred in the method adopted to ascertain the number of shops and the number of occupiers thereof.

T. J. W. O'Connor, for the applicant.
Irving S. Fairty, for the city corporation.

KELLY, J. (after setting out the facts at length) :—My view is, that none of the signatures rejected in the count were entitled to be allowed. This leaves to be dealt with the 273 names counted by the city clerk as being of persons entitled to sign.

The propriety of the method resorted to of arriving at the number of proprietors of barbers' shops in the city—that is, by the use of the city directory—may well be questioned. While I do not now pass upon the question, I am not to be taken as approving of that procedure. The actual number might have been ascertained by some more accurate method.

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

One of the 273 signatures purported to be that of Thomas Rackstraw, an occupier or owner of a barber shop at 43 Jarvis street. His signature was not affixed by himself, but by his employee in his absence and without his instructions, authority, or sanction. Rackstraw was examined vivo voce on the 14th November, 1912, and his evidence is part of the material used on the motion. . . .

[Parts of the depositions of Rackstraw were then set out by the learned Judge. Rackstraw said that he did not sign the petition, nor authorise his man to sign, and would not have signed it if it had been presented to him.]

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

This attempted ratification . . . in my opinion . . . was inoperative. Rackstraw, at the time the by-law was passed and as late as the 14th November, 1912, was not in favour of the petition; he did not authorise any one to sign it for him, and not only did he not approve of it, but he expressly disapproved. His name is not properly attached to the petition, and should not have been counted among the 273 signers. . . .

[Reference to Taylor v. Ainslie, 19 C.P. 78, 85, per Hagarty, C.J.; Bird v. Brown, 4 Ex. 786, 798, per Rolfe, B.; In re Gloucester Municipal Elections Petition, [1907] 1 K.B. 683; Halsbury's Laws of England, vol. 1, p. 181, sec. 389; Cyc. 1284.]

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

The circumstances under which the names of Edward Harper and William Batte appear on the petition—they being two of the 273—make their allowance open to objection.

It is evident from Harper's affidavit and his cross-examination thereon that he at no time intended to sign the petition, and that he absolutely refused to sign it. After this refusal, he was approached about signing a memorandum relating to an increase in prices, which was submitted to him; this he agreed to sign; and his evidence is, that what he read over before signing referred only to prices and not to early closing; and that, if it turns out that his name appears as having been signed to the petition for early closing, it is improperly there.

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

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

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

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

The by-law, if passed, would not only restrict the rights of the minority opposed to it, who, in many instances, would suffer financial loss in being deprived of the right to keep open after

8 p.m., but also would cause inconvenience to those who have but little opportunity of patronising barber shops during the hours permitted by the by-law. . . .

The right of the Legislature to give power to municipalities to pass such a by-law is not questioned: City of Montreal v. Beauvais, 42 S.C.R. 211. But the necessary formalities should be strictly complied with. . . .

[Reference to In re Robertson and Township of North Easthope, 16 A.R. 214, 216, 219.]

The passage of a by-law such as is now under consideration is a somewhat violent interference with the rights of a considerable body of persons engaged in a legitimate business. The promoters of the by-law and the city council have no cause for complaint if they are held to the strictest compliance with each and every of the conditions and terms imposed upon them by the statute; the rights of the minority should not be curtailed, and inconvenience be imposed upon the public by such curtailment, if any reasonable doubt exists that the necessary three-fourths of the proprietors signed the petition, or that those who did sign signified their wishes as required by law.

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

Had I not reached this conclusion on the grounds I have stated, I would still feel bound to quash the by-law for the reasons on which the Divisional Court based its judgment in Re Halladay and City of Ottawa, 15 O.L.R. 65—a case where the Judge of first instance quashed a by-law passed under the Ontario Shops Regulation Act, by which it was sought to provide for early closing of retail grocery stores in the city of Ottawa: Halladay v. The City of Ottawa, 14 O.L.R. 458. The procedure there adopted to ascertain if the petition was properly and sufficiently signed was much the same as in the present case, and what is said in that judgment may well be applied here.

The by-law is quashed with costs.

LATCHFORD, J. JANUARY 10TH, 1913.

*BARTLET v. DELANEY.

Crown—Lands Covered by Water—License of Occupation—Fisheries—Lands Included in Prior Grant—Construction—Ambiguous Description—Evidence to Identify Subject of Grant—Admissibility—"Channel," Meaning of—Boundary—"Channel-bank"—Misrepresentation by Licensee—Suppression of Material Facts—License Obtained by Fraud—Knowledge by Crown of Adverse Claim—Presumption—1 Geo. V. ch. 5—Cancellation of License—Parties—Attorney-General—Injunction—Damages—Possession—Costs.

The plaintiff, the administrator in Ontario of the estate of Francis F. Palms, of Detroit, Michigan, who died on the 4th March, 1905, brought this action against the original defendants to recover certain property situated in the Detroit river, into possession of which they had entered in April, 1907, under a contract of sale and purchase made between their assignor, one Behen, as purchaser, and the heirs of Palms, as vendors.

The original defendants declared that they were ready and willing to carry out the terms of the contract; but they alleged that, owing to a grant to one Gauthier by the Crown (Province of Ontario) of part of the property included in the agreement and the entry of Gauthier into possession, the plaintiff was unable to make a good title.

The action coming on for trial in March, 1912, it was directed to stand over until notice of the proceedings should be served on the Attorney-General for Ontario, and until after Gauthier should be brought before the Court as a defendant.

Notice was given to the Attorney-General, and Gauthier was added as a defendant. Amendments were made to the original statement of claim, alleging that, in derogation of the plaintiff's title to the lands in question, the Crown had assumed, in 1909, to grant to the defendant Gauthier a license of occupation of certain lands covered by water which were included in the prior grant; and that Gauthier had entered into and was in possession thereof.

As against the original defendant, the plaintiff claimed possession and mesne profits; and, as against Gauthier, a declaration that his license of occupation was issued in derogation of

*To be reported in the Ontario Law Reports.

the plaintiff's title and should be cancelled, and an injunction restraining him from further entering upon the property in dispute.

The action was tried before LATCHFORD, J., without a jury, at Sandwich, on the 3rd December, 1912.

E. D. Armour, K.C., and A. R. Bartlet, for the plaintiff.

J. H. Rodd, for the defendants Delaney, Richey, and Glukoff.

McGregor Young, K.C., and H. C. Clay, for the defendant Gauthier.

The Attorney-General was not represented.

LATCHFORD, J. (after stating the facts as above):—It was stated that the fisheries carried on by Gauthier upon the property have an annual value of many thousand dollars. . . . The main question for determination, if indeed not the only question, is, whether or not the description in the letters patent from the Crown to the plaintiff's predecessors in title includes the land covered by water now in possession of Gauthier under his license of occupation.

If the description were clear and unambiguous in its terms, the purpose for which the property was originally obtained from the Crown could not be shewn by the correspondence which led up to the grant. Such is, as I understand it, one of the two principles of the decision in Attorney-General for Quebec v. Fraser, 37 S.C.R. 577, and [1911] A.C. 489, sub nom. Wyatt v. Atorney-General for Quebec. The question of navigability, also there dealt with, is not in issue here. But all that passed is admissible to prove what was in fact the subject of the sale; not to alter the contract, but to identify its subject: Gordon-Cumming v. Houldsworth, [1910] A.C. at p. 541.

The description in this case is far from plain. Some of its terms are certainly ambiguous. It purports to grant an island according to a plan, and, by reference to physical features, grants much more than the island shewn on the plan. In it the word "channel" is used to signify the easterly and westerly boundary of the property granted. "Channel" is a word of many meanings. As used in the description, what meaning is it intended to convey? Obviously, only such as will be reconcilable with the other terms of the description. Any meaning involving repugnance to or inconsistency with the rest of the instrument may be modified to the extent of removing that repugnancy or inconsistency: Gray v. Pearson, 6 H.L.C. 61, 106.

Some light may also be thrown upon the matter by a consideration of the circumstances attending the grant of the patent. . . .

[Historical references to "Fighting Island" or "Grosse Ile aux Indes," formerly occupied by the Wyandotte Indians, and details of grants and descriptions.]

Loose and general words in a description yield to particular and specific words in the same description. I, therefore, find that the area granted by the patent is not merely the 90.9 acres called on the plan "Fighting Island," but a very much greater area, including "Fighting Island" as shewn on the plan and at least the marshes surrounding it, though they form, according to the plan, no part of "Fighting Island." . . .

"Channel," as applied to a river, may mean the place or bed in which the river flows. That is, perhaps, its primary meaning: Murray's Dict.; Dunleith, etc., Co. v. Dubuque County, 55 Iowa 558. Where the word has that meaning, the side or bank of the channel is, of course, identical with the side or bank of the stream. But . . . the primary signification may be controlled by the circumstances. The Imperial Dict., while stating the usual meaning to be "the place where the river flows," adds, "More appropriately, the deeper part or hollow in which the principal current flows." To a like effect is the definition of the Century Dict.

As the word was, no doubt, first applied to the Detroit river by the French explorers and voyageurs, or by the French settlers who followed their adventurous courses, the meaning of the word in their language may not be unworthy of a reference. Littré, whose authority is pre-eminent, defines "chénal" as primarily meaning "Passage pratiqué dans une rivière ou a l'entrée d'un port."

I think "channel" is used in the description in this case to designate the deeper parts of the Detroit river most convenient as a track for shipping. . . . Such a channel exists on both sides of the island. It has well-defined and fairly permanent banks. In fact, "channel-bank" is a term that has long been used as a designation of boundary in the Detroit river. . . . "Channel-bank" is . . . used in the license of occupation issued to the defendant Gauthier . . . Each of the lots covered by Gauthier's license of occupation is "west of Fighting Island;" and the westerly boundary of each lot is "the channel-bank of the Detroit river . . . following the windings of the said channel-bank." . . .

I am unable to distinguish between "channel-bank" . . . in the license of occupation and "side of the channel" . . . in the patent. . . . When the identity of the words "side of the channel" and "channel-bank" is made plain, the description in the patent becomes clear and consistent. The point of origin and completion is where the channel-bank on one side of Fighting Island begins to diverge from the channel-bank on the other side. . . .

In May, 1904, while Gauthier without colour of right was operating the Clark and other fisheries purchased by Palms from Mrs. Paxton, the Canadian solicitors for Palms applied to the Commissioner of Crown Lands for Ontario for a patent for the water lot surrounding the island—stating that the water lot was not included in the patent. If my view is right, they were mistaken. In reply, the Department asked for the area. The solicitors answered that they had nothing but a map made by the War Department of the United States, and suggested as bounds of a description "the channel-bank and water's edge following the course of the water's edge and the channel-bank." To this the Department replied declining to accept the plan referred to and insisting on compliance with the usual conditions; a special plan in triplicate; a description by metes and bounds, made by a surveyor; an abstract of title to the island; and a declaration by the owner verifying ownership, shewing no adverse claim, and stating the purpose for which the grant was desired.

There is no evidence as to what happened in the interval between the date of the letter and the issue on the 15th February of the license of occupation to Gauthier, except his testimony that he continued as from 1903 to operate the fisheries, and what may be gathered from the letter of the Minister of Crown Lands of the 3rd November, 1909, to Mr. J. W. Hanna, who, on behalf of the Palms estate, had asked for the cancellation of Gauthier's license of occupation—a right expressly reserved by the Crown.

What does appear beyond question is, that Gauthier was not required to comply with the conditions prescribed to Palms in 1904. No plan except the rejected plan was furnished, no survey, no surveyor's description.

From the Minister's letter it is clear not only that material facts were suppressed, but that there was gross misrepresentation by Gauthier. . . . I have no hesitation in finding that in obtaining the license Gauthier perpetrated a deliberate fraud.

That there was knowledge on the part of the Crown of an adverse claim, and some doubt as to the right to issue a license, is manifest. . . .

The recent statute regarding presumptions in grants from the Crown, 1 Geo. V. ch. 5, does not, in my opinion, assist Gauthier. . . .

Following the long line of decisions referred to in Martyn v. Kennedy, 4 Gr. 61, and continued to Florence Mining Co. v. Cobalt Lake Mining Co., 18 O.L.R. 275, determining that, though the Attorney-General is not a party to the suit, a grant made by the Crown through error or improvidence may be set aside, I consider that the prayer of the plaintiff as against Gauthier should be granted and Gauthier's license of occupation declared cancelled and void. An injunction should issue against Gauthier's further interference with the fisheries and lands of the plaintiff. I also direct a reference to the Master at Sandwich to determine the damages.

As between the original parties, the plaintiff is entitled to the possession of the property conveyed; to mesne profits, as to which there will be a reference; and to costs up to the time Gauthier was added as a party. Costs subsequently—other than of the reference, which I reserve—with costs of trial, are to be paid by Gauthier.

BOYD, C.

JANUARY 10TH, 1913.

CAMERON v. HULL.

Vendor and Purchaser—Title to Land—Will—Construction—Life Estate—Specific Performance—Parties—Representatives of Deceased Tenant for Life—Application under Vendors and Purchasers Act—Dismissal—Res Judicata—Cancellation of Contract—Release—Costs.

An action for specific performance of a contract. See Re Cameron and Hull, 3 O.W.N. 807.

R. G. N. Weekes, for the plaintiff.
T. G. Meredith, K.C., for the defendant.

BOYD, C.:—Cameron is vendor and Hull is purchaser of forty acres of land in North Dorchester. The purchaser objected that Samuel James Henderson, under whom the vendor

claimed, had not the fee of the land, and required that a release from the heirs of Mary Jane Henderson should be procured. On this point the vendor applied in a summary way under the Vendors and Purchasers Act to have it declared that the objection was not valid, the outcome of which was that the motion was dismissed with costs "leaving the vendor to seek such other remedy, if any, as he may be advised in the matter:" 3 O.W.N. 807.

This action being brought in apparent pursuance of that leave, it is now broadly objected by the defendant (purchaser) that the question of specific performance, as between them, has been definitely and finally settled by the dismissal of the summary application, and that such decision is to be treated as res judicata.

The situation must be examined. The testator disposed of the land in these words: "I give to my mother Mary Jane Henderson and to my brother Samuel James Henderson jointly. . . . the farm on which we live to have and to use or to sell as they may choose; each to be entitled to the benefit of one-half of the product of the farm and chattels. But it is hereby clearly understood and designed that my mother shall have no power to sell or convey any part or portion of the whole of what is hereby given to her by this will; but is only to have a share of the proceeds for her use during her life. And at my mother's death then the whole of my interest in this estate . . . is to go to my brother Samuel James Henderson as above to have and to hold as and for his own or to dispose of as he may wish."

This will was made in August, 1894; the testator died before February, 1896, when the will was registered (no probate has been issued); and the mother has died—no attempt having been made to sell the land during her life.

Pending the summary application, a direction was given by Mr. Justice Clute that the representatives of the deceased mother should be added as parties and be bound by the proceedings and order to be made therein. These representatives are also made parties to this action, but have in no way, earlier or later, intervened actively in the litigation.

Sutherland, J., doubted as to the power to bring in the representatives of the mother; and, as to the will, though he thought the mother took no more than a life estate, still he thought it possible that a different opinion might be held by another. He made no further order, though he may have thought that, as between the parties, the title was too doubtful to be forced on an unwilling purchaser.

The title was not found to be bad; and I think, after the length of time possession was held under the brother, it could fairly be said to be a good holding title, even if the frame of the will was doubtful.

Speaking for myself, I would say that the Judge might well have held that the title was good without any release from the representatives, and I can clearly and unquestionably so declare in the present action, to which the representatives are properly parties.

It was with a view of some such proceeding as this that the leave was given by Mr. Justice Sutherland, as I have ascertained from him. Even without that leave, there was no res judicata on the question of title. The summary proceedings under the Act afford a convenient and inexpensive way of getting the opinion of the Court on isolated points arising out of or connected with the contract. The real question here was, whether a release from the heirs of the mother was needful in a proper conveyance of the farm. Sutherland, J., abstained from declaring that the title could not be forced on the purchaser, and rightly so, because, as pointed out by Kekewich, J., in In re Walsh, [1899] 1 Ch. 521, the whole case is not exhaustively treated on a vendor and purchaser summons, and to reach such a conclusion is really a matter for decision in an action for specific performance.

Any point expressly decided by a Judge summarily cannot be reviewed in an action for specific performance, and this is all that is meant or decided in the case relied on by Mr. Meredith of Thompson v. Roper, 44 L.T. 507 (1881).

Apart from the question on the will raised before my brother Sutherland, the purchaser started a claim that the vendor had released him from the contract and had sold to another. This contention is also set up in the pleadings before me (par. 8 of defence), but no evidence was offered to substantiate it. But for this contention the proper practice in cases of doubtful title arising out of testamentary language is for the matter of construction to be brought up on originating summons with all parties before the Court, and this might have been done pending the application under the Vendors and Purchasers Act: see In re Nicholas, [1910] 1 Ch. 45.

The claim as to cancellation of the contract called for an action to determine the whole controversy; and, as a consequence of this excessive litigation, much outlay for costs has been incurred. The purchaser obtained his costs under the

vendor and purchaser application, and he should pay costs of this action, in which he fails. But the Taxing Officer should not allow for any of the documents copied out in extenso in the statement of claim.

The application was dismissed on the 6th March, 1912, and the order was entered on the 23rd March. On the 16th March, the purchaser wrote withdrawing from the contract and refusing to complete. The action for specific performance was begun on the 4th May, 1912. The purchaser might have taken possession had he chosen; and notice was given him that the vendor would, without prejudice, dispose of the hay on the land and look after the weeds pending the result of the action. Evidence was given that the property had become deteriorated to the extent of $300. But that is far beyond the mark; the deterioration will be far more than covered by the $75 to be paid for the hay—a sum which will enure to the benefit of the defendant, Hull. Judgment will be for the balance of the price, $2,800, and in strictness he should also pay interest, some $160 or so. But I will act on the offer of the plaintiff to take $2,800 and the $75 without interest. The land is vested in the defendant, who is to pay $2,800 in a month and costs of action—with a lien on the land till paid; the plaintiff is to collect the $75 from Broughton.

SUTHERLAND, J. JANUARY 10TH, 1913.

STRONG v. CROWN FIRE INSURANCE CO.

Fire Insurance—Actions on Policies—New Actions—Consolidation—New Trial—Value of Goods Destroyed—Stock-taking—Profits—Depreciation — Former Fire—Non-disclosure—Materiality to Risk—Time for Bringing Actions—Variation of Statutory Condition 22—Unjust and Unreasonable—Interest—Procedure—Insurance Act, 1912—Retroactivity — Proofs of Loss—Misrepresentation—Costs.

The above and three other actions were brought upon policies of fire insurance issued by the four defendants respectively; and afterwards a second action was brought against each defendant. This was the second trial of the actions.

N. W. Rowell, K.C., and George Kerr, for the plaintiffs.

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

SUTHERLAND, J.:—This action was tried before me, and my judgment previously delivered is reported in 3 O.W.N. 481.

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

After the argument before the Court of Appeal, and while judgment was still pending, an application was made to me to strike out of the judgment the paragraph in question. Under the circumstances, I declined to make any order: see 3 O.W.N. 1378.

In consequence of the point so raised before the Court of Appeal, a new trial was ordered: 3 O.W.N. 1534.

Clause 3 of the formal certificate of the judgment of the Court of Appeal was in part as follows: "And it is further ordered and adjudged that the parties in the secondly above intituled action shall be entitled to deliver pleadings in the said action, and that both the above said intituled actions shall be reheard or retried . . . upon the evidence already given . . . and such further evidence (if any) as the parties hereto may offer, without prejudice to any order which the trial Judge may make as to consolidation under sec. 158 of the Ontario Insurance Act, 1912, upon the completion of the pleadings in the later action."

Pleadings were then delivered in the said secondly intituled action, and a motion under sec. 158 made by the plaintiffs to consolidate the actions. In consequence, I made an order on the 17th October, 1912, from which I quote as follows: "It is ordered that the above actions be and they are hereby consolidated and that they be hereafter carried on as one action; that the pleadings in the secondly above intituled action, including any defences raised in the first intituled action, and not included in the secondly intituled action, do stand as the pleadings in the consolidated action, and that the action do proceed to trial in the manner provided in said certificate. . . ."

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

On the whole evidence, I see no reason to modify my former findings as to the reliability of the stock-taking and its accurate record in exhibit 6, and to the effect that at the time of the fire there was in the store approximately $25,000 of goods estimated at cost price; and I accordingly re-affirm those findings. Nor

am I able, from the new evidence offered, to come to the conclusion that my previous findings that 25 per cent. was a reasonable deduction on cost for estimated profits on sales for the assignee to make in arriving at the amount of merchandise sold and for the purpose of making a valuation thereof, and that 10 or 12 per cent. was a fairly liberal reduction on the $25,000 for depreciation of stock, should now be varied. I also re-affirm them. . . .

Upon the second trial considerable evidence was given as to the place in the store at Blenheim where a former fire had occurred, and which, it was contended on behalf of the defendants, Jeffrey had concealed from the defendant companies when applying for insurance by answering in the negative a question whether he had or had not had a former fire. . . . I cannot help thinking that if the facts had been known to the defendant companies they would not have considered the former fire as a matter which would have materially affected the risk. That view is in accordance with important expert evidence given at the trial. I find, therefore, that, under the circumstances, it was not material to the risk. See In re Universal Non-Tariff Fire Insurance Co., L.R. 19 Eq. 485, at p. 493.

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

This is one of four actions tried together, against insurance companies. Two of the other companies are the Anglo-American Fire Insurance Company and the Montreal-Canada Fire Insurance Company. In the variations in conditions in each of their policies this clause is found: "Condition No. 22 is varied to read: 'Every suit, action, or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred unless commenced within the term of six months next after the loss or damage shall have occurred.'"

The fire in question in these actions occurred on the 25th December, 1910. The writs in the original actions were issued on the 26th April, 1911, and in the new actions on the 20th December, 1911. The defendants, therefore, contend that, the new writs being issued more than six months after the loss occurred, the aforesaid condition of the contracts applies, and the plaintiffs cannot recover against these two companies. . . .

[Reference to Merchants Fire Insurance Co. v. Equity Fire Insurance Co., 9 O.L.R. 241, 247, where it was held that such

a variation of statutory condition No. 22 was both unjust and unreasonable.]

Following that authority, I find to the same effect in this case. See also May v. Standard Fire Insurance Co., 5 A.R. 605, 622; Peoria Sugar Refinery Co. v. Canada Fire and Marine Insurance Co., 12 A.R. 418; Marshall v. Western Canada Fire Insurance Co., 18 W.L.R. 68.

The plaintiffs also claim interest from the 1st April, 1911. . . . The Insurance Act, R.S.O. 1897 ch. 203, sec. 168, sub-sec. 17, prescribes that "the loss shall not be payable until sixty days after the completion of the proofs of loss unless otherwise provided by the contract of insurance." That was the statute in force when the former action was commenced and tried and where judgment was pronounced on the 2nd January, 1912.

Subsequently, the Ontario Insurance Act, 1912, 2 Geo. V. ch. 23, was passed. Section 247 is as follows: "Sections 162 to 201 of this Act shall come into force on the 1st day of August, 1912, and the remaining sections of this Act shall come into force forthwith." Section 194, sub-sec. 22, is as follows: "The loss shall be payable in sixty days after the completion of the proofs of loss unless a shorter period is provided by the contract of insurance."

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

I dealt with this before, and came to the conclusion that that was not the true view of the matter, and that I could not find that the proofs were reasonably complied with until the 17th March, 1911. . . . If it is necessary, I repeat that finding. It is, however, to be noticed that the last portion of sec. 199 of the present Act goes farther than the old sec. 172 (1), and that it enacts that "no objection to the sufficiency of such statement or proof or amendment or supplemental statement or proof, as the case may be, *shall be allowed as a defence by the insurer*, or a discharge of his liability on such policy whenever entered into."

The defendants were also objecting to the loss on other grounds than imperfect compliance with the conditions as to proofs of loss.

It is now contended by the plaintiffs that the Act of 1912 applies to the present action, and that the result of the varia-

tions in the sections referred to by the Act of 1912 is, that the original actions were not prematurely brought.

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

The contention is, that, the amendments . . . being matters of procedure, the sections, though coming into force after the actions were commenced, were retroactive and applicable at the time of the trial. . . .

[Reference to Maxwell on Statutes, 5th ed., pp. 363, 364, 367; Gardner v. Lucas, 3 App. Cas. 603; Kimbray v. Draper, L.R. 3 Q.B. 160; Wright v. Hall, 6 H. & N. 226, 230, 232; Rex v. Chandray, [1905] 2 K.B. 335, 339; The Ydun, [1899] P. 236; Leroux v. Brown, 12 C.B. 800, 803, 826, 827; Hilliard v. Lenard, Moo. & M. 297; Towler v. Chatterton, 31 R.R. 411.]

It would seem that in such a case it is appropriate to allow interest, and perhaps, indeed, incumbent upon me to do so. See Toronto R.W. Co. v. City of Toronto, [1906] A.C. 117.

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

There will, therefore, be judgment against the Rimouski Fire Insurance Company on their two policies for $3,000 and $5,000, in all $8,000; against the Anglo-American Fire Insurance Company and the Montreal-Canada Fire Insurance Company for $4,000 each; and against the Crown Fire Insurance Company for $5,000; and in each case with interest from the 4th April, 1911.

As in the former judgment, so in this, I have come to the conclusion that I should make no order as to costs up to the time of the delivery of the judgment of the 2nd January, 1912. The plaintiffs will have the costs of all proceedings subsequent thereto.

ONTARIO BANK v. BRADLEY—MASTER IN CHAMBERS—JAN. 2.

Venue—Change — County Court Action—Convenience — Witnesses.]—Motion by two of the three defendants to transfer the action from the County Court of the County of York to the County Court of the United Counties of Stormont, Dundas, and Glengarry. The action was for a declaration that a certain pro-

missory note made by the defendant Hitchcock in favour of the defendant Minnie Bradley was held by her in trust for her husband, the defendant S. W. Bradley, against whom the plaintiffs had recovered a judgment for the payment of money, which judgment remained unsatisfied, and for payment of the note by the defendant Hitchcock to the plaintiffs. The Master, after stating the facts, said that the case was eminently one for trial at Cornwall. Order made transferring the action as asked. Costs in the cause. Grayson Smith, for the applicants. M. L. Gordon, for the plaintiffs.

PORTLANCE v. MILNE—DIVISIONAL COURT—JAN. 2.

Master and Servant—Injury to Servant—Workmen's Compensation for Injuries Act—Defect in the Arrangement of Ways, Works, etc.—Negligence—Contributory Negligence—Findings of Jury.]—Appeal by the defendants from the judgment of the Judge of the District Court of the District of Sudbury, upon the findings of a jury, in favour of the plaintiff, a servant of the defendants, who was injured in their saw-mill when on duty there, and brought this action to recover damages for his injuries, under the Workmen's Compensation for Injuries Act. It was the plaintiff's duty to assist in operations connected with the drawing of logs from the water by an endless chain into the mill and until they reached the saw-carriage. A stop-board was suspended a short distance from the head of the inclined plane up which the logs were being drawn. When a certain log was being drawn by the chain up this inclined plane, the plaintiff endeavoured to cant it off towards the "kicker," but failed to do so, and it passed under the bounce-board, where it got wedged in. The plaintiff then pulled a rope, thereby stopping the chain, and then tried to free the end of the log from the bounce-board. Whilst he was thus engaged, the free end of the log slipped down and came in contact with the saw-carriage, which was then in motion, and this caused the other end to swing round violently, striking the plaintiff and inflicting the injuries complained of. The plaintiff's contention was, that the bounce-board should not have been so high as to permit the log to pass under it, and that its being so was a defect in the condition or arrangement of the ways, works, etc. To question 2, "What was the cause of the accident, and was there any defect in construction in the machinery that caused

the same?'' the jury answered: ''Stop log too high from chain.'' They also found that the plaintiff was not guilty of contributory negligence. The appeal was heard by MULOCK, C.J.Ex.D., SUTHERLAND and MIDDLETON, JJ. Written reasons for judgment were given by all the members of the Court. LAND, J., was of the same opinion. MIDDLETON, J., said that, in view of the evidence, the meaning of the answer to question 2 was, that the accident was caused by the bounce-board being too high from the chain, and that its being too high was a defect in the arrangement of the ways, works, etc.; that there was evidence upon which the jury might properly find as they did; and there was no reason for disturbing the judgment. SUTHERLAND, J., was of the same opinion. MIDDLETON, J., said that, in his view, there was much room for uncertainty; but, as the other Judges had no doubt, and there was no further appeal, he did not dissent. Appeal dismissed with costs. R. McKay, K.C., for the defendants. A. G. Browning, for the plaintiff.

HEAD v. STEWART—MASTER IN CHAMBERS—JAN. 3.

Default Judgment—Motion to Set aside—Absence of defendant—Excuse—Affidavit of Solicitor — Correspondence.]—Motion by the defendant to set aside a judgment for the plaintiff entered upon default of defence in an action to recover £670, money lent by the plaintiff to the defendant in England, and interest. The statement of claim was delivered on the 13th March, 1912, and the judgment signed on the 17th December, 1912. The motion was supported only by an affidavit of one of the defendant's solicitors, exhibiting the correspondence between the plaintiff's and defendant's solicitors between the 19th March and the 18th December, 1912. There was no affidavit from the defendant, who was said in his solicitor's earlier letters to be out of reach of communication—at Seattle or elsewhere. The Master said that this was no excuse and no valid reason for depriving a litigant of any rights given him by the Rules or for interfering with their application. A litigant is not justified in putting himself out of reach of his solicitor and then expecting the usual course of an action to be stayed to suit his convenience and allow him to attend to other matters which he thinks of more importance. The Master also referred to the fact that the defendant was in Ontario in November last; and said that, strictly speaking, there was no material on which the

motion could succeed, as there was no affidavit from the defendant that he had a good or any defence. The Master was also of opinion that the correspondence between the solicitors shewed that the motion could not succeed; and referred, as to the inference to be drawn from the defendant's solicitors not repudiating a statement that the defendant did not intend to defend, to Weidman v. Walpole, [1891] 2 Q.B. 534, 537, So far as appeared, the plaintiff's solicitors had shewn great leniency to the defendant. It did not appear that the defendant had any assets in Ontario, and it was stated that he had none at Seattle, available in execution. Motion refused, unless security is given, to the reasonable satisfaction of the plaintiff, within ten days. In either case, costs to the plaintiff in any event. Featherston Aylesworth, for the defendant. E. D. Armour, K.C., for the plaintiff.

ONTARIO ASPHALT BLOCK CO. v. COOK—DIVISIONAL COURT—JAN. 4.

Account—Reference—Book-accounts—Credits—Absence of Surcharge or Falsification—Payment—Onus—Amounts Received in Excess of those for which Credit Given—Opening up Accounts—Estoppel—Fraud.]—Appeal by the defendants from the order of MIDDLETON, J., 3 O.W.N. 1289. The appeal was heard by BRITTON, CLUTE, and KELLY, JJ. The members of the Court were unanimously of the opinion that the order appealed from was right. On the argument, the Court was asked to grant leave to the defendants to have the accounts opened up and gone into again. KELLY, J., in a written opinion, said that, having regard to the opportunities afforded of attacking the plaintiffs' accounts during the long time over which the reference extended, there was no good reason for granting that indulgence. BRITTON, J., in a written opinion, said that if either the plaintiffs or their agent had been guilty of fraudulent concealment of any money received by either which should have gone to the credit of the defendants, the defendants would not, by reason of the present decision, be estopped from succeeding, upon establishing such facts, in any action they might bring for the purpose. Appeal dismissed with costs. F. W. Griffiths, for the defendants. D. L. McCarthy, K.C., for the plaintiffs.

CAULFEILD v. NATIONAL SANITARIUM ASSOCIATION—MASTER IN CHAMBERS—JAN. 8.

Pleading—Statement of Claim—Wrongful Dismissal—Other Causes of Action—Prolixity—Irrelevancy—Embarrassment.]—Motion by the defendants to strike out the greater part of the statement of claim as embarrassing. The claim of the plaintiff, a physician, was for wrongful or premature dismissal from the service of the defendants. He also alleged a variation in his original agreement with the defendants; and complained that the defendants had wrongfully ejected him and his assistant from their building and destroyed specimens on which the plaintiff set great value and deprived him of the opportunity of completing his research work, and of board and lodging, etc. The Master said that, if the action were viewed simply as one for wrongful dismissal, the statement of claim might seem unnecessarily prolix; but, as explained by counsel, there was nothing really irrelevant, nothing which was not covered by Millington v. Loring, 6 Q.B.D. 190. Motion dismissed. Paragraph 3 of the statement of claim to be amended if the defendants desire. Costs in the cause. R. McKay, K.C., for the defendants. D. L. McCarthy, K.C., for the plaintiff.

SHANTZ v. CLARKSON—MASTER IN CHAMBERS—JAN. 8.

Venue—Change—Expediting Trial—Refusal of Motion—Terms.]—Motion by the defendants to change the venue from Berlin to Toronto. The object sought was to expedite the trial so as to free lands of an insolvent company from a certificate of lis pendens and allow a sale already made to be completed and the assets distributed. The Master said that as a general rule motions to change the venue were fruitless and should not be encouraged. In this case, as there was to be a sitting at Berlin in March, little would be gained by transferring the trial to Toronto. The Master also suggested that, the action being to set aside a sale of realty situate at Berlin, the venue was properly laid there under Con. Rule 529(c). Motion dismissed; costs in the cause; the plaintiff to undertake to go to trial in March, with the usual penalty for default in so doing. Other terms imposed upon the plaintiff. R. H. Parmenter, for the defendants. H. S. White, for the plaintiff.

STRONG V. LONDON MACHINE TOOL CO.—MIDDLETON, J.— JAN. 8.

Principal and Agent—Agent's Commission on Sale of Assets of Company—Employment of Agent—Introduction of Purchaser—Dependent Commission Agreement — Termination — Quantum Meruit.]—Action by an agent to recover commission upon the sale of the assets of the defendant company to the Canada Machinery Corporation, called "the merger." The defendant company was a family concern, one Yates and his sons holding the bulk of the shares. On the 14th July, 1911 (after negotiations had been proceeding for some time and a tentative agreement had been arrived at), a memorandum of agreement between the plaintiff and Yates was drawn up and signed, whereby Yates agreed with the plaintiff "to pay him the following commission: In the event of the London Machine Tool Company being merged with the Canada Machinery Corporation, and the London Machine Tool Company getting in preference shares the amount of their surplus and a bonus of $50,000 worth of common stock, . . . F. T. Strong is to receive $10,000 worth of common stock as commission, and also, in the event of the London Machine Tool Company receiving preference shares in excess of $112,000 worth, twenty per cent. of such excess is to be delivered to F. T. Strong. This agreement is contingent upon E. G. Yates being able to retain the control of the London Machine Tool Company, and also contingent upon the deal going through." Thereafter, a formal agreement was executed between the company and "the merger," dated the 29th July, 1911; this was upon the lines of the tentative agreement and in accord with the expectation of the parties when the agreement of the 14th July was executed; but the "merger" refused to carry out the agreement of the 29th July; and the defendants were advised that they could not enforce it. The defendants, after further negotiations with the "merger," in the absence of the plaintiff abroad, sold out to the merger at the best price that could be obtained. Instead of there being a surplus over the $112,000 of stock, the defendants received only $55,000 in bonds and $40,000 in cash; and out of this $95,000 had to pay $18,000 as being the excess of actual over scheduled liabilities. The plaintiff contended that he should receive the commission which the agreement of the 24th July called for, because it was the defendants' own fault if the agreement of the 29th July turned out to be unenforceable. The defendants contended that Strong was entitled to nothing—there being no surplus but a deficit. MIDDLETON, J., said that when the defendants accepted the plaintiff's services

as intermediary in promoting the sale to the "merger," he became entitled to receive a commission. No rate was stipulated at the time; but from what took place subsequently it was clear that he was ready to accept and did accept the position that his compensation should be—to some extent at any rate—dependent upon the result of his labours. When he thought a sale had been arranged, the memorandum of the 14th July was executed. That sale falling through, this dependent agreement also came to an end. Although the plaintiff thereafter did nothing towards the making of the agreement which was subsequently carried out, he was, nevertheless, entitled to something, because be set on foot the negotiations which ultimately resulted in the transaction actually carried out. Although the plaintiff did not actually "introduce" the contracting parties, he did that for which he was employed—he induced the "merger" to enter upon serious negotiations for sale. Judgment for the plaintiff for $5,000 and costs, with leave to amend as advised. J. W. Bain, K.C., and M. L. Gordon, for the plaintiff. M. K. Cowan, K.C., and T. Hobson, K.C., for the defendants.

SPITZER BROS. v. UNION BANK OF CANADA—MASTER IN CHAMBERS—JAN. 9.

Particulars—Statement of Claim—Cheques—Refusal to Account—Discovery—Production of Books—Banks.]—The plaintiffs by their statement of claim alleged that during 1912 and two preceding years the defendants "came into possession of certain cheques, express orders, and post office order which were the property of the plaintiffs . . . to which the defendants acquired no right or title whatever . . . (and) wrongfully collected the amount of the same and have refused to account or give any credit to the plaintiffs for the said cheques, etc. The plaintiffs also alleged that their total loss, so far as it could be ascertained, was $3,000. The defendants, before pleading, moved for particulars of this definite sum of $3,000; and the plaintiffs moved for an order for production by the defendants of all books, etc., appertaining to the questions at issue between the parties. The plaintiffs' motion was supported only by an affidavit of their solicitor. After stating the facts out of which the present claim arose, he said that the plaintiffs had "a certain number of the cheques," but that the majority were in the possession of the drawers, who refused to turn them over to the plaintiffs, and there were a number of other cheques which

the plaintiffs had not been able to trace. The affidavit then proceeded, in violation of Con. Rule 518, to say, "I am informed and verily believe," without stating that the grounds of such belief, that the defendants had a record of all the cheques in question, shewing all the particulars of the same, and that this must be produced to enable the plaintiffs to give the particulars asked. The Master said that this part of the affidavit must be disregarded, following the authorities given in Holmested and Langton's Jud. Act, 3rd, ed., p. 729. In any case it was met by the affidavits of the defendants' superintendent and solicitor, stating, in the first of these, that there was no such record in existence, and, in the second, that the defendants had demanded inspection of the cheques, etc., spoken of in the statement of claim, but that this had been refused. The motion was supported on the argument by the judgment in Townsend v. Northern Crown Bank, 19 O.L.R. 489; but that was very different in its main factor from the present. There the plaintiff, being merely an assignee for the benefit of creditors, could have no knowledge of the transaction between his assignor and the defendants which he was impeaching. Here the plaintiffs must be supposed to know their own loss when they put it at a precise sum of $3,000 on their present information. The plaintiffs should give such particulars as they were able to furnish, with leave to serve further particulars as they might come to their knowledge, and the defendants should be allowed inspection of such of the cheques, etc., as were in the plaintiffs' possession. Time for delivery of the statement of defence to run from such inspection. Costs of the motions to the defendants in this cause. Thomas Moss, for the plaintiffs. D. W. Saunders, K.C., for the defendants.

HARRISON v. KNOWLES—BRITTON, J.—JAN. 10.

Sale of Goods—Written Warranty—Oral Representations—Defect in Machinery Sold—Existence at Time of Sale—Onus—Evidence—Non-delivery of Part—Acceptance — Action upon Promissory Notes—Counterclaim — Lien — Agreement—Title Remaining in Vendor — Judgment — Set-off.]—Action upon twelve promissory notes made by the defendants, payable to the order of the plaintiff, given in part payment for a second-hand lithographic press owned by the plaintiff and sold to the defendants by one Parker, in New York, for $2,900. The plaintiff conceded that he was bound by anything Parker said or did in making the sale. The plaintiff and Parker gave the defendants

a written warranty that the press was in first-class order as a second-hand press, and that it would automatically print from zinc plates in a proper manner all commercial work. The warranty was to extend for one year, "it being understood . . . that the press is reasonably and properly handled." The defendants took the press down and packed and shipped it at their own expense. It was sold with attachments, including rollers. BRITTON, J., said that, as the defendants had stipulated for and obtained the express warranty, they could not, in the absence of fraud, rely upon the alleged oral representation in regard to the press; and, at all events, the evidence did not support any alleged misrepresentation as to any point not covered by the warranty. The defendants, by their defence and counterclaim, alleged that the press was defective; that it was not in first-class order; and that it would not do the work as represented. The main defect alleged was an indentation in the main cylinder, apparently made by a small screw or screw-head which had been allowed to pass between the cylinders when in rapid motion. The question whether this defect existed at the time of the sale was a question of fact; the onus was upon the defendants, and they had not satisfied that onus; so the finding upon the main question should be against the defendants. The learned Judge found in favour of the defendants that a pair of rollers was not furnished by the plaintiff, and that the rubber blankets furnished were not in first-class condition even for a second-hand machine; but, he held, the defendants could not set up the non-delivery of the rollers as a complete answer to the plaintiff's whole claim—the defendants having accepted what was shipped, themselves packed and put it on the cars, accepted it at London, Ontario, when it arrived, treated it as their own without objection at first, and paid a considerable portion of the purchase-price. But the defendants were entitled, upon their counterclaim, to recover the value of the rollers not delivered and damages for the bad condition of the blankets and for delay and expense, in all the sum of $80. There was nothing in the defendants' contention that the plaintiff must fail in his claim upon the notes because of the lien-agreement executed by the parties by which the title remained in the plaintiff until the press should be paid for. The plaintiff had not taken possession nor attempted to do so. He had the right to sue upon the notes notwithstanding the lien-agreement. Judgment for the plaintiff for $1,200 and interest and costs and for the defendants for $80 with interest and costs, with a set-off pro tanto. A. C. McMaster, for the plaintiff. T. Coleridge, for the defendants.