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COURT OF APPEAL.

APRIL 15TH, 1912.

*RE MOUNTAIN.

Will — Construction — Secured Debts—Postponement of Payment—Payment out of Accumulated Income—Rights of Creditors—Exoneration of Property Charged—Charitable Trust in Respect of Lands Charged—Transfer after Payment of Charges—Condition—Creation of Bishopric within Long Period—Gift over to Charity—Rule against Perpetuities—Vested Gift Subject to be Divested—Suspended Gift—Valid Charitable Bequests—Restraint upon Alienation.

Appeal by certain of the next of kin of the testator from the judgment of BOYD, C., 2 O.W.N. 246.

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

J. A. Macintosh, for the appellants.

Glyn Osler, for other next of kin, in the same interest as the appellants.

Travers Lewis, K.C., and J. W. Bain, K.C., for the Synod of the Anglican Diocese of Ottawa.

D. C. Ross, for Bishop's College, Lennoxville.

R. Smith, K.C., for the executors.

MOSS, C.J.O.:—This is an appeal by certain of the next of kin of the testator, the Rev. Jacob Jehoshaphat Salter Mountain, D.D., from the judgment pronounced by the Chancellor of Ontario upon two of several questions raised by the executors and executrix of the will, under Con. Rule 938, as enacted by Con. Rule 1269. The questions were: whether, if the executors were obliged to pay debts or any part of debts secured on the testator's real or personal estate otherwise than out of income, the

*To be reported in the Ontario Law Reports.

amount so paid should be restored to the estate out of subsequently accumulated income; and whether or not the devise and bequest contained in the will to the Synod of the Diocese of Ottawa is void as offending the rule against perpetuities.

The learned Chancellor determined both these questions adversely to the contention of the appellants, who are supported in the appeal by others in the same interest. Other questions were discussed by council for the Synod of the Diocese of Ottawa during the argument; but, if they are at all proper to be disposed of upon a proceeding of this kind, they seem not to be ripe for determination at present.

The main question is, of course, whether the devises and bequests to the Synod are void under the rule against perpetuities.

The will, which with three codicils deals with and purports fully to dispose of the testator's estate, is a very long and intricate instrument, containing many complicated and involved provisions and directions, due to some extent, no doubt, to the testator's evident fondness for and tendency to minute detail, and his desire to leave nothing unprovided for in the final disposition of his estate. And it is apparent that he must have felt satisfied that he had effectively disposed of all he possessed, for there is no residuary clause.

His whole estate, real and personal, is said to be of the value of about $99,000. There were debts, which he appears to have divided into two classes, and which it was his desire should be treated differently or at least regarded in a different way by his executors in the administration of his estate: (*a*) ordinary current debts, which he calls his "just debts;" and (*b*) debts secured by him on lands or personalty, among which he seems to have included a liability of $5,000 to the University at Windsor, Nova Scotia, for which, he says, he gave his "note of hand."

He desired the first class, together with his funeral expenses, to be paid as soon after his death as possible. His intention with regard to the other class was to postpone payment so far as to enable them to be paid off from the income of his estate. He could not, of course, control the action of the creditors in case they were not willing to wait after their claims became payable. Beyond this, he gives no specific directions to his executors with regard to the payment of these debts, except what is to be gathered by inference from the 19th paragraph of the will, and the direction in the first codicil as to the payment by the executors of the $5,000 to the Alumni Association of King's College, instead of directly to the University of

Windsor. This latter direction is quite consistent with the payment of the amount in one sum out of the general estate, instead of out of income. By the 11th paragraph of the will, the testator gives directions for the conveyance of the properties therementioned, and the proceeds of any that may have been sold to the Synod of the Diocese of Ottawa, to be held by it in trust for the endowment of the Bishopric of Cornwall, only delayed, if at all, by virtue of what is provided in the 19th paragraph of the will. But I do not think that these provisions were intended to affect or do affect the vesting in the Synod of Ottawa of an immediate estate or interest for the purpose designated in the 11th paragraph. The two paragraphs must be read together; and, so read, they are found to contain, as the learned Chancellor expresses it, "an immediate gift for charitable uses, delayed as to the actual conveyance till the secured debts are paid, and therefore vested at his (the testator's) death."

Here the gift to the Synod for the charitable purposes expressed is not conditional upon the payment of the debts out of the income. The gift takes immediate effect, whichever way the debts may be paid.

[Reference to In re Bewick, Ryle v. Ryle, [1911] 1 Ch. 116, distinguishing it.]

I agree with the construction which the learned Chancellor has placed upon this will as regards this branch of the case.

As to the application of income to the exoneration of the general estate, to the extent, if any, to which it may be called upon to answer the secured debts, I am, with deference, unable to perceive any reason why that should not be the case. It is very apparent that, while the testator was anxious, if possible, to free the incumbered estates by the application of income, he had no intention that they should be freed at the expense of the general estate; and I think the judgment should be varied in this respect.

We were asked by counsel for the Synod to pronounce upon a number of other points. One was with regard to a further declaration as to conditions which he submitted were in restraint of sale of the testator's Cornwall property and Hudson Bay shares. This may or may not depend upon circumstances, and could only properly arise in administration proceedings. So with regard to the alleged obligation of the testator's widow to elect between the gifts to her of a life estate in the testator's Cornwall house and one in the Isle of Wight. The facts are not sufficiently developed to enable any proper conclusion to be

arrived at on this question. Then as to the claim that the Synod should be paid its costs as between solicitor and client, the rule does not extend in general beyond the applying trustee or executor, and we could not interfere with the order as it now stands in this respect.

Except as indicated, I would affirm the judgment appealed from, the directions of which appear quite sufficient to enable all the matters dealt with by the learned Chancellor to be properly worked out.

As to costs the appellants have failed as to the substantial part of their appeal, and should pay the costs of the respondents who are adverse in interest to them. The executors' costs as between solicitor and client may be paid out of the estate.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

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

Judgment below varied.

APRIL 15TH, 1912.

*MERCHANTS BANK v. THOMPSON.

Promissory Note—Failure of Consideration—Note Deposited by Customer with Bank before Maturity—Purpose for which Deposited, whether for Collection or as Security for Advances—Indebtedness of Customer after Maturity of Note—Equities between Original Parties—Bills of Exchange Act, secs. 54, 70—Evidence of Consideration—Purchase of Interest in Business—Partnership.

Appeal by the plaintiffs from the judgment of a Divisional Court, 23 O.L.R. 502, 2 O.W.N. 904, reversing the judgment of BOYD, C., 23 O.L.R. 502, 1 O.W.N. 1015, and dismissing the action.

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

J. F. Orde, K.C., for the plaintiffs.

Travers Lewis, K.C., and J. W. Bain, K.C., for the defendants.

*To be reported in the Ontario Law Reports.

Moss, C.J.O.:—. . . The plaintiffs sue as the holders of a promissory note for $2,000 made by one A. H. Living and the defendants, in favour of one C. H. Fox, and by him indorsed to the plaintiffs' order. The note is in form joint and several. The action was brought against the two defendants alone, and no steps were taken by them to bring or cause the plaintiffs to bring Living and Fox into the action. They were, of course, not bound to do so unless they considered it material to their defence; but in one aspect of the case it might have been to their advantage to have had them before the Court. . . .

The . . . defences . . . that the note was made without consideration and was indorsed to the plaintiffs without consideration and after maturity, that the consideration for the note as between Fox and Living failed, and that at the time of the commencement of the action the plaintiffs' title was no higher than Fox's, and the note was held subject to the existing equities between him and Living, are those upon which the differences of opinion have arisen.

It is now beyond question, upon the evidence, that the defendants became parties to the note as sureties for Living, upon a transaction between him and Fox for the acquisition by the former of a half share or interest in the business of manufacturers' agent, carried on by Fox in the city of Vancouver, and the formation of a partnership between them in the business. The nature of the transaction is to be gathered from the evidence of these parties and the memorandum of agreement signed by them. In effect, it was not the unusual transaction of a person purchasing his way into an established business, paying a bonus or premium to the owner, and entering into partnership with him, upon terms arranged between them.

The bonus or premium to be paid was $2,000; but, as Living was unable to provide the money, and Fox was willing to accept the promissory note of the defendants, Living prevailed upon them to join him in the note in question. It is dated the 1st July, 1907, payable three months after date; and, therefore, fell due and payable on the 4th October, 1907. It was received by the plaintiffs from Fox on the 12th September, 1907, and has been in their possession ever since.

At the time when the note was received, the plaintiffs had under discount a note for $500 made by Fox, dated the 4th September, payable in thirty days; but, beyond this, he was not indebted to the plaintiffs.

There is upon the testimony a far from satisfactory account of the terms or conditions under which the note was left with

the plaintiffs. Fox was positive that it was left for collateral and collection. The plaintiffs' manager would not use the term "collateral." He said it was left "for what it was worth," and the records shew that it was entered in the collection and not in the collateral register. The learned Chancellor found as a fact that it was left as collateral security and also for collection; while in the Divisional Court the learned Chief Justice said that, notwithstanding Fox's evidence, the impression made upon him was, that the note was indorsed to the plaintiffs merely for collection and not as collateral. The conclusion I have reached upon the question of consideration renders it unnecessary finally to decide between these conflicting views; but on the whole I incline to the latter. Even so, in my view, it still leaves the plaintiffs entitled to the judgment awarded to them by the Chancellor.

As indorsees for collection of the note they were entitled to a lien on it for debts that were then presently payable and from time to time thereafter becoming payable. The claim now made is in respect of an indebtedness of Fox, which became payable from and after the 24th November, 1908. Prior to that date, there was a period in which Fox was free from direct indebtedness, although there were some outstanding notes or drafts under discount; a time during which, according to the plaintiffs' manager, Fox was at liberty to take the note out of the plaintiffs' possession, had he chosen. But Fox did not take it away, and it remained with the plaintiffs until the debts now due and payable had accrued. And, unless something had occurred between Fox and Living, prior to the 24th November, which furnished the latter with a defence to an action on the note, the plaintiffs are entitled as holders to a lien for the amount of Fox's indebtedness to them.

The defence set up is want of consideration and total failure of consideration. Upon the evidence, it seems to me to be plain that there was good consideration for the note when it was given. Living obtained an interest in Fox's agency business which he then had and which he might thereafter acquire, and became a partner on equal terms with Fox. He was and acted as a partner for at least fifteen months, during which time he says he earned or become entitled to several thousand dollars as profits, and actually received about $1,000 for his own use. He was known to at least some of the customers or persons with whom or on whose behalf he and Fox executed commissions, and drafts in the firm name had been drawn upon some of them. Upon the facts, it would be impossible for Fox to deny that

Living was a co-partner or legally to refuse him his rights as such. Neither could Living be heard to say, as against persons dealing with the firm, that he was not a partner. When, therefore, the note was received by the plaintiffs, it was a note for good consideration, not overdue.

But then it is said that a failure of consideration accrued by reason of what took place between Fox and Living in July, 1908, when Living left the firm's place of business. What occurred at that time could have no greater effect than a dissolution of the partnership. If, as Living seems to think, it was a wrongful expulsion, that could not alter his right to be restored, or, if the conditions appeared to be such as to render impossible a continuance of the partnership, to a judgment for dissolution upon such terms as the circumstances justified. Whether Living considered that a dissolution was effected by what occurred, or considered that he was wrongfully expelled, he seems to have acquiesced and to have taken no steps either to be restored or to procure a taking of the partnership accounts.

The circumstance that Living paid or was paying a premium or bonus could not make no difference in this case, where there was no stipulation or agreement as to the time of the duration of the partnership.

Whether through oversight or inadvertence, there was no agreement that the partnership should continue for a specified time or definite period. But the partnership was in fact created; and, that being so, its subsequent termination would not create a total failure of consideration so as to affect its validity in the hands of either Fox or the plaintiffs; although, upon taking the partnership accounts, Living might be able to shew himself entitled to a return of part of the premium. The question is discussed at length in Lindley on Partnership, 7th ed., p. 625 et seq. . . .

The defendants' difficulty in this case is, that they have not shewn the circumstances attending the dissolution sufficiently to enable a decision to be given as to whether Living is entitled to a return of part of the premium. There are charges and counter-charges of misconduct on the part of Fox and Living, but they are not before the Court; and it was for the defendants, if they desired to avail themselves of the defence of partial failure, to have put the case in proper train for inquiry. Neither is there material upon which can be ascertained what, if any, proportion of the premium should be returned, nothing to reduce the amount of the indebtedness as represented by the note. The burden of shewing this was on the defendants, and it was

not for the plaintiffs to shew the state of the accounts. Payments, either by reduction of the amount of the premium or receipt by Fox of profits of the business, were to be proved by the defendants, and they failed to shew either.

The appeal should be allowed and the judgment at the trial restored with costs of the appeal to the Divisional Court and this Court.

MEREDITH, J.A., agreed in allowing the appeal. He was of opinion, for reasons stated in writing, that the note was taken and always held by the bank as security for the repayment of all that might from time to time be owing by Fox to the plaintiffs (Atwood v. Crowdie, 1 Stark. 483); and that the note was good, in the plaintiffs' hands, against the makers of it, for the amount of the indebtedness of Fox to the plaintiffs; the fact that at some times there was nothing due from Fox to the plaintiffs would not cut out that right, or deprive the plaintiffs of the position of holders in due course.

GARROW and MAGEE, JJ.A., agreed in allowing the appeal.

MACLAREN, J.A., dissented, for reasons stated in writing, agreeing with the judgment of FALCONBRIDGE, C.J.K.B., in the Divisional Court.

Appeal allowed; MACLAREN, J.A., *dissenting.*

APRIL 15TH, 1912.

UNION BANK v. CRATE.

Husband and Wife—Notes and Mortgage given by Wife to Secure Debt of Husband—Absence of Independent Advice—Application for Leave to Adduce Fresh Evidence upon Appeal—Action upon Mortgage — Premature Action — Reference—Scope of—Accounts—Conflicting Evidence—Knowledge of Wife of Husband's Business—Findings of Referee —Appeals.

Appeal by the defendants from the judgment of a Divisional Court, 2 O.W.N. 1147.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, JJ.A., Latchford, J.

F. E. Hodgins, K.C., and C. M. Garvey, for the defendants.

J. A. Hutcheson, K.C., for the plaintiffs.

Maclaren, J.A.:—The defendants have appealed from a judgment of the Divisional Court dismissing their appeal from the report of the County Court Judge at Brockville, on a reference to him for trial of certain actions brought by the bank against the defendants (husband and wife), based upon certain notes and a collateral mortgage, and upon an overdraft.

Before proceeding with the appeal, the defendants' counsel applied to this Court for leave to adduce further evidence as to the circumstances under which the wife had executed the mortgage in question. They stated that this evidence had not been produced before the County Court Judge, as her counsel was then relying upon the law as laid down by the Supreme Court of Canada in the case of Stuart v. Bank of Montreal, 41 S.C.R. 516, to the effect that the wife should have had the benefit of independent advice; and, in consequence, did not bring out the evidence that would have shewn that the circumstances of this case were in fact similar to those on which the judgment of the Privy Council in the Stuart case, [1911] A.C. 120, was based. The evidence taken before the Referee, however, shews clearly that the facts of this case are widely different from those of the Stuart case. The moneys borrowed from the bank were in large part applied to the building of a large number of houses erected for the female defendant on her private property. She herself says that she was kept pretty well informed in the office as to the indebtedness, and she discussed the course of the business with her husband. She appeared to have taken a more than usually active part in looking after the business, on account of the ill-health of her husband during a portion of the time the account was current. The application to re-open the case and adduce further evidence may, I think, be fairly described as not only unusual, but extraordinary. The circumstances are not such as are contemplated by the Rules; and no precedent was cited to us of any case at all analogous to the present, and I do not think any such precedent can be found. Not even a shadow of a case has been made out for a re-opening.

It was next urged that the action on the mortgage was premature, inasmuch as some of the notes to which it was collateral were current and had not matured when the writ in the mort-

gage action was issued on the 12th February, 1908. The mortgage was dated the 13th July, 1906, and set out that the defendants were indebted to the bank in the sum of $31,674.70 on certain notes and $3,778.75 on an overdraft, and that the mortgage was taken as collateral security for the payment of the said notes, or of those that might be accepted in renewal of or in substitution for them. It was made payable in one year from its date, with interest at the rate of seven per cent., payable every three months in advance.

I am of opinion that this objection ought not to be allowed to prevail. The defendants executed this mortgage under seal, promising to pay the amount on a day named, and such payment was seven months overdue when the writ was issued. At that time, at least two of the notes, amounting in the aggregate to $11,620.75, had been dishonoured, and were still unpaid. Besides this, when the action was referred to the County Court Judge to take the accounts between the parties, it was well understood between them that the whole accounts were to be taken. When the parties appeared before the Referee, and the counsel for the bank had stated the wide scope of the reference, the counsel for the defendants stated that he went a step further, and his understanding was, that not only all matters arising in the actions, but anything else that might crop up, any outstanding differences between the parties, might be included in the reference, so that the reference might be a final adjustment of the dealings of the defendants with the bank. This was acquiesced in, and the parties proceeded with the reference on this basis, producing all their witnesses and documents. So that, even if the objection ever had any force, it was formally waived, and the defendants would now be estopped from setting it up.

As to the merits of the report, a perusal of the evidence satisfies me that the learned Referee allowed the defendants all that they were entitled to, and that the latter have failed to shew error in the report in this respect. The accounts are very much confused by the fictitious entries made in the books of the bank, by the then manager, with the knowledge and connivance of the male defendant, to impose upon the inspectors of the bank and to keep his superior officers in ignorance of the real condition of the defendants' account. The defendants' counsel, however, has failed to shew that they were entitled to any greater reduction than that made by the Referee, and the present appeal from

the judgment of the Divisional Court, which dismissed their appeal from the report of the Referee, should be dismissed with costs.

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

MOSS, C.J.O., GARROW, J.A., and LATCHFORD, J., also concurred.

Appeal dismissed with costs.

APRIL 15TH, 1912.

*RE CITY OF TORONTO AND TORONTO R.W. CO.

Street Railways—Interchange of Traffic—Ontario Railway Act, sec. 57—Application of—Order of Ontario Railway and Municipal Board—Municipal Corporation—Railway not yet Constructed.

An appeal by the railway company from an order made by the Ontario Railway and Municipal Board, upon an application by the city corporation for an order requiring the appellants to afford the city corporation all proper and reasonable facilities for the receiving and forwarding of passenger traffic upon and from the several railways belonging to the appellants and those to be constructed and operated by the city corporation upon St. Clair avenue and Gerrard street in the city of Toronto, and providing for the return of cars, motors, and other equipment belonging to either the city corporation or the appellants, and used for the purpose of receiving or forwarding such traffic so as to afford all passengers on the cars of the municipal system passage over the tracks of the appellants, as a continuous line of communication without unreasonable delay and without prejudice or disadvantage in any respect whatsoever, etc. The order made by the Board declared that sec. 57 of the Ontario Railway Act should apply to the appellants and their street railways and to the city corporation and the streets railways to be constructed by that corporation.

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

*To be reported in the Ontario Law Reports.

H. S. Osler, K.C., for the appellants.

H. L. Drayton, K.C., and G. A. Urquhart, for the respondents.

Moss, C.J.O.:—In the view which I take of the question raised by this appeal, it is not necessary to discuss or consider at length many of the arguments which were forcibly presented against and in support of the order appealed from.

As a practical operative order, it works no substantial advantage to the city and it imposes no real disadvantage upon the company. It settles nothing of a practical nature; and as a declaratory order does nothing towards making effective the provisions of sec. 57 of the Ontario Railway Act, as between the parties hereto.

Whether, if the Board had the power to issue the order, it rightly exercised it, is a question with which we have no concern. It is right to assume that, when its power to determine is invoked, the Board will not undertake to determine without having first informed itself of all the existing conditions, and considered whether the circumstances shewn make it just and proper to put the provisions of the section into effect as between the street railways then before it.

The question of power turns, as it appears to me, upon the proper view to be taken of sub-sec. (6) of sec. 57 of the Railway Act, read, of course, in connection with and in the light of the other portions of the section.

I am unable to satisfy myself that in this case the circumstances had arisen which, upon a careful study of the section, I think must occur before the power under sub-sec. (6) is called into action.

It is, of course, undeniable that primarily the provisions of the section deal only with steam railways, and are intended to govern the regulation and interchange of traffic between transportation agencies of that character. And it is also quite plain that the legislation contemplates existing operating companies actually engaged in carrying traffic, which includes, no doubt, passengers, as well as goods. Thus sub-sec. (1), providing for agreements between companies, speaks of "traffic passing to and from the railways or the companies," of "the working of the traffic over the said railways," of "the division and apportionment of tolls, rates, and charges in respect of such traffic," and of "the appointment of a joint committee or committees for the better carrying into effect such agreement." So, too, sub-sec. (2), imposing upon a company an obligation to afford faci-

lities to other companies, speaks of "the receiving and forwarding and delivering of traffic," of "the return of carriages, trucks, and other vehicles," of a company "having or working a railway which forms part of a continuous line of railway, or which intersects any other railway," of the duty of such a company to "afford all due and reasonable facilities for receiving and forwarding by the one of such railways all the traffic arriving by the other."

Again, sub-sec. (3), dealing with penalties, speaks of refusal or neglect "to receive, convey, or deliver at any station or depot of the company for which they may be destined, any passenger, goods or other things brought, conveyed, or delivered over or along the railway from that of any other company intersecting or coming near to such first-mentioned railway."

All these point plainly and unmistakably, not to projected or contemplating railways, but to railways actively engaged in the business of conveying passengers and goods upon and over their lines. It is only when they are found in that condition that they can be usefully rendered available for carrying out the objects aimed at.

Sub-section (4) brings the Board into requisition where there is a failure or inability to agree as to the regulation and interchange of traffic or any other of the matters provided for, and empowers it to determine upon an agreement according to the terms of which the mutual services prescribed by the previous portion of the section shall be performed by the parties interested.

But, before the Board's powers can come into play, it must find, and be prepared to deal with, a case of: (a) at least two existing operating companies engaged in receiving, forwarding, and delivering traffic, with railways forming parts of a continuous line or intersecting each other, or having termini stations or wharves near to each other; in fine, operating and carrying on the business of transportation of passengers or freight or both under the circumstances detailed in the preceding portion of the section; and (b) inability to agree as to the regulation and interchange of traffic or in respect to the other matters provided for.

Now, is there anything in sub-sec. (6) to shew that in the case of street railways there is to be any different mode of treating the matter?

It says "this section," that is, the preceding provisions of the section, "shall apply to such street railways as may from time to time be determined by the Board." Is it intended by

this enactment to do more than to apply the provisions of the section to street railways which the Board shall find holding towards each other, relatively at least, the same position as steam railways? That it was not so intended seems to be manifest from the language. Under sub-sec. (4) the powers of the Board arise only when there has been inability to agree upon the matters there specified. And these powers are confined to determining in respect of these matters. Sub-section (6) enables the Board to deal with street railways, but does not say that it is to do so under circumstances different from those under which they deal with steam railways by virtue of sub-sec. (4). In other words, the Board, when it finds two or more existing operating street railways before it, upon application made by one or more of the parties interested, is to determine whether, as regards the street railways before it, there is a case proper for intervention under sub-sec. (4). It may be that the Board should have regard, upon such an application, to the differences in methods of transport and the conduct of business between the two systems, but there does not appear to be any warrant for such a wide departure from the manifest object and scope of the section as to adapt it to a case where there are not two existing and operating lines before the Board upon the application.

The application is intended to result in something practical in the form of an order determining the terms and conditions upon which the regulation or interchange of traffic is to take place. There is no indication anywhere that the Board is to deal with any but a state of circumstances outlined in sub-sec. (4).

For these reasons, I think that, under the then existing circumstances, the order made was not within the scope of the Board's powers, under sec. 57, and that it should not stand.

The appeal will be allowed with costs.

The other members of the Court concurred; MEREDITH and MAGEE, JJ.A., each giving written reasons.

APRIL 15TH, 1912.

*COUNTY OF WENTWORTH v. TOWNSHIP OF WEST FLAMBOROUGH.

Highway—Township Boundary Line—Deviation—Substituted Road—Assumption by County—Evidence—By-law—Plan—Dedication—Compulsory and Permissive Provisions—Municipal Act, 1903, *secs.* 617, 622-4, 641, 648-653.

*To be reported in the Ontario Law Reports.

Appeal by the defendants from the judgment of a Divisional Court, 23 O.L.R. 583, 2 O.W.N. 1003, reversing the judgment of MIDDLETON, J., 23 O.L.R. 583, 2 O.W.N. 360.

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

G. Lynch-Staunton, K.C., for the defendants.

J. L. Counsell, for the plaintiffs.

GARROW, J.A.:—The defendants applied for leave to appeal, and such leave was granted, but confined to one point, namely, whether the road in question was and is a deviation road. See 2 O.W.N. 1223.

The defendants' objections to an affirmative answer to this question seem to be: (1) as to its origin, which, it is said, was the Carroll plan; and (2) that the road does not return to the line of the original boundary line road allowance.

These objections are not unlike those considered by this Court in Township of Fitzroy v. County of Carleton, 9 O.L.R. 686. There is evidence here, slight it is true, that before the registration of the Carroll plan the travelling public had used a road in the nature of a trespass road upon or near the line of the road afterwards laid out upon that plan, just as in the Fitzroy case a trespass road had preceded the formal action of the township councils. And in that case, as in this, the deviation did not terminate in the boundary line between the two townships where it originated, but was carried across another township boundary, and thence through that township into the original line. The question there arose under sec. 617, sub-secs. (1) and (2). Here it arises under sec. 622, which does not contain the condition in sec. 617 that the deviation must only be for the purpose of obtaining a good line of road. But, notwithstanding that difference, the question what, under the statute, is a deviation road, must, under both sections, in my opinion, be practically the same. The statute gives no definition. Its object, no doubt, was, first, to assist the public in obtaining a practical highway by enabling serious obstacles in the true line to be passed around, and second, to make the general provisions as to maintenance, whereby the burden is fairly apportioned, apply. The question is really more one of fact than of law. There must have been a sufficient excuse in the nature of the ground to justify an abandonment of the original line of road. And it must appear that the deviation was intended to serve and is serving the public need, which would have

been served if it had been reasonably possible to open and use the original allowance; but its origin and history are of less consequence than the facts existing when the question arises; when the main inquiry must be, is the road now a public highway, and is it in fact serving the public purposes which a road upon the original allowance would have served? Its direction and its nearness to the original line are, of course, not to be disregarded; for a new road at right angles could scarcely be called a deviation, within the meaning of the statute. But, while the general trend of the new road should be in the direction of the old, it is not, I think, imperatively necessary that the former should actually terminate in the latter. The statute does not say so, nor, in my opinion, does reason, so long as, by means of some other public road, the original line may conveniently be reached.

The facts here seem to be sufficient to justify the judgment of the Divisional Court. For over half a century the public, in passing and repassing along the boundary line road, so far as it was opened, have used the new road, or deviation, to reach points which would have been reached over the original allowance if it had been opened. And that that was the intention is also, I think, established by the circumstance that the county council, before conveying the original allowance to Carroll, required a report from an engineer, which was furnished, that the new road was sufficient for public use. At that time township boundary lines were under the jurisdiction of county councils; and, if the new road was not intended to be in substitution for the old, and therefore a deviation within the meaning of the statute, the matter in no way concerned the county council.

I would dismiss the appeal with costs.

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

Moss, C.J.O., Maclaren and Magee, JJ.A., also concurred.

Appeal dismissed.

April 15th, 1912.

*CLARK v. LOFTUS.

Life Insurance—Benefit Certificate—Change of Apportionment—Person Benefitting by Change—Onus—Validity of Transaction—Agreement not to Change—Failure of Proof—Mental Capacity of Insured—Undue Influence—Surrounding Circumstances.

Appeal by the defendant from the judgment of a Divisional Court, 24 O.L.R. 174, 2 O.W.N. 1288, affirming the judgment of Middleton, J., at the trial, in favour of the plaintiffs in an issue as to the disposition of money arising from a benefit certificate upon the life of James E. Clark, deceased.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

G. H. Watson, K.C., and J. T. Loftus, for the defendant.

J. B. Clarke, K.C., and E. J. Hearn, K.C., for the plaintiffs.

Moss, C.J.O. (after setting out the facts and referring to the evidence and the opinions of the Judges in the Court below) :—Upon the testimony, I am, with deference, of the opinion that no agreement is shewn. . . .

. . . The element of agreement should, I think, be entirely eliminated from the case.

Upon the other branches, I am also unable to agree to the conclusions reached by the trial Judge and the Divisional Court.

These conclusions appear to me to be based upon a misapprehension as to the duties and obligations of the defendant, under the circumstances disclosed by the testimony, and as to the onus of proof at the trial. No doubt, the burden may shift from time to time during the progress of the trial, and it may be assumed that in the course of this trial the onus varied from time to time, as in other cases. The question is, upon whom was it resting, having regard to the testimony given, at the time when the evidence closed?

It having . . . been shewn beyond question that the instrument impeached was signed by Clark, it is scarcely necessary to say that the onus of shewing that it was, for some reason or reasons, invalid and ineffectual, was cast upon the plaintiffs.

Clark had the right by law to change the nomination of beneficiaries within the scope of the certificate; and, in order to

*To be reported in the Ontario Law Reports.

avoid his act, it was incumbent upon those impeaching its effect to shew mental incapacity unfitting him to execute the instrument with knowledge and appreciation of its effect, or that he was induced to execute it through fraud or undue influence, or that the defendant, in whose favour the nomination was made, stood in a fiduciary relationship towards her father, that is, that she occupied such a position of trust and confidence in regard to him as necessarily to lead to the conclusion that she possessed a controlling influence over his mind and actions. If the latter case were established, then the onus might be cast upon her to support the transaction, and the question whether she had satisfactorily shewn all that was required would arise, but only in that case.

It was not alleged nor was it proved or found that the defendant stood in a fiduciary position towards her father. She was his daughter, but she was neither his trustee, guardian, nor agent. There is no evidence that at any time during his life had he reposed any special trust or confidence in her. There existed between them nothing but the natural affection of father and daughter; no relationship that called upon the daughter to justify or explain her father's action. Assuming capacity and the absence of fraud or undue influence, the act was one within his rights, however unreasonable or unjust towards others it may appear.

Apart from agreement, with which I have already dealt, Clark was in no manner a trustee of the certificate or for any of the parties named as beneficiaries; and his act is binding and conclusive, unless the plaintiffs have proved a case of mental incapacity or fraud or undue influence.

I have given careful atention to the evidence, as well as to the adverse comments of the learned trial Judge upon the testimony of some of the witnesses; and, after making every allowance for the advantage which is necessarily enjoyed by the trial Judge from having seen the witnesses and noticed their demeanour, I am unable to adopt the conclusions arrived at. It may be that, if I shared the views of the Courts below as to the burden of proof, I should not disagree with their findings. But if, as appears to me, it lay upon the plaintiffs to prove their case, then I think they failed to discharge the onus.

It has been said more than once that it is a fallacy to suppose that the affirmative is proved because the witness for the negative is not wholly and entirely to be believed. The affirmative must be proved; and to say that a witness for the negative is

not wholly to be believed is, in no sense of the word, to prove the affirmative: Nobel's Explosives Co. v. Jones (1881), 17 Ch. D. 721, at p. 739.

The learned trial Judge was disposed to deal with the question of capacity as upon the same footing as if the act was a testamentary act. As the instrument was intended to take effect in Clark's lifetime, it was probably more in the nature of, though not in all respects similar to, a gift inter vivos. It differed from the latter, in that it was not absolute in effect, because of the reservation of a power of revocation.

But, however regarded, the evidence fails, in my judgment, to establish a want of capacity to understand the nature of the transaction or to appreciate its effect. . . . It was a single and simple transaction in connection with a certificate, with the purport and effect of which he was quite familiar, for he had considered and discussed it on more than one occasion. His signature appended to the instrument compares quite favourably with that appended to the agreement concerning the additional rates made with the Order in September, 1908, and presents every appearance of having been written by one quite capable of controlling his faculties. And it is to be noted that the learned trial Judge says that he is not satisfied that Clark had not testamentary capacity.

Beyond vague suspicion, there is really no evidence of fraud or undue influence such as is required to be shewn in order to invalidate such an act as that here impeached. It is important to bear in mind that there was no secrecy about the matter; no retaining the instrument so as to prevent scrutiny and inquiry. It was sent on to the Order immediately, and the plaintiffs were afforded opportunities not only of seeing the instrument, but Clark was shewn to have visited the plaintiffs from time to time afterwards, and they had every opportunity of ascertaining whether or not any improper suggestions had been made to him, or his mind otherwise unduly influenced. But, beyond endeavouring to induce the Order to refrain from recognising the instrument, nothing was done or attempted.

The defendant had paid the arrears due in respect of the certificate after the plaintiffs had abandoned making payments, and she kept it on foot from that time onwards. Otherwise it would have lapsed and have been of no benefit to anybody. Having done so, there was no reason why her father should not, if he chose, put her in the position of sole beneficiary. In doing so, he was not bestowing upon her an extravagant sum, and he may very justly have considered that, his wife having consider-

able property of her own and having shewn no disposition to keep the certificate on foot, his daughter by his first marriage, through whose payments it had been kept on foot, might without unfairness receive the full benefit of it.

I would allow the appeal and declare the defendant entitled to the moneys in Court, subject, however, to repayment to the plaintiff Jane Clark of the sums paid by her in respect of dues and assessments, as offered and agreed to by the defendant's counsel.

As to the costs; the defendant is entitled to her general costs of the interpleader proceedings, of the issue, and of the appeal to the Divisional Court and to this Court.

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

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

GARROW, J.A., dissented, for reasons given in writing.

Appeal allowed; GARROW, J.A., *dissenting.*

HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. APRIL 11TH, 1912.

*RE CONSTANTINEAU AND JONES.

Costs—Criminal Proceedings—Taxation of Costs by Local Registrar—Tariff of Costs for Civil Cases—Right of Appeal from Taxation—Refusal of Registrar to Tax Costs of Preliminary Inquiry before Magistrate—Mandatory Order—Right to Costs—Construction of Judgment Awarding Costs—Intention of Trial Judge—Criminal Code, secs. 576, 689, 1044, 1045, 1047.

An information was laid before the Police Magistrate at L'Orignal for the publication of a defamatory libel. The accused was committed for trial, and at the assizes was surrendered by his bail; but, the prosecutor not appearing, was discharged; and an order was made by LATCHFORD, J., for the recovery by the accused (Jones) from the prosecutor (Constantineau) of his (Jones's) costs occasioned by the proceedings, the same to be taxed.

*To be reported in the Ontario Law Reports.

A bill of costs was brought in before the Local Registrar covering both the proceedings before the magistrate and those at the assizes; but the Local Registrar, upon taxation, disallowed entirely the costs of the proceedings before the magistrate, and largely reduced the bill in respect of the costs incurred at the assizes.

Jones appealed from the taxation.

The appeal came on for hearing before MIDDLETON, J., in Chambers.

G. A. Urquhart, for the appellant.

H. S. White, for Constantineau, objected that there was no appeal from the taxation, as the proceedings were under the Criminal Code, and the provisions of the Consolidated Rules did not apply.

MIDDLETON, J.:—I think this objection is well taken. . . . Section 689 of the Criminal Code merely gives authority to direct payment of costs. Section 1047, I think, is wide enough to apply not only to costs ordered to be paid under secs. 1044 and 1045, but to apply to all costs ordered to be paid under any of the earlier provisions of the Code. This section indicates that, where no tariff is provided in respect to criminal proceedings, costs shall be taxed according to the lowest scale of fees allowed in the Court in which the proceeding is had in a civil suit. Power is given, under sec. 576, to the Court, to provide by general rule for the costs to be allowed; but no tariff has been promulgated under the Code; and, therefore, the tariff applicable in civil proceedings, and provided by the Judicature Act and Rules, is applicable; but, under the Code, no appeal is given, nor is the right of appeal which is found in civil cases made to apply by the mere introduction of the civil tariff. . . .

In the absence of any appellate jurisdiction, I have no right to interfere with the discretion of the officer whose duty it is to tax these costs; but . . . where the officer has failed to discharge his function at all, and has failed to make any allowance for the costs of the preliminary inquiry, the applicant has the right to come to this Court to compel the officer to exercise his function; and it was arranged by counsel that . . . this may be treated as a motion for a mandatory order, and that I should deal with the questions which would be open upon such an application.

The officer has proceeded upon the theory that the trial Judge did not intend to award the costs of the preliminary inquiry, and that the language used in the judgment is not sufficient to award these costs. I have had an opportunity of consulting the learned trial Judge, and he tells me that it was his intention to make an unrestricted award of all costs over which he had any jurisdiction; and I think that the judgment adequately awards the costs of the preliminary inquiry.

The formal judgment entered recites the information before the magistrate, the committal, and the notice of discontinuance given by the complainant; and the award is "of the costs occasioned by the said proceedings."

In the second place, I think that, upon the true construction of sec. 689, where costs are awarded in general terms, these include the costs of the appearance on the preliminary inquiry.

The motion thus amended will be dealt with by determining that I have no appellate jurisdiction, and cannot, therefore, deal with the appeal as an appeal; but a mandatory order will go to the Local Registrar directing him to tax and allow to the applicant his costs of the preliminary proceedings before the magistrate. As success is divided, I make no award of costs.

RIDDELL, J., IN CHAMBERS. APRIL 11TH, 1912.

KARCH v. KARCH.

Husband and Wife—Action for Alimony—Desertion—Application for Interim Alimony—Admission of Marriage—Evidence—Examination of Parties—Inadmissibility—Quantum of Allowance—Disbursements.

Appeal by the defendant from an order of the Local Master at Guelph allowing the plaintiff $10 a week interim alimony and $40 for disbursements.

W. E. S. Knowles, for the defendant.
C. A. Moss, for the plaintiff.

RIDDELL, J.:—The plaintiff in this action for alimony alleges: marriage in 1899; birth of two children still living; residence at Hespeler; refusal by the defendant since the spring of 1911 to provide her with sufficient money for household expenses and

clothing for herself and children; since that time till he left her "a very bad temper and disposition towards" her; "on the 20th November, 1911, without any warning, the defendant left the house wherein he had up to that time resided with the plaintiff and their children, and has not returned to the said house or offered to return to it or corresponded with the plaintiff, and has in fact deserted the plaintiff." Since that day he has stopped the children on their way to school and endeavoured to excite distrust on their part toward the plaintiff; she has no means of support for herself and children; and she claims alimony, interim alimony at the rate of $12 per week, the custody of her children, an order that the defendant maintain the children by paying such sum as may be awarded, costs, etc.

The defendant admits the marriage, etc., but says that from even before 1905 the plaintiff assumed mastership in all things, and after that time she exhibited an increasingly bad temper and disposition toward him, and continuously scolded him and used bad language toward him, treated him contemptuously, and encouraged the children to do the same; she kept large sums of money coming to him from his debtors and used it for other than household purposes and gave away large quantities of household supplies to members of her own family—all this against his wishes. He treated her properly and put up with her abuse for the sake of the children and to avoid public scandal till the 20th November, 1911; he has provided a suitable dwelling-house and furniture for her, and made an arrangement, which he has kept, to pay all accounts which she incurred for clothing and coal and wood, and, in addition, has paid her $6 a week out of his wages for household expenses. For three years she neglected and refused to prepare breakfast for him, and he had to get his own breakfast before going to his work—for two years she refused to cohabit with him and occupied a separate bed-room. Unable to stand her abuse and neglect and refusal to cohabit with him, he on the 20th November, 1911, went to Dundas on a visit, remained there six weeks, and then went back to Hespeler and worked for and boarded with his brother; the plaintiff and children residing in the house formerly occupied by them but excluding the defendant; the plaintiff making no offer of reconciliation. He has continued to pay all accounts incurred by the plaintiff for clothing and household expenses which have been presented to him, and has given instructions to the tradesmen to call and take her orders for goods and supply them—and he denies tampering with

the children. He is 55 years old, his wife 11 years younger, strong and healthy—he asks the custody of the children.

An application was made for interim alimony. The plaintiff set up that the defendant had in money and securities, etc., some $18,500, besides a house worth $1,700. The defendant sets out in detail his income; wages $2 per day, $600; various investments $372.85; in all, $972.85.

Both parties filed affidavits on the application before the Local Master, and both were examined at length, and without objection, upon their affidavits. Were I not bound by authority I may not disregard, Cook v. Cook (1892), 12 C.L.T. Occ. N. 73, 28 C.L.J. N.S. 95, I should think these examinations so taken might be read upon the application. From the wife's examination it is plain that the ostensible reason for bringing the action is "because he left me without reason;" that she has continued living in the defendant's house with her children, using his furniture, running bills for groceries, food, and clothing, which he never objected to paying. The only complaint is: "He is living down with his brother. Why didn't he come home and live with me and the children?" She never asked him to do so, "because I thought it was his place to come back and make the first offer toward reconciliation." In June, 1911, the husband and wife made a bargain that he was to give her $6 a week to run the house on and pay the bills for clothing and fuel. When he left she had $43 in cash, and she had still when examined $11 left. She thinks he swore at her this summer "in front of people," but she did not hear the words and judges by the tone of voice. The sole reason for bringing this action is, that he went away and didn't come back—it is his duty to come back and start the reconciliation. She has not wanted for anything since he went away; the flour and feed man calls for orders and the grocer is near-by. Nothing like cruelty is alleged, but the husband and wife seem to have had from time to time the not unusual jangles about her spending too much money, and an occasional "tiff" over other matters.

Of course no one but the wearer knows where the shoe pinches, but I can see nothing in all the allegations which would prevent two persons of ordinary common sense living together in a fairly comfortable manner. And it is an infinite pity that the defendant did not take up the implied challenge and at once make the advance toward reconciliation. He says, "Well, I thought, as she wouldn't make any steps towards me, I don't need to make none toward her." But authority by which I am

bound says that the examination of the wife cannot be looked at upon an application for interim alimony, as that would be going into the merits of the case.

It has been laid down from the earliest time in our Courts that upon an application for interim alimony proof of the marriage is all that is necessary: Nolan v. Nolan, 1 Ch. Ch. 368.

The defendant was not allowed to shew that the plaintiff was living wantonly in adultery apart from her husband: Campbell v. Campbell (1873), 6 P.R. 128.

And where the plaintiff had admitted facts which, when proved, at the hearing, would disentitle her to the relief sought, the defendant was not permitted to make use of the examination as an answer to the application. The Referee could "see no difference in principle between considering an uncontradicted affidavit alleging adultery on the part of the plaintiff, and considering this examination extracted by compulsion at the instance of the defendant for the purpose of being used as part of his defence." The decision was affirmed by Proudfoot, V.-C., and by that I am bound: Keith v. Keith (1876), 7 P.R. 41.

The statement of claim alleges desertion. Whether the plaintiff can at the trial establish a case for alimony is immaterial; the order for interim alimony must be made unless the defendant can shew some bar such as is spoken of in Snider v. Snider, Snider v. Orr (1885), 11 P.R. 140. The decision in these cases is, that, if there be no cruelty pleaded, nothing but desertion, and the husband is willing and offers by defence and affidavit to resume cohabitation with his wife—she living in his house—an order for interim alimony will not go.

Nothing of the kind appears here—the only approach to it is the allegation in defence and affidavit that he is ready and willing properly to support and maintain his children.

The order for interim alimony and disbursement must stand.

But, under the circumstances, the amount ordered is rather excessive, and the interim alimony should be reduced to $6 per week. The amount of interim disbursements may stand, as they must be accounted for at the conclusion of the action. No costs.

It is not, I trust, too late to urge upon the parties to do their best to bring about a reconciliation, without regard to who should make the first advance. A stubborn persistence in their present attitude will most certainly be disastrous to themselves and to their children's future. The children they should consider before themselves, and make every endeavour to prevent calamity for them.

RIDDELL, J., IN CHAMBERS. APRIL 11TH, 1912.

RE MILLS.

Devolution of Estates Act—Application by Administrator for Leave to File Caution after Time Expired—10 Edw. VII. ch. 56, sec. 15 (1) (d)—Partnership Lands—Sale by Surviving Partner—Approval of Foreign Court—Sufficiency—Unnecessary Application.

Motion by the administrator of the estate of Barney Mills, deceased, for an order allowing the applicant to file a caution, under sec. 15 (1) (*d*) of the Devolution of Estates Act, 10 Edw. VII. ch. 56, after the proper time for filing had expired.

J. D. Montgomery, for the applicant.

F. W. Harcourt, K.C., Official Guardian, for certain absentees.

RIDDELL, J.:—Nelson Mills and Barney Mills, both of the county of St. Clair, Michigan, and citizens of that State, were in partnership under the firm name of N. & B. Mills, in which Nelson Mills had a three-fourths and Barney Mills a one-fourth interest. Amongst other firm assets, the partnership owned Stag Island, in the county of Lambton, and Province of Ontario.

Nelson Mills died in 1904, having made a will and codicil whereby he appointed M.W.M and D.W.M. his executors, and directed them to carry on the partnership. They did so until the death, in 1905, of Barney Mills; then, in 1908, they were directed by the proper Court in that behalf in Michigan to wind up the partnership within the year ending the 4th May, 1909. They sold, in 1909, certain of the real property of the firm, including Stag Island (with certain property, personal and mixed) to themselves as executors for over a quarter of a million. By a decree of the Circuit Court for the County of St. Clair (in Chancery) the sale was confirmed, and it was "ordered, adjudged, and decreed that said M.W.M and D.W.M., executors of the estate of Nelson Mills, deceased, surviving partner of the co-partnership of N. & B. Mills, make, execute, and deliver to M. W.M. and D.W.M., executors and trustees of Nelson Mills, deceased, the necessary conveyances, deeds, and other papers to convey all the property, real, personal, and mixed, of the co-partnership of N. & B. Mills, and more particularly the following descriptions of property as are hereinafter more fully set

forth; and that, in case said executors do not make, execute, and deliver the necessary conveyances to transfer and vest in M.W.M. and D.W.M., executors and trustees of the estate of Nelson Mills, deceased, all the property . . . of said co-partnership . . . then this decree is to stand and operate as such conveyance, and a certified copy thereof placed on record in the register of deeds offices in the various counties and States of the United States of America and the Province of Ontario, Canada, wherein the real property is located, will be a proper conveyance to pass the title of said real property to M.W.M. and D.W.M., executors and trustees of the estate of Nelson Mills, deceased, to receive said property free and clear from all claims and liabilities of N. & B. Mills co-partnership; the description of said property being as follows . . ." Amongst the lands described, appears Stag Island.

It would appear that all the beneficiaries of the Barney Mills estate have received their shares of the estate, including a share of the proceeds of this sale.

Barney Mills died intestate in 1905, and his administrators have distributed his estate, with the approval of the Michigan Court having jurisdiction in the premises.

It is desired that a valid conveyance of Stag Island be made; and W. J. Barber, of Sarnia, has taken out (October, 1910) letters of administration from the Surrogate Court of Lambton. He, however, neglected to register a caution within the proper time.

A motion is made by him to be allowed to file a caution now, under 10 Edw. VII. ch. 56, sec. 15(1) (*d*).

The beneficiaries are so scattered that it is impracticable to obtain their consent. The Official Guardian is not willing to give consent without some intimation by the Court that he should do so. Moreover, the applicant desires that an order be made dispensing with the payment of money into Court: Con. Rule 972(*c*). In fact, the purpose is, simply, that the Ontario administrator shall make a conveyance to M. W. M. and D. W. M., executors and trustees of the estate of Nelson Mills, in accordance with and to carry out, in a manner which will give them a valid and registrable title to the Ontario land, the sale they made under authority of the Michigan Court.

I do not think the order should be made under the circumstances set out. It is not the ordinary case of a personal representative in good faith desiring to sell land of his estate which has gone from him under 10 Edw. VII. ch. 56, sec. 13(1), but a wholly different case.

The purchasers were willing to pay the purchase-price, and did so, on the title which they had or could themselves make.

And I see no necessity for any proceedings by the Ontario administrator.

Of course, the vesting order granted by the Circuit Court is wholly invalid to affect land in Ontario considered as land; and, no doubt, so far as that land is concerned, was either per incuriam or granted quantum valeat. All the formalities for passing title to real property are those prescribed by the lex rei sitæ: Story on Conflict of Laws, secs. 435 sqq., and cases noted. So that while, upon the doctrine of Penn v. Lord Baltimore (1750), 1 Ves. Sr. 444, and like cases, the Michigan Court had full power to direct the executors to make a conveyance of Ontario land, that Court could not make its own decree effective as a conveyance: Norris v. Chambres (1861), 29 Beav. 246, 3 DeG. F. & J. 583. In re Hawthorne, Graham v. Massey (1883), 23 Ch. D. 743, and Companhia de Mocambique v. British South Africa Co., [1892] 2 Q.B. 358, may also be looked at on similar points.

But it appears that the land was really partnership assets. It further appears that, between the deaths of Nelson and Barney Mills, they carried on the partnership business as partners of Barney Mills. They had no right to become such partners simply because they were executors of the deceased partner: Pearce v. Chamberlain (1750), 2 Ves. Sr. 33. Accordingly, Barney Mills must have assented to such partnership; and the decree of a Court of competent jurisdiction, in an action to which the administratrices of Barney Mills are parties, not only finds that such partnership did exist till the death of Barney Mills, but also that the executors of Nelson Mills became at such death "the surviving partner entitled to wind up the said co-partnership," and ordered that they should do so. As surviving co-partners, they were entitled to sell all the partnership property, and they did so. Whether a sale by them to themselves would be permitted under our practice, we need not inquire—a Court having jurisdiction in the premises, in an action to which the administratrices and all beneficiaries of Barney Mills were parties, has approved the sale.

In my view, under these circumstances, there is no necessity of any representative of Barney Mills joining in the conveyance. The land was partnership assets, and the surviving partner could sell it—and there is no difference in the powers of a surviving partner in a foreign partnership and in a domestic partnership: Co. Litt. 129, C; Bacon's Abr., Alien, D.; so long as the foreigner is not an alien enemy, and the countries are at peace.

It is not, I presume, necessary to elaborate the doctrine that, according to our law, land owned as partnership assets is personal property.

All difficulty about the two (M. W. M. and D. W. M.) conveying to themselves can be got over by an appropriate form of conveyance—as to which any Ontario solicitor could advise. If it be feared that at some time some of the beneficiaries of Barney Mills may make some claim, the decree of the Circuit Court may be appealed to; and, moreover, "it has been ruled uniformly, that if one receive the purchase-money of land sold he affirms the sale, and he cannot claim against it whether it was void or only voidable:" Maple v. Kussart (1866), 53 Pa. St. 348, at p. 352. And the same rule applies where the claimant has received part of the purchase-money only: Steen v. Steen (1907), 9 O.W.R. 65, 10 O.W.R. 720 (C.A.); and, in the Supreme Court of Canada, Clark v. Phinney (1895), 25 S.C.R. 633, and cases cited by Sedgewick, J. And ignorance of the facts could not be alleged, since all parties were represented by counsel.

Upon both grounds—(1) that the purchasers were content to pay their purchase-money upon the authority of the Circuit Court, and did not deal with the representatives of the Barney Mills estate; and (2) that the order sought is wholly unnecessary—I refuse the motion. The Official Guardian will have his costs.

It may be that a declaration of ownership could be obtained in the High Court of Justice for Ontario, in an action properly framed; but that is not a matter upon which I pass; on the present application, that would be impossible.

KELLY, J. APRIL 11TH, 1912.

SMITH v. HOPPER.

Contract—Action against Executor for Value of Services Rendered to Testatrix—Absence of Promise to Remunerate—Monthly Payments in Lifetime of Deceased—Legacy—Sufficenicy to Cover Services.

Action against the executor of Selina Gillbard, deceased, to recover the value of services alleged to have been rendered by the plaintiff to the deceased.

F. M. Field, K.C., and T. F. Hall, for the plaintiff.
A. M. Peterson and Irving S. Fairty, for the defendant.

Kelly, J.:—The plaintiff, a widow, is a niece of Selina Gillbard, who died on the 16th November, 1910. The defendant is the executor of the will and codicil of Selina Gillbard, the will being dated the 4th December, 1908, and the codicil the 17th February, 1909. Probate of the will was issued to the defendant on the 13th February, 1911.

The estate, as shewn by the inventory filed on the application for probate, amounted to $24,493.77. In addition to bequests of some personal articles, the specific legacies amounted to $15,857.54, of which more than $8,000 was given to the brother, nephews, nieces (including the plaintiff), and a cousin of the testatrix, and the remaining part of these bequests and the residue of the estate go to objects chiefly of a religious, charitable, and educational character.

At the time of her death, Selina Gillbard was eighty-one years of age. Her husband died in August, 1907; and, as they were without children, and Mrs. Gillbard was then left alone, the executors of the husband's will (one of whom is the defendant) and some of her relatives thought it inadvisable that she should be allowed to live alone; and it was, therefore, suggested that the plaintiff should take up her residence with Mrs. Gillbard. The plaintiff at that time was occupying a house for which she paid a rental of $6.50 per month.

Mrs. Gillbard intimated that she did not require any person to live with her; but, when pressed by those interested in her, she consented that the plaintiff should come to her, and volunteered the statement that she would do well by the plaintiff. There was no arrangement for the plaintiff remaining with the deceased for any definite time, nor was anything said on either side about remuneration except the voluntary statement of the deceased that she would do well by the plaintiff.

The plaintiff lived with the deceased from August, 1907, until her death, on the 16th November, 1910; and during that time the services she performed consisted of going to the bank when the deceased needed money, or when she received any cheques or orders for money which she wished to have cashed or deposited, making purchases of provisions for the house, making up the bed which was used by the plaintiff and the deceased, and attending to the furnace. All the other housework, except the laundry work, which was done by another person, was done by the deceased, who refused to permit the plaintiff to assist her in the performance of this work, when at times the plaintiff offered her services.

The evidence shews that the deceased was a person who rarely left her house, and associated but little with her friends or neighbours; she was careful of her money to an extent verging on penuriousness, but always paid promptly any debts she incurred, and at the time of her death owed nothing except some small current accounts.

She had suffered from cancer in her finger, and in March, 1909, it became necessary to have it amputated. Notwithstanding this, however, she continued until a very short time prior to her death to perform her household duties to the extent which I have stated.

The plaintiff in her evidence complained that conditions of life with the deceased were unpleasant, by reason of the somewhat exclusive life she led, her economy in providing necessary food, and her persistence in preparing the food when she was suffering from cancer in her finger.

Though the plaintiff did not ask for remuneration, Mrs. Gillbard from August, 1907, until the 1st October, 1910, paid her a monthly sum of $10. The plaintiff states that the deceased said this was for pin-money.

By her will, the deceased also gave the plaintiff a bequest of $2,000 and a contingent interest in a further sum of $1,000. The plaintiff expected that the deceased would have been more generous towards her, and she says that she thought the deceased would have "done by her" to the extent of about $5,000 at least. This was a matter purely of expectation on her part, and her hopes were not based upon any agreement, promise, or suggestion by the deceased, except the statement that she would do well by her.

After Mrs. Gillbard's death, the plaintiff filed with the defendant a claim for services amounting to $2,379, made up of a charge at the rate of $60 per month for three years and one and one-half months, beginning in August, 1907 ($2,250), and at the rate of $21.50 per week for the six weeks ending with Mrs. Gillbard's death.

The defendant refused to acknowledge the claim, except that he expressed an inclination to recognise the plaintiff's right to some payment for the time from the 1st October, 1910, until the death of the testatrix; the plaintiff's evidence being, and it is not contradicted, that, when she asked the defendant if she had any chance of putting in a claim, he replied that she might for the last six weeks..

The defendant, while denying the plaintiff's right, has brought into Court $141.50. He also stated in his evidence

that the plaintiff, after the death of the testatrix, said she had been paid up to the 1st October.

Under the authority of such cases as Walker v. Boughner (1889), 18 O.R. 448; Mooney v. Grout (1903), 6 O.L.R. 521; and Johnson v. Brown (1909), 13 O.W.R. 1212, 14 O.W.R. 272, the plaintiff cannot succeed, at least for the time down to the 1st October, 1910, when the monthly payments ceased.

There having been no agreement or promise for payment of any definite amount, the most that the plaintiff can claim for her services and trouble while living with the deceased is the fair and reasonable value thereof. Apart from the monthly sum of $10, paid promptly by the deceased and accepted by the plaintiff for almost the whole period of her residence with the deceased, the amount of the bequest made to her by the will was more than ample remuneration, on the most liberal scale of allowance, for the services of every kind which she performed and any trouble she was put to, in any event down to the 1st October, 1910.

In view, however, of the fact that there seems to have been some recognition of the special claim put forth for the last six weeks of the lifetime of the deceased, during part of which she was ill and perhaps required attention such as the plaintiff had not previously been called upon to give her, it is not unreasonable that there be allowed to plaintiff out of the $141.50 paid into Court the amount claimed by her for that period, namely, $129.

Subject to this allowance to the plaintiff, I dismiss her action with costs.

MULOCK, C.J.Ex.D. APRIL 11TH, 1912.

GOTTESMAN v. WERNER.

Vendor and Purchaser—Contract for Exchange of Lands—Defendant Entitled only to an Interest in Lands Offered in Exchange—Specific Performance with Compensation—Reference as to Title—Costs.

Action for specific performance of a written agreement entered into between the parties for the exchange of certain properties situate in Toronto.

L. F. Heyd, K.C., for the plaintiff.
Frank Denton, K.C., for the defendant.

Mulock, C.J.:—The defendant, honestly believing himself to be the owner of or able to make title to certain lands on Richmond street, agreed to exchange the same for certain lands of the plaintiff; the defendant to assume payment of an existing mortgage for $1,900 upon the plaintiff's lands, and to be entitled to a mortgage for $4,000 to be made by the plaintiff on the Richmond street lands.

At the trial, the defendant alleged and endeavoured to prove that he was not the owner of the Richmond street lands, and at most had but a part interest therein, and had no control over any outstanding interests. The plaintiff, however, expressed a willingness to take specific performance to the extent of the defendant's interest in the land, with compensation in respect of any outstanding estate.

He is entitled to such relief: Kennedy v. Spence, 24 O.L.R. 535.

It should be referred to the Master to ascertain whether the defendant can make title to the lands in question, or to any interest therein. If he cannot, then the action should be dismissed with costs of the reference. If the defendant can make title, the plaintiff to be entitled to specific performance, with costs of the action, including those of the reference; but, if he is able to make title to a part interest only, then the Master should determine what sum by way of compensation should be allowed the plaintiff in respect of any outstanding estate; and, in such case, further directions and costs should be reserved.

Boyd, C. April 12th, 1912.

LEE v. CHIPMAN.

Will—Charge on Land for Maintenance—Land Sold Free from Charge under Order for Partition or Sale—Annual Payment for Maintenance—Application of Purchase-money—Payment into Court — Payment out of Annual Sum to Chargee until Death or Fund Exhausted—Election to Take Lump Sum—Opposition of those Entitled to Surplus.

An appeal by the plaintiff and the defendant Robert Stevenson from the report of the Local Master at Cornwall in a proceeding for the partition or sale of land.

The appeal was heard in the Weekly Court at Ottawa.

D. B. Maclennan, K.C., for the appellants.

G. I. Gogo, for the other defendants.

BOYD, C.:—The testator has charged the land in question with the maintenance of his niece Bridget Lee, without limiting such support to the income of the land and without requiring her to live on the place. That, of course, runs for the life of Bridget, who is about sixty years old and somewhat infirm, and the charge is upon the whole of the lands—not merely the rents and issues thereof.

She applied, being also a part owner of the lands, for a sale or partition, and this the Master has granted, in the shape of directing a sale freed from the charge for maintenance. The sale has produced the net sum of $4,315, which is all chargeable with what will be required for maintenance. The Master finds that she is entitled to receive $500 a year for maintenance, and that the annual payment, if capitalised, would amount to more than the entire purchase-money. The amount he fixes would be $4,470; but, in his view, it is not proper so to apply the fund; he directs all to remain in Court, subject to the payment with accruing interest of the yearly sum, and no distribution of the surplus (if any) till her death.

The appeal is taken by her and one of the co-owners, Robert Stevenson, who owns five-eighths of the land, she being owner of one-eighth, to have a lump sum paid out, and she is willing to have that fixed at $3,600, which would leave a surplus, of which Robert would get $448, and she $89, and the others, five in all, small sums under $50 each.

The fund in Court represents the land, and by retaining the fund in Court she gets precisely what was intended for her by the testator so long as she lives and so long as the fund lasts. As against the resisting co-owners, who desire to take the chances of her living a less period than that accepted by the Master as her probable term of life, I do not think I should interfere with the report. There would be a change made in the terms and manner of payment by this process of commutation; and I do not think the Court would have jurisdiction so to determine against the opposition of any co-owner. Power to pay a lump sum is given by statute in certain cases of dower and the like, but not in case of a charge for maintenance created by will. That the consent of both sides is required is implied in the case of Hicks v. Ross, [1891] 3 Ch. 499; and the general rule of the Court is, when charged land is sold, to set apart a sufficient sum to answer the claim for the annuity as it falls due from time to time: In re Parry, 42 Ch. D. 570, 583, approved in Harbin v. Masterman, [1896] 1 Ch. 351. That the Master has done in this report.

It was argued that the terms of the judgment suggest a lump sum as being contemplated. But the Master who made the report was the judicial officer who issued the judgment for partition, and he does not so read his judgment, nor do I. The clause relied on is, that the parties are, after paying costs, entitled to the proceeds of the sale, in the following order and proportions: the said plaintiff is entitled to such an amount as may be sufficient in the aggregate to satisfy her claim and lien for support . . . and that the residue be distributed in proper proportion among the co-owners. The word "aggregate" does not mean one payment of one lump sum, but that a sufficient aggregate sum shall be held to answer the claim as it falls due from time to time. The Master has carried out this direction and has provided fully for her claim during life. The annuitant is living with the defendant Robert; and, no doubt, it is for his interest to forward her claim; but I do not think that can be done by the Court as against the other parties interested.

The appeal should be dismissed with costs to be paid to the respondents out of the money in Court; but no costs to those supporting the appeal.

SUTHERLAND, J. APRIL 12TH, 1912.

SINCLAIR v. PETERS.

Way—Private Place or Way—Dedication—Municipal Corporation — Assessment — User — Prescription—Limitations Act —Deeds—Construction—Injunction—Damages.

In this action the plaintiff complained that the defendant, his servants and workmen, entered upon his lands on or prior to the 11th October, 1910, and broke down and removed his fence and dug up and removed curbing; and sought an injunction restraining him from a repetition of such acts, and damages.

The defendant, in answer, said that the acts complained of were done on land known as "Ancroft Place," a public place and highway, in the city of Toronto, of which he was entitled to a "free and uninterrupted user and enjoyment;" and that, furthermore, by a deed of grant of lands to him and successive deeds of grant to his predecessors in title, he is entitled to a right of way in common with others entitled thereto over the way or road known as "Ancroft Place." He also alleged that he and his predecessors in title had used and enjoyed and acquired prescriptive rights of way over Ancroft Place as appurtenant to his

lands and premises, by user thereof for twenty years and upwards, and pleaded the Limitations Act, 10 Edw. VII. ch. 34. He likewise denied that the plaintiff was the owner of Ancroft Place, and said that the plaintiff had unlawfully endeavoured to obstruct it, and to prevent the defendant's full user and enjoyment thereof. By way of counterclaim he asked for an injunction restraining the plaintiff from obstructing his (the defendant's) user and enjoyment of Ancroft Place, and damages.

M. H. Ludwig, K.C., for the plaintiff.
J. D. Montgomery, for the defendant.

SUTHERLAND, J. (after setting out the facts and referring to various quit-claim deeds and other conveyances):—The defendant has put up an iron fence on the south side of his property on the northerly line of Ancroft Place, with a gate therein. The plaintiff placed a wooden gate in front of the iron gate, and this was taken down by the defendant. The writ was issued on the 13th October, 1910. . . .

At the commencement of the trial of the action, and in pursuance of a notice previously given by the plaintiff to the defendant, an application was made on behalf of the former to amend the statement of claim, in which, in describing Ancroft Place in paragraph 2, the same description was used as in the first-mentioned quit-claim deed, by allowing the point of commencement in the description as set out in paragraph 2 to read 147 ft. 9 in, instead of 200 feet. This application was opposed by the defendant, and was reserved by me until the evidence had been taken. I think it should be allowed, and do allow it. The description in the first-mentioned quit-claim deed, in itself, is, I think, sufficient for the purposes of this suit, notwithstanding the error. "In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect:" Cowen v. Trufitt, [1898] 2 Ch. 551, affirmed, [1899] 2 Ch. 309; . . .. Barthel v. Scotten, 24 S.C.R. 367.

The plaintiff was, in any event, the equitable owner under the quit-claim deed, he having bought the rights of Mrs. Patrick in Ancroft Place, and she having intended by her quit-claim deed to convey the same to him. On the property owned by the defendant, there is a residence, situated towards the north-west corner, not far from the corner of Sherbourne street and Maple

avenue. The property has a considerable frontage on both streets. There is a stable on it, near the northerly limit of Ancroft Place, and towards the rear thereof. Considerable evidence was given on behalf of the defendant to prove that, in connection with the ingress to and egress from the stable, and also in connection with repairs and improvements to the residence, there had been a continuous user of Ancroft Place as associated with or appurtenant to the defendant's property for the statutory period. I am unable to find that this has been made out. There were undoubtedly gaps in the period, and the user was, at best, a discontinuous one. In the first instance, the land known as Rachel street and later as Ancroft Place was used and intended to be used to serve the occupants of the double house situated on the Elwood and Davis properties and furnish a right of way thereto—and later to serve Mr. Henderson and his property. There was evidence that at one time the access to the stable was from Maple avenue. There can be no doubt, I think, that by far the greater part of the traffic upon Ancroft Place was in connection with the properties to the south and east thereof. There was nothing to shew that there was in connection with the land now owned by the defendant any user of Ancroft Place to the knowledge of Mrs. Patrick or adverse to her ownership. There was no grant of a right of way to the defendant or his predecessors in title on the strength of which he can claim. With some hesitation, I have also come to the conclusion that there was no dedication of the land as a public street or highway. When Mrs. Patrick made the deed to Henderson, the latter obtained only a right of way over Ancroft Place or Rachel street, as it was then called. The reference to it, in the conveyances to Henderson and Elwood, as a street or road have no conclusive significance, as in each case they are in the deeds shewn to have been associated with a right of way over the land, which was all the owner of it was yielding up to the grantee. Mr. Henderson testified that, when he obtained his deed, there was a definite understanding between Mrs. Patrick and himself that Rachel street was to be a private street or road and to be kept and continued as such. He also said that, after he purchased, he had given instructions to his gardener to keep up the fences on the north side of Rachel street to prevent user or trespass with respect to the said street or lane. It is true that in his deed he was by Mrs. Patrick given a right to make Rachel street (Ancroft Place) a public street, by the registration, after one year, of a plan, in the preparation of which he could use her name. Such a plan would, of course, before it could be registered, be required to be prepared with the formalities and

in the manner provided by the Registry Act. He registered his deed on the 16th August, 1884. Its registration with the sketch attached could not and did not accomplish this. In the deed to Henderson, Mrs. Patrick reserved to herself the right to make a plan of the land then owned by her lying to the north of Rachel street, and now owned by the defendant, and agreed that, if she did, she would shew the said street on it; she could thereafter have made it a street if she had desired to do so—she never subsequently made or registered a plan shewing it as a street, private or public. In her subsequent deed to Helen E. McCully, of the land which was later acquired by the defendant, she made no reference to Rachel street in any way and gave no right of way over it. Under these circumstances, she still owned the fee in Ancroft Place, subject to the rights of way which she had granted. I think the reference in the deed to Henderson "in common with said Rachel Patrick, her heirs and assigns, and the persons to whom she or her said late husband has already granted or may hereafter grant any part of said lot 22 abutting on said street," must be construed to mean abutting on said street and to whom she would grant such right of way.

The defendant and his predecessors in title are not in that position nor parties in any way to that deed nor entitled to take advantage of it. Subsequent to her deed to Henderson, Mrs. Patrick never did anything, so far as the evidence disclosed, from which the city corporation or any one else could claim or infer a dedication, nor inconsistent with the agreement, which Henderson said they had made, that Rachel street should be continued as a private road. It is true that she was not assessed nor did she pay taxes on Ancroft Place for many years. It is not much wonder that she did not volunteer to do so, nor that the city corporation, seeing the place being used as a right of way for those to the south and east of it, should for a long time have overlooked its assessment. The city corporation have never directly asserted any claim to dedication, unless the alleged assessment of Ancroft Place as a street since 1903 can be so considered, and have not attempted to do corporation work on it: . . . Hubert v. Township of Yarmouth, 18 O.R. 458, at p. 467.

Mrs. Patrick was not called as a witness at the trial. The fact, however, that she executed the quit-claim deed in favour of the plaintiff, for a consideration, would indicate that she considered that she had not dedicated Ancroft Place as a street. There must be an intention to dedicate; and I cannot, from the

evidence, come to the conclusion that such has been satisfactorily made out. . . .

[Reference to Simpson v. Attorney-General, [1904] A.C. at p. 493; Halsbury's Laws of England, vol. 16, sec. 53; 13 Cyc. 475, 476.]

In this case there is no such thing as a way of necessity in question, for the reason that the defendant has abundant access to two public streets from his property. The user of Ancroft Place has been largely in connection with properties, other than the defendant's, with respect to which rights of way have been given by the owner. No one, until the defendant since his recent acquisition of the property, ever in any formal way claimed to use as of right Ancroft Place in connection with and as appurtenant to the land lying north of it. No adverse claim is shewn to have been brought to the notice of Mrs. Patrick. The mere fact that some of the defendant's predecessors in title at odd times used this private way, lane, road, or street, without her knowledge or objection, does not establish a dedication.

The plaintiff will, therefore, have, as asked, an injunction restraining the defendant from a repetition of any of the acts complained of. The damages which the plaintiff has suffered are slight, and I assess the same at the sum of $10. If either party is dissatisfied with that amount, he may have a reference as to the same, at his risk. The plaintiff will also have his costs of suit.

Divisional Court. April 12th, 1912.

Re GRIFFIN.

Executors — Compensation — Commission — Quantum — Appeal.

Appeal by the executors of the will of G. H. Griffin, deceased, from the order of Middleton, J., ante 759, setting aside the order of the Judge of the Surrogate Court of the County of Lambton, whereby he allowed the executors the sum of $3,000 for their care, pains, and trouble as such executors, and in lieu thereof awarding them the sum of $815.73.

The appeal was heard by Mulock, C.J.Ex.D., Clute and Sutherland, JJ.

C. A. Moss, for the executors.

R. C. H. Cassels, for the residuary legatee.

F. W. Harcourt, K.C., for the infants.

The judgment of the Court was delivered by MULOCK, C.J.:—There is no fixed rate of compensation applicable under all circumstances for services of executors and trustees. They are entitled to reasonable compensation; and what is reasonable compensation must be governed by the circumstances of each case: Robinson v. Pett, 2 W. & T. L.C. Eq. 214. Various authorities upon the subject are collected in Weir's Law of Probate, p. 389, et seq. An examination of the cases there cited shews the following allowances to executors according to circumstances. In some instances they have been given a commission on moneys passing through their hands, varying from one to five per cent.; in others, a bulk sum; in others, a commission and a bulk sum; in others, an annual allowance in addition to or exclusive of commission.

As said by Chancellor Vankoughnet in Chisholm v. Barnard, 10 Gr. 481: "Five per cent. commission on moneys passing through the hands of executors or trustees, may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in, and a great deal of labour, anxiety, and time spent in managing an estate, when five per cent. would be a very insufficient allowance."

And in Thompson v. Freeman, 15 Gr. 385, Spragge, V.-C., says: "On the other hand, the amounts might be so large, and the duties of management so simple, that five per cent. would be more than a reasonable allowance."

Thus, there being no established uniform rate or method of compensation, it is necessary here to consider the nature of the estate and the duties required by the testator to be performed by the executors in order to determine what would be a proper allowance for their care, pains, and trouble.

The testator died on the 10th October, 1910, leaving an estate valued at $100,002.98. The estate consisted of the sum of about $3,000 cash on hand, a life insurance policy which realised $3,693, shares in some fourteen different companies of an estimated value of about $93,000, and household furniture of trifling value. The testator bequeathed pecuniary legacies to fifty-three different persons, resident in twenty-three different places in Ontario, Quebec, Manitoba, Great Britain, and the United States. Fifteen of them were infants, under the age of twenty-one years. He also gave legacies to six charities. He created a fund of $10,000 to be held by his trustees for the benefit of his half-sister Frances Griffin during her life, and thereafter for the daughter of his half-brother, Frank Wether-

all. He also directed his trustees to acquire a burial plot at a cost not exceeding $500.

The executors have carried out the trusts of the will, and in the course of administration sold certain stocks, realising therefor $23,837.17. They have also collected interest and dividends amounting to $4,022.67, making together the sum of $27,859.84, and have disbursed in payment of legacies, funeral and testamentary expenses, taxes, debts, and succession duties, $26,813.12. The assets of the estate were situate in the Provinces of Ontario, Quebec, and Manitoba, and the executors were obliged to adjust with the several Governments of those Provinces the amounts of succession duties to which they were respectively entitled. The realising of this sum of $27,859.84 began in October, 1910, and continued throughout the year and until the following October. There were in all forty-seven items of receipts. The disbursement of the said sum of $26,-813.12 extended throughout the same period, and involved sixty separate transactions. There are still in the hands of the executors stocks of the estimated value of $66,641.50, and unpaid specific legacies amounting to $5,853.34.

It appeared during the argument that the executors are now prepared to wind up the estate and transfer the residuary estate to the residuary legatee. I, therefore, am dealing with the case upon the basis of a full administration of the estate.

The learned Surrogate Court Judge has allowed the executors $3,000 or about three per cent. of the value of the estate when taken over by the executors. Adding to that the $4,022.67 income, the total value of the estate would be $104,025.65.

Having regard to the labour and responsibility involved in the carrying out of the testator's directions, I am unable to reach the conclusion that the learned Surrogate Court Judge allowed an excessive amount. On the contrary, I am of opinion that, if he erred at all, it was in not allowing a larger sum. I have not overlooked the circumstance that the estate consisted largely of shares in companies, which, it was argued, were readily convertible; but shares in companies are liable to fluctuation in value, and a loss accruing to the estate because of their falling in value might, under some circumstances, render executors liable therefor, although exercising what they considered good judgment. Such a risk on their part should not be overlooked when compensation for their services is being fixed. No complaint is made that the executors in any respect failed in their duty; and it, therefore, may be assumed that they

exercised good care and judgment in the administration of the very large estate intrusted to them.

I, therefore, am, with very great respect, unable to agree with the view expressed by my learned brother Middleton, and think the order of the Surrogate Court should be restored, with costs of this appeal.

MIDDLETON, J., IN CHAMBERS. APRIL 15TH, 1912.

RE McCREARY v. BRENNAN.

Division Courts—Jurisdiction — Garnishment before Judgment —Claim of Primary Creditor—"Claim for Damages"—Breach of Warranty on Sale of Hay—Part Failure of Consideration — Prohibition — Costs.

Motion by the primary debtor for an order prohibiting a further prosecution of garnishee proceedings before judgment, in the Fifth Division Court in the County of Kent, upon the ground that the claim of the primary creditor against the primary debtor was "a claim for damages;" and that, therefore, under the provisions of the Division Courts Act, 10 Edw. VII. ch. 32, sec. 146, there is no right to garnish before judgment.

Featherston Aylesworth, for the primary debtor.
Christopher C. Robinson, for the primary creditor.

MIDDLETON, J.:—The claim of the primary creditor, as set forth in his affidavit filed upon a motion in the Division Court, arises in this way. Brennan was holding an auction sale upon his farm. When the auctioneer put up the hay in the mow for sale, and asked for bids, the quantity of hay became a very material factor. Brennan then announced that the hay had been measured, and that there were nine tons; whereupon the auctioneer said: "You hear what Mr. Brennan says:; he has had the hay measured: there is nine tons of hay in it; how much am I offered for it?" Thereupon the plaintiff bought the hay and paid for it; but, when he came to draw it away, he found that under the hay was a large quantity of worthless straw, and that there were only four and a half tons of hay.

In his affidavit the primary creditor states that he is advised that these words constitute a warranty, and that he is entitled to recover for breach of warranty.

Upon a motion made against the garnishee summons in the Division Court, the Judge allowed an amendment; and upon the amended claim the primary creditor rests his case not only upon the warranty, but upon an allegation that there was a part failure of consideration, and that the four and a half tons of hay which he did not receive were worth $60; and he claims that sum.

The clause of the statute gives the right to garnish before judgment only where there is a debt or money demand "not being a claim for damages;" and I think the defendant has a right to prohibit proceedings in the Division Court, if he has successfully made out that the claim here is a claim for damages and not a debt.

It seems clear to me that, no matter how the case is looked at, the primary creditor's claim cannot be regarded as a debt or a liquidated demand for moneys. It is essentially an unliquidated demand, and is for damages for failure to receive whatever quantity of hay the contents of the mow fell short of the nine tons sold. If there had been an entire failure of consideration, then at common law the money paid might have been recovered as money received by the defendant for the use of the plaintiff. But here there was not a complete but only a part failure of consideration.

I am, therefore, compelled to award the order sought; but I do not think that it is a case in which I should award costs. If the primary debtor has a good defence upon the merits, he might well have allowed the money to remain idle pending the trial in the Division Court. If he has no defence, the judgment creditor cannot be blamed for seeking to avail himself of this remedy, even if his effort is unsuccessful.

SUTHERLAND, J. APRIL 15TH, 1912.

RAMSAY v. LUCK.

Mortgage—Action for Foreclosure—Subsequent Purchasers of Portions of Mortgaged Land Made Defendants—Failure to Prove Notice of Mortgage—Mistake in Land Titles Office—Mortgage not Recorded against Portions Bought—Costs—Scale of—9 Edw. VII. ch. 28, sec. 21(e).

Action upon a mortgage, for foreclosure, payment, and possession.

T. A. Gibson, for the plaintiff.
S. H. Bradford, K.C., for the defendant Wilson.
G. Waldron, for the defendant Lancaster.
The defendants Luck were not represented.

Sutherland, J.:—The defendant William Luck was the owner of the east half of lot No. 162 on the southerly side of Merton street, in the township of North Toronto, plan No. M-5, which east half had a frontage on Merton street of 50 feet. On the 12th October, 1909, he executed in favour of the plaintiff (his wife, the defendant Kezie Luck, joining therein to bar dower) a mortgage on the said land for $300 and interest, as therein provided. The 50 feet were divided into three parcels, each having a frontage on Merton street of 16 feet 8 inches, and on each parcel was a house. The mortgage was, on the 16th October, 1909, recorded in the land titles office in the city of Toronto; but, by oversight, only as against the easterly one-third portion of the said lands. Subsequently, the defendants Lancaster and Wilson, without notice of the said mortgage, respectively purchased and secured certificates of title to the centre one-third and westerly one-third portions thereof. Later on, the plaintiffs learned of the error as to registration; and, by writ of summons dated the 13th August, 1911, commenced this action for foreclosure, upon the said mortgage.

All four defendants were served with the writ, but the defendants Luck did not enter an appearance thereto, and were not present nor represented at the trial.

The plaintiff in his statement of claim asks, as against all defendants, that the mortgage be enforced by foreclosure and for possession of the mortgaged premises, and in addition, for a personal judgment for the principal money and the unpaid interest as against the defendant William Luck. Each of the defendants Lancaster and Wilson pleads that he bought without notice or knowledge of the plaintiff's mortgage. These last-mentioned defendants were examined for discovery, and the plaintiff thereupon learned that they were, as claimed, innocent purchasers for value, without notice. Upon the face of the record, no notice was apparent; and the plaintiff, in initiating the action as against Lancaster and Luck and making them defendants, was taking a risk that, if he failed to fasten notice upon them, he would be obliged to pay their costs. When, after examination for discovery, he decided to proceed to trial, without discontinuing as against them, he took the risk of the further costs which would thereby be incurred.

He is entitled as against the defendants Luck to the ordinary judgment for foreclosure, limited to the easterly one-third of the 50 feet in question, and to a personal judgment against the defendant William Luck for $300 principal moneys and interest from the 12th October, 1912, according to the terms of the mortgage; and I order and adjudge accordingly.

The plaintiff will have his costs as against the defendant William Luck on the County Court scale: see 9 Edw. VII. ch. 28, sec. 21, sub-sec. (*e*).

The action will be dismissed with costs as against the defendants Lancaster and Wilson.

At the trial, counsel for these defendants offered, in case I should be of opinion, under the circumstances, that they might well be content with costs on the County Court scale only, not to press for costs on the High Court scale, which ordinarily they would be entitled to claim. I think, having regard to the facts, it will be appropriate to give them costs throughout as against the plaintiff on the County Court scale; and I order and direct accordingly.

The oversight having occurred in the land titles office, the plaintiff will be left to seek such relief as he may be reasonably entitled to, if any, out of the assurance fund under the Act.

LATCHFORD, J. APRIL 15TH, 1912.

MARTIN v. MUNNS.

Contract—Undertaking to Re-purchase Shares — Enforcement —Collateral Agreement — Consideration — Acceptance of Interest — Waiver—Estoppel — Bonds — Evidence of Value — Admissibility.

Action to recover $1,000 upon an undertaking or agreement set out below.

H. J. Martin, for the plaintiff.
W. D. McPherson, K.C., for the defendant.

LATCHFORD, J.:—In 1904, the plaintiff was induced by the defendant to subscribe for stock in a company then in process of formation; the defendant at the time agreeing that, if the plaintiff at any time wished to withdraw the $1,000 proposed

to be invested, the plaintiff would, upon returning the stock subscribed for and $1,000 bonus stock that went with it, be entitled to receive from the defendant $1,000 in cash.

About a year later, the plaintiff desired to return the stock and receive back from Munns, as agreed, the money invested. Munns, even when threatened with a writ, declined to pay the plaintiff the $1,000. A new agreement was then made, as expressed in the following letter:—

"Toronto, Canada, Jan. 3rd, 1906.

"Arthur W. T. Martin, Esq.,

"Dear Sir:—Following up our several conversations regarding the $2,000 of stock that you hold in the Crown Manufacturing Company, I now hereby confirm my verbal understanding with you in writing, and agree to hand over to you two first mortgage bonds of the Eastern Coal Company Limited, bearing six per cent. interest, payable semi-yearly, of the denomination of $500 apiece, with the accumulated interest, for the $2,000 of stock you hold in the Crown Manufacturing Company Limited; it being understood and agreed that I will undertake to sell the said bonds for you, within a period of three months, for the face value of the same; in cash and accrued interest if the time exceeds three months; and it is further understood that you will not offer the same for sale to any person else during that period. To all of which I agree.

"Yours truly,

"W. Munns."

"I hereby agree to the foregoing. Arthur Wesley Thomas Martin."

The bonds were thereupon delivered to the plaintiff. He, however, urged the defendant to sell them, as had been agreed in the undertaking given by the defendant. But the defendant failed to sell, notwithstanding frequent urgings by the plaintiff; and in November, 1908, the plaintiff wrote to the defendant insisting that the bonds should be sold for their par value and the proceeds handed over to the plaintiff. A letter is in evidence which shews the position taken by the plaintiff at this juncture. He says: "I have allowed this matter to go on from time to time, owing to your repeated promises over the telephone and verbally in my presence that you were doing all you could to sell; but, as up to the present time I have received no definite proposition in reference to them (the bonds), I hereby demand, as before, that I be paid the par value of these bonds at once."

The defendant still declined to sell the bonds; again putting the plaintiff off with specious promises; and the plaintiff was obliged to bring this action.

The agreement is admitted, but the defence is set up that the undertaking is collateral to the bargain between the parties, and that, as it is without consideration, it cannot be enforced.

I think this defence fails. The undertaking is part of the transaction which resulted in the transfer to the defendant of the plaintiff's $2,000 stock in the Crown Manufacturing Company. It was made for good consideration; and, as a matter of law, as well as of common honesty, is enforceable against the defendant.

The further defence is urged, that the plaintiff, by accepting interest from time to time on the bonds, waived his right to insist on their sale by the defendant. The plaintiff did accept interest from time to time and surrender the coupons; but, considering the position taken by the defendant in deferring the sale, the acceptance of interest by the plaintiff was not, in my opinion, any waiver of his right, and cannot be urged as estopping him from claiming performance by the defendant of his agreement.

Upon the evidence, the bonds are of no value. The company has gone into liquidation, and a sale of the assets of the company for a few thousand dollars by the receiver has not been carried out. Since the hearing, the Registrar has received a letter from the plaintiff's solicitor in which it is stated that the assets of the coal company have been sold under an order of the Supreme Court of Nova Scotia, and that, after deducting all charges, a first and final dividend will be paid to the bondholders of 3.45 cents on the dollar, upon production of the bonds. The defendant's solicitor protests against the acceptance of this statement; but, while it is not evidence, I am confident that an appellate Court would permit evidence of the amount realised upon the bonds. In that event, their value would be $37.20; and the defendant, if he desires, will be entitled to reduce his liability by that amount. Otherwise, the plaintiff will be entitled to judgment for $1,000, with interest from the 1st January, 1910, and his costs of suit, and the defendant will then be entitled to the bonds, which are now in Court.

BRITTON, J. APRIL 15TH, 1912.

GUY MAJOR CO. v. CANADIAN FLAXHILLS LIMITED.

Penalty—Companies Act, sec. 131, *sub-secs.* 5, 6—*Failure of Company to Make Returns—Continuing Default — Right of Corporation to Sue for Penalties—"Private Person"—Absence of Statutory Authorisation.*

Action for penalties.

R. S. Hays, for the plaintiffs.

H. D. Gamble, K.C., and F. Erichsen Brown, for the defendants.

BRITTON, J.:—The plaintiffs, a foreign corporation, having their head office at Toledo, Ohio, have brought this action against the defendants for penalties which, it is alleged, the defendants incurred because they did not on or before the 8th February in each of the years 1909, 1910, and 1911, transmit a summary, properly verified, containing, as of the 31st December preceding, the particulars required by the Companies Act, 7 Edw. VII. ch. 34, sec. 131, sub-secs. 5 and 6, to the Provincial Secretary for the Province of Ontario.

The penalty for such default is $20 for every day during which the default continues.

The Act cited, sec. 131, sub-sec. 6, provides that these penalties "shall be recoverable only by action at the suit of or brought by a private person suing on his own behalf with the written consent of the Attorney-General of the Province of Ontario."

The defendants were incorporated by letters patent dated the 10th September, 1908, and therefore should have made the returns required on or before the 8th February in each of the years mentioned.

The consent of the Attorney-General was obtained by the plaintiffs dated the 19th December, 1911, for bringing this action, but limiting the plaintiffs' right of recovery to a sum not exceeding $3,000.

The action was commenced on the 27th September, 1911.

The returns which should have been made on or before the 8th February, 1909 and 1910 respectively, were not made until the 1st September, 1911, and the return due on the 8th February, 1911, was made on the 28th July, 1911. The aggregate of the per diem penalties, if the plaintiffs are entitled to recover, would, for the period within two years prior to the com-

mencement of this action, largely exceed $3,000. The action was commenced not only against the defendant corporation but also against George A. Turner, who, at the time the returns should have been made, was manager of the company. The action as against Turner was discontinued, but was proceeded with against the company.

The pleadings do not afford much information as to the real merits of the action or defence. In fact, the statement of defence, if it sets up any defence, is, that the requisite returns were duly made before the consent of the Attorney-General was obtained and before the commencement of the action. The argument was, that there must, under the Act, be a continuing default at the time of the consent of the Attorney-General and at the time of the commencement of the action. I am not prepared to accede to that contention; and, taking the view I do of the plaintiffs' right to recover, it is not necessary to consider that objection further.

At the trial many other objections were raised to the right of the plaintiffs to recover—and I allow, if necessary, an amendment of the statement of defence, so that these objections may be set out.

All that is known of the plaintiff corporation is what appears in the statement of claim, that they "carry on the manufacture and sale of linseed oils." As the defendants did not specifically deny the incorporation of the plaintiffs, it was not necessary to prove it: see Con. Rule 281. Passing over all the other objections raised, I am of opinion that the plaintiff corporation have no right, as such corporation, to sue for these penalties.

The plaintiff is not "a private person" suing on his own behalf within the meaning of the statute. There is nothing in the Act under which this action is brought as to appropriation of these penalties—so 7 Edw. VII. ch. 26, sec. 1, sub-sec. 2, applies, and one half would go to the "private party" suing, and the other half to the Crown.

A corporation cannot for the purpose of recovering penalties be a common informer, unless expressly authorised by statute—and express authority to the plaintiffs to sue is wanting in this case.

The case seems covered by the authority of Guardians of the Poor of the Parish of St. Leonards, Shoreditch, v. Franklin, 3 C.P.D. 377, 9 L.T.R. 122.

The point came up so recently as the 9th January last before the Beaconsfield Petty Sessions, when the above case was cited

and followed. At the Petty Sessions, the points were successfully raised that the prosecutor had not proved the minute of the corporation authorising the commencement of proceedings and had not passed the minute authorising the prosecuting solicitor to appear to prosecute. I would be slow to follow—even if I should follow—mere technicalities raised to prevent recovery in a proper case; but in an action for a penalty the law must be strictly followed and rigidly interpreted. A reference to the Sessions case may be found in Law Notes (Northport, N.Y.), the April number, 1912, at p. 16.

In this case it was not shewn that the plaintiff corporation had any power to collect penalties even in the State of Ohio—much less to collect them in Ontario.

The Joint Stock Companies Act may be wide enough to permit the incorporation of a company to collect penalties from defaulting companies or individuals. The plaintiff corporation were not shewn to be such, and no license was produced authorising them to do business in Ontario. The Interpretation Act, 7 Edw. VII. ch. 8, sec. 7, clause 13, which provides that "person" shall include any body corporate, does not help the plaintiffs. This interpretation clause seems to me to emphasise the words "private person" to distinguish a private person from an ordinary corporation. Once the position of the plaintiff is established as that of attempting to act as a common informer—there must be express statutory authority to sue. American cases are in accord with the English, and they allow a corporation to sue for a penalty only when the corporation is, eo nomine, to get the penalty for its own use—or for other purposes. See Wiscasset v. Thursby, 3 Me. 207.

In Ancient City Sportsmen's Club v. Miller, 7 Lansing (N.Y.) 412, it was held that the power to sue and be sued is subject to the qualification that it is within the scope of the statute and the legitimate purpose of the organisation. Where penalties are recoverable by any person in his own name, power to recover them is not conferred upon corporations.

Judgment will be for the defendants, dismissing this action with costs.

RIDDELL, J., IN CHAMBERS. APRIL 15TH, 1912.

McNAUGHTON v. MULLOY.

Practice—Dismissal of Action for Want of Prosecution—Delay —Counterclaim — Terms — Costs — Discretion — Appeal.

An appeal by the defendant from the order of the Master in Chambers, ante 970.

Grayson Smith, for the defendant.
D. Inglis Grant, for the plaintiff.

RIDDELL, J.:—In Siever v. Spearman (1896), 74 L.T.R. 132, in a motion to dismiss for want of prosecution, the Court of Appeal said: "No doubt, the Master had a right to dismiss the action for want of prosecution, or to make an order in such terms as he might think just and proper . . . What form of order he will make depends upon the circumstances of the case as they are presented to him. Also he might attach other conditions to the order, provided they were not unreasonable or unfair. The Judge could alter the order made by the Master if he thought that it was not the right order . . ."

I am unable to say, on the facts of the present case, that the discretion to be exercised by the Master was wrongly exercised —or to say that the order "was not the right order."

The appeal will be dismissed; costs to the plaintiff in any event.

RIDDELL, J., IN CHAMBERS. APRIL 15TH, 1912.

RE DINNICK AND McCALLUM.

*Municipal Corporations—Regulation of Buildings on Streets—By-law—Validity—*4 *Edw. VII. ch.* 22, *sec.* 19*—Building "Fronting" on Street—Authority of Previous Decision—Ontario Judicature Act, sec.* 81 (2)*—Reference of Motion to Divisional Court.*

Motion by W. L. Dinnick for a mandamus directed to the Corporation of the City of Toronto and the City Architect to issue a permit to the applicant for the erection of an apartment house on the corner of Avenue road and St. Clair avenue, in the city of Toronto.

W. C. Chisholm, K.C., for the applicant.
H. Howitt, for the respondents.

RIDDELL, J.:—By the Act (1904) 4 Edw. VII. ch. 22, sec. 19, it was provided that "the councils of cities . . . are authorised . . . to pass and enforce . . . by-laws . . . to regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street."

The Council of the City of Toronto, purporting to act under the powers given by this statute, in December, 1911, passed by-law No. 5891, containing the following provisions: "No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road, from St. Clair avenue to Lonsdale road, within a distance of forty feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law."

Avenue road is admittedly a "residential street," within the meaning of the Act.

Mr. Dinnick, being the owner of the block of land at the north-east corner of St. Clair avenue and Avenue road, desired to build an apartment house at the corner, 60 feet on St. Clair avenue and 130 feet on Avenue road. Drawing up all proper plans and specifications, he applied to the City Architect for a building permit, which was refused, solely on the ground that the proposed building would be in violation of by-law 5891.

Upon motion for a mandamus, the respondents did not insist upon any technical objection—and the real matter to be decided is as to the validity of the by-law and its application to the present case.

It is admitted that the building "fronts" on St. Clair avenue.

The first and substantial contention of the applicant is, that the legislation does not empower the city to pass a by-law prohibiting the erection of a building within a certain distance of a residential street, unless the proposed building "fronts" on the street.

I do not agree with that contention. The power is given to limit the distance of buildings from the line of the street in front of the proposed buildings—the street is in front of the building, indeed, but that does not necessarily imply that the part of the building which is in common parlance called "the front" should face or look toward the street.

Any side or face of a building is a front, although the word is more commonly used to denote the entrance side: New Oxford Dict., sub voc. "Front," p. 563, col. 3, para. 6. Back-front, rear-front, the four fronts of a house, are all terms in common use—and there is no reason why a building should not "front" on two, three, or four streets—or that two, three, or four streets should not be "in front thereof"—all such streets would, I think, "confront" the building: New Oxford Dict., "Front," p. 564, col. 1, para. 10 (*a*).

We must look at the object of the legislation. It must be plain that the whole object was to enable the city to make residential streets more attractive, etc., by preventing building out to the street line. It would make a farce of the legislation if persons were to be allowed to build with the gable ends of their houses toward the street and up to the line of the street, claiming that they did not front on the street, and therefore the street was not "in front thereof." And it would be no less absurd to say that, if people could not build in that way in the middle of the block, they could at the corners. I am of the opinion that the power exists to prevent any buildings being placed within a distance (of course reasonable) of the line of a residential street.

Then it is said that this is in effect an expropriation of the applicant's land on St. Clair avenue, but this is an argument to be advanced to the legislature and to the council.

The by-law is not perhaps very well drawn—it is not lots through which Avenue road runs, and which, therefore, are "on both sides of Avenue road," which are meant, but lots on each side. But the language is quite intelligible; and can fairly be made to cover the lot of the applicant. "East and west lines" must, of course, be read distributively. No objection can be taken to the prohibition to "build on the lots fronting or abutting on . . . Avenue road," where the legislation authorises a prohibition to build on any lot within the fixed distance of the line of the street.

I should dismiss the motion but that a decision of the Chief Justice of the King's Bench has been brought to my attention, City of Toronto v. Schultz (1911), 19 O.W.R. 1013, which seems to be the other way. I am not at liberty to disregard sec. 81 (2) of the Ontario Judicature Act; but, as, with the utmost respect, I "deem the decision previously given to be wrong and of sufficient importance to be considered in a higher Court," I refer this case to a Divisional Court.

DIVISIONAL COURT. APRIL 15TH, 1912.

HAWKINS v. McGUIGAN.

Highway—Obstruction Caused by Contractor Doing Work for City Corporation—Dangerous Condition of Street—Injury to Pedestrian—Negligence — Contributory Negligence — Findings of Jury—Duty of Contractor to Public.

Appeal by the defendant from the judgment of MEREDITH, C.J.C.P., in an action tried by him with a jury, in which the plaintiff was awarded $1,000 damages for injuries sustained by him by falling, while upon King street east, at the junction of that street with the Don Improvement road, in the city of Toronto.

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

M. K. Cowan, K.C., for the defendant.

H. D. Gamble, K.C., for the plaintiff.

The judgment of the Court was delivered by BRITTON, J.:—The defendant was engaged, under a contract with the Corporation of the City of Toronto, in erecting a bridge over the Don river at its intersection with King and Queen streets east. A roadway had been made, called the Don Improvement road, crossing King street and extending southerly upon the Don Esplanade. It is alleged that there was a sharp decline from the sidewalk upon the south side of King street to the Don Improvement road, and that this sidewalk and the roadway at the point of intersection of the sidewalk with the Don Improvement road was in a dangerous condition.

The plaintiff was a workman employed in Sabiston's factory, which is situate on the Don Improvement road, south of King street. He resides on Sumach street, and on the morning of the accident went from his home by his usual route, which was down Sumach street to Queen street, along Queen street to River street, across River street to King street, then along King street to the corner of King and the Don Esplanade. He turned that corner to go to Sabiston's factory. There was a sidewalk, two or three planks wide, laid longitudinally, leading from or nearly from the corner mentioned, to the factory. This had been the plaintiff's usual route for five years. The defendant, in the execution of his contract work, had thrown a considerable

quantity of earth upon the King street sidewalk at this corner, erecting there a bank two or three feet high. As stated, the plaintiff, arriving at this corner, turned to the right and started to go down the icy incline, when he slipped and broke his leg. This bank, upon the sidewalk, directly upon the road usually travelled by persons going to and from the factory by way of King street, was a dangerous obstruction. Depositing earth there to the extent proved, leaving it there until ice formed upon it, leaving what appeared as a pathway, connecting, or nearly connecting the plank walk on Don Esplanade with the sidewalk on King street, was evidence of negligence.

The jury found that the defendant, in not providing a proper approach to the sidewalk, and in leaving the road in the place where the accident happened in the condition in which it was when the accident happened, was guilty of negligence.

It was established—it was apparently admitted by the defendant—that, before his interference with King street, it was higher than the Don Esplanade—and consequently a slope down to the Don Esplanade. To increase this slope upon the pathway in such general use, and not either stopping it up or in some way protecting persons using it, was a dangerous experiment, by the defendant.

The defence, apart from that of denial of negligence by the defendant, is that of contributory negligence by the plaintiff, and in that connection it is said that there was a good and sufficient road provided by the defendant which the plaintiff could and ought to have used. I am unable to say that, even with the bank in plain sight—increasing the incline to the Don Esplanade—it was so much the duty of the plaintiff, in the circumstances of this case, to go by another road—newly made, apparently more for horses and vehicles than for those on foot—as to prevent his recovery. It was a question for the jury. This case could not have properly been taken from the jury. The finding of the jury is entirely in favour of the plaintiff, not only as to there being no negligence on his part, but that the newly made roadway provided as a means of access from King street to the Don Esplanade, was not reasonably safe and sufficient for traffic, vehicular and pedestrian. I cannot agree that, as argued, the findings of the jury were "perverse." I cannot think that it was necessarily a negligent act on the part of the plaintiff to attempt to go to the Don Esplanade by means of this incline. He knew of the danger; but it was in his path, on the place where he had a right to be; and he sought to pro-

tect himself by careful walking—he did not apparently realise the extent of the danger. The plaintiff took his chances, but did so carefully endeavouring to avoid accident.

As between the defendant and those lawfully using King street and the Don Esplanade, this is a case of wrongful obstruction by the defendant of the highway, and the defendant is not protected by his contract with the city corporation against damages to persons, without fault on their part, sustained by reason of such obstruction. I do not need to consider or discuss the question of liability of the Corporation of the City of Toronto to the plaintiff, further than to say, as was said in the case of Tilling v. Dick, [1905] 1 K.B. at p. 571, to which case reference was made on the argument, that the contractor was not the servant of the corporation. The work complained of was done by the defendant as contractor, and in doing it he was not acting in the execution of any public duty or authority, but simply in performance of the private obligations which arose from the contract into which he had entered. The defendant, as an independent contractor doing the work for his own profit, was not authorised to obstruct the street in the manner complained of; and his duty to the public was to do his work in such a way as not to injure persons lawfully and carefully using the street.

There was no suggestion that this pathway could not, if allowed to remain, have been made safe.

I have read the charge to the jury of the learned trial Judge, and also his reasons for judgment; and it seems to me that the plaintiff is clearly entitled to recover.

The case of City of Birmingham v. Law, [1910] 2 K.B. 965, is in favour of the plaintiff's contention.

The appeal should, in my opinion, be dismissed with costs.

MIDDLETON, J. APRIL 16TH, 1912.

* LIVINGSTON v. LIVINGSTON.

Partnership—Account—Profits of Separate Business Carried on by one Partner—Assent of other Partner—Competing Business—Sale of Property of Firm—Purchase by Nominee of Partner—Adequacy of Price — Finding of Referee — Liability to Account for Profits on Resale—Allowance to Surviving Partner for Services in Liquidation of Partnership—Trustee Act, secs. 27, 40—Application Confined to Express Trustees.

*To be reported in the Ontario Law Reports.

An appeal by the defendant and a cross-appeal by the plaintiffs from the report of George Kappele, K.C., Official Referee, upon a reference for taking the accounts of a partnership which formerly existed between John Livingston and James Livingston. John Livingston died in 1896; and this action was brought by his representatives against James.

The Referee found, among other things, that a certain business carried on at Yale, Michigan, was an asset of the firm of Livingston & Livingston; and he required James Livingston to account for the profits.

I. F. Hellmuth, K.C., and J. H. Moss, K.C., for the defendant.

W. Nesbitt, K.C., and H. S. Osler, K.C., for the plaintiffs.

MIDDLETON, J. (after setting out the facts):—The learned Referee has found that the Yale business is and always was a separate business, and that it was not owned by the partnership; and no appeal has been had from that decision. The Referee has, however, found that the facts bring the case within the rule of law laid down by Lindley, L.J., in Aas v. Benham, [1891] 2 Ch. 244, 255: "It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection. It is equally clear law that if a partner, without the consent of his co-partners, carries on a business of the same nature as a competing business with that of the firm, he must account for and pay over to the firm all profits made by that business."

Upon that assumption the Referee has directed the defendant to bring into the partnership accounts all the profits received by him from the Yale business; and I understand this ruling to include not merely the profits which have actually been divided, but profits which have gone to increase the capital of that concern.

Upon the argument before me it was admitted that this was too wide, and that James's liability, if any, to account, must be taken to have terminated upon the dissolution of the Canadian firm by the death of his brother John.

With great respect for the learned Referee, and realising the advantage he had in hearing some portion of the evidence, I find myself unable to agree with him. I think the irresistible infer-

ence from the facts is, that what was done by James was done with the assent and approval of John; and, therefore, the rule has no application.

The case in this aspect is singularly like Kelly v. Kelly, 20 Man. L.R. 579, decided since the learned Referee's report.

Had I not come to this conclusion, I would have hesitated long before determining that this business was a competing business, within the rule in question. . . .

The second ground of appeal is in connection with an oil mill owned by the firm. After the dissolution, and after the parties were at arm's length, and represented by separate solicitors, negotiations took place between James Livingston and the representatives of John for the purchase of this mill. James offered $45,000. This was at first accepted, but the acceptance was withdrawn. The property was then offered for sale, and was purchased by one Erbach, brother-in-law of James, for $38,500. This sale was attacked before the Referee as being a sale at an undervaluation; but the Referee found, upon the evidence, that the sale was provident, and the price realised was as much as the mill was worth. This finding is well warranted by the evidence. . . .

This sale was further attacked upon the ground that James Livingston was in truth himself the purchaser, and that Erbach was a mere trustee for him; and the Referee has so found. A company was incorporated shortly after the purchase, and the property was turned over to it, and this company has, in its turn, again sold to the Dominion Oil Company. The whole transaction was financed upon James Livingston's credit, and neither the purchaser nor any of the shareholders of the company have ever put any money into the concern. I do not think it was open to the Referee to inquire into the title of the purchasers, in their absence. The company, although the creation of James Livingston, and in one sense almost identical with him, was still a legal entity and could not be deprived of its property in its absence; but James Livingston can be made to account, upon a proper basis, if he has been guilty of any wrongdoing.

Upon the appeal before me it was argued that the Referee's finding of fact was not correct. No doubt, the finding is opposed to the oath of all those concerned; but actions frequently speak louder than words; and the conclusion appears to me irresistible that Livingston was in truth the purchaser.

I was urged to find that the correct inference from the evidence is, that Livingston was not the purchaser at the sale, that

Erbach was not a trustee for him, but that, after the contract has ceased to be executory, Livingston had purchased from Erbach. The difficulty is, that there is no evidence to support this contention, and that it is quite opposed to what is stated by every one. . . .

Livingston, no doubt, was advised, and, no doubt, knew, that he would not buy directly or indirectly; but, nevertheless, I think Erbach did buy for him; and everything that has taken place subsequently is consistent only with this view.

But I cannot at all agree with the consequences the Referee has attributed to this finding of fact. He says that the defendant must account to the estate for what was received by the James Livingston Linseed Oil Company when it went into the oil merger and transferred its property to the Dominion Linseed Oil Company.

I do not think this is the result. Before the transaction was attacked, Erbach has conveyed the property to the James Livingston Company. Their title has not been impeached. This transfer was at the same purchase-price, and merely involved the assumption of the liability to pay the $38,500 to the estate; so there was then no profit. Nevertheless, Livingston would be liable to account for the real value of the property which he had improperly purchased; but it has been found that the property sold for its full value, and the finding has not been appealed from; and I think this ends his liability.

The consequences of the Referee's finding appear to be most serious. The James Livingston Oil Company carried on business for years. The builders and machinery formed a very small part of its real assets. It was, as a going concern, transferred—probably at a fictitious price—to the Dominion company; and it would be an extraordinary thing if the result should be, that the estate should receive much more than the buildings and machinery were worth, and much more than these buildings and machinery cost or could be duplicated for. The question involved somewhat resembles that discussed in Lindley on Partnership, 7th ed., p. 634, concerning the liability of partners who carry on a partnership business, after a dissolution, and the profits made arise, not so much from the partnership assets which are used, as from the skill, industry, and ability of the surviving partners.

The question of the measure of damages of a trustee who becomes himself a purchaser is dealt with in the Divisional Court in the case of Atkinson v. Casserley, 22 O.L.R. 567.

The third question is the propriety of the allowance made by the Referee to the defendant for his services in connection with the liquidation of the partnership. No doubt, the defendant has rendered great services to the partnership; and, as a matter of fairness and equity, his services ought to be remunerated; but I fear that the law is against his claim. In England it is well-settled—though I have been unable to find any case indicating the precise ground upon which such a claim is disallowed. It may be because of the nature of the partnership contract; or it may be because in England trustees render their services gratuitously, unless it is otherwise expressly provided in the trust deed. More probably there has never been any exact statement of the reason for the rule, because no English lawyer would think of placing the right of a surviving partner higher than the right of a trustee.

I can find no trace of any such allowance having been made in Ontario. The right, if it exists, must be based upon the Trustee Act. For convenience I refer to the Act in the revision of 1897, which in this respect is similar to the Act of 1887, which probably applies. The sections dealing with this matter are 40 et seq. Section 40 provides that "any trustee under a deed, settlement, or will . . . or any other trustee, howsoever the trust is created," shall be entitled to an allowance. These words, it seems to me, apply only to express trustees; and this impression is strengthened by reference to sec. 27, which provides that the expression "trustee" in the next five sections of the Act include "a trustee whose trust arises by construction or implication of law, as well as an express trustee." So, even if a surviving partner could be regarded as a trustee, he would not be within the provision of the statute relating to remuneration.

Besides this, there is authority for the statement that a surviving partner is not a trustee at all: Knox v. Gye, L.R. 5 H.L. 675. His position, no doubt, imposes certain obligations and duties which are in their nature fiduciary; but it is not every one who is subjected to these obligations and restraints who can claim to be a trustee and entitled to all the privileges of a trustee. A wider construction has been adopted in the interpretation of the statutory provision corresponding with sec. 27. See In re Lands Allotment Co., [1894] 1 Ch. at p. 632; but I am precluded from applying this reasoning to the case in hand, because of the view I entertain that sec. 40 applies only to express trustees.

The result is, that both appeal and cross-appeal succeed to the extent indicated; and, as success is divided, there should be no costs.

DIVISIONAL COURT. APRIL 16TH, 1912.

COREA v. McCLARY MANUFACTURING CO.

Master and Servant—Injury to Servant—Negligence—Dangerous Machine—Findings of Jury—Want of Evidence to Support—View by Jury—Disobedience of Instructions—Inadvertence—New Trial.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the plaintiff, in an action for damages for personal injuries sustained by the plaintiff while working in the defendants' factory.

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

G. S. Gibbons, for the defendants.

E. M. Flock, for the plaintiff.

RIDDELL, J.:—The plaintiff, an Italian, 21 years of age, was working on a stamping press, stamping dipper bottoms. The operation was as follows. The workman would take a tin "blank" up with his left hand, place it upon the plate of the machine in the reverse part of the die, put his foot upon the treadle of the machine, which caused the obverse of the die to descend upon the blank, and, after pressing it into shape, rise, leaving the blank; then the operator would, with a small lever in his right hand, raise the stamped tin from the reverse of the die, when he saw that the part of the machine carrying the reverse, in the meantime, had come to a standstill. This operation was repeated da capo.

The workman, the plaintiff, was thus working on the 22nd July, 1911, when, by some means, his hand got caught between the parts of the die, and he sustained a permanent injury to his left hand. He says his foot was not on the treadle at the time of the accident, but he had it on the stool upon which he was sitting: and he does not know "why it dropped."

Much evidence was given that it was impossible for the die to come down, unless the plaintiff put his foot upon the treadle—and some (rather vague indeed) that a certain "tick, tick," or "click, click," which the plaintiff says he heard, might indicate that a spring or key was "not clear of this connecting point," that the "click click there might keep on until it would wear the corners off and in some . . . cases it would fetch the press down ahead of its time."

The machine was produced at the trial for the inspection of the jury. . . .

[The learned Judge then set out certain of the proceedings at the trial. The jury were allowed to visit the defendants' factory, where they saw similar machines in operation. The questions left to the jury and their answers were as follows:—

1. Was the machine on which the plaintiff was working a dangerous machine? A. Yes.

2. Was it practicable to securely guard the machine? A. Yes.

3. Was there a defect in the machine which caused the die to come down without the treadle being pressed upon by the operator? A. Yes.

4. If so, what was the defect? A. Weakness of the coil spring which operated the steel dog.

5. If the machine was defective, was its defective condition not discovered or remedied owing to the negligence of some person intrusted by the defendants with the duty of seeing that the condition or arrangement of the machine was proper? A. Yes.

6. If so, to whose negligence? A. The negligence of the foreman of this special department.

7. Was the plaintiff sufficiently instructed as to the way in which the machine should be operated so as to avoid accident to the operator? A. No.

8. If he was not, in what respect were the instructions insufficient? A. We firmly believe the operator was not properly instructed by his foreman.

9. Was the accident due: (a) To the absence of a guard? (b) To the plaintiff being insufficiently instructed how to operate the machine? (c) To a defect, if any, in the machine, or to any or either of these causes, and, if so, which of them? A. Owing to the absence of a guard.

10. Was the accident due to the plaintiff having kept his foot on the treadle? A. No.

11. If so, was the plaintiff negligent in keeping his foot on the treadle? A. No.

12. Damages? A. $700.]

From all that took place it is, to my mind, perfectly clear that the jury have proceeded, not upon the evidence at all, but upon their own judgment (if it can be called a judgment, and not a mere guess, as I think it was) in finding that the coil spring which held the steel dog was weak, and that allowed the die to come down without the treadle being pressed upon by the operator.

It was this, and this only, which would justify them in finding (if they did find) that the plaintiff did not cause the die to descend by putting his foot upon the treadle.

It is quite clear that where Court or jury look at the locus of an accident or the machine which is said to have caused one, it is simply to enable the trial tribunal the better to follow the evidence—and that the verdict is still to be given upon the evidence. Nothing of the kind absolves the jury from their oath, "You shall well and truly try the issues joined between the parties and a true verdict give according to the evidence."

In any view, it is, if not inevitable, at least nearly so, that it must have been found that the plaintiff himself, in violation of his instructions, had put his foot on the treadle at the wrong time, and that at the time of the accident he was not standing as he should have done.

In such case, the verdict would be for the defendants, even if a possible guard had been left off.

In Mercantile Trust Co. v. Canadian Steel Co., ante 980, I had occasion recently to consider the case of a workman, by inadvertence or otherwise, putting himself in the wrong place. Following a Divisional Court case, Laliberté v. Kennedy, there mentioned, I held that mere inadvertence in disobeying an order did not excuse.

Then D'Aoust v. Bissett, 13 O.W.R. 1115, followed as it has been in the Divisional Court, is authority for saying that if the workman gets into the wrong place or acts as he should not, his act being one without which the accident would not have happened, the master cannot be made liable.

The defendants' counsel saying he would be satisfied with a new trial, I think that relief should be granted.

Costs of the appeal to be to the defendants in any event; costs of the last trial to be in the cause unless otherwise ordered by the trial Judge.

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

MEREDITH, C.J.C.P. APRIL 17TH, 1912.

*RE McGILL CHAIR CO. MUNRO'S CASE.

Company—Winding-up—Contributory—Shares Issued at a Discount—Ultra Vires—Liability of Allottee—Mistake of Fact or Law—Repudiation—Cancellation of Allotment—Ontario Companies Act, secs. 10, 33, 37—*Company Treating Allottee as Shareholder—Knowledge and Acquiescence—Allotment of Half Share.*

An appeal by the liquidator of the company from an order of the Local Master at Cornwall, dated the 12th September, 1911, refusing to settle the respondent on the list of contributories in respect of two and one-half shares of the capital stock of the company, which was in liquidation under the Dominion Winding-up Act.

George Wilkie, for the liquidator.
J. A. Macintosh, for Munro, the respondent.

MEREDITH, C.J.:—The facts, as far as they are material to the question for decision, are undisputed, and are as follows. The respondent was asked by McGill, a director of the company, to subscribe for shares, and was promised 7½ fully paid-up shares of $100 each, for $500; and he was advised by Pitts, another director, to do so. The respondent agreed to take the shares on these terms, and accordingly subscribed for them and paid the $500, receiving, on the 16th January, 1907, a stock certificate describing the shares as fully paid up.

This transaction was not an isolated one, for, as I understand, all the shares issued by the company were subscribed for and allotted on the same terms. All parties acted in good faith and under the belief that the transaction was one into which the company might lawfully enter. A resolution of the directors had been passed on the 31st October, 1906, "that services in connection with the promotion and organisation of the McGill Chair Company be paid for in fully paid-up shares of the stock of the company, and that certificates be issued for the same." Instead of allotting bonus shares to the persons who had rendered the services mentioned in the resolution, the plan was adopted of giving to each person who subscribed for shares three shares for every two for which he paid, or, at that rate;

*To be reported in the Ontario Law Reports.

the additional 50 per cent. being provided by the shares the issue of which was authorised by the resolution.

Although this was the plan adopted, Munro was treated in the books of the company as having subscribed for five shares and paid for them with the $500, and as holding 2½ shares paid for by "services rendered in connection with promoting this company."

The respondent, on the 24th April, 1908, gave a proxy to Mr. Campbell to vote for him at a shareholders' meeting to be held on the 27th of that month, and in it he described himself as the holder of 7½ shares, and the respondent himself attended two of such meetings.

In January, 1910, the company, as the learned Master puts it, was in deep water financially.

Some of the shareholders to whom shares had been allotted, on similar terms to those on which the respondent's shares were allotted to him, had, about a year before this, learned of the illegality of the transaction, and demanded that the certificates which had been issued to them should be cancelled, and new certificates issued for the shares for which they had fully paid in cash. These demands, and occasional threats of legal proceedings to enforce them, continued during the year preceding the passing of the resolution to which I shall next refer.

On the 14th January, 1910, at a meeting of the shareholders, it was resolved: "That all stock certificates which have been regarded in the light of bonus stock be recalled into the company, and whereas Thomas McGill performed special services in connection with the promotion of the company and is desirous of retaining his stock, that he may be exempt from the above resolution."

The respondent made no separate demand to have his bonus shares cancelled, but he was present at this meeting and voted in favour of the resolution.

In pursuance of this resolution, the stock certificates except McGill's were called in and cancelled, and on the 22nd January, 1910, a new certificate was issued to the respondent for 5 fully paid-up shares.

In the view of the Master, the respondent in accepting the 7½ shares, acted under a mistake of fact; and, having repudiated the bonus shares, as the Master found, as soon as he became aware of the mistake, he was entitled to have the allotment of them cancelled, as was done.

The mistake under which, as the Master thought, the respondent acted, was in believing that the 7½ shares were, as they were represented to be, fully paid-up.

I am unable to agree with this view. The mistake of the respondent was not, in my opinion, a mistake of fact but a mistake as to the law.

It is not like the case of Burkinshaw v. Nicolls (1878), 3 App. Cas. 1004. . . .

The respondent dealt directly with the company, and knew that he was purchasing from it shares that had not been issued to any one else, but were being issued then for the first time; and the mistake under which he laboured was the belief that the company had a right to issue shares to him at a discount of one-third of their face value, for that was the effect of the transaction. . . .

[Reference to Ex p. Sandys (1889), 42 Ch. D. 98, 117; In re Almada and Tirito Co. (1888), 38 Ch. D. 415; Beck's Case (1874), L.R. 9 Ch. 392; Welton v. Saffery, [1897] A.C. 299; Re Cornwall Furniture Co. (1910), 20 O.L.R. 520, 533.]

In the English cases it will have been noticed that the assent of the shareholder to his name appearing on the register of shareholders is spoken of as the determining factor for fixing him with liability as a shareholder; and in the case at bar there is nothing to shew that the respondent knew that his name had been entered in the register as the holder of the 7½ shares. That circumstance is not, in my opinion, material, as the real determining factor is his knowledge that the company treated him as a shareholder and his acquiescence in being so treated; and that I take to have been the opinion of the Chief Justice of Ontario, judging from his observations in the Cornwall case which I have quoted—"Having assented to the allocation of the shares and accepted the position of holders in respect of them, they cannot be relieved. . . ."

The Act under which the company was incorporated, the Ontario Companies Act, contains no provision similar to sec. 25 of the English Companies Act of 1867, which provides that every share "shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

It is clear, however, from Ooregum Gold Mining Co. v. Roper, [1892] A.C. 125, that, apart altogether from the provisions of sec. 25, the issue of shares at a discount is ultra vires a company whose capital is divided into shares of a fixed amount and the liability of the shareholders of which is limited to the amount unpaid on their shares. See the observations of the Lord Chan-

cellor, p. 134; Lord Watson, pp. 135-6; Lord Macnaghten, p. 145; and Lord Morris, p. 148. See also Welton v. Saffery (supra).

There is, in my opinion, no reason why these and similar cases should not be applicable to companies incorporated under the law of Ontario. . . .

[Reference to secs. 10, 33, and 37 of the Ontario Companies Act.]

For these reasons, I am of opinion that the respondent was not entitled, upon the ground of mistake, to be relieved from his position of shareholder in respect of the 2½ shares; and it follows, I think, that the resolution of the 14th January, 1910, and what was done under it, was ultra vires the company. . . .

[Reference to Ooregum Gold Mining Co. v. Roper, [1892] A.C. at p. 133; Bellerby v. Rowland & Marwood's Steamship Co., [1902] 2 Ch. 14; Trevor v. Whitworth (1887), 12 App. Cas. 409.]

I do not understand how half a share came to be allotted. I find no warrant in the Act to allot anything less than a share; and I do not think that the liability which I hold attached to the respondent extends to the half share which the company assumed to allot to him. This point was not taken on the argument, and counsel may speak to it if the appellant contends otherwise; and, subject to this, an order will issue allowing the appeal and substituting for the order of the Local Master an order that the name of the respondent be put upon the list of contributories in respect of two shares.

There will be no costs of the appeal or of the application to the Local Master.

Since writing the foregoing, my attention has been called to a recent decision of my brother Middleton, Re Mathew Guy Carriage and Automobile Co., Thomas's Case (1912), ante 902, which it is said is opposed to the view I have expressed as to the effect of the resolution to cancel the shares and the action taken upon it. I find however, on inquiry from my learned brother, that it is not, and that in that case the contract to take the shares was still executory at the time the resolution to cancel the bonus shares was passed.

HAWES GIBSON & CO. v. HAWES—MASTER IN CHAMBERS—APRIL 6.

Evidence—Foreign Commission—Pleading—Amendment—Costs.]—Motion by the plaintiffs for an order for the issue of a commission to Edmonton, Alberta, for the examination of certain witnesses. See ante 312. The Master said that, in view of the pleadings as they now appeared, it would seem that the plaintiffs might have the commission. The statement of defence should be amended as proposed, and the proposed reply should be delivered. The question would then be fairly raised, whether the agreement relied on by the defendant was made under such circumstances as would render it invalid. It would be for the plaintiffs to consider whether this could be shewn without the evidence of James Hawes, with whom it was apparently made on behalf of the partnership. The costs of the motion and commission reserved for the Taxing Officer unless disposed of by the trial Judge. H. D. Gamble, K.C., for the plaintiffs. F. R. MacKelcan, for the defendant.

ONTARIO AND MINNESOTA POWER CO. v. RAT PORTAGE LUMBER CO.—MASTER IN CHAMBERS—APRIL 10.

Pleading—Statement of Defence—Interference with Riparian Rights—Action for Injunction and Damages—Status of Plaintiffs—Right to Equitable Relief—Statutory Rights—Non-Compliance with Statutes—Motion to Strike out Parts of Defence—Scope of Con. Rule 298.]—By the statement of claim, the plaintiffs alleged that they were riparian owners in respect of certain lands on the north shore of Rainy river, and as such entitled to the use of the waters of that river naturally flowing over and past their lands; that they had constructed thereon a large and valuable dam and works for generating hydraulic and electrical power, and were erecting a pulp mill. They complained that the eight defendants had obstructed the natural flow of the waters of the river, interfering with the rights of the plaintiffs, and causing them loss and damage; and asked for an injunction and damages. Four of the defendants delivered statements of defence; and the plaintiffs moved to strike out eleven paragraphs of each. It was alleged by paragraph 16 that the plaintiffs had no office or place of business and no assets, business, or property under their control in Ontario; that the plaintiffs were controlled by the Minnesota and Ontario Power Company, and American company, and the real owners of the assets

nominally belonging to the plaintiffs; that the American company had no charter or license to do business in Ontario, and were not entitled to invoke the equitable jurisdiction of the Court. The Master referred to Stratford Gas Co. v. Gordon, 14 P.R. 407, 413, and said that paragraph 16, and also paragraphs 27 and 28, which were similar in effect, could not be summarily excised at this stage: they might be unnecessary—but that did not make them embarrassing.—In the other paragraphs objected to, the defendants alleged that the plaintiffs had not complied with the statutes under which their works were constructed, and that the plaintiffs, by reason thereof, were not entitled to rely upon those statutes; and, further, that the statutes were void and ineffective; and they asked a declaration to that effect. The Master said that the paragraphs based upon that line of defence were not so clearly bad as to justify their excision upon an interlocutory application. The plaintiffs alleged special damage, which it was important to prove in order to obtain an injunction: White v. Mellin, [1895] A.C. at p. 167. The tendency of the practice at present is against any interference with the pleadings of either party except in the very plainest cases. Con. Rule 298 is usually confined to cases where statements are made which could not be considered at the trial, and which would tend to prejudice a fair trial. See Flynn v. Industrial Exhibition Association of Toronto, 6 O.L.R. 635. Motion dismissed; costs to the defendants in the cause. R. C. H. Cassels, for the plaintiffs. Grayson Smith, for the defendants.

UNITED GAS COMPANIES v. FORKS ROAD GAS CO.—KELLY, J.—APRIL 11.

Natural Gas—Claim for Gas Supplied by Company to Customers of another Company—Failure of Proof.]—The plaintiffs alleged that a stopcock intended to shut off the flow of natural gas from their pipes to the pipes of the defendants, and vice versa, was open for many months ending on the 10th March, 1911, and that during that time gas flowed from their pipes into the pipes of the defendants, and supplied the customers of the latter. The plaintiffs asked for payment of $750 for the gas so alleged to have been supplied to and used by the defendants' customers. At the trial, evidence was given that on the night of the 9th March, 1911, when a valve on the plaintiffs' supply-pipe was turned off, the lights in the houses of some of the defendants' customers either went out or were reduced, and that

on the following morning the stopcock referred to between the two sets of pipes was open, and that a fresh mark as if made by a wrench was found on it. The stopcock in question was situate at or near the line between the highway and the property of Frank Misener, a member of the defendant company; it was above ground and could have been opened by any one with the aid of a wrench. The plaintiffs also contended that, by reason of the defendants' wells (which were only two in number) not having been pumped out for many months, they were incapable of supplying the defendants' customers, and that, therefore, the gas used by them must have been gas which flowed from the plaintiffs' pipes. Frank Misener, in his examination for discovery, extracts from which were put in at the trial, said that the stopcock between the two sets of pipes was not open prior to the morning of the 10th March; that he knew this to be the case from his own personal observations; and that this stopcock was always kept shut. This evidence was uncontradicted. The learned Judge said that the plaintiffs had failed to prove that the stopcock was open at the time for which the claim was made, or that gas flowed from their pipes into the pipes of the defendants during that time. Action dismissed with costs. H. H. Collier, K.C., for the plaintiffs. W. M. German, K.C., for the defendants.

RICE V. MARINE CONSTRUCTION CO.—MASTER IN CHAMBERS—APRIL 13.

Venue—Motion to Change — Convenience — Place where Property in Question Situate—Expense—Witnesses—Bringing Case from Outer County to Toronto.]—In September, 1911, the plaintiff bought from the defendants a motor-boat for $1,300, which was paid; and the boat was delivered to the plaintiff at Burk's Falls. The plaintiff alleged that this purchase was made in reliance on certain representations made by the defendants' officers or agents about the boat, which the plaintiff said were untrue, and on a guaranty of efficiency, which had not been fulfilled. The plaintiff, therefore, asked: (1) cancellation of the sale; (2) repayment of the $3,000; and (3) $200 for expense and loss to him from the defendants' misrepresentations. The defendants denied making the representations, and counterclaimed for the return of a boat-cover lent to the plaintiff at the time of the sale, worth $25, and for $50.36 for other things, of which $32.86 was still due. The defendants moved to change

the venue from Parry Sound to Toronto. The plaintiff resided in the district of Parry Sound, and the boat in question was there also. Parry Sound is distant from Toronto 149 miles. The return fare will be $6.55 in May, and the sittings there is fixed for the 6th May. The plaintiff had served a jury notice. The affidavit in support of the motion was made by the president of the defendant company. He said that the defendants would require seven witnesses, all resident in Toronto, except one at Buffalo, New York, and that it would be very inconvenient to have to take the company's servants and officers away at their busy time. The plaintiff was away in Florida, and was not able to send an affidavit, but one was made by his solicitor, who stated that several witnesses would be necessary for the plaintiff. The Master said that ordinarily the plaintiff's own affidavit should be made in answer to a motion of this character. But, in the circumstances of this case, the solicitor's affidavit was not to be rejected. It was unnecessary to refer to any of the numerous decisions on motions of this character. They establish that the convenience of witnesses and resulting loss to the business with which they are connected is no ground for a change of venue, except in the case of public officers. See Higgins v. Coniagas Reduction Co. and Ontario Power Co., 2 O.W.N. 953. Here, too, the train service between Toronto and Parry Sound is such that an absence of one or perhaps two days from Toronto will be all that is necessary. The case being on the jury list, if transferred to Toronto, must stand until September, unless the jury notice is struck out. A motion to that effect can be made to the trial Judge, if the defendants still think that a jury at Parry Sound would not be impartial. Other cogent reasons against bringing cases to Toronto from the country are to be found in a judgment of Meredith, J., in Saskatchewan Land and Homestead Co. v. Leadlay, 9 O.L.R. 556. The venue was not laid capriciously in being named at the assize town of the district where the plaintiff resides, and where the boat itself is, in case a view should be thought useful or necessary. Motion dismissed; costs in the cause. A. R. Lewis, K.C., for the defendants. C. A. Moss, for the plaintiff.

FULLER v. MAYNARD—MASTER IN CHAMBERS—APRIL 13.

Pleading — Statement of Defence—Action for Specific Performance of Contract—Setting up Facts Justifying Termination of Contract—Embarrassment—Irrelevancy.]—In this action for specific performance, the plaintiff by the statement of claim alleged a contract made on the 24th July, 1911, to be completed on the 17th September, 1911, time being of the essence of the contract. The time for completion was afterwards extended until the 16th October; and, not being completed on the 10th November, the defendant declared the contract at an end and refused to accept the tender of money and conveyances made on that day by the plaintiff in an attempt by him to have the transaction carried out. This action was begun the next day. The statement of claim was delivered on the 6th February and the statement of defence on the 20th March. The plaintiff moved to strike out paragraphs 13, 14, 15, 16, and 17 of the defence, as embarrassing. They set out as facts matters which, it was said, explained the situation and shewed why the defendant was justified in putting an end to the contract after two enlargements of the time originally fixed for completion. They alleged the speculative nature of the property and the desire of the defendant to take advantage of an active and rising market—they also gave the defendant's reasons for alleging that the plaintiff, not being himself the real purchaser, was never in a position to carry out the agreement at any time prior to the 8th November, and was able to procure the money with which to make the tender of the 10th November only by assigning the benefit of the contract (if any still existed), and that such assignment was still in force. The Master said that it was only in the very plainest cases of embarrassment, which in this sense meant irrelevancy, that any part of a pleading, and especially of a statement of defence, could be struck out on the application of the opposite party: Stratford Gas Co. v. Gordon, 14 P.R. 407, and cases cited; Knowles v. Roberts, 38 Ch. D. at p. 27, where Bowen, L.J., said that it is not for the Court to dictate to parties how they should frame their case, so long as they do not violate any of the rules of pleading laid down by the law. Motion dismissed with costs to the defendant in the cause. C. Kappele, for the plaintiff. A. J. Russell Snow, K.C., for the defendant.

SWAISLAND v. GRAND TRUNK R.W. CO.—RIDDELL, J., IN CHAMBERS—APRIL 15.

Appeal — Leave — Discovery.]—Leave to appeal to a Divisional Court from the order of MIDDLETON, J., ante 960, was granted to the plaintiff; costs of the motion to be costs in the appeal unless otherwise ordered by the appellate Court. W. E. Raney, K.C., for the plaintiff. Frank McCarthy, for the defendants.

DAY V. CITY OF TORONTO—MASTER IN CHAMBERS—APRIL 16.

Pleading—Statement of Claim—Particulars—Damage by Flooding—Origin of Waters—Specific Ground of Claim—Amendment.]—The plaintiff in this action sought to compel the defendants to have ashes and refuse placed by the defendants on Ashburnham avenue removed, or to oblige them to construct a drain which would relieve his premises from flooding in the future. The defendants moved, before pleading, for particulars of the statement of claim so as to shew whence came the waters which, in paragraph 4, were spoken of "as formerly wont to pass the plaintiff's premises." The Master said that the cases cited—Darby v. Township of Crowland, 38 U.C.R. 338; Baggs v. City of Toronto, 23 C.L.J. 7; Ostrom v. Sills, 28 S.C.R. 485—seemed to shew that the defendants were not bound to provide drainage for surface water, coming from other persons' land on to that of the plaintiff. It might be different if the flow of water from the plaintiff's own lands was obstructed. Under the special facts of this case, it seems to be in the interests of both parties to have the ground of the plaintiff's claim made more specific. This could best be done by amendment of the statement of claim. Order directing amendment. Costs in the cause. H. Howitt, for the defendants. C. A. Thomson, for the plaintiff.

McKENZIE V. ELLIOTT—DIVISIONAL COURT—APRIL 16.

Building Contract—Parol Modification of Written Agreement — Evidence — Onus — Allowance for Materials — Services of Architect—Quantum Meruit.]—Appeal by the plaintiff from the order of BOYD, C., 2 O.W.N. 1364, setting aside the report of the Master in Ordinary. The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and RIDDELL, JJ. MEREDITH, C.

J., gave written reasons for judgment, in which he said, among other things, that the argument of counsel for the plaintiff failed to satisfy him (the Chief Justice) that the Chancellor erred in his conclusion that the barn was built under the terms of the written agreement, as modified by the subsequent verbal arrangement by which the size of the barn was reduced by 20 feet, and the materials of another barn of the defendant were to be used in the construction of the new barn, and an allowance was to be made to the defendant for the value of those materials, and the services of the architect dispensed with. It was not open to question that at one time there existed a contract in writing between the parties for the building by the plaintiff of a barn for the defendant; and the onus rested upon the plaintiff to establish that it had been, as he contended, entirely abrogated; and that onus was not satisfied. The evidence shewed that the contract was only changed in some of its terms, and there was no ground for the plaintiff's assertion that in doing the work he acted as agent for the defendant. The appeal should be dismissed with costs; but, in order to end the litigation, it would be well for the parties to adopt the suggestion that $8,000 be fixed as the full price of all the work, on the terms mentioned by the Chancellor. TEETZEL, J., concurred. RIDDELL, J., dissented, being of opinion that the case turned upon the credibility of the parties; and, as the Master believed the plaintiff, and he was "the final judge of the credibility of witnesses," his finding should not have been reversed: Booth v. Ratté, 21 S.C.R. 637, 643; Hall v. Berry, 10 O.W.R. 954; Fawcett v. Winters, 12 O.R. 232. W. Mulock, for the plaintiff. F. E. Hodgins, K.C., for the defendant.

MOORE FILTER CO. v. O'BRIEN—MASTER IN CHAMBERS—APRIL 17.

Pleading—Statement of Defence—Patent for Invention—Royalties—Agreement—Validity of Patent.]—Motion by the plaintiffs to strike out paragraphs 3 and 4 of the statement of defence in an action to recover royalties under an agreement. By the paragraphs attacked, the defendants alleged that they were "induced to enter into the agreement by the representation of the plaintiffs that they owned and controlled the letters patent and the invention and improvements referred to in the signed agreement, and that the letters patent were valid and subsisting"—all of which representations were untrue (the defendants said), as the plaintiffs well knew. By the 5th para-

graph want of consideration as rendering the agreement sued on void was alleged; and the defendants counterclaimed to have the agreement set aside or declared to be of no force or effect. The Master said that, looking at the whole pleading, it was clear that the first part of paragraph 3 was unobjectionable. Reference to Duryea v. Kaufman, 21 O.L.R. 161. The plaintiffs sought to enforce an agreement which the defendants said they were induced to enter into by untrue representations, and asked to have the agreement set aside, on that ground. The allegation as to the untruth of the representation that the "letters patent were valid and subsisting" was intended to put in issue only their actual existence, and not to attack their validity, in the usual sense. If necessary, it might be recited in the order that the defendants did not attack the validity of the patents in any other sense, as this point should be made clear. Motion dismissed; costs in the cause. D. Urquhart, for the plaintiffs. C. A. Moss, for the defendant.

KUULA v. MOOSE MOUNTAIN LIMITED—MASTER IN CHAMBERS—APRIL 17.

Practice—Consolidation of Actions—Common Defendant—Distinct Claims of Different Plaintiffs for Damages Arising from Fire Set out by Defendant—Direction as to Trial—Multiplicity of Proceedings—Examinations for Discovery.]—Motion by the common defendants in the above action and three others, each brought by a different plaintiff, for an order consolidating the four actions. The actions were brought to recover damages alleged to have been suffered by the respective plaintiffs through a fire set out by the defendants on their own lands in the township of Hutton, on the 10th July, 1911. The amount of damages claimed was different in each case. No details were given of these sums. In each case negligence was alleged. The plaintiffs were all represented by the same solicitors. The statement of defence in each case was a simple denial of the allegations of the statement of claim. The defendants also asked that only one of four proposed examinations of their officers for discovery be allowed to proceed. The Master said that, unless the decision in one of a number of actions, such as those in question, would necessarily dispose of the essential cause of action in the others, no order could be usefully made to stay the rest. And, unless this could be done, the actions could evidently not be consolidated. He referred to Williams v. Township of Raleigh, 14 P.R.

50, 53. The Master also said that it was at least doubtful whether these four plaintiffs could have united in one action—the only thing alleged in common was the fact that a fire or fires were negligently set out by the defendants. This, though, technicality in issue, was probably not denied, so far as the fact of fire being set out was concerned. But what would be sufficient proof of negligence by one plaintiff might not be so in the case of the others—much would depend upon location, direction of wind, condition of the plaintiff's own property, and other circumstances peculiar to each case. The only direction that could usefully be given now was, that the actions should be all set down together, so that any evidence common to all (if such there were) might not be repeated, as the trial Judge would, no doubt, direct. See Carter v. Foley-O'Brien Co., ante 888, citing the Raleigh case. As to the examinations for discovery, that point, too, was dealt with in Carter v. Foley-O'Brien Co., though there it was the converse case of a plaintiff wishing to have one examination for discovery—to be applicable to all the three actions. Neither of the reliefs asked for here could possibly have been granted if the plaintiffs had not all been represented by the same solicitors. See as to this Conway v. Guelph and Goderich R.W. Co., 9 O.W.R. 369, affirmed 420. For the same reasons, it did not seem possible to interfere with the examinations for discovery. As the plaintiffs' solicitors were the same, it was not to be presumed that, if one examination gave the necessary information, they would proceed with the others—especially as these depositions could not be used at the trial. But, even if they did, that must be left to the trial Judge or the Taxing Officer to deal with. The only way of avoiding more than one examination was for the defendants to make admission of such fact or facts as were common to all the cases. But, apart from their own consent, there was no power to control or limit the plaintiffs' proceedings, so long as they were regular. Motion dismissed; costs in the cause to the plaintiffs. R. C. H. Cassels, for the defendants. H. E. Rose, K.C., for the plaintiffs.

LYON V. GILCHRIST—MASTER IN CHAMBERS—APRIL 17.

Practice—Consolidation of Actions—Common Defendant—Distinct Causes of Action—Direction as to Trial.]—Motion by the defendant in two actions brought against him by two different plaintiffs, husband and wife, for an order consolidating the actions. The Master said that the actions were similar, but they

dealt with different lands and with separate contracts with the defendant. Even if the claims of the plaintiffs arose out of the same transaction or series of transactions, they did not involve any common question of law or fact, within the meaning of Con. Rule 185. As between the husband and the defendant, the question was, whether the property he assigned was to be re-assigned on payment of the admitted loan of $190. As between the wife and the defendant, the question was, whether her assignments were for anything more than a collateral security for the $190. Any advantage to the defendant would be gained by directing that the actions be set down together and tried together, if the trial Judge should so direct. He would, no doubt, take care that any evidence, if such there be, common to both actions, should not be repeated. Costs in the cause. Alexander MacGregor, for the defendant. W. Douglas, for the plaintiffs.