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APPELLATE DIVISION.

MARCH 15TH, 1915.

*TORONTO ELECTRIC LIGHT CO. v. CITY OF TORONTO.

Contract — Municipal Corporation—Electric Light Company—Overhead System—Erection of Poles in Highways—45 Vict. ch. 19, sec. 2—"Upon" — R.S.O. 1877 ch. 157, sec. 54—Agreements between City Corporation and Company—Construction—Absence of Agreement or Consent for Erection of Poles for Transmission of Lighting Current to Private Consumers—Acquiescence—Knowledge — Estoppel — Special Permission—Extended Area of City.

Appeal by the Corporation of the City of Toronto, the defendant, from the judgment of MIDDLETON, J., 31 O.L.R. 387, 6 O.W.N. 349.

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

G. R. Geary, K.C., and C. M. Colquhoun, for the appellant corporation.

I. F. Hellmuth, K.C., and A. W. Anglin, K.C., for the plaintiff company, the respondent.

MEREDITH, C.J.O.:— . . . The action involves a determination as to the rights of the respondent to use the streets, highways, and public places of the City of Toronto for conducting electricity for the purposes of light, heat, and power "by any

*This case and all others so marked to be reported in the Ontario Law Reports.

means, through, under, and along the streets, highways, and public places" of the city. . . .

[Reference to the incorporation of the respondent company by letters patent of the 20th September, 1883, under the authority of the Ontario Joint Stock Companies Letters Patent Act, R.S.O. 1877 ch. 150; to the Act respecting Companies for Supplying Electricity for the Purposes of Light, Heat, and Power, 45 Vict. ch. 19, secs. 2, 3; the Act respecting Joint Stock Companies for Supplying Gas and Water, R.S.O. 1877 ch. 157, sec. 54.]

The first question to be considered is the effect of the qualifying words of sec. 2 of 45 Vict. ch. 19, as to the use of the "streets, highways, and public places." That the right to conduct electricity by any means through, under, and along the streets, highways, and public places, is not an absolute right, is clear; for it is to be exercised "only *upon* and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively, and subject to any by-law or by-laws of the councils of the said municipalities passed in pursuance thereof." . . .

[Reference to Paynter v. James (1867), L.R. 2 C.P. 348, 354; Regina v. Humphery (1839), 10 A. & E. 335, 370; Regina v. Arkwright (1848), 12 Q.B. 960, 970, 971.]

As used in sec. 2, the word "upon," in my opinion, plainly means that what the section prescribes is a condition precedent to the exercise by the company of the right to conduct electricity through, under, and along the streets, highways, and public places of the municipality. . . .

[Reference to Regina v. Justices of Lancashire (1857), 8 E. & B. 563.]

That the intention of the Legislature was to use the word "upon" in the sense of "not unless" is emphasised by the addition of the word "only." . . .

The condition which is to be complied with . . . is not, in terms at all events, that the consent of the municipal authorities shall be obtained, but it is that the company's powers to use the streets . . . of the municipalities shall be exercised "only upon and subject to such agreement . . . as shall be made between the company and the said municipalities respectively and under and subject. . . ."

What the section means . . . is, I think, that a company shall not have the right to conduct electricity through, under, and along the streets . . . of the municipality until it shall have entered into an agreement with the corporation of the muni-

cipality by which it shall be authorised to do so upon such terms and conditions as the corporation may impose; and it cannot have been contemplated that a company should be at liberty to make use of the streets . . . at its mere will and pleasure unless the municipal authorities should intervene and forbid altogether the use of them, or the use of them unless the company should be willing to agree to terms and conditions governing their use if, in the opinion of the municipal authorities, it should be deemed necessary or advisable in the public interests to impose any such terms and conditions. . . .

[Reference to Ghee v. Northern Union Gas Co. (1899), 158 N.Y. 510, 511; British Columbia Electric R.W. Co. Limited v. Stewart, [1913] A.C. 816.]

There is no case that makes it necessary for us to hold that the power which sec. 2 vested in the appellant could be exercised otherwise than by a corporate act . . . an act done by the corporation itself under the authority of its municipal council. . . .

[Reference to Township of Pembroke v. Canada Central R.W. Co. (1882), 3 O.R. 503; Port Arthur High School Board v. Town of Fort William (1898), 25 A.R. 522; In re Township of Nottawasaga and County of Simcoe (1901), 3 O.L.R. 169; Regina v. Great Western R.W. Co. (1862), 21 U.C.R. 555; City of Toronto v. Toronto R.W. Co. (1905-6), 11 O.L.R. 103, 12 O.L.R. 534.]

In all these cases the municipal council had acted, and the only question was, whether, having acted by resolution and not by by-law, its action was effective; and none of them lends colour to the view that the power conferred upon the municipal authorities could be effectively exercised otherwise than by some corporate act.

It is open, I think, to grave question whether the doctrine of estoppel, or the barring of rights by acquiescence or laches, have any application to the creation of such rights as by sec. 2 the appellant was empowered to confer upon the respondent. . . .

I am of opinion, however, that, even if the views I have expressed are unsound, the respondent's case, except as to the matters to which I shall afterwards refer, fails, and that neither on the ground of laches or acquiescence on the part of the appellant nor of estoppel nor on the fiction of lost grant was the respondent entitled to succeed. . . .

In order to raise an estoppel, the person who sets it up must have been mistaken as to his own legal rights, and must

have expended money or done some act on the faith of his mistaken belief; and the person against whom the estoppel is set up must have known of his own rights and of the other person's mistaken belief, and must have encouraged him in his expenditure of money or other act, either directly or by abstaining from asserting his legal right: Halsbury's Laws of England, vol. 13, p. 167, para. 201. . . .

Subject to what I shall say as to the agreement of the 13th November, 1889 . . all the documentary evidence is inconsistent with the view that any general assent to the use of the streets . . was ever given, and leads irresistibly, I think, to the conclusion that the respondent was never under any mistake or misapprehension as to its legal rights. . . .

The agreement of the 13th November, 1889, . . . was relied upon not only as a recognition by the appellant of the right of the respondent to use the streets . . . of the city for the purposes of its overhead system, but also as containing an express grant of that right. . . .

This agreement, no doubt, recognises the fact that the respondent had been and was doing that which is mentioned in the recital, and that it was done by means of an overhead system; but, in considering what effect should be given to this recognition, regard must be had to the fact that the appellant had, by the agreement of the 30th August, 1883, given to the respondent the right to use the streets in a large section of the city for the purposes of its business and to carry it on there on the overhead system, and that it had an overhead system for street lighting. . . . The recitals may well be treated as having reference to the overhead system which had been established and was being used . . . and the recitals cannot fairly or properly be treated as a recognition of an existing right in the respondent to exercise its statutory powers to use all or any of the streets . . . of the city, at all events for the purpose of an overhead system. . . .

That the respondent well knew that it had no right to use the streets . . . of the city without at all events the consent of the appellant, and that that consent must be evidenced by a formal document, is, I think, the only conclusion that properly can be drawn from the facts and circumstances. . . .

There remains to be considered the question whether the agreement of the 13th November, 1889, confers upon the respondent the right to establish and maintain an overhead system

throughout the city. . . . It is clear that the object of the agreement was to confer the right to use an underground system. . . . The reference . . . to the overhead system was designed, I think, to prevent the agreement from operating to take away any rights which the respondent possessed to use the overhead system, and . . . the respondent possessed that right under the agreement of the 30th August, 1883, the resolution of the 10th December, 1883, and the existing street lighting contract, subject to the conditions embodied in them. . . .

Upon the whole, I am of opinion that the respondent has the right to use, for the purposes mentioned in sec. 2, any of the streets . . . of Toronto for the purposes of an underground system, under and subject to the terms and conditions of the agreement of the 13th November, 1889; but that for the purposes of an overhead system it has no right to use any of the streets . . . except such of them as lie within the section of the city mentioned in the agreement of the 30th August, 1883, and such of them as to which . . . special permission . . . was given, and as to these subject to the terms and conditions of the agreement by which the permission was granted.

If the right of the respondent to use the streets . . . of the city be thus limited, as in my opinion it is, and loss results to the respondent, the fault lies at its own door. The provisions of the law under which it was incorporated are plain, and appear to have been fully understood by the respondent; and yet, putting its case on the highest ground on which it can be put, with this knowledge it went on extending its operations and making the large expenditures which it has made, entirely disregarding the limitation of its powers which the statute itself imposes, and without taking the trouble even to make application to the appellant for its consent. It may be that . . . if application had been made the consent would have been given; but that, in view of the course which from the outset the appellant adopted, I do not think. . . .

Having come to the conclusion I have reached, it is unnecessary for me to consider the question whether the respondent's rights extend to territory added to the city since the letters patent were issued.

As the poles for the cutting down of which the action is brought were not being erected within the section of the city mentioned in the agreement of the 30th August, 1883, or any permission to erect them given by the appellant, the result is, that, in my opinion, the appeal should be allowed, and there

should be substituted for the judgment which has been directed to be entered a judgment dismissing the action, the whole with costs.

MAGEE, J.A., concurred.

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

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

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

MARCH 15TH, 1915.

*ANTISEPTIC BEDDING CO. v. GUROFSKI.

Prinicipal and Agent—Insurance Broker—Fire Insurances Obtained for Principal—Payment of Amount of Premiums to Agent—Course of Dealing between Broker and Insurance Companies — Acceptance of Broker as Debtor—Res inter Alios—Validity of Policies.

Appeal by the plaintiff company from the judgment of MIDDLETON, J., 7 O.W.N. 95, dismissing an action brought to recover from the defendant the amount of loss sustained by the plaintiff company by reason of the destruction of its property by fire. The plaintiff company alleged that the defendant was employed by it as an insurance agent or broker to place insurance upon its property, and that, by reason of the breach of his duty, the insurance contracts obtained from four out of five companies with whom insurances were effected were not valid or binding upon the insurance companies, and the plaintiff company was not compensated for its loss. MIDDLETON, J., was of opinion that the defendant had been guilty of no default.

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

F. Arnoldi, K.C., and W. A. Proudfoot, for the appellant company.

C. A. Moss, for the defendant, respondent.

MEREDITH, C.J.O. (after setting out the facts and stating that he agreed with the findings of fact of the trial Judge ex-

cept in regard to the insurance effected with the North American Mutual Fire Insurance Company) :—The North American company did not give any notice of cancellation, but, after proofs of loss were sent to it, it denied liability on the ground that the premium was never paid to it, and that it was, as the company understood, never paid to the appellant's "brokers, C. E. Ring & Company," and on the further ground that it was not liable because of the appellant's default in paying an assessment made on the company's policy-holders, which, according to the terms of the policy, rendered it void.

The proper conclusion upon the evidence is, I think, that each of the companies looked to its agent as its debtor for the amount of these premiums, and not to the insured; and that it was only when the premiums had not in fact been paid to the agent that he was entitled to have the amount of them credited to him.

I agree with the finding of my brother Middleton that as between Ring & Company and the appellant, the premiums had been paid in all of the four cases, and it follows that the payment by Ring & Company to the companies by which he was charged with the premiums was an absolute payment, discharging the appellant from liability to pay them, unless the decided cases require us to hold that the transactions between these companies and Ring & Company were "res inter alios" and cannot be taken advantage of by the appellant.

In the case of the Security company, the premium was never received by Pettibone & Company; and, therefore, when that fact became known to the company, that firm was entitled to be credited with the amount of the premium which had been charged to it, and the premium was therefore never paid to the company; and it had the right, for that reason, to repudiate liability on the policy.

Not only was this the case, but Ring did not pay the premium to Woodcock & Company, nor did Woodcock & Company pay it to Pettibone & Company.

Except in the case of the Security company policy, it is clear, I think, that no question would ever have arisen as to the non-payment of the premiums but for the intervention of Ring, and it was entirely owing to his intervention that the companies took the position that the premiums were not paid, and assumed on that ground to cancel their policies. The policies had been on foot for several months before Ring intervened, and during that time all parties treated them as valid and subsisting, and it

was not for the purpose of protecting the companies that Ring intervened, but he did so for some purpose of his own after he had quarrelled with the respondent.

The strongest case against the appellant's right to recover on the policies is London and Lancashire Life Assurance Co., v. Fleming, [1897] A.C. 499, but that case is, I think, distinguishable. . . .

I do not understand that what is said by Sir Henry Strong in that case with reference to the application of the principle of Acey v. Fernie (1840), 7 M. & W. 151, means more than that the mere fact of the company having taken the agent's note for the premiums, in the circumstances of that case, afforded no presumption of the nature which Sir Henry Strong mentioned. I do not understand him to mean that the fact that an agent has given credit for a premium, and has treated himself and has been treated by the insurers as their debtor in respect of it, if proved, is not sufficient to warrant the conclusion that the premium has been paid to the insurers and the contract of assurance has become effective. To hold that it is not would, I venture to think, come as a surprise to insurance agents and the business community, for I also venture to think that in many cases it is the course of dealing of agents to treat the insured as their debtor for the premium, and themselves as the debtors in respect of it to the insurers whom they represent, and that this practice is well known to and recognised and acted on by insurers.

However that may be, the liability of the companies in this case does not depend upon presumptions afforded by the course of dealing between them and their agents. But the facts in evidence warrant the conclusion that it is proved that the intention of all parties was that Ring, and he alone, should be liable to the companies for the premiums, and that he should look to the insured or those at whose instance he had placed the insurances for payment to him of the premiums; subject only to the conditions that if Ring should be unable to obtain payment of the premium the debit to him should be cancelled.

If this was the true nature of the transactions, having come to the conclusion, as I have already stated, that as between the appellant and Ring the premiums had been paid to Ring, they were as between the companies and the appellant also paid.

If this view is right, the notices of cancellation given by the companies, if otherwise sufficient, were insufficient to put an end to their contracts, because there was neither return nor offer to return the unearned premiums that had been paid.

In the case of the Security company I am unable, for the reasons I have already mentioned, to come to the conclusion that the premium was paid to that company, and I am of opinion that the respondent is liable to the appellant to make good the loss which the appellant has sustained, owing to the respondent not having obtained a binding contract from that company.

It was argued by Mr. Moss that all the respondent was required to do was to "buy insurance" to the required amount, and that, having employed the Insurance Brokerage and Contracting Company to obtain it, and having received the policies from that company duly executed and having delivered them to the appellant, his whole duty was performed, but I am not of that opinion. What the respondent undertook to do was to procure binding contracts of insurance, and to do all that was necessary on his part to procure them, which involved the payment of the premiums; and, having failed in that duty, in respect to the insurance with the Security company, he is, in my opinion, liable to the appellant for the loss occasioned thereby.

It may be unfortunate for the appellant that the question of the liability of the companies whose policies are, in my opinion, binding on them, has not been determined as between them and the appellant, for it may be that, if the appellant proceeds against them, a different state of facts may be developed in the actions against them, and the result may be that they will escape liability, because on those facts the conclusion cannot be properly drawn that the premiums were paid to them.

Upon the whole, I am of opinion that the appeal should be allowed, and that there should be substituted for the judgment dismissing the action, judgment for the appellant for the amount for which the Security Mutual Fire Insurance Company would have been liable upon its policy for $1,000, with interest from the date from which interest would have run against the company; the amount of principal and interest to be settled by the Registrar if the parties are unable to agree to it.

The appellant should have the costs of the action, except as to the issues on which it has failed, and the respondent should have his costs of these issues, and there should be no costs of the appeal to either party.

MACLAREN and HODGINS, JJ.A., concurred.

MAGEE, J.A., agreed in the result.

Appeal allowed in part.

MARCH 15TH, 1915.

KEECH v. SANDWICH WINDSOR AND AMHERSTBURG R.W. CO.

Negligence—Injury to Horse by Collision with Street Car—Negligent Operation of Engine and Cable—Findings of Jury—Duty Owing to Invitee—Patent Danger—Voluntary Assumption of Risk.

Appeal by the defendant the Caldwell Sand and Gravel Company from the judgment of the Senior Judge of the County Court of the County of Essex, in favour of the plaintiff against the appellant company, upon the findings of a jury, in an action to recover damages for injury to a horse.

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

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

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

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellant company is a dealer in gravel and sand, and its business premises abut on Sandwich street west, in the city of Windsor. The ascent from them to the street is very steep, so steep that a pair of horses cannot draw up it a loaded waggon, and the company has provided, as a means for pulling loaded waggons up the hill, a cable which is operated by means of a steam engine on the level ground; the modus operandi being that the cable is hooked on to the reach of the waggon, which is then pulled up the hill by the cable being wound up. The horses walk one on each side of the cable, and at a short distance from the crest of the hill the power is shut off, and the cable then becomes automatically detached from the reach. At this point there is a pulley around which the cable passes, placed at the distance of 19 feet from the nearest rail of the track of the defendant railway company. The length of a waggon and horses is said to be about 22 feet; and, when the cable drops from the reach, the horses' heads, if they are not turned, are a little over that rail. From the pulley to the street the ground rises a little, and the horses have there "a little stiff pull." This appliance was provided for the purpose of the appellant's business, but persons who purchased sand or gravel from the appellant were permitted to use it for hauling their laden vehicles up the hill.

On the 15th June, 1914, the respondent was employed by a purchaser of gravel to haul it from the appellant's premises, and the purchaser employed a teamster named Lesperance to drive the horses while engaged in that work. Lesperance had been engaged all that summer in hauling gravel from the appellant's premises, and was well acquainted with the locality and the local conditions and the way in which the cable was operated in pulling waggons up the hill. He had already drawn five loads on that day, and had gone for the sixth at between half-past four and a quarter to five o'clock in the afternoon. The waggon having been loaded, the cable was attached to the reach of it, and the waggon was pulled up the hill. The account given by Lesperance . . . at the trial was: that the horses came up the hill on a trot; that looking to the east there was nothing to obstruct his view, but that the view to the west was obstructed . . .; that he was watching his horses and looking out to the east for the street cars, and saw none coming from that direction; that when he got to the top of the hill he saw a street car coming from the west, and endeavoured to make a short turn, but, as he said, "the car got" him "before" he "made the hill;" that, when the cable dropped off the back of the waggon, his horses were "right on the street car track;" that he had partly succeeded in turning his horses when one of them was struck by the car; that, if he had seen the car sooner, he could not have stopped his horses, on account of the rate at which he was being "shoved;" that when he saw the car it was about 100 feet away and was coming "quite fast;" that he had never met with an accident before, although the cable on all previous occasions had been operated as it was being operated at the time of the accident; that sixty or seventy other teams were drawing out sand or gravel on the day of the accident, and that some of them were pulled up the hill while he was waiting for his turn to come.

The action is brought to recover damages for injury done to the horse by the street car colliding with it; and in his pleadings the respondent alleges that his waggon was drawn "swiftly up the incline," and that the collision occurred through the negligence of the railway company in not stopping the car in time to avoid the collision, and through the negligence of the appellant or its servants in operating the engine and cable.

The jury found, in answer to questions, that the accident happened by reason of the negligence of the appellant; that its negligence consisted "in not having a watchman at the top of

the hill;'' and that the respondent did not, by reason of his own negligence, contribute to the accident. Upon these answers the learned trial Judge directed that judgment should be entered for the respondent against the appellant for the damages assessed by the jury ($192) and costs, and dismissing the action as against the railway company, with costs if exacted.

As I understand the respondent's pleadings, what the jury has found to have been the negligence of the appellant is not alleged as the negligence which caused the accident, but its cause is alleged to have been the improper manner in which the appliance for pulling the waggon up the hill was operated; and that ground of negligence is negatived by the finding of the jury.

Lesperance was, no doubt, not a mere licensee, but was in the position of an invitee; and, though the appellant would have been liable if the accident had been caused by the negligent manner in which the appliance Lesperance was making use of was operated, the appellant owed no duty to him except the duty not to expose him to any unexpected danger without warning him of it.

Putting the respondent's case on the highest ground upon which it can be put, his complaint is that, owing to the proximity of the pulley, at or near which the power was shut off, to the railway tracks, the method employed for pulling the waggon up the hill was a dangerous one, at all events in the absence of a watchman stationed at the top of the hill to warn persons coming up it of the approach of street cars.

The answer to this is, I think, that where the danger is patent to every one, and the invitee knows of it, he voluntarily takes upon himself to bear the risk.

The cases dealing with the question of the duty which an owner or occupant of premises owes to an invitee were considered and discussed by Atkin, J., in the recent case of Lucy v. Bawden, [1914] 2 K.B. 318, and that is the doctrine that he deduced from them, and rightly so, I think.

It is manifest from Lesperance's evidence that he knew of and fully appreciated the danger, if danger there was, from the proximity of the pulley to the street railway tracks, which I doubt; and, if it existed, it was patent to every one who made use of the appliance for the purpose of pulling his waggon up the hill. There was, therefore, nothing in the nature of a trap or hidden danger known to the appellant and not known to Lesperance.

I have no doubt that the accident which happened was

occasioned by the unusual manner in which the street cars were being run . . . of which Lesperance testified he was not aware; but, if he was not aware of it, there is nothing to shew that the appellant or its servant knew of it, if that would have made any difference as to the extent of the duty owed to Lesperance.

In my opinion, the respondent's case entirely failed, and his action should have been dismissed.

If I entertained a different view as to the duty which the appellant owed to Lesperance, I should have been of opinion that the findings of the jury ought not to be allowed to stand. . . . The injustice of fixing liability upon the appellant for an act of negligence which was not charged against it, and as to which it had no opportunity of presenting its case to the jury, is manifest.

I would allow the appeal, and substitute for the judgment . . . against the appellant, a judgment dismissing the action against it, the whole with costs.

MARCH 15TH, 1915.

MILO CANDY CO. v. BROWNS LIMITED.

Contract—Purchase of Plant and Business — Right of Purchasers to Benefit of Contract for Supply of Material—Refusal of Contractors to Supply—Evidence — Novation — Equitable Assignment—Statute of Frauds—Breach of Contract—Damages—Measure of — Seizure of Chattels and Book Accounts—Loss of Profits.

Appeal by the defendants from the judgment of LATCHFORD, J., 7 O.W.N. 466.

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

W. N. Tilley, for the appellants.

J. W. McCullough and S. J. Arnott, for the plaintiffs, respondents.

MEREDITH, C.J.O.:— . . . The case of the respondents, as presented on their pleadings, is that in the latter part of July, 1914, they purchased from the appellants the business which the

appellant company was carrying on in Toronto, together with all the plant, machinery, stock in trade, furniture, fixtures, goods and chattels, as well as the goodwill of the business, "and all other appurtenances appertaining" to the business, for $4,379.09; that the appellants Brown and Langley had on the previous 28th January made a contract with the Dominion Sugar Company Limited, by which that company agreed to deliver on or before the 1st December, 1914, upon the appellants' business premises and for their use in their business, 300,000 lbs. of the company's No. 1 crystal granulated sugar, for the price of $3.95 per cwt.; that it was agreed between the parties that, as part of the consideration for which the respondents were to pay the $4,379.09, the appellants should "turn over" the sugar contract to the respondents; that the agreement which was prepared and executed, and bears date the 7th August, 1914, and purported to express the agreement between the parties, did not contain the whole agreement, but that there was "left out" of it the agreement as to the sugar contract; that this occurred through "some inadvertence;" that, in pursuance of the "real agreement," the respondents, at the request and by the direction of the appellants, informed the sugar company that the respondents had purchased the appellants' business, and that the appellants had agreed to transfer to them all the benefits to which the appellants were entitled under the sugar contract; that the sugar company accepted "the said assignment;" and, in consideration of the respondents agreeing to pay to the sugar company the price mentioned in the sugar contract, the company agreed to deliver to the respondents what yet remained to be delivered of the sugar, which was 220,300 lbs.; that the sugar company commenced to supply the sugar to the respondents in continuation of the contract between the company and the appellants, and supplied to the respondents "pursuant to the . . . contract and to the assignment" of it, 32,700 lbs. of sugar; that the sugar company was willing to continue to deliver the sugar to the respondents, but was, about the 14th September, 1914, notified by the appellants not to do so; that the price of sugar advanced to $6.71 per cwt.; that it was necessary for the successful carrying on of the respondents' business that they should have the benefit of the contract with the sugar company, because their competitors had, as the practice was, made contracts for a supply of sugar for the year in the early part of the year, at the lower prices which then obtained; and that, in consequence of the respondents not being able to obtain the sugar from the sugar company under its con-

tract, they were obliged either to close their factory or to operate their business at a financial loss; that the respondents had made contracts with several firms to supply them with large quantities of candies, sweetmeats, and other confections; but, owing to having been deprived of the benefit of the sugar contract, they were obliged to cancel these contracts. and lost the profits they would have made if the contracts had been performed, and also lost the profits they would have made on other contracts or would have been able to make if the sugar had been supplied; and that the appellants, pretending to have under a provision of the contract the right to do so, entered into possession of the respondents' premises and took possession of the goods and chattels mentioned in the agreement, as well as of others that had subsequently been purchased or manufactured by the respondents and of the books of account of the respondents, and removed them from their premises, although there had been no default by the respondents in performing their obligations under the agreement; and the claim of the respondents is for a return of these goods and chattels and books of account, or for judgment against the appellants for their value, damages for the seizure, removal, and detention of them, and for loss of profits, and judgment restraining the appellants from applying to the sugar company for or receiving from the sugar company, or attempting to sell or dispose of, any part of the undelivered sugar, and for other relief.

If the case made by the respondents in their pleadings had been proved, they must have failed, because, on their statement of the facts, there was a novation in respect of the contract with the sugar company, and that company became bound to deliver to the respondents the sugar which they had contracted to sell to the appellants, and the benefit of the contract had passed to the respondents; and the refusal of the sugar company to supply the sugar was, therefore, a breach of its agreement with the respondents for which the sugar company is answerable in damages to them, and the mere fact that the appellants notified the sugar company not to deliver the sugar to the respondents did not give rise to any cause of action against the appellants, for, apart from any other difficulty in the way of the respondents' success, the loss which they sustained was not occasioned by the action of the appellants, but by the refusal of the sugar company to implement the contract it had made with the respondents.

The evidence, however, did not substantiate the allegations

of the respondents as to the novation, and no novation was proved, but at most only an equitable assignment by the appellants to the respondents of the sugar contract and notice of the assignment of it to the sugar company.

There was a conflict of testimony as to whether it was agreed between the parties that the respondents were to have the benefit of the sugar contract, and upon that issue the learned trial Judge found in favour of the respondents, preferring, as he says, the testimony of the respondents to that of the appellants Brown and Langley; and it is impossible for us to say that in so finding the learned Judge erred.

The learned Judge also found that there was an informal transfer of the sugar contract to the respondents, which I take to mean an equitable assignment of it; and the evidence, in my opinion, warrants that finding.

If there was such an equitable assignment, the appellants had no right to derogate from it, and are liable to the respondents for any damages which resulted from the appellants having done so. If they had made a formal assignment of the contract, and had afterwards assigned it to some one else, under circumstances which entitled the subsequent assignee to the benefit of the contract, and had deprived the respondents of the benefit of it, there can be no doubt that the appellants would be answerable in damages to the respondents for the loss which they suffered; and it can, I think, make no difference as to the rights of the parties that no formal assignment was made to the respondents, and no assignment to any one else. The appellants, by their action in notifying the sugar company not to deliver the sugar to the respondents, deprived the respondents of the benefit of the contract as effectually as they would have done by assigning it to another whose assignment prevailed over the prior assignment.

The fact that the arrangement as to sugar contract was not included in the written agreement between the parties does not stand in the way of the respondents' succeeding. The proper conclusion upon the evidence is, I think, that it was not intended that the writing should embody that part of the arrangement which was intended to be carried out by the "informal" assignment of the sugar contract which it has been found was made, and was made before the agreement was executed, the operation of which of course depended upon the agreement being completed; nor does the Statute of Frauds stand in the respondents' way, because the statute does not apply to such an agreement.

The loss which the respondents sustained by being deprived

of the benefit of the sugar contract was found by the learned Judge to be $3,557.40.

I do not think that the learned Judge had before him the data necessary to enable him to assess these damages. The quantity of sugar undelivered on the 14th September, when the sugar company stopped making delivery to the respondents, was 181.500 lbs.; and my learned brother says in his reasons for judgment that the loss to the respondents was at least $1.96 per cwt., and that that was the advance in the price between the 1st August and the 14th September, according to the evidence of Mr. Edwards, and he arrived at the $3,557.40 by charging the appellants with $1.96 per cwt. for the 181,500 lbs. Mr. Edwards's statement (exhibit 11) shews that the price of sugar on the 25th July was $4.35, and on the 11th September $6.31, per cwt., and the $1.96 is the difference between these prices. It appears that a war tax of 70 cents per cwt. was imposed on sugar, but at what date it not shewn, nor does it appear whether this war tax is included in the prices shewn in Mr. Edwards's statement, or whether the incidence of the tax fell on the sugar company or on the purchasers under the sugar contract. If the tax was to be borne by the purchasers, the amount of it should be deducted from the quotation in the statement, if it is included in them.

The loss which the respondents sustained by being unable to obtain the sugar under the contract was not the difference between the contract price and the market price on the 14th September. If deliveries had been made under the contract, they would have been made in such quantities as the respondents from time to time required for the purposes of their business, and their loss was the difference between the contract price and the prices which they would have had to pay in the open market, calculated as to the quantities they would have required as of the respective dates when they would have required them. There were not, therefore, as I have said, before the Court, the necessary data for determining the damages; and, if the parties are unable to agree as to the facts necessary to be proved to furnish these data, there must be a reference to ascertain the damages.

The learned trial Judge also found that the seizure of the respondents' goods, chattels, and book accounts was "illegal and not in good faith," and assessed the respondents' damages on this branch of the case at $1,000.

The appellants sought to justify the seizure under a pro-

vision of the agreement which entitled them to seize if they felt unsafe or insecure in respect of the payments due or accruing due, but the learned Judge was of opinion that the appellants "would not have the slightest reasonable ground for feeling unsafe or insecure in respect of the small payment not falling due until more than 9 months after the seizure;" and he therefore held that there was no right to seize.

We cannot say that this finding was not warranted by the evidence, and, if it stands, it supports the conclusion of the learned Judge that the seizure was "illegal."

I am unable to agree with the learned Judge as to the damages to which the respondents are entitled for the "illegal" seizure. He based them upon the profits which they would have made if they had not been prevented by the seizure from carrying on their business, but the respondents shew by their pleadings that it was impossible for them to carry on their business successfully, because of their inability to get the sugar on the sugar contract, and before the seizure they had discontinued their operations. The loss of profits was, therefore, not occasioned by the seizure but by the inability of the respondents to carry on their business for the reason mentioned, and therefore nothing should have been allowed for loss of profits.

As the seizure has been found to have been unlawful, the respondents are entitled to some damages for its having been made, and I would assess them at $100.

The result is that, in my opinion, the appeal should be allowed, and the judgment be vacated, and that there should be substituted for it judgment for the recovery by the respondents of $100 as damages for the unlawful seizure, and as damages for the non-delivery of the sugar on the sugar contract such sum as the Master in Ordinary shall ascertain, on the basis I have mentioned, to be the loss sustained by the respondents by the non-delivery of it, and for the recovery by the respondents of their costs of the action, unless the parties agree as to the data which are wanting to enable the latter damages to be assessed, and in that event the case may be spoken to and the damages will be assessed by the Court; and, after that has been done, the proper judgment will be directed to be entered.

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

MAGEE, J.A., was of opinion, for reasons stated in writing, that the appeal should be allowed and the action dismissed.

Judgment as stated by MEREDITH, C.J.O.

MARCH 15TH, 1915.

STABLES v. UNITED GAS AND FUEL CO.

Negligence—Explosion of Natural Gas in Cellar of Dwelling-house—Escape from Underground Pipes of Gas Company—Break in Pipe—Cause of—Findings of Jury—Liability of Company.

Appeal by the defendant company from the judgment of KELLY, J., upon the findings of the jury at the trial at Hamilton, in favour of the plaintiff, in an action brought to recover damages for injury to the plaintiff and his property caused by an explosion, in the cellar of his dwelling-house, of natural gas which had escaped from the underground pipes of the defendant company, in Bellevue avenue, in the city of Hamilton.

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

G. Lynch-Staunton, K.C., and C. V. Langs, for the appellant company.

W. A. Logie and T. B. McQuesten, for the plaintiff, the respondent.

F. R. Waddell, K.C., for the Corporation of the City of Hamilton, made a third party.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . It is not disputed by the appellant company that the gas which exploded had escaped into the respondent's residence from the appellant's pipes in Bellevue avenue; but the appellant disputes liability upon the ground that the escape was not due to any negligence upon its part.

The respondent sought to establish at the trial that the escape of the gas was due to the negligence of the appellant; and the acts of negligence relied on were . . . : (1) not having laid the pipe from which the gas escaped below the frost line; (2) not having used expansion joints to counteract the effect of the expansion and contraction of the pipe; (3) not having laid the pipe deep enough to prevent its being injured by heavy traffic passing over it; and (4) not having sufficiently inspected the pipes in Bellevue avenue after the explosion which had occurred in that street 10 days before the explosion in respect of which the respondent claims.

The jury, in answer to questions, found that the appellant was guilty of all these four acts of negligence, and they also found, in answer to other questions: (1) that the appellant in laying its pipes in Belleville avenue did not use the best known mode of construction; (2) that the fault in this respect was not putting down the pipes below the frost line; (3) that there was a better and safer mode of construction than that adopted known to the appellant; (4) that the appellant did not use all possible care to prevent injury from the use of these pipes; (5) that the fault in this respect was "improper inspection;" (6) that the injury and damage sustained by the respondent were not the result of accident, but of negligence of the appellant; and (7) that the negligence of the appellant caused the injury and damage.

The jury were unable to answer and did not answer the 6th question—"What caused the break or opening in the gas pipe on Bellevue avenue, near plaintiff's residence?"

All these findings were attacked by counsel for the appellant on the argument before us, but their main contention was, that judgment should not have been entered for the respondent because of the failure of the jury to answer the 6th question, especially as, it was argued, there was nothing to support the finding that expansion joints should have been used.

We are of opinion that there was evidence which, if believed, warranted the findings of the jury, and that a finding as to which of the negligent acts of which the the jury found the appellant guilty was the cause of the injury and damage of which the respondent complains, was not necessary to entitle him to have the judgment entered for him.

There was, no doubt, evidence which, if believed, would have warranted the jury's coming to the conclusion that it was not necessary to put the pipes down below the frost line, and that it was not necessary where they were laid above that line to use expansion joints; but the jury, as they had a right to do, preferred to that evidence the evidence to the contrary which was adduced by the respondent. . . .

It is plain, I think, that the jury's difficulty as to the 6th question was that, according to the theory of the appellant, the pipe the breaking of which permitted the gas to escape could not have been broken by the action of frost, but was broken by heavy traffic on the street; while, according to the theory of the respondent, the break was occasioned by the frost; and the jury were unable to determine which of these theories was the right one, but were of opinion that the break was caused either by

the heavy traffic over the pipe or by the frost, and that the cause in either case was the insufficient depth at which the pipes had been laid.

The finding as to the failure to use expansion joints means no more than that if expansion joints had been used it would not have been improper not to lay the pipes below the frost line, but that, being laid above the frost line, it was improper not to have used expansion joints; and the finding as to insufficient inspection simply means that the consequence of the improper system used by the appellant would have been avoided if there had been a proper inspection of the pipe line on Bellevue avenue after the previous accident, and that there had not been such an inspection.

Upon the whole, I am of opinion that the appeal fails, and should be dismissed with costs.

MARCH 15TH, 1915.

*McNIVEN v. PIGOTT.

Vendor and Purchaser—Agreement for Sale of Land—Inability of Vendor to Make Title—Rescission by Purchasers—Vendor's Damages by Reason of Purchaser's Dealings with Land—Destruction of Buildings — Inability of Purchasers to Make Complete Restitution—Consent to Alteration of Property—Measure of Damages.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 7 O.W.N. 593.

The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., and LENNOX, J.

I. F. Hellmuth, K.C., and W. S. MacBrayne, for the appellants.

G. Lynch-Staunton, K.C., and S. F. Washington, K.C., for the defendant, respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—Appeal from the judgment of Middleton, J., varying a Master's report by allowing $2,000, the value of buildings destroyed and removed by the plaintiffs. Another ground of appeal was dismissed on the argument, and judgment was reserved on the plaintiffs' main appeal.

The learned Judge's view now is, that the judgment pronounced by the Appellate Division, and reported in 31 O.L.R. 365, necessarily involved restitutio in integrum or its equivalent. Hence he allows $2,000, the value of the respondent's buildings as they stood when the contract was entered into, rather than $75, the amount received by the appellants from the sale of the salvage from the buildings over and above the cost of removal.

This, however, is not the case. No claim was made by the respondent that the appellants were not entitled to rescission because they had removed the buildings, or that, if granted, they must fully compensate the respondent for the value of the buildings removed. It is hardly likely that the experienced counsel who then acted for the respondent would have overlooked that point, especially as it would have answered a double purpose—viz.: as shewing, if unexplained, an acceptance of the title (Margravine of Anspach v. Noel (1816), 1 Madd. 310; Commercial Bank v. McConnell (1859), 7 Gr. 323; Wallace v. Hesslein (1898), 29 S.C.R. 171); and as affording a practical bar to rescission, unless full restitution could be made.

However that may be, the point was not argued before the Court, and its judgment did not rest upon that view of the respondent's rights.

The contract itself probably affords the explanation. It provided that possession might be taken at once, and leave was given to the appellants to take possession at once and "to cut down trees, remove fences, clear off all obstacles necessary to put property in good saleable condition, survey and open up streets through said property, sell or build on said property."

. . .

The buildings were removed when both parties were under the impression (which apparently the respondent and the learned Judge below still retain) that the respondent had a good title, and before knowledge that a claim under the Bell agreement was being actively asserted. What was done was, therefore, not only in pursuance of the terms of the contract, but in good faith and before notice, not of course, of the existence of the Bell agreement, but of the fact that trouble was likely to arise therefrom.

Inability to make restitutio in intergrum is held to be a bar only as against the party by whose acts the property has been changed or depreciated: Phosphate Sewage Co. v. Hartmont (1877), 5 Ch. D. 394; Rees v. Bernardy, [1896] 2 Ch. 437, 446. I have found no case where it forms a defence when the altera-

tion has been made pursuant to the contract, and therefore is something consented to by both parties. . . .

[Reference to Head v. Tattersall (1871), L.R. 7 Ex. 7.]

The vendor is bound to hold the property for the purchaser after the contract is entered into: Clarke v. Ramuz, [1891] 2 Q.B. 456. Neither he nor the purchaser, if let into possession by contract, can change it, but they may agree to any modification of their strict rights. If, where the vendor is asserting a good title, and, pending completion, he and the purchaser are willing that the latter should begin to make improvements, or deal with it so as to make it different from what it originally was, the reason of the rule does not seem applicable. If the contract goes off, the purchaser may lose his expenditure (Rankin v. Sterling (1902), 3 O.L.R. 646); but the vendor certainly cannot complain if he gets the property back together with any benefit which in its altered condition has come to the purchaser as the result of the agreement or pursuant to the terms of the contract. See Addison v. Ottawa Auto and Taxi Co. (1913), 30 O.L.R. 51.

The reference as to the damages, if legally recoverable, was confined to those claimed in the pleadings, namely, loss and damage caused by reason of the appellants not carrying out the contract, and because the respondent had been unable to meet obligations contracted in expectation of receiving the purchase-price for the property; but the reference has been proceeded with under the idea that the value of the buildings was a possible element of damage. These, however, must be assessed under the real circumstances of the case, and not put upon the view that the appellants had improperly altered the condition of the property, which is contrary to the fact.

Hence the allowance of the $75, being the profit made by the appellants, was the proper measure of damages, and is that which must have been in the contemplation of the parties, having regard to their contract.

The appeal should, therefore, be allowed with costs, and the damages reduced to $75. There should be no costs in the Master's office nor in the Court below to either party, as in the result success has been divided throughout. . . .

MARCH 15TH, 1915.

*REX v. COHEN.

Criminal Law—Director of Company—False Statement Made to Bank—Criminal Code, sec. 414—Statement as to Director's own Affairs Affecting his Responsibility as Guarantor — "Prospectus"—Amendment of Code by 3 & 4 Geo. V. ch. 13, sec. 16—Inapplicability to Previous Offence—Obtaining Credit by False Pretences — Criminal Code, sec. 405A.— Credit Given to Director by Bank upon Guarantee.

Case reserved by one of the Junior Judges of the County Court of the County of York, on the application of the Crown.

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

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

T. C. Robinette, K.C., for the accused.

MACLAREN, J.A.:—The accused was tried at the general Sessions on two indictments. At the close of the case for the Crown, the Judge directed the jury to acquit in each case, on the ground that there was no evidence of the offence charged; and reserved for the Court the following question: "Was there any evidence upon which a jury could find the accused guilty on either of the indictments or any of the counts thereof?"

The first indictment charged that the accused, "being a director of the National Matzo and Biscuit Company Limited, did make, circulate, or publish, or did concur in making, circulating, or publishing, statements or accounts which he knew to be false in a material particular, with intent to deceive or defraud the Northern Crown Bank to entrust or advance property, to wit, a large sum of money, to such National Matzo and Biscuit Company Limited, contrary to the Criminal Code."

Section 414 of the Criminal Code, under which this indictment is laid, reads as follows: "Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promoter, director, public officer or manager of any body corporate or public company, either existing or intended to be formed, makes, circulates, or publishes, or concurs in making, circulating, or publishing, any prospectus, statement, or account which he knows to be false in any material particular, with intent to induce persons, whether ascertained or not, to become

shareholders or partners, or with intent to deceive or defraud the members, shareholders, or creditors, or any of them, whether ascertained or not, of such body corporate or public company, or with intent to induce any person to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof.''

This section of the Code was based on sec. 85 of the Canadian Larceny Act of 1869, 32 & 33 Vict. ch. 21, which was substantially copied from the Imperial Larceny Act, 24 & 25 Vict. ch. 98, sec. 84. . . . The only new matter in the Code was the insertion of the words ''promoter'' and ''prospectus.''

The evidence shewed that the accused had given a guarantee to the bank to the extent of $10,000; also that he gave a statement of his own affairs to the bank which to his knowledge was untrue, as it omitted a liability of his to one Simon Cohen. The Judge held that sec. 414 applied only to statements of the affairs of the company, and directed the jury to acquit.

There is no doubt that the introduction of the word ''prospectus'' in sec. 414 has a tendency to strengthen the impression that the ''statement of account'' in the section has reference to the affairs of the company, and not to the personal affairs of the officer making the same, and to suggest that the maxim ''noscitur â sociis'' might possibly be applicable.

I have not been able to find a single reported case either in England or Canada where the prosecution was based upon a statement of the personal affairs of the officer accused, notwithstanding that this law has been in force in these countries for a period of 57 and 45 years respectively.

In the circumstances, there is, in my opinion, sufficient doubt as to the proper interpretation of the section to require us to give a negative answer to the question reserved for us by the trial Judge as to this indictment, inasmuch as the law ought to be clear to justify a conviction, and ''the Court must see that the thing charged as an offence is within the plain meaning of the words used:'' Dyke v. Elliott (1872), L.R. 4 P.C. 184, at p. 191.

Usually a reserved case is asked for by the Crown in case of an acquittal in order to settle the law for the future. This is not necessary in the present case, as Parliament has, by sec. 16 of ch. 13 of the statutes of 1913, 3 & 4 Geo. V., added a new section, 407A., to the Criminal Code, expressly providing for a case like the present. That section, however, is not applicable to the present case, as it was passed only on the 6th June, 1913, and the statement now complained of was made in February, 1909.

The second indictment referred to in the reserved case contained three counts. The first count charged the accused, under sec. 405 of the Code, with having in February, 1909, knowingly and fraudulently, by false pretences, obtained from the Northern Crown Bank $5,000 with intent to defraud the said bank. The third count charged the accused, under sec. 405, with having, knowingly and fraudulently, by false pretences, procured the said bank to pay and deliver to the National Matzo Company various sums of money aggregating $5,000.

The County Crown Attorney, who represented the Crown at the General Sessions, informed the presiding Judge that as to the charges which were laid under sec. 405 of the Code the Crown would offer no evidence; and counsel for the Crown before us did not press for an affirmative answer as to these two counts.

The second count of the indictment charged that the accused, "in incurring a debt or liability to the Northern Crown Bank, did obtain credit under false pretences from the said bank." This count was laid under sec. 405A., which was added to the Code by sec. 6 of ch. 18 of the statutes of 1908, 7 & 8 Edw. VII., and which reads as follows: "Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretences, or by means of any fraud."

This section was introduced to overcome the defect in our law pointed out by the Quebec Court of Appeal in Regina v. Boyd (1896), 4 Can. Crim. Cas. 219, viz., that sec. 405 applied only to the obtaining by false pretences of something capable of being stolen, and not to the obtaining of credit. The new section 405A. . . . was copied from the Imperial Debtors Act, 32 & 33 Vict. ch. 62, sec. 13(1), which was considered in Regina v. Bryant (1899), 63 J.P. 376, and it was held . . . that the Act did not apply where credit was given to some person other than the party making the application for it.

The facts of the present case are, however, different. The accused in fact incurred a liability for himself, if not a debt, and obtained a credit for himself on his guarantee, although the money was actually paid to the company of which he was a director and shareholder; and be benefited by it.

This section was considered by the Quebec Court of Appeal in Rex v. Campbell (1912), 5 D.L.R. 370, and it was there unanimously held to be applicable to a case where the president of a company had fraudulently obtained credit for the company.

I am of opinion that the question as to this count should be answered in the affirmative.

Upon the whole, I am of opinion that our answer to the question reserved should be in the negative as regards the first indictment and the first and third counts of the second indictment; and in the affirmative as regards the second count in the second indictment.

MEREDITH, C.J.O., for reasons stated in writing, agreed in the conclusions of MACLAREN, J.A.

GARROW, J.A., also agreed with MACLAREN, J.A.

MAGEE, J.A., for reasons stated in writing, was of opinion that the question should be answered in the affirmative as to the counts under secs. 414 and 405A., and in the negative as to the others.

HODGINS, J.A., for reasons stated in writing, agreed with the judgment of MACLAREN, J.A., except as to the second count in the second indictment, in respect of which he thought the acquittal was proper.

Answers as stated by MACLAREN, J.A.

MARCH 15TH, 1915.

BAIRD v. CLARK.

Contract—Sale of Animals for Breeding Purposes—Undertaking —Construction—Breach.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 7 O.W.N. 535.

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

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

W. N. Tilley, for the defendant, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The material facts and the reasons for judgment of the learned trial Judge are reported in 7 O.W.N. 535.

I agree with the conclusion of my learned brother and with the reasoning upon which it is based, and cannot usefully add anything to what he has said.

I would affirm the judgment and dismiss the appeal with costs.

MARCH 15TH, 1915.

TYRRELL v. VERRAL.

Landlord and Tenant — Lease to two Tenants — Omission of Clause Providing that Tenants should Pay Taxes—Agreement by one Tenant to Pay Taxes—Absence of Knowledge by the Other—Statutory Right to Deduct Taxes from Rent —Payment of Taxes—Construction of Lease—Evidence—Interpretation Act.

Appeal by the defendant Verral from the judgment of the Senior Judge of the County Court of the County of York, in favour of the plaintiff, after the trial of the action in that Court, without a jury.

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

W. G. Thurston, K.C., for the appellant.

L. Duncan, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—By a lease dated April, 1911, the respondent demised to the appellant and Marmaduke E. Matthews premises in Weston for a term of five years, to be computed from the 1st May following, at the rental of $40 per month payable in advance. The lease was made in pursuance of the Act respecting Short Forms of Leases, and contains a covenant, in the statutory form, to pay the rent, water rates, gas and electric light rates; the reddendum is in the statutory form, with the words "without any deduction defalcation or abatement whatsoever" added; and there is no covenant to pay taxes.

The action is brought on the covenant to pay the rent, for the recovery of the rent for the months of February to September (both inclusive) of the year 1914. The right to the rent for these months is not disputed by the appellant, but he claims the right to deduct from it $157.66, which, he alleges, he was compelled to pay for taxes of the year 1913, and he has paid into Court $122.34, which, he says, is sufficient to satisfy the respondent's claim after deducting the amount paid for the taxes.

Counsel for the respondent presented an elaborate argument as to the effect of the words of the reddendum in its expanded form, with the superadded words quoted above, which, he con-

tended, was to exclude the right to deduct the taxes. In the view I take, it is not necessary to decide that question; but, as at present advised, I am not prepared to assent to the argument, especially as the lease contains an express covenant by the lessees to pay the water rates, gas and electric light rates, which would seem to exclude liability to pay any other rates.

I am, however, of opinion that the judgment of the learned Judge is right.

The arrangements for the lease were made by Matthews. It was supposed that, as the premises were to be occupied as a school, they would be exempt from municipal taxation; but it was agreed that, if they were not, the taxes were to be paid by the lessees. By an oversight . . . a covenant on the part of the lessees to pay the taxes was not inserted in the lease. This appears from a letter written by Matthews to the respondent on the 21st August, 1911. . . .

The appellant testified that he was not informed of the arrangement as to the taxes, and that he executed the lease believing that it embodied all the terms of the agreement that had been made between Matthews and the respondent.

The school under the management of Matthews was not a success, and the appellant took it over and took possession of the demised premises; and he and the Rev. John Hughes Jones (the nature of whose connection with the matter does not appear) took from Matthews a bill of sale of the furniture and other chattels in the school premises, and put in charge of the school as headmaster . . . George F. Ward. . . .

On the 17th February following, an agreement was entered into between the appellant and Matthews providing for the disposition of the proceeds of the sale of lands standing in the name of the appellant, but held by him for himself and Matthews. By the terms of this agreement, out of the proceeds of the sale there were first to be paid the incumbrances on the lands, then an amount which the appellant had advanced, then certain debts mentioned in a schedule, one of which was the taxes on the leased premises, $232.14, of which $120.52 is stated to have been paid; and the residue of the proceeds was to be divided equally between the appellant and Matthews.

Matthews clearly recognised his liability to pay the taxes, and gave his cheque to the collector for the taxes of 1911. The cheque was dishonoured, and these taxes, amounting to $111.62, were paid by the appellant on the 12th March, 1913. The taxes for 1912, amounting to $120.95, . . . were also paid by the appellant. The taxes for 1913, which he seeks to deduct from

the rent, were paid, not by the appellant, but by Jones and Ward —$76.91 by the former and $80.75 by the latter. It is also in evidence that the appellant and Matthews waited upon the council of Weston and sought to have the school exempted from taxation, but without success.

Accepting as true the testimony of the appellant that when he executed the lease he did not know of the arrangement that Matthews had made as to the payment of the taxes, and believed that the lease contained all the terms that had been agreed upon, the only possible inference to be drawn from the facts I have mentioned is, I think, that the appellant subsequently learned of the arrangement as to the taxes, and recognised that the lessees were bound to pay them, or, at all events, that Matthews was under that obligation; and, when the appellant took over the school, and, as Matthews testified, released him, the appellant became bound as between him and Matthews to pay the taxes, and probably, as between himself and the respondent, came under that obligation.

If it be the proper conclusion that as between the appellant and Matthews the appellant became liable to pay the taxes—and of course if the result of the transactions was that the appellant came under that obligation to the respondent—the appellant is not entitled to deduct the taxes from the rent. The statutory right of a tenant to deduct taxes paid by him from his rent exists only where, as between the landlord and the tenant, the landlord ought to pay them; and, in the circumstances of this case, it cannot be said that, as between his tenants and the respondent, the latter ought to have paid the taxes.

If the circumstances I have mentioned were absent, and the question were to be determined on the terms of the lease and the evidence as to the omission of a provision that the tenant should pay the taxes, I am of opinion that the appellant would fail. Matthews and he were the tenants under the lease, not the appellant alone; and, where there are more tenants than one, it is, in my opinion, sufficient to exclude the operation of the statute that, as between one of them and the landlord, that one ought to pay the taxes; in other words, that in such a case, applying the Interpretation Act, the section which gives the right to deduct the taxes applies only where none of the tenants is liable, but the landlord is liable, to pay the taxes.

A further difficulty in the way of the appellant's success is the fact that he did not pay the taxes of 1913.

Appeal dismissed with costs.

MARCH 15TH, 1915.

WILSON v. SMITH.

Easement—Right to Drainage and Water Supply through Adjoining Tenement—Use of Unlawful Means—Municipal By-laws.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Wentworth dismissing an action brought in that Court and tried by him without a jury.

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

J. L. Schelter, for the appellant.

H. Carpenter, for the defendant, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought to recover damages for the stopping up by the respondent of a drain for carrying off the refuse water and sewage from number 261 Wellington street, in the city of Hamilton, and for his stopping up the water pipe by which the house was supplied with city water; for a declaration that this house "might enjoy the easements of drainage and water supply," by means of this drain and water pipe, through the adjoining property of the respondent, number 263, to the main sewer and water main; and for an injunction restraining the respondent from interfering with these alleged easements.

The respondent was the owner of 50 feet of lot No. 179 on the west side of Wellington street, in John Ferguson's survey of the block bounded by Wellington, Barton, Cathcart, and Robert streets, and on the 20th March, 1913, conveyed to the appellant the southerly 25 feet of the lot, which is further described as "being the lands occupied by and used with the premises known as city number 261 Wellington street north;" and the remainder of the lot is known as city number 263, and is still owned by the respondent.

This conveyance is made in pursuance of the Short Forms of Conveyances Act, and it contains no habendum, but does contain covenants and bar of dower in the statutory form.

Both 261 and 263 were, at the time of the sale to the appellant, occupied as "one dwelling-house and one 'lean-to,'" and they were all under one roof. As I understand the evidence, the

"lean-to" is No. 261, and about 8 months before the sale of it to the appellant it was let by the respondent to a tenant. The pipe connection with the main sewer was at this time in No. 263 only; and, when No. 261 was rented, the respondent made a connection from his connecting pipe to a temporary closet on No. 261. A connection from the water pipe in No. 263 had been made previously for the convenience of a former tenant of No. 261, and that was the position of matters when the conveyance was made to the appellant.

It is contended by the appellant that, by the conveyance, there passed to him the right to have uninterrupted use of the drain leading from house No. 261 through house No. 263 to the drain pipe in it, and the right to have the water conveyed to house No. 261 through the pipe leading to it from house No. 263; and in support of this contention Israel v. Leith (1890), 20 O.R. 361, and the cases there referred to, were cited and relied upon.

It was argued for the respondent that, in the circumstances of this case, Israel v. Leith has no application; that the drain and water pipes in question were put in for a merely temporary purpose in connection with the "lean-to," and for the accommodation of the tenants of it, and were not intended to be permanent; that the "lean-to" was a very old building, and it had been the intention of the respondent, if he had not sold it, to pull it down and replace it by another structure; and that Frohman, to whom the respondent appears to have sold the land now owned by the appellant, who acquired Frohman's right, intimated to the respondent, at the time he purchased, that it was his intention to pull down the building and put up another; that, according to the by-laws of the City of Hamilton, it is unlawful to drain two separate tenements by means of a common pipe within either of them, and it is also unlawful for any person, being an occupant or tenant in any house or building, to use or apply the water supplied to it to the use or benefit of others, without permission in writing having been first obtained from the waterworks department; and that, after the conveyance to the appellant, it was not only the right but the duty of the respondent, in order to conform to the provisions of these by-laws, to discontinue the joint system of drainage, and to discontinue to use or apply the water which was supplied by the pipe which led to his building, to the use or benefit of the occupant of the appellant's building without the permission prescribed by the by-law, which had not been obtained.

The learned County Court Judge gave effect to the latter of

these contentions of the respondent; and we cannot say that he erred in so doing. If the respondent had not taken the course he did of cutting off the connections between the pipes on his land and the land of the appellant, he would have been liable to be fined for breaches of the by-laws; and it cannot be, I think, that the appellant had the right to insist upon the unlawful means which were in use for supplying him with water, and to provide an outlet for his drainage being continued; and I am of opinion that, if easements for these purposes had passed by conveyance to the appellant, they came to an end when the use of these means became unlawful. See by-law No. 41, sec. 38, sub-secs. 4 and 5, by-law No. 54, sec. 4, sub-sec 3, and by-law No. 79, sec. 6, as to soil pipes and drains; and by-law No. 1388, sec. 42, as to the water supply.

For these reasons, I would affirm the judgment of the learned Judge, and dismiss the appeal with costs.

MARCH 15TH, 1915.

EDWARDS v. TOWN OF NORTH BAY.

Highway—Nonrepair—Accumulation of Snow and Ice on Sidewalk in Town—Injury to Pedestrian—Gross Negligence—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 450, *sub-sec.* 3—*Evidence—Liability of Town Corporation.*

Appeal by the plaintiff from the judgment of KELLY, J., at the trial without a jury, dismissing an action for damages for personal injuries sustained by the plaintiff by falling upon an icy sidewalk.

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

S. H. Bradford, K.C., for the appellant.

G. H. Kilmer, K.C., for the defendant corporation.

The judgment of the Court was delivered by GARROW, J.A.:—The action was brought to recover damages said to have been caused to the plaintiff by falling upon a sidewalk on Main street in the town of North Bay, which it is said was out of repair owing to the negligence of the defendant corporation. The accident occurred on the evening of Wednesday the 12th February, 1914. The plaintiff's injuries as a result of the fall were quite

severe. Her left wrist was broken, and she was also injured internally, but not, I think, upon the evidence, in either respect permanently.

The negligence complained of was permitting an accumulation of ice and snow to be and remain upon the sidewalk upon which the plaintiff fell. Kelly, J., dismissed the action with costs, upon the ground that gross negligence had not been established, as required by sec. 450, sub-sec. 3, of the Municipal Act, R.S.O. 1914 ch. 192—a provision which has long formed part of the municipal law of the Province.

In discussing the evidence in his judgment delivered at the trial the learned Judge seemed to be of the opinion, based upon the evidence of certain witnesses called for the defence, that the account given by the plaintiff and her witnesses of the condition of the sidewalk at the time of and shortly before the accident was erroneous, or at least overstated, although not deliberately so. This does not, in my opinion, amount to a definite finding against the credibility of the plaintiff and her witnesses, but is rather a balancing of the plaintiff's case against that presented in defence, with a final inclination towards the latter upon the weight of evidence. The learned Judge having, therefore, himself supplied the corrective for the exaggerations, if any, on the part of the plaintiff, I have the less diffidence in expressing my own view, derived from a careful perusal of the evidence, upon the question of fact presented, which, with deference, differs from the conclusion arrived at by the learned Judge.

The condition of the sidewalk at the time of the accident, as given in evidence by the plaintiff, is, that she fell in front of Campbell's drug store, "the ice being lumpy and slanted there, and very slippery, and a slope from the inside out to the street." . . .

If the case stood as it did at the close of the plaintiff's evidence, the plaintiff's right to recover could scarcely, it seems to me, be in doubt. She had, it appears to me, proved very clearly that upon one of the busiest streets in the town there was, where she fell, an obstruction caused by an accumulation of ice and snow which rendered its use in that condition dangerous, as is evidenced by the undisputed fact that within a period of five days three other persons all fell at the same place. No one on behalf of the defendant has offered a single suggestion to explain why they should all have fallen at that particular place.

The case thus made is not, in my opinion, fairly met or displaced by the evidence given on behalf of the defence, largely

and indeed entirely negative in its character, of persons who did not see what the plaintiff's witnesses described or do not remember the conditions as they then existed. There was no particular reason why they should observe or should remember. Probably they would have had a more lively recollection if they too had slipped and fallen, as did the plaintiff and her witnesses.

Upon the whole, the evidence seems to me to establish a reasonably clear case of gross negligence within the meaning of the statute, entitling the plaintiff to recover.

There having been no assessment of damages, I have also had to consider that question; and, dealing with it as I best can, I think the sum of $500, suggested from the Bench on the argument of the appeal, is upon the whole a fair amount. And for that sum the plaintiff should, I think, have judgment. She should also have her costs here and below.

MARCH 15TH, 1915.

GRAMM MOTOR TRUCK CO. OF CANADA LIMITED v. GRAMM MOTOR TRUCK CO. OF LIMA OHIO.

Contract—Construction—Sale of Goods—"At Factory Cost"—"Overhead Charges"—Royalties—List Price in Excess of Actual Cost—Refund of Excess—Evidence—Onus.

Appeal by the plaintiff company from the order of MIDDLETON, J., 7 O.W.N. 448, varying the report of a special referee.

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

J. H. Rodd, for the appellant company.

A. R. Bartlet, for the defendant company, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The material facts are stated in the reasons for judgment of my brother Middleton. I agree with his conclusion and with the reasoning upon which it is based, and have only a few words to add to what he has said.

The appellant has paid for the goods in respect of which it seeks to recover from the respondent what it is alleged the appellant was charged for the goods in excess of the cost price. The onus was upon the appellant to prove that it was charged more than the cost price, and that onus it has not, in my opinion, satis-

fied. If it had not been shewn that the cost-cards did not shew correctly the cost of the productive labour that was employed, they would have afforded cogent evidence that the cost of it, as indicated by the cards, was the actual cost—which is the theory upon which the appellant's claim and the referee's finding are based.

It is abundantly clear that the cost-cards do not shew correctly the cost of labour, and the appellant fails not only because it did not satisfy the onus which rested upon it, but also because the respondent adduced evidence which affords reasonable ground for the conclusion to which the learned Judge came, that the list prices are approximately correct.

I would dismiss the appeal with costs.

MARCH 15TH, 1915.

*KENDLER v. BERNSTOCK.

Mechanics' Liens—Action to Enforce Lien—Commencement of Action after Expiry of Lien—Right to Recover Personal Judgment—Mechanics Lien Act, R.S.O. 1914 *ch.* 140, *sec.* 49—*Jurisdiction.*

Appeal by the defendant from the judgment of an Official Referee in a proceeding to enforce an alleged lien under the Mechanics' Lien Act.

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

H. H. Shaver, for the appellant.

A. Cohen, for the plaintiff, respondent.

HODGINS, J.A.:—The only objection on which judgment was reserved was, that, the action having been begun after the lien had expired, there was nothing on which to found jurisdiction to pronounce a personal judgment. The mechanic's lien was registered on the 17th July, 1914, and in it the date of the last supply of material was given as the 18th June, 1914. Action to enforce the lien, under sec. 24 of the Mechanics Lien Act, R.S.O. 1914 ch. 140, should therefore have been begun before the 16th September, 1914. It was not commenced, however, until the 8th October, 1914.

Section 49 provides that where a claimant fails to establish a valid lien he may nevertheless recover a personal judgment against any party to the action for such sum as may appear due to him and which he might recover in an action against such party.

The Official Referee before whom the action was tried held that there was no valid lien—an issue expressly raised in the pleadings—and gave judgment for the amount found by him to be due by the appellant to the respondent.

The Act gives a lien upon the lands of an owner, limited except in certain cases to the amount justly due by the owner to the contractor, which was the relationship of the parties to this action. The lien in this case was registered apparently within the time limited by sec. 22. Under sec. 31, actions to realise all liens must be brought in the Supreme Court of Ontario, and the procedure and mode of trial is therein prescribed. Power is vested in certain officers to exercise the jurisdiction of the Supreme Court in trying and disposing of these actions: Smeeton v. Collier (1847), 1 Ex. 457, 462.

There are generally but two issues to be determined: first, whether a valid lien or more than one exists; and, second, the amount due in respect thereof.

The Supreme Court being seised of an action commenced in it, according to the practice prescribed by the Act, to realise the lien or liens, it becomes a judicial question whether or not a lien or more than one exists, or whether, by reason either of non-compliance with any of the statutory provisions (see secs. 17, 18, 19, 22, 24, 25) or otherwise, the lien or liens has or have ceased to exist. Evidence upon these points must be given at the trial, and the judgment becomes a judgment of the Court (sec. 37, sub-sec. 3), and it is appealable under sec. 40. It is not always a simple matter to decide whether a lien has been registered in time or whether a mechanic's lien proceeding has been begun within the proper time-limit: Re Moorehouse and Leak (1887), 13 O.R. 290.

If any one affected by the registration of a lien desires to take advantage of the cesser thereof by reason of the provisions of secs. 23, 24, or 25, he may apply ex parte under sec. 27, sub-sec. 5, to vacate the registration of the certificate of lis pendens; and, if the motion is successful, the lien itself may be discharged. In such a case there is no trial, and no judgment can be pronounced. But, where the question is left to be tried, the provisions of sec.

49 apply, and a judgment for the amount properly due may be had, although no lien is established.

The appeal fails, and must be dismissed with costs.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., concurred.

GARROW, J.A., agreed that the appeal should be dismissed, for reasons stated in writing.

Appeal dismissed with costs.

MARCH 15TH, 1915.

*CHRISTIE v. LONDON ELECTRIC CO.

Master and Servant—Death of Servant — Lineman Ascending Pole—Condition of Pole—Negligence—Contributory Negligence—Inspection—Evidence — Findings of Jury—Supplemental Finding by Court.

Appeal by the defendant company from the judgment of Britton, J., 7 O.W.N. 703, upon the findings of the jury at the trial, in favour of the plaintiff, in an action, under the Fatal Accidents Act, to recover damages for the death of John Christie, by reason (as alleged) of the negligence of the defendant company, by which he was employed as a lineman. The deceased in the course of his employment climbed one of the defendant company's poles, which moved as if to fall towards the street, whereupon the deceased jumped for another pole which was near, but failed to catch it with his hands, and so fell to the ground and was killed.

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

D. L. McCarthy, K.C., and W. R. Meredith, for the appellant company.

Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after setting out the facts and the findings of the jury):—There was, I think, evidence to warrant the conclusion that the pole which the deceased climbed had been inspected by

some one appointed by the appellant to make the inspection, and that he was negligent in making the inspection and reporting that the pole was in fair condition, when even a superficial examination would have shewn that it was not in any such condition, but, as the jury found, was rotten and quite unsafe for a man to work on; and the jury's view evidently was, that, if the inspector had done his duty and the appellant its duty, there should have been something put upon the pole to indicate that it was unsafe to climb upon it, or that the deceased should have been warned of the true condition of the pole and of the danger he would incur if he climbed on it; and that, instead of this being done, the dangerous condition of the pole was concealed from the deceased by the earth which had been heaped up at the butt of it by the servants of the appellant.

That the deceased came to his death while in the performance of a duty which he was called upon to perform, and that, apart from the question of contributory negligence, his death was occasioned by the condition of the pole, is, I think, beyond question.

The question as to the deceased having climbed the old pole and having done so without seeing that it had been lashed to the new pole, and as to the giving way of the old pole having been caused by the deceased shaking it, were questions bearing on the issue as to contributory negligence, and the jury has acquitted the deceased of that.

There were circumstances that probably weighed with the jury in reaching that conclusion, and among them the following: the improbability of the deceased, who . . . was an experienced lineman, risking life or limb if he thought there was danger to be apprehended from climbing the old pole; the fact that the dangerous condition of the old pole was concealed, and that it was classed as a fair pole; the fact that it was impracticable or at all events difficult for him to have removed the cross-arm if he had climbed the new pole; the fact that there were no ropes or wires provided for lashing the two poles together; and the fact that the foreman was upon the ground superintending the work and made no objection to the deceased climbing the old pole; and it is, in my opinion, impossible to say that the finding that the deceased was not guilty of contributory negligence was one that twelve reasonable men might not have made.

The principle of the decision of the Supreme Court of Canada in Randall v. Ahearn & Soper Limited (1904), 34 S.C.R. 698, is, I think, applicable. . . .

Putting the appellant's case on the highest ground that it can be put, the deceased was chargeable only with disregarding, not a rule of his employer, but a practice, in not seeing that the two poles were lashed together before he climbed the old pole; and, if the disregard of the rule as to wearing rubber gloves did not warrant the case being withdrawn from the jury in the Randall case, I do not see how the mere fact of the disregard by the deceased of the practice as to lashing the poles together would have warranted my brother Britton's withdrawing this case from the jury.

There is more difficulty as to whether the findings of the jury were sufficient to entitle the respondent to have judgment entered for her; but, after much consideration, I have come to the conclusion that they were, if the findings of the jury are to be taken to mean what I have said I think they do mean; and this is a case in which, if the findings are insufficient, the Court ought to exercise the power it possesses and find the facts to supply what the jury has omitted to find if the evidence warrants such a finding. If the answers of the jury to the first three questions and the finding as to contributory negligence stand, there is no difficulty in reaching the conclusion that, if there had been a proper inspection, the true conditions of the old pole would have been discovered, and there would have followed from the discovery a duty on the appellant's part to give warning to the deceased of the condition of the old pole; but, instead of that being done, it was classed as a fair pole, and what would have disclosed to the deceased that it was not such a pole was concealed from him by the act of the appellant in covering with earth the hole at the butt of the pole.

It appears to me that the appellant is on the horns of a dilemma. If there was no inspection, it was guilty of negligence because, having regard to the age of the old pole and the other circumstances in evidence, it was the duty of the appellant to have inspected it, and there was a failure to perform that duty, the result of which was, that the deceased was led to believe that it was safe to climb it, and his death was, therefore, occasioned by the negligence of the appellant. If, on the other hand, there was an inspection, and the person who inspected the old pole reported, contrary to the fact, that it was a fair pole, he was guilty of negligence which caused the accident, because, if he had ascertained the true condition of the pole and reported it, the duty of the appellant would have been to have warned the deceased of its condition.

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

MARCH 15TH, 1915.

*SHARPE v. CANADIAN PACIFIC R.W. CO.

Master and Servant—Death of Servant—Railway Lineman Run over by Engine of another Railway Company when Returning from Work — Trespasser — Injury not Happening in Course of Employment—Workmen's Compensation for Injuries Act—Conforming to Orders of Superior—Negligence —Evidence—Absence of Warning—Findings of Jury.

Appeal by the defendant the Canadian Pacific Railway Company from the judgment of BRITTON, J., 7 O.W.N. 167.

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

J. D. Spence, for the appellant company.

F. D. Kerr, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The action is brought under the Fatal Accidents Act to recover damages for the death of Thomas L. Sharpe, which occurred under circumstances which, according to the contention of the respondent, entitle him to recover damages under the Act.

The deceased was an employee of the appellant company, and on the day upon which he met his death had been engaged, under the charge of a foreman named Brinker, in the performance of his duties at Welland. The work there having been completed, the foreman, the deceased, and three of his fellow-employees, who had been engaged in the work, returned by train to Hamilton, and arrived there shortly before nine o'clock in the evening. Their destination was a car upon the appellant's line in Hamilton, in which they slept and kept their working tools. When the party reached the Hamilton station, they went to take a car on the street railway by which they would have reached a point near the sleeping-car. Finding that the car they expected to take had already left, they decided to get to the sleeping-car by walking along the railway track. The deceased was a comparative stranger in Hamilton, and it was not shewn, at all events clearly, that he knew that the sleeping-car could be reached by the street car line or that it had been the intention of his companions to have taken passage by the street car.

The deceased was paid for his work by the hour, and his right to be paid his wages came to an end when the work at Welland was completed, or at all events when he had got back to Hamilton.

While proceeding along the railway track, the deceased was struck by an engine of the Toronto Hamilton and Buffalo Railway Company, which was proceeding in the direction in which he was going, and came up behind him, and he died as the result of the injuries he thus received.

These facts are not in dispute, and it is contended by the appellant that it is not liable, because the deceased was a trespasser on the tracks of the railway, to whom neither the appellant nor the other railway company owed any duty except the duty of not knowingly or intentionally injuring him, or that, in the view of the case most favourable to the respondent, the deceased was a mere licensee and took the risk incidental to the carrying on of the operations of the railway company.

It was argued on behalf of the respondent that the deceased met his death in the course of his employment, and that his injury was caused by reason of the negligence of the foreman with whose orders or directions the deceased at the time of the injury was bound to conform and did conform, and that the injury resulted from his having so conformed; and that was the view apparently taken by the jury. The jury found, in answer to questions, as follows:—

(3) Were the defendants the Canadian Pacific Railway Company guilty of any negligence which contributed to the death of Thomas Sharpe? A. Yes.

(4) If so, what was that negligence? A. Allowing their workmen to walk the tracks to boarding-car.

(5) Was the user of the track and right of way of the defendants the Toronto Hamilton and Buffalo Railway Company by the workmen and repair men of the Canadian Pacific known to and acquiesced in by the Canadian Pacific? A. Yes.

(7) Was the deceased, at the time of the accident, in the employ of the Canadian Pacific Railway Company? A. Yes.

(8) Was the deceased, at the time of his death, under the direction and control, as to his work and return to the sleeping-car, of Fred Brinker? A. Yes, until the tools were placed in car.

(9) Was Fred Brinker, at the time of the accident, a person in the employ of the Canadian Pacific Railway Company to whose orders the deceased was bound to conform? A. Yes.

(10) In starting for the sleeping-car on the night of the

accident, did the deceased Thomas Sharpe conform to the orders and direction of Fred Brinker? A. By his presence he was directed.

There was, in my opinion, no evidence to support these findings. The deceased's injury was not sustained in the course of his employment. When his work at Welland was done, his work for the day had come to an end, and he was no longer subject or bound to conform to the orders or directions of the foreman. Indeed there was no evidence that the foreman gave or assumed to give him any order or direction to proceed along the track to the sleeping-car. The case was simply this: the foreman and the men who had been working with him were proceeding homeward after their day's work was done, and they took what they apparently thought was, in the circumstances, the most convenient way to reach the sleeping-car.

It was argued by Mr. Kerr that it was the duty of the deceased to take to and leave at the sleeping-car the tools he had been using at Welland, and that until he had done that he was still under the direction of the foreman; but, granting that this was his duty, there was no evidence to support the conclusion that until that was done the deceased was still subject to the order or direction of the foreman. . . .

[Reference to Holmes v. Mackay & Davis, [1899] 2 Q.B. 319; Kelly v. Owners of the Ship Foam Queen (1910), 3 B.W.C.C. 113; Waltes v. Staveley Coal and Iron Co. Limited (1910), 4 B.W.C.C. 89, 303; Beckerton v. Canadian Pacific R.W. Co. (1914), 6 O.W.N. 158.]

Having come to the conclusion that the deceased did not meet with his injury in the course of his employment, it is unnecessary for us to consider whether, if an opposite conclusion had been reached, and it had properly been found that the deceased met with his injury while conforming to an order of the foreman to which he was bound to conform, it could properly be found that his injury was the result of the negligent order and of the deceased having conformed to it—a finding which would be necessary to entitle the respondent to recover.

I would allow the appeal, reverse the judgment of the learned trial Judge, and substitute for it a judgment dismissing the action, the whole with costs if costs are asked.

MARCH 15TH, 1915.

*WINDSOR AUTO SALES AGENCY v. MARTIN.

Husband and Wife—Conveyance of Lands of Husband to Wife Subject to Trust—Reconveyance in Pursuance of Trust—Action by Judgment Creditors of Wife to Set aside Reconveyance—Absence of Fraudulent Intent—Evidence — Estoppel—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of LATCHFORD, J., 7 O.W.N. 474.

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

J. H. Rodd, for the appellants.

T. Mercer Morton, for the defendants, the respondents.

MEREDITH, C.J.O.:—The appellants are execution creditors of the respondent Elizabeth Martin for $1,917.30 and costs, and bring their action to set aside as fraudulent and void, as against them and her other creditors, a conveyance made on the 30th June, 1914, by her to her husband, Joseph Martin, the other respondent.

The judgment upon which the execution was issued was recovered on the 10th October, 1914, on promissory notes given by the wife in respect of the purchase-price of an automobile bought by her from the appellants. On the 18th April, 1914, she gave an order to the appellants for an automobile, for which she agreed to pay $1,375. The automobile was ready for delivery on the 6th May following, and on that day she gave to the appellants the joint promissory note of her husband and herself, payable in one month, for the whole of the purchase-price, with interest at seven per cent. This note was not paid at maturity, and on the 11th June following a new note of the wife alone for $1,384.35, payable in eight days, with interest at the same rate, was given. This note also was not paid at maturity, and a new note for $1,387.30, payable on the 1st July following, with interest at the same rate, was given by the wife on the 22nd June, 1914. In the meantime the automobile had been exchanged for a higher priced one, and a note at one month, with interest at the same rate, was given by the wife on the 17th June, 1914, for $500, which represented the difference in price on the exchange, and it was upon this note and the note for $1,387.30 that the judgment was recovered.

The appellants, besides being agents for the sale of automobiles, were agents for the sale of land, and on the 18th April, 1914, and at the same time that the order for the first automobile was given, the wife placed in their hands for sale lot No. 12 in the 9th concession of the township of Maidstone, one of the parcels of land in question in this action, and discussed with them the question of obtaining a loan on mortgage of the lots in Windsor that are in question.

The respondents allege that the impeached conveyance was executed in pursuance of an arrangement betwen them when the lands which were reconveyed were conveyed by the husband to the wife on the 13th April, 1914. The consideration expressed in the conveyances is natural love and affection and one dollar. The circumstances under which the property was conveyed to the wife, as she and her husband testified and the learned trial Judge found, were these. The husband had been an active business man, but had fallen into bad health, and was advised by his physician that he might not recover and that he had better put his worldly affairs in order. A will was made devising the property to the wife, but on account of the fears of the wife that the will might be attacked by the husband's next of kin, it was decided that a deed should be made to the wife, on the understanding and agreement that, if the husband recovered his health sufficiently to attend to his business, the wife should reconvey the property to him, and upon that understanding and agreement the conveyance to the wife was made. The husband did recover sufficiently to be able to attend to his business, and the reconveyance was then made to him in pursuance of the understanding and agreement upon which the property had been conveyed by him to his wife.

The question of the intent with which the reconveyance was made was a question of fact, and the learned Judge who saw and heard the witnesses was in a much better position to judge as to their credibility than an appellate Court can be; he has given credit to their testimony, and his finding of fact, especially as it is a finding which acquits the respondents of the fraud with which they are charged, ought not, in my opinion, to be disturbed. While it is true that the absence of evidence corroborating the testimony of the parties to a transaction impeached as fraudulent against creditors is a circumstance, and an important one, to be considered in determining as to the intent with which the transaction was entered into, there is no rule

of law that I am aware of which renders it impossible to uphold such a transaction because of the absence of such corroborative evidence.

Such an arrangement as the respondents testified was made was not an improbable one in the circumstances. I doubt very much whether the wife could successfully have resisted an action by the husband to set aside the conveyance to her on the ground of its improvidence if the effect of it was entirely to divest him of any interest in the property. As I understand the evidence, the conveyance covered everything he possessed, and there are frequent instances in which such conveyances, made without consideration, have been set aside as improvident.

The circumstances that the reconveyance was made after the wife had become indebted to the appellants may be a suspicious circumstance, but mere suspicion as to its bona fides does not warrant the setting of it aside; still less does it warrant the setting aside of a finding by an experienced Judge that it was made in good faith and without any fraudulent intent.

The fact that the wife placed the farm property in the hands of the appellants for sale, and that she expressed her intention of borrowing money on a mortgage of the city property, although it was part of the agreement upon which the property was conveyed to her that she should not sell or mortgage it, is, in my opinion, not inconsistent with the existence of the agreement which the respondents testified was made as to the reconveyance of the property to the husband, because he was an assenting party to what the wife did and proposed to do.

The doctrine of estoppel was much relied on by the learned counsel for the appellants, but the evidence does not warrant the application of it, even if in any case it would be applicable to prevent parties from resisting an attack by a creditor upon a conveyance by his debtor of property, on the ground that it was made with intent to defraud creditors.

There was, no doubt, evidence that the wife represented to the appellants that she was the owner of the property. I doubt very much whether she did so in words, but the fact of her placing the farm in the hands of the appellants for sale, and expressing her intention to borrow upon mortgage of the city property may well have led the appellants to believe that she was the owner of both properties, and is probably the only ground the witnesses had for saying that she represented that she was the owner of them. However that may be, and assuming that the representation was made, there was no satisfactory evidence that the husband was a party to it or was present when it was made.

The appellant Burnes testified that the representation was made by the wife, but declined to say that the husband was present when it was made. The witness Welch does say that the wife told him, before the order for the automobile was given, that the property was hers. He also testified that this was said in the presence of "everybody," but who "everybody" was he did not say. He also testified that the wife, addressing her husband, said in French: "Now, Joe, are you satisfied with this? You know everything belongs to me, but I want you to be satisfied." I cannot understand what there was to call for any such remark from her, and that such a thing was said seems to me most improbable.

If, as I think, there was no satisfactory evidence that the husband was a party to the alleged representation of his wife, or present when it was made, there is an end to all question of estoppel, because the person to be estopped, if estoppel is to help the appellants, is the husband, and not the wife.

It may seem a hard case, if the appellants sold the automobile to the wife under the belief induced by her conduct or by her representation in words that she was the owner of the property, that they should not have the right to look to it for payment of their judgment; but if, as was stated upon the argument, the respondents were willing and offered to return the automobile, which is valued at $800, and pay $1,000 besides in satisfaction of the judgment, and that offer was refused, the appellants have not much to complain of, and in any case we should resist the inclination on account of the hardship of the case to make bad law or establish a vicious precedent, which, in my opinion, we should do if we were to reverse the judgment of my brother Latchford.

I would dismiss the appeal with costs.

MACLAREN, J.A., concurred.

MAGEE, J.A., and BRITTON, J., agreed that the appeal should be dismissed with costs, for reasons stated by each in writing.

GARROW, J.A., dissented, for reasons also stated in writing.

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

MARCH 15TH, 1915.

*HEALY v. ROSS.

Ditches and Watercouses Act—Award of Township Engineer—Construction of Drain—Land of Infant Affected by Award—Notice—"Owner"—Father—"Guardian of an Infant"—R.S.O. 1897 ch. 285, secs. 3, 8.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 32 O.L.R. 184, 7 O.W.N. 246.

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

S. S. Sharpe, for the appellants.

J. T. Mulcahy, for the defendants, respondents.

The judgment of the Court was delivered by GARROW, J.A.:—Upon the argument before us, we declined to enter upon the question of the merits of the award which counsel for the plaintiffs desired to discuss. See In re McLellan and Township of Chinguacousy (1900), 27 A.R. 355.

The plaintiffs also object to the proceedings upon the ground that, when they were instituted, the plaintiff William Johnston the younger, one of the "owners," was an infant, and was not duly served with notice of the proceedings as required by the statute.

The statute in force when the proceedings began was R.S.O. 1897 ch. 285 (the Ditches and Watercourses Act). By sec. 3, the word "owner" is interpreted to mean and include (1) an owner, (2) the executor of an owner, (3) the guardian of an infant owner, (4) any person entitled to sell and convey the land, (5) an agent under a general power of attorney authorised to manage and lease the lands, and (6) a municipal corporation in respect of highways under its jurisdiction.

At that time William Johnston the younger was about seventeen years of age. He resided with his father William Johnston the elder, who was also an "owner" within the drainage scheme. It was apparently at first assumed that the father owned both lots. He was duly served with notice, and at the meeting informed the engineer that his son owned one of the lots. The engineer then verbally informed the son that procedings were being taken, but no fresh notices were served upon any one.

Not much help is, I think, to be derived from the two contradictory English cases to which the learned Judge refers in his judgment. The language there under consideration was quite different. There was no such context as we have here in the case of agents and other representatives of owners whose lands are involved in the scheme, and the consent to be given, by whomsoever given, had, for the protection of the infant, always a much favoured person, to be approved by the Court. There is no similar protection in our statute.

An infant, it is clear, may have more guardians than one. To put the simplest case, he may have a guardian of his person, and another and a different person as the guardian of his estate. The father may, it is true, if he desires it, be both. See the Infants Act, R.S.O. 1914 ch. 153, sec. 26. But, if he is intended to have the management and control of the infant's property, he is not exempt from giving proper security under sec. 27.

By force of the interpretation clause in question, the guardian of the infant may not only be brought in as a party to the proceedings under the statute, but he might also originate them, for he has all the powers of an owner, apparently, including that of entering into an agreement respecting the drainage scheme under sec. 9, which, when executed and filed, has all the effect of an award.

If there were two guardians, that is, one of the person and the other of the estate, there would, I suppose, be little doubt that the proper guardian to act under the statute would be the one entitled by law to manage the estate, and not the one entitled to control the person only. The Legislature might of course have conferred the power upon the guardian of the person only; but, considering the extensive powers of the guardian and finding the equivocal word in its present company, with other agencies all more or less associated directly with the management and control of the land of the owner represented, I cannot help thinking that the guardian intended by the statute was such a guardian as has by law the management and control of the infant's land, and not merely the guardian of his person.

The result is that, in my opinion, the plaintiff William Johnston the younger was not properly made a party to the proceedings, and was not and is not bound by the award.

That being so, it seems to follow, as the plaintiffs contend, that the whole drainage scheme falls to the ground. The objection is fundamental, like the objection of the absence of a proper

initiating "owner," which proved fatal in Township of McKillop v. Township of Logan (1899), 29 S.C.R. 702, even after the work had all been done.

The appeal should, therefore, in my opinion, be allowed. But, under the circumstances, there should be no costs to either side here or below.

MARCH 15TH, 1915.

HASSAN v. REYNOLDS.

Fire—Setting out on Defendant's Land—Escape to Plaintiff's Land—Destruction of Plaintiff's Property—Fire Set out for Proper Purpose — Lack of Reasonable Care to Prevent it Spreading—Negligence—Findings of Fact of Trial Judge—Appeal—Damages—Quantum.

Appeal by the defendant from the judgment of the Judge of the District Court of the District of Parry Sound, in favour of the plaintiff, in an action in that Court, tried by him without a jury, brought to recover damages for the setting out by the defendant on his own land of a fire which escaped to the plaintiff's land and burnt over it, causing damage.

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

R. McKay, K.C., for the appellant.

H. E. Stone, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . That the fire was set out by the appellant on his land, and spread from it to the land of the respondent, and caused him loss and damage, is beyond question; and for this loss and damage the appellant is liable, unless he has proved that the setting out of the fire was, in the circumstances, a lawful act, and the escape of it to the respondent's land and the consequent damage were not occasioned by any negligence on the part of the appellant.

The justification or excuse of the appellant for setting out the fire was, that there was a fire burning in proximity to his land; that he feared that it would spread to it and destroy his fences and buildings; and that he set the fire for the purpose of burning

long grass, to which, if he had not done that, there was imminent danger of the other fire spreading to and burning his fences and buildings.

The fire was set out by the appellant in a very dry season, but, as the learned District Court Judge found, for a "good purpose," which I understand to mean under the honest belief that the burning of the grass was necessary to prevent the other fire from spreading to his land and destroying or damaging his fences and buildings. The learned Judge, however, found that the fire set out by the appellant ran on the respondent's land "through lack of reasonable care and protection to prevent it spreading;" and he, therefore, held that the appellant was liable for the damages suffered by the respondent.

There was evidence to support this finding, and it is fatal to the appellant's case.

Having come to this conclusion, it is unnecessary for us to determine whether the appellant was justified in setting out the fire, but I am inclined to think that the principle of the case of Cope v. Sharpe No. 2, [1912] 1 K.B. 496, is applicable; and that, apart from the question of negligence in not taking reasonable precautions to prevent the spread of the fire to the respondent's land, it would be a good defence to the action if there was in fact real and imminent danger of the other fire spreading to the appellant's land and doing damage to it or to his fences or buildings; and the means which he took to prevent it from doing so were reasonably necessary, in the sense that they were acts which, in all the circumstances of the case, a reasonable man would do to meet such a real danger.

The appellant also complains that the damages are excessive, but it is impossible for us to interfere upon that ground. There was evidence to warrant their being assessed at the time at which they were assessed, and the learned Judge, from his knowledge of local conditions, was in a far better position to determine the question of damages than we can possibly be.

I would dismiss the appeal with costs.

MARCH 15TH, 1915.

MOODY v. MURRAY.

Principal and Agent—Agent's Commission on Sale of Land and Business — Purchaser Found by Agent and Agreement Signed—Parties not ad Idem—Sale not Completed—Payment of Deposit by Proposed Purchaser to Agent—Right of Principal to Recover from Agent—Counterclaim.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Middlesex, after trial without a jury of an action brought in that Court, dismissing it with costs. The action was brought to recover commission for services performed by the plaintiff for the defendant by finding for him a purchaser of his land and business.

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

G. S. Gibbons, for the appellant.

C. G. Jarvis, for the defendant, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . The amount of the commission and the terms of the employment of the appellant are not in controversy, for they are evidenced by the following writing, dated the 6th August, 1913, addressed to the plaintiff, and signed by the defendant: "I own and wish to sell my property on Rectory street, No. 427, and my soda water business in the same building, and I agree to give you the sum of 2½ per cent. commission on real estate and 5 per cent. on the business, if I accept any client you assist me in obtaining."

The appellant found and introduced to the respondent, as a prospective purchaser of the business, a man named Edward Jenner; and, after some negotiations between Jenner and the respondent, an arrangement was made between them, which took the form of an offer by the respondent to sell dated the 11th December, 1913, and addressed to Jenner, in the following terms: "I hereby agree to give you an option to purchase my soda water plant and equipment chattels at 427 Rectory street, London, for the sum of $4,000, and as payment I agree to accept your mortgage for $2,000 on Markham property and $500 cash, and balance to be paid $100 with interest every 6 mos.—or more if

convenient—balance secured by mortgage or agreement. Stock on hand at cost, and I agree to assist you and instruct in the manufacture, when required, and will transfer all my goodwill, and will not directly or indirectly engage in this business in London while Mr. Jenner is engaged in the said business. This option to purchase will expire on 16th Dec., 1913, and if accepted you to send marked cheque for $100 to Mr. Moody."

The cheque for $100 was sent by Jenner to the appellant on the 13th December, 1913, and the parties were proceeding to complete the sale when, on examining the title of the Markham property, it was ascertained that the mortgage for $2,000 was a second mortgage, being subsequent to a mortgage for $1,000. The offer was made by the respondent under the belief, and, as he and his son testified, upon the faith of Jenner's representation, that the $2,000 mortgage was a first charge on the Markham property. Jenner being unable or unwilling to get rid of the first mortgage, the arrangement fell through, and the intended sale was never carried out.

Jenner was examined as a witness at the trial, and denied that he had represented the $2,000 mortgage to be a first charge on the Markham property, and testified that he had always been ready and willing to carry out his contract, which I understand to mean, to carry it out if the respondent was willing to take the mortgage, although it was not a first mortgage.

Jenner brought a suit in a Division Court against the respondent to recover the $100 that he had paid, and was nonsuited, but on what ground the nonsuit was entered does not appear.

The learned Judge found that the respondent and Jenner were not ad idem as to the terms of the sale; and that there was, therefore, no contract. There was evidence to support that finding, and no ground has been shewn for disturbing it.

If there was no contract, the appellant did not earn his commission, for Jenner was never willing to buy on the only terms upon which the respondent was willing to sell; and, therefore, the respondent did not "accept any client" whom the appellant assisted him "in obtaining," within the terms of the agreement between the parties, and the case is exactly in the same position, as to the right to commission, as if Jenner had been unwilling to buy for the only price for which the respondent was willing to sell, and the negotiations for that reason had resulted in nothing.

There was a counterclaim by the respondent for the $100 paid by Jenner to the appellant, and upon it it was adjudged that "the defendant do, if requested so to do by the plaintiff in writ-

ing, indemnify him against any claim which Edward Jenner may make upon him for the deposit of $100 in said pleadings mentioned, and that thereupon, or in default of such request, the defendant do recover from the plaintiff the sum of $100.''

The $100 was held by the appellant as agent for the respondent, and the appellant had no right to retain it as against the respondent, whatever rights Jenner may have to recover it from the respondent—which are of course not affected by the judgment.

I would dismiss the appeal with costs.

MARCH 15TH, 1915.

BURLAK v. BENEROFF.

Conversion of Chattels—Justification—Evidence—Chattel Mortgage—Lien-note—Findings of Trial Judge—Appeal.

Appeal by the defendant from the judgment of LATCHFORD, J., at the trial of the action without a jury at Sandwich, in favour of the plaintiff.

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

A. B. Drake, for the appellant.

G. A. Urquhart, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . The action is brought to recover damages for the wrongful seizure and conversion by the appellant of a quantity of household furniture and other goods and chattels which at the time of seizure were in the possession of the respondent, and are said to have belonged to him.

The appellant justifies the seizure, as to part of what was seized, under a chattel mortgage from Frankapin Cupernor, another name by which Samuel Nazar was known, to Henry Greenberg, of which the appellant is the assignee, and as to the remainder of the goods seized under what is said to be a lien-note or hire-receipt.

The respondent disputed the claim under the chattel mortgage on the ground that Nazar did not own and was not interested in the goods which it covers, but the learned trial Judge found against his contention, and held that the appellant had a right to seize under it for the $150 which, it was alleged by the appellant, was owing upon it.

The respondent also disputed the existence of any right in the appellant to or in respect of the other goods in question under the so-called lien-note or hire-receipt; and upon this branch of the case the learned Judge found in favour of the respondent. It is difficult to ascertain from the reasons for judgment the ground upon which my brother Latchford proceeded in coming to that conclusion. . . .

The right to seize the goods not included in the chattel mortgage was disputed on two grounds: (1) that all that was owed to the appellant was $2, and not $88.25, which the appellant claimed; and (2) that the documents put in and relied on as lien-notes or hire-receipts were not of that character, and conferred no right upon the appellant to seize the goods said to be enumerated in them.

The difficulty I have is to ascertain whether the learned Judge found in favour of the respondent on both of these grounds or upon only one of them, and, if upon one only, upon which of them he so found.

There was evidence which would have warranted a finding in favour of the respondent on the first ground, as his testimony that he had paid the appellant all that was owing to him except the $2 was corroborated by several witnesses, and met only by the denial of the appellant, whose evidence was not given in a satisfactory manner as to several of the matters that were in controversy.

There is nothing beyond what the learned Judge speaks of as the "so-called conditional sales cards" to support the appellant's claim to a lien on or a right to seize the goods which the respondent had purchased from him, and the appellant was not asked as to the terms on which the goods were sold, nor did he say that there was with respect to them any such agreement as it is said these documents evidenced. It is difficult to make "head or tail" of them; the written part of them is said to be in the Russian language, but no one was asked to translate it into English. The figures upon them and what is printed in English would seem to indicate that the consideration for them was an advance of money, but that is certainly not in accordance with the fact.

All that the appellant claimed was owing to him, apart from the money secured by the chattel mortgage, was $70 and $18.25 for a stove, and, as I have said, the contention of the respondent was that he owed only $2.

It was argued on behalf of the appellant that the goods in question belonged to Nazar, and that the respondent had, there-

fore, no right to maintain the action, but the answer to this is, that the respondent was in possession of them when they were seized, and was at least bailee of them—if indeed, although at one time they may have belonged to Nazar, whatever interest he had in them had not been subsequently and before the seizure transferred to the respondent, and were not his property, subject to the chattel mortgage, and of this there was evidence.

Upon the whole, I am of opinion that it has not been shewn that the judgment of my brother Latchford is wrong, and I would affirm it and dismiss the appeal with costs.

MARCH 15TH, 1915.

CONWAY v. DENNIS CANADIAN CO.

Railway—Fire from Locomotive Engine—Destruction of Property—Control of Engine at Time of Escape of Fire—Liability of Railway Company for Act of Servant—Scope of Employment—Evidence—Corroboration—Onus — Findings of Jury.

Appeal by the defendant company from the judgment of BRITTON, J., 7 O.W.N. 236.

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

G. F. Shepley, K.C., and H. S. White, for the appellant company.

J. T. White, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . The action is brought to recover damages sustained by the respondent owing to a fire which was caused, as the jury found, by a locomotive engine of the appellant; and the only question raised upon the appeal is as to whether there was any evidence to warrant the finding of the jury that Macdonald, who was operating the engine which caused the fire, was then acting for the appellant and within the scope of his authority.

At the time the engine was taken out by Macdonald, the appellant's superintendent, Lachlan Van Meter, was away from the mill of the appellant in connection with the operation of which the engine was used, and Macdonald, who was the foreman in charge of shipping out the lumber, was the man in charge of the operations that were then going on at the mill. There was no person specially assigned to the running of the engine,

but it was run by different employees of the appellant, including Macdonald, and he had taken it out to Barry's Bay, on the line of the Grand Trunk Railway, with which a spur line from the appellant's mill connected, on the morning of the day upon which the fire was started; and it was upon a second journey on that day to Barry's Bay that the fire was caused; Macdonald and his wife were the only persons on the engine on this journey, and he drove the engine.

Macdonald was called as a witness for the defence, and testified that in making this second journey he was not upon his employer's business, but was taking his wife to Barry's Bay to do some shopping. He was closely questioned as to whether a part at all events of his object in going to Barry's Bay was not for the mailing of letters there for his employer. His answers to these questions were by no means satisfactory, and the jury may well have concluded that his object in going to Barry's Bay was to mail letters for his employers, or at all events, that that was one of his objects in going there, and perhaps the principal object. . . .

The respondent made out a primâ facie case when he proved that the engine was being driven in the ordinary way by Macdonald, who was accustomed to drive it. That proof of this raised a presumption that the engine was being driven by an authorised servant of the appellant within the scope of his employment is, I think, beyond question: Jones v. Capel (1838), 8 C. & P. 370; Beard v. London General Omnibus Co., [1900] 2 Q.B. 530; and if that, as these cases shew, is the presumption in the case of an ordinary vehicle, it is a fortiori the presumption in the case of a locomotive engine. It rested, therefore, upon the appellant to rebut this presumption by shewing that the fact was otherwise. This it attempted, but, in the opinion of the jury, failed to do. The jury were not bound to believe the testimony of Maconald, especially as his wife was not called to corroborate it. The learned trial Judge was not favourably impressed with his evidence, and the jury must have disbelieved it. My own reading of it satisfies me that Macdonald was not a candid witness or a witness upon whose truthfulness doubt was not cast by himself. . . .

The jury may well have thought that he was a man upon whose testimony they could not safely rely.

Upon the whole, I am of opinion that the case could not properly have been withdrawn from the jury, and that there was evidence which warranted their findings, and I would dismiss the appeal with costs.

MARCH 15TH, 1915.

*MURDOCK v. KILGOUR.

Canada Temperance Act—Voting on—Invalidity of—Improper Practices—Returning Officer—Injunction against Making Return—Jurisdiction of Supreme Court of Ontario—Status of Plaintiff—County Court Judge—Powers upon Scrutiny.

Appeal by the defendant Kilgour from the judgment of LENNOX, J., 7 O.W.N. 165.

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

James Haverson, K.C., for the appellant.

W. E. Raney, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O.:—. . The respondent, who brings the action, is an elector entitled to vote under the Canada Temperance Act and the Election Act of Canada, in the town of Welland, in the county of Welland, and is a resident of that town, and voted on the submission of the petition for the taking of the votes of the electors of the county on the question of bringing into force in the county Part II. of the Canada Temperance Act.

The action is brought against the appellant, who is the president of the Welland County Hotelkeepers' Association; Hugh A. Rose, the returning officer; and L. B. Livingstone, Judge of the County Court of the County of Welland; and the claim of the respondent, as endorsed on the writ of summons, is "for a declaration that the proceedings had and taken in the county of Welland on and prior to the 29th day of January, 1914, for a polling of votes under the Canada Temperance Act, were not pursuant to or in accordance with the proclamation of the Governor in Council in that behalf or the said Act, and that on or after the 29th day of January, 1914, certain of the ballot boxes used in connection with the said proceedings were tampered with so as to make it impossible to determine what ballots were actually cast by electors and how they were marked, and that the said proceedings did not and do not constitute a polling of votes under the said Act, and were and are invalid and void, and ought not and do not operate to prevent (the issue of a new proclamation by the Governor in Council upon the petition upon which the said former proclamation was issued or) the putting of a similar petition to the vote of the electors of the said county

at any time. And to prohibit the defendant L. B. C. Livingstone, as Judge of the County Court of the County of Welland, from determining or certifying as a result of the pending scrutiny under the said Act whether the majority of votes given on the said proceedings was or was not in favour of the petition to the Governor in Council; and for an injunction restraining the defendant Hugh A. Rose, as returning officer under the said proclamation, from transmitting any return to the Secretary of State with reference to such proceedings except such return as this Honourable Court may be pleased to order."

The respondent moved for an order prohibiting the Judge until the trial or determination of the action from determining or certifying, as a result of a scrutiny pending before him under the Act, whether the majority of votes given on the proceedings taken in the county of Welland on and prior to the 29th January, 1914, pursuant to a proclamation of the Governor in Council for a polling of votes under the Act, was or was not in favour of the petition, or, in the alternative, for an injunction to the like effect, and for an injunction restraining the returning officer until the trial and final determination of the action from transmitting any return to the Secretary of State with reference to the question as to whether or not the majority of the votes was in favour of the petition, or, in the alternative, for an order prohibiting the returning officer from transmitting his return.

On the motion coming on to be heard, it was turned into a motion for judgment, on the facts stated in the memorandum to which I have referred, and judgment was pronounced declaring "that the proceedings had and taken in the county of Welland on and prior to the 29th January, 1914, for a polling of votes under the Canada Temperance Act, were not pursuant to or in accordance with the proclamation of the Governor in Council for the taking of the votes of the electors of the said county for and against the petition to the Governor in Council for the bringing into force in said county of Part II. of the said Act, and were not pursuant to or in accordance with the said Act, and that the said proceedings did not and do not constitute a polling of votes under the said Act, and were and are invalid and void, and ought not to and do not operate to prevent the issue of a new proclamation by the Governor in Council upon the petition upon which the former proclamation was issued, or the putting of a similar petition to the vote of the electors of the said county at any time." And by the judgment it was ordered "that the defendant Hugh A. Rose be and is hereby perpetually restrained

from transmitting any return to the Secretary of State with reference to the said proceedings, except a return that the said proceedings were invalid and void as declared by this judgment,'' and it was further ordered that the action be dismissed as against the defendant Livingstone. . . .

The appellant's contention is, that the Supreme Court of Ontario has no jurisdiction to inquire or determine, by action or otherwise, as to the validity of the voting, or of any other of the proceedings taken under the Act, and also that the respondent had no status to maintain an action, if an action is maintainable, and that the validity of the voting could not properly be determined in an action in which only the appellant, the returning officer, and the Judge of the County Court are defendants.

It was conceded by counsel for the respondent that he could not support that part of the judgment by which the returning officer is restrained from transmitting his return to the Secretary of State, as required by sec. 64, but he argued that the action, so far as it sought an inquiry into the validity of the voting, was maintainable, and that the action was properly constituted.

No case was cited which supports the contention of the respondent's counsel, and none was referred to, nor have I found one, in which the interference of a Provincial Court was sought to obtain such an adjudication as that which was made in this case.

The Canada Temperance Act provides its own code of procedure, and the provision which it makes for an inquiry as to whether or not a majority of the votes was or was not given in favour of the petition to the Governor in Council is, in my opinion, the only way in which, by a judicial proceeding, the result of the voting can be inquired into.

But for the decision of the Supreme Court of Canada in Chapman v. Rand (1885), 11 S.C.R. 312, I should have thought that the powers of the Judge of a County Court in holding a scrutiny under sec. 69 were larger than by that case they were decided to be, but by that decision we are bound unless the subsequent case of McPherson v. Mehring, The West Lorne Case (1913), 47 S.C.R. 451, has overruled or modified it. Accepting the construction which the Supreme Court in that case put upon the section, I cannot escape from the conclusion that the draftsman of the Act thought, erroneously as the result has shewn, that he had given to the Judge upon a scrutiny the powers which in that case it was unsuccessfully argued were conferred upon him by what is now sec. 69; and this view is fortified by

the provisions of what is now sec. 105. "No tribunal having cognizance of the question" is provided for by the Act, unless it be the tribunal before which the scrutiny takes place, which in Quebec is a Judge of the Superior Court, in British Columbia a Judge of the Supreme Court of that Province, or a Judge of the County Court, and in any other Province, except Saskatchewan and Alberta, the Judge of the County Court.

In Chapman v. Rand, in the course of the argument of counsel for the respondent, he pointed out that if sec. 62 (now 69) were construed to give the Judge only the power to recount and declare the numerical majority of ballots, sec. 70 (now 105) is meaningless, because, as he argued, there would be no tribunal having cognizance of the question, i.e., of the validity, or otherwise, of the poll. This argument was not dealt with by any of the Judges except Henry, J., who appears to have agreed with it, for he said (pp. 320-1): "Whether the ballot is right or wrong—whether parties are guilty of corruption or not—are matters into which there is not provision made by the Act to inquire, unless it can be done under the scrutiny." Then, after mentioning the provisions of sec. 62, he went on to say: "Now, what is the meaning of that? Nobody else has any authority to try out the question." And later on he said: "If the judgment of the Court below is wrong, then corrupt or illegal practices will not avoid an election such as this." And there was no dissent from these views expressed by any other member of the Court.

It would be highly inconvenient if the powers of a Provincial Court could at any time be invoked to stay, or to set aside, any of the proceedings leading up to the issue of the proclamation bringing the Act into force, or to set them aside. If that were permissible, those opposed to the bringing of the Act into force might be able to prevent the vote from being taken at the appointed time, or to delay the proceedings for bringing it into force until the end of the litigation they had begun, which might not arrive until the case had reached, and had been decided by, the Privy Council.

The provision for the scrutiny and the absence of any other provision for questioning the result or the validity of the voting, point clearly, I think, to the conclusion that Parliament did not intend that any other means should be available for questioning the result of the voting than the scrutiny for which—inadequately as it has turned out—the Act provides.

It may be said that if this is the correct view there is no remedy where such irregularities as in this case have been found to have occurred, or perhaps worse ones, have taken place; but,

if that be the case, the remedy must be sought in Parliament, and, as I understood the statement of counsel upon the argument, Parliament has already supplied the remedy by an amendment of the Act; and I may add that I do not see why it was not open to the Judge on the scrutiny, if the form of ballot paper used rendered a ballot void—as to which I express no opinion—to have rejected it in making his count, nor do I see why it was not open to him to reject any ballot paper which was numbered as stated in the memorandum, if that was a ground for rejecting it; and, if that be the case, his decision as to the count, even if erroneous, was final (sec. 70).

Having come to the conclusion that my brother Lennox acted without jurisdiction, it is unnecessary to consider the question raised as to the constitution of the action.

I would allow the appeal, reverse the judgment appealed from, and substitute for it a judgment dismissing the action, and leave each party to bear his own costs of the litigation.

GARROW, J.A., concurred.

MACLAREN and MAGEE, JJ.A., agreed in the result.

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

Appeal allowed.

MARCH 15TH, 1915.

CURRY v. MATTAIR.

Vendor and Purchaser — Sale of Mining Claims — Terms of Agreement—Imperfect Title—Guaranty of Title — Failure to Make Title—Recovery of Purchase-money—Evidence—Jurisdiction of Mining Commissioner—Mining Act of Ontario, 8 Edw. VII. ch. 21, sec. 65—Parties.

Appeal by the defendant from the judgment of LENNOX, J., 7 O.W.N. 465.

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

A. G. Slaght, for the appellant.

G. H. Watson, K.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . The appellant, claiming to be the owner of mining claim M.R. 1753, otherwise known as L.O. 167 west of the east branch of the Montreal river, in the Gowganda mining division, contracted to sell it to the respondents for $2,000. The agreement for the sale is in writing, and is dated the 12th January, 1909, and one of its provisions is: "I hereby guarantee the J. Curry Company Limited and J. Curry that the assessment work and Recorder's work for the said claim is all done for the year, and there is until the 1st January, 1910, to do sixty days' more work. I guarantee that the said claim is properly staked and the said work properly done, and an affidavit filed thereto in accordance with the mining laws of the Ontario Mines Act. I guarantee that my title to the said property is correct, and the property is properly staked, and that it does not interfere with the staking of anybody else in the locality; and, as it is the intention of the J. Curry Company Limited to have a survey of the said claim made by a proper land surveyor as soon as convenient after this date, and if it is found, when the said surveyor goes on the property and makes the survey, that the staking is defective, and it is shewn that the proper transfer of the 40 acres according to the application cannot be made of the property, or for any other reason the title is imperfect, I agree on demand to refund the J. Curry Company Limited the full amount of the purchase-price paid for the property on this date."

The purchase-money was paid on the 12th January, 1909, and the mining claim was on the same day transferred by the appellant to the respondents.

Subsequently an application was made for the cancellation of the certificate of record of the claim. The application was made by Adam Burwash and E. M. Goodman, who claimed that they were entitled to and had recorded a claim to the same property; that they had staked it and recorded it as M.R. 1687 before the staking and recording of it as M.R. 1753 by the appellant. Both the respondent J. Curry and the appellant were made parties to the proceedings before the Mining Commissioner, and were served with notice of them. The appellant did not appear before the Commissioner, and made no opposition to the claim which Burwash and Goodman were asserting. The respondents appeared, and an adjournment of the hearing was granted at their request, but they did not afterwards appear or take part in the proceedings.

The result of these proceedings was that, upon the evidence

adduced before him, the Mining Commissioner found that mining claim M.R. 1753 covered the same ground as mining claim M.R. 1687; and that, as the former was staked and recorded subsequent to the latter, and as the stakes and markings belonging to M.R. 1687 were still upon the ground when a survey was made of the claim by a land surveyor named Fullerton, and must have been seen by the stakers of M.R. 1753, as well as known to have been upon record when that claim was applied for, there was no escape from the conclusion that the recording of it was procured by a false and fraudulent affidavit, and that the certificate of record for it which followed from the fraudulent recording must be held to have been obtained by fraud, or at all events would not in the circumstances avail to protect the claim; and the Commissioner also found that the certificate of record of M.R. 1753 was issued by the Recorder "in mistake, being in forgetfulness or ignorance of the fact that" that claim "covered the same ground as the prior claim M.R. 1687;" and the result of these proceedings was, that the Commissioner ordered that the certificate of record issued for mining claim M.R. 1753 should be revoked and cancelled, and found and declared that the claim was invalid, and directed that it be cancelled.

The action is brought to recover the purchase-money paid for the claim, and the right to recover it is based on the term of the agreement that "if for any other reason the title is imperfect" the appellant agreed on demand to refund to the respondents "the full amount of the purchase-price paid for" the property. The respondents made another claim in the action against the appellant in respect of another mining claim, but that claim was dismissed, and is not in question on the appeal.

At the trial the respondents gave no evidence of the facts which were proved before the Commissioner and formed the basis of his decision, but put in the decision and relied upon it to prove that the appellant had no title to the mining claim.

It was argued at the trial and again before us that the Mining Commissioner had no jurisdiction to pronounce the decision which he gave, and that at all events he had no jurisdiction to make the appellant, who had parted with all his interest in the claim, a party to the proceeding, and as against him to adjudge that the claim was invalid.

The learned trial Judge did not give effect to this contention, and gave judgment for the respondents for $2,085: $2,000 for the purchase-money and $85 for the cost of a survey of the claim which the respondents had had made before they became aware

that there was any difficulty or dispute as to the title of the appellant to the claim.

It is clear, I think, that the Mining Commissioner had jurisdiction to cancel the claim and vacate the recording of it if the case was brought within the exceptions mentioned in sec. 65 of the Mining Act of Ontario (8 Edw. VII. ch. 21), as upon the evidence before him it was.

The appellant was properly made a party to the proceedings. Although he had transferred the claim to the respondents, he was bound by his agreement, if it was found that he had no title to it, to refund the purchase-money paid to him; and, upon payment of it, he would be entitled to a reconveyance, for whatever it might be worth, of the claim. He was, therefore, a proper, if not a necessary, party to the proceedings and is bound by the decision.

It was also argued by counsel for the appellant that the respondents' failure to contest the claim of Burwash and Goodman, and to bring before the Commissioner the facts to which Patrick Murdock deposed at the trial, of which, it was alleged, they had knowledge, disentitled them to rely upon the decision of the Commissioner; but the explanation given by the respondent J. Curry that there was nothing to be gained by contesting the claim of Burwash and Goodman, as the respondents knew that it was well founded and did not desire to run the risk of having to pay the costs of an unsuccessful defence, appears to be an answer to the argument of the appellant. It is also to be observed that, if the staking by the appellant had been an honest staking, he had an opportunity of proving that, and his failure to prove it affords ground for believing that he could not have proved it. It is also a significant circumstance that, although the appellant was examined as a witness at the trial, he made no attempt to shew that the finding of the Mining Commissioner was not in accordance with the real facts.

For these reasons, I would affirm the judgment of the learned trial Judge, and dismiss the appeal with costs.

MARCH 15TH, 1915.

*GOWLAND v. HAMILTON GRIMSBY AND BEAMSVILLE ELECTRIC R.W. CO.

Railway—Injury to Person Crossing Track of Electric Railway on Company's Land—Private Driveway across Track Used with Knowledge of Company—Dangerous Crossing—Duty to Give Warning of Approach of Car—Negligence—Findings of Jury—Evidence.

Appeal by the defendant company from the judgment of KELLY, J., 7 O.W.N. 591, upon the findings of a jury, in favour of the plaintiff.

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

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

G. Lynch-Staunton, K.C., and H. S. Robinson, for the plaintiff, respondent.

MEREDITH, C.J.O.:—. . . The action is brought to recover damages for injuries sustained by the respondent while driving a horse and waggon over a crossing of the appellant's line called "Carpenter's crossing," owing, as is alleged, to the negligence of the appellant, and the negligence charged is, that a car of the appellant which came into collision with the waggon was being driven at an excessive rate of speed, and that proper warning of the approach of the car was not given. . . .

The jury, in answer to questions, found: (1) that the appellant was guilty of negligence which caused the injury to the respondent; (2) that the crossing was an unusually dangerous one —that the appellant should use necessary caution in such places, and should sound an alarm in such places; (3) that the respondent was not guilty of contributory negligence; and, in answer to further questions of the learned Judge, the jury said that the caution that should have been taken was "sounding an alarm" and "by running at a slower rate of speed;" and they added, "Then there were the trees in the way;" and upon these findings the judgment was directed to be entered. . . .

I shall deal with the case on the assumption that the planked crossing was the way agreed upon between the owner of the land and the appellant as the way which was to be used (as a way of necessity from the land to the highway). . . .

Counsel for the appellant relied upon Grand Trunk R.W. Co.

v. McKay (1903), 34 S.C.R. 81, as authority for the proposition that, apart from statutory restrictions or regulation by the Ontario Railway and Municipal Board, the appellant was entitled to run its cars at any rate of speed that it chose, and was not bound, in operating its railway on its own land, to sound a whistle or ring a gong or do anything else for the purpose of warning persons lawfully crossing the line of the approach of a car, unless the place of crossing was a highway crossing; but the case does not, in my opinion, support that contention. . . . There is nothing in the reasons for judgment or in the decision itself which requires us to hold that, in the circumstances of this case, the appellant was not guilty of actionable negligence in failing to give warning by bell or whistle of the approach of the car which came into collision with the waggon. The car was being run at a speed of about 20 miles an hour. There was nothing unlawful or negligent in that; but the servants of the appellant who were operating the car knew or ought to have known that it would have to pass over the crossing from Carpenter's premises; that persons might be coming out by the driveway with their vehicles; that, owing to the trees, it would be impossible to see any one coming out until the car had almost reached the crossing; and that, travelling at the rate of 20 miles an hour, it would be impracticable to stop the car in time to prevent injury to a person coming out whose vision of the approaching car would be obstructed until he had almost come to the railway, and who might have reached the tracks before becoming aware that the car was approaching.

To have run the car, in these circumstances, without, as the jury has found, giving any warning by bell or whistle of its approach, warranted the jury in finding that the appellant was guilty of negligence which caused the accident.

It may be that if the crossing had been a highway crossing the McKay case would have applied, because in the case of such a crossing the Railway Act prescribes what the duty of the railway company as to it is, and the warning which is to be given by approaching trains; and, according to that case, it is not competent for a jury to add to these safeguards others which the jury may think ought to have been provided.

For these reasons, I would dismiss the appeal with costs.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A., also concurred, for reasons briefly stated in writing.

Appeal dismissed with costs.

MARCH 15TH, 1915.

*PARKS v. SIMPSON.

Judgment—Action for Damages for Breach of Directions in Judgment of Court—Right of Action on Judgment for Payment of Money—Limitation.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Hastings dismissing an action brought in that Court and tried by him without a jury.

The action was brought to recover damages for non-performance of the judgment pronounced by the Court in two former actions and for failure of the defendant to carry out the same.

The two former actions were brought in the same County Court, and were tried together, and by the judgment pronounced by the Senior Judge on the 19th June, 1912, it was adjudged that the present plaintiff was entitled to a return of all his bees and honey and other chattels brought upon the property of the defendant's testator for the purpose of working the hives and caring for the honey, and to $25 damages for their detention; that the defendant's testator was entitled to $165, "balance of the purchase-money," with interest; that the plaintiff should pay into Court that sum and interest, less the $25 damages; and that thereupon he should be permitted to remove from the premises of the deceased his goods and chattels, together with the bees and honey bought by him from the deceased; and that, immediately after such removal, the money paid into Court should be paid to the defendant; and that each party should bear his own costs.

The appeal in the present action was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

F. E. O'Flynn, for the appellant.

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

The judgment of the Court was delivered by MEREDITH, C.J.O. (after setting out the facts at length):—It appears from the testimony of the appellant in this action that he has got back all the goods and chattels which he brought to the deceased's farm, except 5 top boxes, and that his claim is for damages for the loss of the bees, which, as he alleges, came to their death owing to the negligence of the deceased, and for the loss of some

of the honey which they had made, which had "candied" on the deceased's farm and had become practically valueless.

The evidence as to the 5 top boxes which the appellant testified he had not got back was not satisfactory, and the proper conclusion is, I think, that he was not prevented by the respondent from taking them away, and that if he did not get them it was his own fault.

The extent of the appellant's right as to the bees and honey is to be measured by the judgment in the former actions, and is that, upon payment into Court of the $165 and interest, less the $25 damages awarded to him, he was to be permitted to remove them from the premises of the deceased; and all other questions are, in my opinion, concluded by the judgment.

It is unnecessary, in the view I take, to express any opinion as to whether the loss occasioned by the death of the bees and the spoiling of the honey falls upon the appellant or upon the respondent. The rights, if any, which the appellant may have must be sought and obtained in the Court by which the judgment was pronounced.

It is only a judgment for the payment of money upon which an action may be brought; that to be available as a cause of action a judgment must be a definitive personal judgment for the payment of money, final in its character, and not merely interlocutory, remaining unsatisfied and capable of immediate enforcement, is settled law. Cyc., vol. 23, pp. 1503-4, and the authorities there cited, support this statement of the law. See, also, Seligman v. Kalkman (1860), 17 Cal. 152; Smith v. Kander (1894), 58 Mo. App. 61.

The theory upon which it was held that an action of debt might be brought upon a judgment was, that, upon its being shewn that a judgment is "still in force and effect, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt and is bound to pay it:" Blackstone's Commentaries, Lewis's edition, book 3, pp. 159, 160.

"A debt which is properly enforceable by an action of debt must be a sum of money due by certain and express agreement where the amount is fixed and specific and does not depend upon any subsequent valuation to settle it; and, if the contract is to be discharged by the delivery of stock, merchandise, or other articles of trade or value, the action cannot be maintained:" Cyc., vol. 13, pp. 403, 407, 409. And, although forms of action have been abolished, it is still necessary, to found an action upon

a judgment, that the judgment be of a character which would have supported an action of debt under the old forms of procedure.

The judgment upon which the appellant sues is not a judgment for the payment of a sum of money, either certain or uncertain, but the action is in reality an action to recover damages for an alleged breach by the respondent of the directions of the judgment in not permitting the appellant to remove his bees and honey, and such an action does not lie.

It may not be amiss to point out that, even where the action lies, it was said more than 150 years ago in Bowen v. Barnett (1754), Sayer 161, that, "as there is a degree of vexation in bringing an action of debt on a judgment, such an action ought not to be favoured." And Blackstone says: "Wherefore since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the Courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one:" Black., loc.cit., p. 160. And as late as 1899 a very eminent Judge said: "But, although an action will lie, still if the person who has obtained a garnishee order brings an action upon it without any necessity, he will run the risk of having it stayed as an abuse of the process of the Court, and probably have to pay the costs:" per Lindley, M.R., in Pritchett v. English and Colonial Syndicate, [1899] 2 Q.B. 428, 435.

In my opinion, the appeal should be dismissed with costs.

MARCH 15TH, 1915.

*GARSIDE v. GRAND TRUNK R.W. CO.

Railway—Level Highway Crossing — Person Struck by Yard Engine and Killed—Negligence—Neglect to Give Warning of Approach of Engine—Contributory Negligence of Deceased—Going between Lowered Gates at Crossing—Gates not Maintained by Statutory Authority or under Direction of Board of Railway Commissioners—Railway Act, R.S.C. 1906 *ch.* 37, *sec.* 279.

Appeal by the defendant company from the judgment of BRITTON, J., in favour of the plaintiff, upon the findings of a jury, at the trial, at London, of an action, under the Fatal Accidents Act, to recover damages for the death of Walter Joseph Garside, which was caused, as the plaintiff alleged, by the negligence of the defendant company.

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

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

Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . The deceased was run down by a yard engine of the appellant, which was backing across Wellington street, in the city of London, without having a man stationed upon it to warn persons standing on or crossing or about to cross the track of the railway, and without, as the jury found, any bell having been rung before it began to cross the street to give warning that it was about to move.

Wellington street, which runs north and south, is crossed by six tracks of the appellant's railway, and there are gates at the crossing, which, when let down, extend from the east end of the sidewalk on the east side of the street to the west end of the sidewalk on the west side. The south gates are situate about 25 feet south of the south track, and the north gates are 10 or 15 feet north of the north track. The gates were down apparently because a freight train was moving eastward on the fourth track from the south. The deceased was proceeding on foot and going north on the east sidewalk. When he came to the gates, he passed around or under them on that side of the street, and walked diagonally to the west sidewalk, and stood on the space between the second and third tracks, a little off the west sidewalk and to the west of it, waiting for the freight train to go by, when he was struck by the yard engine.

As I have said, the freight train was moving eastward on the fourth track, and the yard engine was standing with its rear end about on the east line of Wellington street; when the yard engine was moving, the deceased, who had not observed that it was moving, stepped a little closer to the fourth track, and was struck by the yard engine and killed. There was nothing on any of the other tracks except some "dead" cars standing on one of them.

The findings of the jury, except the one which exonerated the deceased from contributory negligence, were not challenged by the learned counsel for the appellant, but he contended that, when the gates were lowered, the right of the public to use the highway between them was suspended, and that the deceased in entering on that part of the highway was a trespasser, to whom

the appellant owed no duty; or that his so entering was, in the circumstances of the case, as a matter of law, per se negligence disentitling the respondent to recover.

It was not proved that the gates were erected or maintained in pursuance of any order or direction of the Board of Railway Commissioners for Canada, nor is there any statutory authority requiring or authorising the erection or maintenance of them, and in this respect the case of Wyatt v. Great Western R.W. Co. (1865), 34 L.J.Q.B. 204, referred to by Mr. McCarthy, differs from the case at bar. . . .

It was further argued by counsel for the appellant that sec. 279 of the Railway Act (R.S.C. 1906 ch. 37) has the same effect as the section under consideration in the Wyatt case, but I am not of that opinion. Section 279 is a prohibitive section designed to prevent a railway company, in carrying on the operations mentioned in it, unnecessarily or unreasonably obstructing the traffic upon highways which its railway crosses, and does not confer upon the company any exclusive right to the use of that part of a highway upon which its tracks are laid during the time which the section allows for the operations with which it deals.

No case was cited which supports the contention of the appellant with which I am now dealing, although there are expressions to be found in the reasons for judgment in the American cases to which I shall afterwards refer, which appear to indicate that, in the view of the Court, a railway company has the exclusive right of user of that part of the highway within the gates when it has erected and maintains gates across the highway, and the gates are down.

In my view that is not the law in this Province, at all events where, in the case of a Dominion railway, it is not shewn that the erection and maintenance of the gates is authorised or required by an order or direction of the Board of Railway Commissioners for Canada, and the lowering of the gates is but a warning to persons desiring to cross the tracks that it is dangerous to do so.

I am also of opinion that the other contention of the appellant's counsel is not well-founded. It is, no doubt, supported by decisions of the highest Courts of some of the States of the neighbouring Republic, and among them the Courts of Massachusetts, New York, and Illinois, but it is opposed to the view of the highest Courts of other States.

Among the cases which support the appellant's contention are Granger v. Boston and Albany R.R. Co. (1888), 146 Mass. 276; Cleary v. Philadelphia and Reading R.R. Co. (1891), 140

Pa. St. 19; and Hatch v. Lake Shore and Michigan Southern R.R. Co. (1913), 156 N.Y. App. Div. 394. . . .

[Quotations from Thompson on Negligence, 2nd ed., vol. 2, p. 1532.]

Among the cases in which a different view was taken are Chicago and Western Indiana R.R. Co. v. Ptacek (1898), 171 Ill. 10, in which it was held that, although an act of imprudence, it is not negligence per se in every case, as a matter of law, for a person to attempt to cross a railway track in front of an approaching train when the crossing gates are down, and Samkiwick v. Atlantic City R.R. Co. (1911), 81 Atl. Repr. 833 . . . ; and the same view was adopted by McLennan, P.J., who dissented from the decision of the Court in Hatch v. Lake Shore and Michigan Southern R.R. Co.

The reasoning of the Courts in the cases which are opposed to the appellant's contention commends itself to me as sound and preferable to that which led to the opposite conclusion; and, in my opinion, the fact that the deceased went upon the highway between the gates when they were lowered was not in itself sufficient to disentitle the respondent to recover; it was not per se negligence, and the learned trial Judge ought not to have instructed the jury that as a matter of law the deceased was guilty of contributory negligence; the lowering of the gates was a warning to the deceased that it was dangerous to cross the tracks, but it was a question for the jury to decide whether, under all the circumstances, he was guilty of contributory negligence.

I would dismiss the appeal with costs.

MARCH 15TH, 1915.

*BIRCH v. STEPHENSON.

*McDOUGALL v. STEPHENSON.

Master and Servant—Death of Servant in Master's Burning Building—Absence of Fire-appliances and Presence of Inflammable Material—Non-compliance with Factory Shop and Office Building Act, 3 & 4 Geo. V. ch. 60—Cause of Death—Negligence or Breach of Duty not Proved to be Cause—Evidence—Difficulty of Establishing Causal Connection.

Appeals by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., 6 O.W.N. 124, dismissing the actions, after trial without a jury.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and J. G. Kerr, for the appellants.

O. L. Lewis, K.C., and Christopher C. Robinson, for the defendant, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . The actions were brought under the Fatal Accidents Act to recover damages for the deaths of Alexander McDougall and Robert J. Birch, which were caused, as the appellants allege, by the failure of the respondent to comply with the provisions of the Factory Shop and Office Building Act, 3 & 4 Geo. V. ch. 60, as to fire escapes (sec. 59) and as to the keeping of combustible or inflammable material (sec. 56).

That the respondent was guilty of a contravention of sec. 59 is undoubted, and the fact that there were other means of escape is immaterial, except upon the question whether the deaths of the two men were caused by the absence of the fire escapes which, by the section, the respondent was required to have provided.

There is more difficulty as to the barrel, partly filled with printer's ink, which was undoubtedly both combustible and inflammable; but I am inclined to think that there was also a contravention of sec. 56, in not keeping the ink, when not in actual use, in a building separate from other parts of the factory, or in a fireproof compartment in the factory.

Although this part of the appellants' cases was proved, I have reluctantly come to the conclusion that the actions fail and were rightly dismissed, because there was no evidence which warranted the conclusion that the deceased came to their deaths because of the failure of the respondent to provide the prescribed fire escapes, or because of the presence of the printer's ink in the respondent's factory—I say reluctantly because if in such a case as this there can be no recovery, the purpose of the Legislature in enacting the section in question will be frustrated in many, and perhaps in most, cases where death occurs, owing to the great difficulty that will exist in establishing the causal connection between the death and the absence of the fire escapes or the presence of the combustible or inflammable material.

Upon the evidence, it is impossible to say that the deaths of the deceased were occasioned by the absence of the fire escapes or the presence in the factory of the printer's ink, or both. It is consistent with the evidence, and perhaps the most probable theory,

that they were suffocated by the smoke of the burning building. . . . There is an entire absence of anything to indicate that the deceased had sought escape by any window at which a fire escape ought to have been found.

It is clear, I think, that proof of a contravention of the Act, and that a person lost his life in the burning building, is not enough to entitle his personal representatives or his dependents to recover; there must be, in addition to this, reasonable evidence to warrant the conclusion that the death resulted from the contravention; and the appellants fail because of the absence of that evidence.

The Admiralty cases cited by Mr. Hellmuth have no application. The doctrine laid down in them, that an infringement of the regulations for preventing collisions contained in or made under the Merchant Shipping Acts, 1854 to 1873, must be one having some possible connection with the collision, or, in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision, and that the burden of shewing this lies on the party guilty of the infringement—proof that the infringement did not in fact contribute to the collision being excluded—depends upon the provisions of sec. 17 of the Merchant Shipping Act, 1873. . . .

[Reference to The Fanny M. Carville (1875), 13 App. Cas. 455 (note); The Acklow (1883), 9 App. Cas. 136, The Duke of Buccleuch, [1891] A.C. 310; The Corrinthian, [1909] P. 260; The Bellanoch, [1907] A.C. 269.]

There being in the Factory Shop and Office Building Act no provision similar to that of sec. 17 of the Merchant Shipping Act, 1873, these cases, as I have said, have no application. But, though they cannot help the appellants, they may suggest to the Legislature the advisability of amending the Provincial Act by providing that there shall be such a presumption as sec. 17 raises, where there has been a non-observance of those provisions of the Act which are designed to safeguard human life. . . .

Smith v. Midland R.W. Co. (1888), 57 L.T.R. 813, . . . illustrates the difficulty which a plaintiff has to meet where a condition which is proved to exist might have been due to several causes, and there is nothing to indicate by which of them it was caused.

I would dismiss the appeals with costs, if costs are asked.

MARCH 15TH, 1915.

BUTLER v. DUNLOP.

Sale of Goods—Action for Price—Written Agreement—Absence of Express Warranty—Caveat Emptor—Sale of Specific Article or Article of Specified Class—Doubtful Description—Parol Evidence to Explain—Right to Inspect and Reject—Provision of Agreement that Property not to Pass till Payment — Evidence Justifying Rejection — Finding of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of MEREDITH, C.J. C.P., at the trial, dismissing the action without costs, and allowing the defendant's counterclaim, also without costs.

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

R. J. McLaughlin, K.C., and R. D. Moorhead, for the appellant.

W. N. Tilley, for the defendant, respondent.

The judgment of the Court was delivered by GARROW, J.A.:—The action was brought to recover a balance said to be owing by the defendant upon the purchase by him from the plaintiff of a motor boat.

The written contract signed by the parties, in the form of an order, is as follows:—

"M. L. Butler, builder of motor boats and yachts,
Brighton, Ont.

"Toronto, March 10th, 1914.

"Dear Sir: Kindly enter my order for the following: one 25 × 6 standard family runabout, for which I agree to pay the sum of $1,250. Cash with order $312.25, the balance when launch is ready for delivery. It is agreed that the right and title to the goods shipped under this order shall remain in M. L. Butler until the price thereof or any cheque, bill, or note given therefor or any part thereof is paid in full." (Here follows a minute description of how the boat was to be finished and equipped.) "Delivery to be as follows, f.o.b. Brighton, May 1st.

"We hereby accept the above order and acknowledge the receipt of $312.25 deposit thereon. The purchaser agrees not to rescind this order, and to accept delivery of the goods as specified."

The defendant is a merchant, and resides at the town of Pembroke. The correspondence shews that there was some delay in delivery beyond the 1st May . . . but finally, on the 13th May, a boat was sent to the defendant at Pembroke, as if in purance of the order, which, upon trial in the water at Pembroke, immediately after its arrival, was found, so the defendant alleges, not to be in accordance with the representations made to him at the time of purchase by the plaintiff and his agent, upon the faith of which he purchased. Some correspondence ensued, but finally the defendant rejected the boat, and notified the plaintiff of such rejection. . . .

Evidence was given on behalf of the defendant by several witnesses in respect of trials of the boat in the water at Pembroke . . . which, if believed, sufficiently shewed, as the learned Chief Justice found, that the boat was unsteady and unseaworthy and that its speed did not exceed nine miles an hour.

In his judgment the learned Chief Justice says that the defendant intended to buy and the plaintiff intended to sell a boat which was steady, suitable for the uses of the defendant's family, and which would "make" 12 miles an hour. He adds: "Upon the evidence, as it stands now, I can come to no other conclusion than that the boat which was delivered is not a boat of that character or capacity. I must, upon the evidence, find that it is an unsteady boat, not suitable for any family, and not ordinarily capable of 'making' more than 9 miles an hour. . . . They have each been mistaken as to the character and capacity of the article." And he dismissed the action without costs and allowed the defendant's counterclaim for a refund of the instalment of purchase-money which had been paid.

Without dissenting from the conclusions of the learned Chief Justice as to the mistake, there are, it seems to me, other grounds upon which the judgment may well rest.

The plaintiff relies upon the contention that the sale was a sale of a specific article which the defendant saw and selected; that the contract was in writing and contains no express warranty, and the maxim "caveat emptor" applies to exclude any implied warranty.

But, looking, as the plaintiff desires we shall, at the writing, it does not appear from it that the sale was of a specific article, but rather a sale of one of a class, in the agreement described as a "standard family runabout." That description in itself does not, in my opinion, ascertain and set apart any particular boat. And, on the evidence, . . . it is at least obscure, if not

meaningless, since there is really no such a thing shewn to exist as a class of boat known by that designation. The phrase then being, as it clearly is, at least, obscure, parol evidence was, I think, admissible to explain and if possible apply the description to the subject-matter—upon the principle applied in such cases as Bank of New Zealand v. Simpson, [1900] A.C. 182; and in that way we arrive, from the evidence of what took place, at what presumably the parties intended by the expression a "standard family runabout," which, in all the circumstances, was, in my opinion, intended to mean a boat of the character and description which the defendant had informed the plaintiff he desired to purchase. Why the word "standard" was introduced, when there is no such thing known as a "standard boat," is not clear. The other word, "family," was probably intended to cover the idea which the defendant had . . . impressed upon the plaintiff, that what he wanted was a boat which above all must be safe for his family to use.

It may be and I think was intended that the boat which the defendant saw at the exhibition was the one intended to be completed and sent on in fulfilment of the order. But, if the plaintiff had instead, for any reason, furnished the duplicate boat which he says he had on hand at the time, and had sent in, I do not at present see how, on the terms of the writing, the defendant could for that reason have complained if the boat was otherwise satisfactory. I do not, however, regard the question whether the purchase was of a specific article or not as being decisive. . . . The boat which the defendant saw was on land, not in the water, and was unfinished. It could not have been there and then adequately inspected. To such a case, even on the sale of a specific article, the maxim "caveat emptor" does not apply: Jones v. Just (1868), L.R. 3 Q.B. 197, See also Shepherd v. Pybus (1842), 3 Man. & G. 868.

The property in the boat had not passed. By the agreement it was not to pass until the purchase-money had been paid; and, on its receipt at Pembroke, the defendant had a perfect right to try the boat in the water and to reject it if, upon reasonable trial, it was found not to be in accordance with the true agreement, either as to speed or as to seaworthiness. And, as to both, the learned Chief Justice has found, upon sufficient evidence, in favour of the defendant. . . .

Both parties were apparently acting in good faith; but it would be very unfair to place upon the shoulders of the purchaser the burden of what seems to have been an experiment in boat-building by the vendor.

For these reasons, I would dismiss the appeal with costs.

HIGH COURT DIVISION.

MIDDLETON, J. MARCH 16TH, 1915.

*TREASURER OF ONTARIO v. CANADA LIFE ASSURANCE CO.

Constitutional Law — Ontario Corporations Tax Act — Intra Vires—"Direct Taxation within the Province" — British North America Act, sec. 92 (2).

Action to recover $25.059,25, the amount of taxes assessed against the defendant company under the authority of the Corporations Tax Act, R.S.O. 1914 ch. 27.

The action was tried without a jury at Toronto.
W. S. Brewster, K.C., for the plaintiff.
E. Bayly, K.C., for the Attorney-General.
A. W. Anglin, K.C., for the defendant company.

MIDDLETON, J.:— . . . The defence to the action is, that the statute imposing the tax is in whole or in part ultra vires the Provincial Legislature, because the tax imposed is not within subsec. 2 of sec. 92 of the British North America Act, "Direct Taxation within the Province."

This taxation originated in an Act 62 Vict. (2) ch. 8, passed in 1899, and from time to time amended until it assumed its present form in the Revised Statutes of 1914. The Revised Statute has been further amended by the Act 4 Geo. V. ch. 11, which increases the rate of taxation imposed upon insurance companies from one per cent. to one and three-quarters per cent., calculated on the gross premiums received by the company in respect of business transacted in Ontario.

The tax so imposed was paid by the different insurance companies until last year, when the increased rate became operative.

This action is a test case, for the purpose of determining the validity of the legislation in question.

That the Province may tax the insurance companies is not denied. The complaint is, that the tax is not a direct tax, and that, by virtue of an interpretation clause, the taxation is made to extend to subject-matter which is not "within the Province."

The case really turns upon the correct understanding of the decision of the Privy Council in Bank of Toronto v. Lambe (1887), 12 App. Cas. 575. There the Province of Quebec im-

posed a tax upon banks and insurance companies. The tax upon the bank varied with the paid-up capital, and an additional tax was imposed for each office or place of business. The tax upon insurance companies was of a named sum, without reference to the amount of its capital. Their Lordships accepted as the definition of direct and indirect taxation that found in the writings of John Stuart Mill: "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such as the excise or customs." . . .

The definition from Mill is adopted, not "with the intention that it should be considered a binding legal definition, but because it seems . . . to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding and is likely to have been present to the minds of those who passed the Federation Act."

Precisely similar statements are made in other cases which have been carried to the Court of last resort; and in the latest of these, Cotton v. The King, [1914] A.C. 876, it is said: "Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase 'direct taxation' in sec. 92 of the British North America Act is substantially the definition quoted from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

Mr. Anglin drew attention to the fact that the phrase "indirect taxation" is not found in the Act, and argued that there might be taxation which could not be regarded as either direct or indirect, and that the Province had no jurisdiction, unless it could be ascertained that the tax imposed was in truth a direct tax. This argument appears to have been put forward by counsel in the Lambe case; and I think it must be taken to have been repudiated by their Lordships, and that it may now safely be said that all taxation is, for the purpose of this Act, to be regarded as either direct or indirect. It is either demanded from the very person who it is intended or desired should pay it, or it is demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.

Bearing in mind that it has been held that a company possesses a distinct individuality from its shareholders, it might be argued from a theoretical standpoint that every tax imposed

upon a joint stock company is indirect, because the taxation is in truth borne by the shareholders. But in the construction of this statute no such narrow interpretation can be given effect to, and the decision in Bank of Toronto v. Lambe is conclusive authority; for there the tax imposed upon incorporated companies was upheld.

What Mr. Anglin argued with reference to the tax now in question was that the intention, as ascertained from the Act itself, applied to the existing state of affairs, is that the tax, though imposed upon the insurance company, is in truth indirect because the Legislature must have contemplated that it would not in the result be borne by the insurance companies but would be cast upon the policy-holders. The imposition of a tax of one and three-quarters per cent. upon the premiums collected must in the long run mean that a larger premium must be paid to precisely that extent, or the companies cannot continue to transact business. The insurance companies are in truth, he says, dealers in insurance as a commodity, and this tax on the cost of the commodity, though levied on the vendor, must inevitably be paid by the purchaser.

At first sight this argument appears to be cogent and forcible; but after the best consideration I can give to the matter it appears to me to be unsound. The great bulk of insurance effected within the Province is effected upon the participating plan. The premiums levied are, to use technical language, "loaded;" that is, they are greater than necessary to meet the actual expected loss. This excess or "loading" constitutes the so-called "profit" in the operation of the company, and it is divided between the shareholders and the participating policy-holders. Under the general law the shareholders can only receive ten per cent. of the profit. Ninety per cent. must be divided among the participating policy-holders. See 9 & 10 Edw. VII. ch. 32, sec. 110 (D.)

The effect of the payment of any taxation out of the gross income of the company will be to reduce the amount of profits available for distribution among the shareholders and the participating policy-holders. The tax does not become indirect because the amount which would reach the shareholder is reduced, nor does it become indirect because the amount which would reach the participating policy-holders would also be reduced.

. . .

The policy-holders, having contracts with the company, stand in precisely the same position, as far as this matter is concerned,

as do its shareholders. They alike share in its profits under their several contracts, but this does not affect the true nature of that tax. . . .

All this, however, is beside the question, if I am correct in the view which I entertain that the taxation is direct, even though by the contract of the policy-holders ninety per cent. of it must be borne by them.

An argument was presented by Mr. Brewster which is not without weight; that the great bulk of this taxation, certainly the entire taxation for the year 1914, must in truth be borne by the company, for the premiums are payable on pre-existing contracts which are not susceptible of change. While this is undoubtedly so, I prefer to rest my judgment upon the broader ground indicated, as the taxation is not of a temporary nature, and the incidents peculiar to a transition period are not a fair index of the real nature of the tax imposed.

Much has been said concerning the clause in question, looking only at the words "direct taxation" torn apart from their context and without regard to their historical setting.

The framers of the Act sought to mould a stable Dominion out of separate Provinces and to end the jealousy and friction which had resulted from the antagonisms and conflicting interests incident to their separate existence. "Trade and Commerce" was assigned to the Dominion, and with it had to go the power of imposing customs and excise duties. Manifestly no Province could be permitted to interfere with the general fiscal policy of the Dominion by any such indirect tax; but the Provinces had to be given some source of income; and so direct taxation, and this alone, was permitted.

These considerations seem to indicate that it was not so much the intention to limit the provincial powers to taxation which would be direct in the strictest sense in which that term is used by political writers, as to prevent the imposition of indirect taxes which would tend to interfere with the general policy of the confederation. The ultimate incidence of the tax was not so much the concern of the draftsman as the securing of freedom for the Dominion from any interference by the Provinces in matters assigned to it. The term "indirect taxation" ought therefore to be liberally and not narrowly construed, and all taxation which can fairly be regarded as direct should be permitted so long as it is confined "within the Province."

The tax which is imposed under the Act in question is said to be upon the gross premiums received by the company in respect

of the business transacted in Ontario; but by sub-sec. (e) this is made to cover every premium which by the terms of the contract is payable in Ontario or which is in fact paid in Ontario or is payable in respect of a risk undertaken in Ontario or in respect of a person or property resident or situate in Ontario at the time of payment. Notwithstanding the wide scope of this interpretation, I think the tax still remains a direct tax within the Province. The application of any artificial scale to determine the amount to be paid where the company taxed is in the Province or has assets which can be reached within the Province, does not appear to me to change the nature of the tax or to take it outside the powers of the Legislature.

The problem which the Legislature was called upon to face when devising a fair basis for the taxation of insurance companies was not easy. The amount of capital employed within the Province could not be ascertained. The amount of capital bears no relation to the amount of business done; a fixed assessment or tax would bear heavily upon the smaller companies. The amount of premiums received for business within the Province seemed to be a fair criterion. The Courts, however, are not concerned with the reasonableness of the tax. I can find nothing ultra vires in the mode of assessment provided.

Judgment will be for the plaintiff for the recovery of the amount claimed.

SUTHERLAND, J. MARCH 16TH, 1915.

RE CHATHAM GLEBE TRUST.

Trusts and Trustees—Crown Grant of Land in Trust—"Glebe for Use and Benefit of Ministers and Congregations in Town"—Construction and Meaning—Distribution and Apportionment of Income of Trust Fund — Principle of Equality.

Motion by the Church of England Synod of the Diocese of Huron, by originating notice, for an order declaring the true construction of the trust in a grant of land from the Crown, dated the 6th September, 1837, to named trustees, their heirs and assigns, "in trust to hold the same to and for a glebe for the use and benefit of the ministers and congregations of the Established Church of England in the town of Chatham."

The lands were sold, and the trustees had in hand the sum of $13,200. See the Ontario statute 3 & 4 Geo. V. ch. 150.

The applicants were the present trustees, and they asked the opinion and advice of the Court in respect of the following questions:—

1. It having been decided by arbitration that Christ Church, Chatham, and Holy Trinity Church, Chatham, being the only two churches of the Established Church of England at present in existence in the city of Chatham, are entitled to participate in the uses and benefits of the said trust, in what shares and proportions should the trustees pay the income of the trust to the two churches?

2. Under the wording of the trust, in the event of other churches of the Church of England being established in the future in the said city of Chatham, would the ministers and congregations of such new churches be entitled to participate in the uses and benefits of the trust?

3. Under the wording of the trust, would ministers of the Established Church of England, residing in the said city of Chatham, but not having charge of churches or congregations of the Church of England, nor having the performance of definite clerical duties assigned to them in connection with such churches and congregations, be entitled to participate in the uses and benefits of the trust?

4. Under the wording of the trust, (a) would it be necessary for the trustees to deal with the ministers and the congregations of Church of England churches in the city of Chatham as separate entities and to pay so much of the income of the trust to the minister and so much to or for the benefit of the congregation, or would the minister and congregation of any such church be properly treated by the trustees as a single entity so that payment to the Rector and Wardens as the governing body of such church would satisfy the obligations of the trustees in that behalf; and (b), if the minister and the congregation should be treated as separate entities, in what shares or proportions should the shares of income payable in respect of any particular church be distributed between or among them?

5. In the event of there being at any time in the future more ministers or clergymen attached to and performing clerical duties in connection with any church of the Church of England in the city of Chatham, would each of such clergymen be entitled to participate individually in the said income, and if so in what shares and proportions?

The motion was heard at the London Weekly Court.

F. P. Betts, K.C., for the trustees.

O. L. Lewis, K.C., for the Rector and congregation of Christ Church, Chatham.

T. Scullard, for the Rector and congregation of Holy Trinity Church, Chatham.

SUTHERLAND, J. (after setting out the facts at length):—It is contended on behalf of Christ Church and congregation that, they being the direct successors and practically a continuation of the original S. Paul's church, and the trust being "to hold the same to and for a glebe" etc., and "glebe" meaning a portion of land attached to an ecclesiastical benefice as part of its endowment, the whole of the fund should in strictness be used for its minister and congregation. The further words of the trust are, however, "for the use and benefit of the ministers and congregations" etc., and they would seem to contemplate more than one minister and congregation for whose use the glebe and its revenue should be used and applied. . . . It is also conceded that the arbitration had settled this in so far as the two now existing congregations and their ministers are concerned, and that both are to share.

It is, however contended that, while this may be so, it does not necessarily imply that each should get one half of the revenue, or that if, at a later date, additional congregations are formed, they and their ministers should share in the fund.

It is contended on behalf of Christ Church that, as it was the successor of the original congregation and in receipt of the whole revenue for a time, it should be dealt with in a different way from that in which Holy Trinity Church should be dealt with, and that a portion of the revenue should first be set apart for it, and only the balance thereof divided in some appropriate and equitable way between the two.

It is further contended that, in default of a disposition of the matter in the manner just suggested, the revenue should be divided between the two existing congregations on the basis of the number of their respective members: Attorney-General v. Grasett (1856-7), 5 Gr. 412, 6 Gr. 200; Langtry v. Dumoulin (1884-5), 7 O.R. 644, 11 A.R. 544; Dumoulin v. Langtry (1886), 13 S.C.R. 258.

As the membership of the existing congregations will be fluctuating from time to time, this does not appear to be a very satisfactory or equitable adjustment, and if in time an-

other congregation or other congregations and their ministers will be entitled to share, the matter will become yet more complicated and difficult. It would seem to me, however, that the language in which the terms of the trust are couched would imply that all congregations then existing or thereafter to be formed in the town of Chatham, and their respective ministers, were intended to have the advantage of the glebe land and its revenue, and that this will apply in the future in case further congregations are formed therein over which other ministers will be called to preside.

I do not think that there is anything in the language used to indicate that any preference should be given to one congregation as compared to another, where there happens to be a difference in territorial area or in the number of members, nor that, if there is to be a division, the shares should be other than equal shares.

I think also that the language used, "for the use and benefit of the ministers and congregations," seems to imply that it is only ministers in active oversight of congregations who are intended to be recipients of the benefits, and who, with their congregations, should share in the benefit of the trust.

I see nothing in the language used to indicate that the trustees are called upon to apportion the amounts paid between the ministers and their congregations. I cannot see how a better principle can be applied in this case than that expressed in the maxim that "equality is equity:" Lewin's Law of Trusts, 12th ed., p. 1277; Jarman on Wills, 5th ed., pp. 175, 176; Williams v. Roy (1885), 9 O.R. 534; Re Hislop (1915), 7 O.W.N. 614, ante 53.

I would, therefore, answer the questions propounded . . . as follows:—

1. Half to each.

2. Yes.

3. No.

4. (a) The minister and congregation of each church may properly be treated as a single entity and payment properly made to the Rector and Wardens thereof.

(b) The minister and congregation may be left to apportion as they may decide.

5. Yes; and the amount which they and the congregation shall agree upon as payable to such ministers may be equally divided between them if there be but two, or among them if there be more.

The costs of all parties will be out of the fund.

FALCONBRIDGE, C.J.K.B. MARCH 16TH, 1915.

ROBINSON LITTLE & CO. v. TOWNSHIP OF DEREHAM.

Highway—Nonrepair—Injury to Goods Carried in Waggon by Waggon Upsetting—Narrow Roadway — Want of Guard-rail—Negligence of Driver of Hired Waggon—Owners of Goods not Identified with Driver—Findings of Fact of Trial Judge—Damages.

Action to recover damages for injury to goods of the plaintiffs by reason, as the plaintiffs alleged, of a road in the township of Dereham being neglected by the defendants, the township corporation, and defective and out of repair.

The action was tried without a jury at Woodstock and Toronto.

Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiffs.

G. H. Watson, K.C., and S. G. McKay, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B.:—The plaintiffs are wholesale dry goods merchants carrying on business at the city of London. On the 29th January, 1914 (a very dark night), a traveller of the plaintiffs, in the usual course of his business, was being driven with his cases of samples in a waggon known as a democrat (and described as a good, fairly heavy waggon), drawn by two horses, along a highway of the defendants, viz., the 10th concession line.

The conveyance in which the cases containing the samples were being carried was upset, and the samples were so damaged as to be rendered of no value. The plaintiffs contend that the highway had become defective owing to the neglect of the defendants. The defendants, besides denying this allegation, contend that, if damages were sustained as alleged, the same were caused through the neglect and fault of the plaintiffs, and not of the defendants.

I find that the road at the place of the accident was too narrow. It was not only too narrow, but it narrowed in at one place and widened out at another, which made it more dangerous than it otherwise would have been. Secondly, I find that it should have been protected by a guard-rail. The road was not in a state reasonably safe and fit for ordinary travel.

Dereham is a very wealthy township, with an assessment of $3,000,000 and a tax rate of 7 mills.

The defendants rely on two different grounds of alleged negligence causing the accident; first, as to the plaintiffs' agent travelling on a dark night without a lantern; and, secondly, on an alleged defective and negligent packing of the load of samples in the waggon, causing the load to be top-heavy.

The plaintiffs say that, if any such negligence existed, it was the negligence of the driver of the waggon, who was the servant of the livery stable keeper, and that there was no identification or relationship between the plaintiffs and the driver.

Atkins, the plaintiffs' traveller, on the night in question, was in the village of Brownsville, in the said township, and finished his business there about 5.30. Then he packed up his samples and telephoned to Barnett, a liveryman at Tillsonburg, to take him and his samples (contained in six trunks) to that town. A conveyance came over, driven by one Bouncer, an employee of Barnett. Bouncer had driven Atkins before. Atkins had not intended to drive the "rig" himself, and did not in fact do so.

The distance between the two places was about 7 miles. It is Atkins's practice, when he finishes his business in a place at any time before 10 p.m., to drive to the nearest place for the next morning's business. On this night his samples were loaded on the "rig," and they left Brownsville between 7.30 and 8 o'clock.

About a quarter of a mile west of the scene of the accident, Atkins found the waggon being "canted," and got off, lit a match, and found where they were, and Bouncer drove on the road again. Bouncer also was out of the "rig" once to find out where they were.

The trunks were about 2½ ft. high by 32 to 36 in. long and 24 in. wide, all well filled, and weighing about 225 lbs. each.

Atkins did not put in the trunks nor help to put them in nor see them being put in. The trunks were piled by Bouncer—who was called as a witness by the defendants—three in the waggon box and three on top, roped from handle to handle on each side and fastened to the waggon. Bouncer says he did not know that the load was top-heavy; he did not think it was top-heavy, and he would not call it top-heavy. He says also that he packed them carefully and fastened them carefully—"the way I always fasten them"—and thought it was safe. He (Bouncer) did the driving, "did not ask Atkins how and did not think it was for Atkins to interfere with" him. Bouncer had been driving "mostly all his life" since he was big enough to handle a team.

They had gone only about one mile or a mile and a quarter from Brownsville when the accident happened. A short time before, one of them (probably Bouncer) suggested that it would be better to have a lantern. They saw lights ahead of them, and they seem to have agreed, on Bouncer's suggestion, that when they got to that house they would get a lantern, but, before they got so far, the waggon upset.

If there was any negligence in either respect causing or contributing to the accident, in the sense that without such negligence the accident would not have happened (and I do not find that there was), it was the negligence of the driver, in which the plaintiffs' traveller in no way participated or was responsible for.

An analysis of the cases brings me to the clear conclusion that the plaintiffs are not identified with the negligence of Bouncer and his employer, if any such existed. See Mills v. Armstrong, "The Bernina" (1888), 13 App. Cas. 1; Flood v. Village of London West (1896), 23 A.R. 530; Foley v. Township of East Flamborough (1899), 26 A.R. 43; Plant v. Township of Normanby (1905), 10 O.L.R. 16; Bloch v. Moyer (1914), 7 O.W.N. 389, 830.

Judgment will be entered for the plaintiffs for $1.029.28, the value of the goods destroyed. The other elements of damages claimed are too remote. It is likely that under the conditions that have existed for 7 or 8 months, the plaintiffs may be quite as well off with the extra goods, if any, which they might have sold, remaining in their own warehouse.

Judgment for the plaintiffs for $1,029.28 and costs.

FALCONBRIDGE, C.J.K.B. MARCH 17TH, 1915.

McALLISTER v. DEFOE.

Title to Land—Action of Ejectment—Paper Title—Possession by one of the Heirs at Law of Patentee from Crown—Tax Sale—Invalidity—Distress on Premises—Sufficiency — Assessment Act, R.S.O. 1897 *ch.* 224, *sec.* 156—*Title by Possession—Limitations Act.*

Action for possession of lots 19 and 20 in the 5th concession of the township of Herschel, in the county of Hastings.

The action was tried without a jury at Belleville and Toronto.

E. G. Porter, K.C., and F. H. White, for the plaintiff.

F. E. O'Flynn, for the defendant.

FALCONBRIDGE, C.J.K.B.:—The plaintiff in his statement of claim describes himself as a "foreman." The defendant is one of the children of the forest, and is now 78 years of age. In 1876, the patent was granted to his father under the name of Jean Baptiste Defoe. His real, aristocratic name, as set out in his commission as an Indian Chief granted to him by his late Majesty King George IV. was Kijikomanitou; and in a like commission from his Majesty King William IV. he is called Kei-jic-o-ma-ni-tou. This patentee gave his son (this defendant) the patent to the lands about 3 days before he died, and the defendant got the "chief-papers" (the above-mentioned commissions) at L'Amable, where the old man told him to get them.

It is elementary that a gift of real estate cannot be sustained as a donatio mortis causa, for that extends only to personalty.

So the defendant's only paper title is as one of the 5 heirs at law of his father.

The plaintiff's paper title, apart from a tax-deed (to be hereafter referred to) is a quit-claim deed from one Mary Ann Benwa (Benoit!), née Baptiste or Defoe.

By way of assignment or quit-claim to the said Mary Ann Benoit, there are produced some "scraps of paper," not under seal, purporting to be signed by heirs or next of kin of the patentee.

I find that there was sufficient distress on the occupied lands to satisfy the total amount of the taxes charged against the same: Assessment Act, R.S.O. 1897 ch. 224, sec. 156; and the sale and the tax-deed are, therefore invalid.

These poor people (the defendant and his family) also remitted by post-office order to J. Perry, a bailiff at Maynooth, the sum of $22 in response to a Division Court summons for taxes.

I find that the defendant has proved his title by length of possession. A considerable portion of the peninsula was fenced in "from water to water," and he exercised acts of ownership over the other parts of the lots, sufficient to perfect his title.

Action dismissed with costs.

MIDDLETON, J. MARCH 18TH, 1915.

RE GREIG AND CITY OF LONDON.

Municipal Corporation — Liquor License Reduction By-law — Liquor License Act, R.S.O. 1914 *ch.* 215, *sec.* 16—*Petition for Submission of By-law to Electors—Petition Insufficiently Signed—Knowledge of Council—Report of Assessment Commissioner—Submission notwithstanding Insufficiency of Petition—By-law Approved by Electors and Passed by Council —Motion to Quash—Municipal Act, R.S.O.* 1914 *ch.* 192, *sec.* 259—*Application of—Powers of Board of Control of City—Powers of Municipal Council—Costs.*

Motion by Greig to quash by-law No. 4893 of the City of London, being a by-law to limit the number of tavern licenses to 20.

The motion was heard at the London Weekly Court on the 6th March.

N. P. Graydon, for the applicant.

T. G. Meredith, K.C., for the city corporation.

MIDDLETON, J.:—By sec. 16 of the Liquor License Act, R.S.O. 1914 ch. 215, it is provided: "If a petition in writing, signed by at least 10 per cent. of the total number of persons appearing in the last revised voters' list of the city to be qualified to vote at the municipal elections is filed with the clerk of the city on or before the 1st day of November in any year, praying for the submission of a by-law . . . the council shall submit such proposed by-law to the electors . . ." If the majority of the electors assent, the council shall, within 6 weeks thereafter, finally pass the by-law.

A petition was prepared, and signed by a large number of persons, and lodged with the clerk of the city, and by the Board of Control the petition was referred to the assessment commissioner for the purpose of ascertaining whether it had been adequately signed, it being assumed that sec. 259 of the Municipal Act, R.S.O. 1914 ch. 192, applied.

The assessment commissioner, instead of following the requirements of this section and certifying that the application was sufficiently signed, made a long deliverance, finding the number of signatures on the petition, that a certain number of names did not appear on the voters' lists, and that of the re-

maining names the addresses given did not correspond with the addresses on the voters' list. Appended to this certificate was a list of the names appearing under these two classes. The commissioner then gave the total number of names on the voters' list, and finished thus: "I hereby certify that this statement is correct to the best of my knowledge and judgment."

Upon receipt of this document, the Board of Control referred the petition back to the commissioner "for the certificate required by the provisions of the Act," and authorised him to obtain the opinion of the city solicitor as to his procedure. The commissioner then held a court under the provisions of sec. 16 of the Local Improvement Act, which is embodied in sec. 259 of the Municipal Act, but most of the witnesses subpœnaed, it is said, refused to attend.

There was much argument and controversy before the commissioner, and in the result he found that he had made substantial errors in counting the total number of voters upon the list, and he changed his rulings as to some of the voters' names on the petition, and in the end found that the petition fell short of the adequate number of required signatures by one-tenth of one signature. Thereupon he signed a certificate, perfect in form, stating that the "petition has not been signed by at least 10 per cent. of the total number of persons," etc.

This certificate was taken before the municipal council . . . was ignored, and a by-law was passed directing the submission of the proposed by-law in due course.

The by-law was submitted, and received the approval of the majority of the electors voting, and was thereafter finally passed by the municipal council.

The motion attacks the by-law upon two grounds: first, that the petition was not in fact signed by the requisite number of ratepayers; and, secondly, that the by-law had been passed without the certificate of the assessment commissioner, which, it is contended, was necessary under sec. 259 of the Municipal Act.

It appears that the petition had been prepared by having the signatures of similar petitions obtained by different persons and at different places, and that the same course had been adopted as was followed in regard to the petition in Re Williams and Town of Brampton (1908), 17 O.L.R. 398: the signatures had in several instances been cut off from the heading and pasted below similar headings; and, notwithstanding the decision in that case, these signatures had been counted by the commissioner. If, as was determined in that case, these signatures should be disregarded, the petition was clearly in fact insufficiently signed.

An attempt was made to support the by-law upon the theory that the first certificate must be taken to have been a certificate in accordance with sec. 259, and that the council must be taken to have acted upon it, and that everything done by the commissioner thereafter was a nullity.

I do not think that this contention can be successfully made; for the only certificate that was ever before the council was the later one. . . . I also think that at any time before the council had acted upon the certificate it was open to the commissioner to correct any error that he might have made.

Section 259 contains a provision that in cases where it applies the certificate of the commissioner is final and conclusive. The desirability of some such provision is clearly manifest, but I think that the section as it now stands is not wide enough to reach the case of a license reduction by-law. . . It applies only where, by the Municipal Act or some other statute, "it is provided that a by-law may be passed by a council upon the application of a prescribed number of electors." There are many instances in which it is so provided, but the Liquor License Act, already quoted, provides for a totally different thing. If the prescribed number of electors petition, the council is not empowered to pass a by-law, but is required to submit it to the electorate. If the electorate carry the by-law, then the council must pass it. . . . There is the widest difference. . . . In the one case the council may itself act if the proper requisition is made—in the other, the council must submit the by-law to the electorate, and, if the electorate approve, must pass it.

This . . . is emphasised by the requirement of sec. 259, that the certificate shall be furnished before the by-law is finally passed. It would be most reasonable that the sufficiency of the petition under the Liquor License Act should be determined in some similar way, but the determination ought to be before the by-law is submitted to the electorate, and not only before the by-law is finally dealt with.

Sub-section 3 of sec. 16 of the Liquor License Act, imposing the compulsory duty upon the council, to be enforced at the instance of any elector, by mandamus or otherwise, contains no exception based upon the existence of the certificate.

If the municipal council had satisfied itself that the petition was signed by the requisite number of electors, and then had directed the vote, and no proceedings had been taken to interfere with the submission to the ratepayers, I should have thought that it might well be argued that, after the submission, it was

too late to raise any question as to the sufficiency of the petition, and that sub-sec. 3 of sec. 16 . . . in effect superseded all possible criticism of the sufficiency of the petition; but where, as here, the petition was not in fact duly signed, and the municipal council knew that it was not, and acted in defiance of the statutory provision or without appreciating the fact that the power of the council itself to initiate a reduction by-law, which once existed, had been taken from it, I can see no course open but to quash the by-law. . . .

While the by-law is quashed with costs, I think it proper to fix the costs at a sum which will not cover . . . unnecessary material. I therefore give $80 costs.

I have said nothing as to the power of the Board of Control; but it appears to me that it has been assumed throughout that the Board of Control has a jurisdiction which it does not in truth possess.

SUTHERLAND, J., IN CHAMBERS. MARCH 19TH, 1915.

OKE v. OKE.

Pleading—Statement of Claim—Motion to Strike out as Disclosing no Reasonable Cause of Action—Rule 121—*Excision of Portions of Pleading—Declaratory Judgment—Judicature Act, sec.* 16(*b*)—*Action against Administratrix for Distributive Share of Estate—Time for Bringing—Devolution of Estates Act, sec.* 32—*Jurisdiction of Surrogate Court—Surrogate Courts Act,* sec. 71(3).

Motion by the defendant for an order striking out the statement of claim, on the ground that it was contrary to the statutes in such case made and provided, did not disclose a cause of action against the defendant, and was premature.

One William Oke died, intestate, on the 7th April, 1914, leaving a widow, Ida Oke, the defendant, and a brother, Richard Oke, the plaintiff, and no other heirs, and possessed of real and personal property. The widow applied for and obtained letters of administration of his estate, dated the 6th July, 1914. She appraised the estate in the inventory filed as real estate $6,000 and personal estate $540.

The intestate was also in his lifetime possessed of a debenture of the Huron and Erie Loan and Savings Company, alleged to be of the value of $7,500, and a gold watch and diamond ring,

said to be worth respectively $100 and $175. None of these was included in the inventory filed. Endorsements in writing on the debenture are alleged to have been made and signed by the intestate in his lifetime as follows: "March 1st, 1914. After my death pay to my wife, Ida Oke, $7,000 of this debenture with interest. William Oke." "The remaining $500 to be used in case of my death for funeral expenses and other debts. William Oke."

In this action the plaintiff alleged that the defendant had converted the debenture and the watch and ring to her own use, and refused to treat them as forming part of the estate of the deceased. He also said that the debts of the intestate exceeded the value of the personal estate as shewn by the inventory; and sought an injunction restraining the defendant from selling the real estate without his consent. He also claimed to have it declared that the debenture and the watch and ring formed part of the estate, and that he was entitled to receive from the defendant a half of the value thereof.

E. C. Cattanach, for the defendant.
No one appeared for the plaintiff.

SUTHERLAND, J. (after setting out the facts):—Section 16 (*b*) of the Judicature Act, R.S.O. 1914 ch. 56, is as follows: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not."

A declaratory judgment is sought here, but, in addition, the further relief is claimed, as consequential, of a personal judgment against the defendant for the value of a half share of the personal property in question.

It is contended that, as in the action the plaintiff seeks to recover from the administratrix a portion of the distributive share of the estate to which he claims to be entitled, the relief cannot be sought or granted within a year from the death of the intestate. Under the Devolution of Estates Act, R.S.O. 1914 ch. 119, sec. 32, no "distribution shall be made until after one year from the death of the intestate." See Slater v. Slater (1870), 3 Ch. Chrs. 1; Vivian v. Westbrooke (1872), 19 Gr. 461.

The right to make a declaratory judgment is a discretionary one under the statute. I do not think, however, that on this motion I am called upon to express an opinion as to whether it should or should not be exercised in the plaintiff's favour.

It is contended by the defendant that the plaintiff can and should seek all the remedies he is asking for in the action, on the passing of the defendant's accounts in the Surrogate Court. It may be so.

While perhaps formerly there might have been a question of the power of the Surrogate Court Judge, on passing the accounts of an administrator, to inquire concerning the whole property which the deceased was possessed of or entitled to at his death, there is apparently now no such question under the Surrogate Courts Act, R.S.O. 1914 ch. 62, sec. 71, sub-sec. 3: Re Russell (1904), 8 O.L.R. 481; In re MacIntyre (1906), 11 O.L.R. 136, at p. 139.

It may also be that, if the plaintiff is of opinion that the security given by the administratrix is not sufficient in consequence of his claim that the estate is larger than she represented upon her application to lead grant, he can cite or summon her before the Surrogate Court Judge and have that question dealt with to his satisfaction.

This is a motion to strike out the *plaintiff's statement of claim*. Demurrers have been abolished. Consolidated Rule 124 provides that "a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action," etc. It is founded on an English Rule, the effect of which has been considered in a number of cases. . . .

[Reference to Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489, 495; Hubbuck & Sons Limited v. Wilkinson Heywood & Clark Limited, [1899] 1 Q.B. 86; Worthington and Co. Limited v. Belton (1902), 18 Times L.R. 438; Robinson v. Fenner (1912), 106 L.T.R. 542, 722.]

Our present Rule 124 is similar to old Consolidated Rule 261 (based on the English Rule), the effect of which was considered in Smith v. Traders Bank (1906), 11 O.L.R. 24, and it was there held (p. 29) that "the jurisdiction conferred by Rule 261 may not be invoked for the excision of portions of a pleading. It is only where the entire pleading 'discloses no reasonable cause of action or answer' that this Rule applies. Upon that ground alone the defendant's appeal should be allowed. But it should be also stated that the portions of the statement of defence in question do not so plainly disclose no reasonable answer to the plaintiff's claim as pleaded that they should, had the plea not contained the matter set up in paragraphs numbered one and three, have been summarily striken out: Bank of Hamilton v.

George Brothers (1895), 16 P.R. 418; Roberts v. Charing Cross, etc., R.W. Co. (1903), 87 L.T. 732; Christy v. Ion Specialty Co. (1889), 18 C.L.T. Occ. N. 85; Brophy v. Royal Victoria Life Insurance Co. (1901), 2 O.L.R. 651."

Here, while there may be doubts as to the right of the plaintiff to ask for a part of his claim, or at all events to do so at this time, I am unable to say that the whole claim can properly be struck out, as asked on this motion; and, under that case and this portion of the Rule, I am not at liberty to strike out portions only of the pleading. In these circumstances, I think the proper course to take is to make such an order as was made in Robinson v. Fenner, supra, and direct that the case proceed to trial in the ordinary way, and all questions of law and fact will be then dealt with.

The trial Judge can also dispose of the costs of this motion.

CLUTE, J. MARCH 19TH, 1915.

MacTAGUE v. INLAND LINES LIMITED.

Negligence—Death of Servant of Shipping Company by Breaking of Cable in Moving Ship—Negligence of Foremen of Shipping Company and Railway Company—Findings of Jury—Defective Plant—Lending of Appliances and Men by Railway Company to Shipping Company—Gratuitous Bailment—Liability of both Companies—Contribution inter se.

Action by Mary MacTague, on behalf of herself and her six children, to recover damages for the death of her husband, Michael MacTague, who was killed on the 16th February, 1914, while in the employment of the defendants the Inland Lines Limited, by the parting of a cable under the strain caused by attempting to move the steamship "Emperor" from its winter anchorage to the Canadian Pacific Railway Company's wharf and elevator at Port McNicoll.

The action was brought against the Canadian Pacific Railway Company, as well as against the Inland Lines Limited, and was tried with a jury at Barrie, on the 23rd, 24th, and 25th February, 1915.

The following were the questions submitted to the jury and their answers:—

1. Were the defendants or either of them guilty of negligence which caused the death of Michael MacTague? A. We do find both parties guilty of negligence.

2. If one defendant only was guilty of such negligence, which defendant? A. We do find both parties' negligence.

3. State fully the acts of negligence which, in your opinion, caused the death of the deceased? A. We do believe that the Canadian Pacific Railway Company are guilty of negligence by not having proper appliances such as not taking clamp out of the frost, on the 5th February, 1914, not having strong enough pin for shackle; and that the Inland company were negligent for not having the "Emperor" boat cut free from the ice before strain was put on.

4. Was the deceased guilty of negligence that caused or contributed to the accident? A. No.

The jury assessed the damages both at common law and under the Workmen's Compensation for Injuries Act at $2,700.

The argument of counsel was heard at Toronto on the 5th March, 1915.

W. A. Finlayson, for the plaintiff.

R. I. Towers, for the defendants the Inland Lines Limited.

Angus MacMurchy, K.C., for the defendants the Canadian Pacific Railway Company.

By consent of counsel, all questions of fact not found by the jury essential for the final disposition of the case as between the plaintiff and the defendants and on the question of contribution were reserved for the Court.

CLUTE, J. (after stating the facts and the findings of the jury):—The bolt, which came into the hands of the defendants after the accident, but was not produced, it having been lost, was left out during the night of the 5th, and the effect of this was, according to the evidence, to diminish its strength to the extent, as some witnesses stated, of one half.

I think it fully established, and find as a fact, that the plant was defective in not having a connection bearing a reasonable proportion to the strength of the cables, and that there was negligence by the formen of both defendants in leaving out the bolt and connections overnight when the cold was below zero.

Upon the findings of the jury I directed judgment to be entered for the plaintiff against the defendants, reserving the question of apportionment and of the liability of the third party to be spoken to in Toronto. Counsel for the defendants the Canadian Pacific Railway Company was not present when judg-

ment was entered; and, when the matter came up before me on the 5th March, Mr. MacMurchy, having given notice to the plaintiff's counsel, who was also present, requested that the case might be opened and he be permitted to argue the question of the liability of his clients to the plaintiff. On consent of the plaintiff's counsel the request was granted, and the question of the liability, as well as contribution, argued.

Upon the argument counsel for the railway company urged that that company had nothing to do with the shifting of the vessel; that they simply lent their appliances to the Inland Lines Limited, upon the express understanding that they were not to be in any way responsible; and that, even if they were liable to the plaintiff, they were entitled to indemnity from their co-defendants, the Inland Lines Limited; and he relied on Rourke v. White Moss Colliery Co. (1876-7), 1 C.P.D. 556, 2 C.P.D. 205; Donovan v. Laing Wharton and Down Construction Syndicate, [1893] 1 Q.B. 629; Coughlin v. Gillison, [1899] 1 Q.B. 145; Blakemore v. Bristol and Exeter R.W. Co. (1858), 8 E. & B. 1035; MacCarthy v. Young (1861), 6 H. & N. 329; Jones v. Scullard, [1898] 2 Q.B. 565.

This argument proceeds upon the ground that there was a gratuitous bailment of the plant owned by the railway company and of the men in their employ for the removal of the vessel. I think it clear, upon the evidence in this case, and find as a fact, that there was no bailment of the plant, and the men of the railway company assisting in the removal did not enter the employ and were not under the control of the Inland Lines Limited.

The foreman, Charles Eberts, in charge of the elevator and men employed in and about it, retained the oversight and control of those men and of the plant belonging to the railway company used in assisting the removal of the vessel. The power was applied and directed and controlled by Eberts as foreman, and under his immediate control and authority the clamp for connecting the cables was made and joined to the ship's cable with the assistance of the ship's men; and Eberts had knowledge that such connection was defective by reason of the bolt being only one quarter the strength of the cables; so that, in my opinion, the cases cited have no application.

But, assuming that there was a gratuitous bailment of the plant and transfer of the men to the Inland Lines company, the cases cited are, in my opinion, distinguishable from the present. They are referred to in Halsbury's Laws of England, vol. 1,

para. 1100, for the proposition that if a lender is aware of any defect in the chattel which renders it unfit for the purpose for which it is lent, and fails to communicate the fact to the borrower, who in consequence is injured thereby, the borrower can recover against the lender damages for any injury so caused.

The lender's duty and responsibility are discussed in Beal's Law of Bailments, Canadian Notes, p. 117, where these and other cases are referred to, and it is pointed out that the principle laid down in Coggs v. Bernard (1704), 2 Ld. Raym. 909, and followed by Lord Kenyon and Buller, J., and by Lord Tenterden in the cases cited in the note, 1 Sm. L.C., 11th ed., p. 188, that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender, as was laid down in the Blakemore case. By the implied purpose of the loan a duty is contracted toward the borrower not to conceal those defects known to the lender which will make a loan perilous or unprofitable. . . .

It was urged by Mr. MacMurchy that the agent of the railway company stated to Captain Cunningham, who was in charge for the Inland Lines Limited, that the railway company would take no risk. This was denied by Cunningham, and not satisfactorily established. Nor would it, I think, make any difference if it were, so far as the defendants' liability to the plaintiff is concerned, if, as found by the jury, and with which I agree, there was direct negligence on the part of the railway company which caused the death of the deceased.

For the same reason, I do not think that the railway company are entitled to contribution. . . .

[Reference to Sutton v. Town of Dundas (1908), 17 O.L.R. 556; Merryweather v. Nixan (1799), 8 T.R. 186; Palmer v. Wick and Pulteneytown Steam Shipping Co., [1894] A.C. 318.]

On the question of contribution reference was made to the case of Till v. Town of Oakville (1914), 31 O.L.R. 406; in appeal (1915), 7 O.W.N. 667. In that case it was held by Middleton, J., that, where the injury was caused by two independent acts of negligence on the part of the defendants respectively, and each act would have been innocuous save for the other negligent act, each act was the proximate cause of the injury, and the plaintiff was entitled to recover against both defendants, and that in such case there was no claim for contribution, but that the Court had power to direct contribution with respect to the costs. On appeal by the Bell Telephone Company, the judgment against the

appellants was reversed on the findings of fact. . . . Having regard to the facts as found in the present case, this decision in appeal does not help the railway company.

I have been supplied with a copy of the reporter's notes taken at the trial, and, having reviewed the evidence, I am confirmed in my opinion expressed at the close of the trial that the plaintiff was entitled to succeed against both defendants, as, in my opinion, each defendant was guilty of negligence which was the proximate cause of the accident, and that there should be no contribution.

Judgment should be entered for the plaintiff for the amount found by the jury, with costs against both defendants, and the claim of the railway company for contribution should be dismissed with costs.

CLUTE, J. MARCH 19TH, 1915.

*STANDARD BANK OF CANADA v. WETTLAUFER.

Bill of Exchange—Accommodation—Acceptance on Condition—Admission of Oral Evidence to Prove Condition—Bank—Holder in Due Course—Bills of Exchange Act—Evidence—Liability of Acceptors Conditional on Something being Due to Drawers at Maturity—Extent of Liability—Findings of Fact of Trial Judge.

Action upon a bill of exchange accepted by the defendants.

The action was tried without a jury at Stratford.

R. S. Robertson, for the plaintiffs.

George Wilkie, for the defendants.

CLUTE, J.:—The action is brought upon a bill of exchange for $2,500 drawn by the New Hamburg Machinery Company upon and accepted by the defendants. The bill was delivered by the New Hamburg Company to the plaintiffs and placed to the credit of that company upon an overdrawn account—reducing the same by the amount of the draft, less the discount. The plaintiffs rested their case after putting in the bill of exchange, the defendants' signature being admitted.

The defendants set up that they are not liable because the bill was accepted by them as accommodation for the New Hamburg company, and transferred to the plaintiffs without con-

sideration, and that it was accepted upon the condition that the defendants should not be liable for and would not pay the bill at maturity unless at that date it was found that the defendants were indebted to the New Hamburg company for the amount of the bill.

The plaintiffs deny that the bill was transferred to them upon the terms alleged, and claim to be holders in due course for value; they further allege that oral evidence tending to prove the allegations of the defendants is inadmissible, inasmuch as it varies the written instrument. . . .

The New Hamburg company is now in liquidation.

The plaintiffs were pressing the New Hamburg company for further security, and the company represented to the plaintiffs, as was the fact, that the company had in course of manufacture two machines for the defendants, from whom they expected to receive over $5,000 on the delivery and acceptance of this machinery. The plaintiffs urged the company to get a bill accepted by the defendants. . . . The defendants refused to accept a bill. . . . The plaintiffs' branch manager stated that he would undertake that, if the defendants would accept a bill, they should not be called upon for payment unless, at its maturity, the defendants were indebted to the New Hamburg company for that amount. . . . The defendants still refused to accept without calling up the bank manager and ascertaining that he understood the arrangement to be as alleged. This was done; and I find as a fact that the bank manager acquiesced in this arrangement—that is, that, if the defendants would accept the bill, they would not be called upon for payment unless they were indebted to the New Hamburg company at its maturity. . . .

I find, therefore, the issue upon the question of fact in favour of the defendants.

The further question remains, whether the evidence as to the conditional acceptance is admissible. . . .

[Reference to the Bills of Exchange Act, R.S.C. 1906 ch. 119, secs. 38(3), 39, 40, 41, 55(1), (2), 74; Byles on Bills, 17th ed., p. 210; Decroix Verley et Cie. v. Meyer & Co. Limited (1890), 25 Q.B.D. 343, 347, 348; Chalmers on Bills of Exchange, 7th ed., p. 61; Watson v. Russell (1862-4), 3 B. & S. 34, 5 B. & S. 968; Clutton v. Attenborough & Son, [1897] A.C. 90; Jefferies v. Austin (1726), 1 Stra. 674; Bell v. Lord Ingestre (1848), 12 Q.B. 317; Seligmann v. Huth (1877), 37 L.T.R. 488; Ex p. Twogood (1812), 19 Ves. 229; In re Boys (1870), L.R. 10 Eq. 467.]

The result of the cases as to when and to what extent oral evidence may be given is, I think, correctly stated in Chalmers.

Oral evidence is inadmissible in any way to contradict or vary the effect of a bill or note; but it is admissible (a) to shew that what purports to be a complete contract has never come into operative existence; (b) to impeach the consideration for the contract. "Though the terms of a bill or note may not be contradicted by oral evidence, yet, as between immediate parties, effect may be given to a prior or collateral oral agreement by a cross-action or countrclaim." . . .

[Reference to Byles, 17th ed., p. 122; Lindley v. Lacey (1864), 34 L.J.C.P. 7; Wallis v. Littell (1861), 31 L.J.C.P. 100; Chalmers, 17th ed., p. 65; Foster v. Jolly (1835), 1 C. M. & R. 703; Abbott v. Hendricks (1840), 1 Man. & G. 791; Halsbury's Laws of England, vol. 2, pp. 467, 483, 508, 817; New London Credit Syndicate v. Neale, [1898] 2 Q.B. 487; Commercial Bank of Windsor v. Morrison (1902), 32 S.C.R. 98; Pym v. Campbell (1856), 6 E. & B. 370; Herdman v. Wheeler, [1902] 1 K.B. 361; Abrey v. Crux (1869), L.R. 5 C.P. 37; Young v. Austen (1869), L.R. 4 C.P. 553; Stott v. Fairlamb (1883), 52 L.J.Q.B. 420.]

In my view . . . in the present case . . . the agreement operated as a suspension of the bill until it was ascertained that there was an indebtedness at the end of the term mentioned in the bill.

The principle recognised in Wallis v. Littell, supra, was applied and followed in Ontario Ladies' College v. Kendry (1905), 10 O.L.R. 324. . . . See also Brown v. Howland (1885), 9 O.R. 48; . . . Long v. Smith (1911), 23 O.L.R. 121; . . . Holmes v Kidd (1858), 28 L.J. Ex. 113.

In the present case the bank had not only notice of the arrangement, but was a party to it, and the acceptance was signed only upon the distinct understanding that there was to be no liability unless there was an indebtedness from the defendants at the maturity of the bill. The plaintiffs were, therefore, in no better position than the new Hamburg Company, and were not holders in due course for value. The plaintiffs had no right, in my opinion, to treat the bill as one for discount; nor was it, so far as the evidence shews, any part of the arrangement, so far as the defendants were concerned, that any advances should be made upon the faith of the acceptance. The plaintiffs, it is true, passed it through their books in the form of a discount, and reduced the overdrawn account by so much; but that was a matter of bookkeeping. The bill was never in their hands as holders for value without notice, in which character they might claim

payment in disregard of the condition upon which the acceptance was given.

It was argued that the transaction, as put forward by the defence, was improbable, because the plaintiffs would get no benefit out of it. That view is not correct. There was a very large indebtedness, in addition to the overdrawn account, of the New Hamburg company to the plaintiffs, upon which the plaintiffs were likely to lose, as their local manager said, a large amount. The obtaining of this conditional acceptance operated in effect an equitable assignment by making the amount of $2,500 become payable to the plaintiffs upon the acceptance of the machines by the defendants from the New Hamburg company, and upon the amount due thereon becoming payable by the defendants.

In my view, the oral evidence was admissible to establish the condition upon which the defendants signed the acceptance.

There was some evidence given that there was no indebtedness from the defendants to the New Hamburg company; but it was agreed that the decision of this question should stand over until the state of account should be ascertained by the liquidator of the company.

Judgment, therefore, will not issue until that question is settled. If it be found that there was no indebtness, the action should be dismissed with costs. If there was an indebtedness, the judgment should be for the plaintiffs, with costs, for the amount of the bill, if so much is due, or such lesser sum as may be found due. (For such reduction, see Holmes v. Kidd, supra.)

SUTHERLAND, J. MARCH 20TH, 1915.

RE SHORT.

Will—Construction—Payment of Quarter of Annual Income of Estate to Widow Quarterly—Meaning of "Quarterly."

Motion by the Toronto General Trusts Corporation, the executors and trustees under the will of William B. Short, deceased, for an order determining a question arising as to the proper construction of a clause of the will.

The motion was heard in the Weekly Court at Toronto.

C. A. Moss, for the applicants.

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

SUTHERLAND, J.:—The particular clause is as follows: "10. I direct the said company out of the income of my estate to pay

to my wife quarterly a quarter of such sum as they may reasonably expect my estate to produce per annum, after first paying to my sisters Caroline and Emeline, if they are still unmarried and not otherwise, the sum of $25 each per quarter;" and the particular word therein as to which doubts have arisen is the word "quarterly."

In Stroud's Judicial Dictionary, 2nd ed., vol. 3, p. 1637, the word "quarterly" has been defined as follows: "Where an annual rent, salary, or (semble) any other annual payment, has to be made 'quarterly' without more, that means, by four equal portions on the usual quarter-days." And the case of Vanaston v. Mackarly, 2 Lev. 99 (26 Car. II., in Banco Regis), is cited in support of that view.

It is contended on behalf of the infants that the word "quarterly" means by quarters, and that, while when words are of doubtful meaning the Court has power to expunge or add to when necessary to construe, it is not called upon to go beyond the words in a plain case, even though the result might appear to be unjust to a person interested.

It is contended on behalf of the executors, on the contrary, that the whole scheme of the will is to allocate and dispose of the income during the life of the wife; that, if she remain unmarried, she is to receive it all subject to the deductions in favour of his sisters Caroline and Emeline referred to in clause 10, and one half less if she re-marry, in which case the balance of the income is still disposed of during her lifetime, and goes to the same two sisters of the testator.

Reference is made in this connection to the fact that in clause 6 the wife is permitted "during her lifetime to use and enjoy the dwelling-house and premises with their appurtenances. . . . and the household furniture and household effects;" and in clause 7 she is given unlimited power and discretion "during her life to use and dispose of such furniture and household effects;" and particularly to clause 11: "Should my wife marry again, I direct the said company to pay to her quarterly one-half the amount specified in clause 10, and the balance of the yearly income to be paid to my sisters . . . if they are still unmarried."

There is nothing to shew that the testator intended that during her lifetime any part of the income should accumulate and form part of the residuary estate, nor is there a residuary clause which would seem to apply thereto.

I am of the opinion that "quarterly" means every quarter of a year, once in a quarter; and that, if this can be considered

as open to doubt, then by reference to the will as a whole the reasonable meaning to be given to it is the same.

Thus interpreted, the result is to entitle the widow every quarter to a quarter of such sum as the executors may "reasonably expect" the estate to produce per annum after first paying to the sisters $25 each per quarter. . . .

Costs of all parties will be out of the fund.

RE BROTHERHOOD OF RAILWAY TRAINMEN AND MOORE—LENNOX, J.—MARCH 15.

Life Insurance—Benefit Certificate—Designation of Beneficiary—Alteration after Marriage—Mental Competency of Assured—Trial of Issue—Finding of Fact—Apportionment of Insurance Moneys.]—Patrick Moore, while an unmarried man, insured with the Brotherhood of Railway Trainmen, for $1,500, and the certificate issued to him provided for payment of the benefit to his mother, the claimant Bridget Moore. He afterwards married, and died on the 28th May, 1913, leaving him surviving his widow, Celina Moore, and an only child, Harold Moore, the other two claimants. On the 28th November, 1912, Patrick Moore, as he was authorised to do under the laws and constitution of the insurance society, executed an assignment of the $1,500, apportioning it between his wife and son—$1,000 to his wife and $500 to his son. The society, by their constitution, had the right to expend a sum not exceeding $150 for funeral and burial expenses, and deduct it from the moneys payable under the benefit certificate; and they expended in that way $132.50, leaving in their hands a balance of $1,367.50 to be paid to the person or persons entitled. Bridget Moore disputed the right of the wife and child to the moneys which the deceased purported to assign to them, mainly upon the ground that Patrick Moore, at the time he executed the assignment, was suffering from paresis and unable to understand the disposition he purported to make of the money. The society applied for an interpleader issue to determine to whom they should pay, and an issue was directed to be tried, and was tried before LENNOX, J., without a jury at Ottawa on the 13th March, 1915, and judgment was reserved. The learned Judge wrote a short opinion, in which he set out the above facts, and proceeded to say that the disposition made by the deceased was an eminently proper one for him to make. He was certainly in poor health. His faculties were somewhat impaired, and at times, perhaps, he would not have been able to grasp and deal with an involved and difficult

matter of business, although there was no actual evidence as to that. The learned Judge had no doubt at all, however, that when the deceased executed the assignment he was able fully to understand, and did understand, its nature and effect, and intended to dispose of the insurance money in the way he purported to dispose of it: Badenach v. Inglis (1913), 29 O.L.R. 165. The issue is found in favour of the wife and child. Their costs and the society's costs to be paid by the society out of the fund, $15 to each. This leaves $1,322.50 in the society's hands. Upon payment of $440.84 into Court to the credit of the infant, and $881.66 direct to the widow, and upon satisfying the Official Guardian that the funeral and burial expenses have been paid as alleged, they will be discharged from liability under the certificate. A. F. May, for the society. W. L. Scott, for Bridget Moore. J. R. Osborne, for Celina Moore. J. F. Smellie, for the Official Guardian, representing the infant.

RE FINLAY AND DARLING—MIDDLETON, J.—MARCH 16.

Will—Construction—Devise — "Heirs" — Estate Tail — Vendor and Purchaser.]—Motion by the vendor, under the Vendors and Purchasers Act, for an order declaring that he can make a good title in fee to land devised by the will of B. J. Finlay, deceased. On the hearing of the motion, it was directed by the Court that notice should be given to those interested in opposing the vendor's contention. This was done, and one of the persons interested appeared, but no more. MIDDLETON, J., said that the word "heirs" used in the will was by the will shewn to be equivalent to "heirs of the body," and the devise in the last clause was a gift of the remainder to the "surviving members of my family." The devise to "Humphrey Finlay and his heirs" gave him an estate tail, and by proper conveyance he could bar the entail and convey in fee. Order so declaring. No order as to costs. F. D. Kerr, for the vendor. C. A. Moss, for the purchaser. W. J. Elliott, for one of the heirs of the testator.

ACRES v. CONSOLIDATED INVESTMENTS LIMITED—LENNOX, J.—MARCH 20.

Contract—Rescission—Fraud—Return of Money Paid.]—An undefended action, tried at the Ottawa Weekly Court on the 13th March. The defendants, a foreign company, were served with the writ of summons and statement of claim by delivery thereof to their president at Edmonton, where the company carried on business. No appearance having been entered and no

defence delivered, the pleadings were noted closed. The action was to set aside an executory contract. The learned Judge said that the allegations and prayer of the statement of claim appeared to be sufficient; and directed that judgment should be entered for the plaintiff against the defendants declaring that the defendants obtained the impeached agreement by fraud and misrepresentation, directing the delivery up and cancellation of the agreement, and for recovery of $672, with interest from the 12th October, 1912, and the costs of the action. T. D. McGee, for the plaintiff.

WYATT v. CONSOLIDATED INVESTMENTS LIMITED—LENNOX, J.—MARCH 20.

Contract—Rescission—Fraud—Return of Money Paid.]—This case was of the same character and in the same position as the previous one, and a like judgment was pronounced. T. D. McGee, for the plaintiff.

LORD v. SANDWICH WINDSOR AND AMHERSTBURG R.W. CO.—LENNOX, J.—MARCH 20.

Nuisance—Obstruction of Street—Peculiar Damage to Occupant of Shop—Loss of Business—Assessment of Damages.]—This was an action for damages arising out of the same nuisance that was complained of by other owners of land in Mitchell and Dresch v. Sandwich Windsor and Amherstburg R.W. Co. (1914), 6 O.W.N. 659, 7 O.W.N. 508, and the right to maintain an action for special damages occasioned by the nuisance was there affirmed. This action was tried without a jury at Sandwich. The learned Judge disposed of the case in a short written opinion, in which he said that for 15 months before Ferry street was torn up by the defendants the plaintiff was carrying on a very extensive, lucrative, and steadily increasing grocery business upon his shop premises in that street, and was greatly inconvenienced, obstructed, and damaged by the operations of the defendants. There was no by-law of the municipality authorising the work; and the defendants had no justification for interfering with the street and obstructing the plaintiff. The plaintiff suffered a very serious direct loss of trade and profits during the time the defendants were operating upon Ferry street. Damages assessed at $800. Judgment for the plaintiff for that amount with costs. J. H. Rodd, for the plaintiff. A. R. Bartlet and G. A. Urquhart, for the defendants.