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HIGH COURT OF JUSTICE.

MASTER IN CHAMBERS. JUNE 20TH, 1912.

TRUBEL v. ONTARIO JOCKEY CLUB AND FRASER.

Pleading—Statement of Claim—Motion to Strike out Portions—Embarrassment — Irrelevancy — Prejudice — Historical Statement—Damages.

The plaintiff was a professional jockey. He asked $10,000 damages for the refusal by the defendants of the necessary license to enable him "to exercise his profession." This refusal, he said, was without giving him a hearing and without assigning any cause for such refusal, after receipt and retention by the defendants of the usual fee of $25 for such license, duly paid by the plaintiff.

Before pleading, the defendants moved for an order striking out parts of paragraphs 2 and 4 and the whole of paragraph 5 of the statement of claim, under Con. Rule 298.

C. F. Ritchie, for the defendants.
J. T. White, for the plaintiff.

THE MASTER:—The statement of claim is in some parts decidedly rhetorical. Language less ornate would have been more appropriate. This is especially true of the expression objected to in the 4th paragraph, where it is said that the defendant Fraser "officiously and maliciously volunteered . . . to be a defendant." It was conceded on the argument that the words "officiously and maliciously" might properly be struck out; and the order will so direct.

The second paragraph is as follows: "The defendant club derives its existence from a public franchise, and owns and operates, for gain, a race-track in the city of Toronto, where it carries on race meetings at which the public are invited to attend and for which they are charged an entrance fee, and it owes a public obligation in the conduct of its business to treat all members of the public equally and fairly [and so public is the function it exercises, that it has a monopoly of race-horse betting on its track, that would be criminal but for the saving grace of legislation, whereby all members of the public, at its race-meetings, are forced to bet through the defendant club, which acts as stake-holder, and exacts therefor over five per cent. on over a million dollars a year of bettors' money passing through its hands and from which its chief revenue is derived.]"

The defendants ask to have all that follows the word "fairly," enclosed in brackets as above, struck out as irrelevant and tending to prejudice them at the trial, which the plaintiff asks to have before a jury.

In disposing of these motions it is well to refer once more to Con. Rule 268, which provides that pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved.

As to this second paragraph, it would seem that the material fact which the plaintiff must prove is the allegation in the first part that the Ontario Jockey Club is obliged to treat all members of the public equally and fairly—and that the part after the word "fairly" is probably wholly irrelevant, and not admissible in evidence in chief, whatever may be allowable in cross-examination.

In any case, it is no more than evidence to establish the obligation of which the plaintiff claims the benefit. It should, therefore, be struck out, as was done in Blake v. Albion, 35 L.T. 269, 45 L.J. C.P. 663, even though it was by the same Court allowed to be used at the trial: see 4 C.P.D. 94. Standing in the statement of claim, it could be read to the jury, and might very possibly prejudice their minds by suggesting the possibility of the defendants gaining $50,000 a year without any labour or expense.

The 5th paragraph is as follows: "The plaintiff further says that one of the members of the said Canadian Racing Association is known as the Niagara Racing Association, controlled by John H. Madigan, of Buffalo, New York, and Louis Cella, of St. Louis, Missouri, and owning and operating a racing-track at

Fort Erie, Ontario, where betting is done with book-makers in the employ of and working for the said Madigan and Cella, who control and operate the race-track, and the same control and betting conditions prevail on the tracks of the Hamilton Jockey Club and the Windsor Jockey Club, all of which are members of the said Canadian Racing Association."

This is not so easy to deal with as were the other objections. The Canadian Racing Association is said, in paragraph 3, to be "an unincorporated combine of a body of representatives of various racing clubs and associations in Canada;" and it is further said that to this association is given, amongst other things, the "licensing of jockeys to ride on Canadian race-tracks."

This 5th paragraph may be justified either as being merely historical and explanatory of the nature and composition of the association, or as being referable to damages, as shewing that the refusal of a license prevents the plaintiff from "exercising his profession," not only on the track of the Ontario Jockey Club, but also at other important race meetings such as Fort Erie, Hamilton, and Windsor.

It seems to be implied that, as all these meetings have a public franchise similar to that of the Ontario Jockey Club, they are under the like obligation "to treat all members of the public equally and fairly." There seems no ground for interfering with this paragraph at this stage. I see nothing in it embarrassing or prejudicial to a fair trial.

The motion succeeds on the two first grounds, but fails as to the third. The costs will, therefore, be in the cause. The defendants should plead in four days.

RIDDELL, J. JUNE 20TH, 1912.

SARNIA GAS AND ELECTRIC LIGHT CO. v. TOWN OF SARNIA.

Municipal Corporations—Powers of Expropriation—Works and Property of Gas and Electric Light Company—Municipal Act, 1903, *sec.* 566, *sub-sec.* 3, 4—*Stated Case—Costs.*

A special case stated for the opinion of the Court.

The plaintiffs had their origin in a declaration filed in 1878, under R.S.O. 1877 ch. 157, whereby they became, under sec. 5, a

body corporate for twenty years, under the name of "The Sarnia Gas Company," with the object of supplying the town of Sarnia and its suburbs with gas for illuminating purposes. In that year a by-law was passed by the town council permitting the company to lay down pipes, etc.

In 1880, there was a further incorporation for fifty years, under the same Act. Under that the company were to supply electricity, as well as gas.

Various by-laws and statutes affecting the company were passed in successive years. See 44 Vict. ch. 56; 53 Vict. ch. 133; 2 Edw. VII. ch. 61; 3 Edw. VII. ch. 80.

The statute 56 Vict. ch. 105 changed the name of the company to "The Sarnia Gas and Electric Light Company."

Since the 1st January, 1910, the plaintiffs had wholly discontinued the manufacture and supply of artificial gas.

On the 21st August, 1911, a by-law was passed by the town council providing that $125,000 should be offered to the plaintiffs for their works and property. The plaintiffs refused this; and proceedings were taken for an arbitration. The plaintiffs objected to the proceedings; and brought this action on the 2nd February, 1912. The case was stated in the action.

I. F. Hellmuth, K.C., W. J. Hanna, K.C., and R. V. Le Sueur, for the plaintiffs.

E. F. B. Johnston, K.C., and J. Cowan, K.C., for the defendants.

RIDDELL, J. (after setting out the facts and referring to the statutes and by-laws):—The main question in the case is, whether, even if an award be made under the Municipal Act, the town can take the works and property of the company. If this be answered in the negative, there is, I am informed, no need of answering any further.

The statute is the Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 566, sub-secs. 3, 4. Before the Act of 1899, 62 Vict. (2) ch. 26, sec. 35, which introduced what are known as the Conmee clauses, sec. 566, sub-sec. 4, read thus: "By the councils of cities and towns:—For constructing gas and water works and for levying an annual special rate to defray the yearly interest of the expenditure therefor, and to form an equal yearly sinking fund and for the payment of the principal within a time not exceeding 30 years, nor less than 5 years." Then followed (*a*), providing for the case of a water company incorporated for the municipality, and that the council should not levy water rates

before offering the company a price for the works or stock of the company, etc., etc. No provision was made for the case of a gas company.

This was amended by 62 Vict. (2) ch. 26, sec. 35, giving power to cities, towns, and villages to construct gas, electric light, or water works, and introducing the provision, "in case there is any gas, electric light or water company incorporated for or in the municipality," to be found in the present Act. The amendments of 63 Vict. ch. 33, sec. 29, and 2 Edw. VII. ch. 29, sec. 20, I pass over as immaterial on the present inquiry.

The defendants contend that they have the power under the statute, upon an arbitration being had and the price paid or secured, to take the works and property of the company, or some of it: sec. 566, sub-secs. 4, (a4).

It is argued for the plaintiffs that they are not "a gas, electric light, or water company incorporated for or in the municipality." I do not proceed upon that ground, but upon the general ground that nowhere is there given to the municipality a right of expropriation.

From personal knowledge, I am able to say that the intention, of some at least of those who were interested in the passing of the Act of 1899, was solely to protect the companies already in operation. It was thought unjust for a municipality to start opposition with a private enterprise without giving the owners of the enterprise an opportunity of "getting from under"—it was not intended to give the municipalities a power they had not theretofore had of taking away the business directly from its owners.

Of course we must determine the meaning of the legislation not by what we may know or surmise of the meaning and intention of the legislators, or some of them, but by the meaning of the language which is employed.

It is trite law that a man's property is not to be taken from him except by legislation of the clearest character. Here there is no legislation at all indicating that the property can be taken in invitum. What is provided for is, that no rate shall be struck or works constructed by the municipality until the company has had a chance of getting out with 10 per cent. over and above the value of their works and property as they stand: sec. 566, sub-secs. 4, (*a*2), (*a*3).

The only penalty upon the company is, that the municipality may go on and run a competing business—if the shareholders are ratepayers, they will know that their own money is being used to build up a business competitor.

The question of costs is not left to me, and the practice is not for the Judge hearing the "special case" to decide as to costs—that may be done in the action: Attorney-General v. Toronto General Trusts Corporation (1903), 5 O.L.R. 607.

I do not deal with the many other questions raised, more or less interesting, more or less important.

RIDDELL, J. JUNE 20TH, 1912.

RE GORDON.

Executor—Application for Advice—Trustee Act, sec. 65—Con. Rule 1269(938)—Practice—Determination of Validity of Lease Made by Life-tenant—Course to be Pursued by Executor.

Motion by the executors of the will of Isaac Gordon the elder, deceased, for the opinion, advice, or direction of the Court, under sec. 65 of the Trustee Act and Con. Rule 1269(938).

A. A. Craig, for the executor.

C. W. Plaxton, for tenants under a lease made by Henry Gordon.

RIDDELL, J.:—Isaac Gordon the elder devised certain lands to his son Henry, "for himself during his natural life, subject to the payment of" certain legacies, "but in case of my son Henry Gordon's death without issue or without leaving any child or children then it is my wish that the real estate be sold and the proceeds divided equally between my surviving sons and daughters share and share alike . . . ." Henry, in 1909, made a lease of the land to C. and A. for a term of five years; and died, without issue, in June, 1911. The executor of Isaac Gordon the elder demanded possession of the land, and the tenants refused, asserting that the lease was good for the term mentioned in it. The executor was advised by his solicitor and believes that the lease was voided by the death of Henry, and that it is his duty to sell the farm as executor.

Instead of taking proceedings to obtain possession of the land, he served upon the tenants a notice of motion "for the opinion, advice, or direction of the Judge, pursuant to sec. 65 of the Trustee Act and Rule 1269 of the Consolidated Rules

of Practice." The notice is somewhat ambiguous, but I accept the interpretation which counsel for the motion says was intended, viz., that opinion, advice, or direction is sought in two matters: (1) the course to be pursued by the executor with respect to the lease; (2) the validity of the lease.

Objection being taken to the practice by counsel for the tenants, I gave effect to his objection; and, as he refused to consent to the motion being turned into any other form of motion, I dismissed the second branch of the application, with costs, fixed at $5, following Re Rally (1912), 25 O.L.R. 112, and also Re Turner, ante 1438.

The portion of Con. Rule 1269 (938) which, it is contended, covers the former branch of the application, is (e), by which an application may be made for an order "directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or trustees." But this means any act in or about the estate of which they are executors or trustees. As it is put in Suffolk v. Lawrence (1884), 32 W.R. 899, "this only relates to the doing or abstaining from doing by trustees of some act within the scope of their trusts." The section was not intended to cover the case of an executor who was in doubt as to whether he should follow his solicitor's opinion so far as to claim as part of the estate land claimed adversely to the estate. Executors must use their business sense, and not ask the Court to exonerate them in advance: the general duties of executors are so well known that the Court should not be called upon to lay them down on every occasion of apparent difficulty.

This part of the application is also refused.

MIDDLETON, J. JUNE 20TH, 1912.

RE DRUMMOND.

Will—Construction—Devises of Different Parcels of Land to Daughters of Testator—Division of Residuary Estate—Equalization of Values of Parcels Devised—Powers Personal to Executors—Death of Executors—Duty Devolving on Court—Method of Equalization—Valuation of Parcels—Principle of Valuation.

Originating notice to determine certain matters arising upon the will of the late J. W. Drummond.

C. J. Holman, K.C., for Hester A. Worden, Charlotte E. Benn, and Eveline E. Drummond.

G. C. Campbell, for Laura Pearean.

W. H. Irving, for Isabel Segsworth.

F. W. Harcourt, K.C., for infant children.

Adult children were represented by the same counsel as their parents.

MIDDLETON, J.:—The testator died on the 9th September, 1881, leaving the will in question, dated the 5th December, 1879. He was survived by his widow and five daughters. The widow died on the 23rd March, 1912. The five daughters have all survived her. The daughter Hester is married, and has five children; the daughter Charlotte is married, and has two children; the daughter Isabel is married, and has no children; the daughter Laura, married, has two children; the remaining daughter, Eveline, is unmarried.

By his will the testator gave his wife a life interest in the whole estate; and, subject to this, he gave to each daughter a parcel of land, to be held by her during her natural life, and after her death to go to such of her children as may then be living and to the issue of any deceased child. The testator, in addition, had certain residuary estate, consisting principally of some lands in Adelaide street, now said to be worth approximately $50,000. By the 10th clause of the will, the testator directs that, subject to the provision next mentioned, this residuary estate shall be equally divided between his children.

In clause 18 of the will is found a provision which occasions the present controversy. By it, the testator directs that if, when the division is being made of this residuary estate, his trustees shall be of opinion that the "fee simple(s) of the several properties" specifically devised to his daughters for life are not then equal to each other in value, the trustees shall, before dividing the estate, apportion to every person entitled to property of less value than the most valuable, a sum equal, in their opinion, to the difference between the value of the fee of the property devised and the value of the most valuable property; it being his intention that each of his children should receive as nearly as may be equal shares of his estate.

This provision is supplemented by clause 24, which directs that, in case this residuary estate is not sufficient for the purpose of equalization, the person whose estate is more valuable shall pay to the other or others such amount as may be necessary

to bring about equalization; and the executors are given power to charge the fee simple of the lands which are to be burdened.

The executors upon whom this duty devolves are all dead; and the first question calling for determination is, whether a new trustee should be appointed, and whether the powers were appurtenant to the office or personal to the executors named. I came to the conclusion upon the argument that the powers were personal to the executors, and that, there being no one who could exercise the power, the duty would devolve upon the Court, through its proper officers, to exercise the function imposed upon the executors by the will.

Counsel all agreed in this view; and it was then arranged that, instead of directing a reference, valuators should be named, who should value the different parcels. This valuation has now been made. In the result the parcel given to Hester is valued at $92,000; the portion given to Eveline is valued at $75,000; the parcel given to Charlotte, $92,000; that given to Isabel, $75,000; and that given to Laura, $128,000.

The will itself is very obscurely expressed, and I have to determine whether, upon the true construction of the will, these values are the values which control and govern. I have come to the conclusion that they are. The testator has, I think, treated the daughter's share as covering that which is to go to her children upon her death; and the equality which he desires to have attained is not an equality between the life estates of the several daughters, but equality between the shares going to each daughter and her issue.

I think, further, that the words used in clause 18 indicate that what is to be valued is "the fee simple of the several properties," and that the distribution of the residuary estate and the charge upon the more valuable properties to be made for the purpose of equalization is to be treated as an increment to the less valuable shares, and that the sums to be set apart to produce this equalization must be held in precisely the same way as the less valuable shares are themselves held; that is to say, any money set apart from the proceeds of the residuary estate, or any money charged upon the more valuable property, will be held in trust for the daughter who has the less valuable property, for her life, and upon her death will go to her children and the issue of deceased children.

Disregarding for the present minor matters, such as the $1,000 to be given to the daughter who is yet unmarried and the sums to be charged with respect to the small parcels of

land that have been already sold, the result of the valuations is, to give to each daughter an estate of the value of $92,000; so that neither Hester nor Charlotte is entitled to receive nor liable to be called upon to pay anything to bring about equalization. Laura must pay, to bring about equality, $34,000. Eveline and Isabel will each receive $17,000.

If the residuary estate, when sold, realises $50,000, Hester and Charlotte will each receive one-fifth—$10,000; Laura's one-fifth will be primarily applicable to reduce from $34,000 to $24,000 the charge which would otherwise be placed upon her property; Eveline and Isabel will receive each from this source $5,000 in addition to their $10,000 share; and the amount of their charge on Laura's property will be reduced from $17,000 to $12,000 each.

When I speak of these moneys being "received," and the charge being made in favour of Eveline and Isabel, my meaning is, of course, that these sums of $5,000 and the charges of $12,000 shall, as already stated, be held upon trust for them and their children in the same manner as their respective parcels are held.

I have not followed the precise direction of the will by creating charges upon each property so as to bring it up to the value of Laura's, because this would involve imposing charges upon the shares of Hester and Charlotte, and they would receive charges upon Laura's estate to precisely the same value. I set off what they would have to pay against what they would be entitled to receive, had the mode of compensation pointed out by the testator been followed strictly. The result is, however, mathematically equivalent. . . .

The valuations which have been made state that the buildings upon the different properties, other than Mrs. Pearean's, are not to be considered as worth anything, because no one would purchase the property at anything like the price at which it is now valued with any other idea than the demolition of the old buildings now upon the land.

With reference to the building upon Mrs. Pearean's property, it is, I think, to be disregarded, because the lease must be assumed to be an entire bargain, and if as the realisation of that lease she receives a building of considerable value for a small sum, she is entitled to this advantage, which will go to compensate her for what is possibly an inadequate rental.

A trustee should be appointed to sell the residuary property and divide the proceeds.

The properties devised to the daughters other than Laura may be vested in them and their issue, in accordance with the terms of the trust; or, if it is thought more to their advantage, the properties may be vested in trustees on the same trusts.

Mrs. Pearean's property will be charged with payment of the $24,000, with interest at five per cent.; the principal to fall due as to one-half upon the death of Eveline, the other half upon the death of Isabel. The charge will be to a trustee, upon the proper trusts, for each daughter for life, and, after her death, for division as directed by the will. Mrs. Pearean should have the privilege of paying off the whole or any portion of this charge at any time she may desire, when the money will be held upon the same trusts.

The shares of all the daughters in the residuary estate (except Mrs. Pearean's share, which is to be applied pro tanto in ease of the charge) will go to the respective daughters absolutely.

The figures can be adjusted and the details arranged when the order comes to be settled.

The interest upon the charge on Mrs. Pearean's share will be payable out of the rent.

Some discussion took place as to the effect to be given to the leases. I do not think they have any effect upon the valuation. The leases must be assumed to have been properly made by the life tenant. If they are open to attack, then they must be attacked directly, or her estate must be made answerable. Leases made by the life tenant within her authority, or sanctioned by the Court under the Settled Estates Act, are not made a factor in the valuation.

Costs of all parties, and the valuators' fees, will be paid by the trustee out of the proceeds of the residuary estate.

DIVISIONAL COURT. JUNE 20TH, 1912.

*RE DINNICK AND McCALLUM.

Municipal Corporations—Regulation of Buildings "Fronting" on Streets—By-law—Validity—4 Edw. VII. ch. 22, sec. 19—Compliance with—Application of By-law to Particular Case—Discrimination—Unreasonableness.

Motion by W. L. Dinnick for a mandamus directed to the Corporation of the City of Toronto and the City Architect to

*To be reported in the Ontario Law Reports.

issue a permit to the applicant for the erection of an apartment house on the corner of Avenue road and St. Clair avenue, in the city of Toronto.

The motion was originally made before RIDDELL, J., in Chambers, and was referred by him to a Divisional Court: see ante 1061, where the facts are stated.

The motion was heard by BRITTON, TEETZEL, and KELLY, JJ.

W. C. Chisholm, K.C., for the applicant.

H. L. Drayton, K.C., and H. Howitt, for the respondents.

TEETZEL, J. (after stating the facts):—The matter to be decided is as to the validity of the by-law, and its application to the present case.

The points urged against the by-law by Mr. Chisholm were: (1) it does not in its terms comply with the enabling Act; (2) even if its terms complied with the Act, it is not applicable to a case like the present; and (3) it is discriminatory in its operation, and unreasonable.

Upon the first point, the language of the authority is, to "regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built," while the by-law only prohibits building "on lots fronting or abutting on . . . Avenue road . . . within a distance of forty feet from the east and west lines of said road;" so that, as pointed out by Mr. Chisholm, if a fronting or abutting lot had a depth or width, measured from Avenue road, of less than forty feet, a building erected on land adjoining such lot to the rear, although within forty feet of the street line, would not be within the operation of the by-law, notwithstanding that such building might possibly be described as on Avenue road, within the meaning of the Act.

There is nothing in the material to shew that, in any survey of lots fronting or abutting on Avenue road, is there any lot in reference to which such an incongruous result might follow; but, even if such a result is possible, I do not think that the by-law can be held to be invalid for that reason. The statute does not require that the distance limited by the by-law shall be uniform, but expressly provides that "such distance may be varied upon different streets or in different parts of the same street."

Presumably, although perhaps not necessarily in every case, a building on a residential street must be built upon a lot "fronting or abutting thereon;" so that, while it may be that

the council, in limiting the restriction to buildings "on lots fronting or abutting on Avenue road," etc., instead of imposing the restriction generally to all buildings to be erected on that street, may not have gone the full length of the authority conferred by the Act, I think it has clearly kept within that authority; for, while the Act, no doubt, confers authority to impose the restriction in regard to all buildings to be erected on the street in question, it does not require the restriction to be imposed upon all buildings; and, as pointed out, express authority is given to vary the distances in different parts of the street.

Then, assuming the by-law to be valid, is it applicable to the building in question? The answer to this depends upon whether, when erected, the building can be properly described as being *on* Avenue road within the meaning of the words of the Act, "buildings on residential streets."

Mr. Chisholm argues that this building is on St. Clair avenue, and not on Avenue road, and that that street, and not Avenue road is "in front thereof," within the meaning of the Act.

The word "on," used in this connection in its ordinary and natural meaning, signifies, "In the relation of environing or lying along or by:" Standard Dictionary, sub voce "On," p. 1228, column 3, para. 4; and also "In proximity to, close to, beside, near:" New Oxford Dictionary, sub voce "On," p. 114, column 2, para. 3.

Then as to the words "line of the street in front thereof," as pointed out by my brother Riddell, at p. 1063 of 3 O.W.N., citing the New Oxford Dictionary, "Any side or face of a building is the front, although the word is more commonly used to denote the entrance side. . . . The back front, rear front, or fore front of a house are all terms in common use—and there is no reason why a building should not 'front' on two, three, or four streets, or that two, three, or four streets should not be "in front thereof." All such streets would, I think, "confront the building."

The manifest object of the Legislature was to enable councils of cities and towns to make residential streets more attractive, etc., by preventing buildings being placed out to the street line; and it would largely defeat such purpose if a by-law could be made applicable only to buildings to be erected on inside lots and not to buildings on corner lots. When the Legislature used the words "residential street," prima facie the whole of such street must have been intended, and not merely the portion in

front of inside lots; so that, in the absence of any reservation in favour of owners of corner lots, the street from end to end and from limit to limit must be included.

While a building at the corner of two streets is numbered on the street upon which its main entrance fronts, and is in common parlance spoken of as "on that street," it also lies along or borders on the other street, and, in the relation of environing, is also on that street, and such street would also be in front of that part of the building adjoining it.

Having, therefore, regard to what appears to me to be the natural meaning of the words "street in front thereof" and "buildings on residential streets" and to the object of the Legislature, I think the building in question, although the proposed entrance is from St. Clair avenue, would, nevertheless, be a building on Avenue road, and would, therefore, be within the restriction imposed by the by-law.

Then, is the by-law discriminatory in its operation, or is it so unreasonable that it should be declared invalid?

If it should transpire, which is very unlikely, that there are any lots fronting or abutting on Avenue road, less than forty feet in depth or width, the by-law as worded might not, as pointed out above, apply to a building erected on adjoining land, and in that case the by-law might have the effect of discriminating in favour of such building; yet, as the council is entitled to vary the distance in any part of the street, and has limited the application of the by-law to buildings on lots fronting or abutting on Avenue road, as I think it had the right to do, I do not think the by-law is open to attack on this ground.

There remains the question whether the by-law ought to be held invalid for unreasonableness, in that its effect upon the applicant and others is to deprive them of the unrestricted use of their property, and in that it is limited in its operation to buildings on lots fronting or abutting on the street in question, in respect of both which matters I have already expressed the view that the by-law is within the power conferred by the Act.

Given the power to pass the by-law, the question of its reasonableness is, generally speaking, for the judgment and conscience of the council; and, except in extreme cases, it is well settled that the Court will not hold by-laws passed by municipal bodies, within the ambit of their authority, to be invalid for unreasonableness. This proposition was not contested by Mr. Chisholm, and is supported by Kruse v. Johnson, [1898] 2 Q.B. 91, cited by him, and by Stiles v. Galinski, [1904] 1

K.B. 615. . . . See also Leyton Urban Council v. Chew, [1907] 2 K.B. 283.

While this by-law may have the effect of depriving the applicant of making the most profitable use possible of his property, that is not, assuming that the by-law is authorised and was honestly passed in the public interest, any ground for holding it invalid for unreasonableness. . . .

[Reference to Simons v. Mauling Rural District Council, [1897] 2 Q.B. 433, 438; Slattery v. Naylor (1888), 13 App. Cas. 446.]

KELLY, J., concurred, for reasons stated in writing.

BRITTON, J., dissented, for reasons stated in writing.

Application dismissed with costs.

DIVISIONAL COURT. JUNE 20TH, 1912.

MERCANTILE TRUST CO. v. CANADA STEEL CO.

Master and Servant—Injury to and Death of Servant—Dangerous Work—Warning—Lack of Proper Appliances—Negligence of Servant—Findings of Jury—Prohibited Act—Inadvertence—Absence of Express Finding of Contributory Negligence.

Appeal by the plaintiffs, the administrators of a deceased Italian labourer, from the judgment of RIDDELL, J., ante 980, dismissing the action, which was brought to recover damages for the man's death, caused, as alleged, by the negligence of the defendants, for whom the plaintiff was working at the bottom of a shaft, when a portion of a brick fell down the shaft and inflicted such injuries that he died.

The facts are stated in the judgment of RIDDELL, J., ante 980.

The appeal was heard by CLUTE, SUTHERLAND, and LENNOX, JJ.

A. M. Lewis and J. R. Sloan, for the plaintiffs.

J. W. Nesbitt, K.C., for the defendants.

The judgment of the Court was delivered by CLUTE, J. (after setting out the facts):—The questions put to the jury and their answers are as follows:—

1. Was there any defect in the appliances of the defendants which caused or assisted in causing the casualty?

2. If so, what was it? Answer fully.

3. Was the deceased warned to keep his head from below the shaft? A. By the foremen? A. Yes. B. By Bissett? A. Yes.

4. Did he know that it was dangerous to put his head below the shaft? A. Yes.

5. Was he killed by reason of his putting his head below the shaft? A. Yes.

6. Was he in his proper place when he was killed? A. No.

7. If he had been in his proper place would he have been killed? A. No.

8. Damages? A. $2,150.

We consider that, if the shaft had been continued upwards another 6 inches, this accident would not have happened, but we cannot agree whether the absence of this is or is not a defect, nor can 10 of us agree as to this.

Even assuming that the answers to the two first questions were favourable to the plaintiffs, the answers to the remaining questions preclude the plaintiffs from recovering.

The deceased was warned to keep away from the shaft. He knew that it was dangerous; and it was by reason of his doing that which he was warned not to do that he came to his death. He was not in his proper place. Had he been, he would not have been killed. All this is found by the jury, upon sufficient evidence.

Mr. Lewis strongly urged that there was no sufficient finding that the deceased was guilty of contributory negligence. The finding is stronger: it is in effect that he was the cause of his own death, and that with knowledge of the danger and warning not to incur it.

The plaintiffs' counsel strongly relied upon the language of Armour, C.J.O., in Moore v. Moore, 4 O.L.R. at p. 174, where he says: "A person may be exercising reasonable care, and, in a moment of thoughtlessness, forgetfulness, or inattention, may meet with an injury caused by the deliberate negligence of another, and it cannot be said that such momentary thoughtlessness, forgetfulness, or inattention will, as a matter of law, deprive him of his remedy for his injury caused by the deliberate negligence of the other, but it must in all such cases be a question of fact for the jury to determine." In that case, as the Chief Justice points out, the jury negatived contributory negligence on the part of the plaintiff, finding that he used reasonable care for a boy of his age. There were no findings

against him such as in the present case; and, having regard to the facts of that case and the findings of the jury, I think it quite distinguishable from the present.

In Deyo v. Kingston and Pembroke R.W. Co., 8 O.L.R. 588, where the deceased was on top of the car contrary to the rules of the company, of which he was aware, and was knocked from the car by coming in contact with the overhead bridge, it was held that the accident was caused by his own negligence, and the defendants were not liable, although there was not a clear headway space, as required by the statute. This case was distinguished in Muma v. Canadian Pacific R.W. Co., 14 O.L.R. 147. See also Findlay v. Hamilton Electric Light and Cataract Power Co., 11 O.W.R. 48; Markle v. Simpson Brick Co., 9 O.W.R. 436, in appeal 10 O.W.R. 9; Grand Trunk R.W. Co. v. Birkett, 35 S.C.R. 296; Bist v. London and South Western R.W. Co., [1907] A.C. 209.

In Barnes v. Nunnery Colliery Co., [1912] A.C. 44, a boy employed at the colliery jumped into a hoist tub in order to ride to his work. It was a common practice for the boys to ride to their work in this way, and it was expressly forbidden, and the prohibition was in force as far as possible. It was held that the death was caused by an added peril to which the deceased by his own conduct exposed himself, and not by any peril involved in his contract of service.

I think the appeal should be dismissed, and with costs, if demanded.

RIDDELL, J., IN CHAMBERS. JUNE 22ND, 1912.

REX v. LAPOINTE.

Liquor License Act—Three Informations against one Defendant for Selling without License to Different Persons—Police Magistrate—Evidence Applicable to all three Charges Taken at same Time—Conviction on one Charge—Part of the Evidence not Applicable thereto—Order Quashing Conviction—Magistrate Required to Pay Costs—Protection on Payment of Costs.

Motion by the defendant to quash a conviction made against him by the Police Magistrate at Thessalon for selling intoxicating liquor without a license.

H. S. White, for the defendant.

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

RIDDELL, J.:—On the 9th November, 1910, one Grigg laid three informations against Louis Lapointe for selling liquor without a license, on the 29th October then ultimo, to (1) B. Guertin, (2) Joseph Dubie, and (3) Edward Dubie, respectively.

The defendant appeared before the Police Magistrate at Thessalon; the Police Magistrate read to him the informations one by one; and the defendant pleaded "not guilty" to each. Thereupon the Police Magistrate took the evidence of witnesses, B. Guertin, Joseph Dubie, and Edward Dubie for the prosecution, and others for the defence, the evidence being taken down on paper headed:—

"Deposition of a Witness.

"Canada

"Province of Ontario

"District of Algoma

"To wit:—

"The deposition of———— taken before the undersigned Police Magistrate for the said district of Algoma this 18th day of November in the year 1910, at Cutler, in said district of Algoma, in the presence and hearing of Louis Lapointe, who stands charged that he did, at or near the village of Cutler, in said district, on or about the 29th day of October, 1910, sell liquor without a license, as required by law."

There was ample evidence of the sales to Joseph Dubie and Edward Dubie. With some hesitation, I think there was sufficient to justify a conviction in the Guertin case also.

The Police Magistrate recorded a conviction in the Joseph Dubie case, and imposed a fine of $100 and $32 costs, and, in default of payment, three months' imprisonment.

It is sworn and not denied that at the same time he announced that he found the defendant guilty on the other two charges, but adjourned these two convictions for the purpose of fixing the fine thereon until a future day—and this must have been the case, as we find the magistrate writing the defendant on the 1st December, 1910: "Having adjourned the two other cases against you for selling liquor without a license until to-day, I have this day come to the conclusion to simply allow the one fine to go which has been paid, on payment of the costs in the other two cases." He then states the amount of costs,

and asks this to be sent him by return mail—"otherwise I will have to send the constable down."

The Police Magistrate told the solicitor for the defendant that all the evidence in the three charges is set out in the depositions forwarded, and that "the said evidence was utilised by him on each and all of the said charges."

A motion is now made to quash the conviction for selling to Joseph Dubie—the grounds taken in the notice of motion being: (1) that there was no evidence to support the conviction; (2) that, having three informations before him, the Police Magistrate proceeded to hear evidence in all three cases, and did then find him guilty in all three cases.

It is a well-established and well-known principle of the criminal law "that each case ought to stand on its own merits and should be decided on the evidence given with relation to that particular charge:" per Pollock, B., in Hamilton v. Walker, [1892] 2 Q.B. 25, at p. 28. And where the Justices had two informations before them, and, after hearing evidence on the one charge, determined to proceed with and hear the second, and, having so proceeded with and heard the same, thereupon convicted of the offence charged in the first, the conviction was quashed. So in Regina v. Fry (1898), 67 L.J.Q.B. 67, 19 Cox C.C. 135, 62 J.P. 457, it was held that it is contrary to the rules and principles of the criminal law that Justices should mix up two criminal charges and convict or acquit in one of them with any reference to the facts appearing in the other. In that case one of the Justices had been the Rt. Hon. Sir Edward Fry, "a great lawyer of long judicial experience;" and the Justices satisfied the Court that they applied to the case the evidence that was given in reference to it and to none other; and the conviction was sustained.

In our Canadian Courts the points has come up more than once: Regina v. McBerny (1897), 3 Can. Crim. Cas. 339; S.C. 29 N.S.R. 327; Rex v. Burke (No. 2) (1904), 8 Can. Crim. Cas. 14. The two cases in Ontario to which I have referred are not in reality against the view I have indicated. In Rex v. Dunkley (1910), 1 O.W.N. 861, there were in fact two informations, and both were before the magistrates; but the Court (Middleton, J.) held that one charge and one charge only was tried. In Rex v. Sutherland, before the same learned Judge, 2 O.W.N. 595, there was also only one charge tried—it being considered that the Crown might prove any number of sales on one day as constituting a selling on that day.

In the present case, the conviction is for selling to Joseph Dubie; and it is evident that all the evidence taken was heard on that charge and considered in determining the question of guilt upon that charge. I am not prepared to say that, if all the evidence given were applicable to that charge, the conviction must be quashed simply because the other informations were before the Police Magistrate, and evidence applicable to the three charges was heard: but, if any of the evidence could not be applicable to the Joseph Dubie charge, it is, to my mind, plain that the conviction cannot stand. This, I think, applies to all the evidence on direct, cross, or redirect examination, and whether for prosecution or defence.

Looking at the defence evidence, it would seem that the real defence is an alibi; there is nothing in that part of the evidence which is not applicable and admissible in the Joseph Dubie case.

In the Crown case, Joseph Dubie swears that it was the defendant who sold him the whisky; Edward Dubie swears that he was with him at the time, and that he, Edward Dubie, bought a bottle at the same time. He would not swear that it was not Louis Lapointe, as it was dark, and he did not know who it was. Remembering that the defence is apparently based upon the identity of the seller, I cannot say that this last statement was inadmissible. Guertin does not seem to have been with the Dubies, and he says that the man who sold him the whisky was one of the Lapointes, he did now know which one, but he knew by the voice that it was one of the Lapointes—this was at 9.15. Joseph Dubie bought his liquor at about 8.30; the places were close together—or not far apart. Can it be said that this is not cogent evidence against the alibi set up? The defence and the only defence actually set up being that the accused was at Spanish at 8.50 (Modviski), 9.20 (John Foltz), 8.45 (John Smith), 8.30 (Louis McGregor), 6.30, 7.30, 9, and 10 (Simon Lapointe), 9.00 Peter Lapointe, 6.30, 7.30, and 9 (Joseph Lapointe), is it not competent to shew by witnesses that he was at Cutler that evening?

Notwithstanding all this, it may have been that the magistrate would not have accepted the statement of Joseph Dubie that he had bought whisky at all, had it not been sworn that two others had bought whisky the same evening. We are left in the dark as to this—the magistrate has not vouchsafed any explanation. In that view, as the sale to the two others is clearly not evidence of the sale to Joseph Dubie, I think the doubt should

be resolved in favour of the defendant, and the conviction quashed.

As to costs and protection, it is the rule of the Court to go as far as possible for the protection of non-professional magistrates. But the present Police Magistrate is a lawyer and a King's Counsel; he has left us in the dark, and not (like that other lawyer Sir Edward Fry) explained his conduct (and it certainly needed explanation); the proceedings were very irregular; and I think the conviction should be quashed with costs to be paid by the magistrate; and that, on these being paid, an order for protection will go, but not otherwise.

RIDDELL, J., IN CHAMBERS. JUNE 22ND, 1912.

RE RICHARDSON.

Will—Construction—Codicil—Revocation of Clause of Will—Division of Residue among Infant Grandchildren—Shares Payable at Majority—Gift over on Failure to Attain Majority—Express Direction to Pay Fund into Bank—Application of Income for Maintenance of Children—Executors—Right to Disregard Direction—Investment of Fund—R.S.O. 1897 *ch.* 130, *sec.* 2*—Discretion—Summary Application to Court—Form of—Petition—Originating Notice—Con. Rule* 938*—Costs.*

Petition on behalf of Lottie M. Richardson, widow of the late Dr. Richardson, for an order: (1) appointing her guardian of the estate of her infant children; (2) authorising the payment to her of the income of the estate of Margaret S. W. Richardson, deceased, for the maintenance of the said infant children; and (3) for costs.

W. T. Evans, for the petitioner.
W. C. Chisholm, K.C., for the executor.
T. J. Blain, for the next of kin.
F. W. Harcourt, K.C., for the infants.

RIDDELL, J.:—As all parties interested appeared before me, and are acting harmoniously, consenting to a change of this proceeding into the proper form, I deal with the real matters presented.

By the will of Margaret S. W. Richardson, she, in clause 9, directed her executor to sell the residue of her estate, real and personal (after certain specific bequests), giving one third to her grandchild Harry R. and the other two-thirds to her grandchildren Stewart R., Gerald R., and Margaret R., in equal parts—none of these to "receive his or her share until . . . Margaret R. shall have attained the full age of twenty-one years, and in case . . . Margaret R. shall not have attained the age of twenty-one years at the time of my decease, I hereby direct my executor hereinafter named to deposit the proceeds of such sale at interest in some chartered bank and to keep the said proceeds so deposited until . . . Margaret R. shall have attained the age of twenty-one years, and then to hand over their respective shares with accrued interest to each of my said grandchildren. I further direct that the share or shares of any of my said grandchildren who may die before . . . Margaret R. shall have attained the age of twenty-one years, shall be divided equally amongst the survivors. In case all of my said grandchildren shall die before . . . Margaret R. shall have attained the age of twenty-one years, then in such case I give and bequeath the said proceeds of such sale to my next of kin."

This provision was modified by the third codicil of the will, dated the 27th July, 1911, which directed "the residue of my property to be divided equally amongst . . . Harry, Stewart, Gerald, and Margaret, the shares of the said Harry, Stewart, and Gerald to be paid to them when the youngest of them shall have attained the age of twenty-one years, and the share of the said Margaret to be paid to her when she shall have attained the age of twenty-one years." The ages of these grandchildren are: Harry, 18; Stewart, 15; Gerald, 12; and Margaret, 11.

Dr. Richardson, son of the testatrix and father of these infants—the petitioner being their mother—died some time ago, and the petitioner has no means to support her children with. The executors of Margaret S. W. Richardson have about $14,000 from the sale of the property directed by the will.

The present proceeding has two objects in view: (1) to have the petitioner paid some part of the money, or of the interest, to apply to the support of her younger children; (2) to permit the executors to disregard the express provisions of the will and to invest the money, instead of paying it into the bank.

The former could be done only if it were clear: (a) that

the money was the money of the infants; and (b) that the express provision as to payment contained in the will could be disregarded.

To determine these points, I shall treat the present application as though it were a proceeding under Con. Rule 938 (a), (e).

It is necessary to examine with care the provisions both of clause 9 of the will and of the third codicil.

Clause 9 not only (1) directs the sale, (2) the division one-third to Harry and two-thirds to the other grandchildren, (3) the payment when Margaret R. is 21, (4) the direction to pay into a bank until Margaret is 21, and (5) then to pay their respective shares with accrued interest to the grandchildren; but it also directs (6) that the share of any grandchild who dies before Margaret R. becomes 21, shall go to the survivors; and (7), if all die before Margaret becomes 21, the fund goes to the next of kin.

In the third codicil, clause 3 reads: "Whereas by clause 9 of my said will I directed that one-third of the residue of my estate be paid to my grandchildren Harry R. and the remaining two-thirds to my grandchildren Stewart, Gerald, and Margaret in equal shares: now I revoke that part of said clause of my said will, and I direct the residue of my property to be divided equally amongst my four grandchildren, the shares of the said Harry, Stewart, and Gerald to be paid to them when the youngest of them shall have attained the age of twenty-one years, and the share of the said Margaret to be paid to her when she shall have attained the age of twenty-one years."

Here, in addition to the express revocation of clause 9 (No. (2) above) there is also a revocation of so much of Nos. 3 and 5 as applies to the young men. There is no revocation of No. 4 so far as it relates to the payment of the money into a bank; and, while No. 6 is by implication revoked so far as it relates to the death of any of the young men at any time between the majority of Gerald and Margaret, it is not revoked as regards Margaret. But what is of most importance here is that No. 7 is not revoked. It may be that all will die before Margaret becomes 21, and the three young men before Gerald is 21, and then it would seem that the next of kin will take. Without the consent of the next of kin, which cannot be given, the same being infants, the infants cannot receive any of this money at present, as they may turn out not to be entitled to any.

2. May the executors disregard the express direction to pay

into a bank? I deal with this as an application under Con. Rule 938(e) and (g).

Where executors or trustees disregard the express direction of the instrument under which they act, they cannot make money thereby for themselves and make themselves personally responsible for any loss. R.S.O. 1897 ch. 130, sec. 2, does not apply to the present case—there is no discretion given to the executors.

I do not consider it necessary to answer further.

Costs as of a motion, not of a petition (see Re Rally, 25 O. L.R. 112; Re Turner, ante 1438; Re Gordon, ante 1458), of all parties, out of the fund.

RIDDELL, J. JUNE 22ND, 1912.

*RE CANADIAN SHIPBUILDING CO.

Company—Winding-up of Shipbuilding Company—Claim of Liquidator to Ownership of Ship in Course of Construction by Company under Contract with Navigation Company—Reference—Scope of—Construction of Contract—Payment—Transfer of Ownership of Part Constructed—R.S.O. 1897 *ch.* 148—*Status of Liquidator to Invoke—"Creditor"—Bills of Sale.*

Appeal by the liquidator of the Canadian Shipbuilding Company Limited from a certificate of an Official Referee, to whom a reference was directed for the winding-up of the company, of his finding against the claim of the liquidator to the ownership of an unfinished ship which the comany were building for the Hamilton and Fort William Navigation Company Limited when the winding-up order was made.

The contract for the building of the ship was made between the two companies on the 18th February, 1907. The contract-price was $297,000. The building company were paid $30,000 on account of the work, and on the 4th November, 1907, executed a bill of sale upon the ship, so far as then built, to the navigation company. On the 27th November, 1907, they made another bill of sale to the same company. The winding-up order was made in January, 1908.

The navigation company, desiring to get possession of the unfinished ship, applied by petition to the Court; and on the

*To be reported in the Ontario Law Reports.

3rd March, 1909, an order was made by MEREDITH, C.J.C.P., directing that upon the navigation company giving security in the sum of $40,000 to pay such amount (if any) as the liquidator had a lien for upon the ship, and for any damages which the liquidator might suffer by reason of the navigation company taking possession of the material, which amount should be promptly determined by the Referee in the winding-up proceedings, the navigation company should be at liberty to take possession of the ship (if any) and the material purchased and intended to be used for constructing the same covered by the bills of sale and in the possession of the liquidator.

The navigation company took possession of the unfinished ship; and the Referee proceeded as directed.

The liquidator claimed the ownership of the work, upon the ground that the bills of sale were invalid as against him.

J. A. Paterson, K.C., for the liquidator.

H. E. Rose, K.C., for the navigation company.

RIDDELL, J.:— . . . The first matter to be considered is, whether it was open to the Referee to consider this point at all (that is, the liquidator's claim to the ownership, based upon the proposition that the bills of sale were invalid as against him). I think his conclusion that he could consider it is entirely justified. There is no adjudication as to the ownership in the order of reference, but the rights of the navigation company and the insolvent company (and its liquidator) are presumed. The navigation company is allowed to take possession of the ship and materials, but that is all. The reference is, to determine the amount of lien, if any, and any damages the liquidator may suffer by reason of the navigation company taking possession of the said material—in other words, if there be a lien, how much is it? and, if there be ownership, what damages for taking the property from the possession of the owner?

By the agreement, the shipbuilding company was to build a freight steamer for the navigation company by the 1st October, 1907, for $297,000; payments to be made every two months to the extent of 80 per cent. of the work done and material purchased by and delivered to the contractor for constructing the steamer; balance on completion; the shipbuilding company to provide all manner of labour, material, and apparatus. As work goes on after the first payment, "the property in the said steamer, so far as constructed, and in all machinery belonging thereto and in all materials purchased and intended

to be used for constructing the same or any part thereof, shall be vested in and be the absolute property of the owner" (*i.e.*, the navigation company); "and the contractor" (*i.e.*, the shipbuilding company) "shall and will then or at any time thereafter, at the request of the owner, execute and deliver to the owner such bill of sale or other assurance as the owner may be advised to be necessary to so vest said steamer and machinery and material in the owner, subject to the lien of the contractor upon the said steamer and its machinery and equipment for any unpaid balance . . . and subject to the possession of the said steamer remaining in and with the contractor until the owner is entitled to delivery in accordance with the provisions of this contract."

This provision operated in equity as a transfer of ownership, from the time of the first payment, of all the ship and materials, etc., without the execution of a bill of sale. There is, I presume, no difficulty as to that part of the ship and materials in hand in esse at the time of this payment; and, I think, there can be no doubt as to the rest. . . .

[Reference to Holroyd v. Marshall (1861), 10 H.L.C. 191, 9 Jur. N.S. 213; Re Thurkill, Perrin v. Wood (1874), 21 Gr. 492; Mason v. McDonald (1875), 25 C.P. 435, 439; Coyne v. Lee (1887), 14 A.R. 503; Horsfall v. Boisseau (1894), 21 A.R. 663.]

The statutes R.S.O. 1897 ch. 148 and the like are appealed to by the liquidator. I do not think the liquidator can take advantage of the provisions of these Acts—he is not a creditor or a purchaser for valuable consideration. It is said that he stands for the creditors; but the Act does not speak of those who stand for the creditors, but of creditors; and sec. 38 of R.S.O. 1897 ch. 148 does not extend the meaning to liquidators. . . .

Before the Act of 1892, 55 Vict. ch. 26, it had been held that an assignee for the benefit of creditors could not claim, in the capacity of creditor, any benefit from want of registration: Parkes v. St. George (1882), 2 O.R. 342, at p. 347, per Boyd, C.; Kitching v. Hicks (1884), 6 O.R. 739, per Proudfoot, J., at p. 745; per Osler, J., at p. 749, and cases cited. And, while an assignee in insolvency was held to be entitled to take advantage of the Act, that was "decided upon the peculiar language of our Insolvent Act: per Osler, J., in Kitching v. Hicks, 6 O.R. at p. 749, citing Re Barrett, 5 A.R. 206; Re Andrews, 2 A.R. 24. . . .

We have a statute which makes void perfectly legitimate and proper transactions, and this statute must be read strictly. I think that one who is not a creditor cannot claim as though he were a creditor, unless he can bring himself within the words of the Act. I do not read the cases as excluding this view. . . .

[Reference to In re South Essex, etc., Co. (1869), L.R. 4 Ch. 215, 217; In re Duckworth (1867), L.R. 2 Ch. 578, 580; Waterhouse v. Jameson (1870), L.R. 2 H.L. Sc. 29, 38.]

In In re Canadian Camera Co. (1901), 2 O.L.R. 677, it is indeed said that, in considering the statutes (R.S.O. 1897 chs. 148 and 149), "it is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, viz., that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights." The learned Judge (Street, J.), cites In re South Essex, etc., Co., supra. Nothing, however, in that case, I venture to think, justifies the statement of law . . . just cited. . . . The dictum of Street, J., was not necessary for the determination of the case. . . .

The "materials purchased and intended to be used," after the execution of the agreement and after the payment of the first bi-monthly instalment, never became the property of the shipbuilding company as against the navigation company, but in equity became at once upon purchase the property of the navigation company. . . .

I have not said anything as to the validity of the bills of sale; but I am not to be considered as dissenting from the view of the learned Referee in that regard.

I think the appeal should be dismissed with costs.

BOYD, C. JUNE 22ND, 1912.

RICHARDS v. COLLINS.

Assessment and Taxes—Tax Sale—Indian Lands—Indian Act, R.S.C. 1906 *ch.* 51, *secs.* 58, 59, 60—*Approval of Tax-deed by Superintendent-General—Right to Patent from Crown —Time-limit for Bringing Action to Set aside Tax Sale and Conveyance—Application of, where Approval not Given—Disability of Tax-purchaser — Infancy — Assignment—Recognition by Department of Indian Affairs—Invalidity of Tax Sale—Ontario Assessment Act, R.S.O.* 1897 *ch.* 224, *sec.* 209—*Lien of Purchaser for Improvements—Set-off of Profits.*

Action to recover possession of land and to set aside a tax sale. Counterclaim by the defendant for improvements.

F. E. Titus, for the plaintiffs.
R. R. McKessock, K.C., for the defendant.

BOYD, C.:—An objection not on the pleadings was raised ore tenus, that, by reason of some provisions of the Dominion Indian Act, this action was not well-founded.

The Indian Act, as found in R.S.C. 1886 ch. 43, sec. 43, was amended in 1888 by 51 Vict. ch. 22, sec. 2, now found in the revision of 1906, as ch. 51, secs. 58, 59, and 60, and brings in an entirely new provision as to dealing with Indian lands which have been sold for taxes. The substance of this new legislation appears to be, that, when a conveyance has been made by the proper municipal officer of the Province, purporting to be based upon a sale for taxes, the Superintendent-General may "approve of such conveyance and act upon it and treat it as a valid transfer" of the interest of the original purchaser: sec. 58 (1).

When the Superintendent-General has "signified his approval of such conveyance by endorsement thereon," the grantee shall be substituted (in all respects in relation to the land) for the original purchaser: sec. 58 (2).

The Superintendent-General may cause a patent to be issued to the grantee named in such conveyance, on the completion of the original conditions of sale, unless such conveyance is declared invalid by a Court of competent jurisdiction, in a suit by some person interested in such land, within two years after the date of the sale for taxes, and unless, within such delay, notice of such contestation has been given to the Superintendent-General: sec. 59.

These provisions are, I think, to be read as applicable to a case where the Superintendent-General has actively intervened as between the tax purchaser and the original purchaser: where the Superintendent-General has taken under consideration the tax deed, and has approved of it as a valid transfer, by endorsement thereon. This primâ facie ruling of his may be brought into question and disputed in the Court by suit brought within two years after the date of the tax deed. But, in my view of these sections, there is no such limit of time in attacking an illegal tax sale and deed, if (as in this case) no action in respect of the tax deed by way of approval has been taken by the Superintendent-General. If the Superintendent-General remains silent and inactive, there is no restriction as to time placed upon the right of the original purchaser to claim the assistance of the Courts so far as the Indian Act is concerned.

He may otherwise lose his legal status by delay and adverse possession, but in this case no such barrier exists.

This case rests under the general law as to tax sales then in force, namely, that where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, that deed shall be, to all intents and purposes, valid and binding, if the same has not been questioned before some Court of competent jurisdiction by some person interested, within two years from the time of sale: sec. 209, R.S.C. 1897 ch. 224.

This statutory protection does not avail if there has been no legal impost of taxes, and if these, though legally imposed, have not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Assessment Act, and if there has been no such list furnished at all. Each one of these necessary preliminaries appears to be absent in the case in hand, as may now be briefly noted.

The action relates to certain conflicting claims made to the possession of an interest in land situate in the district of Manitoulin, part of an Indian reserve, and as such subject to the control of the Department of Indian Affairs for the Dominion of Canada. Lot 21 in the 12th concession of the township of Howland, in that district, containing 147 acres, was sold in June, 1869, to Thomas F. Richards, and a certificate of sale was duly issued. This land was so dealt with that a patent from the Crown was issued for the westerly 100 acres in 1879 to Jane Mackie, and that part is not in controversy. The easterly 47 acres was assigned in 1876 to David Richards by his son Thomas, and that was duly registered in the Indian Department, and that part still stands in the name of David Richards, and has not been patented.

David Richards died in February, 1890, leaving a will by which he left all of his belongings to his wife to hold for her life. He gave her power to sell a part or all of the real estate and personal, and declared that, at her death, what remained was to be equally divided between his sons Thomas and Luther. These two are the plaintiffs; and I see no reason to question that they take directly through their father. I do not give effect, therefore, to the contention that the widow made a valid disposition of the 47 acres by will so as to give a life estate to her second husband, Moore, and a remainder to the plaintiffs.

The disability of the original purchaser to hold or to transfer, on the ground of infancy, is raised by the pleadings. It appears that he was born in 1854, and he was of age in 1875, when he assigned to his father, and that assignment has been

recognised and acted on by the Indian Department; and I think any controversy as to his status will have to be decided by that Department, if and when he applies for a patent. He has sufficient locus standi, with his brother, to seek the intervention of this Court.

The intervention is sought in respect of a tax sale held in 1901, and a certificate of purchase obtained by the defendant. That certificate sets out that a sale was had on the 4th September, 1901, of the right, title, and interest of the owner in the patented lot, being lot 21 in the 12th concession of Howland, containing 48 acres, more or less, and that Collins became the purchaser, for the sum of $8.65.

That sum was directed to be levied by warrant of the reeve, dated the 27th May, 1901, of which $7.85 was for arrears of taxes alleged to be due up to the 31st December, 1900.

On this state of facts, the tax deed was executed by the proper officer of the township on the 17th September, 1902, which has been duly registered upon the land and in the Indian Department. By this deed the defendant claims that he has cut out any right of the plaintiffs to the land, and is alone entitled to claim a patent from the Indian Department. The validity of the tax sale is, therefore, the main issue in this litigation.

Evidence is given as to the taxes for the years 1897, 1898, and 1899, and which appear to form the aggregate of the arrears alleged to be sufficient to support the sale. But I have seldom seen a case where the evidence was so limping and unsatisfactory, and where so many flagrant mistakes and omissions are manifest in all the proceedings.

The radical error appears to be this, that the 100 acres patented, being the westerly part of the whole lot, was treated as being lot 21 in the 12th concession of Howland, and all the taxes on that part have been duly paid. The officers appear to have assessed the easterly 47 acres as lot 21 in the 13th concession of Howland—as an entirely different lot in another concession, which concession has no existence. Among other mishaps, the assessment rolls of 1898 have been lost; but, on production of the assessment rolls of 1897 and 1899, it clearly appears that lot 21 in the 13th concession is assessed as belonging to Richards and as containing 48 acres. I cannot suppose that this mistake was remedied in the missing roll of 1898, though some reliance is placed upon the collector's roll of 1898, as shewing taxes of $2.47 on 48 acres, concession 12, lot 21, owned by Thomas Richards; yet it does not seem to be clear that this is not the

roll of 1899. But, even in the roll of 1898, Richards was not notified of the tax till the 10th October, 1898, which would be less than three years before the sale in September, 1901. Besides, by the tax deed the sale purports to be for arrears alleged to be due up to the 31st December, 1900. Upon the evidence, I can find no valid assessment of the land intended to be sold for the years 1897 or 1899; and I much doubt the validity of that in 1898.

The lands were assessed as "resident," and no list of lands containing these as liable to be sold for taxes was prepared by the treasurer; this statutory warning, which is an indispensable prerequisite to a valid sale, was not in this case given: sec. 152.

What was substituted is frankly told by the treasurer: "The clerk and I found that this lot had been missed in being assessed, and we went back three years and computed the taxes; I do not remember notifying anybody; they would see it when it was advertised. I had no authority to fix the amount in this way."

This summary ascertainment of what ought to have been assessed from year to year appears to be the only foundation upon which this land was confiscated by enforced sale for taxes. Apart from all other objections (which need not be further discussed), those I have mentioned are fatal to the validity of the tax sale, which has to be vacated upon proper terms.

The defendant has counterclaimed for his outlay in taxes, statute labour, and improvements by way of clearing and fencing in the lands. These should be ascertained and declared to be a lien on the land, and against this should be set off any profit derived from the land, or which could reasonably have been derived from it, by the purchaser.

The plaintiffs should get the costs of action, and the defendant the costs of counterclaim, to be set off. The amount of the lien to be ascertained by the Master, if the parties cannot agree; and he will say how the costs should go in his office of the reference.

DIVISIONAL COURT. JUNE 22ND, 1912.

*SCOTT v. ALLEN.

Husband and Wife—Authority of Wife to Pledge Husband's Credit for Necessaries—Action by Executrix for Balance of Price of Goods Sold—Limitation of Authority—Instruction to Wife not to Buy on Credit—Evidence of—Want of Corroboration—Running Account — Payments — Statute of Limitations.

Appeal by the defendant from the judgment of the County Court of the United Counties of Leeds and Grenville, in favour of the plaintiff, in an action by an executrix for the balance of an account for goods supplied to the defendant, upon the order of his wife, by the plaintiff's testator.

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

I. Hilliard, K.C., for the defendant.

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

RIDDELL, J.:—The plaintiff is the executrix of the late R. A. Scott, who in his lifetime carried on business as a grocer; and she sues the defendant for the balance of an account for goods supplied by her testator. The defendant defends mainly on two grounds, viz.: (1) want of authority in his wife (now deceased) to order the goods; and (2) the statute.

We disposed of the first at the hearing of the appeal, holding that the law is correctly laid down in Eversley on Domestic Relations, 3rd ed., pp. 312, 313: "During cohabitation, there is a presumption, arising from the very circumstances of the cohabitation, of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate; that is to say, a wife has an implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and are necessary and suitable to the style in which her husband chooses to live . . . In other words, where a wife is living with her husband, the presumption is that she has his authority to bind him by her contracts for articles suitable to that station which he permits her to assume: but that presumption may be rebutted by shewing that she had not such authority. This doctrine was laid

*To be reported in the Ontario Law Reports.

down in the two important cases of Jolly v. Rees, 15 C.B.N.S. 628, 33 L.J.C.P. 177, and Debenham v. Mellon, 5 Q.B.D. 394, 6 App. Cas. 24, and is now settled law."

There was no doubt that the goods supplied were necessaries suitable to the station of the defendant and the style in which he lived. We also held that in this action, at the suit of an executrix, corroboration of the alleged instruction to his wife not to run a bill must be adduced—and that no such corroboration was furnished.

Speaking for myself, I would say that the alleged limitation of authority was by no means made out, even if the defendant's evidence should have full credence and effect—all that took place was a warning not to get into debt—not an unprecedented occurrence. It has been held that grumbling and remonstrance at a wife's extravagance is not a limitation of authority: Morgan v. Chetwynd, 4 F. & F. 457. We reserved judgment to look into the question of the application of the statute.

On the other branch of the case, also, I think, the defendant fails. The present account began as far back as the 23rd February, 1882, at which time the parties had a settlement, and the account was paid in full. During the lifetime of Scott, the practice was for the wife of the defendant to buy groceries and make monthly payments, generally precisely the amount of the month's purchases—but sometimes a little more or a little less; if less, the running balance—for it was all one running account—was increased; if more, diminished. But, after the death of Scott, June, 1907, and in August, 1907, the account was sent to her in full, *i.e.*, a statement of the whole balance. Mrs. Scott, the plaintiff, was under the impression that this was done in June, 1907; but it is clear that she made a mistake in the date—and indeed she acknowledges it on cross-examination. That the account was sent is abundantly proved, not only by the plaintiff, but also by the book-keeper, by Mrs. Birks, and by the daughter of the defendant. It is actually produced at the trial by the defendant (exhibit 8); see also exhibit 4. This witness says that her mother received the account; that it came as a great shock and surprise to her "this large account," "she did not know where it ever arose from."

Mrs. Allen then went to the plaintiff and asked her not to crowd them for the account; that she would pay it all. This is established by the evidence of the plaintiff and of Mrs. Birks—and the promise seems to have been repeated at different times.

Payments were made from time to time by Mrs. Allen upon this account; the plaintiff ceased to keep a shop; and the pay-

ments were not in whole or in part on goods bought at or about the time. Even after the death in 1909, her daughter, who then was put in charge of the defendant's household affairs, made a few payments, and doubtless would have continued doing so, had not the defendant put a stop to it.

I have not thought it necessary to go through the account from the beginning; we were told by counsel for the plaintiff that the whole account from beginning to end was kept alive by payments, and that there never was a time when any part of it—or any item of it—was barred by the statute. While this was denied by counsel for the defendant, we were not pointed to any person as supporting his contention: and the course of dealing in the periods I have examined make it most probable that the plaintiff is right. Since Boultbee v. Burke (1885), 9 O.R. 80, it cannot be successfully argued that the payment of a part is not an act from which the inference may be drawn that the debtor intended to pay the balance, though no special reference is made thereto at the time of such part payment; or that a payment on account of a debt is not such part payment: Ball v. Parker, 39 U.C.R. 488, and cases cited there and in 9 O.R. 80. Here the case is stronger—the debt was known and acknowledged, time was asked and accorded, and the payments were, at least in some instances, made specifically and explicitly with reference to it—and there was no other debt.

FALCONBRIDGE, C.J., concurred.

BRITTON, J., also concurred, stating reasons in writing.

Appeal dismissed with costs.

BOYD, C. JUNE 24TH, 1912.

*YOUNG v. CARTER.

Contract—Renewal of Lease—Action by Lessor to Set aside—Absence of Threats and Coercion—Lease Executed while Lessor Serving Term in Prison under Conviction for Indictable Offence—Status of Convict—Property Rights—Freedom to Contract—Criminal Code, sec. 1033.

Action to set aside a lease of hotel premises made by the plaintiff to the defendants for three years from the 1st May, 1910, in renewal of a former lease.

*To be reported in the Ontario Law Reports.

The renewal lease was executed by the plaintiff on the 15th August, 1910, while he was serving a term of imprisonment in a penitentiary. He was released on parol in January, 1911; and this action was brought in April of that year.

The action was tried before BOYD, C., without a jury, at Fort Frances, in June, 1910.

G. S. Bowie, for the plaintiff.

A. D. George, for the defendants.

BOYD, C.:— . . . No case was made out at the trial for relief on the ground of the plaintiff being overborne by threats or pressure so that he was coerced into signing the document. . . . Evidence was . . . given that the rent was, all circumstances considered, a fair rent; and, though more is now offered, that is probably the result of improved conditions and prospects in Fort Frances, where the hotel is situate. . . .

The plaintiff pleaded that, being a convict undergoing sentence, he was, at the date of execution, incompetent to contract. . . . He was . . . in actual custody and incarcerated at the time he signed. But had this bodily condition of penal servitude for the brief term any legal effect on his political status?

It is not necessary to deal with the old-time distinctions between attainder and forfeiture. . . . The method of punishment by depriving the convicted offender of lands and goods has been distinctly put an end to by the Canadian Code. . . .

The present English law is cited for the plaintiff; but it has really no direct application to the state of affairs in Canada. . . .

[Reference to the Imperial Forfeiture Act, 1870, 33 & 34 Vict. ch. 23; Ex p. Graves, 19 Ch.D. at p. 5.]

Our legislators have had an eye on the English statute, for they have adopted the remedial provisions of sec. 1 into our Criminal Code, where it appears as sec. 1033 (R.S.C. 1906 ch. 146). . . . The effect of this section of the Code is equivalent to that of the English Act, leaving undisturbed in the possession of the convict all his property. The law in Canada has not gone further, as has been done in England, so as to interpose certain obstacles on the action of the convict with respect to his property and to vest the administration thereof in a statutory official. A convicted offender, serving his term, may deal with his goods and lands as other men who are free from custody

may deal with theirs; and no disability or restraint is put upon the convict, so far as dealing with his property is concerned, beyond that which attaches to other owners.

I find that the point has been expressly decided by Mr. Justice Jetté in Dumphy v. Kehoe, 21 Rev. Leg. 119 (1891), that the Imperial statute . . . 33 & 34 Vict. ch. 23 is not in force in Canada: pp. 126, 127. The other aspects of his decision have been superseded by the repeal of the clauses of R.S.C. 1886 ch. 181, secs. 36 and 37, by sec. 981 of the Criminal Code, 1892.

The result is, that the plaintiff's action fails in all respects, and must be dismissed with costs.

MIDDLETON, J. JUNE 24TH, 1912

*MALOUGHNEY v. CROWE.

Vendor and Purchaser—Contract for Sale of Land—Completed Agreement—Memorandum in Writing Sufficient to Satisfy Statute of Frauds—Parol Variation—Purchaser Offering to Submit to—Refusal of Vendor—Specific Performance.

Action by the purchaser for specific performance of an agreement for the sale of land.

The action was tried before MIDDLETON, J., without a jury, at Ottawa, on the 19th June, 1912.

G. D. Kelley, for the plaintiff.

J. E. Caldwell, for the defendant.

MIDDLETON, J.:—I accept the plaintiff's evidence in this case, and, where there is a conflict between the parties, I give it the preference.

The plaintiff called at the residence of the defendant for the purpose of purchasing, if possible, the property in question. He asked the defendant's price. The defendant said $5,500. The plaintiff . . . agreed to purchase it for the sum demanded, and paid $10 on account.

I think this was a completed agreement.

Thereafter, the defendant suggested the giving of a receipt, and he prepared exhibit 1. This receipt, I think, correctly states the terms of the bargain, and is sufficient to answer the Statute of Frauds.

*To be reported in the Ontario Law Reports.

After the receipt had been given, the plaintiff . . . asked the defendant when he would be given possession. The defendant then stated that he did not intend to give possession for a month; whereupon some discussion took place as to the unfairness of this contention, the plaintiff thinking it unreasonable that he should have to pay the whole price in ten days and not receive possession for thirty days. Finally, the parties agreed that, upon the plaintiff paying "a substantial sum" within ten days, he should not be called upon to pay the balance of the price until the defendant was ready to yield possession.

This agreement constituted, I think, a subsequent parol agreement, modifying the former arrangement in the manner indicated.

When the parties met in Mr. Scott's office later, for the purpose of closing the transaction, the defendant demanded $1,000 as the "substantial sum" to be paid; and the plaintiff assented to this.

A new difficulty had in the meantime arisen. A real estate agent, in whose hands the property had been, appeared upon the scene and wanted commission. The defendant insisted on this commission being assumed by the plaintiff. The plaintiff would not assent. This, I think, was the real bone of contention.

The defendant then sought to recede from the parol agreement giving the extension for the payment of the balance of the purchase-money, in consideration of the delay in giving possession; and, although the plaintiff stated that he was ready to pay the whole price, if need be, the parties parted; and, at a subsequent meeting, when the controversy was renewed and carried through practically the same phases, nothing was done. The plaintiff throughout adhered to the position that he should have possession when he paid the whole price. The defendant throughout adhered to the position that, apart from all other difficulties, he would not convey unless the plaintiff would indemnify him against the claim of the agent.

The plaintiff was able to pay . . . . The defendant had no foundation whatever for his claim that the plaintiff should pay the real estate agent's commission. . . .

Upon the argument, no authority was cited by either side directly dealing with the question which now arises. This is not a case of attempting to enforce an agreement some of the terms of which only are disclosed in the written evidence of the agreement. It is a case of an agreement complete and suffi-

cient in all respects, fully evidenced by the subsequent written receipt or memorandum, with a subsequent parol agreement dealing with some of the terms.

The result of the authorities is, that where by law a written contract is necessary, or a parol contract is required to be evidenced by writing, the subsequent parol variation may be ignored, and that specific performance may be granted of the original agreement; or, if the plaintiff admits the parol variation, and the defendant desires to avail himself of that variation if specific performance is awarded, the Court will withhold specific performance unless the plaintiff assents to yield to the defendant any advantage which he is entitled to under the modification.

In the earlier cases a distinction was attempted to be drawn between the 4th and the 17th sections of the statute; the 4th providing that "no action shall be brought," and the 17th that "no contract . . . shall be allowed to be good." But the tendency is now to construe the sections as being substantially equivalent in this respect. As put by Lord Blackburn in Maddison v. Alderson, 8 App. Cas. 488: "It is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but to render the kind of evidence required indispensable when it is sought to enforce the contract."

Statements contained in some of the earlier cases, in which the expression used is that the contract is void, or that writing is necessary to make the contract, must be treated as not being strictly accurate; and the cases must be read in the light of the passage quoted. Noble v. Ward, L.R. 2 Ex. 135, states the principle applicable. . . .

[Reference also to Moore v. Campbell, 10 Ex. 323; Stowell v. Robinson, 3 Bing. N.C. 928.]

The statute is available to either party, and prevents the new contract being given in evidence at all, save for the purpose of affecting the conscience of the Court, which may, in its discretion, refuse to give specific performance if the party seeking its aid withholds from his opponent the benefit of the parol variation. Save as to this, the operation of the statute is the same in law and in equity. See Emmet v. Dewhurst, 3 Macn. & G. 597; Goss v. Lord Nugent, 5 B. & Ad. 58; . . . Halsbury's Laws of England, vol. 7, p. 422. . . .

Leake on Contracts, 6th ed., p. 583, after examining the authorities at law, states: "Where a plaintiff claims specific per-

formance of a written contract, at the same time stating and offering to submit to subsequent parol variations, the Court will decree specific performance with the variations if the defendant is willing to accept the same, and, if not, according to the original contract:'' citing for this Robinson v. Page, 3 Russ. 121—a case which abundantly justifies the text.

Under these circumstances, I think the plaintiff is entitled to judgment for specific performance, with costs. . . .

MIDDLETON, J. JUNE 24TH, 1912.

SIBBITT v. CARSON.

Principal and Agent—Agent's Commission on Sale of Land—Employment of Agent—Time-limit—Sale Effected after Expiry of—Introduction of Purchaser by Agent.

Action by a real estate agent to recover commission on the sale of land, tried without a jury, at Ottawa, on the 17th June, 1912.

R. G. Code, K.C., for the plaintiff.
G. F. Henderson, K.C., for the defendants.

MIDDLETON, J.:—The defendants Carson and Bingham owned land on Albert street. On the 23rd February, Bingham had some conversation with Sibbitt in his office as to the terms on which he would undertake the sale of the property. Nothing was concluded then. On the next day, Saturday the 24th, after consulting with his partner, Bingham again called, and placed the property with the plaintiff at $50,000, upon what was called in the evidence an exclusive agency or option, which was limited in time and would expire on the Monday at two o'clock. This time was undoubtedly very short; but, owing to some excitement with reference to real estate in this particular locality, and to the fact that some properties in the immediate vicinity had changed hands several times, each time at an increased price, and owing to the extremely optimistic disposition of the plaintiff, he assented to take the property upon these terms; and forthwith endeavoured to find purchasers or to arrange a syndicate to take over the property.

An option or agency of longer duration was sought. A document giving an option until the 29th was prepared and

presented for signature; but the signature was promptly and emphatically refused.

Just before the expiry of the time-limit, the plaintiff communicated with the defendants, and was given until 2 p.m. next day to complete his arrangements. In the meantime, the plaintiff had made some endeavour to find purchasers, and had failed. Various suggestions as to exchange were refused by the defendants.

During the search for a purchaser, the plaintiff spoke to Mr. Grant, and obtained from him a verbal agreement to take some interest in a syndicate to be formed. Grant had heard of the property when offered for sale some time earlier than this, at a smaller price, and was willing to take some share, if acceptable co-adventurers could be found. A dispute ultimately arose between the plaintiff and Grant as to the amount of his contribution; and this ended by Grant withdrawing and declining to have anything further to do with the plaintiff. The plaintiff then made an endeavour to find some one who would take Grant's place in the proposed syndicate; but, as already stated, his efforts proved abortive.

In the meantime Grant, having had his attention thus drawn to the property, placed himself in direct communication with the defendants. This was after the expiry of the original option at two o'clock on Monday, but before the extension until two o'clock on Tuesday was up. Nothing further was done. The defendants communicated with the plaintiff at the expiry of the time limited, and he admitted his inability to find a purchaser. Subsequently, the defendants sold the land, for the stipulated price, to Grant and another co-adventurer.

The plaintiff bases his claim upon the fact that the property was sold immediately after the expiry of the time-limit, to Grant, and the property had been introduced to Grant's consideration by him.

The negotiations leading to the sale to Grant and his confrère were quite independent of any negotiations between the plaintiff and Grant. The case is not one where the owner is endeavouring to defeat the agent's right, by himself taking up and concluding negotiations with a purchaser found by the agent. It differs in many important respects from the reported cases.

The point which appears to me to be vital is, that the plaintiff's right must rest upon his contract. The agreement which he made was one which entitled him to a commission if he procured a purchaser by the time limited. In this he failed; and

the parties were, therefore, entirely at large, so far as any contractual or other relationship is concerned.

The mere finding of a purchaser is not enough; there must be a contract to pay; and the terms of the contract, including all limitations as to time, must govern.

The cases relied upon by the plaintiff do not appear to me to help him. In none of them was there a limitation of time for the finding of the purchaser. Burchell v. Gowrie and Blockhouse Collieries Limited, [1910] A.C. 614, was a case of a general agency. The plaintiff found the purchaser, and was regarded as the efficient cause of the sale, which was negotiated and carried on behind his back by the principal. Stratton v. Vachon, 44 S.C.R. 395, is upon precisely the same lines, affirming the right of the agent to his commission when he brings the parties into relation and a contract ultimately results. Again there was no time-limit.

This is quite apart from the alternative defence suggested by the defendants here, that, upon the facts, the plaintiff could not be regarded as having in any way brought about this particular sale. The plaintiff's suggestion to Grant was to take a $5,000 interest in a $50,000 purchase; the plaintiff to supply the capital to take up the remaining shares. The transaction which was carried out was a sale to Grant, and to another with whom the plaintiff had no connection, of the entire property, for the $50,000. The plaintiff was not instrumental in any way in bringing this about, and is not in fairness entitled to claim commission upon this transaction.

Rice v. Galbraith, 26 O.L.R. 43, indicates that my brother Latchford had present to his mind what seems to me to be the vital point in this case, when he says, in deciding in the plaintiff's favour there, "No limit as to time was imposed when authority to find a purchaser was given."

Action dismissed with costs.

DIVISIONAL COURT. JUNE 24TH, 1912.

WILEY v. TRUSTS AND GUARANTEE CO.

Contract — Correspondence — Construction—Transfers of Land Held in Escrow—Undertaking not to Register—Violation—Trustees — Reconveyance—Vendor's Lien—Estoppel—Sale of Land—Terms—Costs.

Appeal by the defendants from the judgment of TEETZEL, J., ante 997.

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

J. W. Bain, K.C., and M. L. Gordon, for the defendants.

I. F. Hellmuth, K.C., and W. J. Elliott, for the plaintiffs.

RIDDELL, J. (after setting out the facts):—It seems too clear for argument that, for valuable consideration, Wiley had undertaken to transfer the property to the Trusts and Guarantee Company; that, at a certain stage, he desired to get away from his definite undertaking; that, his solicitor advising a delivery as in escrow, an attempt was made (in and by the letter of the 7th March, 1907), to have the agreement made by Wiley modified in two particulars: (1) the transfers were not to be registered; (2) they were not to become the property of the Syndicate until an agreement between the Syndicate, Campbell, and Wiley should be carried out—and that, while the first change was acceded to by Warren (whether wisely or unwisely), the second was not. He says: "I will hold the transfers unregistered, subject to the terms of the undertaking that I have."

It is argued that the last words of Warren's letter have some significance; but, in view of all the correspondence, all they mean must be, "neither the rights of Wiley nor those of the purchaser Campbell, etc., the parties to the agreement you speak of, will be affected inter se by the transfers reaching our hands."

If these terms were not satisfactory to Wiley or his solicitor, they should have said so: but . . . , by their course of conduct, they must be taken to have acquiesced in the terms of this last letter.

Counsel for the Trusts and Guarantee Company seems to have thought that, notwithstanding the express agreement to hold the transfers unregistered, the company, being trustees,

were justified in registering them. No authority is cited for that proposition, and counsel before us expressly abandoned the position, and admitted for the purpose of this action that his clients had done wrong. Therefore, however the omission to register might have rendered the company liable to their cestuis que trust, the registration must be vacated and the transfers declared "*unregistered.*"

But, with that done, I cannot see that the company are not entitled to hold the transfers in trust "for the Cobalt Nipigon Syndicate," as set out in the undertaking of the 22nd November, 1906.

What is the "Cobalt Nipigon Syndicate"? Not simply Campbell, Dexter, and White, who, in a proceeding to which the defendants were not party, were held to be "the only members on the 26 November, 1906." See McKim v. Bixel, 19 O.L.R. 81, at p. 86.

There is no doubt that confusion has arisen by reason of the ambiguity in the name "The Cobalt Nipigon Syndicate." There was a partnership formed by Campbell, Dexter, and White, evidenced by an indenture of the 24th November, 1906 (exhibit 6), to continue for two years under the management of Campbell alone, he to have 80 per cent. of the profits and each of the others 10 per cent., and he to have the right, if either of the others should desire to retire, to buy him out for $500. This, if any, must have been the Cobalt Nipigon Syndicate which had dealings with Wiley. Then there is a more extensive "The Cobalt Nipigon Syndicate" provided for by another indenture of the same date (exhibit 5), to be composed of those three and "such other persons as may from time to time be entitled to membership in such Syndicate," the number of memberships to be unlimited, the three persons named to be entitled to 60 per cent. of the profits and the "members" to 40 per cent. "Memberships" were advertised for sale in advertisements referred to by Warren (exhibit 3), and some favourable answers received, with $120 enclosed for a "special membership" (see McKim v. Bixel).

It was this "Syndicate" for which the Trusts and Guarantee Company were to be trustees—a syndicate composed of three persons who were partners and an undetermined number of persons who were not partners, but rather like shareholders in a company or co-owners than members of a partnership. See 19 O.L.R. at p. 87.

It is plain that the "memberships," so far as appears, were bought on the advertisement, which states in so many words,

"Title to all mineral lands is and will be vested in the Trusts and Guarantee Company Limited," and "The Syndicate already own over 750 acres of valuable mining lands . . ."

It was clearly the duty of the Trusts and Guarantee Company to have this land vested in them before permitting the advertisement to issue—and, having permitted the advertisement to issue before such vesting, the company were clearly right in insisting upon its being done as soon as possible. "Vested" must in this connection mean "effectively and safely vested;" and I cannot understand the action of the company in waiving the right—which, in their position as trustees, may also have been a duty. It is possible that there were considerations which justified them in so doing: but, if so, they do not appear. But we need not consider this matter—the company consent now to be bound by their agreement—this consent and the judgment of the Court based upon it will not prejudice the right of the cestuis que trust or any of them against the trustees for breach of trust, if any damages accrue from such breach of trust, which is not to be anticipated.

It is and was the duty of the Trusts and Guarantee Company to set up and actively assert their claim to the land and conveyances as such trustees—and they also had a legitimate claim for expenses, commission, etc., as such trustees. The judgment obtained against the Cobalt Nipigon Syndicate by default of pleading must apply to the only Cobalt Nipigon Syndicate in existence in November, 1906, when A. M. Wiley is alleged to have agreed to sell to the "defendant the Cobalt Nipigon Syndicate for the consideration of $30,000" the lands mentioned—and that was the Syndicate formed by the first agreement of the 24th November of the three persons named—the new Syndicate had not been formed with "special members"—these came in in answer to the advertisement published after the sale and after the undertaking. No judgment against that Syndicate can bind the "special members"—they are not partners (McKim v. Bixel).

So long as there are persons for whom the Trusts and Guarantee Company are trustees, I think they are entitled to retain these transfers.

It is claimed that the plaintiffs have a vendor's lien. It is not proved as against the Trusts and Guarantee Company or their cestuis que trust that the amount was not paid—but, waiving that, when the company accepted the trust, it was represented by the owner of the land that the land had been paid for; it is apparent that the company would not have allowed

themselves to be represented in public advertisements as vested with the property if the land had not only not been paid for, but even wholly unpaid for. The representation was made that it should be acted upon, the advertisement represented the land as vested in the company—which, of course, implies not subject to a vendor's lien, but paid for; subscriptions were received on this basis by the company from special members, who are now cestuis que trust of the company; and I think the vendor is now estopped from setting up that the land is unpaid for—at least as against the "special members." I think, from the evidence of Warren, the position of E. as solicitor for Wiley and the Syndicate, and all the circumstances, that Wiley must have known and did know the whole plan. This, however, applies only to the "special members," who are entitled only to 40 per cent. of the proceeds of the lands—the judgment against the Syndicate will apparently bind the partners in that syndicate, i.e., those who are entitled to the 60 per cent.

It would seem to be the best disposition to make of the case to direct the sale of the lands; all parties to be at liberty to bid; pay out of the proceeds (1) the costs of the Trusts and Guarantee Company between solicitor and client of action and appeal; (2) any expenses, commission, etc., to which the said company are entitled; (3) the costs of all parties of the reference; and of the remainder divide 40 per cent. between the "special members" and pay the rest to the plaintiffs. The plaintiffs consenting to this, it should be referred to the Master in Ordinary to sell, tax costs, fix expenses, commission, etc., determine the "special members," and generally to do everything necessary to carry out the judgment—disposing of the costs of the reference as above stated.

Or, as a business proposition, the plaintiffs may think it wise and profitable to purchase or otherwise acquire the claims and rights of the "special members"—who they are, or at least who they were originally, must be known from the books of the Syndicate and of the defendant company. If this be done, upon the defendants being paid their costs, commission, and expenses as above, the plaintiffs would be entitled to a reconveyance of their property. The Master would fix the costs, etc., and dispose of the costs before him.

If the plaintiffs do not accept either course, I think the appeal should be allowed and the action dismissed, both without costs, but with a declaration that the defendants hold the transfers unregistered according to their agreement.

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

BOYD, C. JUNE 25TH, 1912.

*KERLEY v. LONDON AND LAKE ERIE TRANSPORTATION CO.

Constitutional Law—Ontario Railway Act, 1906 *sec.* 193—*Intra Vires—R.S.C.* 1906 *ch.* 37, *sec.* 9—*Delegation of Powers to Provincial Legislature—Running Electric Railway Cars on Sunday—Electric Railway wholly within Ontario—Work for General Advantage of Canada—Statutory Provision for Extension beyond Province—Sunday Laws—Company Incorporated by Dominion Charter after Passing of Statutes Impeached—Penalties—Carriage of His Majesty's Mail.*

Action to recover $1,200 penalties from the defendants for running their cars on Sunday, contrary to the provisions of the Ontario Railway Act, 1906.

J. A. Paterson, K.C., for the plaintiff.

M. Cowan, K.C., and J. B. Holden, for the defendants.

BOYD, C.:— . . . First, as to the legal status of the defendants, a body incorporated on the 17th March, 1910. On the ground, the line of track of the defendants extends over an area of some sixteen miles from London to Port Stanley on Lake Erie. Power is given by the charter to establish a line of lake steamers and so communicate with the State of Ohio at Cleveland. Power is also given to construct various ramifications all near-by the present line and all within the Province of Ontario. The railway is at present nothing more than an electric road within the Province. Its possibly larger operation in the future over other Provinces, or over the Great Lakes, is a matter of contingency that does not affect the present situation. Nevertheless, by reason of presenting in its application for incorporation this extended character as in contemplation, it became a subject for incorporation by Dominion charter, and so was passed the statute 9 & 10 Edw. VII. ch. 120, wherein the undertaking was declared to be a work for the general advantage of Canada, and the company was empowered to hold, maintain, and operate the railway, subject to the provisions of the Railway Act of Canada (R.S.C. 1906 ch. 37). That statute

*To be reported in the Ontario Law Reports.

does not, nor does the private Act, prohibit the running of cars on Sunday. The running in this case took place on the 11th, 18th, and 25th days of December, 1910. It is proved that on one of these days His Majesty's mail was carried, by special request, from London to Port Dover, in addition to the usual carriage of passengers and their belongings. . . .

[Reference to R.S.O. 1887 ch. 203; Attorney-General v. Hamilton Street R.W. Co., 24 A.R. 170; R.S.O. 1897 ch. 246; Re Lord's Day Act of Ontario, 1 O.W.R. 312; Attorney-General v. Hamilton Street R.W. Co., [1903] A.C. 524; In the Matter of the Jurisdiction of a Province to Legislate respecting Abstention from Labour on Sunday, 35 S.C.R. 589.]

In the statute 4 Edw. VII. ch. 32, amending the Dominion Railway Act, first appear the important clauses upon the force and effect of which the present litigation is mainly to be determined. One provision relates to every railway (electric and other) wholly situate within one Province of Canada, but in its entirety or in part declared to be a work for the general advantage of Canada, and enacts that it shall, notwithstanding such declaration, be subject to any Act of the Legislature of the Province in which it is situated, prohibiting or regulating work, etc., upon the first day of the week, which is in force at the time of passing the Act (sec. 6a). And by sec. 3 it is enacted that the Governor in Council may at any time and from time to time by proclamation confirm for the purposes of this section any Act of the Legislature of the Province passed after the passing of this Act, (i.e., 10th August, 1904), for the prohibition or regulation of work, business, or labour upon the first day of the week. And from and after the date of any such proclamation the Act thereby confirmed, in so far as it is in other respects within the power of the Legislature, shall, for the purposes of this section, be confirmed and ratified and made as valid and effectual as if it had been enacted by the Parliament of Canada. And, notwithstanding anything in this Act (i.e., the Railway Act) or in any other Act, every railway, steam or electric street railway and tramway, wholly situate within such Province, but declared by the Parliament of Canada to be in its entirety or in part a work for the general advantage of Canada . . . shall thereafter, notwithstanding such declaration, be subject to the Act so confirmed, in so far as that Act is otherwise intra vires of the Legislature."

This first appears as an amendment to the Railway Act, and is carried into the revision of 1906, where it now stands as sec. 9, with some few immaterial verbal variations: R.S.C. 1906

ch. 37, "An Act respecting Railways." This large committal of powers to the Provincial Legislature in respect of local railways was subject to some exceptions; the section was not to apply to any railway or part of a railway which forms part of a continuous route or system operated between two or more Provinces or between any Province and a foreign country, so as to interfere with or affect through traffic thereon,—or

(b) between any of the ports on the Great Lakes and such continuing route or system so as to interfere with or affect through traffic thereon,—or

(c) which the Governor in Council by proclamation declares to be exempt from the provisions of the section (sec. 9, sub-sec. 5).

In the year 1906, being that of the last revision of the Dominion statutes, the Province passed the Ontario Railway Act, 1906, assented to on the 14th May, in which provisions are to be found respecting and under the heading of "Sunday Cars." Section 193 (1) declares that no company operating a street railway, tramway, or electric railway, shall operate the same or employ any person thereon on the first day of the week commonly called Sunday, except for the purpose of keeping the track clear of snow or ice or for the purpose of doing any other work of necessity. With certain exceptions (not now relevant) the section is to apply to all railways operated by electricity, whether on a highway or a right of way owned by the company (sub-sec. 6).

The proclamation of the Governor-General in Council confirming sec. 193 of the Ontario Railway Act (just set forth) was duly promulgated on the 8th December, 1906.

The defendant company came into existence on the 17th March, 1910, by Dominion Act 9 & 10 Edw. VII. ch. 120, under this condition of prior legislation (federal and provincial). Nothing has been done, as I have said, by the company, in the way of lake navigation in connection with their line.

No proof was given of any such facts as would indicate that this local road formed part of a continuous route or system carrying through traffic, within the meaning of these words as used in railway legislation. The cases shew that there must be a direct physical connection between the local road and the other through road of which it is to form part, and that proper facilities by way of sidings and accommodations for the transfer of traffic must exist, and these generally should be sanctioned by the proper authorities (in this case the Board of Railway

Commissioners) before the particular road can form part of a "continuous route or system:" Hammans v. Great Western R. W. Co., 4 Ry. & Canal Traffic Cas. 181 (1883), and Great Central R.W. Co. v. Lancashire and Yorkshire R.W. Co., 13 Ry. & Canal Traffic Cas. 266 (1908). To the same effect is American Railway law: Blake v. Delaware and Raritan Canal Co., 22 N.J. Eq. 131, 402.

I find as facts that the road has always been strictly a local concern with no such connection as would constitute it part of "a continuous route or system," and that the traffic of the company was in no sense "through traffic," within the meaning of the Dominion Railway Act, R.S.C. 1906 ch. 37, sec. 9. So that the road as operated at the time of the alleged offences was not within any of the exceptions expressed in such section of the Dominion Railway Act. Wherefore the net result is that the defendant company, though it be an undertaking which has been declared to be for the public benefit of Canada, is yet, by virtue of the Canada Railway Act and the proclamation of December, 1906, subject to sec. 193 of the Ontario Railway Act, which prohibits the operation of electric railway cars on the first day of the week commonly called Sunday. . . .

The Parliament of Canada has, through the agency of the executive proclamation, ratified and confirmed sec. 193 of the Ontario Railway Act, and made it as valid and effectual as if it had been enacted by the Parliament of Canada: R.S.C. 1906 ch. 37, sec. 9 (3). So far as express language can effect anything, this defendant company has been made subject to sec. 193 in so far as it has been so confirmed (sub-sec. 4).

All that remains, as I regard the case, is to consider whether what has been done by this conjoint legislation is within the scope and power of the respective Legislatures under the Imperial Constitutional Act so as to justify this Court in exacting the penalties claimed. . . .

[Reference to Ex p. Green, 35 N.B.R. 137, at p. 147; The Queen v. Halifax Electric Tramway Co., 30 N.S.R. 469; Riel v. The Queen (1885), 10 App. Cas. 675, 678.]

The scheme of this twofold legislation is not to be regarded as a delegation of legislative power in a matter of criminal law to a body having no capacity to legislate criminally, but rather the designation by the Dominion of a legislative agency to decide whether it is expedient to enact a law for the regulation of the Lord's Day in its secular aspect as to railways entirely within the Province, and a legislative report being made

by an appropriate enactment, then to give full legal force and efficacy to such provincial action by accepting it and assuming responsibility for it as if it were a Dominion statute. The statute of the Province indicates the policy acceptable to the Province, and the Dominion says "be it so." In this regard the legislative power of the Province is no longer overridden by the Dominion, but is recognised as a power properly exercised. It appears to me that the Dominion may relax its hold on any internal provincial railway and lay it open in a defined degree to be regulated or controlled by the local legislature.

As I read the opinion given to the special case in 35 S.C.R., the Court intimates that a Province has no power to restrict the operation of companies of their own creation to six days in each week, because that restriction seems to be within the views expressed in the Privy Council and to be regarded as a matter of criminal law, ultra vires of the Province. See pp. 582, 592, in answer to question 5.

This point in this limited way as to purely provincial corporations was not before the Lords of the Privy Council, and their guarded deliverance would rather imply that this was one of the questions not passed upon. However, with all proper deference to the Judges of the Supreme Court, I cannot regard the opinion expressed on this head as a judgment binding on me, nor can I accept it as the law. I fail to see why the Province may not legally and validly incorporate a railway company in Ontario as a local undertaking with power to operate only on six days of the week. A refusal to allow work on the Sunday would not in this connection savour of the criminal law, but would be a supposed or an accepted salutary rule of conduct imposed for the benefit of the workmen and the better working of the road itself. If the company accept such a charter with such a limitation, wherein is the Constitutional Act offended against? The legislative working of the whole constitution in these cases of apparent conflict or discrepancy is to be accommodated or adjusted by the expedient worked out in the Hodge case and others in the same direction: Hodge v. The Queen, 9 App. Cas. 117; Fielding v. Thomas, [1896] A.C. 611; Grand Trunk R.W. Co. v. Attorney-General of Canada, [1907] A.C. 68. . . .

Briefly to sum up the results. It is not to be overlooked that the defendant in this case takes the Dominion charter subject to the state of existing legislation. It is taken, therefore, with knowledge that the Dominion had permited the Province to legislate as to Sunday work on local railways (despite the de-

claration as to the undertaking being for the public advantage of Canada), and that the Province had legislated to the effect that for six days only should the road be worked for profit, and that the Executive of the Dominion, under sanction of the Parliament of the Dominion, had approved and confirmed this provincial law. How then can the defendant defend this action on the ground that the charter was not taken on this footing? Can the company be allowed thus to "approbate and reprobate"? Can the privileges of the charter be enjoyed and the conditions be repudiated?

I may add a few words as to laws having more than one aspect. . . .

[Reference to Gibbons v. Ogden, 9 Wheat. 1, 204; Calder and Hebble Navigation Co. v. Pilling, 14 M. & W. 76; Thomas v. Sutters, [1900] 1 Ch. 10, 15.]

By the legislation of the Dominion it has been left to the Province to say whether any condition shall be imposed upon local electric railways in regard to the working of the road on Sundays. And the response made by the Province is, that it is fitting that there should be one day of rest in seven, and that Sunday is the fittest day for that purpose. Good reasons may easily be found for such a policy, having regard to Sunday as a secular institution; public economy requires for sanitary reasons a periodical day of rest from labour, and this salutary rule may rightly and legally be imposed upon corporations which owe their existence to the provincial power which so legislates and creates. This is not, therefore, a general law extending to the public at large—to all classes and conditions of men—but to a corporate body over which the Local Legislature has, inherently or by delegation from the Dominion Legislature, plenary power as to its conduct, governance, and operation.

The late decision of the Supreme Court of Canada on Sunday law in Ouimet v. Basin (not yet reported) is not in point for the present case. It is distinguishable, both because it purports to be a general law framed for all persons, and because the case did not involve the question of local corporations over which the Province has constitutional power and competence.

The legislation is not to be regarded as a section of the criminal law of Canada, but as a particular penal law intended for the regulation of local electric railways within the Province.

So viewed, I would uphold the impeached legislation as intra vires, and would award to the plaintiff the penalties claimed.

There should be no exemption as to the day on which the mail was carried. The cars were not run for the purpose of carrying the mail, but the mail was carried as a favour because the cars ran that Sunday.

Costs to the plaintiff.

MIDDLETON, J. JUNE 25TH, 1912.

CANADIAN NORTHERN R.W. CO. v. BILLINGS.

Railway—Right to Cross Private Way Adjoining Highway—Order of Board of Railway Commissioners—Interpretation—Confinement to Highway—Rights of Owner of Private Way—Dedication—Expropriation.

Action for an injunction to restrain the defendant from interfering with the construction by the plaintiffs of their railway across a certain road shewn upon a plan referred to in an order of the Dominion Board of Railway Commissioners, dated the 10th May, 1912; and counterclaim by the defendant for a declaration of his right to the road as a private way and an injunction restraining the plaintiffs from trespassing upon it.

G. F. Macdonnell, for the plaintiffs.

D. J. McDougal, for the defendant.

MIDDLETON, J.:—The defendant asserts that the order of the Railway Board does not apply to a strip of land fifteen feet in width along the northern limit of the road in question, and that the road referred to in the order of the Railway Board is altogether upon lot 17. The fifteen feet is in fact the southerly fifteen feet of lot 16, and constituted a private roadway leading from the River road to the old Billings homestead, used as a private road many years prior to the dedication of the public road on lot 17.

At the trial it was proved that the defendant and his predecessors in title had owned and occupied lot 16 for more than eighty years. The witness McKellar lived in the Billings residence for eighteen years, from early in 1857 to the year 1874. Mr. Charles M. Billings, son of the late Charles Billings and brother of the defendant, carried the history of the locus in quo from 1874 down to the present time.

A road was originally constructed near the southern boundary of lot 16. In 1860, it was straightened; and, from that time on until at any rate quite recently, there has been no material change. In 1860, the fence, which had theretofore been to the south of this road, was moved to the north; a ditch was constructed at the side of the road; and this road for many years was the only means of access to the house from the River road, which lies to the west of the railway track.

About 1854, the St. Lawrence and Ottawa Railway was constructed, crossing this private road. This railway is now operated by the Canadian Pacific Railway Company, and is called in the evidence "the C.P.R." Where this railway crossed the road, gates were erected, and these were generally closed. Until quite recently the gates were maintained, and occasioned no difficulty, as there was no travel save by those going from the River road to the residence.

In 1892, the late H. O. Wood laid out lot 17 in building lots, and, according to his plan, laid out a street called Billings avenue, twenty-five feet wide, to the north of lot 17. This street was immediately to the south of the old farm road upon the Billings property, which was immediately north of the division line between 16 and 17. . . .

From some time shortly after this date, the two adjoining roads have been used without much distinction. The travelled portion of the road has been the middle of the forty feet. This portion is said to be twelve feet wide, leaving a margin of fourteen feet on each side. The gates were still maintained at the "C.P.R." crossing, and were not removed until about four years ago, when, owing to the increased traffic arising from the erection of some houses to the east of the "C.P.R.," the travel had increased to an extent which rendered the keeping of the gates closed a troublesome matter. The Canadian Pacific Railway Company then, of their own motion, took down the gates, and constructed fences and cattle-guards. . . .

It may be that the travelled road encroached slightly upon lot 16; but the material question to be determined, in the first place, is, whether any portion of the fifteen feet in question still remains the private property of the defendant. An encroachment of one or two feet does not seem to me to be material.

Charles Billings the elder died on the 29th November, 1906, and he left to his son, Charles M. Billings, all of lot 16 between the railway and the Rideau river, save and except a strip of land fifteen feet in width along the southern boundary, "which I

hereby reserve for a public highway.'' He also gave to the present defendant all the remainder of lot 16. The residue of his estate is given to his two sons, share and share alike. This will is dated the 29th August, 1904, prior to the location of the Canadian Northern Railway; so that the railway referred to as constituting the division between the defendant and his brother is the ''C.P.R.'' line.

Upon this will, I think it is clear that Charles M. Billings took only the land west of the railway and north of the fifteen-foot road in question. I think it is equally clear that it was not the testator's intention to give the road west of the railway to the defendant; as the ''remainder of lot 16'' means, I think, that which remains, not only after the devise to Charles of his portion, but after excepting from the lot the fifteen-foot strip to the south of Charles's, which is reserved for a public highway.

It was conceded by counsel for both parties that this reservation was quite insufficient to amount by itself to a dedication; and, therefore, the road west of the ''C.P.R.'' would pass to the defendant and his brother as residuary devisees.

It would have been more satisfactory if Charles M. Billings had been a party to this litigation, so that the matter might now be determined once for all; but, as it is plain that what provoked the bringing of this action was the enclosure by the defendant of the land in question where the plaintiffs' line crosses the road, I think I must deal with the action as it is at present constituted; and, looking at the matter from the defendant's standpoint, I think I would also be bound to hold that one of two tenants in common is entitled to defend the land from trespass if the railway company have no title.

An application was made to the Dominion Railway Board by the plaintiffs, who had located their line immediately to the west of the land occupied by the Canadian Pacific for permission to cross ''the public road between lots 16 and 17 . . . as shewn on the plan and profile on file with the Board;'' and on the 7th February, 1911, an order was made by the Board giving the permission sought. Upon the hearing before the Board Mr. Billings was present. Some discussion took place as to whether he was present in his capacity as property-owner or as municipal officer. I do not think this makes any difference, as the order of the Board is in its nature a judgment in rem, and is binding upon all.

I am, however, unable to follow the plaintiffs' counsel when he asks me to read into this order an adjudication by the Rail-

way Board that this fifteen feet constituted part of the public road. The order itself deals only with the public road between lots 16 and 17. The description is not particularly apt, as the road is not between 16 and 17. The road, as shewn on the registered plan, was originally part of lot 17. The private road in question is entirely part of lot 16.

The plan is said to be drawn on a scale of 400 feet to the inch; and an engineer, applying his scale, states that the road, as shewn upon the sketch or plan, scales forty feet. From this I am asked to build up an adjudication that the fifteen feet had become a public road.

The plan, although no doubt substantially correct, is not correct in other matters when tested by a scale. Stanley avenue, for example, is shewn as of much greater width than it is upon the ground or upon the registered plan.

I think the fair test as to what is concluded by the order of the Board is to consider precisely what was before the Board for adjudication. The railway company, before they can enter upon private lands, must take proper expropriation proceedings. Before they can cross a public road, they must obtain the leave of the Board. The contest before the Railway Commission was as to the terms upon which the railway should be permitted to cross the public road. Nothing was said about the adjoining private way; no contest was raised as to whether this fifteen feet was or was not part of the public road; and I do not think that the Board ever adjudicated, either intentionally or unintentionally, upon the matter now in issue.

The title to the right of way of the railway was not disclosed before me; and I must, therefore, assume that the plaintiffs have not acquired any title to the fifteen feet, and that their action must fail, unless there has been a dedication to the public.

On the facts I do not think that there was a dedication. As said by Lord Macnaghten in Simpson v. Attorney-General, [1904] A.C. 493, "it is clear law that a dedication must be made with the intention to dedicate, and that the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication."

I do not think, in this case, that the defendant has done anything amounting to a dedication. In this view, the action of the plaintiffs fails, and must be dismissed. For the like reason, an injunction should be awarded to the defendant upon his counterclaim.

The plaintiffs undoubtedly have a right to expropriate;

and the piece of land to be taken is of such trifling value that it is a great pity that the parties have not up to the present been able to settle. The defendant and his brother take this piece of land, impressed with the expression of their father's intention that it should be made a public highway. Probably the defendant himself will sooner or later desire to convert the strip of land to the east of the railway track into a highway, so widening the road from twenty-five to forty feet. In the meantime, the proper course is, I think, indicated by the Supreme Court of Canada; and I ought not to dissolve the injunction which has been granted to the plaintiffs or make operative the injunction which I now award to the defendant until an opportunity is given to the plaintiffs to take expropriation proceedings. This course is justified by what is said in the Supreme Court in Sandon v. Byron, 35 S.C.R. 309.

This judgment will, therefore, not be operative for sixty days, so as to allow the suggested proceedings to be taken.

The defendant is, I think, entitled to his costs.

BENEDICT v. BRANDON—MASTER IN CHAMBERS—JUNE 19.

Costs—Dismissal of Action—Settlement—Costs of one Defendant Unprovided for—Remedy—Practice.]—This action was brought against three defendants, and was set down for trial on the 21st February, 1912. On the 11th March, an order was made dismissing it without costs, upon a consent signed by the plaintiff's solicitor. The consent was given on the receipt of a letter, dated the 29th February, written by the solicitor of two of the defendant to the plaintiff's solicitor, in which it was stated that the action had been settled between the plaintiff and one of the two defendants referred to. The plaintiff confirmed this, on being referred to by his solicitor. Nothing was said about the third defendant, Anderson; who, after some correspondence, moved for an order for payment of his costs by the plaintiff or to set aside or vary the order of dismissal. Anderson's costs of the action, exclusive of the costs of this motion, amounted to $68.26 (as taxed by agreement). The Master said that either the plaintiff must pay Anderson's costs as taxed, with a reasonable additional sum for the costs of this motion (say $20), or else the order must be varied by confining the dismissal to the other two defendants—leaving the plaintiff in either case to take such steps as he might think best to be indemnified by those defendants. Costs of the motion as between the plaintiff and

the two defendants to be part of the plaintiff's claim for indemnity if pressed—otherwise no costs. D. C. Ross, for the defendant Anderson. H. S. White, for the other defendants. A. D. Armour, for the plaintiff.

WALLBERG v. JENCKES MACHINE CO.—MASTER IN CHAMBERS—JUNE 20.

Security for Costs—Plaintiff out of Jurisdiction—Property in Jurisdiction—Company-shares—Undertaking.]—Motion by the plaintiff, who resided at Montreal, to set aside a præcipe order for security for costs. The plaintiff made affidavit that he had assets within the jurisdiction exceeding in value $400, and instanced 1,000 fully-paid up shares of the Canada Wire and Cable Company Limited. He was not cross-examined on this; but, in reply, the defendants' solicitor made an affidavit that he could not find any facts about these shares, "other than the fact that the said company has at the present time no known market value." The Master was of opinion that, as nothing was said of the nature of the inquiries made by the defendants, the plaintiff's unimpeached affidavit was entitled to prevail—and, on his undertaking not to deal with the shares without notice to the defendants, the motion should be granted; costs in the cause. See Wooster v. Canada Brass Co., 7 O.W.R. 748, 807; American Street Lamp and Supply Co. v. Ontario Pipe Line Co., 11 O.W.R. 734. M. L. Gordon, for the plaintiff. W. H. Garvey, for the defendants.

FOSTER v. MITCHELL—DIVISIONAL COURT—JUNE 20.

Partnership—Account—Valuation of Assets — Goodwill — Interest—Assets of Former Firm—Right of User—Costs.]—Appeal by the plaintiff and cross-appeal by the defendant from the order of TEETZEL, J., ante 425, varying the report of a Special Referee in a partnership action. The appeal and cross-appeal were heard by CLUTE, SUTHERLAND, and LENNOX, JJ. The judgment of the Court was delivered by CLUTE, J., who said that the principal point argued on behalf of the plaintiff was with reference to the item of interest upon $5,000 charged as a valuation of the goodwill of the business. In valuing the assets which were handed over to the partnership, the goodwill

was included, and properly included, inasmuch as it formed a part of the property from which the profits were to arise. Upon this question, the Court agreed with TEETZEL, J. Reference to Hibben v. Collister, 30 S.C.R. 459. The plaintiff's appeal should be dismissed, except as to the declaration that the assets of the former firm had passed to the new firm. As to this, there should be a declaration that there was no sale of the assets, but only a right of user, for which interest was to be paid during the continuance of the partnership. The cross-appeal should be dismissed, except as to the declaration above-referred to, from which the defendant also appealed. As both parties had failed in their appeals, except upon a point as to which they practically agreed, there should be no costs. Reference back to the Referee to make his final report and dispose of the question of costs under the original order of reference. F. E. Hodgins, K.C., for the plaintiff. I. F. Hellmuth, K.C., and C. L. Dunbar, for the defendant.

COWIE v. COWIE—RIDDELL, J., IN CHAMBERS—JUNE 21.

Husband and Wife—Alimony—Judgment—Enforcement by Sale—Executions.]—A petition by the plaintiff for sale of the defendant's land to satisfy a judgment for alimony. The defendant appeared in person and said that it was impossible for him to pay the amount of alimony awarded. RIDDELL, J., said that, following Abbott v. Abbott, ante 683, he must hold the petition regular; and, if the applicant filed a sheriff's certificate of no executions covering this land, the order might go; costs of procuring the certificate and of the petition to be paid by the defendant—or the plaintiff might add the amount to her claim. If executions were found affecting the lands, the case might be mentioned again. J. W. McCullough, for the petitioner.

MCFARLANE v. COLLIER—BRITTON, J.—JUNE 21.

Contract—Oral Agreement—Burden of Proof—Failure of Plaintiff to Satisfy.]—Action to recover the sum of $4,300, upon an alleged oral contract made between the plaintiff and the defendant, at the Oriental Hotel, in Peterborough, on or about the 15th January, 1910, to the effect that the plaintiff would remain as superintendent with the Wm. Hamilton Company Limited until the end of the current year, and on the basis of a yearly hiring, and, in consideration therefor, the defendant

would pay to the plaintiff the sum of $4,300. BRITTON, J., said that the whole question was one of fact. No person other than the plaintiff and defendant was present to hear what was said when the alleged bargain was made. The learned Judge then reviewed at length the facts and circumstances and the testimony given at the trial; and concluded:—The onus of establishing this contract is upon the plaintiff. If there is any reasonable doubt, that doubt must be resolved in favour of the defendant. I am not free from doubt. No doubt, the defendant made a very large amount of money out of these transactions, and the plaintiff assisted the defendant to make it. It may be that the defendant promised to pay out of these profits something that would be fair. It might be that the defendant was lulled into security and silence by something the defendant said, in the way of promising to do what would be fair between them—I cannot say—but all this would fall short of the contract which the plaintiff, to succeed, must establish. In the view I take of the evidence, the action must be dismissed; but, in the circumstances, it will be without costs. F. D. Kerr and A. D. Meldrum, for the plaintiff. R. R. Hall, K.C., and S. T. Medd, for the defendant.

DENNEEN v. WALLBERG—MASTER IN CHAMBERS—JUNE 22.

Discovery—Examination of Defendant—Place for Examination—Residence of Defendant—Con. Rules 447, 477.]—Motion by the plaintiff for an order requiring the defendant to attend at Toronto for examination for discovery, pursuant to Con. Rule 447, on the ground that he is resident in this Province. The Master said that Wallberg had in several cases been a plaintiff or defendant, and had always given his residence as at Montreal. See Standard Construction Co. v. Wallberg, 20 O.L.R. 646, as an instance. He made affidavit that his residence was still there; on this he had not been cross-examined. An affidavit was made, in support of the motion, that the defendant rented apartments in Toronto, for which he had paid rent up to the 1st July prox. Dryden v. Smith, 17 P.R. 500, and cases there cited, shew that a person "may have several residences." In Ex p. Breull, 16 Ch.D. at p. 88, Lush, L.J., said on this point, as to what constitutes residence: "The words in question are susceptible of a wider or a narrower interpretation, and in order to interpret them we must have regard to the object and intent of the Rule." Applying that principle to

the present case, it seemed that Con. Rule 477 should be resorted to, following Cox v. Prior, 18 P.R. 492; Lefurgey v. Great West Land Co., 11 O.L.R. 617; as well as Dryden v. Smith, supra. It was said by the learned Chancellor in Pritchard v. Pattison, 1 O.L.R. at p. 42, that, though "there may be strong suspicion or even probable inference that" the view of the moving party is correct, yet, where the contrary is sworn, "one hesitates to find perjury for the purpose of" making an interlocutory order. Here, however, there was neither suspicion nor probable inference. The defendant, like many other residents outside the Province, had many business interests here, and was, no doubt, often in Toronto. Still that did not make him a resident so as to make Con. Rule 447 applicable, even though he might have permanent lodgings here. Motion dismissed. No costs of this motion, nor of that made on the 10th instant, the costs of which were reserved in anticipation of the present motion, as one might fairly be set off against the other. The plaintiff to have an order under Con. Rule 477 for examination of the defendant at Montreal, unless it may be arranged to be taken here. W. T. J. Lee, for the plaintiff. R. W. Hart, for the defendant.

RICKERT v. BRITTON—MASTER IN CHAMBERS—JUNE 22.

Security for Costs—Nominal Plaintiff—Former Application—Res Judicata—Costs of Interlocutory Motion Unpaid.]—Motion by the defendants for an order for security for costs. After the previous motion, ante 1008, the plaintiffs made a motion which is noted ante 1272, sub nom. Rickart v. Britton Manufacturing Co., which was dismissed with costs to be paid by the plaintiffs forthwith after taxation. Execution issued for these costs against Carroll and the other plaintiffs, and was returned nulla bona. The defendants now moved for security, on the ground that Carroll was only a nominal plaintiff, and had no cause of action. The Master said that he still thought that this ground could be taken only on a motion made under Con. Rule 261: Knapp v. Carley, 7 O.L.R. 409. No inquiry as to this could be entertained by the Master—he could not do indirectly what there was no power to do directly. The present motion seemed also in effect an appeal from the order made on the 11th April (ante 1272). Upon the motion then made it was held that Carroll was not "a merely nominal plaintiff," but, "as a member of the Union, had an interest in the action." That order was not ap-

pealed from, and, so far as the Master was concerned, this point was res judicata. The Master further said that the objection that a plaintiff has merely a nominal interest must be supported by "very clear proof—before the Court should intercept it at the outset by an order for security for costs:" Pritchard v. Pattison, 1 O.L.R. 37; and referred also to Wright v. Wright, 12 P.R. 42, following Stewart v. Sullivan, 11 P.R. 529, as shewing that the Master, not having the inherent jurisdiction of the Court, cannot stay an action for non-payment by the plaintiff of interlocutory costs. Motion dismissed, with costs to the plaintiffs in any event, without prejudice to a substantive application to the Court as in Stewart v. Sullivan, supra. Casey Wood, for the defendants. J. G. O'Donoghue, for the plaintiffs.

RE CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO.—RIDDELL, J., IN CHAMBERS—JUNE 22.

Railway—Expropriation of Lands—Warrants for Possession—Sums to be Paid into Court.]—Applications by the railway company for warrants for possession of lands taken. The sole question was as to the amounts to be paid into Court. RIDDELL, J., after perusal of the material, ordered that there should be paid in: for C. A. Annis, $2,000; for James Stanley, $4,000; for J. D. Stevens, $2,500; for R. R. Stevens, $2,500. J. D. Spence, for the railway company. James Pearson, for the landowners.

YATES v. CITY OF WINDSOR—FALCONBRIDGE, C.J.K.B.—JUNE 22.

Highway — Nonrepair — Snow and Ice — Injury to Pedestrian—Gross Negligence—Damages.]—Action by Thomas H. Yates for damages for injuries sustained by falling on ice that had been allowed to accumulate, as alleged, by negligence of the defendants, on the sidewalk on Goyeau street, Windsor, on the 25th January, 1912. The learned Chief Justice reviews the evidence and finds that the defendants were guilty of that gross negligence causing the accident which the statute requires to render the defendants liable therefor. He assesses the plaintiff's damages at $1,250, and gives judgment in his favour for that sum, with costs. O. E. Fleming, K.C., for the plaintiff. A. St. George Ellis, for the defendants.

MACMAHON v. RAILWAY PASSENGERS ASSURANCE CO.—MASTER IN CHAMBERS—JUNE 24.

Discovery—Examination of Plaintiff—Order for Further Examination—Stay of Proceedings until Plaintiff's Return from Abroad.]—By an order of the Master made on the 6th May, 1912 (ante 1239), the plaintiff was required to attend for further examination for discovery; and this was affirmed by RIDDELL, J. (ante 1301). The defendants then served an appointment for the plaintiff's examination on the 7th June. The plaintiff, being absent in Europe, did not attend. The defendants then asked for a consent from his solicitors to have the action stayed until his return and examination. This being refused, the defendants now moved for such an order. Upon the motion it appeared that, since the order of RIDDELL, J., the marriage certificate of the plaintiff's mother had been produced, and a copy taken by the defendants' solicitors. It had been previously stated that this would satisfy them. It now appeared that, as they could get no satisfaction about admitting the marriage certificate, in such form as would enable them to treat it as part of the examination for discovery, they intended to withdraw the offer. The Master said that the case was similar to that of Maclean v. James Bay R.W. Co., 5 O.W.R. 440, 495. There the action was stayed for a month, and the defendants were directed to examine the plaintiff on commission. Here there could not be any trial for nearly three months. In the opinion of the Master, unless some arrangement could yet be made, as by making the certificate part of the plaintiff's productions, which seemed a reasonable course to adopt, an order must go to stay the action until the return of the plaintiff or until the 31st August, if it should be necessary to issue a commission. Costs of this motion to be costs in the cause. Shirley Denison, K.C., for the defendants. G. H. Sedgewick, for the plaintiff.

MCDONALD v. EDEY—MIDDLETON, J.—JUNE 25.

Architect — Negligence — Damages — Counterclaim — Commission — Costs.]—The plaintiffs alleged that the defendant, who was employed by them as an architect in the erection of a house, was liable for damages by reason of his careless, negligent, and unskilful conduct in and about the building in question. The damages claimed were $2,500. The defendant,

denying the plaintiff's allegations, counterclaimed to recover his commission. MIDDLETON, J., said that most of the specific claims put forward by the plaintiffs were negatived by the evidence at the trial; and all the claims were very much exaggerated; yet, in the result, he thought that there was some negligence on the part of the defendant. The two matters in which the defendant was to blame were: allowing the building to be so erected that the eave overlapped the eave of the adjoining building, also owned by the defendant; and his failure to compel the carpenters to use flooring in accordance with the specifications. It was said that the overlapping of the eaves would interfere with the selling value of the premises. This claim was very much exaggerated. The fact that the overlapping eave keeps the 18 inches of space between the houses dry and prevents the walls becoming wet and so injured, was not to be overlooked. The plaintiffs stood by and did not in any way complain of this when the building was located; and, while some allowance should be made upon this head, it should not be large. As to the flooring, the specifications called for flooring not exceeding 4-1/2 inches in width. About 30 per cent, of that actually lad down was 5-1/2 inches in width. This rendered the floor boards more liable to warp and to leave wider cracks in shrinking. The architect was to be allowed 5 per cent. commission upon the erection, or $200 in all; and he had received $50. The learned Judge said that, after giving the matter the best consideration he could, and having in view the exaggerated claims originally made—some of which were pressed at the trial—he had arrived at the conclusion that the best solution of the matter was, to direct the defendant to refund the $50 and to set off the plaintiffs' claim for damages against the defendant's claim for commission—in other words, to assess the damages at $200, the amount which would be payable for commission. No costs. J. J. O'Meara, K.C., for the plaintiffs. T. A. Beament, K.C., for the defendant.