THE
ONTARIO WEEKLY REPORTER

VOL. 23 TORONTO, DECEMBER 5, 1912. NO. 7

HOLMESTED, K.C., IN CHAMBERS. NOV. 13TH, 1912.

QUEBEC BANK v. FREELAND.

4 O. W. N. 305.

Judgment — Motion for Summary — Practice and Procedure—Prima Facie Defence Disclosed—Rule 603 not to be Improperly Used by Plaintiffs—Costs to Defendants in any Event.

Motion for judgment under Rule 603 in an action on a promissory note. Plaintiffs' manager was examined as a witness by defendants and a *prima facie* defence was admittedly established thereby, the outlines of which had been communicated to plaintiffs by letter before the launching of the motion.

HOLMESTED, K.C., in Chambers, dismissed motion, costs to be to defendants in any event of cause, except the costs of examining plaintiffs' manager, which were to be treated as costs of discovery.

Motion for judgment under Con. Rule 603 in an action on a promissory note.

J. E. Jones, for the defendant Freeland.

D. T. Seymour, K.C., for the plaintiff.

GEO. S. HOLMESTED, K.C.:—For the purpose of resisting the motion Mr. Strickland, a local manager of the plaintiffs, has been examined at great length and it is practically conceded by counsel for the plaintiff that his examination has disclosed such a state of facts that would entitle the defendants to have leave to defend. The examination of Mr. Strickland, I am informed, was taken several days and the shorthand notes of it have, I am informed, not yet been extended. It is, however, admitted by counsel for both parties that the examination has been such as would probably in any case have been necessary for the defendants to make for the purpose of discovery. The costs of this examination constitute the principal part

of the costs of this motion for judgment. The motion for judgment fails, and in disposing of the question of the costs I ought, I think, to arrive at a conclusion whether in the circumstances the motion was properly made. The object of Rule 603 is no doubt to furnish a summary remedy in simple cases, and to save thereby unnecessary costs; but a resort to that Rule ought not to be had, where it is known to the plaintiff that there is a *bona fide* dispute as to his right to recover. In this case a letter from the defendants' solicitors was read to me on the argument of the motion, but of which I do not find a copy among the papers, which very clearly intimated to the plaintiff that the defendants disputed their right to recover on the note in question and giving also, as I remember, an intimation of the grounds of defence. This defence I will not say is established, but is at all events shewn not to be without some appearance of substance, owing to the apparent discrepancy between the plaintiffs' books and the testimony of Mr. Strickland as to the time when the plaintiffs actually became the holders of the note in question. In these circumstances it does not appear to me that the plaintiffs were right in seeking to obtain judgment under Rule 603, and it would be wholly frustrating the object of that Rule to permit plaintiffs to litigate on a motion under that Rule a case which ought fairly and reasonably to be carried to trial in the usual way. I think, therefore, that the plaintiffs should in any event pay to the defendants their costs of the motion, except the costs of the examination of Strickland, which are to be treated as costs of discovery.

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 12TH, 1912.

CHAMBERS.

LAND OWNERS LIMITED v. BOLAND AND PAXTON.

4 O. W. N. 305.

Account—Change of Solicitors — Discontinuance of Action—Motion by Plaintiffs for Order for Account—Costs.

J. J. Gray, for the motion.

J. G. Smith, for the company.

J. H. Spence, for the defendants.

HON. MR. JUSTICE SUTHERLAND:—The plaintiff company since the launching of the motion having obtained an order changing solicitors and having through their new solicitors filed and served a notice of discontinuance the action is at an end and the motion must be dismissed. The defendants will be entitled to their costs under the circumstances as against the plaintiffs.

I do not think I can now, or should if I had the power, in view of the facts so much in dispute, make an order as asked by Pickenan on his consent filed joining him as a plaintiff or substituting him as such in this action as brought on his own behalf or on behalf of himself and all other shareholders of the plaintiff company.

HON. MR. JUSTICE LENNOX. NOVEMBER 13TH, 1912.

TRIAL.

LITTLE v. HYSLOP.

4 O. W. N. 285.

Executors and Administrators—Loan by Deceased—Claim of Repayment — Corroboration — Event of — Interest — Statements of Deceased as to Repayment—Admissibility—Scale of Costs—Costs of Administrator Allowed in Full.

Action by an administrator for $700, alleged to have been loaned by deceased to defendant, her son. Defendant admitted borrowing $650 from his mother, but claimed it had been repaid.

LENNOX, J., *held*, on the evidence, plaintiff was entitled to judgment for $577.50, interest from April 5th, 1910, and costs on the County Court scale, without set-off.

Costs of plaintiff, as administrator, to be paid out of estate as between solicitor and client, on the High Court scale.

"A claim of repayment to one deceased must be corroborated, and where the payments are wholly unconnected, corroboration of an item here and there is not a corroboration of the whole account."

Thompson v. *Coulter*, 34 S. C. R. 261; *Cook* v. *Grant*, 32 U. C. C. P. 511, and *Re Ross*, 29 Grant 385, referred to.

Action tried at Walkerton on the 22nd October, when judgment was reserved.

Plaintiff as administrator of the estate of Esther Hyslop, deceased, sued for recovery of $700 alleged to have been loaned by the deceased to the defendant, her son, on the 5th April, 1907, and for interest thereon.

The plaintiff also claimed a lien upon the property purchased by the defendant with this money.

The defendant admitted that he borrowed $650 from his mother, but says he was not to pay interest and that he re-paid, and over-paid, this money to the deceased.

J. H. Scott, K.C., for the plaintiff.

Otto E. Klein, for the defendant.

HON. MR. JUSTICE LENNOX:—The evidence shews that on the date in question there was $700 drawn from the deceased's bank account; and the defendant admits that he drew out this money. But the defendant says he gave his mother $50 out of that amount, or out of money he had on hand, the same evening. His wife gives some evidence upon this point, too; and although, as I shall mention later, I place no great reliance upon the evidence of the defendant or his wife, yet the plaintiff must establish the loan; and I cannot say that I am satisfied that it was for more than $650. The defendant is not at this point giving evidence of repayment—he and his wife are shewing that only $650 was borrowed.

After careful consideration of the circumstances and evidence, I have come to the conclusion that the defendant agreed to pay interest; and I allow interest at five per centum per annum. As between strangers, a loan imports payment of interest, and, in view of the very limited means of the deceased, the doctrine of advancement could find no proper place.

The onus is, of course, on the defendant to prove repayment; and, being "an opposite or interested party" he is not then entitled to a finding in his favour "on his own evidence . . . unless such evidence is corroborated by same other material evidence." R. S. O. ch. 73, sec. 10, *Thompson* v. *Coulter* (1903), 34 S. C. R. 261. And where the alleged payments are wholly unconnected—as they are here—corroboration of an item here and there is not corroboration of the whole account. *Cook* v. *Grant* (1882), 32 U. C. C. P. 511; *Re Ross* (1881), 29 Grant, 385.

The defendant called evidence which would amount to corroboration within the statute, if I could believe it. But, unfortunately for the defendant, I can place no confidence at all in the testimony of Hector McDonald; and defendant's own evidence and the evidence of his wife fell very far short of convincing me that they were telling the truth.

At this point, taking the testimony of these three witnesses alone, and carefully scrutinising the various entries contained in defendant's book of account, the question of corroboration hardly arises as even without reference to the statute—I would not be able to find in favour of the defendant as to the alleged payments.

But the evidence of Martha Wallace, as far as it goes, may, I think, be invoked to relieve the defendant. It is not corroboration—in fact, it is inconsistent with the defendant's evidence—but I am satisfied that the deceased did tell Mrs. Wallace that the defendant had paid her $100, and $30, and three or four sums of $10 each. This evidence was objected to; but it was clearly admissible even upon the narrow ground of being a statement against the interest of the deceased.

I will allow the defendant credit for the outside sum mentioned by Mrs. Wallace, $170. Upon the evidence it is difficult for me to determine when these sums were paid. If I credit the $170 as paid at the end of the third year I shall, I believe, be doing substantial justice between the parties.

The loan, with interest at five per cent. to the 5th April, 1910, will total $747.50. Deducting $170 from this, leaves a balance of $577.50.

There will be judgment for the plaintiff for $577.50, and interest thereon from the 5th April, 1910, with costs on the County Court scale; and the defendant will not be entitled to set off costs.

The defendant has not asked for a stay of execution; and in view of this, I do not think that a declaration of lien is necessary.

The executor was justified in claiming the full $700 and interest. The action was therefore properly brought in the High Court, and he will be entitled to costs out of the estate, as between solicitor and client, upon the High Court scale.

SINGLE COURT.

HON. MR. JUSTICE BRITTON. NOVEMBER 8TH, 1912.

LANE v. BEACHAM.

4 O. W. N. 243.

Vendor and Purchaser—Will—Restraint on Alienation—Not Intended to be Absolute—Vesting of Interests in Remainder—Objections Held Valid—No Costs.

Vendor and purchaser application. Vendors were widow and children of deceased owner of lands, the widow being unmarried and the children all of age. Purchaser urged two objections to title: (1) That deceased had created a valid restraint on alienation by clause 5 of his will providing: "Furthermore, I do not allow my executors to let any lands be sold, only to my own heirs—they may buy or sell to each other"; and (2) That the children had no vested interests to dispose of. The will gave a life estate to the widow till her death or remarriage, on either of which events it was to pass to the children absolutely, and clause 6 added: "Should any of the boys marry and have heirs, the heirs shall claim their parents' share."

BRITTON, J., *held*, that in view of the wording of the whole will, the first objection was invalid, but the second should be given effect to.

Declaration that vendors could not make title, no costs.

A vendor and purchaser summons in the matter of sale of N. ½ lot No. 7, second con. of South Dorchester south of the river Thames, county of Middlesex.

I. C. Heyler, for the vendors.

M. D. Fraser, for the purchaser.

HON. MR. JUSTICE BRITTON:—This property was owned by the late Henry Johnston who died on the 1st December, 1886, and whose will was made on the 21st June of that year.

The executors and beneficiaries under the will have entered into an agreement with John Beacham for the sale to him of the land above mentioned.

There was personal property sufficient for payment of all debts of the deceased, and all such debts have been paid. An only daughter was left a legacy of $1,500, payment of which by the sons was directed by testator although the testator did not in terms leave to the sons property out of which payment was to be made. This legacy has been paid. The widow and all the children of testator are living. The widow has not married. The children are all

of age, and all are anxious that the sale be carried out, as none of the family now reside upon the property.

The purchaser objects that under the will, the vendors are not able to make a good title. One specific objection is, that by clause 5 a valid restraint on alienation is created. I will deal with that objection, as if no other and as if the 3 sons of testator took an estate—a vested remainder—the widow having an estate for her life.

Clause 5 is as follows: "Furthermore, I do not allow my executors hereinafter mentioned to let any of my lands be sold only to my own heirs—they may buy or sell to each other." It seems to me clear from reading the whole will, that the attempted restraint aimed at, was to meet a situation that the testator in 1886 thought might exist in the then, near future. He attempted to provide for the case of his children having the farm divided by the assessor as he mentioned or in some other way, and each one of his sons living upon his part. In that case if one should desire to sell he should sell to a brother—or a member of his family—and not to a stranger. It was not intended to apply and in my opinion does not apply to the case of all those interested selling. No possible objection could come from any one now living.

The clause attempting restraint on alienation may well be interpreted as meaning, that any of testator's sons holding under the division any part of this land, shall not sell that part to one not an "heir." This objection by purchaser is not valid.

A further objection is raised under clause 6 of the will.

The testator disposed of all his property by clause 2. The widow took it all for her life unless she should marry again. Should the widow marry, two-thirds of all the property should go to the testator's sons, living, at the time of the marriage of their mother.

In the event of the widow not marrying she holds the property for her life and then the property will go to the testator's sons living at time of the death of their mother. Then the testator desired to provide for the case of his widow marrying before the youngest son, Fred Meredith Johnson, became of age. That is not material now, as the widow did not marry and Fred attained his majority many years ago. Then the testator added as part of clause 6, the following: "And should any of the boys marry and

have heirs, and should die before this property is divided, the heirs shall claim their parents' share." My interpretation of this clause is that the word "heirs" means children,—that the division of the property means the division provided for by the will, viz., division upon marriage of their mother—should she marry—or upon her death—when that takes place.

The effect of this clause last mentioned is to add to clause 2—from the end of it—these words, "and should any of the boys die leaving children, before the property is divided, the children shall claim their parents' share," and to add to clause 3, after the words, "my boys that may be alive at my wife's death, the words, "and should any of my boys die leaving children before this property is divided, the children shall claim their parents' share."

Under this will I am of opinion that the sons do not take any present interest in the estate of the testator. The interest of such of the sons as may be alive at the marriage or death of their mother, does not vest until such marriage or death. If any one of testator's sons dies before division, and leaves children—then these children will take under this will—the share their father would have taken were he alive. I must hold the latter objection of purchaser valid.

Were it not for the clause bringing in the children, if any, of any deceased son of the testator, there would be no difficulty in making a perfect title, the executors, the widow, and all the children of the testator joining in the conveyance.

As the parties are anxious to have the sale carried out, such a sale apparently being in the interest of all it would seem to be a proper case for sale under the "Settled Estates Act."

No costs.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 6TH, 1912.

CHAMBERS.

RE HORACE B. ALLEN.

4 O. W. N. 240.

Will—Devise to Widow Durante Viduitate—Must Elect as to Dower —Possible Further Election under Devolution of Estates Act.

MIDDLETON, J., *held*, that a devise of all a testator's lands to the widow *durante viduitate* puts her to her election as to whether she will take the interest given her by the will or her dower.

Marriott v. *McKay*, 22 O. R. 320, and *Westacott* v. *Cockerline*, 13 Grant 80, followed.

Originating notice to determine a question arising upon the construction of the will and in the administration of the estate of the late H. B. Allen, who died on the 16th January, 1910.

A. A. Miller, for the widow.

E. C. Cattanach, for the children (infants.)

HON. MR. JUSTICE MIDDLETON:—By his will the deceased gives all his real and personal estate of every nature and kind to his wife for her own use and benefit for her natural life or so long as she does not re-marry. Save for the appointment of executors, this constitutes the whole will. The property consists largely of real estate.

It was admitted that the will gave the widow an estate in the lands during widowhood, and that save as to this estate the testator died intestate as to his realty. It was also admitted that the personalty would go to the widow absolutely.

The widow claims that the will does not put her to her election, and that she is entitled to an estate during widowhood in the testator's lands and is also entitled in her own right to her dower interest in the same lands. She now seeks, under the Devolution of Estates Act, to elect to take a one-third interest in her husband's undisposed of real estate, i.e., in all his real estate subject to her estate during widowhood, in lieu of her dower.

I think I am concluded by authority, and that, as put by Boyd, C., in *Marriott* v. *McKay*, 22 O. R. 320, "a devise of all the lands to the widow *durante viduitate* puts her to

elect. That devise gave her the freehold, and as tenant of the freehold she could not have dower assigned to her while she held that estate."

This is based upon the earlier decision in *Westacott* v. *Cockerline*, 13 Grant 80, where Vankoughnet, C., upon the same reasoning, reaches the same conclusion.

The widow is therefore put to her election. If she elects against the will she may then make the further election under the statute to take one-third of the land. If she elects to take her estate during widowhood her dower right is gone, and she cannot then elect under the statute, because the right given to her by the statute is to take the third interest in the undisposed of lands "in lieu of" her dower.

Costs out of the estate.

DIVISIONAL COURT.

APRIL 12TH, 1912.

RE GRIFFIN.

3 O. W. N. 1049.

Executors and Administrators — Compensation — Commission and Costs—Question as to Allowance for.

MCWATT, SURRO. J., allowed solicitors $3,000 for their care, pains and trouble as executors of an estate amounting to over $100,000, and consisting largely of shares in companies.

MIDDLETON, J., 21 O. W. R. 466; 3 O. W. N. 759, varied above order, and, in lieu thereof, awarded them $815.73. Appellant, residuary legatees, given costs against executors, if asked.

Re Morrison, 13 O. W. R. 767, determines that the provisions of the tariff govern solicitors' costs.

DIVISIONAL COURT *held*, that there is no fixed rate of compensation applicable under all circumstances for services of executors and trustees. They are entitled to reasonable compensation, and what that is, must be governed by the circumstances of each case.

Robinson v. *Pett*, 2 W. & T. L. C. Eq. 214.

Chisholm v. *Barnard*, 10 Gr. 481, and

Thompson v. *Freeman*, 15 Gr. 385, followed.

That, considering the amount and nature of the estate, $3,000 was a very reasonable allowance as compensation to the executors.

Order of MIDDLETON, J., set aside, and order of MCWATT, SURR. J., restored.

An appeal by the executors of the will of the late G. H. Griffin, from an order of HON. MR. JUSTICE MIDDLETON, 21 O. W. R. 466; 3 O. W. N. 759, setting aside an order of HIS HONOUR JUDGE MCWATT, Surrogate Judge of Lambton

County, whereby he allowed the executors the sum of $3,000 for their care, pains, and trouble as such executors, and in lieu thereof, awarding them the sum of $815.73.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE SUTHERLAND, on 12th April, 1912..

C. A. Moss, for the executors, appellants.

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

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

THEIR LORDSHIPS' judgment was delivered by

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

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

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

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

The testator died on the 10th October, 1910, leaving an estate valued at $100,002.98. The estate consisted of the sum of about $3,000 cash on hand, a life insurance policy which realized $3,693, shares in some fourteen different companies of an estimated value of about $93,000, and household furniture of trifling value. The testator bequeathed pecuniary legacies to fifty-three different persons, resident in twenty-three different places in Ontario, Quebec, Manitoba, Great Britain, and the United States. Fifteen of them were infants, under the age of twenty-one years. He also gave legacies to six charities. He created a fund of $10,000 to be held by his trustees for the benefit of his half-sister Frances Griffin, during her life, and thereafter for the daughter of his half-brother, Frank Wetherall. He also directed his trustees to acquire a burial plot at a cost not exceeding $500.

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

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

The learned Surrogate Court Judge has allowed the executors $3,000 or about three per cent. of the value of the estate, when taken over by the executors. Adding to that

the $4,022.67 income, the total value of the estate would be $104,025.65.

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

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

HON. MR. JUSTICE MIDDLETON. NOVEMBER 7TH, 1912.

SINGLE COURT.

SEGUIN v. HAWKESBURY.

4 O. W. N. 239.

Way — Municipal By-law to Close a Street — Motion to Quash —Railway Act, sec. 238—Discretion to Refuse Motion—Costs.

Motion to quash a by-law of the town of Hawkesbury providing for the closing of a street. It was passed in pursuance of an arrangement made by the town with the C. N. Rw. Co., which arrangement was confirmed by an order of the Dominion Railway Board. The order in question, however, did not provide for the closing of the street, but only for its diversion, and was, admittedly, within the competence of the Board.

MIDDLETON, J., *held*, that while the municipal proceedings had been taken under a misapprehension, no harm had accrued, and the application was useless and vexatious.

Motion dismissed with costs.

Motion to quash by-law 179 of the town of Hawkesbury.

A. Lemieux, K.C., for the applicant.

H. W. Lawlor and A. J. Reid, for the respondent.

HON. MR. JUSTICE MIDDLETON:—Under the Railway Act, sec. 238, (see amendment of 1909), the Board has authority to order that a highway may be permanently diverted. No authority is given to close a highway. In October, 1911, the Canadian Northern Railway, desiring to make some changes in its line through Hawkesbury, made an application to the Board which involved the closing of St. David street. Some negotiation took place looking to the closing of the street at the intersection by the municipality and the sale of this portion to the railway. With this in view, notices were given which led up to the by-law in question.

When the matter came before the Board an order was made, quite in conformity with the statute, by which St. David street was diverted at each side of the railway allowance so as to turn at right angles and so connect with Union street; the portion of the original road allowance crossing the railway allowance being closed and an embankment constructed thereon.

Owing to the greater facility given by these diversions to those driving upon St. David street and desiring to reach Main street, the change may be beneficial. Those who desire to make a continuous passage along St. David street are put to some inconvenience, as they must go 178 feet from St. David street to Union street and after passing under the railway bridge must return the same distance.

With this I am in no way concerned, as the whole matter was entirely within the jurisdiction of the Board.

The municipal proceedings were initiated under some misapprehension as to the true situation; but there is no ground whatever for the suggestion that there was any abuse of the municipal power or anything other than an endeavour to come to some satisfactory arrangement with the railway.

The by-law was unnecessary, and was not acted on so far as any conveyance is concerned. It affords no answer to any claim the applicant might have. The order of the Board is a conclusive and final answer to his claims. This motion is an entirely unnecessary and useless piece of litigation, and I think I have discretion to refuse the

order sought, even if there is some irregularity in the proceedings.

I do not think the by-law should be regarded as a by-law under the section of the Municipal Act relating to the closing of streets, but rather as an expression of the municipality's assent to the arrangement for the diversion of the street under the Railway Act. So regarded, it is free from all objection.

The motion must be dismissed with costs.

HON. SIR JOHN BOYD, C. NOVEMBER 7TH, 1912.

TRIAL.

BLAISDELL v. RAYCROFT.

RAYCROFT v. COOK.

4 O. W. N. 297.

Executors and Administrators—Action to set aside Sale—Purchase by Executrix—Plaintiffs Joining in Conveyance—Good Price Obtained—Laches—Shifting of Onus—Action Dismissed—Costs.

Actions by residuary beneficiaries to set aside a sale made by executrices of certain lands belonging to the estate. The evidence shewed that at the time of the sale, some four years ago, a good price was obtained for the lands, but since then, owing to unforeseen circumstances, the lands had more than doubled in value.

Plaintiffs had joined in the deed to the purchaser and obtained certain specific legacies out of the purchase-moneys, but claimed the lands had been in reality secretly purchased by one of the executrices and there had been a consequent breach of trust. The property had, in fact, been purchased to the knowledge of all by a daughter of the executrix, and shortly afterwards conveyed to the executrix.

BOYD, C., *held*, that the facts shewed that the sale was at a good price, and that there had been the utmost good faith on the part of the executrix, both at the time and subsequently.

That the onus was on the plaintiffs to get rid of the deed they signed, and no sufficient grounds had been shewn.

Re Postlethwaite, 59 L. T. n. s. 59; 60 L. T. n. s. 517, and *Williams* v. *Scott*, [1900] A. C. 499, referred to.

Action dismissed with costs.

Two actions tried together seeking to set aside a sale of certain estate property made by the executrices and trustees.

G. F. Shepley, K.C., for the plaintiffs in first action.

J. A. Hutchinson, K.C., for the defendant in first action, who was plaintiff in second action.

T. D'A. McGee, for the defendant, Mrs. Cook.

HON. SIR JOHN BOYD, C.:—I expressed my opinion upon the effect of all the evidence at the trial and found as facts that full value was obtained upon the sale of the land in question, and that there was no scheme between the purchaser and the trustee for sale, whereby the latter should become the real owner. And further than this that the beneficiary legatees who attack the transaction were parties to the conveyance by the purchaser and on faith of their execution of that deed obtained the full amount of their specific legacies out of the proceeds.

The pleadings allege that the plaintiffs improvidently joined in the said conveyance and that the consideration was fictitious. The proof failed, that this was so. The 11th paragraph of the statement of claim alleging that the plaintiffs acted without professional or other independent advice and were under the domination and influence of the trustee Jane Raycroft I found not to be substantial.

I did not give final judgment till I had time to look at and consider the cases cited and other authorities.

Briefly the facts of importance are that the testator gave all his estate real and personal to the defendants, his widow Jane Raycroft, and his daughter (by a former marriage) Florence Cook, to sell and dispose of and to apply the proceeds thus: To wife, defendant, $2,000; to the defendant Florence, $1,200; to the plaintiffs (daughters), Hattie and Laura, $100 each, and also legacies of $100 each to George, Minnie, and Alfred (his children). That is in all $1,700 of pecuniary legacies, and from out of the residue a good comfortable house was to be purchased for the use of his wife during her life and after her death to become the property of her co-defendant at a cost not exceeding $1,800.

An estate left after the expenditure of the said $1,800, and after payment of debts and expenses was to be divided equally between his two daughters, the plaintiffs.

The sale of the chattels realized no more than sufficient to pay debts, and the only other asset was the land in question (a farm) the value of which at the testator's death was no more than $4,800. To meet the legacies and the call for a house would require $5,500, and there were besides other expenses of administration, not less than $400.

The land was put up for auction at a reserved bid of $5,000, and the highest bidder offered no more than $4,800, and afterwards refused to carry out a purchase at that figure. After various efforts to sell, a daughter of the defendants

offered to buy at $4,800, and the transaction was carried out by the intervention of Mr. Dowsley, K.C., solicitor for the estate by the preparation of a conveyance, dated 4th April, 1908 (within a year of the testator's death, which was in September, 1907).

The two executors and the two residuary legatees joined in the execution of this deed to Mrs. Falinger. The residuary legatees lived at Springfield, Massachusetts, and the deed was taken to them for execution by the co-executrix Mrs. Cook, who told them no more money was coming from the estate, and that upon payment of their legacies out of the proceeds of sale, nothing more would be coming to them. The deed was executed by them in presence of a notary public, and in reply to him they said they understood what they were doing. Both of them say they were willing Mrs. Raycroft (the widow) should buy the place at $4,800, and they knew that no balance would be left for them.

The theory of the attack is that the sale was really to Mrs. Raycroft, and that the putting forward of Mrs. Falinger was a mere subterfuge to disguise the real transaction. And upon this theory the doctrine of the Court is invoked, that the sale cannot stand, because it is impossible that the same person can be at once both seller and buyer. That there has been a breach of trust, which cannot be cured, because of the failure to disclose everything to the beneficiaries. But I held that there was sufficient disclosure of all material circumstances to the beneficiaries, and they were satisfied on the essential point, that the estate fell short of the promise of the will, and that upon its best available realization there was not enough to buy the house, and no possible residue could exist for them.

What is now complained of is that no money was paid by Mrs. Falinger. What was done was this; she raised and paid $800 and borrowed the balance of $4,000 from her mother the co-executrix. The language used in the suit was that her mother left her money or put her money into the land, and that was explained as referring to the $2,000 legacy to be paid the widow and a further sum of $2,000 derived from her husband's life insurance which was payable to her with which the $1,700 legacies were paid; and balance available for expenses of administration. There was an understanding between the mother and daughter that in return for this loan

the widow was to live and be maintained in part of the house on the farm. This was not made known to the beneficiaries, but it does not appear to be material, assuming what I have found to be proved, perfect good faith in the whole arrangement. That was a matter between mother and daughter which did not concern the beneficiaries in approving of the sale to Mrs. Falinger. Satisfactory explanation was given at the trial as to why the title was not left in Mrs. Falinger. Her husband, who with her lived in the States, appeared on the scene, and was dissatisfied with the run-down condition of the property, and would not engage himself to the arrangement as to the widow's maintenance in the place.

The difficulty was then solved by the widow buying the place from the grantee Mrs. Falinger, repaying the $800 part consideration, relinquishing the right to be kept on the land, and become owner of it herself. Had this been a complaint lodged soon after the transaction these incumbrances might have provoked some suspicion and have justified some method of investigation, but after a lapse of four years, and after the sale of the property for $10,000 by Mrs. Raycroft, suspicion is transferred to the motives of this litigation, as being an attempt to secure some share of the windfall or Godsend arising from this sudden rise in value.

Exceptional circumstances in the last year have led to this price being for railway purposes, and it casts no reflection on the sale of 1908, as being at an undervalue.

There was no scheme on the part of the widow to enrich herself at the expense of the residuary legatees but an honest attempt to make the best of the situation as it existed at the death of her husband, and the winding up of the estate, so that if she did not get the comfortable home he intended for her out of the unavailable $1,800, she might at least have a home on the place and work it as best she could. She has spent money on repairs and clearances and other improvements, and I can find no equity and no reason now to disturb her or to relieve the plaintiffs.

The onus is on the plaintiffs to get rid of the deed they signed and no sufficient grounds have been shewn. An interesting case on this state of facts is *Re Postlethwaite,* 59 L. T. N. S. 59, which was reversed in 60 L. T. N. S. 517, by the Lords Justices. So also is *Williams* v. *Scott,* [1900] A. C. 499, but distinguishable from this on the facts.

The action should be dismissed with costs with a declaration that the money realised from the late sale and now

paid into Court, is the property of the defendant, Mrs. Raycroft; and as to her the action is dismissed with costs.

RAYCROFT v. COOK.

This was another contest between the co-executrices which was ordered to be tried with *Blaisdell* v. *Raycroft*.

The co-executrix, Mrs. Cook, joined hands with her sisters and sought to have the sale of the property treated as a nullity and to have the $10,000, which has been paid into Court as assets of the testator's estate. In that event $1,800 of it would be set apart for the purchase of a house in which she would have in estate in remainder after the widow's death and the balance would be divisible between the two residuary legatees. The same reasons which apply against relief being given to the sisters are equally, and even more forcible as to the co-executrix. She was informed of what the transaction was by Mr. Dowsley, and was satisfied, and indeed actively intervened to procure the signatures of the two sisters. After the land came into the hands of Mrs. Raycroft, she dealt with her in the application of the proceeds of sale whereby it was ascertained after all the accounts of the estate were taken that a balance of $679 was *pro tanto* available towards the $1,800 to be provided for the purchase of a comfortable home for the widow. The widow having come into the possession of the farm it was arranged between the co-executors that as to this $679 the widow should have only a life estate with remainder to Mrs. Cook. To carry this out a mortgage for that sum was put upon the farm with appropriate words of conveyancing to carry out this agreement. That was accepted by Mrs. Cook; the mortgage contained a provision for the cancelling of the security upon the deposit of a like sum of money in a bank at Prescott, at any time the widow should desire. After the sale for $10,000 application was made to discharge the mortgage upon the deposit of a proper sum in the proper bank. This was refused by Mrs. Cook, who then set up the larger contention which has failed. I find that the defendant was in the wrong; she should have relied upon the deposit in the bank as her security and have executed a discharge of the mortgage. That is now declared, as the judgment of the Court, and judgment accordingly with costs to the plaintiff. If the parties cannot otherwise agree, the $679 may be paid into Court, payable out according to the terms of the

judgment. The counterclaim of Mrs. Cook is dismissed with costs, setting up as it does the contention of the residuary legatees which fails in all points.

This judgment may be without prejudice to the raising of accounts of the estate before the Surrogate Judge, and the reason of any contention there surcharging or falsifying accounts as between the executors, the costs of which he will dispose of.

HON. MR. JUSTICE RIDDELL. NOVEMBER 9TH, 1912.

CHAMBERS.

ROGERS v. NATIONAL PORTLAND CEMENT CO.

4 O. W. N. 299.

Discovery—Examination of Plaintiff—Default—Failure to Justify—Con. Rule 454.

Motion by defendant under Con. Rule 454 to dismiss action for failure of plaintiff to attend for examination for discovery. Plaintiff had no reasonable excuse to offer for non-attendance.

MASTER-IN-CHAMBERS ordered that plaintiff attend at his own expense on 48 hours' notice to his solicitors. Costs of motion to defendants in cause.

RIDDELL, J., dismissed appeal from above order, costs to defendants in any event of cause.

Appeal from order of Master in Chambers, *ante* 218.

F. R. McKelcan, for the motion.

J. Grayson Smith, contra.

HON. MR. JUSTICE RIDDELL:—In this case I entirely agree with the Master in Chambers, and have nothing to add to what he has said.

Appeal dismissed with costs to the defendant in any event.

HON. MR. JUSTICE RIDDELL. NOVEMBER 8TH, 1912.

CHAMBERS.

LAND OWNERS LTD. v. BOLAND ET AL.

4 O. W. N. 242.

Account—Motion under Con. Rule 645—Practice—Non-production of Writ—No Proof of Endorsement—Account Refused—Costs.

RIDDELL, J., dismissed, with costs to defendants in any event, a motion for an account under Con. Rule 645, on the ground that there was no evidence to shew that the accounts sought were necessarily involved in the relief sought in the writ of summons.

In re Gyhon Allen v. *Taylor*, 29 Ch. D. 834, at p. 837, *per* COTTON, L.J., referred to.

A motion by the plaintiffs "for an order that the defendants account to the plaintiffs forthwith for all moneys received by the defendants for the plaintiffs in connection with the sale of lots in Bay View Heights, Port McNicholl, subdivision." It was explained on the motion that this meant an order under Consolidated Rule 645.

J. J. Gray, for the motion.

J. Grayson Smith, contra.

HON. MR. JUSTICE RIDDELL:—The Court of Appeal in England have said "under that rule only those accounts can be directed which are necessarily involved in the relief sought by the writ of summons." In *Re Gybon Allen* v. *Taylor* (1885), 29 Ch. D. 834, at p. 837, per Cotton, L.J.

The writ of summons is not brought before me, no affidavit is filed as to the manner in which the writ was endorsed. I told counsel definitely and specially, that all papers must be put in which were relied upon—it must be taken then that the plaintiff could not shew that the writ claimed any such relief as is now sought—*de non apparentitus et non existentibus eadem est ratio,* and I must take it that the writ was not so endorsed. We have not here as in some cases an admission on the part of the defendants which could help the plaintiffs over the difficulty.

The motion must be dismissed—costs to the defendants in any event of the action.

As notwithstanding what was said at the argument, and to what is said in *Welsh* v. *Harrison* (1912), 4 O. W. N. 139,

at p. 140 as "to the necessity of filing all papers which are to be used on motions—it is too much to expect the Court to act the solicitor's clerk, and hunt up the missing documents," it may possibly be that the plaintiffs have in fact a writ endorsed as required, this dismissal will be without prejudice to any other application for an order such as is now sought or any other order.

HON. MR. JUSTICE RIDDELL. NOVEMBER 9TH, 1912.

WEEKLY COURT.

MASON v. GOLDFIELDS.

4 O. W. N. 300.

Company—Mandamus—Motion for by Plaintiff to Compel Delivery of Certain Share Certificates—Costs.

G. A. Urquhart, for the plaintiff.

HON. MR. JUSTICE RIDDELL:—The applicant has abandoned his right, if any, to costs. There will be no order as to costs.

The other objects of the motion have been achieved; there will be no order.

HON. MR. JUSTICE KELLY. NOVEMBER 11TH, 1912.

CHAMBERS.

RE MCKAY, CAMERON v. MCKAY.

4 O. W. N. 304.

Will—Construction—Amount of Bequest.

Motion by executors under Con. Rule 938 for construction of the will of Angus McKay.

W. Proudfoot, K.C., for the motion.

E. C. Cattanach, for the infants.

HON. MR. JUSTICE KELLY:—The question submitted is, what amount the testator, Angus McKay, intended by the second paragraph of his will should be paid "to the missions of the Free Presbyterian Church, of Ashfield, in the county of Huron, concession fourteen (14), Lochalsh, Canada, in connection with the Free Church of Scotland."

I am of opinion that the testator intended that $200 should be paid at the end of the tenth year after his death, and a further $200 at the end of the eleventh year after his death.

DIVISIONAL COURT.

NOVEMBER 8TH, 1912.

NOKES v. KENT.

4 O. W. N. 252.

New Trial—Terms—Payment of Costs, and Into Court.

DIVISIONAL COURT granted new trial of an action upon terms that defendant pay the costs of the former trial and appeal within 30 days, and also pay $3,000 into Court during the same period.

Appeal by defendants from judgment of BOYD, C., of October 2nd, 1912.

Dewart, K.C., for defendant, appellant.

Denison, K.C., for plaintiff, respondent.

HON. MR. JUSTICE CLUTE:—During the argument it was intimated that a new trial should be granted upon the terms which the Court would further consider. We are of opinion that the learned Chancellor, who tried the case, was right in his refusal to put off the trial upon the material then before him. We think, however, that it will be in the interests of justice, under all the circumstances, that a new trial should be granted upon condition that defendants pay the costs of the former trial, and of this appeal within thirty days, and upon paying $3,000 into Court to the credit of this cause, or giving security therefor to the satisfaction of the Registrar within 30 days, otherwise this appeal be dismissed with costs.

DIVISIONAL COURT.

NOVEMBER 11TH, 1912.

DICKIE v. CHICHIGIAN.

4 O. W. N. 303.

Boundary—Line Fence—Destruction—Trespass—Damages.

DIVISIONAL COURT dismissed, without costs, appeal from judgment of the County Judge, Brant County, dismissing an action for damages for destroying a line fence.

An appeal by the plaintiff from the County Court, Brant.

Baird, K.C., for the plaintiff, appellant.

Brewster, K.C., for the defendant, respondent.

HON. MR. JUSTICE CLUTE:—The plaintiff alleges that on the 16th November, 1911, she built a fence on the boundary line between her land and the defendant's land, and on or about the said 16th November the defendant entered upon the plaintiff's land and broke down the said fence and refused to put the same up again. The plaintiff claims damages, an injunction and further relief. The defendant alleges that the fence is not on the lands of the plaintiff and that she had no right to erect a fence where she did.

His Honour, Judge Hardy, finds upon the evidence that the fence as erected by the plaintiff was not on her own property and dismissed the action with costs.

Upon a careful perusal of the evidence I find there is quite sufficient to support the finding of the learned trial Judge. This view is, I think, supported by the evidence adduced by the plaintiff. There is not, however, sufficient evidence before the Court to enable us to define the boundary line between the properties, and this question is not affected by this judgment. The appeal should be dismissed but under all the circumstances without costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and HON. MR. JUSTICE BRITTON, agreed.

HON. MR. JUSTICE KELLY. NOVEMBER 12TH, 1912.

SINGLE COURT.

REX v. STEPHENSON.

4 O. W. N. 272.

Liquor License Act—Conviction for selling without License—Motion to Quash—Liquor Complained of in Bottles Bearing Label of an Intoxicating Beer—Right to Analysis Denied—Conviction Quashed—Order of Protection.

Motion to quash a conviction for selling liquor without a license. The liquor complained of was being sold by defendant to his customers in bottles bearing the name of an admittedly intoxicating beer, but defendant claimed that the liquor in question was not this beer and was not intoxicating. Defendant had the bottles seized sealed up, and asked for an analysis, but the magistrate delivered judgment convicting defendant without giving him any opportunity to have such analysis made.

KELLY, J., *held*, that defendant had been denied a fair trial.

Conviction quashed with costs, magistrate given an order of protection.

Motion to quash a conviction for selling liquor without a license.

G. W. Bruce, K.C., for the motion.

H. S. White, contra.

HON. MR. JUSTICE KELLY:—Defendant was convicted by the police magistrate for the town of Collingwood of selling liquor without a license on July 12th, 1912, and a penalty was imposed of a fine of $250 and $22.15 costs, and on default three months in gaol at hard labour. The information was laid on July 15th, and the hearing before the magistrate was begun on July 20th and evidence was then taken. Judgment was given on July 27th.

At the time of the occurrence in respect of which the charge was laid, the police officer seized (in defendant's premises), what he said was a bottle of beer, but which defendant swore was non-intoxicating beer, the same, he swore, as he was selling on that day in his premises. The bottle seized bore, at the time, a label "Salvador," the name of a beer which is said to be intoxicating. The officer who seized it swore he had "no other reason of thinking it was Salvador beer except from the label."

One of the grounds relied upon by defendant for quashing the conviction is that he was not given an opportunity

of putting in evidence which he tendered and which the magistrate refused to consider.

On the motion an affidavit of the magistrate was filed wherein it is shewn that immediately after the service of the summons on July 15th, defendant's counsel applied to him (the magistrate), to have the beer which was seized sealed up, and he sealed it up in presence of the counsel; and further that when the case came on for hearing on July 20th he was asked by the same counsel to send the beer for analysis, it being still in the possession of the police officer, and that he then told defendant's counsel that the case must go on on that day and afterwards the beer could be sent for analysis, and that he would in the meantime withhold judgment. The magistrate says further that after defendant had given his evidence on the 20th his counsel again requested that the beer seized be analysed in reply to which the magistrate said he did not wish it analysed but if defendant's counsel wished it, he (the magistrate) would direct the chief of police to send it to the Provincial Analyst; and that after the Court had adjourned he gave directions to that effect.

It is also set out in the affidavit of the magistrate that at the hearing, counsel for the prosecution having argued that defendant having admitted that the label on the bottle seized and the label on other bottles sold were "Salvador," and held out by him to his customers as intoxicating liquor, he was estopped from shewing that the bottles contained non-intoxicating beer; and that he (the magistrate) said he would convict at once if counsel for the prosecution could satisfy him by authority that defendant was estopped.

I am taking the magistrate's version of what took place though the defendant's counsel puts the case even stronger. The magistrate, however, says, in his affidavit, —not in the record of the conviction,—that the question of analysis or the doctrine of estoppel had no bearing upon his judgment, as he made the conviction on other grounds.

The analysis was not produced afterwards and on July 27th without further reference to it or further opportunity to defendant to complete that part of his defence the conviction was made.

Under the circumstances the accused had not a fair trial. In a proceeding involving, as in this instance, a heavy fine and the liberty of the accused he should have

been afforded the fullest opportunity of putting forth his defence, and when he sought to have an analysis made of the liquor which was in possession of the police officers, and which on the prosecutor's own shewing was taken from defendant's premises as part of what was there being consumed at the time of the seizure, and defendant contending that what was seized and what was being consumed on his premises was non-intoxicating beer, it cannot be said that he was afforded the opportunity of making a full defence when the analysis was not proceeded with, especially as the magistrate himself admits that when on July 20th he was asked to have the analysis made, he said the case must go on on that day, that afterwards the beer could be sent for analysis and that he would in the meantime withhold judgment.

The conviction is therefore quashed with costs, and there will be an order of protection to the magistrate.

I have not dealt with the other objection raised by defendant's counsel on the motion.

HON. SIR G. FALCONBRIDGE, C.J.K.B. NOV. 6TH, 1912.

TRIAL.

BURROWS v. CAMPBELL.

4 O. W. N. 249.

Assessment and Taxes — Tax Sale — Action to Set Aside — Gross Irregularities—Plaintiff Continuing in Possession as Tenant of Purchaser — Estoppel — Sec. 173 Assessment Act — Stay of Execution.

Action to set aside a tax sale and tax deed. There had been gross irregularities in connection with the same, but plaintiff had had ample notice, and since the sale had continued in occupation of the lands sold, paying rent to defendant and his predecessor in title, who had purchased the lands at the said sale.

FALCONBRIDGE, C.J.K.B., *held*, that notwithstanding the irregularities, plaintiff could not dispute his landlord's title, and that the action was an unconscionable one.

Action dismissed with costs, thirty days' stay.

Quære, as to whether *Donovan* v. *Hogan*, 15 A. R. 342, is still a binding authority, having regard to the wording of present sec. 173 of the Assessment Act, 4 Edw. VII. ch. 23.

Action to set aside a tax sale and tax deed, tried at Welland.

Raymond and Macoomb, for the plaintiff.

German, K.C., for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:— This is an unconscionable action as the statement of the case will shew.

One Grace B. Edmonstone was the mortgagee of the lands in question. In 1903 the plaintiff purchased the equity of redemption from the representatives of the mortgagor, deceased, and entered into possession and thereafter made some payments of interest to the said mortgagee. In 1904 the plaintiff paid the taxes. In 1905 he paid $10 on account of the taxes and allowed the balance to be in arrear and unpaid. In 1906 and 1907 he did not pay the taxes and allowed them to be in arrear and unpaid.

The lands were advertised for sale for taxes in arrear. Plaintiff had abundant notice of such advertised sale, and was requested to pay the arrears but was unable or unwilling to do so. The mortgagee purchased the lands at the sale on the 22nd July, 1909, paying as purchase-money the arrears of taxes and costs amounting to $139.13. Plaintiff not having redeemed the said lands, said mortgagee on the 15th August, 1910, procured the tax deed which was duly registered.

After procuring the tax deed as above mentioned, the said Grace Edmonstone caused a notice to be sent to the plaintiff as follows:—

(Set out as in paragraph 15 of the statement of defence.)

Plaintiff acceded to such notice, paid the rent asked for the month of August, 1910, and became her tenant (monthly) and continued to pay rent until January, 1912, when the lands were purchased from the said Grace Edmonstone by the defendant for $1,000, which it is said at that time was full value therefor. The deed from Grace Edmonstone to the defendant was duly executed and registered. Plaintiff paid rent to the defendant until April, 1912. The writ herein was issued on the 10th April, 1912.

There were gross irregularities and omissions in the proceedings prescribed by law to be taken before the sale. The plaintiff, in fact, was not prejudiced by any of these.

I am of opinion that the plaintiff is not, as tenant of the defendant and her predecessor in title, at liberty to

deny his landlord's title; Woodfall, 18th ed., 243; *Smith* v. *Modeland*, 11 C. P. 387.

If it were necessary for the disposition of the case I would feel strongly inclined to hold that the change in the wording of the present sec. 173 of the Assessment Act, (4 Edw. IV. ch. 23), by the insertion of the words "the sale and" before "tax deed" would render necessary the reconsideration of the reasoning in *Donovan* v. *Hogan*, 15 A. R. 342. It looks very much to me as though the object which the Legislature had in view was to get rid of that judgment. *En passant*, I desire to pay tribute to my brother Riddell's delicacy in dealing with *Donovan* v. *Hogan*, as expressed by him in *Sutherland* v. *Sutherland*, 3 O. W. R. at p. 1370.

The action will be dismissed with costs, (thirty days' stay.) I understand that the plaintiff can have redemption if he chooses. That offer has been made to him at different stages of the proceedings.

HON. MR. JUSTICE RIDDELL. NOVEMBER 9TH, 1912.

CHAMBERS.

RE LITTLE STURGEON RIVER SLIDES CO. AND THOS. MACKIE ESTATE.

4 O. W. N. 262.

Arbitration and Award—Notice Appointing Arbitrator—Motion to Set Aside—Submission Denied—Lack of Jurisdiction in Court—9 Edw. VII. ch. 35, sec. 5—Costs.

Motion for order setting aside a notice appointing an arbitrator. The applicants denied that there had been any submission to arbitration.

RIDDELL, J., *held*, that he had no jurisdiction to make order asked, 9 Edw. VII. ch. 35, sec. 5, only applying to admitted submissions. The learned Judge suggested that an action be brought to set aside the alleged submission and an injunction obtained staying the arbitration proceedings.

Motion dismissed, costs to respondents in the action if one brought within ten days, if not, to respondents forthwith, after taxation.

Motion for an order setting aside and discharging a notice appointing an arbitrator.

G. F. Shepley, K.C., for the motion.

R. McKay, K.C., contra.

HON. MR. JUSTICE RIDDELL:—In April, 1908, an agreement in writing was entered into ostensibly between the Estate of Thos. Mackie and the Little Sturgeon River Slides Co. for the estate to do certain driving of timber over the works of the company; the company to pay for certain improvements to be made by the estate "and in case of dispute the value thereof shall be settled by arbitration under the provisions of the Timber Slide Companies' Act." This agreement was signed by one H. T. Mackie purporting to act for the Mackie estate and "J. R. Booth per Wm. Anderson, for and on behalf of the Little Sturgeon Timber Slide Company, Limited."

May 2nd, 1912, the estate, by their solicitor, served notice of the appointment of V. as their arbitrator, calling upon the company to name another arbitrator.

The company repudiate the execution of the agreement and say Anderson had no authority to sign it or to make any such agreement for the company. Booth denies all knowledge of it.

A motion is now made for an order setting aside and discharging the notice appointing an arbitrator upon the grounds: (1) that there is no statutory or other authority for the serving of the notice; (2) that the alleged agreement was not made by the company "or at all events the same is *bona fide* in dispute and until the same has been admitted or duly established by process of law to be binding on the said company, the said notice and the proceedings contemplated by the said notice are premature and incompetent" (whatever that may mean); (3) that the company never went into possession.

I asked how I had any jurisdiction in the matter and 9 Edw. VII. ch. 35, sec. 5 was referred to, "a submission unless a contrary intention is expressed . . . shall have the same effect as if it had been made an order of Court." But this applies to an actual submission, not to a document which may or may not be a submission. If upon the application of the company I were to act upon this section, the order would operate as an estoppel against their questioning the document as their submission. This the company do not want—and I accordingly do not act upon this section.

The Timber Slides Act, R. S. O. 1897, ch. 194, secs. 24-35, does not advance matters.

A very simple and plain method was suggested on the argument—an action brought by the company to set aside the alleged submission and a declaration that it is not a submission by the company with an injunction against the estate proceeding with the proposed arbitration would answer all ends—an interim injunction would, no doubt, be granted.

If such an action be brought within 10 days, costs of this motion will be costs in that action to the estate only: if not, the costs will be paid to the estate forthwith after taxation.

HON. SIR G. FALCONBRIDGE, C.J.K.B. NOV. 9TH, 1912.

TRIAL.

MACKAY v. McKAY.

4 O. W. N. 300.

Will—Devise—Arrears of Taxes—Payable by Devisee—Chattel Mortgage—Account—Costs.

Action by devisee against executors for a declaration that he was entitled to certain lands devised to him free and clear of taxes and other incumbrances.

FALCONBRIDGE, C.J.K.B., *held*, that plaintiff was entitled to the lands in question upon payment of the arrears of taxes and certain other amounts chargeable against him including therein the costs of the action and counterclaim.

Action against executors for a declaration that plaintiff was entitled to certain lands devised him by the testator, free of taxes and other incumbrances, tried at Sandwich.

Rodd, for the plaintiff.

Gundy and Brackin, for the defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The first question is as to the plaintiff's claim that the lands devised to him are to be exonerated from the payment of arrears of taxes accrued before the death of the testator. As to this I find against him.

Very elaborate written agruments were put in, which owing to some misunderstanding did not reach me until after vacation, and I adopt the contention put forward by the defendants:—

(2) The defendants, the executors, set up by way of counterclaim a chattel mortgage made by the plaintiff to the testator. The defence to this is that the chattel mortgage was created for the purpose of protecting the plaintiff against his creditors, and that no liability was intended to be created thereby. As to this the plaintiff's evidence was entirely unsatisfactory, contradictory to what he had previously stated and not to be believed. He does not seem to have the faintest idea of the obligation imposed by an oath. I refer particularly to pp. 42, 43, 48, 49, and 52 of the evidence.

I think the evidence of the solicitor ought not, for obvious reasons, to have been received and that it ought to be stricken from the record. Should it remain upon the record, I do not credit it. I prefer to believe that his recollection is at fault, than that he was guilty of conduct so entirely reprehensible as to administer an oath when he knew that the matters stated in the affidavit were absolutely false.

(3) Then as to the overdraft with the Merchants Bank of Canada, I find that the testator did guarantee the indebtedness of the plaintiff, and that the executors are entitled to recover from the plaintiff the amount of the overdraft paid by them.

It is entirely likely that the claim set out in paragraph 12 of the statement of defence for sums paid by testator on account of the plaintiff is a just one, but I hold it to be not proven to my satisfaction.

The result is as follows; the plaintiff is declared to be entitled to have a conveyance of the lands devised to him by testator upon terms of paying to the executors the expenses which they have incurred in and about the sale of the lands, including the moneys actually paid to the treasurer, and their own expenses of attending upon the sale, and their solicitor and client's costs incurred in connection therewith; and also the items of the defendants' counterclaim, to which I find them to be entitled, viz., (a) Chattel mortgage for $315.71 and interest; (b) amount of the overdraft, $242.60, plus $16.50 interest to the 1st of November, 1911, and subsequent interest, and (c) the costs of this action and counterclaim.

Thirty days' stay.

GEO. S. HOLMESTED, K.C. NOVEMBER 13TH, 1912.

CHAMBERS.

FULLER v. BONIS.

4 O. W. N. 306.

Practice—Particulars—Motion to Strike out Certain Paragraphs of Statement of Claim—Breach of By-law Pleaded—Inability of Plaintiff to give Further Particulars—Motion Dismissed—Costs.

Motion for particulars of certain paragraphs of the statement of claim and to strike out certain other paragraphs as irrelevant in an action for an injunction against a nuisance in the working of a quarry. The paragraphs sought to be stricken out alleged breach of a municipal by-law by defendants, and plaintiff had been examined for discovery and had claimed, on oath, that he could give no further particulars other than certain already given in answer to defendants' demand.

HOLMESTED, K.C., in Chambers, dismissed motion, costs to plaintiff in any event of cause.

"Whether the non-performance of a statutory duty which causes injury to an individual gives him a right of action, depends on the purview of the legislature in the particular statute, and the language which they there employed."

Cowley v. *Newmarket*, L. R. 1892, A. C. 352; *Saunders* v. *Holborne, Dis. Bd.*, 1895, 1 Q. B. 64, and *Baron* v. *Portslade Dis. Ct.*, 1900, 2 Q. B. 588, referred to.

Motion by defendant for particulars of the statement of claim.

E. C. Cattanach, for the defendant.

S. S. Mills, for the plaintiff.

GEO. S. HOLMESTED, K.C.:—This is an action for an injunction to restrain the defendants from so working their quarry as to be a nuisance to the plaintiff. The defendant moves for better particulars of the various specific wrongful acts mentioned in the statement of claim. He also moves to confine the particulars already delivered to acts occurring antecedently to the issue of the writ. And to strike out paragraph 17, which alleges the provisions of a municipal by-law, and that part of 18, which claims that the defendants have acted in violation thereof.

The plaintiff has delivered certain particulars prior to the motion in answer to a demand of the defendants' solicitors; and the plaintiff has also been examined for discovery and questioned particularly as to the allegations concerning which

further particulars are now sought and has, on oath, stated his inability to give them. It is not suggested that there is any other source than the plaintiff's own recollection from which more specific dates could be obtained, and I do not think on this application I should order him to do what he swears he is unable to do, at the penalty of striking out those allegations from the statement of claim. Neither do I think that the particulars of acts occurring since the issue of the writ, should be struck out as they appear to constitute what is called in Rule 552 "a continuing cause of action," for which damages may be assessed in this action.

With regard to the allegations as to the municipal by-law, I have come to the conclusion they ought not at this stage of the proceedings to be struck out. It is said that in determining whether the non-performance of a statutory duty which causes injury to an individual gives him a right of action depends on "the purview of the Legislature in the particular statute, and the language which they there employed." *Cowley* v. *Newmarket*, L. B. 1892, A. C. 352, and see *Saunders* v. *Holborne Dis. Bd.*, 1895, 1 Q. B. 64, and *Baron* v. *Portslade Dis. Ct.*, 1900, 2 Q. B. 588.

The same considerations apply to by-laws which are made in pursuance of statutory powers. Whether this particular by-law gives the plaintiff a right of action I do not think can properly be determined by me on a motion of this kind. I do not think paragraph 17 is clearly irrelevant, on the contrary it appears to me to present a question proper for the decision of the Judge who may try the action. It may be remarked that the by-law does not appear to make something unlawful which before was lawful, but rather imposes a penalty for what was already an unlawful act.

The motion is therefore refused, with costs to the plaintiff in any event.

As Mr. Mills has pointed out, there is here no affidavit filed on the part of the defendants suggesting any difficulty in their pleading in the action for want of the particulars claimed, nor do I perceive any. The motion must, therefore, be refused with costs to the plaintiff in any event.

HON. MR. JUSTICE RIDDELL. NOVEMBER 9TH, 1912.

SINGLE COURT.

RE MATCH v. CLAVIR.

4 O. W. N. 263.

Vendor and Purchaser — Deficiency in Frontage — Encroachment — Estoppel—Possession not Notice—Presumption of Accuracy in Conveyance of ¾ of an Inch—Innocent Purchaser.

Application by vendor under Vendor and Purchasers Act, 10 Edw. VII. ch. 58, for a declaration that he could make a good title to certain lands. Vendor had been deeded 25 feet of a certain lot on which he understood there was a shop, later he found that the shop encroached ¾ of an inch upon the adjoining land and sought and obtained a deed of a strip ¾-inch in width. When later he attempted to convey, he found the shop still encroached on the neighbouring lands 2¼ inches in the rear. He attempted to make title on the ground that the owner of the neighbouring lands was the vendor to him of the shop, and under the circumstances of the conveyance he was estopped from setting up the deficiency.

RIDDELL, J., *held*, that vendor could not make a good title.

That the fact that a deed of ¾ of an inch is to be found on the register is a strong presumption of accuracy.

That possession is not in itself notice.

Waters v. *Shade*, 2 Gr. 457; *Sherboneau* v. *Jeffs*, 15 Gr. 574, referred to.

Motion by vendor under Vendor and Purchasers Act, for an order declaring that he can make a good title to the land in question.

A. McGregor, for the vendor.

J. H. Cooke, for the purchaser.

HON. MR. JUSTICE RIDDELL:—In this matter being an application under the Vendor and Purchasers Act (1910), 10 Edw. VII., ch. 58, one Membery owned a certain lot, No. 88, on the north side of St. Clair avenue. He made a contract with a firm of builders, Robinson & Burgess, to build a store on the eastern part of this lot. He told this firm to be very careful to keep within the eastern limit of the lot, but that he was not particular about the west line, as he owned the whole lot anyway. The building was to be 25 feet wide. A Mechanics' Lien action was brought against him by the builders and this was settled according to the official stenographer's note, as follows:—

This case is settled. Each party to pay their own costs. It is hereby agreed and this case is hereby settled on the

above terms, each party to pay their own costs; plaintiff to take building off the defendant Membery's hands and pay the defendant $70 a foot for depth of 120 feet for the land for the 25 feet frontage, giving a deposit of cash within 30 days from date, and permitting defendant Membery to occupy the premises until the 1st of August, 1912, at $40 a month rent; defendant Membery agreeing to vacate premises by 1st August, and all adjustments of taxes and rent to date from the date when the $70 per foot is paid; and all adjustments also to be made as of that date; defendant Membery to be free to take away front platform and also sink in the front cellar when he moves.

G. L. CROOKS,
Reporter.

The builders applying for a loan on the property, a survey was insisted upon, and it turned out that the building occupied the easterly 25 feet ¾ inches of the lot. Membery would not convey till he was paid $10 more and his solicitor $5 for the conveyance; he then, May, 1912, conveyed "the easterly three quarters of an inch throughout from front to rear of the westerly 25 feet of lot No. 88, etc., etc." It was not at that time noticed that while the building did project only three-quarters of an inch on the west 25 feet of the lot, at the front, it ran further west at the rear.

The conveyances then to the applicants cover (1) the east 25 feet, and (2) a strip three-quarters of an inch to the west of this, in all the easterly 24 feet ¾ inches of the lot; and the building is known as No. 1224 Bloor west.

In October, 1912, the grantees made a contract with Clavir to sell him "the premises situate on the north side of St. Clair avenue . . . known as street number 1224 Bloor west, having a frontage of ("about" is scored out here), 25 feet . . ."

Clavir finds that the rear of the building projects 2¼ inches on the west 25 feet; his solicitor delivered requisitions of title, which he does not consider fully and satisfactorily answered; and this application is made accordingly.

There are building restrictions in original grant not to carry on a business or trade, which may be deemed a nuisance —and not to erect building nearer the street line than 10 feet —the said building to cost at least $2,000.

The building was erected 18 feet away from the existing line of the street; but the street was afterwards widened to within 10 feet, indeed within one foot of the building.

This is immaterial; the restriction is against erecting, not against maintaining a building. The price and the question of nuisance have been satisfactorily cleared up.

6. "Grant of Membery of the easterly three-quarters of an inch of the westerly 25 feet; we will also require grant from him of the easterly 2¼ inches of the said westerly 25 feet, as the survey shews the rear of the building to be encroaching to that extent . . ."

The legal estate in this 2¼ inches or so much of it as is not covered by the $10 deed from Membery is still in Membery; it is sworn that his partner said that for $12.50 he could get the deed of this strip from Membery. But whether that is so or not, the vendors have not the title to it. It is argued that Membery would be estopped from setting up title to it—it may be so, I hope so—but that is not the great danger. A man who after agreeing to give up a building supposed to be 25 feet frontage, exacts $10 for three-quarters of an inch extra, which the building really measured; and then when it is found that the rear encroaches an inch or two more will not convey this trifling strip unless he is paid another sum of money, may reasonably be expected to take every advantage of his legal position. An "innocent purchaser" could, no doubt, be found to buy the westerly 24 feet ¼ inches of the lot; he could rely upon the Registry Act, and might very well set up that the second deed of three-quarters of an inch misled him, for ordinary prudence would have called for a perfectly correct deed at that time. When people get down to a deed for three-quarters of an inch, the strong presumption is that they are very accurate indeed. No doubt possession would be taken of the shop; but, as was long ago decided, possession is not in itself notice (*Waters* v. *Shade* (1851), 2 Gr. 457, and *Sherboneau* v. *Jeffs* (1869), 15 Gr. 574), even if the second grantee knows it in some instances at least. *Roe* v. *Braden* (1877), 24 Gr. 559.

At all events the "innocent purchaser" would take care not to know anything about the possession.

I do not think that the deeds are sufficient to convey all the land covered by the building and that this requisition has not been answered.

While it is very seldom that litigation is advised by the Court, this seems to be a case for an action against Membery to carry out his agreement for settlement.

I have not omitted to notice that the contract calls for 25 feet frontage only; both parties agree that it was the building No. 1224 Bloor west, and the land it covers, which are the subject matter of the contract.

The parties have agreed that there shall be no costs.

DIVISIONAL COURT.

HON. MR. JUSTICE RIDDELL. NOVEMBER 5TH, 1912.

JARVIS v. HALL.

4 O. W. N. 232.

Landlord and Tenant — Illegal Distress — Alleged Acceleration — Quantum of Damages—Damage to Business—Effect of 1 Geo. V. ch. 37, sec. 54—Verdict of Jury Reduced—Costs.

Action for illegal distress. Defendant had procured a transcript of a Division Court execution to be issued in plaintiffs' county and a pretended seizure made thereunder. He then had his bailiff seize plaintiff's goods, claiming rent was due by reason of an acceleration clause in the lease providing that should the tenant's goods be seized and taken in execution, the next ensuing year's rent should immediately become due and payable.

MULOCK, C.J.Ex.D., entered judgment for plaintiff for $764 damages and costs, upon the findings of the jury.

DIVISIONAL COURT reduced amount of damages to $464, with costs on High Court scale; at option of plaintiff he was given right to take a reference as to the amount of damages. Plaintiff to be entitled to half the costs of appeal.

Statute 1 Geo. V. ch. 37, sec. 54, considered.

Appeal by defendant from judgment of MULOCK, C.J., at the trial of an action for wrongful distress, awarding plaintiff $764 damages and costs, upon the findings of the jury.

W. T. J. Lee, for the appeal.

Jas Fraser, contra.

HON. MR. JUSTICE RIDDELL:—The trial of this case took a very long time; but many of the matters in controversy were eliminated, and before us the argument was not complicated by much contention as to the facts.

It will be sufficient to set out the facts now material.

The plaintiff was a tenant of the defendant under a written lease, not too skilfully drawn—it contains a clause: "Provided . . . that if . . . any of the goods

. . . of the said lessee shall be at any time during said term seized and taken in execution . . . by any creditor of the said lessee . . . the then current and next ensuing year's rent . . . shall immediately become due . . ."

Rent becoming in arrear a seizure was made for rent; but this resulted in no damage to the plaintiff, and irregular as it was, need not be further considered.

There was a judgment against the plaintiff brought by transcript to the Division Court of the plaintiff's district from Burk's Falls, the previous residence of the plaintiff—this was done by one Hutton, acting for and on the instructions of the defendant. Hutton was instructed by the defendant to find out if there was such a judgment; "if there was such a judgment, I was to have an execution or transcript issued, the execution issued and then issue a warrant," he says. He did this and had the goods of the plaintiff seized accordingly as the defendant contends. The plaintiff says that there was no taking in execution, that the Division Court bailiff accepted a payment on account, and went away without seizure. The landlord then issued his warrant to his bailiff for the current year's rent, which he claimed to be due by virtue of the acceleration clause under which the goods of the plaintiff were seized and sold.

The tenant sued and the action came on for trial before the C. J. Ex. D. and a jury at Brampton.

Cases of this kind in recent years have almost invariably been tried by a Judge without a jury, but as no motion was made to have the jury dispensed with, the learned Chief Justice indulged the parties in their apparent desire to have a jury pass upon the questions in issue.

The jury found answers to a great many questions submitted to them, most of which are not now in controversy—on the question of damages the jury ultimately found $522 in respect of goods, $20 for board of one Smith, and $600 because of interruption to the plaintiff's farming business. They found the defendant, however, entitled to a counterclaim of $378, and judgment was accordingly directed to be entered for the difference ($522+20+600=$1,142—$378), $764 and costs.

There can be no doubt that the landlord cannot give himself any rights under the acceleration clause in a lease by procuring the seizure of the tenant's goods either by an execution of his own or that of another. It is consequently

quite immaterial whether there was or was not an actual seizure by the Division Court Bailiff before the warrant of the landlord; in any case, the seizure by the landlord was illegal. But I see no sufficient ground for saying that the jury were wrong in finding as they did that the landlord's seizure was first.

No rent being due otherwise, it is plain that the seizure was wholly illegal.

In addition to the $20 for board the plaintiff has been found entitled to the value of the goods, and also to special damages. The findings on both these heads are disputed; and it becomes necessary to examine the evidence.

First as to the value of the goods—it cannot be contended that the plaintiff is not entitled to their value. The goods seized on the first occasion were valued by the plaintiff at $825. Of these the following do not seem to have been seized on the second occasion:—

Buckwheat	$150 00	
Wheat	98 35	$248 35
Balance		$576 65

But the following not seized on the first occasion were seized on the second (I give the values as fixed by the bailiff).

3 loads buckwheat in stook, $15	$591 65
This amount should be also diminished (as only 150 bushels of oats were seized instead of 200) by ¼ of $78	$ 19 50
Valuation	$572 15

Upon that evidence, the jury were justified in finding the value $522. No doubt the "fair value to the tenant," would be much more and that is the value to be allowed according to Parke, J., in *Knott* v. *Corley* (1832), 5 C. & P. 322.

There is no complaint as to the $20 allowed for Smith's board.

In an action of this kind special damage may be recovered in addition to the value of the goods. *Bodley* v. *Reynolds*, 8 A. & E. N. S. 779; *Rielly* v. *McMinn* (1874), 15 N. B. R. 370.

The latter case says "In trespass for seizing and selling tools under an illegal distress the plaintiff may recover, not only the value of the goods distrained and sold, but also

damages for being deprived of the use of them, if thereby he is thrown out of employment, and in estimating the damages, the jury have a right to take into consideration the circumstances in which the plaintiff was placed, and the difficulty of obtaining employment . . . without tools."

The plaintiff at the trial claimed $300 for damages in addition to the amount he claimed for the value of his goods.

This is how he puts it in answer to his own counsel: "A, I claim $825 all told, besides the $300 damages.

Q. Besides the $300 damages? A. Yes.

Q. What is $300 damages for? A. Well, they put me out of business, and I have been out of business ever since; I have never been able to do anything. I couldn't go on with my work because they seized everything and sold it. I have nothing to work with, and my son was out of work until Christmas time.

Q. Was your son farming with you? A. Yes. And we were both out of work from the time of the seizure until Christmas time, and I have been out of work ever since.

Q. Have you work now? A. I am out of work yet.

Q. Are you in a position to buy other goods, and go farming again? A. No. because I have got nothing to farm with."

He was cross-examined at great length (some 56 pages of the notes are taken up), but this particular matter of damages was left untouched—and no one else says anything about it.

In *Webb* v. *New Hamburg* (1911), 23 O. L. R. 44, at p. 55, the Court pointed out that a party to an action need not complain if a statement made by his opponent or his opponent's witness is taken as accurate if he allows it to go without cross-examination or contradiction at the trial. The judgment of the House of Lords in *Bowne* v. *Dunn* (1893), 6 R. 67, may be referred as cited in *Webb* v. *New Hamburg*, etc.

There is evidence then which would justify the jury in finding a verdict for $300 damages on this head—but no more. I can find nothing to support the extra amount.

If then the plaintiff will accept a reduction of his judgment to $464 and costs in the High Court scale, he may have it. In that event there being partial success only, he should have only half the costs of the appeal. If the plaintiff declines this, I think there must be a new trial. All the matters in controversy being now removed, but the simple

question of damages, these should be determined by the Master—and if the plaintiff is to have the privilege of increasing his special damages above what the evidence justifies, the defendant should have an opportunity of diminishing the damages on the head of the value of the goods seized.

If this alternative be preferred by the plaintiff, the judgment will be set aside and the matter referred to the Master to assess the damages (1) the value of the goods seized; (2) board of Smith, about which there is no dispute, and which the Master will assess at $20, and (3) special damages. Upon the Master's report becoming absolute, the costs of the former trial, appeal, report, etc., may be disposed of by one of us in Chambers.

HON. MR. JUSTICE KELLY:—I am of opinion that on the evidence plaintiff is entitled to the $522 allowed him as the value of the goods seized, and $20 for board. He is also entitled to damages for interruption to and interference with his farming business, and the evidence supports this claim to the extent of $300, which he made as damages for trespass, and for being deprived of his goods and chattels (over and above their value). The jury, however, awarded him $600 for this damage; this should be reduced to $300, thus reducing the judgment in plaintiff's favour from $764 to $464.

I agree with the manner of disposing of the appeal adopted by my brother Riddell.

HON. MR. JUSTICE LENNOX:—The second distress—the only one we are now concerned with—was made on the 22nd day of September, 1911, and the goods were sold on the 6th October, following. There was no rent in arrear or due either at the time of the distress or sale, and both were illegal.

For such an illegal distress and sale a tenant was entitled to recover from his landlord "double the value of the goods or chattels so distrained and sold, together with full costs of suit," under R. S. O. ch. 342, sec. 18, Sess. 2; 2 W. & M. Sess. 1, ch. 5, sec. 4. And the jury must be directed to give this amount. *Masters* v. *Farris*, 1 C. B. 715.

The plaintiff did not sue for double value; but it was assumed upon the argument that he would be entitled to it if properly claimed; and he now asks to amend his pleadings and claim it.

This is a case for stiff damages. The defendant's action was not only illegal, but deliberately dishonest.

But there is no object in allowing an amendment. The Court has now power to double the damages assessed; the jury must find the value and assess the damages at double that amount.

And there is another reason. Before the wrongs complained of were committed, namely, on the 1st September, 1911, the section referred to was repealed by 1 Geo. V., ch. 37, Ont., and sec. 54 of this Act was substituted therefor. Under the section now in force the plaintiff is not entitled to double damages, but "to recover full satisfaction for the damage sustained by the distress and sale." This may be either more or less than double value, but it eliminates the requirement of a specific claim in the pleadings.

The $522 allowed in respect of the goods is well sustained by the evidence. The $20 for board is not disputed. It was argued that the $522 award exhausted the plaintiff's right to damages. I do not think so. Without reference to cases at all, the language of sec. 54 referred to is broad enough to cover any damages naturally resulting from the defendant's act. And even where the seizure is not illegal, but only irregular, deprivation of the use of chattels or goods is a basis for damages: *Piggott* v. *Britles* (1836), 1 M. & W. 441, at pp. 449 to 451. This is recognized, too, in *Hessey* v. *Quinn*, 21 O. L. R. 519, at p. 521. See also *Sherman* v. *Dutch*, 16 Ill. 283.

But the plaintiff is not entitled to the whole $600. He only asked for $300 in respect of this matter in his statement of claim, and only a total of $1,035. The jury doubles this item, and allows a total of $1,142. The plaintiff has not asked to amend as to this part of his claim, and, having been definitely limited himself to $300 by his evidence at the trial, I think he should not be allowed to recover more.

I agree that the appeal should be disposed of in the way stated by my brother Riddell.

HON. MR. JUSTICE BRITTON. NOVEMBER 8TH, 1912.

TRIAL.

MILLER v. HAND.

4 O. W. N. 245.

Principal and Agent — Secret Profits—Purchase by Agent—Measure of Damages.

Action for an account of the secret profits made by defendant while acting as agent for plaintiff for the sale of certain lands. Defendant had purported to sell them to one McDougall at $100 per foot, but in reality purchased them himself and, a few months later, sold them for $160 per foot.

BRITTON, J., *held*, that plaintiff was entitled to treat the later sale as made on his account, and that he was, therefore, entitled to all profits thereof, less proper deductions.

Judgment for plaintiff with costs.

Action for an account of the secret profits made by defendant while acting as agent for plaintiff, tried at Sault Ste. Marie without a jury.

Geo. H. Kilmer, K.C., for the plaintiff.

J. E. Irving, K.C., for the defendant.

HON. MR. JUSTICE BRITTON:—The plaintiff was the registered owner of the west half of original lot 35 on the north side of Queen street in the city of Sault Ste. Marie, having a frontage on Queen street of 55 feet. The defendant was well known to the plaintiff as a dealer in real estate and as an agent for the purchase and sale of real estate in the city of of Sault Ste. Marie. The plaintiff employed the defendant to act for him in the sale of above lot.

The defendant accepted such employment and in due course represented to the plaintiff that he had found a purchaser for said lot, namely, one Neil McDougall, who as the defendant said, was willing to purchase and pay at the price of $100 per foot frontage. The sale was carried out with McDougall at that price, viz., $5,500, and the usual commission for such a sale at Sault Ste. Marie was:

5% on 1st $1,000 ..... $ 50 00

2½% on balance of $4,500 ..... 112 50

In all the sum of $162 50

This amount was demanded by defendant, and was paid to defendant by plaintiff's solicitor in this transaction.

The agreement for sale between plaintiff and McDougall, made at the instance and upon the representation of defendant acting, as plaintiff supposed, as agent for the plaintiff, was made on the 6th December, 1910. On the 8th December, 1910, plaintiff's solicitor paid to the defendant by cheque on the Traders Bank of Canada the sum of $162.50 commission above mentioned.

This cheque is made payable to the defendant as the "commission on Miller sale," and there was no other transaction between the parties to which the money received upon that cheque was or could be applied. On or about the 29th June, 1911, the defendant again sold the said land to one Edwin Stubbs for the price of $160 a foot. This sale was carried out in the name of Neil McDougall as vendor, but at the request and for the advantage of defendant.

As a matter of fact and beyond all question the defendant represented to the plaintiff and at the time of the sale to McDougall the plaintiff believed that McDougall was a real purchaser for himself and that the defendant was not as a purchaser interested in the property. It was not until after the sale to Stubbs that the plaintiff found out otherwise. I find that defendant purchased this lot for himself, that McDougall merely acted at defendant's request, and that although conveyance accepted by McDougall and mortgage given by him for part of purchase-money—all was at the instance of defendant—and for his supposed benefit. The sale by McDougall to Stubbs was at the request of defendant and for his benefit. The defendant made all the profit. Mr. McDougall did not make any or claim any benefit or profit from this transaction.

McDougall merely represented defendant, and acted at defendant's request.

It will, perhaps, assist in dealing with the evidence to see what defendant attempted to do. It was stated by plaintiff, and not denied by defendant, that defendant wanted to get an option on plaintiff's lot 34, at $90 a foot. The plaintiff refused but told defendant to make it $100 a foot, and upon a sale of 34 at that price he, the plaintiff, would pay defendant full commission even if he, the de-

fendant, could get full commission or split commission from another real estate man as well. The full commission understood as I have stated—would be 5% on first $1,000 and 2½% on the additional amount. Shortly after, the defendant told plaintiff that he had sold 34 for $90 a foot. Plaintiff said he "would not stand for that." Defendant replied it had gone, plaintiff then went to his solicitor, about the matter.

It was ascertained that the defendant had given on behalf of plaintiff a receipt for $100 on account of the purchase of lot 34. The defendant had no authority from plaintiff to sign such a receipt or to make such a sale, for price named. Under threats from plaintiff's solicitor that matter was supposed to have been adjusted, by the purchaser of 34 making no further claim to 34, and that the plaintiff should accept from a purchaser introduced by defendant $100 a foot for 35. That is my interpretation of the evidence. Then the plaintiff found another person ready to buy 34 at a price which plaintiff was willing to accept, and then it was found that the defendant and McDougall would not withdraw the receipt or give a release of any claim to lot 34. An action was then commenced by the plaintiff against McDougall in reference to lot 34, and it was in that action upon examination of McDougall for discovery that the plaintiff found out that there was no sale of 35 to McDougall, but that the whole purchase from plaintiff in the name of McDougall was a scheme of the defendant. I find that the allegations in the statement of claim have been established and the only thing remaining is as to plaintiff's remedy.

The plaintiff asks that an account be taken of the profit realised by defendant out of the sale of plaintiff's land, nominally to McDougall, but really taken by defendant himself for his own profit.

This was a fraud upon the plaintiff. Had the plaintiff known the facts before the sale to Stubbs, he, the plaintiff, could have had the sale to McDougall rescinded.

So far as appears—so far as known to plaintiff and as represented by defendant, Stubbs is an innocent purchaser —a purchaser for value and in good faith.

The plaintiff simply asks that the defendant pay the profit money received by him and which belongs to the plaintiff as principal. There is no dispute about the amount and there is no need of a reference.

It was argued that, by reason of the negotiation which followed after plaintiff ascertained that defendant had without authority given to McDougall a receipt for money on a pretended sale of 34, a settlement was arrived at. McDougall gave up any claim to 34, and got the half of 35, at $100 a foot. The answer to that satisfactory to me is; (1) McDougall did not really then give up 34. He gave it up subsequently as the result of an action brought by plaintiff against him. This action was commenced by writ issued on 30th March, 1910, and (2) whatever plaintiff did, he did in complete ignorance of the part defendant was playing, until the examination of McDougall for discovery in the action last mentioned. Until that examination the plaintiff did not know that defendant was acting all for himself while pretending to act as agent for plaintiff.

It was argued that in an action of this kind, the measure of damages is not the difference between what plaintiff got from McDougall and what defendant got from Stubbs, but the difference between real value on date of sale to McDougall and the price paid by defendant for the McDougall transaction.

The cases cited by counsel for defendant are, I think, distinguishable, but it is not unfair to the defendant to say that the real value even at the time of McDougall deed was about the sum that Stubbs paid. I would rather accept a real transaction such as sale to Stubbs than the evidence of real estate agents as to the real value. The defendant did not give evidence on his own behalf. It may well be that defendant knew the real value at time of McDougall deed was practically what Stubbs paid a little later on.

In any event the defendant should not complain if asked to pay only what he received.

The defendant's profit was $60 a foot for 55 feet, $3,300 as against the small cost of carrying this property from December, 1910, to June 29th, 1911, the defendant may be allowed the 2½% commission. If sold in ordinary course by an agent, the owner would have to pay that. This would amount to $82.50 and would leave $3,217.50.

It appeared upon the trial that the plaintiff was pecuniarily interested only to the extent of an undivided half of the part of lot 35 in question. Then Mr. Hearst was in equity the owner of and entitled to the other half. Mr.

Hearst was a witness at the trial on behalf of plaintiff. No application was made to join Mr. Hearst as a party plaintiff, or to add him as a party defendant, and no claim was put forward by Mr. Hearst for damages.

As the matter stands the plaintiff is personally entitled to only one half of above amount, namely, $1,608.75 with interest at 5% from 1st July, 1911. There will be judgment for plaintiff for that amount with costs and without prejudice to any claim Mr. Hearst may make or to any action he may bring by reason of any interest he had in the said east half of 35, north side of Queen street, in the city of Sault Ste. Marie.

Thirty days' stay.

HON. MR. JUSTICE BRITTON. NOVEMBER 6TH, 1912.

TRIAL.

MUNN v. KEYES ET AL.

4 O. W. N. 250.

Executors and Administrators — Alleged Gift by Deceased — Too Vague to be Given Effect to—Transfer of Moneys in Bank.

Action by administrator of an estate to recover $530.95, then in a chartered bank to the credit of defendants. Defendant Keyes, the sister of deceased, claimed that the money in question had been transferred to her credit in the bank, and deceased had intended to make a gift of the same to her.

BRITTON, J., *held*, that the evidence had not established a gift *inter vivos* or *mortis causa*, and that the deceased's testamentary intentions had not been carried to completion.

Action dismissed without costs.

Action by plaintiff as administrator of the estate of his late brother, Charles Wm. Munn, to recover $530.95, being the amount put to the credit of defendants, in the Bowmanville branch of the Bank of Montreal, on the 5th day of October, 1911.

Tried at Cobourg, without a jury.

F. L. Webb, for the plaintiff.

D. B. Simpson, K.C., for the defendant Keyes.

E. V. McLean, for the defendant Hillyer.

HON. MR. JUSTICE BRITTON:—The money in question in this action was the property of the deceased, and it is unnecessary for the determination of this action to go into family matters in an endeavour to ascertain how the deceased had obtained and saved so large a sum. The deceased was a sickly man, and resided at Bowmanville. The defendants did, and do reside there, and the plaintiff resides at Colborne. The plaintiff occasionally visited the deceased, and on one of these visits, the deceased told plaintiff that he (deceased) had money on deposit in the Bank of Montreal. The deceased had in fact a savings bank account in the Bank of Montreal, running as is shewn by book No. 1926, from 12th October, 1906. On or about the 12th May, 1911, the plaintiff and deceased came to an understanding about the care of deceased, and about money matters. The money was to be placed to the joint credit of plaintiff and deceased. The deceased was to be cared for, by his sister, the defendant Mrs. Keyes, for which she was to be paid $1 per day. Nothing was to be paid without a receipt, and other details were arranged.

The defendant Dr. Hillyer, as a good friend of the family, was as plaintiff says, consulted about this, and said he thought it a good plan. The money then, the amount being $525.70, was checked out by deceased, and a new account opened in same bank in the joint names of plaintiff and deceased. The bank manager for his own protection had each sign a document that the money could be drawn by either.

The deceased continued to grow worse. The plaintiff's visits were not frequent, and it is in evidence that on more than one occasion on such a visit the plaintiff was not in a perfectly sober condition. I pass on to Sunday, the 1st October, 1911, as the determination of this case depends upon what occurred between that day and the date of death of Charles.

Thos. H. Spry, an ex-mayor of Bowmanville, was an intimate friend of deceased, and was in the habit of visiting him. On Sunday the 1st October, 1911, the deceased and witness Spry had a conversation. Mr. Spry in his evidence introduced that part of the conversation relating to money rather abruptly—but here it is. In answer to Mr. Simpson —"Yes—on this 1st October, I was visiting him, and he said then that he wished to make the change at once.

Q. What change? A. To give the money to Mrs. Keyes.

Q. To give what money? A. To give the money that was in the bank to his sister Mrs. Keyes. He wanted to know if I could effect the change. I said I did not want to have anything to do with it, but I thought it would be better for him to employ a lawyer to do it. I said it would not cost you very much. And he said, well he says. Do you think Dr. Hillyer could do it. Well, I said, I do not know, probably he could. Well he says I wish you would send Dr. Hillyer down to do it. The following morning I called on Dr. Hillyer and asked him to go down, and do that business."

On the 3rd Mr. Spry saw deceased, and deceased then told Spry that he, deceased, had given the money to Mrs. Keyes. Dr. Hillyer gives this account of what took place. He went at the request of Spry.

"Q. How did you find his condition? A. Well, of course, he was gradually getting weaker, but I considered him mentally, just as rational as ever he was. I did not see any difference in that respect. Of course, as a matter of fact he was weak, and his breathing was short, and he had been propped up a long time, and he had what we call effusion all through his legs and lower part of the body, and had become gangrenous, and he was in a very bad state."

The doctor's opinion was that the mental condition of deceased was good.

His account of the business transaction is this: "He wanted to change this money over from his brother John to his sister Mrs. Keyes. He had changed his mind he said because Mrs. Keyes had been looking after him, and had a great deal of trouble with him, and he thought she was entitled to the money. He asked me if I would be a trustee with Mrs. Keyes, and the money was to be handed over to Mrs. Keyes and I. Of course, in the event of his lasting very long, he thought perhaps he might want some money, and to have somebody to look after him.

"He said he had been a great deal of trouble to Mrs. Keyes, and she had been very kind to him, and he thought she was entitled to the money.

"He wanted me to be a trustee with Mrs. Keyes."

"Q. Was it you or Mrs. Keyes that was to be the trustee? A. I was to be the trustee I understood. It was in favour of Mrs. Keyes, the money was to be given. The money was to be Mrs. Keyes.

Q. Did he make any charge against the money? A. Well, of course, in the event of his needing money, he was to be provided with all the money he wanted. Mrs. Keyes at this time was there, and he stated that he would be willing that the expenses about the town would be paid.

Q. That is funeral expenses? A. Yes.

Q. And other expenses? A. Yes.

Q. And were they paid? A. Yes.

Q. And did Mrs. Keyes promise to do that? A. Yes, Mrs. Keyes, I think, promised to do that.

Q. She promised to pay these debts? A. Yes."

It was the idea of Dr. Hillyer that the money was to pay debts—that he was responsible with Mrs. Keyes for the payment of these debts and after they were paid, the balance of the money was to go to Mrs. Keyes. Mrs. Keyes in her evidence simply states that she heard the evidence of Dr. Hillyer, and agrees with it.

As to what took place in order to carry out the intentions of deceased whatever the real intentions were, there seems to be no dispute—Dr. Hillyer's account of it is, that deceased took from his pocket book a blank check on the Bank of Montreal. Mrs. Keyes at request of deceased got the pocket book out of the desk and handed it to deceased. He took the check and signed it in blank. He apparently so signed as he did not know exact amount to his credit at the bank. He said that the deceased told him to go to the bank with the check—get the amount, fill it up and place the money to the credit of himself and Mrs. Keyes. On the following day Dr. Hillyer took the check so signed in blank, to the bank—and the manager at the request of Dr. Hillyer filled in date, 3rd October, 1911, made it payable to defendants or bearer—filled in the proper amount having added interest, making the amount in all $530.95, added the words "new account," and wrote across the face of the check the words "savings bank." The new account was opened, starting with the credit of $530.95 as of the date October 5th, 1911. Charles died on the 8th October, 1911. In due course on the 12th March, 1912, the plaintiff obtained letters of administration to the Surrogate Court of the united counties of Northumberland and Durham—and as administrator, claims the money, viz., the $530.95 and interest thereon. By arrangement the money remains in the bank—awaiting the determination of this action.

The statement of defence so far as it relates to Mrs. Keyes is, after stating the service rendered by her to deceased, and the unpleasant character of these services that the deceased gave the check to her as and for her own after payment of debts and funeral expenses of deceased.

The defendant Hillyer says that he is simply a trustee of the money referred to, to see that the funeral expenses of the deceased and the debts incurred by the deceased about Bowmanville should be paid.

Upon the evidence, I do not think a gift to the defendant Mrs. Keyes has been established—either a gift *inter vivos* or a gift *mortis causa*. No more a gift to deceased's sister than to the plaintiff in the arrangement made prior to October 1st, of which both defendants were aware—Mrs. Keyes never had possession of the money in the bank. It was there, to the joint credit of both defendants.

I have some difficulty in coming to a conclusion, satisfactory to myself, as to whether or not an irrevocable trust was created in favour of the creditors of deceased, and of the surplus, if any, in favour of the defendant Mrs. Keyes. If such a trust was created then the plaintiff as administrator could not recover. Inconvenient as it might be for the creditors of deceased to look to the defendants for their pay, and inconvenient and troublesome as it certainly would be for Dr. Hillyer to administer such a trust, that would make no difference, if by what was done such a trust was created. My opinion is that what the deceased desired to do was not to part with the control of his money absolutely during his life, but to get it in the hands of the defendants for safe keeping. In the event of his wanting any of the money during his life, he was to have it. In the event of his death—he desired that his funeral expenses and his debts be paid out of this money, and that his sister should get the balance if any. This arrangement was testamentary in its character. The deceased thought it could be done, without the necessity of a will. This case cannot be put higher as it seems to me, than the case of where a donor delivers property to a third person for the donee. The money was delivered to a third person. If to Dr. Hillyer—to him as trustee—if to both defendants—to them as trustees for the payment of donor's debts. Until the authority of Dr. Hillyer was exercised, he was the agent or trustee of donor—and until authority exercised donor could revoke it, and not being exercised before death of donor, it was revoked by such death.

Although a good deal of the evidence was such as could be fully relied on—yet I cannot help feeling that what took place in regard to the alleged gift was vague, indefinite, and unsatisfactory.

The evidence did not establish that any undue influence was used to get the deceased to sign the check in blank.

It is true that the deceased was very sick. He died on the 8th October, 1911, after a long debilitating illness, Mrs. Keyes did not feel very kindly toward the plaintiff. She admits saying to the deceased on an occasion when he was finding fault with the plaintiff "that is the man you left your money to." The defendant Dr. Hillyer, knowing what had been done between plaintiff and deceased, and with the doctor's apparent approval, should have called in some person so that the deceased could, at least, have had independent advice before signing the blank check. The deceased did not suggest how the new account was to be opened. A paper writing was drawn up by the bank manager that the money should not be drawn unless by a check signed by both defendants. The defendants signed this. Apparently this was the manager's own suggestion for the protection of the bank.

It is not in evidence that the deceased knew anything of this.

There will be a declaration that the money on deposit in the Bank of Montreal at Bowmanville, to the credit of the defendants, is the property of the estate of the late Charles W. Munn.

There will be judgment for the plaintiff for $530.95 with interest at rate allowed by the Bank of Montreal on deposits at Bowmanville, from 5th October, 1911.

Upon all the facts, and as I think the defendants acted in good faith, although mistaken as to their rights, the judgment will be without costs.

The judgment will be without prejudice to any claim the defendants or either of them may have against the estate of the late Charles W. Munn.

Thirty days' stay.

HON. MR. JUSTICE RIDDELL. NOVEMBER 14TH, 1912.

WEEKLY COURT.

KELLY & CLOSE v. NEPIGON CONSTRUCTION CO.

4 O. W. N. 279.

Contract — Damages for Breach — Appeal from Referee — Railway Supplies—Obtaining Permits for Tie-cutting—Involves Location —Waiver of Delivery—Impossibility by Act of Defendant—Conversion—Defendants not Guilty of—Costs.

Appeal from report of Local Master at Port Arthur awarding plaintiffs $12,815.08 damages in an action for breach of a contract to supply certain material and labour to defendants, railway contractors.

RIDDELL, J., reduced the damages to $8,209.20, and gave judgment for plaintiffs for that sum with costs up to judgment. No costs of reference, appeal, nor motion for judgment to either party.

Where plaintiffs were to supply ties, but defendants were to obtain permits for the cutting of such ties, the burden of finding limits where such ties can be obtained is on the defendants.

Appeal from report of Local Master at Port Arthur, dated August 24th, 1912.

H. Cassels, K.C., for the appeal.

Glyn Osler, contra.

HON. MR. JUSTICE RIDDELL:—This is an appeal from the Master at Port Arthur.

The plaintiffs are a firm carrying on business in Port Arthur, while the defendants are a company engaged in building part of the National Transcontinental Railway.

In or about November, 1909, the parties agreed for the plaintiffs to do some freighting, etc., for the defendants—and they did so. The action is in part for these services.

Then on February 9th, 1910, the parties entered into a written agreement for cutting and delivering ties, which will require consideration. There are some other matters of minor importance also.

At the trial an order was made "that all matters in question in this action be referred for enquiry and report to . . Local Master at Port Arthur . . . " and all questions of costs and further directions were reserved.

The Master made his report, August 24th, 1912, finding the defendants indebted to the plaintiffs in the sum of $12,815.08. The defendants now appeal and the plaintiffs move for judgment, etc., etc.

I take up the matters in dispute in the order in which they were argued.

As to the tie contract of February, 1910. This contains a provision that the plaintiffs shall provide all labour, etc., necessary for the cutting and delivering of the ties required for the 75 miles of railway from a point 19½ miles west of the crossing of the river eastward. They were to commence forthwith after the execution of the contract, and cut and deliver before June 15th, 1910—75,000 ties, and unless notified by the company to stop for a time, continue thereafter cutting and delivering ties until the full number should be delivered, and at such a rate as that the work of track laying should at no time be delayed, the company to be the sole judge of this. The ties cut along or near the right of way were to be delivered at points on the right of way properly piled. The said piles were to be distributed so as to provide sufficient ties at each pile to carry the steel from that pile to the next, E. or W., so as to make it unnecessary to haul ties by teams "any of said ties which the company requires to be delivered at its No. 3 warehouse on Ombabika Bay, shall be placed in the water and towed to said warehouse, and there placed in booms or piled on the shore."

The company were to "furnish permits for the cutting of such ties and pay all dues: and the plaintiff to conform to all the regulations of said permits.

The number of ties necessary is as is admitted 3,000 per mile or 225,000 for the 75 miles.

In fact only 3,600 ties were made up to June 15th, 1910, instead of the 75,000 agreed upon, but there can be no complaint on this score as the defendants requested that the plaintiffs should stop and the plaintiffs willingly assented. It seemes probable that the plaintiffs could have had the 75,000 ties cut had it been desired.

Much complaint is made by the appellants that the Master found as a fact that the 75,000 ties were to be made off the Ombabika limit, the contract being silent in that regard. No doubt it would not be proper to amend the written contract by introducing this term. *McNeely* v. *McWilliams* (1886), 13 A. R. 324; *Beth* v. *Smith* (1888), 15 O. R. 413; S. C. (1889), 16 A. R. 421, and similar cases well known. For example the plaintiffs would not be breaking their contract if they delivered these 75,000 ties from some other limit. Yet while the arrangement to cut on the Ombabika

limit cannot be made a term of the contract, it is a circumstance to be taken into consideration in determining the amount of damages, etc., like any other circumstance surrounding the making of the contract or contemporaneous with it: performance in whole or in part—and it is in this view that the Master finds the fact, in which finding I agree.

The direction from the defendants to "go slow" was in March: the licenses expired on the 30th April, and the Government had given notice that they would not be renewed: but on and after the 10th June licenses could have been obtained without any trouble.

The defendants did not procure licenses. From the conduct of the defendants in staying the operations of the plaintiffs it would follow as a natural consequence that the term of the contract requiring delivery of 75,000 at a fixed date was impliedly varied and a delivery at a reasonable time would be sufficient. And it being the duty of the defendants to supply the permits to cut, all time lost by the non-furnishing of the permits the plaintiffs could not be held responsible for.

September 14th, 1910, the plaintiffs asked for permits in a letter to the defendants. They replied September 17th, 1910, saying that they had assigned their contract to O'Brien & Co.: September 26th, O'Brien & Co. wrote the plaintiffs saying: "We will arrange to get permits for you between mileage 160 and 175 and 225 and 235 on either side of the railway," the plaintiffs replied October 5th, that they held the defendants on the contract and had not consented to any assignment but "without prejudice to our claims against the Nepigon company," if O'Brien & Co. would send the permits the plaintiffs would at once act on them. O'Brien & Co. answered, placing upon the plaintiffs the responsibility of saying whether there were enough ties on the lands O'Brien & Co. had preferred and that if the plaintiffs said there were, O'Brien & Co. would get the permits, "But," they add, "surely you do not expect us to go into the woods and select your timber limits." "As stated before we wish you would say if this territory is satisfactory to you, for we do not want to ask for permits in a territory where there is no tie timber."

The specific and definite contract of the defendants was to "furnish permits for the cutting of such ties," and I do not think they could cast upon the plaintiffs the duty of

finding out where "such ties" could be obtained: but that they undertake that responsibility themselves.

The permits were not furnished, the plaintiffs did not perform their contract accordingly, but were prevented from doing so, and they are entitled to damages.

I cannot say that the Master is wrong in his estimate of damages properly attributable to this head. There are, however, two matters which require consideration.

First the Master has made a mistake in his figures, he has made the remainder found by subtracting 75,000 from 225,000 to be 155,000 instead of 150,000. His figures must then be reduced by $150 (i.e., 5000 ties @ 3 cts. = $150). Then he had allowed the plaintiffs $1,00 for "expenditure upon camp buildings, etc., which became useless by reason of the defendants' breach of . . . contract." What the Master says is this:—

"They (i.e., the plaintiffs), had erected the necessary buildings from which to carry on operations and had cut roads as required. These buildings are valued by Mr. Bliss at $700, and the roads at $100 a mile or for 3 miles which was the approximate length, $300, making together $1,000. They had also bought and forwarded to their camp over $2,000 worth of supplies. Mr. Bliss says that Donnell the plaintiffs' foreman was a good competent man. It never could have been contemplated that the plaintiffs would spend $1,000 in preparation for making 3,600 ties and 800 logs also cut by them on that limit. The work on the roads could be taken away when the tie-making was completed. Something might be saved from the building but the loss on both would be spread over 75,000 ties and would be a mere trifle as compared with the loss if it is to be confined to 3,600 ties."

All this, I think, involves a fallacy, the plaintiffs would require to make all these expenditures to carry out their contract, and their reward would be the amount of their net profits, not the net profits plus what they had spent in earning them. They cannot be in a better position than if their contract had not been broken. This $1,000 should be disallowed.

We now come to an item $1,734.24 "for supplies, etc., taken over by the defendants," but the property of the plaintiffs. What the Master says about this item is:—

"I think the defendants are liable to the plaintiffs for all the damages which the plaintiffs suffered from the re-

fusal or neglect on the part of the defendants or their assignees to have that permit on Ombabika Bay renewed and to permit the plaintiffs to carry out and complete their contract as originally agreed upon, and this includes the value of the supplies left at their camp at Ombabika Bay $1,734.24."

It will be seen that this involves the fallacy I have just been discussing. Counsel for the plaintiffs does not pretend to support it on any such ground but bases it as upon a conversion. We must therefore examine into the precise facts of the alleged conversion, and here the Master does not help us.

In the opening before the Master, counsel for the plaintiffs (p. 4), said: "When the defendants gave up work they had a good deal of material on hand on the ground . . . about $2,000 worth which we understand was taken over by the defendants' assignees, O'Brien & Co."

The contracts between the defendants and O'Brien & Co. are two in number, Ex. 17, an assignment of the plaintiffs' contract, and Ex. 18, an assignment of the contract to build the railway. Neither of these contains any assignment of the plaintiffs' goods, and consequently neither can be construed as a conversion. We must look at the facts as they occurred on the ground.

When the plaintiffs ceased work in the spring they left supplies of different kinds on the premises which they had occupied as a camp. The buildings there seem to have been rented. When O'Brien & Co. took over the defendants' contract, he wanted these supplies. Kelly went up and took an inventory of them and he and O'Brien dickered concerning the price but apparently could not, or at least did not, agree. O'Brien took the supplies knowing them to be the plaintiffs' and being willing to pay the plaintiffs for them, not at all by reason of any authorisation of the defendants. The plaintiffs must look to O'Brien & Co., there was no conversion by the defendants.

Item 39 is also attacked. This $516.55 for oats and hay alleged to have been supplied by the plaintiffs to the defendants.

The Master says: "As to the item of accounting in dispute, I find that the defendants should pay for the hay and oats of which they were bailees and which they turned over to O'Brien, McDougall & O'Gorman and that the price should be what it cost plaintiffs to put these articles at

warehouse 1, if plaintiffs had not consented to accept the lower figure fixed by the defendants, $516.55."

Kelly says that in the offce of the defendants' company, in talking to me of their foreman in June, he, Kelly, asked that the defendants taken over these supplies at what they had cost the plaintiffs and "they said they would take over the hay and the oats." I understood them to say they would take it over at what they charged us for it with the freight added." Sometime thereafter he got a "credit slip" from the defendants' bookkeeper, Ex. 3, and said the amount allowed was too low: "I didn't say I wouldn't accept them. I said the prices were low. I don't think we made any price." Nimmo the accountant swears that Kelly refused to take the price the defendants offered, and that McAffray, the foreman, then said: "Well, they can't stay here." McAffray says Kelly "told me they had some hay and oats at South Bay, and he asked me if we would take them off his hands. I told him we would and allow him what it would cost us to replace them. I told Mr. Nimmo the nature of the conversation, who instructed us to see that it was carried out. But the next time I saw Mr. Kelly at Nepigon he refused that altogether and said he wouldn't accept it," and McAffray said he wouldn't take them. The defendants did not, it would seem, ever receive the hay and oats—but O'Brien & Co. took them. I do not think on this evidence there was any sale—nor indeed does the Master find there was, his finding being that the defendants were bailees. What I have said on the large item of $1,734.24 applies to this in that view.

The Master has allowed to the plaintiffs also, in an indirect way, for other "goods supplied by the defendants to the plaintiffs for the purposes of and in connection with the said contract, which expenditure became wholly useless to the plaintiffs owing to the defendants' breach of contract. These amounts appear to items Nos. 100 to 131 inclusive . . . and instead of adding the amount to the damages assessed." he has "disallowed the items in question in dealing with the defendants' account." this is wrong for reasons I have already stated.

The amount of these, reducing No. 112 to $57 and deducting No. 116. $1,500 is $1,030.36.

The report should be amended by allowing to the plaintiffs the following sums in the first column and disallowing those in the second:—

			Allowed	Disallowed
(1)	Nos. 1 to 25	.....	$ 9,411 60	
	" 34	.....	11 25	
	" 35	.....	19 26	
	" 40	.....	208 50	
(2)	" 39	.....		516 55
(3)		.....	9,000 00	150 00
		.....		1,000 00
		.....		174 73
		.....		1,734 24
Forward		.....	$18,650 51	$ 3,575 52

		Allowed	Disallowed
Forward	.....	$18,650 51	$ 3,575 52
	.....		18,650 51
Total	.....		$22,226 03

In the defendants' account there should be added the above amount of $1,030.36 being the real amount of items Nos. 100 to 131, inclusive, making the defendants' total:—

Amount found by Master	$ 9,410 95	
Add	1,030 36	
		$10,441 31
Balance due to the plaintiffs	$ 8,209 20	
		$18,650 51

The plaintiffs' balance in other words is reduced by the sum of $3,575.52 and $1,030.36=$4,605.88; deducting this from $12,815.08, as found by the report, we have $8,209.20.

It is possible that the amounts really due under items 100 to 131 of the defendants' account are not exactly right; either party may, at their own peril, take a reference back upon this point only. If that be done, I will reserve to myself the question of the costs of that reference, but so far as the success has been divided, I think the plaintiffs must have the costs of the action up to and including judgment, and no costs of reference, appeal, or motion for judgment to either party. If my figures are adopted the plaintiffs may have judgment for $8,209.20 with costs up to and including judgment at the trial only.