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APPELLATE DIVISION.

JUNE 1ST, 1914.

SHAW v. TORRANCE.

Contract—Exchange of Horses—Evidence—Finding of Fact of Trial Judge—Appeal.

Appeal by the defendant from the judgment of MIDDLETON, J., ante 172.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. Laidlaw, K.C., for the appellant.

F. Arnoldi, K.C., for the plaintiff, the respondent.

THE COURT dismissed the appeal with costs.

JUNE 2ND, 1914.

CITY OF WOODSTOCK v. WOODSTOCK AUTOMOBILE MANUFACTURING CO.

Mortgage—Security for Loan by City Corporation to Manufacturing Company — Agreement—By-law — Construction of Mortgage-deed—Enforcement of Security—Bonus—Assignment for Benefit of Creditors.

Appeal by the defendants the Canada Foundry Company from the judgment of MIDDLETON, J., 5 O.W.N. 540.

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

W. T. McMullen, for the appellants.

W. M. Douglas, K.C., for the plaintiffs, the respondents.

THE COURT dismissed the appeal with costs.

JUNE 5TH, 1914.

HOWARD v. CANADIAN AUTOMATIC TRANSPORTATION CO. LIMITED AND WEAVER.

Company — Prospectus — Misrepresentation as to Existence of Patent—Purchase of Shares—Rescission—Fraudulent Misrepresentation by Agent as to Business of Company—Materiality—Inducement to Purchase—Evidence—Repudiation—Promptness.

Appeal by the defendants from the judgment of SUTHERLAND, J., ante 285.

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

A. McLean Macdonell, K.C., for the appellants.

T. A. Beament, for the plaintiff, the respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. MAY 23RD, 1914.

RE MARTIN.

Surrogate Courts—Tariff of Costs—Increased Fees—Solicitors.

This was the first application (estate of Joseph S. Martin, deceased) under the recent Surrogate Court tariff for the allowance of an increased fee.

MIDDLETON, J.:—The estate in question is comparatively small —$8,500. The accounts are simple. There was no contest of any

kind. The executors appear to have done their duty satisfactorily, and no one was disposed to complain.

The learned Surrogate Court Judge has certified, pursuant to sec. 5 of the tariff, for an increase of the fee allowed by the tariff from $40 to $100, basing his recommendation upon the large number of beneficiaries and upon a hypothetical bill purporting to be made under the old tariff, which would amount to $78 without any reduction on taxation, and upon the statement, "my idea being that the new tariff was certainly not intended to reduce the amount of solicitors' fees."

The new tariff was intended to fix the fees at the sums named, an increase being sanctioned only where the case was one "of an important nature." This case was not either important or difficult in any way. After payment of debts and some legacies, the residue is to be divided equally between the testator's brothers and sisters and his wife's brothers and sisters; the children of any who are dead taking the parent's share. The will had been interpreted upon an application to the Court. It appears that no less than thirty copies of the appointment and fourteen copies of the accounts were sent by mail to the persons who were supposed to have some interest. In the hypothetical bill $50 is charged for this—an item well calculated to shock.

One solicitor attended on the reference, to represent certain beneficiaries. He would, under the tariff, be entitled to a fee not exceeding $20. The Judge recommends an increase to $25.

When this tariff was prepared, after very careful conference with the Board of County Court Judges, it was thoroughly understood that only in exceptional cases should the prescribed limit to the fee be exceeded. The learned Judge appears, I think erroneously, to have regarded the application for an increase as one that may be lightly made.

The recommendation cannot be approved, and the order should be amended accordingly.

BRITTON, J. JUNE 1ST, 1914.

GUARDIAN TRUST CO. v. DOMINION CONSTRUCTION CO.

Master and Servant—Death of Servant—Action by Administrator under Fatal Accidents Act—Negligence—Railway—Deceased Walking on Track Struck by Train—Death Caused by Reckless Act of Deceased.

Action by the administrator of the estate of Antonio Andriola, deceased, to recover damages for his death, caused, as the plaintiff alleged, by the negligence of the defendant company.

The action was tried before BRITTON, J., and a jury, at Toronto.

Frank Denton, K.C., for the plaintiff company.

R. McKay, K.C., for the defendant company.

BRITTON, J.:—This action is brought by the administrator of the estate of one Antonio Andriola, who, while walking between the rails on a line of railway, was struck and killed by a moving train, which was run and operated by the defendant company.

The deceased left him surviving a wife and one child, also father and mother.

The deceased, with 40 or more others, was in the employ of the defendant company "track-lifting." Boarding-cars were provided by the defendant company for these workmen. These cars were upon a siding, a short distance from the main line, within the railway company's right of way, but far enough removed from the main track to leave ample space for a safe way or walk between the boarding-cars and the main track. At the western end of the line of boarding-cars was a car used by the defendant company as a pay-car. About 10 o'clock on the evening of the accident, the deceased went with others from the boarding-car to the pay-car, where the deceased received a cheque for his work. On his way back from the pay-car to the boarding-car, the deceased, walking easterly, instead of walking upon the way or space between the main line track and the boarding-car, walked upon the track, between the rails. The deceased was not invited to do this, was not told to do it; and, so far as appears, no permission had been given. The night was dark, and probably the walking was easier between the rails than upon the space mentioned. While so walking, the deceased was struck by

a ballast train moving westerly, and so injured that death resulted a short time after. The ballast train which struck the deceased was being moved by a locomotive at the rear end of the train, pushing it. Negligence is charged in that no warning was given to the workmen of the approach of the gravel train, nor was the train provided with a head-light or any light, nor was any bell sounded. Negligence by way of omission of alleged duty, and by negligent acts committed, is charged in almost every possible way.

This action is not against the railway company, but against the construction company, and the defendant company's admission that the train which struck the deceased was under the control of, and operated by, the defendant company, was put in.

I assume that the defendant company is not admitting, and is not in fact under, any greater liability in operating trains under arrangement with the railway company than the railway company would be if the deceased had been working for the railway company and the railway company had been operating its own trains.

At the close of the case the counsel for the defendant company moved for the dismissal of action. I reserved my decision, and submitted the following questions to the jury, and asked the jury to assess the damages contingent upon the plaintiff's right to recover:—

(1) Was the defendant company guilty of any negligence which caused the accident to the deceased Antonio Andriola? A. Yes.

(2) If so, what was that negligence? A. Not sufficient light on the leading car and not enough precaution taken when approaching the boarding-cars.

(3) Could the deceased, by the exercise of reasonable care, have avoided the accident? A. No.

(4) Damages, $1,000.

Upon the case, with the answers of the jury to questions 1 and 2, I am of opinion that the plaintiff is not entitled to judgment.

As to light on leading car: there is no duty cast upon a railway company to have a light upon a leading car.

Sections 275 and 276 are not applicable to this case:—

275. No train shall pass in or through any thickly peopled portion of any city, town, or village at a greater speed than 10 miles an hour, unless, etc.

The place where this accident happened was not a thickly peopled portion of any city, town, or village.

276. Whenever in any city, town, or village any train is passing over or along a highway at rail level, and is not headed by an engine, moving forward in the ordinary manner, the company shall station on that part of the train, or of the tender, if that is in front, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross, the track of such railway.

This accident did not occur at a crossing. The deceased was not standing on, or crossing, or about to cross the track of the railway, and there was a man on the foremost car. There was a light—a small light. If a light was necessary, in the absence of statute or rule, in a case like the present, a small light like that of the ordinary lantern should be reasonably sufficient on a train moving towards a person walking between the rails, to warn such person of the train's approach. The jury, in answering, said that the defendant company did not take "enough precaution when approaching the boarding-cars." Apart from the light, it was not suggested what should have been done, the not doing of which was negligence. Apart from the questions submitted and the answers, I am of opinion that the defendant company should succeed upon the motion for dismissal of the action. Upon the undisputed evidence, the action should be dismissed.

The deceased and those with him had been working for months near this track on which trains were running. The deceased took the dangerous road between the rails instead of the safe way alongside. The deceased was a trespasser in using the railway track as a foot-path.

The case of Phillips v. Grand Trunk R.W. Co., 1 O.L.R. 28, seems expressly to govern. The trial Judge in that case bases his decision in part upon there being clear and undisputed evidence of contributory negligence—not necessary for the jury to find it—no dispute about it. The Divisional Court judgment, delivered by Street, J., is upon the ground, in part, that the plaintiff had not shewn that it was the defendant company's negligence that caused the accident. I quote from p. 33: "It is necessary, however, that the plaintiff should shew that the defendant company's negligence caused the accident; and in this I think he has failed. He chose to walk in a place of extreme danger, that is to say, between the rails, when a place of perfect safety, that is to say, in the space between the tracks and off the line of rails, was open to him and known to him. Therefore,

the accident was caused, not by the neligence of the defendants, but by his own reckless act.''

There must be judgment for the defendant company dismissing the action with costs, if costs demanded.

LATCHFORD, J. JUNE 1ST, 1914.

RE FOWLER AND TOWNSHIP OF NELSON.

Municipal Corporation—Expropriation of Land—Severance of Farm by Taking Strip for Deviation Road—Arbitration and Award—Compensation for Land Taken — Value of Trees in Orchard—Damage by Severance—Award Made by two of three Arbitrators—Validity—Municipal Act, 1913, *secs.* 332 *et seq.—Interpretation Act, R.S.O.* 1914 *ch.* 1, *sec.* 28 (*c*)*—Appeal from Award—Evidence—Increase in Amount—Costs.*

Appeal by Robert C. Fowler from the award of a majority of three arbitrators appointed under the Municipal Act, 3 & 4 Geo. V. ch. 43, Part XVI. (Arbitrations), secs. 332 et seq., to determine the compensation properly payable to the appellant, a farmer, the owner of part of lot 6 in the 4th concession of the township of Nelson, in the county of Halton, for part of his lands expropriated by the township corporation for the purpose of a road in substitution for the present Lake Shore road, which, by reason of the encroachment upon it of the waters of Lake Ontario, had in places become unsuitable for travel and costly to maintain.

C. A. Moss, for the appellant.
W. T. Evans, for the township corporation.

LATCHFORD, J.:—That two of three arbitrators may make a valid award is clear from sec. 28 (c) of the Interpretation Act, R.S.O. 1914 ch. 1.

The present road runs east and west in front of the residence of Mr. Fowler, dividing the farm into two parts, one of about 2 acres, between the road and the lake, and the other of about 58 acres. A driveway bordered by a hedge leads westward from the road to the house; and in rear of the house are the barn and

other outbuildings, an orchard, extensive plantation of small fruits, and some land devoted to ordinary field crops and pasture. All the buildings are located as to appearance and convenience in proper relation to the road as it now exists, and to the farm itself.

The new road will run in rear of the residence and outbuildings and diagonally through the apple orchard. Directly in its course are 40 large and 4 or 5 small apple trees; 6 or 7 others stand so close to the lines of the proposed road that some of their branches will project over it.

The award allows Mr. Fowler for the 0.94 acres taken from his orchard at $400 an acre.....	$376
Less 0.75 acres of old road to be conveyed to him at same rate, or $300, subject to an allowance of $30 for ploughing, or	270
	$106
Fencing new road	100
Improving private road from homestead to new road.	50
Value of trees in orchard taken and affected.....	600
	$856

The costs of the arbitration amount to no less than $816.95, two of the arbitrators charging $240 each, the other, who sat but seven days to his associates' eight, being content with $210. The award determines that each party to the submission shall pay, in addition to his own costs for counsel and witnesses, one-half of the $816.95.

Power is given to the Court in such an appeal as this to set aside the award, to increase, diminish, or otherwise modify it, as may be deemed just: sec. 345, sub-sec. (3).

The main grounds of appeal are: that too little has been allowed for the land expropriated and for the apple trees injuriously affected; and that nothing has been allowed for the severance of the farm by the new road.

The difference in area between the old and the new road is but 0.19 of an acre. Each area has about the same value for farm or orchard land, and the $30 seems a sufficient allowance to bring the old road into a state fit for cultivation. Upon a consideration of the whole evidence, the average value of the land of Mr. Fowler is not more than $500 an acre. At that value

he would be entitled for the 0.94 acres to..... $470
Less at the same value 0.75 acres, amounting to..... 375

$ 95

At the $400 rate the difference in values is $76. So that, upon the point of the value of the land as land, there is in question only the difference between $76 and $95, or $19—too little to warrant the interference of the Court.

The other matters in issue are much more serious, and have not been, in my opinion, properly appreciated by the arbitrators signing the award.

The evidence is contradictory as to the value of the apple trees actually comprised within the bounds of the new road. . . .

Quite apart from any question of severance, the orchard will undoubtedly be damaged by the construction through it of the road. That wind and dust will injuriously affect the trees and fruit is satisfactorily established by credible testimony. It is difficult to estimate the amount of such damages; but from the best consideration I have been able to give to the whole evidence I am satisfied that the damages awarded for the trees taken, and the trees not taken but injuriously affected, should be increased to $1,000. . . .

Upon careful consideration of the evidence, I have reached the conclusion that the arbitrators erred in holding, as they did, that the benefits to Mr. Fowler resulting from the construction of the new road will equal or exceed the injury.

At present the farm has but two acres of "lake front land," and the new road will give it 10.2 acres. There is, it appears, a demand for property fronting on the lake. The 2 acres are too narrow, having regard to erosive agencies, to form a desirable site for a gentleman's residence, while the 10 acres will afford 4 or 5 excellent sites. That part of the farm north of the new road may also provide not a few other, though much less valuable, building locations, and will therefore have some enhanced value. Something is also said as to the advantage to be derived by Fowler from a good road as compared with the existing road. Such is in effect the evidence as to benefit accepted by two of the arbitrators.

They have, it appears to me, placed undue reliance on the view of the real estate speculator put forward by Mr. Flatt. . . .

Mr. Fowler . . . is using and intends to use his farm as

a farm. It has afforded him a certain and increasing income for many years. He prefers his present mode of life to the variable and problematic fortunes or misfortunes of the land subdivider and speculator. The gentlemen who are seeking or who are expected to seek lake shore properties do not want them incumbered with such a house and outbuildings as Fowler has —all, with the exception of a structure where the fruit-pickers sleep, south of the new road. These buildings cost $6,000 or $7,000. Even assuming that the whole 10.2 acres south of the new road are increased in value $500 an acre, the increase is less than the value of the buildings to Mr. Fowler. It follows that, even allowing for the possible increase referred to—which can affect only vacant land—Mr. Fowler derives no benefit as to the 10.2 acres which will be between the new road and Lake Ontario.

The land immediately north of the new road that can by any possibility be increased in value is now covered by a productive and profitable orchard, the trees alone on each acre of which—adopting the value of the trees on .94 of an acre, considered proper by the arbitrators—are worth at least $500 or $600, or more than the anticipated possible benefit.

It is to be remembered that Fowler's access to market will not be improved by the new road. No matter how well the road may be constructed, Fowler's shipping-point will continue to be the station at the rear of his farm, approachable, as now, through the farm itself.

Another disadvantage tending to outweigh benefit is, that the whole aspect of the residence and steading will be changed owing to the new approach that will of necessity have to be made from the new road. The approach will be through or near the barn-yard to the rear of the dwelling. The changed appearance which the house will present to passers-by through a vista of unæsthetic outbuildings will, in my opinion, lessen not a little the value of the property.

In determining that the benefit equalled if it did not exceed the disadvantage from severance, the two arbitrators did not, I think, consider the damage resulting from the changed aspect and consequent depreciation of the homestead, and the fact that all the land likely to be enhanced in value as building sites is at present improved to an extent beyond any reasonably probable increase.

The damages from the severance are manifest and serious. The present appropriate relation of the residence and other

buildings to the existing road and to the farm itself will, undoubtedly, be destroyed by the new road. Gates will be necessary in the fences the two arbitrators have thought proper to be constructed. They must be opened and closed on every occasion the cattle are brought from the pasture to the barn-yard. The road will have to be crossed whenever the major part of the farm has to be resorted to for any purpose; and, if the road becomes—as the land speculators think—the leading thoroughfare between Toronto and Hamilton, and is used by motorists as other leading roads are now used, the greater will be the danger to Fowler in his frequently necessary crossings of it.

Having regard to the fullest extent to the latitude that may be extended to them as valuators, I am convinced that the two arbitrators erred in not making a reasonable allowance for the loss to which, in addition to the $30 a year mentioned by Mr. Sealey (one of the arbitrators), Mr. Fowler will sustain by the severance of his farm and the total change in the present orderly adaptation of the buildings. It is difficult to estimate such damages accurately, but I think I do not err on the side of excess in placing it as I do at $1,000.

In the result, the award is increased by $1,400, or to $2,256.

As to the costs, a word remains to be said. They are not only excessive, but, with deference, seem improperly apportioned. The salutary principle embodied in sec. 199 of the Railway Act should, in my opinion, be generally adopted in cases of this kind. If the amount awarded exceeds the amount offered, the costs should be borne by the party expropriating. The township corporation offered $400, while the award was, as stated, $856. The township corporation should pay the costs of the arbitrators, $816.95, and of this appeal.

MIDDLETON, J. JUNE 2ND, 1914.

BONNELL v. SMITH.

Evidence—Action against Executors—Evidence Act, R.S.O. 1914 ch. 76, sec. 12—Corroboration—Point on which Corroboration Necessary—Action for Money Lent.

Action for money lent.

N. S. Macdonnell, for the plaintiff.
R. W. Treleaven, for the defendants.

MIDDLETON, J.:—The plaintiff seeks to recover from the personal representative of the late E. W. Smith $1,768.82, being the amount of some sixty cheques, most of them for small amounts, drawn by the plaintiff upon an account in his own name in the Bank of Montreal "in trust." These cheques, it is said, were all for loans. None of them indicate this upon the face. No one other than the plaintiff has any knowledge of the relations between the parties or the circumstances under which these advances were made, and the case depends upon the credit to be given to the plaintiff's story and the sufficiency of corroboration under the statute.

At the time of the transaction, the plaintiff was in some way connected with the firm of Jenkins & Hardy, brokers. He was employed for them under a guarantee, bringing them as much business as he might obtain, and having the right, if they rejected any of the business, to retain it for himself.

The plaintiff employed Smith as a sub-agent for the purpose of purchasing volunteer scrip issued by the Ontario Government. Smith was at liberty to purchase this at any price he chose to give, and turn it over to the plaintiff at a fixed price of $75, retaining the difference for himself. This busines was undertaken in 1907.

The plaintiff and Smith were also jointly interested in a much more important speculation. They thought that they could obtain a grant of 300,000 acres of pulpwood land in Keewatin for a nominal consideration. It was proposed to turn this over to American financiers at a profit of at least $1.50 an acre. In that event, the expenses were to be deducted, and the balance divided between Bonnell and Smith.

Bonnell apparently found the purchasers; Smith was to

secure the grant. This handsome profit, $450,000, was not realised, because the result of the elections in September, 1911, was to remove Mr. Smith's friends from political power. In the meantime, $5,000 had been put up by the purchasers, and, I think, the proper inference of fact is, that a certain $2,000, which reached the Royal Trust Company in July, 1908, and which was transferred to Mr. Smith's account on the 16th July, constituted part of that $5,000, and that it was a fund available for expenses.

At this time Mr. Bonnell had paid considerable money to Mr. Smith, and the letter of "Tuesday the 14th," referred to in the evidence, is no doubt a letter of Tuesday the 14th July, 1908. This letter is significant. The plaintiff writes: "Dear Edgar. Russell here and gone away. Cannot find you, hear from you, or see you. Everything looks good; only if you don't shew up when in necessity I will cheat you. The money is here at the Royal Trust Company. Everything all O.K., except I do not like your ways or curves."

The reference to cheating is, no doubt, innocent and jocular, but the importance of this is that it shews that this money was a fund which could be resorted to when Smith was in necessity, that is, when he needed funds for the prosecution of this important venture.

Upon cross-examination, the plaintiff admitted that the money paid to Smith by the cheques might well have been, and probably was, used for expenses in connection with this venture. If so, it is not a loan, and the plaintiff's case fails.

An attempt was made to corroborate by the evidence of Mr. LeVesconte, a solicitor, who had lent Smith money or had had dealings with Smith in connection with the purchase of volunteer scrip. His evidence does not help, because all that he establishes is, that Smith said that, when he, LeVesconte, refused to make further advances, the plaintiff had undertaken to finance him. That is well proved by the trust company's letter of the 11th September, 1907, put in. This does not corroborate in any way the plaintiff's statement that these cheques represent loans.

I think the plaintiff fails in the action for two reasons. In the first place, I think that the proper inference from his own evidence is, that the payments were advances in connection with this transaction in which they were both interested, to be charged against the $2,000 put up by the prospective purchasers. In the second place, I do not think that the corroboration is suffi-

cient. There is, no doubt, ample corroboration of the fact of payment, but that is not the real controversy. The corroborative evidence is as consistent with the case of either party as with the case of the other. This is not sufficient. I think the corroboration required is evidence that would appreciably help the judicial mind towards the acceptance of the one case in preference to the other.

No good purpose would be served by reviewing the authorities. Thompson v. Coulter, 34 S.C.R. 261, is one of the latest, and the point that I rely upon is there emphasised.

Nor do I think any good purpose would be served by reviewing various matters in the evidence which lead me to the belief that the plaintiff's evidence should be accepted with caution.

WEBB v. PEASE FOUNDRY CO.

Building Contract—Contractor Delayed in Performance of Work by Delay of Prior Contractor—Claim for Damages—Clause in Contract Exempting Owner—Change in Circumstances—Extras—Special Items—Payment into Court—Costs.

Action for $2,820.51 alleged to be due for work done under an agreement with the defendants and for extra work done and for damages.

The action was tried, without a jury, at Toronto.

G. H. Watson, K.C., and N. Sinclair, for the plaintiff.

N. W. Rowell, K.C., and J. M. Langstaff, for the defendants.

BRITTON, J.:—The plaintiff on the 4th July, 1912, contracted with the defendants to do the excavating and the cement and concrete work and the cement floors and cut stone and brick work required in the erection and completion of a foundry and manufacturing buildings at Brampton. The price was to be $29,662, and the work was to be done according to the plans, drawings, and specifications then prepared and submitted to the plaintiff, and was to be completed by the 1st November, 1912.

The agreement contained special covenants and provisions, some of which will be referred to later.

The plaintiff was delayed in the performance of his contract,

and did not complete the same until the summer of 1913. He alleges that this delay was caused by and was the fault of the defendants, and he claims damages by reason thereof. The plaintiff states, as the reason why he sustained loss and damage, that he was obliged to perform a part of the work in the winter of 1912-13, under wholly different circumstances from those which existed at the time of making the contract and down to the 1st November following.

This action is brought for the recovery of a balance of $820.51 upon the contract itself and for extras. This amount was certified by the architects, but the plaintiff alleges that the defendants would not pay it over except upon the terms that it would be accepted by the plaintiff in full of all his claims. The plaintiff declined to accept it with such terms and condition attached. The defendants had no right to impose such a condition. That sum is not now further in dispute, as the defendants on the 29th November, 1913, paid that amount with interest upon it, making $828.61 in all, into Court.

The action is also brought for certain specified things, not extras within the ordinary meaning of that term, not covered by the contract, and as to which the claim does not arise by reason of the plaintiff being delayed. Apart from these latter items, the dispute is in reference to the loss alleged to have been sustained by the plaintiff by reason of his being delayed in performing certain parts of his work under his contract.

The foundry buildings of the defendants were all to be erected by contract. On the 27th June, 1912, the defendants entered into a contract with one W. H. Salter for supplying the steel and iron work to be used in erecting the same buildings. Salter was to have the iron and steel on the site ready to erect six weeks or within six weeks from the date of his contract, and was to have the iron and steel in place within four weeks from the time of such delivery. The plaintiff knew of this contract. Very shortly after entering into this last mentioned contract, Salter ordered the steel and iron, and a portion was shipped to Salter; but, before any use was made of it, Salter died. There was considerable delay. The Toronto General Trusts Corporation obtained letters of administration to the estate of Salter, and completed Salter's contract, but not within the time mentioned therein. The delay and default on the part of Salter occasioned the delay and consequent loss to the plaintiff. His work was thrown back so that instead of completing it by the 1st November, 1912, it was not in fact completed until in June,

1913. It was not disputed at the trial, and I find as a fact, that the delay complained of was the delay in furnishing the iron and steel, and that delay occasioned all the loss which the plaintiff can recover in this action, if entitled to recover at all under that head. I find also that the plaintiff did sustain some loss and damage by reason of this delay.

The defendants accepted the work done by the administrator of Salter, and also the work done by the plaintiff, and they made no claim, nor do they now make any claim, for damages by reason of the non-completion of the work by the time mentioned in the contract. The defendants deny any liability to the plaintiff for loss to him by reason of his work being delayed, and they invoke the special provisions of the contract in their defence, which are as follows: "(1) The proprietors are not to be responsible to any contractor for the non-completion of a prior contractor's work, or any particular portion thereof, at the time named, but in case any contractor is unable to get possession on account of the failure of a prior contractor to complete his work within the time named in his contract, such subsequent contractor shall be entitled to have for the completion of his contract such additional time as the architects may deem necessary or just, and such extended time shall be substituted for the time for the completion named in the contract." The time may be considered as having been extended. The defendants make no claim upon the plaintiff for any loss of time. The question is, upon this branch, solely as to the defendants' liability to the plaintiff for the plaintiff's alleged loss.

I am of opinion that the contract must govern, and that the defendants are not liable for this loss.

The plaintiff relies upon the case of Bush v. Trustees of the Port and Town of Whitehaven, set out in full in Hudson's Law of Building, 3rd ed., vol. 2, p. 118. . . . There are many facts in common in that case and this, but the facts wherein the cases differ are such as compel me to uphold the integrity of the present contract. . . .

In the absence of special provisions, it is an implied condition that the proprietor will give possession of the site, and that he will permit the builder to do the work and to proceed with reasonable diligence with the work. The defendants here did provide the site—they did permit the plaintiff to commence and proceed. . . .

Here the defendants did provide the site. They did all they could reasonably be asked to do. There was no reason to expect

that the Salter estate would not proceed as rapidly as any new contractor would to complete the work under the Salter contract. Here the contract was not upon the basis that the defendants would do any more than is expressed in the contract. Here the defendants were in a position at the commencement of the contract to do and act as the contract stated. Here the conditions of the contract, if changed at all, were not changed by any act of the defendants, but only by the death of Salter, which occurred after both contracts were made and entered upon by Salter and the defendants.

Then as to the principle (Jackson v. Union Marine Insurance Co., L.R. 8 C.P. 572) "that where a contract is made with reference to certain anticipated circumstances, and where without default of either party it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application—it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made." This principle has no application here. The only anticipated circumstances are the default or delay of a prior contractor. The condition in the contract is as applicable to Salter's representative as to Salter. It is equally applicable to any "prior contractor," that is to say, any contractor who is to do work necessary to be done before the work of another contractor can be done.

The delay in this case was not of such length or of such a character as to exonerate the plaintiff.

The plaintiff did not ask to be exonerated. He went on under the contract and completed his work, claiming additional compensation because of loss, and the defendants, while willing to consider any application or statement, held to the contract, and denied legal liability: King v. Parker, 34 L.T.N.S. 887.

If I am wrong in thinking the defendants not liable for the plaintiff's loss by reason of the delay of a prior contractor, and if I am to consider the amount, the plaintiff is not entitled to any such sum as claimed at the trial. In the statement of claim the amount asked is $820.51, which the defendants at first withheld, but afterwards paid into Court, and $2,000 for loss by delay in the work. . . .

The plaintiff asked at the trial for $3,590 damages occasioned by delay. The increase from $2,000 in the statement of claim to $3,590, in round figures, at the trial, is remarkable, and for all of this the plaintiff, before the trial, presented an account of $955.64, and would have accepted that in full, in addition to

the $820.51, had the defendants been willing to pay it. The plaintiff should not, of course, be precluded, by a mistake honestly made, from claiming more, if he claimed too little, but the increase from $955.64 to $2,000, and then to $3,569, compel me in considering all the evidence to accept the earlier estimates in preference to the estimates of a bookkeeper; and, if the defendants are liable, and if the plaintiff is entitled to recover on this branch of the case, I would find the amount to be $955.64.

. . .

On the 6th March, 1914, the defendants, by special leave, paid into Court, in respect of certain specific items of damage claimed, the sum of $200. That sum was enough.

The judgment will be for the plaintiff for the sum of $1,028.61, being for the two sums paid into Court, viz., $828.61 paid into Court on the 29th November, 1913, and $200 paid in on the 6th March, 1914. The plaintiff will be entitled to such interest from the Court as will be payable on these sums. As to all other matters in controversy in this action, the judgment will be for the defendants.

The defendants should pay costs upon the High Court scale up to the 6th March, 1914. There will be no costs payable by either to the other in this action for proceedings since the 6th March, 1914.

MIDDLETON, J., IN CHAMBERS. JUNE 4TH, 1914.

REX v. NERO.

Liquor License Act—Magistrate's Conviction—Keeping Intoxicating Liquor for Sale—Evidence—Onus—Secs. 109 *and* 111 *of Act—Presumption from Finding of Liquor, not in a Bar.*

Motion by the defendant for an order quashing a conviction of the defendant by a magistrate for having intoxicating liquors on his premises for sale, without having a license to sell, contrary to the Liquor License Act.

F. W. Griffith, for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—The motion was made before me, on the return of the notice on the 24th April, for an order quashing

the conviction. On that day, owing to some misunderstanding, the Crown was not represented, nor were any papers returned. The papers have now been handed to me by Mr. Cartwright, who tells me that he agrees that the conviction cannot be supported.

The charge was having liquors for sale without a license. The only evidence was the finding of certain bottles containing beer, and certain bottles that had contained beer, in the barn of the accused. It was objected that there was no evidence that the liquor found was intoxicating, and that there was no evidence to shew that the liquor, such as it was, was kept for sale. The magistrate held that the seals on the bottles were sufficient evidence of the intoxicating nature of the liquor contained in them, and also held that the onus was upon the accused under sec. 111 of the statute. The magistrate was quite wrong in holding that this section applies here. The section relates only to the finding of liquor in a bar or upon premises where there is a sign or a display indicating that liquor is for sale.

Section 109, also relied upon, has no application. That dispenses with proof of payment of money if the magistrate is satisfied that there was a transaction in the nature of a sale. Nowhere in the statute is there found anything to justify the presumption that liquor is kept for sale merely from the finding of the liquor, unless found in a bar.

I find nothing to indicate that the magistrate did not act in good faith; and so, while I quash the conviction and direct repayment of the fine and costs, I make an order for the protection of the magistrate, and give no costs of this motion.

MIDDLETON, J., IN CHAMBERS. JUNE 4TH, 1914.

RE WATKINS.

Distribution of Estates—Intestate Succession—Shares of Next of Kin Presumed to be Dead—Nephews and Nieces—Exclusion of Children of Nephews and Nieces.

Motion by nephews and nieces of Margaret Watkins, deceased, for payment out of Court of the shares of a deceased sister and a deceased niece of Margaret Watkins.

G. W. Adams, for the applicants.
D. Ross, for John McFadden.
J. M. Langstaff, for the Kinler estate.

MIDDLETON, J.:—The intestate, Margaret Watkins, died on the 1st February, 1909. She left her surviving six nephews and nieces, who would be entitled to share equally in her estate. A portion of her estate being realised, the administrator paid it into Court and freed himself from liability. A motion was made before the Chief Justice of the Common Pleas for an order for payment out of Court, and he referred it to the Registrar to ascertain who were the next of kin. The learned Registrar by his report distributed the fund, not only among the nephews and nieces, but included the children of deceased nephews and nieces, and made the distribution per stirpes and not per capita.

The Registrar, acting upon this theory, set apart one-fourth of the fund for Mrs. Keenan, a sister of the deceased, and one-eighth of the fund for Mary Jane Litle, one of two children of Mary McNulty, another sister. These two sums were not paid out of Court, as Mrs. Keenan had not been heard of for many years, and was, no doubt correctly, supposed to have died in Ireland. Her only daughter was last heard of in 1907, when lying ill in a hospital in Belfast, Ireland.

Mary Jane Litle was last heard of in 1895. She is supposed to have had two children. These children would not be entitled to share, being too remote.

Upon an application being made for payment out, the errors in the report of the learned Registrar were apparently overlooked. It is now too late to correct these errors with reference to anything other than the shares retained in Court, the money having been paid out to the representatives of the deceased nephews and nieces. I thought it proper that notice should be sent to those who took under the former erroneous distribution, so that they might, if so advised, be represented. No one appeared upon the return of the motion except counsel for the Kinler estate, representing the representatives of one branch of the family, who admit that the grand-nephews and grand-nieces cannot claim. A written statement was, however, sent in by Robert A. Starratt, claiming that the former distribution was correct. He was, of course, unaware of the decision of our Courts excluding under our statute the representatives of deceased nephews and nieces. The matter is not now open

for argument, and the distribution should, I think, be made as sought by the applicants.

Under the former distribution McFadden received more than his proper share, but counsel representing the other nephews and nieces do not ask that he should be now compelled to equalise. The order will, therefore, go as indicated.

Costs out of the fund.

MIDDLETON, J., IN CHAMBERS. JUNE 4TH, 1914.

RE CITY OF BERLIN AND BREITHAUPT.

Municipal Corporation — Board of Water Commissioners — Rights and Duties—Alteration and Extension of Plant and Equipment—Surplus of Revenue over Cost of Operation—Payment by Commissioners to Municipal Treasurer—Power of Commissioners to Draw upon—Right of Commissioners to Determine what Extensions Necessary—Municipal Waterworks Act, R.S.O. 1897 ch. 235, *secs.* 2, 38, 40, 47—*Public Utilities Act,* 3 & 4 *Geo. V. ch.* 41, *secs.* 3, 26, 34, 35, 43.

Motion by the Corporation of the City of Berlin for a mandatory order directing Messrs. Breithaupt and others, the water commissioners of the city, to pay over to the city treasurer the surplus of revenue over the cost of operation.

I. F. Hellmuth, K.C., for the applicants.

E. F. B. Johnston, K.C., and E. P. Clement, K.C., for the respondents.

MIDDLETON, J.:—The question raised upon this motion is of importance, and the motion has been argued upon broad lines, for the purpose of obtaining a decision as to the rights and duties of the water commissioners with reference to the alteration and extension of the plant and equipment.

The Municipal Waterworks Act, R.S.O. 1897 ch. 235, sec. 2, authorises the Corporation to "construct, build, purchase, improve, extend, hold, maintain, manage and conduct waterworks." By sec. 40, the council may itself or by its officers exercise and enjoy the powers, rights, and authorities conferred upon the

corporation, or the council may provide for the election of commissioners for such purpose. Upon the election of the commissioners, all the powers, rights, authorities, and immunities which under the Act might have been enjoyed and exercised by the council shall and may be exercised by the commissioners.

By sec. 38, after the construction of the works, all the revenues arising from the supply of water shall, after providing for the expenses attendant upon the maintenance of the waterworks, subject to the obligation to pay off any money borrowed which is a charge thereon, form part of the general funds of the corporation.

By sec. 47, where the powers are exercised through a board of commissioners, the water rates, less disbursements by the commissioners, shall be paid over by the commissioners to the municipal treasurer, to be placed by him to the credit of the waterworks account.

In the revision of 1914, ch. 204 embodies an intervening revision, the Public Utilities Act, 3 & 4 Geo. V. ch. 41. The provisions of that statute somewhat from the earlier Act.

By sec. 3, the corporation may "acquire, establish, maintain and operate waterworks."

By sec. 26, the council may itself pass by-laws for the maintenance and management of the works; or, under sec. 34, the council may, with the assent of the electors, provide for intrusting the construction of the works and the control and management of the same to a commission. When this is done, under sec. 35 the powers, rights, authorities, and privileges conferred upon the corporation shall be exercised by the commission and not by the council of the corporation.

By sec. 43, the revenues, after deducting disbursements, shall be paid over to the treasurer of the municipality, to be placed by him to the credit of the account of the public utility work, and if not required for the purpose of the work the surplus shall form part of the general funds of the corporation.

If the municipal council itself is operating, then, under sec. 43, the revenue arising from supplying any public utility is, after paying for the expenses of maintenance, to form part of the general funds of the corporation.

Although the phraseology adopted in these two Acts is different, I do not think that there is any real difference, so far as the matters now arising are concerned. The scheme of both Acts is similar. The statute confers in general terms power

upon the corporation to construct, operate, and maintain the works. It then provides that the council may be the executive body for the purpose of exercising the powers conferred, or, if it is seen fit to appoint a commission, then the commissioners shall be the executive body. Once the election in favour of a commission is made, all the powers conferred upon the municipality must be exercised by the commission, and not by the council; everything that the municipality is authorised to do must be done through the commission; the commission alone has authority to "construct, operate, and maintain," and these words are to be interpreted in no narrow sense, but as covering the entire municipal authority.

The provision for payment over of the surplus of income over expenditure is ancillary to this. Before paying over, the commissioners have the right to deduct all outgoings. If there is then surplus, that surplus is to form part of the general funds of the corporation; but it is to be borne in mind that the surplus is not to be used for the general purposes unless it is "not required for the purpose of the work." In the meantime the money, even when paid over, is to be "placed to the credit of the account of the public utility work." While it is at the credit of the public utility work in question, the commissioners have, I think, power to draw upon it if required. The commissioners are bound to pay over the surplus in their hands, quarterly or oftener; but payment over must not hamper the commissioners in whatever they may think fit to do under the general wide powers conferred upon them by the statute.

As, in my view, the whole municipal authority to construct, maintain, and operate the waterworks system is vested in the commissioners, it follows that they, and they alone, have the right to determine what extensions are necessary and proper, and they may apply money in their hands to meet the cost of such works, and may, if they see fit, draw upon any money which they have in the interim paid to the council. Any money paid over from time to time must remain to the credit of the waterworks system until the commissioners determine that it is not required for it; then and then only may it be used for municipal purposes.

The motion is refused. No order need be made as to costs, as the parties both represent the municipality.

MIDDLETON, J. JUNE 4TH, 1914.

DOMINION WASTE MANUFACTURING CO. v. RAILWAY EQUIPMENT CO. OF TORONTO.

Landlord and Tenant—Lease—Sublease—Covenant for Quiet Enjoyment—Privilege of Making Fireproof Room—Breach of Covenants—Failure to Prove.

Action for damages for breaches of covenants in a lease.

J. C. Macbeth, for the plaintiff company.
C. A. Moss, for the defendant company.

MIDDLETON, J.:—The Canada Malleable and Steel Range Manufacturing Company Limited, the owner of the lands in question, on the 31st July, 1911, granted a lease to the Rhodes Railway Equipment Company of New York, of a building known as number 1240 Dundas street, Toronto, for a term of five years, commencing on the 31st July, 1911, with a right of renewal for a further term of two and a half years, upon certain terms. The lessee covenanted that it would not permit any business to be carried on upon the premises which would be deemed a nuisance or by which the insurance on the premises would be increased.

On the 15th January, 1912, the lessees made a sublease of part of the premises to the plaintiff company for one year and nine months, commencing on the 15th January, 1912. This sublease contains this clause: "And the lessee shall have the privilege of making a fireproof room, in which will be installed a waste machine." The sublease also contains the ordinary covenant for quiet enjoyment.

Some three weeks after this—on the 6th February, 1912—the Rhodes company assigned its lease and the reversion in the sublease to the Railway Equipment Company of Toronto Limited, the defendant. Notice of this assignment was not given to the plaintiff company until the 2nd November, 1912.

In the operation of the business carried on by the plaintiff company—the manufacture of "waste" from the refuse from cotton mills—the crude material received from the mills is placed in a machine in which the fibres are torn apart and separated. There is a risk of some stone, nail, or other foreign matter getting into this machine, when, by reason of its con-

tact with the revolving steel parts, a spark may result, and, the separated cotton fibre being of a highly inflammable nature, a fire may occur, which would be sudden and violent in its nature; consequently the operation of this machine is recognised as being highly dangerous from the fire standpoint. It was for this purpose that the plaintiff company obtained permission in the sublease to construct the fireproof room. The nature of the business to be carried on was probably understood by the lessors at the time of this sublease; but, if so, both parties contemplated that a fireproof room would be sufficient security.

At the time of the making of the sublease, the head lease was not produced nor could it be found. No adequate search was made for it, no inquiry was even made from the lessors; so that the provision of the lease against the carrying on of any business which would increase the insurance rates was not known to the plaintiff company.

Shortly after the business was commenced, objection was taken by the insurance companies to the increased risk, and the insurance on the entire building and its contents was cancelled. The result was, that the lessor, the Canada Malleable Range Company, brought an action and finally obtained an injunction restraining the operation of the machines in question in the premises. This, no doubt, placed the plaintiff company in a very serious position. It had the lease; it had no other premises; premises of the kind necessary for business were not easily obtainable; and its business called for the immediate production and supply of material.

In the result it did what, I think, was prudent; it rented an adjacent lot, and erected upon it a temporary fireproof building, removed the dangerous machinery to it, and continued the manufacture. This action is brought to recover the amount of the rent of this land, the cost of the building, the loss of profit during the time the business operations were suspended, the excess wages paid for carrying the raw material to this new building and returning it to the other building, and the costs of the former action. The sums claimed, I think, may be fairly taken to represent the actual loss sustained by the plaintiff company by reason of the failure of its original plan.

While I sympathise much with the very unfortunate position in which the plaintiff company finds itself, I think there are insuperable difficulties in the way of maintaining this action. As brought, the action is based upon a breach of the covenant for quiet enjoyment and of the covenant permitting the erection of the fireproof room.

In the first place, and at the threshold of the plaintiff company's case, is the difficulty that the defendant here sued is not a party to the lease or the covenants. It can only be made liable by shewing that these covenants were covenants running with the land, and that this defendant had been guilty of a breach. Assuming that the covenants do in one sense run with the land, I do not think that any breach on the part of the defendant has been shewn. The covenant for quiet enjoyment, when read in the light of the Short Forms Act, is a covenant against any "disturbance from the lessor or other persons or persons lawfully claiming by or under him." The disturbance here was by the head landlord. The lease contains no covenant on the part of the lessor as to its right to make the lease. If it did, the original lessor, and not the assignee, would be liable for any damages under it.

Then, the other covenant sued on is a covenant permitting the erection of a fireproof room. There is no breach of this. The lessee erected just such a room as it saw fit. The complaint was, that the room erected was not an adequate protection against fire. In no way was it prevented from doing that which the lease stipulated it might do.

The action fails, and must be dismissed, with costs if asked. I hope the defendant may be generous enough not to press the claim for costs.

MIDDLETON, J. JUNE 4TH, 1914.

RAMSAY v. PROCTOR.

Landlord and Tenant—Building Lease—Assignment or Sublease of Part of Demised Premises—Renewal—Ascertainment of Value of Buildings—Ascertainment of Ground Rent for Renewal Term—Provision for Notice—Failure of Lessor to Give Notice of Intention not to Renew—Valuation—Agreement—Surrender—Possession—Mesne Profits—Rental Value—Reference—Terms.

Action to recover possession of land, tried without a jury at Toronto on the 29th May, 1914.

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

L. F. Heyd, K.C., for the defendant Hawken.

MIDDLETON, J.:—The action is brought to recover possession of certain land. Hawken was in possession of the land, by his tenant Proctor, and has intervened under the provisions of Rule 53 for the purpose of defending the possession of his tenant. Proctor's tenancy has now come to an end, and he, on the 31st December, 1913, surrendered and conveyed all his rights to his landlord.

The real contest arises over the provisions in regard to renewal contained in a lease bearing date the 1st January, 1892, by which Messrs. Kingstone and Macdonald, executors of the late Robert Baldwin, leased to John D. Irwin certain lands on the north side of King street and on the south side of Adelaide street for a term of 21 years from the 1st July, 1892. . . .

On a comparatively small portion of the entire parcel covered by the lease . . . there was erected a building now used as an hotel known as the Wilson House. On the 1st July, 1892, the same date as the lease referred to, Irwin executed a document, which is by recital declared to be an assignment and not a sublease, by which he demised and leased this smaller parcel for the whole term of the head lease, with all the privileges of renewal contained therein, to the executors of Morphy. This so-called assignment contains certain provisions for the protection of the tenant with reference to the renewal provisions contained in the head lease, which must be mentioned later on.

Subsequently, the executors of Morphy were succeeded by the Union Trust Company. The chain of mesne conveyances is admitted, and the details are not material.

On the 13th April, 1907, the Union Trust Company conveyed all its interest as executor and trustee of the Morphy estate to Hawken, who thus become tenant under this sublease or assignment of the Wilson House parcel. In the meantime, on the 27th September, 1904, the executors of Baldwin conveyed the fee, subject to the lease, to the plaintiff.

Turning to the lease, it is found that there is an agreement that, if the lessors shall at the expiration of the term have given 8 months' previous notice in writing of their desire not to renew, in that event the amount proper to be paid by the lessors to the lessee for the buildings upon the land, and also the amount proper to be paid by the lessee as the ground rent for the following term of 21 years, if such term should be granted, shall both be ascertained by three valuators, one chosen by the lessors, one chosen by the lessee, and a third to be

selected by the two. The lessors are then to pay to the lessee the amount found proper to be paid for the building, not less than 4 months before the end of the term; and, in the event of the buildings not being paid for within the time limited, or in the event of the lessors not having given the 8 months' notice of the desire to grant no further term, and the lessee having given, 6 months previous to the end of the term, notice of his desire that a further term should be granted, the lessee shall be entitled to a renewal of the lease for the further term of 21 years, at the annual rent ascertained by the valuators.

It is, I think, clear that this lease does not contemplate the subdivision of the property in such a way as to confer upon any one claiming under the lessee a right to demand at the end of the term a lease of part of the property originally demised. The parcel demised, together with all the buildings upon it, was throughout to be treated as an entirety. All the buildings upon it were to be valued, the ground rent was to be fixed for it, and the renewal was to be for the whole.

This appears to have been the view of those who framed the document of the 1st July, 1892, for it provides that Irwin will include the smaller parcel thereby dealt with in all renewal notices and vauation proceedings taken by him under the original lease, and, in the event of renewal, he will in his turn grant a renewal to his assignees, and in the event of the leases not being renewed he will pay over to his assignee the amount ascertained as the amount to be paid by the Baldwin estate for the buildings; and the assignor authorises the Baldwin estate to pay such amount direct to the assignee in discharge of its obligation under the lease quoad the buildings in question.

Through some oversight on the part of the plaintiff, he did not give a notice of his intention not to renew, 8 months previous to the expiry of the lease in January, 1913. He did give a notice after the day stipulated, and those representing the Irwin estate did not raise any objection to notice by reason of its not having been given in time; and all parties proceeded with a valuation under the terms of the lease.

In 1901, negotiations had taken place between those interested in the Irwin estate, resulting in the agreement of the 20th April, 1901, under which the interest of that estate became vested in Mrs. Irwin, Mrs. Macnab, and Mrs. Grover. On the 31st May, 1913, an agreement was arrived at between the plaintiff and these three ladies, by which the further prose-

cution of this valuation became unecessary. They agreed to surrender the lease to Ramsay in consideration of $75,000. This was practically an ascertainment of the value of the buildings upon the entire parcel at that sum. Hawken, acting upon the theory—which, I think, is erroneous—that he had under his assignment some right to compel an independent valuation and an independent determination of the amount of rent to be paid for his particular subdivided parcel, on the 30th December, 1912, served a notice upon the Union Trust Company, upon the solicitor for Mr. Ramsay, and upon the solicitor for the Irwin estate. By this notice, he appointed Mr. Tanner his arbitrator (not valuator) to determine the rent to be paid by him as a ground rent for the premises in which he was concerned, for the term of 21 years. He also served at the same time upon the same persons a notice that he desired a renewal lease of his parcel.

Apparently, and possibly in some informal way—for the document is not produced, if there was one—Mr. Garland was appointed to represent the landlord's interest. His authority appears to have been derived from the Irwin estate only. A third arbitrator was agreed upon, and these three gentlemen proceeded, not with an arbitration, but with a valuation, by which they fixed the ground rental of a renewal lease at $665.50 per annum, and ascertained the value of the buildings upon the land to be $5,000. These proceedings related to the Wilson House parcel alone.

I have already indicated that I think this valuation was something entirely outside of what was contemplated by the lease. Hawken now repudiates the valuation, in so far as it purports to determine the value of the building, but claims that it has some validity as a determination of the rental.

Even if the assignee of the term as to one parcel had any rights under the lease, the valuation contemplated by the lease was one valuation which would determine the two things: the value to be paid for the buildings and the amount to be paid for ground rent, so as to enable the landlord to pay the amount to be paid for the buildings if he desired to avoid giving a renewal lease, which he would be bound to give if he made default in payment.

There is no desire on the part of either Ramsay or the Irwin estate to deprive Hawken of the value of his building. The $5,000 has been tendered to him, and has been refused by him. So far as I can see, Hawen has no right against Ramsay; his

only claim is against the Irwin estate. That estate is not before the Court in this litigation. The representatives of the estate assent to payment to Hawken of the $5,000. If he has a claim for any greater sum, that claim will be recognised, but it must be ascertained in proceedings to which the representatives of the Irwin estate are parties. In the meantime, it is said that the plaintiff is holding a portion of the $75,000 ample to secure any claim which Hawken may have.

In this litigation the only matter in issue is Hawken's right to retain possession of the land against Ramsay. He can have no such right unless he has the right to demand a lease of the subdivided portion of the whole parcel. He has no such right, and judgment must therefore go for possession.

Ramsay is entitled to recover mesne profits. The only satisfactory evidence given at the trial indicates that the rental value of the building is $250 per month with taxes. Mr. Heyd says that he is taken by surprise in having to deal with this issue at the hearing, and I am disposed to grant him some indulgence, upon proper terms. I assess the mesne profits at that rate; but, on payment into Court of the sum so ascertained, as a condition precedent, I will allow Mr. Heyd's client to have a reference, at his own expense, for the purpose of ascertaining the mesne profits.

There is no reason why costs should not follow the event.

MIDDLETON, J. JUNE 4TH, 1914.

WINNIFRITH v. FINKLEMAN.

Vendor and Purchaser—Agreement for Sale of Land—Time Fixed for Closing Sale—Extension of Time—Payment of Money by Purchaser to Vendor—Repudiation by Vendor—Time of Essence of Contract—Right of Vendor to Treat Agreement as Terminated and to Recover Money Paid—Equitable Relief.

Action to recover the sum of $1,000 paid to the defendant Smith on behalf of the defendant Finkleman.

D. L. McCarthy, K.C., and H. E. Wallace, for the plaintiff.

G. H. Watson, K.C., and A. L. Fleming, for the defendant.

MIDDLETON, J.:—The plaintiff is a clerk in the employ of the National Trust Company, and entered into an agreement, as trustee and agent for the company, on the 31st October, 1913. He offered to purchase certain lands for the price of $20,850, payable $500 as a deposit with the offer, $10,000 on acceptance of the offer—the close of sale to be not later than the 15th November, 1913—and the balance on or before the 15th May, 1914, with interest on the unpaid purchase-money up to the time of payment, from the 15th November. This offer was accepted by Mr. Vanderwater, to whom it was addressed, on the 1st November, 1913.

The National Trust Company were purchasing as trustees for some one undisclosed—probably either the Toronto Railway Company or Mr. Fleming, manager of that company.

When the title came to be searched, the matter was placed in the hands of Messrs. McCarthy, Osler, & Co. Mr. Case, who is connected with that firm, was instructed to look after the searching and generally the carrying out of the transaction. Some difficulty was found owing to the fact that Mr. Vanderwater was not the owner of the property, but was entitled to call for a conveyance under an agreement between himself and Mr. Finkleman, one of the defendants in this action. That agreement was not produced, and I have no knowledge as to Finkleman's exact rights under it.

No difficulty arose upon this question, because it was arranged that Finkleman should convey direct to Winnifrith; and an order or direction to him so to convey was obtained from Vanderwater. The purchaser's solicitors were content to accept the direct conveyance.

There are, however, other difficulties arising in connection with the title; and some deficiency in the quantity of land supposed to exist arose when a survey was had.

On Saturday the 15th November, the day named for closing, Mr. Smith, who represented Mr. Finkleman, and Mr. Bond, who represented Mr. Vanderwater, met Mr. Case at the office of McCarthy, Osler, & Co. The adjustments were made, not only for the purpose of ascertaining the amount to be paid by Mr. Winnifrith, it being arranged that the whole price should be at once paid, but also an adjustment as between Vanderwater and Finkleman. There was an outstanding mortgage, and it was arranged that the amount due the mortgagee should be deducted; and a comparatively small sum, $112.50, was to be held in abeyance for a few days until a further report from the surveyor could be obtained.

By the time all these adjustments were made and other matters had been arranged, one o'clock had arrived. Mr. Case then found that the senior members of the firm were away from the office, and apparently the purchase-money was not on hand. He was somewhat chagrined at the situation, and, I think imprudently, telephoned to the Toronto Railway Company's offices to see if he could get the money from Mr. Fleming, without first taking precautions that his conversation could not be overheard. Mr. Fleming was also out, and it became clear that it would be impracticable to close the transaction, owing to the early hour at which banks and registry offices close on Saturday. He asked the other solicitors to allow the matter to stand until Monday. To this they finally agreed, and left the office. They, however, shortly afterwards returned, and Mr. Smith took the position, in which he was backed up by Mr. Bond, that Mr. Finkleman had been communicated with and would not allow the matter to stand until Monday unless $1,000 was paid on the Saturday.

There was no need for any anxiety as to the final closing of the transaction. The sum of $500 had been paid as a deposit. But Mr. Case agreed to pay the $1,000 asked rather than permit any question to be raised. He therefore paid to Mr. Smith the $1,000. Mr. Smith was entitled to receive this, as Mr. Finkleman had signed an order directing the money to be paid to his solicitor. Then Mr. Case adopted the precaution of having the extension until Monday evidenced by writing, and a memorandum was signed by the three solicitors, by which they mutually consented to the extension of the closing until Monday the 17th.

On Monday the 17th, apparently, concerted action took place between Smith and his client to frustrate the closing on that day. The money was forthcoming; Mr. Bond was found, and he was apparently willing; but Mr. Smith dodged all endeavours to obtain an appointment. When found, he did not know when he could close; and finally he said that his client had taken away the deed, which had been executed some days previously—the affidavit of execution is dated the 14th November—and, upon tender of the money being made, he declined to do anything. Tender was made also to Vanderwater, but he repudiated all knowledge of the matter.

The only inference I can draw from the facts proved is, that Smith and his client, having learned enough to lead them to suspect that the Toronto Railway Company was the bene-

ficial purchaser, determined to make use of that fact to secure some additional advantage.

I find as a fact that what took place on the 17th amounted to a deliberate repudiation on the part of Finkleman and his solicitor of all obligation to convey the lands in question and a refusal so to convey.

On the morning of the 18th, there was an entirely unexpected change of heart on the part of Finkleman and Smith. They were then ready to convey. There was likewise a change of heart and desire on the part of the purchaser. The contract having been repudiated and performance of it refused on the 17th, the purchaser claimed to be entirely exonerated therefrom. The purchaser refused on the 18th to carry out the contract of which he sought performance on the 17th, and he also maintained that Finkleman, having refused to convey on the 17th, when he ought to have conveyed, became liable to refund the $1,000. This action is brought to recover this sum. The $500 was paid to Vanderwater, and I am not concerned with it.

First as to Smith. He acted as agent for Finkleman. He received the money as Finkleman's agent. When the money was paid to Smith, it became and was Finkleman's. If there is a liability to refund, that liability is Finkleman's. I, therefore, think the action should be dismissed as to Smith, but I would not give him costs, as I cannot see that costs have been in any way increased by his presence.

Mr. Watson contends, first, that there was no repudiation of the contract on the 17th; that there was no contract closed on the 17th; time not being of the essence of any arrangement that was made; and that, even if there was a repudiation, there is a right, where no harm is shewn to have been done, to reform the contract.

I think this argument is based upon a fundamental misconception. Originally there was no contractual relationship between the parties to this action. The plaintiff's contract was with Vanderwater; the defendant's contract was also with him; but there was a parol agreement by which the defendant should convey to the plaintiff on receipt from the plaintiff of the balance due under the defendant's contract with Vanderwater. It was known that this was under and in part performance of a contract between the plaintiff and Vanderwater. It was known that time was of the essence of this contract; and, when the plaintiff found himself unable to complete the contract on the 15th as he had undertaken, the new contract then made, to close on the 17th, was a contract that, I think, embodied in it by

implication all the appropriate terms of the original agreement between the plaintiff and Vanderwater, and thus time became and was of the essence of the contract. In consideration of the $1,000 paid to Smith for the defendant, the defendant undertook to hand over the conveyance already executed so as to permit Vanderwater's agreement with the plaintiff to be consummated in that way. As soon as the defendant refused to carry out this agreement, he was guilty of a breach of agreement, and the right of action in the plaintiff to recover back the $1,000 paid as upon failure of consideration became vested in him.

The cases on which Mr. Watson relies are cases of a different type. Where a contract is to be performed in futuro, one party may, by announcing his intention not to carry out the contract when the time arrives, so repudiate the contract as to confer an immediate right of action upon the other. That other may treat the announcement of the intended breach as giving him a present cause of action, or he may, if he choose, wait to ascertain if default is really made. If he elects to take the latter course, it is open to the repudiating party to change his mind and withdraw his announcement of repudiation, and he is then at liberty to carry out his original contract. But nowhere can be found a case which suggests that an offer to perform after the time fixed constitutes a defence. It may be relied upon in mitigation of damages. It may afford some ground for application to the Court for equitable relief, but a tender of a deed on the 18th, when the contract calls for the completion of the sale on the 17th, is not a compliance with the obligation assumed.

This, I think, is the result of all the cases.

If this is to be regarded as an action for specific performance and an application to the Court for equitable relief from the default, then nothing has been shewn to justify interference. No explanation of the default is vouchsafed. A defence is filed in which charges of fraud are made, and not a scintilla of evidence has been given to support them. Everything indicates that the position in which the defendant finds himself is the unexpected result of a piece of sharp practice on his part.

With the rights as between the plaintiff and Vanderwater I am not here concerned, for he is no party to this litigation. I can see nothing which justifies the retention by the defendant of this $1,000, for which he has given nothing.

Judgment for the plaintiff against the defendant Finkleman.

FALCONBRIDGE, C.J.K.B. JUNE 4TH, 1914.

CASSON v. HAIG.

Surgeon — Negligence — Malpractice — Finding of Fact—Damages.

Action against a surgeon to recover damages for permanent injury and disfigurement of the plaintiff through the injection of a fluid into his eye, which was alleged to be malpractice or negligence.

The action was tried without a jury at Cobourg.

E. G. Porter, K.C., and G. A. Payne, for the plaintiff.

R. McKay, K.C., and D. J. Lynch, for the defendant.

FALCONBRIDGE, C.J.K.B.:—The application of the crystal (which the defendant claims was cocaine) to the plaintiff's eye was instantly followed by excruciating pain to the patient and by an alarming appearance of the eye itself.

Two high experts testified that these conditions were post hoc, but not necessarily or even probably propter hoc, and were more likely due to poisoning from a small piece of wood or sawdust which had got into the plaintiff's eye the day before.

The coincidence in time and otherwise is too startling for me to accept this theory; and, in view of the general history of the case and the other medical testimony, I am driven to the conclusion that the defendant made a mistake and introduced into the eye, not cocaine, but a crystal of some corrosive or caustic substance; and accordingly I so find as a fact.

The defendant is, therefore, liable to the plaintiff.

The jury assessed the damages at $1,200, a very reasonable amount, and I direct judgment to be entered for that sum, with costs.

MIDDLETON, J. JUNE 5TH, 1914.

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

Railway—Burning Worn-out Ties on Right of Way—Damage by Spread of Fire to Neighbouring Property—Negligence—Common Law Liability—"Injury Sustained by Reason of the Construction or Operation of the Railway"—Time-limit on Action—Railway Act, R.S.C. 1906 *ch.* 37, *sec.* 306.

Action for damages for destruction of the plaintiff's property by fire.

The action was in respect of two independent fires. The parties agreed upon the amount of damage sustained in each case; and it was admitted that the defendants were responsible for the fire which took place in 1913. The facts with reference to the fire of 1911 were admitted, and also the responsibility of the defendants therefor, unless they were relieved by the limitation found in sec. 306 of the Railway Act, R.S.C. 1906 ch. 37.

In accordance with the custom of the defendants, worn-out and decayed ties, removed in the ordinary course of the maintenance of the railway, were burned upon the right of way. The sectionmen of the defendants, in burning ties, permitted the fire to spread, and, reaching the plaintiff's lands, it destroyed timber to the amount admitted. It was also admitted that a proclamation was issued under the Fire Prevention Act, R.S.O. 1897 ch. 267, prohibiting the setting out of fires between April and November.

By sec. 306 of the Railway Act, all actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained.

The damage was sustained by the plaintiff some time between April and November, 1911; and the action was not begun until the 6th January, 1914.

The sole question for decision was, whether the plaintiff's claim was one "for damages or injury sustained by reason of the construction and operation of the railway."

The action was tried without a jury at Bracebridge.

W. Laidlaw, K.C. for the plaintiff.

Angus MacMurchy, K.C., for the defendants.

*To be reported in the Ontario Law Reports.

MIDDLETON, J., referred to the change made in the language of the section in the Railway Act of 1903, the words "by reason of the construction and operation of the railway" being there substituted for "by reason of the railway," the words used in the former statutes; and suggested that the amendment was probably little more than a recognition by the Legislature of that which had been determined by the Courts, that "by reason of the railway" covered all things done in supposed pursuance of the Act and intended to be in conformity with the Act—looking to the construction and operation of the railway.

He then referred to McArthur v. Northern and Pacific Junction R.W. Co. (1888), 15 O.R. 933, 17 A.R. 86; Ryckman v. Hamilton Grimsby and Beamsville R.W. Co. (1905), 10 O.L.R. 419; Prendergast v. Grand Trunk R.W. Co., 25 U.C.R. 193; McCallum v. Grand Trunk R.W. Co., 31 U.C.R. 527; Canadian Northern R.W. Co. v. Robinson, 43 S.C.R. 387, [1911] A.C. 739; West v. Corbett, 47 S.C.R. 596; and proceeded:—

Mr. Laidlaw argues that, as the liability here relied on is a liability at common law, the statute cannot be invoked. This is to ignore what has been taken from the first to be the meaning of the statute. It is a statutory limit within which common law actions must be brought. Originally the Act from beginning to end contained no provision imposing liability; it afforded complete protection so long as the railway company complied with its provisions. More recently there is imposed a statutory liability with respect to fire, but this cannot affect the construction of the section in question.

Then it is argued that the particular thing complained of is neither construction nor operation. I cannot assent to this. As pointed out by Mr. Justice Anglin in the Robinson case, all the operations of the road are in the Act classified under the heads of "construction" or "operation," and this affords a key to the scope of the section. I am not justified in making another classification, "construction, maintenance, and operation," and then placing certain things under the head of maintenance. When a railway company receives under its charter power to construct and operate a line from one place to another, all that might be called "maintenance" must be regarded as either construction or operation—it does not matter which.

What was done in this case—the removing and destroying of worn-out and decayed ties—falls under the heads of "construction and operation;" and, though there was negligence, and so common law liability, the action must be brought within the year.

There will be recovery for the loss within the year. The action fails as to the loss in 1911. The amount, I understand, of the loss in 1913 has been adjusted. The plaintiff will have the general costs, but must pay the costs of the issue on which he has failed.

BRITTON, J. JUNE 5TH, 1914.

RENZONI v. CITY OF SAULT STE. MARIE.

Negligence—Explosives Left Lying in Street and Found by Child—Injury to Child—Action for Damages—Evidence—Failure to Connect Defendants with Negligent Act.

Action against the city corporation and McNamara & Son for damages for personal injuries sustained by the plaintiff by reason, as alleged, of the negligence of the defendants or one of them.

The action was tried without a jury at Sault Ste. Marie.

U. McFadden and McMillan, for the plaintiff.

J. L. O'Flynn, for the defendant corporation.

J. A. McPhail, for the defendants McNamara & Son.

BRITTON, J..—The plaintiff, Arthur Renzoni, a boy of about 7 years of age, residing at Sault Ste. Marie, alleges that on or about the 16th November, 1913, he was walking in Allen street, in that city, when he saw a man—whose name the boy did not know—place a small box upon a stone or upon something in the street. The plaintiff took the box to his home; it contained about a dozen or more dynamite caps or detonators such as are generally used for firing blasts in blasting rock. The plaintiff did not know to the full extent the dangerous character of these caps; but I am of opinion that he knew well that he should not have taken them, and that they were explosive. It is not certain how long the plaintiff kept these caps. He was living with his sister and brother, and they moved from where they resided at the time of the alleged finding, to Cathcart street, and, during the time from the finding until the accident, the plaintiff carried about with him in his pocket these caps. Pasquel Renzoni, the brother, and the next friend in this action, had heard of the

caps, that they were in the house, and that the plaintiff was carrying them, but he did not see them until after the accident. I am of opinion that the plaintiff kept the caps more than 2 or 3 days. After his brother and sister moved to Cathcart street, the plaintiff threw one of these caps upon or into the stove, with the result that it exploded and destroyed one of the plaintiff's eyes.

The allegation is, that the defendants were making excavations in Allen street, or in that vicinity, and for that purpose used such dynamite caps as were found by the plaintiff, and that these caps so found were negligently and carelessly left upon the street by the defendants.

The work which was being done on behalf of the city corporation was done by the defendants McNamara & Son under a contract in writing, which contract was for a very large amount of work.

There was no evidence of any work done by the city corporation other than the McNamara & Son work, or of any interference by the city corporation with the work of or with the time or manner of doing it by McNamara & Son. The plaintiff's right to recover depends upon his being able to establish negligence on the part of McNamara & Son. At the trial the plaintiff stated that he saw a man put down the box of caps. He was asked to look about and see if he could identify that man if in the court-room. The plaintiff made a careful search in the crowded court-room, but did not pick out the defendant McNamara, or any person, as the one who had the box of caps. The senior McNamara was in the court-room at the time. He was the one of the firm most about the work. He stated that the caps used were kept in the cap-box, then in a wooden compartment of a big tool or implement chest, kept on the ground or in close proximity to the work. The work on Allen street, where caps were said to have been found, was completed a considerable time before the 16th November.

There is a considerable uncertainty as to the time when the caps first come into the possession of the plaintiff. If long before the 16th November, the greater chance there was of their being McNamara caps. The notice of action is dated the 18th November, and states the date as the 16th, but that probably was, and was intended as, the date when the plaintiff received the injury.

I am not satisfied that the plaintiff gave a full and accurate account of how he came to find these caps. After the accident,

naturally, inquiry was made and suspicion was directed towards McNamara & Son, and that suspicion was strengthened because the senior of the firm was on one or more occasions intoxicated when at work. I accept the evidence of Andrew McNamara that he did not see any of the caps at Renzoni's house after the accident nor did he see any of them anywhere. I find that Andrew McNamara took the position from first to last that the caps alleged to be found were not those of his firm. He said in effect that he was quite sure that the caps were not theirs. The case is one of suspicion—the plaintiff fails in his proof. I do not feel myself at liberty to draw the inference that the caps said to be found were those of the defendants McNamara & Son, or that they were guilty of any negligence in the use of any caps on their work.

The case seems to me no stronger (if so strong) than Jones v. Grand Trunk R.W. Co., 45 U.C.R. 193. Such caps could have been easily purchased by any one desiring to buy.

If, upon the evidence, the plaintiff is entitled to recover, I would assess the damages at $1,200 against McNamara & Son.

The action must be dismissed, and with costs, if demanded.

ROYAL BANK OF CANADA v. LEVINSON—KELLY, J.—JUNE 1.

Guaranty — Fraud — Undue Influence — Finding of Trial Judge.]—Action upon a guaranty of certain debts and liabilities of a firm of Galt & Mackey, given to the Traders Bank of Canada and transferred to the plaintiffs. The guaranty was signed by the defendant; he did not deny his signature; but he alleged that it was obtained by the fraudulent representations of the manager of the Traders Bank at Kenora, or by undue influence arising from a confidential relationship, without knowledge on the defendant's part of what he was signing. The learned Judge reviews the evidence, and finds that the defendant, knowingly and willingly and without any undue influence or fraud or misrepresentation on the part of the manager, signed the guaranty; and that the defendant has not established any ground for escaping liability for the amount claimed. Judgment for the plaintiffs with costs. J. H. B. Coyne and A. McLennan, for the plaintiffs. R. M. Dennistoun, K.C., and J. F. MacGillivray, K.C., for the defendant.

HAY V. COSTE—MIDDLETON, J.—JUNE 4.

Contract—Construction—Scope—Partnership—Contemplated Profits from Oil Leases and Agreements—"Extensions"—Profits from Natural Gas Leases and Agreements—"Oil and its Products."]—Action to compel the defendant to account to the plaintiff for all profits resulting from oil and gas discoveries made by the defendant directly or indirectly, upon the theory that there was a partnership agreement under which the plaintiff was entitled to all profits derived from leases, rights, agreements, or franchises for or connected with oil or gas. A memorandum of the agreement between the parties, dated the 20th July, 1905, recited negotiations looking to the development of oil-fields in western Canada, along the line of the Canadian Pacific Railway, and that these negotiations had reached a point where an agreement was likely to be entered into with the railway company for the purpose of drilling for oil in the Northwest, on or near the line of the railway; the basis of the agreement being set forth in a letter a copy of which was attached. Then followed this recital: "Whereas the parties hereto have agreed that they shall mutually benefit in any and all profits which may result from the conclusion of these negotiations and from any agreement which may be entered into by them or either of them as a result of the same." It was then agreed, in consideration of the assistance and services each had rendered to the other in conducting the negotiations, "that all profits which may accrue to the parties hereto or to either of them, whether in cash or in stock in any company or companies which may be found as the outcome of the negotiations which have led up to the agreement contemplated to be made as above referred to and of any extensions of the same shall be equally divided between the parties hereto." The defendant found natural gas, but no oil. The railway company refused to enter upon any gas project. The defendant ultimately (in 1910) arranged for the flotation by others of a gas enterprise, and secured gas leases and entered into agreements with relation to gas, which made him a considerable profit; and in that profit the plaintiff claimed a half interest. The learned Judge said that, looking solely at the agreement, as he must, he was satisfied that this profit was not within its scope. The agreement itself spoke of oil; both parties agreed that that was deliberate. The only thing upon which an argument could be hung was the expression in the agreement which gave the plaintiff a half interest in the

profits to accrue from the agreement then contemplated "and any extensions of the same." But the learned Judge was satisfied that the agreements of 1910 were not in any sense extensions of the agreement contemplated when the agreement was made between the plaintiff and defendant, but were totally independent and distinct agreements. It was sought to expand the agreement by reference to the correspondence between the parties before and after it was made; but that was not admissible; the agreement must stand or fall entirely by what was found within its four corners. In one of the letters, the expression "oil and its products" occurred; but, even if the letters could be looked at, natural gas was not a product of oil in the sense intended. "Products" was there used in the sense of artificial products. It would be beside the question to enter into a discussion as to whether natural gas was produced from oil in Nature's laboratories. Action dismissed with costs. J. W. Bain, K.C., and M. L. Gordon, for the plaintiff. C. A. Masten, K.C., and G. C. Cooper, for the defendant.

A. B. JARDINE CO. v. MACDONALD & SONS—TOLEDO PIPE THREADING MACHINE CO. v. MACDONALD & SONS—MIDDLETON, J., IN CHAMBERS—JUNE 6.

Summary Judgment—Rule 57—Defence—Extension of Time for Payment of Debt—Arbitration—Application of Commissions on Debt—Dispute as to Credit Item—Reference.]—Appeal by the defendants from summary judgments granted by the Local Master at Guelph in these actions, under Rule 57. MIDDLETON, J., said that the Master was right in granting judgment. The agreement which authorised all the commission or profit from the sales to be applied on the debt did not provide that the time for payment was to be extended till enough had been so earned as to pay off the claim. If this was to be the only way the claim was to be paid, what reason for asking a guarantee of the debt? The debtors and sureties appeared to have been willing to trust to the leniency of the creditors, and to have stipulated for no extended time for payment. The arbitration contemplated was an arbitration to determine whether the grantees had lived up to their obligation before the grantors forfeited the rights given. It was not an arbitration as to an admitted debt. The last affidavit filed suggested a credit not given of less than

$1,200. The judgment should be reduced by this amount, and there should be a reference to the Master at Guelph to ascertain whether there was on the part of the defendants the right to credit upon the amount of the claim for any of the sums mentioned, and to ascertain the true amount due. This judgment should provide for payment of the amount ascertained (over the amount for which the judgment now stood) forthwith after the making of the report. The Master was to deal with the costs of the reference; the plaintiffs to have the costs of the appeals. J. Shilton, for the defendants. G. F. Shepley, K.C., for the plaintiffs.