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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. APRIL 11TH, 1911.

GISSING v. EATON.

Negligence — Damages — Alleged Settlement — Improvident Release—Inadequate Consideration—Undue Influence—Parties not on Equal Terms.

Appeal by the defendants from the judgment of TEETZEL, J. The plaintiffs, Alice Gissing and her husband, Albert A. Gissing, brought action against the T. Eaton Co. to recover $5,000 damages for injuries alleged to have been inflicted on the plaintiff, Alice Gissing, by rolls of oilcloth that were standing in the defendants' store toppling over and falling on her. At the trial the action as against the plaintiff Albert Gissing was dismissed, and judgment given Alice Gissing for $750 and costs. Defendants set up a release for $50 signed by the plaintiff, in answer to the claim, and the trial Judge tried that question first, before submitting the main issue to the jury. He allowed the plaintiff at the trial to amend her reply, setting up that the release or alleged settlement was improvident and inadequate, and not such as should be allowed to stand in answer to her claim. As to whether the alleged settlement furnished an answer to the plaintiff's claim, on the ground of being an accord and satisfaction or discharge of it, the trial Judge decided that it did not afford such a answer. Then evidence on the main issue was submitted, and the case went to the jury, who allowed the plaintiff $750 damages. It was on the question of the release that the appeal was principally argued, though the appellants claimed also that the damages were excessive.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

I. F. Hellmuth, K.C., and G. W. Mason, for the defendants.

T. N. Phelan, for the plaintiffs.

At the close of the argument, the judgment of the majority of the Court, (Boyd, C., and Latchford, J.), was delivered orally by BOYD, C.:—Two of the members of the Court agree that the appeal should be dismissed. My brother Middleton dissents. There has been a double trial, first on the question of the release, by the learned trial Judge, and then by the jury on the question of injuries to the plaintiff and damages. The learned trial Judge decided that the alleged settlement did not furnish an answer to the plaintiff's claim. The verdict for $750 shows the estimate which the twelve men composing the jury placed upon the plaintiff's injuries. It is true that in the beginning, Mrs. Gissing was willing to release the Eaton Company from all liability on payment to her of $200, and if that demand had been acceded to, it might have been a fair settlement and this case would never have been here. But $50 was grossly inadequate, and was not commensurate with the injuries sustained by the plaintiff. The woman suffered a serious injury and is entitled to substantial damages. It cannot be said that the parties were dealing on equal terms. The woman was in bed; her leg was benumbed; she had that day suffered from a fainting spell caused by the pain from her injury; she was worried about the health of her husband, who was suffering from heart failure, and who was in a state of trepidation.

Black, the claims agent of the defendants, who negotiated with her, was an astute, alert man, who thoroughly understood the business in hand and its consequences. The learned trial Judge credits what the woman says of the matter. He also says in his judgment: "Black had alleged that they were prepared to prove by witnesses that she had not got hurt in the way she claimed at all, which, together with the fact that she had lost or forgotten the address of the only witness whom she had in mind to prove her case, would be circumstances which, in her then condition, would probably unduly influence her in accepting any proposed compromise."

Looking at all the circumstances, I am not able to say that the judgment should be disturbed. The appeal should be dismissed with costs.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I cannot agree with the majority of the Court, and I think the appeal should be allowed. I need not recapitulate what my Lord, the Chancellor, has said about the facts. I think the case comes clearly within North British Railway

Company v. Wood (1891), 18 Court of Sessions Cas. (4th series), 27. The Court ought to enforce the contract of release. There was not, in my view, upon the plaintiff's own evidence and that of her husband, any fraud or over-reaching.

SUTHERLAND, J. APRIL 12TH, 1911.

TORONTO GENERAL TRUSTS CORPORATION v. ROBINS.

Mortgage Action — Reference — Mortgagee in Possession — Repairs on Mortgaged Property — Commission Received by Agents from Contractors—Mortgagee Charged with, in Account—Alleged Custom of Agents.

Appeal of defendants Sarah A. Bowman, Arthur M. Bowman, and John M. Bowman, from the report of the Master in Ordinary dated 9th June, 1910. The action was one on five mortgages on real estate, in which the usual judgment was given, directing a reference to the Master, and enquiry as to subsequent encumbrancers.

D. O. Cameron, for the appellants.
G. Bell, K.C., for the plaintiffs.

SUTHERLAND, J. (after stating the facts) :—The first ground of appeal in the notice of motion is as follows: "That the learned Master in Ordinary should have charged the plaintiffs herein, in taking the accounts of the amounts due them under the mortgages in question herein by the defendants, various sums of money amounting to $500.00 and upwards, which the evidence upon the reference herein showed had been paid by the various persons doing repairs upon the houses on the lands comprised in the said mortgages, to Copeland & Fairbairn and Russell Greenwood, the plaintiffs' agents, who had let the making of the said repairs on behalf of the plaintiffs, upon the ground that the said $500 and upwards must be considered as a matter of law to have been received by the plaintiffs, and that the receipt of a commission by the plaintiffs, or their agents, from those to whom they were letting contracts for repairs, is contrary to law and has a tendency to, and did raise the prices which the plaintiffs paid for the making of the said repairs upon the said houses."

The circumstances seem to be as follows: At the time that the

said repairs upon the houses in question were being done, the Trust Corporation of Ontario were collecting the rents thereof for the purpose of applying the same upon the mortgages in question. It is said that not having any collection department in connection with their business at the time, they appointed Copeland, Fairbairn and Russell Greenwood their agents to collect the said rents.

For the services of these agents in that connection, the Trust Company paid them a regular and usual commission. These agents, in connection with the repairs to the houses in question, asked for, and obtained from each of the contractors so doing the work, 10% commission on the prices charged therefor, and the sums representing these prices were, of course, deducted from the amount of the rents collected.

[The learned Judge then referred to the evidence given before the Master by the agents, Fairbairn and Greenwood, and proceeded as follows]:

These men state that there was a usage among agents to do what they state they did here, and attempt to support such usage by their own evidence. The repairs in question were being done upon property which had been mortgaged, and the mortgagors or their assigns were interested in the repairs being done at a reasonable price. The mortgagees were, through their agents, collecting the rents and looking after the repairs, and it was their duty to see that the repairs were done at a reasonable price. I do not think the alleged usage was proved in at all a satisfactory way. In any event the mortgagees knew nothing about the question of the repairs being dealt with in this way or the existence of any such usage. Neither Mr. Plummer nor Mr. Langmuir gave evidence on the reference.

Upon the evidence aforesaid, the Master found as follows:

"Then with respect to commission paid to land agents Copeland & Fairbairn, and Greenwood, who were employed to collect the rents, I think that the mortgagees were perfectly justified, being a company engaged in the business in which they were, in the employing of agents to collect these rents. It is not to be supposed, looking at the volume of business necessarily transacted by a corporation such as the plaintiffs, that they will either by their executive officers or by officers which they may maintain for that purpose, themselves, personally or directly collect rents of all estates that would be in their hands. That would become impracticable. I think they are perfectly justified in employing, as they did here, people in that particular line of business to make these collections, and I think in so doing they

properly submitted themselves to the terms on which such business is carried on. I can readily see where a land agent, having a large number of properties in his hands as to which he is to be chargeable with the making of repairs and the collection of rents, may very well save money to his clients, the owners of the property, by taking just such a course as Copeland & Fairbairn and Greenwood did. If a mechanic has got to take odd jobs such as these repairs all over a place like Toronto—not on his regular business, but simply as an incident —he would be put to great loss of time—to a very great loss of time. If the land agent employs one firm of mechanics in each particular trade to do the various works necessary to the repair of a large number of houses, it seems to me the probability is that he would get those repairs done cheaper by such people as make a business of doing that class of work, than if he left it to chance to pick up a mechanic haphazard. Where he is a regular man, and they look to him as part of his business to do that class of work and he holds himself in readiness to do their work, I think the probability is that the work would be done quite as cheaply, and I think more cheaply, than if they went about and found a mechanic who would be willing to drop the work he might be at and make these repairs. I don't think it at all unreasonable under these circumstances in a mechanic who applies himself to that particular line of business, to pay a commission to the land agent who supplies him with that business. I am not disposed to find fault with the allowance of that commission, upon these grounds—it is part of the business, it is incident to the business, and was sworn to by both these gentlemen, who appear to be very reputable persons, as their regular practice, and it was their belief that the custom was universal in the trade."

With respect, I am unable to agree with the Master in his disposition of this matter.

The first question to be considered is, was such a course likely to increase the cost of repairs or not. The Master from the evidence seemed to have drawn the inference that they were likely to cost less. On the contrary, I would be of the opinion that they would cost more, and that the repairs did cost more as a result of such a way of dealing. The temptation would be for the contractor or mechanic to ask a sum in excess of the price for which he was willing to do the work, sufficient to cover the 10%, and particularly if tenders were not asked. . . . As a matter of fact, if the mortgagors or a regular officer of the plaintiff company had asked the contractors or mechanics to do the re-

pairs they would have done them for a price 10% less than was actually charged.

If the practice sworn to by the real estate agents is a regular practice, then it is one that I think should be discountenanced. It is perfectly plain upon the authorities that the trustees themselves could not have obtained the commissions from the contractors and mechanics without accounting therefor. They are responsible for what their agents so appointed do. They must exercise some reasonable supervision over them. The agents testify that the arrangement in question was made with the knowledge of Mr. Plummer and Mr. Langmuir. If so, I think it is clear that the commissions must be taken into account upon the reference as to the amount due to the plaintiffs upon the mortgages in question.

In the case of Re Wilson and Toronto General Trusts Co., 15 O.L.R. (1908), trustees who had obtained commissions on insurance premiums paid in connection with insurance effected on the trust property were held to be properly chargeable in the accounts with the amount of such commissions or rebates, notwithstanding that the estate was not charged more than what was actually and properly paid by the trustees. In that case the trustees acknowledged receiving commissions, "but considered that they were entitled to retain them in consequence of their having to employ a special clerk to look after the insurance." Here the agents of the trustees and with their knowledge, it is said, and testified to, not only received a commission from the trustees for collecting the rents, but also a commission from the contractors doing the repairs. I think that the appeal on this first ground must be allowed.

[The learned Judge then referred to the other grounds of appeal, which turned largely upon the question of the appropriation of rents to interest and repairs, and the verification of the various items of repairs, as to which, upon the evidence, he agreed with the disposition of these matters made by the Master.]

The matter will, therefore, be referred back to the Master to make such alterations in the account as he may think proper in view of the disposition I have made of the first ground of appeal. As the success has been divided there will be no costs of the appeal.

DIVISIONAL COURT. APRIL 12TH, 1911.

CRONK v. CARMAN.

Principal and Agent—Sale of Business—Remuneration of Agent —General Employment — Contractual Relationship—Purchaser at Lower Price than First Named—Implied Contract —Quantum Meruit.

Appeal by the defendants from the judgment of the County Court of Hastings of 14th February, 1911. The plaintiff, who was formerly foreman of the defendants, sued to recover $250, which he said the defendants agreed to pay him if he procured a purchaser for their printing business, whom he said he did procure, which assertion the defendants denied. At the trial judgment was given for the plaintiff for $250 and costs.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

C. Millar, and F. E. O'Flynn, for the defendants.

E. N. Armour, for the plaintiff.

MIDDLETON, J.:—In Toulmin v. Miller, 58 L.T. 96, cited by Mr. Millar, Lord Watson states the law thus: "When a proprietor with the view of selling his estate goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given." The plaintiff in that action failed because there was no employment. The mere introduction of a purchaser was not enough. The introduction no doubt brought about the sale, but to entitle the plaintiff to recover he must establish a contractual relationship.

In the case before us, though the plaintiff was given an option to purchase, it was always well understood that he was not to become the purchaser. This option was to facilitate his arrangement with the real purchasers. He was always an agent only, and had the sale been carried out at the price named, admittedly he would have been entitled to his commission.

When this negotiation fell through, and a new sale at a new price was arranged, through the plaintiff's exertions, with a purchaser whom he had found, it cannot be said that there was such

a complete absence of contractual relationship as to disentitle the plaintiff to recover. The defendants cannot accept the plaintiff's purchaser at the lower price and repudiate all liability.

The recovery would not necessarily be for the amount named as commission upon the higher price, but would be upon a quantum meruit. The defendants' position is really this. They employed the plaintiff to sell at $12,000; this he was unable to do, but he produced a purchaser for a smaller price, and when they accept this purchaser at this price there is an implied contract to remunerate.

No question is raised on this appeal as to the amount. Liability for any sum is the sole matter discussed.

We think the appeal fails and should be dismissed with costs.

BOYD, C., and LATCHFORD, J., concurred.

BRITTON, J. APRIL 12TH, 1911.

DAVY v. FOLEY.

Water and Water Courses—Adjoining Proprietors of Pulp Mills—Tail Race—Cross-Wall—Obstruction of Flow—Easement—Abandonment—Dominant and Servient Tenement—Increase of Burden—Claim of Interruption—Revocable License—Damages.

Action between pulp manufacturers, carrying on business in the village of Thorold, on adjoining properties, as to their respective water rights.

M. K. Cowan, K.C., for the plaintiff.
W. M. German, K.C., for the defendants.

BRITTON, J.:—The plaintiff is the owner of the mill, now known as "Davy's Pulp Mills." The defendants are the owners of the property immediately to the south, called the "Keefer Mill property," on which they operate another pulp mill. Both mills are run by water and both at present use the same tail-race from a point where the water from the defendant's mill unites with, or is joined by water from the plaintiff's mill. The water which furnishes the power flows from the head-race, situate on the east side of the respective properties. Each property has its own head-gate, and there is no dispute about the water entering each mill and supplying the power.

The plaintiff, about 25 years ago, with the consent of the then owners of the Keefer property, or without any opposition from them, built a wall across this tail-race, obstructing to some extent the flow of water down this race.

The circumstances as to the building of this wall, must be considered hereafter. On the 10th September last, the defendants having become the owners and having improved the "Keefer Mill" property, took down this stone wall, or a part of it. It was 8 or 9 feet long, 2½ or 3 feet high and 18 inches thick; the cost of building it would be about $25.

The plaintiff now complains of the taking down of this wall, as a trespass, and contends that the tail-race is in part upon his property and that the defendants have no right to use it.

If the plaintiff's contention is well founded, it becomes a very serious matter for the defendants, as a new tail-race, if practicable, would involve very great expense.

This action was commenced on the 16th November, 1910. The plaintiff asks for an injunction, restraining the defendants from discharging water on the plaintiff's property, and for damages.

The defendants claim the right to discharge the water from their mill, through the tail-race in question; deny that the tail-race is upon the plaintiff's land, and by way of counterclaim, ask that the plaintiff be restrained from using it, and from interfering with the defendants' use of it.

[The learned Judge refers to the description and title of the properties owned by the parties, and proceeds]:

The position then is this, that from a date, at least as far back as prior to the 21st September, 1868, down to the commencement of this action, the defendants and their predecessors in title have been using this tail race, for the discharge of the used water from the "Keefer Mill." Part of the time the Keefer mill was not in operation, and the plaintiff claims that the easement, if acquired for that property, has been extinguished by non-user. I will deal with this later. There is no evidence of any complaint or objection by any owner or occupant of the plaintiff's mill property down to the time of the alleged trespass on the 10th September, 1910. The plaintiff became interested in this property in 1881, and then knew about the tail-race and its user. The conveyance to the plaintiff is dated 18th of May, 1883. Under that conveyance the plaintiff went into possession of all of the cotton factory lot, except that part used as a tail-race for the Keefer property, he found a flume, as the tail-race for his property, and used it as such.

He knew that the tail-race in question was used as of right by the Keefer mill, and he made no objection, nor did he then set up any claim to it.

In 1886 the plaintiff proceeded with improvements upon his property. He cleaned out the race, deepened it, built a wall to confine the water more closely to the race, and built the wall before mentioned across the race.

I find as a fact, upon the evidence of Frederick Paulin, that the wall was upon plaintiff's own land. It was 11 inches to the north of the line dividing the properties. In the view I take of the case, the exact position of this cross-wall does not matter, as to the real rights of the parties, in respect to the discharge of water from the Keefer mill; the water from the plaintiff's mill up to that time had discharged by way of the flume into the level of lock 24, and afterwards by way of the race it was discharged into 23. The defendant was in the employ of the plaintiff when the wall across the tail-race was erected. He assisted in doing it, and he says it was done, not as any intended interference with the Keefer mill rights, but to prevent all the water running out of that mill, leaving the wheel pit dry. The bearings should be submerged to prevent their burning out. It was practically necessary to do what the plaintiff did in 1886, to prevent injury to the Keefer mill, as the mill then was.

The plaintiff's own evidence satisfies me that he had no thought of reducing or extinguishing to any extent the Keefer mill rights, but on the contrary he desired to avoid doing harm to the then owners by reason of the improvement he was then making.

I find that the owners of the Keefer mill, at the time of the plaintiff's improvement in 1886, had acquired and owned as belonging to that property an easement, entitling them to discharge by the tail-race in question, all the water that the mill then could use in the ordinary work of the mill.

The wall placed across the race in 1886, and which remained there until 1910, did not extinguish the easement to the extent of any difference made by the wall 2½ or 3 ft. high.

There was no intention on the part of the owners of the Keefer mill to abandon, or on the part of the plaintiff that his act would work as abandonment, and so an extinguishment. This wall did not prevent any water flowing upon plaintiff's land, other than the quantity required to fill the small pond created by the wall. After the wall the water remained to a depth sufficient to cover the bearings in the wheel pit, but having risen to the height of the wall it flowed over and down the

tail-race as much as before. The quantity of water held back would amount to but a few hundred cubic feet of all the quantity going through the mill.

In my opinion, neither the wall built by the plaintiff, nor what has occurred since, has effected an extinguishment of whatever rights the owner of the Keefer mill acquired by prescription, or otherwise, as to the tail-race.

There has been no alteration in the condition or character of the dominant tenement, so as to cause the extinction of the easement as a matter of law—no alterations of a substantial character, so that the burden on the servient tenement has been materially increased.

I am of opinion that the placing of the wall by the plaintiff across the tail-race was not an interruption, within the meaning of sec. 37 of ch. 133, R.S.O.

There was no interruption of the easement; there was, as I have said, only the storage of a small quantity of water for a short time, that otherwise would have gone down the tail-race, and then the water flowed on, in quantity as before, and in stopping this small quantity of water there was no intention to interrupt the right of the dominant tenement to the easement.

During the period from 1886 to 1910, whenever the Keefer mill was in use, sufficient water was used for the business carried on, and from 1868 down to the present time there has not been any act of the owner of the dominant tenement pointing towards abandonment or reduction of the easement. "Non-user is generally the principal evidence of an abandonment of an easement, but non-user is not in itself conclusive evidence that the right has been abandoned, for it may be explained by, and must be considered with, the surrounding circumstances; it must, moreover, always be a question as to the intention with which the usage was given up": Goddard's Law of Easements, 7th ed., p. 563. Any non-user in the present case was not accompanied by any circumstances which would tend to shew an intention of not resuming the user again. No act was shewn in this case that would be evidence that any person knowing or looking at the property, supposed that the owner of the dominant tenement intended to abandon his easement. The plaintiff never thought that any abandonment was contemplated. Even if there was consent or implied consent to placing of the wall, it was a license to do an act which might otherwise be unjustifiable. Such a license would be revocable at will of the grantor or his successor in title.

No evidence was given that the plaintiff, acting upon a supposed license, had made any improvements or incurred expenses in consequence thereof. Clearly the improvements in the plaintiff's mill were not made with any idea or expectation that the Keefer mill would never be improved.

Edward Foley, manager of the defendants, in 1886 was in the employ of the plaintiff, and had charge of putting in the wall in the tail-race. The plaintiff had deepened the tail-race about 5 or 6 ft. and so required to strengthen its walls. Then having provided for so complete and rapid a discharge from the Keefer mill, the cross-wall was erected "to retain the water up to the old fashioned turbine in the Keefer mill." Speaking of the walls, Foley was asked, if they had not been built in view of Mr. Davy's deepening the tail-race, what would have happened to the Keefer mill wheels, and Mr. Foley replied: "They would have burned out, you could not run them unless the water was retained around them."

As I understand the evidence, Lawson had put in rubble-stone to keep back enough water to submerge the wheel, but after the plaintiff's enlargement, the water would, without the wall, have washed the rubble-stone out. The effect of the wall was to keep the rubble-stone in place, and to keep water enough back to submerge the Keefer turbine.

The plaintiff from time to time continued to improve his mill and machinery. In 1894 he enlarged his head-race. When the defendants bought the Keefer mill they improved it by putting in two vertical turbines; up to that time the Keefer mill had been working, when in use, under a 17 or 18 foot head, while the plaintiff had 23 foot head. There was no question about back water for the defendants' new wheels, as their water was discharged through a tube, the lower end of which was below the surface of the water in the tail-race.

What was done by the defendants in regard to the machinery and deepening and cleaning out the race, all except taking down the cross-wall, was upon their own property, and considering the improvements made and the changed conditions, I am of opinion that what was done, was reasonably necessary for the enjoyment of the easement belonging to the Keefer mill.

The complaint of the plaintiff is that the Keefer mill water, as discharged, so crowds or "wells up" the water in the tail-race at the point where water from the plaintiff's mill enters the race, as to reduce the head and so reduce the plaintiff's output of pulp.

It was hardly denied that, at comparatively small expense,

the tail-race can be so enlarged as to take care of all the water from both mills, and without any possible damages to either. The plaintiff of course is not obliged to make any settlement, but is entitled to stand upon his strict legal rights. The only damage claimed was loss of profit by decrease of output, and by affecting the quality of pulp manufactured. That is in fact the only way damage could result, if it resulted at all, so far as appears upon the facts in this case.

[Reference to the evidence on the question of damage.]

The position is this: The plaintiffs are, when their mill is running, discharging a large quantity of water into the tail-race—the defendants have the right to discharge a large quantity of water into the same race—when the waters from both mills meet, there is necessarily a rise in the water and a consequent loss of head. That must be so, but it may not be so great as to affect the output. I am unable to say the exact quantity the defendants have the right to discharge, and I am asked to say that the difference between the quantity the defendants have the right to discharge, and the quantity they actually discharge, has caused damage to the plaintiff.

I cannot say that, and in reaching that conclusion I have in mind the wall mentioned, and repeat—that the removal of the wall does not increase the quantity of water put by defendants into the race, beyond the small quantity held in the pond created by the wall. The velocity of the water into the tail-race would be increased by removal of the wall—but it was not shewn to what extent that increase in velocity would cause a piling up of the water, if at all, to the damage of the plaintiff.

The main point of the case was the increased quantity of water. I am of opinion that the plaintiff has not been injured by anything the defendants have done. There may always be some irregularity in the working of machinery run by water power, going faster and slower at times when working under nominally the same head.

Upon finding that the defendants had an easement for the flow of water by this tail-race, and that the easement had not been abandoned or extinguished, it was not necessary to go farther in this action, but upon the authority of Frechette v. St. Hyacinthe, L.R. 9 A.C. 170, I could have dismissed it. That case was the converse of the present. The plaintiff there had the right to flow, to some extent, the lower land, but aggravated the servitude by increasing the flow. In the action the plaintiff, not content with seeking relief for interference with plain-

tiff's actual rights, claimed more, claimed to the existing flow, and refused to allege and prove a case for relief pro tanto, so the action was dismissed. Here the plaintiff did not in his statement of claim admit an easement to any extent as to water from the defendants' mill flowing through the tail-race in question. The plaintiff should, in my opinion, have alleged and proved, if it was capable of proof, that the defendant had added to the burden, and to what extent to the burden the plaintiff's land was bound to bear.

The defendants, in their statement of defence, at first did not attack the plaintiff, but an amendment was asked, which I allowed. This amended statement of defence denies the plaintiff's right to use the tail-race, and by way of counterclaim asks that the plaintiff be restrained from discharging water from his mill into the tail-race.

The plaintiff, in his reply, while continuing to deny any right in the defendants to discharge water upon the plaintiff's land, alleges as an alternative answer, that if the defendants have any rights they are restricted to the discharging of a much smaller volume of water, and to discharging it in a particular and well-defined manner, different from the present mode of discharge.

It is impossible for me to say to what precise quantity of water the owners of the Keefer mill are restricted. The respective properties had leases of water, or water rights, but it does not follow that only the quantity mentioned was actually used. The plaintiff admitted that he used more water than was mentioned in the prior lease of water to him. Probably the defendants' mill, under whatever management, used more water than strictly entitled to under the government lease. The leases do not establish anything between these parties in an action of this kind. The question is, whether, if the defendants have used more water than they have the right to use, such increased quantity has injured the plaintiff. The mode of discharge is not materially different from the former mode. The defendants cannot complain of what the plaintiff has done or may do upon his own land, unless the plaintiff's action interferes with the discharge to which defendants are entitled of water from their mill, and the plaintiff cannot complain of what the defendants may do, unless the defendants' actions wrongfully interfere with the plaintiff's rights.

There is no evidence to establish a verbal agreement such as is set out in the 6th paragraph of the statement of defence, but as the defendants aver their willingness to enlarge the tail-

race to a size sufficient to take all the water from both mills, I should think the plaintiff would accept that as a much better thing than litigation, which cannot in any event result more favourably to the plaintiff than to have the race so enlarged as "to prevent any possible detriment to the operation of the plaintiff's mill."

The action should be dismissed with costs, and the counterclaim of the defendants will be dismissed with costs.

BRITTON, J. APRIL 13TH, 1911.

THIBODEAU v. CHEFF.

Negligence—Parent and Child—Fire Caused by Act of Imbecile Son—Liability of Parent—Mischievous Propensity—Scienter—Harbouring Dangerous Animal—Tort of Minor.

Action for damages, tried at Chatham with a jury. The facts are stated in the judgment.

O. L. Lewis, K.C., and W. G. Richards, for the plaintiff.
Matthew Wilson, K.C., and J. M. Pike, for the defendant.

BRITTON, J.:—The plaintiff is a farmer residing in the county of Kent, occupying a farm belonging to the defendant, who is a merchant residing near to the plaintiff.

The plaintiff's crop of fall wheat for the season of 1910 was harvested and threshed, cleaned up and stored in a granary near to the defendant's store. The straw was stacked near by. According to the plaintiff's evidence, he said to the defendant on the day when the plaintiff had completed storing the wheat that he, the plaintiff, had a nice crop of wheat and he did not want the defendant's children around there.

On the 20th August, 1910, between 5 and 6 o'clock in the afternoon, the straw stack was set on fire, and the straw and granary and wheat were destroyed.

The plaintiff alleged, and the jury have found that to be so, that the fire was set by an irresponsible, imbecile son of the defendant.

This boy did not fully appreciate the difference between right and wrong—he was under age, lived with his parents, housed and fed and clothed and cared for to a certain extent by the defendant.

The plaintiff further alleged that this boy had, to the knowledge of the defendant, an inclination and propensity to handle lighted matches, and to set out fire in places and under circumstances, where fire would be likely to do damage. The defendant is charged with negligence, by reason of which this boy was permitted to set the fire of which the plaintiff complains.

I submitted to the jury certain questions, now attached to the record, all of which were answered by the jury.

Mr. Wilson, for the defendant, contends that, even upon these answers, there should not be judgment for the plaintiff, and that upon the undisputed evidence there is no liability on the part of the defendant. The liability here, if any liability, does not depend upon the relation of master and servant, which may arise, or which may be implied as existing, between parent and child. It may be conceded that there is no liability of the parent by virtue merely of the relationship at the time the negligent act or tort is committed, if the child is engaged in his own affairs, and not on the parents' behalf, so many of the cases cited by the defendant's counsel are quite outside of this one.

It is good legal doctrine that minors are liable for their own torts, and that no presumption arises from the relationship, by which the parent can be made liable, but this is not a case where presumption is invoked. The case of Edwards v. Crume, 13 Kansas 343, goes no farther than to state the proposition that there is no presumption of liability by reason merely of the relationship of parent and child. The liability in this case, if any, is because of the defendant's not taking care of a dangerous human being—a dangerous animal which the defendant was harbouring. As man is an animal, I may properly use that word in reference to the son of the defendant. This boy had the habit of smoking tobacco to excess, and of using lighted matches in places where damage would likely result from the use he made of matches. The defendant encouraged the son in the use of tobacco. That was contrary to law, but such an infraction of the statute would not create a liability here. (The boy was under 18; see R.S.O. 1897 ch. 261.) There was scienter on the part of the defendant of the dangerous tendencies and habits of the son; there was the ability on the part of the defendant to take care of his son, and it was the defendant's duty while keeping the boy at home to take care of him, and this action is for damages for the negligence involved in the breach of that duty; damages as the proximate result of such negligence.

In Homson v. Noker, 60 Wisconsin 511, it was held that a father who permits his young children to do upon his premises

acts which are likely to cause injuries to passers-by, is responsible for an injury so resulting, although he did not by express words of command direct his children to do such acts.

This case is somewhat novel. I have not been referred to, nor have I found any just like it, but, upon general principles, I must, upon the answers of the jury, and upon the whole case, direct that judgment be entered for the plaintiff against the defendant for $570.40 damages with costs.

MULOCK, C.J. Ex.D. APRIL 13TH, 1911.

BOOTHMAN v. SMITH.

Slander—Statement that Plaintiff was a Lunatic at Large—Words not Actionable—General and Special Damages—Costs.

Action for slander.

A. M. Lewis, for the plaintiff.
G. Lynch-Staunton, K.C., for the defendant.

MULOCK, C.J.:—This is an action of slander, the defendant saying of the plaintiff at a public meeting that he was a "lunatic at large."

The case was tried at Milton, and at the close of the plaintiff's case, the defendant's counsel moved for a dismissal of the action on the ground that the words used were not actionable. On this motion, I reserved judgment, letting the case go to the jury, which rendered a verdict for the plaintiff of $100 damages.

There was no evidence of damages, general or special, and the only question now to determine is whether the law will presume general damages as a natural and probable consequence of the words complained of.

General damages are only presumed where the words are actionable per se. As stated by Odgers, 4th ed., p. 37, the rule is that spoken words are presumed to be defamatory in four cases only, namely:

"1. Where the words charge the plaintiff with the commission of a crime; or,

"2. Impute to him a contagious disease tending to exclude him from society; or,

"3. Are spoken of him in the way of his office, profession, or trade; or

"4. Impute unchastity or adultery to any woman or girl."

And the author adds: "In no other case are spoken words actionable, unless they have caused some special damage to the plaintiff."

This is, I think, a correct statement of the rule.

The words in question do not come within any of these classes of cases, and are therefore not actionable in themselves: Weldon v. De Bathe, 54 L.J.N.S., Q.B., 113.

In order then to maintain the action it was necessary for the plaintiff to have proved some appreciable injury from their use. There was no such evidence, and therefore the action fails and must be dismissed.

The conduct of the defendant, who is the plaintiff's nephew, was undutiful and extremely cruel, and I refuse to give him his costs of the action.

MIDDLETON, J. APRIL 13TH, 1911.

RE WEST LORNE SCRUTINY.

Municipal Corporations—Local Option By-law—Adoption by Electors—Three-fifths Majority — Computation —Scrutiny by County Judge—Finality of Voters' List—Right of County Judge to Enquire into Qualification of Voters—Effect of Change of Residence—Prohibition—Enquiry Directed as to How Rejected Ballots Marked.

Motion by an elector of the village of West Lorne for an order prohibiting (or in the alternative for an injunction restraining) the county Judge of Elgin from entering upon any enquiry as to the right to vote of any person whose name is entered on the voters' list upon which the voting on the by-law in question took place, unless, under the provisions of the statute in that behalf, such person had become by change of residence disentitled to vote.

W. E. Raney, K.C., for the applicant.

C. St. C. Leitch, for the respondent.

MIDDLETON, J.:—I agree with the learned County Court Judge that no matter how great the degree of finality given to

the voters' list, revised on 28th October, 1910, he must upon the scrutiny determine the question whether the tenant who has voted was entitled to vote by reason of his having resided within the municipality for one month next before the election. The voters' list, while conclusively establishing that the voter was a tenant at the time of the revision, does not determine this question of residence, and it can make no difference that the evidence upon the question of residence may incidentally disclose the fact that the voter ought not to have been upon the list at all. What is said by Mr. Justice Garrow in Ellis v. Renfrew, 18 O.W.R. 703, at p. 707 et seq., is conclusive.

I have then to face the more difficult branch of the case, as this scrutiny reveals the fact that five persons voted who were not entitled to do so. Deducting those votes from the total ballots cast, and from the votes in favour of the by-law, the result is 137 in favour out of 229, and the by-law fails to carry, as 3/5 of 229 is 137 2/5.

If it can be assumed that the 5 voters in question voted in favour of the by-law, then this is the proper result, but if the fact be that these five really voted against the by-law, it was carried by a majority of four over the required three-fifths. If only one of the five voted against the by-law, it would be carried.

The applicant contends that he should be allowed to shew that one or more of these five votes was in fact cast against the by-law, and contends, with much force, that to deny him this right is to enable one who has no right to vote, really to vote against the by-law, as the effect of his improper act of casting a ballot is to subtract one from the votes cast in favour of the by-law.

When the question arises upon an election which is attacked in the ordinary way under a summons in the nature of a quo warranto, the practice has grown up of ascertaining whether the number of votes improperly cast is equal to, or greater than the majority, and when this is so the Court orders a new election, upon the principle that the will of the electorate cannot be ascertained as the result of the inquiry, as these votes may have constituted the majority, but the Court does not deduct the number of votes cast from the vote of the candidate having the majority, and declare the minority candidate elected.

I have been referred to no case arising upon a scrutiny where the Judge upon the scrutiny might have to face the same problem because he could not direct a new election.

If the scrutiny had been confined to a mere recount of the

ballots cast, without any inquiry as to the right of the voters to cast ballots, the question could not arise.

Had the ballots been numbered, or in any way been rendered capable of identification, then the votes improperly cast could be rejected. In the absence of any such safeguard, the law places a manifestly improper power in the hands of the man who, having no right to vote, votes. If there can be no inquiry as to how he voted, and he has in fact voted against the by-law, his vote must yet be deducted from the votes in favour, and if there can be an inquiry the result depends upon his veracity, which cannot be in any way checked. There is much said in the cases upon motion to quash which indicates that the same rule as that adopted in elections should be applied, but in all such cases the result of the quashing is to leave the matter open for the submission of a new by-law at the following municipal election. But when, as in this case, instead of moving to quash, the opponents of the by-law avail themselves of a scrutiny, they claim the result is not another election, but a vote adverse to the by-law, which precludes submission to the electorate for three years.

I find many statements in the cases against the right to compel a voter to disclose how he voted, but as the result of the best consideration I can give the matter, I have reached the conclusion that those men who have improperly cast ballots must disclose how they voted.

Section 371 of the Municipal Act directs the Judge to "determine whether the majority of the votes given is for or against the by-law." The Judge cannot say, as did Mr. Justice Mabee in Cleary v. Nepean, 14 O.L.R. 394, with reference to votes improperly cast, "It is impossible for the Court to say, etc.," because a duty is cast upon him to determine the fact whether the majority of the votes was given for or against the by-law, and this he must ascertain, not by the application of any artificial rule, but by an actual ascertaining of the real facts. The papers cast as ballots by those not entitled to vote are not really ballots at all, and it is the duty of the Judge to eliminate from the real votes, the spurious ballots mingled with the true by the inadvertent admission of those not entitled to exercise the franchise to the polling booth. This does not, I think, violate sec. 200: "No person who has voted at an election shall in any legal proceeding to question the election or return be required to state for whom he has voted." These five men were not voters, they did not vote, they are not within the protection of the Act—as strangers and interlopers they have placed in the

ballot box, a paper which interferes with the counting of the true votes, and so that the result may be ascertained, they are now asked how this was marked, so that the consequences of their attempt to pose as having a qualification they did not possess may be destroyed, and the will of the electorate as manifested by the genuine votes may be ascertained. This general provision may also be read as subject to the requirement of sec. 371, which upon the scrutiny, it seems to me, not only permits but compels the Judge to ascertain how the result was affected by the unauthorized vote.

The order which I make upon this motion is to prohibit the learned County Court Judge from certifying to the municipal council that the by-law has not been approved by 3/5 of the qualified voters voting thereon, until he has made inquiry and ascertained how the five spurious voters, or a sufficient number of them to enable him to certify, marked the ballots improperly cast and placed in the ballot box, and directing the learned Judge to enter upon the inquiry indicated for the purpose of ascertaining the facts necessary to enable him to certify as a matter of fact, and not as the result of an assumption, that the improper votes must be deducted from those cast in favour of the by-law.

The applicant must have his costs of this motion against the relators on the scrutiny.

MIDDLETON, J. APRIL 13TH, 1911.

RE ONTARIO AND WEST SHORE R.W. CO.

Railway Company—Issue of Bonds—Debenture Mortgage—Guarantee by Municipalities—Construction of Clauses as to Payment—Progress Certificates—Engineer.

Motion under Con. Rule 938 to determine certain questions arising under a debenture mortgage set out in full in the schedule to 9 Edw. VII. ch. 139.

E. T. Malone, K.C., for the Toronto General Trusts Corporation.

S. C. Smoke, K.C., for the railway company.

W. Proudfoot, K.C., for the township of Ashfield.

C. Garrow, for the town of Goderich.

MIDDLETON, J.:—Upon the argument I appointed the township to represent all the guaranteeing municipalities save Goderich, which is separately represented.

The company was incorporated under 2 Edw. VII. ch. 78, as The Huron Bruce & Grey Electric Railway Co., and several Acts have been passed relating to it. By sec. 78 the railway was empowered to issue bonds to the extent of $15,000 per mile. The railway is now constructing 40 miles and has issued $600,000 debentures.

Goderich, Kincardine, Ashfield, and Huron have respectively guaranteed certain portions of this sum, aggregating $400,000. The by-laws are set out in the schedule to 8 Edw. VII. ch. 135, and the debenture mortgage in the schedule to 9 Edw. VII. ch. 139, and all these are validated. The $200,000 debentures not guaranteed have been handed over to the railway, and the questions now arising relate to the making of advances on the $400,000 guaranteed bonds.

These bonds (or their proceeds when sold) were placed in the hands of the Trust Corporation, and under clause "Third" are to be paid out by the trustee as it receives progress certificates, which are to be issued for 90% of the cost of construction, pro rata with the proceeds of the bonds not guaranteed, i.e., 60% or ⅔ being paid by the proceeds of the guaranteed bonds, and 30% or ⅓ by the bonds not guaranteed.

Then follows the provision: "And the balance shall be paid out only after the completion of the said railway."

The construction of the railway is likely to cost more than $600,000, and the question arises whether the railway, on producing progress certificates shewing that work has been done, 90% of which exceeds $600,000, are entitled to demand the whole $400,000 from the Trust Co. The balance that is to be paid over is the balance, if any, remaining after the line is completed. The only thing that has been stipulated for by way of protection of the guaranteeing municipalities is the production of progress certificates shewing the value of the work done. I cannot read into the agreement a right to retain a sum of money until the road is completed. If the road can be built for less than the $600,000, then the balance is a security, as it is not to be paid until the road is completed. The letter of the bond must govern and I cannot make a new agreement for the parties. Both parties seem to have taken the risk of the available funds being sufficient to complete the building of the line, and the agreement makes no provision for the retention of such a sum as may be necessary to complete the line, and it

would have been quite impracticable to devise any workable agreement to that effect.

The other question is as to the engineer to certify. The agreement speaks of "the engineer appointed to inspect the said works." Section 145 of the Ontario Railway Act shews this to be "the Chief Engineer of the railway." Apart from this the progress certificates granted by the engineer in charge of the supervision of the work for the railway are intended to govern.

Costs as arranged between the parties.

Since the argument of the two questions already dealt with, a third question has been raised by Mr. Garrow as set out in his memorandum.

I think Mr. Smoke in his memorandum successfully answers this contention. It may well be that the payment should be pro rata with the proceeds of the bonds of both classes, but if so, the guaranteed bonds would bring more than the bonds without guarantee, and the result would be less favourable to the municipalities than that which the railway is prepared to accept. I cannot think that the proceeds of the guaranteed issue is to be compared with the face value of the unguaranteed bonds, and this is not stipulated.

BRITTON, J. APRIL 15TH, 1911.

NELSON v. NELSON.

Husband and Wife—Property Bought by Husband in Wife's Name—Oral Agreement for Life Lease—Statute of Frauds —Amendment—Trust by Operation of Law—Evidence.

Action by the plaintiff, who is the wife of the defendant, to obtain possession of lot 38 fronting on James street in Wallaceburg, the dwelling house and premises now occupied by the defendant, and where formerly the plaintiff resided with her husband.

W. R. Meredith, for the plaintiff.
J. S. Fraser, K.C., for the defendant.

BRITTON, J. (after stating the facts):—In 1898 and the early part of 1899 the parties, then living, apparently, happily together, desired to have a residence nearer to the place of de-

fendant's work. The defendant with his own money, to which the plaintiff did not contribute at all, purchased the property in question for the sum of $500. At the defendant's request the vendor made the conveyance to the defendant's wife. This conveyance is dated the 23rd February, 1899. The defendant says that the conveyance was so made, and that it was afterwards delivered to the plaintiff upon the understanding and agreement that the plaintiff would give to the defendant a life lease of the property. This the plaintiff denies. She asserts that the defendant simply made a gift of the property to her. After the purchase of the property by defendant, the parties for some considerable time lived there together as husband and wife, and nothing was said about the life lease, but later, and probably when coming differences "cast their shadow before," the defendant had a life lease prepared, presented it to the plaintiff for signature, and after conversation and discussion she refused to execute it. The relations between the parties became more and more strained, and now they are living apart, with an action for alimony pending—the defendant in the meantime paying interim alimony to the plaintiff.

The defendant sets up in his statement of defence the agreement mentioned, namely that the plaintiff would execute to the defendant a life lease at a nominal rent. The plaintiff simply joined issue upon the statement of defence, but at the trial, and upon notice served before the trial, the plaintiff asked to amend by pleading the Statute of Frauds. The amendment should not be allowed at the trial stage of the case. If the defendant is in equity entitled to succeed, his right should not be defeated, even if it could be, by allowing the reply as asked by the plaintiff. To allow the amendment under such circumstances would be an attempt to use the statute, not to prevent, but to permit a fraud. But apart from any question of pleading, and apart from proving an actual oral agreement to give a life lease, I am of opinion that this is not a case to which the Statute of Frauds applies. The statute does not affect, indeed it expressly excepts, trusts arising by operation or construction of law: see Lewin on Trusts, 11th ed., p. 182. It was competent for the defendant to prove by parol, as he did, the payment of the purchase money by him. As the conveyance was taken in the name of the plaintiff as wife of the defendant, advancement would be presumed, but that presumption may be rebutted by the special circumstances under which the transfer was made, and those circumstances may be proved by parol evidence. There is no doubt whatever in my mind that when this property was purchased,

it was intended by both as a home for husband and wife. There was then no idea of separation other than by death. The defendant was, and is now, a man of small means, industrious and frugal. He expended all of his savings up to that time in the purchase of this property. The fair inference from the evidence is that in having the conveyance made to the plaintiff, the defendant was not to be prevented from having the possession and enjoyment of the property during his life. The defendant says that his father, now deceased, was present on one occasion before the purchase, when there was a conversation with the plaintiff, or in her presence, as to putting the property in plaintiff's name, and the father said it would be all right if she would give a life lease. I take it, believing as I do the defendant's evidence, that the father suggested that, as a way of carrying out the intention of the parties, that the defendant should have the property during his life. There was some corroboration of the defendant's evidence as to this agreement for a life lease, or that defendant should have the property for life. Even if the witnesses knew but little of what a deed was, or of how a life lease should be drawn, their evidence establishes that the plaintiff at the time of the conversation spoken of, did not think she was entitled in her own right, absolutely, to more than an estate subject to the defendant's right of possession during his life.

[The learned Judge referred to the evidence of the defendant and his witnesses, and proceeds]:

It is a fact, although not evidence in rebuttal, that the defendant has, treating the house as his own for life, expended a large amount relatively in improvements upon, and repairs to it, no doubt for his comfort and convenience, but clearly with the idea that he could not be turned out of possession upon plaintiff's demand. The defendant does not refuse possession if plaintiff will accept it with him. This the plaintiff declines to accept, and she says that in another action she will justify her refusal to live with the defendant, and she will seek to establish her right to be maintained by her husband while living apart from him. Should the plaintiff succeed in this action she would necessarily deprive the defendant to a large extent of his means of paying the alimony the plaintiff seeks. Success to the plaintiff in this action would mean not only possession of the property, but it would render it more difficult, if not impossible, for the defendant to perform his work, now close to his present home.

The plaintiff now seeks the property, not only as originally

purchased, but with the additional permanent improvements made wholly out of the defendant's earnings, and with a view to the comfort of the plaintiff and himself in their now declining years.

The action will be dismissed.

There will be a declaration that the plaintiff is entitled to the property subject to the defendant's estate for life, to which he is entitled. In the hope that the plaintiff will accept what the defendant is willing she should have, a home with him, there will be no costs.

DIVISIONAL COURT. APRIL 15TH, 1911.

BENNETT v. HAVELOCK ELECTRIC LIGHT AND POWER CO.

Company—Sale of Property to Company by Director—Class Action—Form of Judgment—Costs—Lien—Salvage.

Motion by the plaintiffs to vary the judgment of this Court as issued: see 21 O.L.R. 120; 1 O.W.N. 751. The question was as to the costs which should be allowed to the plaintiffs on taxation under the judgment of the Court above referred to.

The motion was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

D. O'Connell, for the plaintiffs.

J. Grayson Smith, and S. T. Medd, for the defendants.

MIDDLETON, J.:—From the taxing officer's certificate it appears that effect has not been given to our intention. No useful purpose would be served in discussing the questions whether the formal order is in accord with our reasons, and whether the interpretation of that order by the taxing officer is correct.

When we came to consider the question of costs, it was plain that, prior to the amendment, the plaintiffs' claim was not placed upon the ground which commended itself to us, and we thought that the defendants should be liable for costs only from the time when the action was rightly framed. Some of the defendants were then for the first time brought before the Court.

With reference to the costs incurred before that time, prima facie the plaintiff could have no salvage lien, but we thought it proper to allow him to make a case, if he could do so, in the taxing office, for such a lien. If any costs incurred prior to the

amendment aided in any substantial way in the creation of the fund, the actors who created this fund by their exertions should not be in any worse position than the other members of the class entitled to share therein, save in so far as they have themselves to blame by reason of having mistaken their remedy, and indulged in litigation, in fact, fruitless. The good faith of their endeavour is not the measure of their right, but its productiveness.

The material necessary to enable this to be passed upon was not before us, and our intention was that this question should be worked out in the taxing office. The parties are to blame in not seeing that the matter was made clear when the formal judgment was settled, and that appropriate terms of art were used therein.

The formal judgment may now be amended to place the matter beyond doubt, and as the parties so desire, the time for appealing may run from this date. No costs.

It was said that the plaintiff had not enforced his judgment though it was pronounced more than a year ago. If by reason of his laxity he is unable to recover from any defendant any part of the judgment, then the class would have strong ground for contending that the amount of any such loss should be borne by the plaintiff, but this question does not now arise.

BOYD, C.:—I agree.

LATCHFORD, J.:—I agree.

SUTHERLAND, J. APRIL 19TH, 1911.

RE QUIGLEY AND TOWNSHIPS OF BASTARD AND BURGESS.

Intoxicating Liquors—Local Option By-law—Irregularities in Conduct of Election—Violation of Provisions as to Secrecy—Interference with Voters—Permission of Canvassing—Ballots Taken out of Polling Place—Alleged Custom—Substantial Violation of secs. 145, 168, 169, 170, 173, 174, *and* 198 *of Municipal Act—Irregularities not Cured by Application of sec.* 204 *of Act.*

Application to quash by-law No. 844 of said townships, the vote for which was taken on the 2nd January, 1911, with the

result that 484 votes were cast for, and 300 against the by-law, and it was carried by a majority beyond the three-fifths necessary, of 13 votes. The general grounds of attack as set out in the notice of motion were the following: 1. Irregularities in the conduct of the voting upon said by-law; 2. Interference with voters; 3. Violation of the provisions of the statute as to secrecy; 4. Permitting canvassing in the polling booths.

J. A. Hutcheson, K.C., for the applicant.
J. Hales, for the respondents.

SUTHERLAND, J.:—The material filed upon the application is somewhat voluminous, consisting of 18 affidavits for the applicant, and 28 for the respondents.

The voting was done at five polls, and in four out of the five there was a substantial majority for, and in the fifth a substantial majority against the by-law.

One of the applicants, Peter J. Quigley, makes the general statement that from his own personal knowledge of the manner in which the voting was conducted on said by-law, and from the information and belief supplied to him by scrutineers at all the polling subdivisions, he has no hesitation in saying that the voting was not conducted in accordance with the principles laid down in the Municipal Act, and that such non-compliance may have affected the result of the voting.

In answer to this there are definite statements made in a number of the affidavits filed on behalf of the respondents, to the effect that the election in a general way was a very orderly and well-conducted one.

The applicant charges irregularities in the conduct of the voting under the following various sections of the Consolidated Municipal Act, 1903, ch. 19: sec. 145: "Every polling place should be furnished with a compartment in which the voters can mark their votes *screened from observation;* and it shall be the duty of the clerk of the municipality, and of the deputy returning officer, respectively, to see that a proper compartment for that purpose is provided at each polling place."

It is alleged that in the case of two polling places, the compartments in which the voters had to mark their ballots were not separated at all, except with curtains running up part way towards the ceiling.

It is charged that no such proper compartments were furnished in the case of this election.

Section 168 provides that after an elector has deposited his

ballot in the ballot box he "shall forthwith leave the polling place." This provision is said to have been violated.

Section 169 is as follows: "While a voter is in a balloting compartment for the purpose of marking his ballot paper, no other person shall be allowed to enter the compartment, or to be in any position from which he can observe the mode in which the voter marks his ballot paper."

It is alleged that more than one voter was allowed in to a balloting compartment at the same time, and that people were in positions from which they could observe the mode in which other voters marked their ballot papers.

Section 170 provides: "No person who has received a ballot paper from the deputy returning officer shall take the same out of the polling place." While this section was not in terms violated, it was proved by the applicant, and admitted on behalf of the respondents, that in the case of at least three voters, ballot papers were taken by the deputy returning officers out of the polling places to people who were physically unable to come into the booths, and marked by the voters in their carriages on the street. No warrant for such a course of procedure exists anywhere in the Act.

Section 173 provides that: "During the time appointed for polling, no person shall be entitled or permitted to be present in the polling place, other than the officers, candidates, clerks or agents authorised to attend at the polling place, and the voter who is for the time being actually engaged in voting." It is alleged and proved that in certain of the polling places in question, from 5 to 30 people, consisting of voters and non-voters, were allowed to be present at different times during the day of polling in question.

Section 174 says: "In every polling place, the deputy returning officer shall, immediately after the close of the poll, in the presence of the poll clerk (if any) and of such of the candidates or of their agents as may then be present, open the ballot box, and proceed to count the votes as follows." It is said that after the close of the poll a number of people in addition to those authorised in such last-mentioned section were present at the counting of the ballots.

Section 198 (sub-sec. 1) is as follows: "Every officer, clerk and agent in attendance at a polling place shall maintain and aid in maintaining the secrecy of the voting at the polling place." It is said that as numbers of people were allowed to be present in the polling booths, it was possible for others than the officials and the agents of the parties sworn to secrecy, to hear what was

being said in the polling booths, and particularly to hear, in the case of illiterate voters, their instructions as to how they wished to have their ballots marked, thereby making it impossible to maintain the secrecy of the voting at such polling places.

Polling booth No. 1, called Portland, consisted of a small harness shop, in which was placed a table where the officials sat, and at one corner of which a voting compartment, screened from the rest of the room with heavy horse blankets, had been made, in which was placed a table where the ballots were marked.

It is said that in this polling booth one Charles Lyons, the owner of the shop, and not a polling official or an agent of either party, was allowed to be present in the polling booth, and to sit a short distance from the voting compartment all day.

Polling booth No. 2, Harlen, consisted of a hall about 20 x 50 feet in size. At one end of the hall a curtain 7 feet high, and distant about 11 feet from the end of the hall, had been erected to form a polling booth, and from this curtain to a point in the centre of the room, another curtain about 7 feet high had been erected for the purpose of a voting compartment, in which the ballots were marked.

Polling booth No. 5, Delta, consisted of a hall about 60 feet by 40 feet in size, at the north end of which was a platform about 12 feet in depth, and the full width of the hall, and raised about 2 feet above the main floor. In one corner of this platform was a room, called the judge's retiring room, with a door by which to enter it, and a partition running part way up to the ceiling. It was in this small room, in which was a table, that the voters marked their ballots. The officials sat around a table placed about the centre of the platform. No partition or screen of any kind separated the platform from the main body of the hall which, it is said, was used during the day by voters and non-voters as a place in which to congregate and talk.

[Reference to the evidence contained in the material filed on behalf of the applicant, to substantiate the above statements as to the mode in which the voting on the by-law was conducted.]

In a number of particulars the statements, in whole or in part above quoted from the affidavits filed on behalf of the applicant were contradicted and denied specifically in the affidavits filed on behalf of the respondents.

[Reference to the statements contained in the said affidavits filed on behalf of the respondents.]

General allegations were made in the affidavits filed on behalf of the applicant as to crowding in booths, and as to canvassing, or opportunities to canvass. These allegations are generally

denied in the affidavits filed on behalf of the respondents, and any suggested particular instances of alleged canvassing are specifically denied.

In a number of the affidavits filed on behalf of the respondents, there are definite statements to the effect that the voting and proceedings in connection with the by-law on the occasion in question were well-conducted and orderly. Statements are also made therein to the effect that none of the objections now put forward by the applicant were raised on his behalf, or on behalf of anybody opposed to the passage of the by-law, at any time during the polling of the votes on the day in question.

It appears plain also, from the statements made in the affidavits filed on behalf of the respondents, that the polling booths in question have been used for elections in exactly the same way as they appear to have been used upon this occasion for years back, the same places, the same mode of screening off parts of the polling places for polling booths, and polling compartments, the same permission or acquiescence in voters and non-voters being present in the polling booths or places during the time of voting, the same permission or acquiescence in ballot papers being taken outside to voters who were unable to enter the polling places, and marked by them in their vehicles on the street.

In the face of the many contradictions as to material allegations contained in the statements in the affidavits filed respectively on behalf of the applicant and the respondents, it is somewhat difficult to arrive at the exact facts. But the permission or acquiescence of individual officials and voters to substantial violations of the statute, and the proof of a custom permitting or continuing it, cannot be successfully set up on an application of this kind. While no actual interference with voters has been satisfactorily proved, there is no doubt that abundant opportunity to canvass voters in the polling booths is shewn to have existed, and what looked very like canvassing appears to have gone on. It seems to me also that upon statements, some of which are uncontradicted and others reasonably proved, the applicant is entitled to succeed on the grounds that there were "substantial irregularities in the conduct of the voting upon the by-law," and "that the provisions of the statute as to secrecy were violated." While one cannot expect, and must not look for an absolute and literal compliance with all the requirements of the statute as to polling places, voting compartments and the like, it must not be allowed to be understood that elections of this kind, or any kind, can be conducted with all sorts of irregularities.

In this case, it seems plain on the whole that there have been substantial violations of sec. 145 as to the furnishing of proper compartments in which the voters could mark their votes, screened from observation. I think this election was conducted with too much latitude in permitting voters and other persons to be in the polling booths, and in positions where they might, and in all likelihood did, see how the voters were casting their ballots.

I think that the provisions of sec. 168 were violated, and that voters after depositing their ballots did not leave the polling places, but remained therein with others.

I think that the provisions of sec. 169 were violated. The taking of the ballots out of the polling places on to the street, in three cases, to permit voters unable to enter the booths to mark their ballots, was also improper and unauthorised.

The provisions of sec. 173 were, I think, grossly violated. It is useless to argue that an imaginary line at the edge of a platform in a hall can create a real division between one part of the hall that consists of the platform, so as to make it the polling booth, and the rest of the hall, so that the latter will be a place distinct from such polling booth, and one where voters and other persons in numbers can be permitted to congregate, and see and hear everything done by the voters and officials, except the actual marking of the ballots.

The provisions of sec. 174 were, I think, in effect violated.

The provisions of sec. 198, as to maintaining the secrecy of proceedings at polling places, were also violated. It is admitted in the material filed on behalf of the respondents, that the provisions in the polling booths for marking the ballots of illiterate persons were so inadequate that persons in the polling booth, other than the officials, could and did hear how such voters instructed their ballots to be marked. It is said that this occurred to the extent of 12 votes in one polling subdivision.

While the acts complained of in this election are not so flagrant as in the case of Re Hickey and Town of Orillia, 17 O.L.R. 317, nevertheless they are such as I think brings this case within the scope of that decision, and also of In re Service and Township of Front of Escott, 13 O.W.R. 1215.

I do not think I can hold that this election was conducted in accordance with the principles laid down in the Municipal Act, or that the irregularities mentioned can be cured by the proper application of sec. 204 of that Act.

The by-law will be set aside with costs.

RE STURMER AND BEAVERTON—MIDDLETON, J.—APRIL 11.

Motion to Quash—Applicant not Party Really Litigating—Security for Costs.]—Motion by respondents for security for costs in an application to quash a local option by-law. Judgment: "It is here shewn that this proceeding is not in truth taken by the applicant, but he is put forward by McDonald and Hamilton, who are the real actors. The Court has inherent jurisdiction to prevent abuse of its process, and, as part of this jurisdiction, will stay proceedings as being taken against good faith, when a man of straw is put forward by those really litigating, until they either give adequate security, or consent to be added as parties, so that an order for costs may be made against them in event of failure. This jurisdiction may be exercised as well in the case of a summary application to the Court as in an action. The statutory requirement of security to a certain sum in any case, does not take away the right of the Court to require those invoking its aid to come personally before it and assume full responsibility for their actions, or to supply such security as will be adequate to meet the respondent's costs. If the real applicants consent to be added, no further order need be made; if they do not, they must give further security by paying $200 further into Court, or by a bond in twice this amount. In event of the applicants failing to give this security, or to file a consent to be added, duly verified, in a month, the motion against the by-law should be dismissed with costs, and in the meantime the hearing of the motion must be stayed. Costs of this motion will be to the respondents in any event of the main motion. This motion might well have been made in Chambers, and the order should issue as a Chamber order." W. E. Raney, K.C., for the respondents. J. B. Mackenzie, for the applicant.

REILLY v. DOUCETTE—MIDDLETON, J.—APRIL 11.

Judgment Debtor—Legal and Equitable Interest—Principles Acted upon by Courts of Equity.]—Motion by the plaintiff for an order to continue an injunction. Judgment:—Holmes v. Millage (1893), 1 Q.B. 551, is conclusive against this motion. "The only cases of this kind in which Courts of equity ever interfered were cases in which a judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only . . . nor did the Court ever presume to en-

large a judgment creditor's rights; nor, under colour of assisting him to enforce these rights, did the Court of Chancery reach by its process a kind of property not liable to execution," per Lindley, L.J., at p. 555. This principle is well settled, and has been frequently acted upon. Motion dismissed and injunction dissolved. Costs fixed at $20 to be set off against judgment debt. G. M. Clark, for the plaintiff. J. M. Ferguson, for the defendant.

HENDRY v. WISMER—DIVISIONAL COURT—APRIL 12.

Sale of Land — Specific Performance — Payment of Purchase Money to Vendor's Agent—Limitation of Agent's Authority—Evidence.]—Appeal by the defendant from the judgment of MULOCK, C.J.Ex.D., in an action for specific performance of an agreement to sell the plaintiff three lots in New Liskeard for $850, which the plaintiff alleged that he had paid. The money was, as a matter of fact, paid by the plaintiff to one Weaver, who was employed to sell the land by the defendant, who throughout the transaction was in British Columbia. At the trial judgment was entered declaring that the payment by the plaintiff to Weaver was payment to the defendant, and ordering specific performance, with costs. From this judgment the defendant appealed, and the case was heard before BOYD, C., LATCHFORD and MIDDLETON, JJ. The judgment of the Court was delivered by BOYD, C., who, after a full review of the correspondence and evidence, came to the conclusion that there was no proof that the defendant ratified the action of Hendry in turning over the money to Weaver. "The defendant appears to have been willing to assist in closing the transaction by getting the money from Weaver and relieve Hendry from putting up the money again; he was willing to call upon Weaver to carry out his trust of paying the purchase money to the owner, and would have accepted it from him, but when Weaver refused and finally disappeared, there was simply a breach of trust in the application of the money as between Hendry and Weaver, but no satisfaction of the price as between the parties to this action." The appeal was allowed with costs, and judgment given for the defendant with costs. R. McKay, K.C., for the defendant. George Ross, for the plaintiff.

PATTERSON v. DODDS—MIDDLETON, J.—APRIL 15.

Automobile—Invalid Notes given in Payment for—Fraud.]—Action for the recovery of an automobile, for an injunction, and

damages. The learned Judge found that the plaintiff and another person conspired to obtain possession of the automobile in question by fraud, knowing that the notes given in payment were not valid and of no value, and for this and other reasons stated by him, dismissed the action with costs, the defendants to return the stock of the Wood Vulcanizing Co. to the plaintiff. C. H. Porter, and W. W. Denison, for the plaintiff. The defendants appeared in person.

RE CANADIAN MAIL ORDER CO. (MEAKINS' CASE)—MIDDLETON, J.—APRIL 18.

Company—Winding-up Order under Ontario Act—Right of Appeal from—"Practice and Procedure."]—Motion under sec. 101 of the Dominion Winding-up Act for leave to appeal from the judgment of the Chancellor, reported 2 O.W.N. 882. Judgment: "The winding up is under the Ontario Act, an order having been made in May, 1908, by Mr. Justice Anglin under sec. 191 (of 7 Edw. VII. ch. 34). It was suggested that this was a motion to bring the liquidation under the Dominion Act (see sec. 6b); but the order, and the note contained in the Judge's book are conclusive upon that point. The only right of appeal is that given by sec. 202 of the Ontario Act, and this gives no right to appeal from the decision of a Judge of the High Court. Section 203 does not help the applicant, as the right of appeal is not covered by 'practice,' or 'practice and procedure.' Motion dismissed with costs." R. C. Levesconte, for the liquidator. C. J. Holman, K.C., for the contributories.

HOLDAWAY V. PERRIN—FALCONBRIDGE, C.J.K.B.—APRIL 18.

Negligence—Defective System—Answers of Jury—Common Law, and Statute.]—Action claiming $1,500 for damages alleged to have been sustained by the plaintiff, an employee of the defendants, through the negligence of the defendants. Judgment: "The answers of the jury indicate negligence of the defendants, both at common law (defective system), and under the Statute, and so with some hesitation I enter the verdict for the plaintiffs —$650 and costs." Sir George Gibbons, K.C., and J. M. McEvoy, for the plaintiffs. T. G. Meredith, K.C., for the defendants.

CLARKE v. BARTRAM & O'KELLY MINES—MASTER IN CHAMBERS—APRIL 18.

Discovery—Production of Documents—Allegations in Pleading.]—Motion by the plaintiff for further examination of the defendant Bartram, and for production of a book called the petty ledger, which is admitted to be in his possession. The learned Master held that, looking at the pleadings, it seemed that the defendant should make answer to certain questions which were relevant to the allegations in the statement of claim, as to which discovery was therefore reasonable: Canavan v. Harris, 8 O.W.R. 325. From the examination of the officer of the defendant company, it appeared that certain entries in their books are not original, but are taken from a book kept by the defendant Bartram, which is still in his possession. (He was, with the plaintiff, the promoter of the O'Kelly mines.) So much of it as is copied into the company's books should be produced. If it can be limited to this, that can be done. If not, the book must be produced as it is. The plaintiff was entitled to see that the entries in the company's books have been correctly transferred. The costs of the motion to be to the plaintiff in the cause. The plaintiff in person for the motion. F. E. Hodgins, K.C., for the defendants.

CLARKE v. BARTRAM—MASTER IN CHAMBERS—APRIL 18.

Discovery—Production of Documents—Privileged Claim—Claim not Assignable—Commission in Lieu of Costs.]—Motion by the plaintiff for an order for further examination of one of the defendants and production of documents. The action was in respect of certain dealings between one of the defendants and Thomas Crawford, leading up to the transfer by Crawford of his interest in the Lawson mine. In his statement of claim the plaintiff alleged that in October, 1905, he became liable to Crawford to pay all costs of the well-known litigation over the Lawson mine, and further, that in November, 1910, he obtained an absolute assignment from Crawford of all his interest in the premises, i.e., in the subject-matter of this action. On this was founded a claim by the plaintiff to have delivery and taxation of all bills of costs for services by Bartram against Crawford in this matter, an account of all the money received by Bartram in the matter, and a declaration that 100,000 shares of the Lawson stock said to have been bought by Bartram at 25c. a share were

only transferred by way of mortgage, and to make him account for the difference, he having, as alleged, sold them for 40c., and so made a profit of $15,000. The statement of defence admitted that the defendant bought 100,000 shares at 25c. with the consent of the plaintiff and Crawford, but says he was acting as agent for Crawford, and as his solicitor, when he sold Crawford's interest in the mine for $180,000, and received for his services a commission of $12,500. He denied that the plaintiff had anything to do with this matter, and said he has no status to bring this action, all claims as between Crawford and himself having been settled, and a full release given to Crawford for any claim for costs, or otherwise, arising out of this transaction. The plaintiff on examination of Bartram for discovery got him to admit that he acted as solicitor for Crawford in the matter, but the defendant refused to answer any other questions, or to produce his books and dockets, whereupon the present motion was launched. Judgment: "At the present stage I do not think this further examination and production can be ordered. The defendant admits that he acted as solicitor for Crawford, and took a so-called commission for $12,500 in lieu of any claim for costs. This he contends puts an end to any attack by Crawford, and he further says that the plaintiff in any case cannot maintain the action, as the claim in any case is not assignable. It would seem that the plaintiff must first establish the right of Crawford to an account, and then his own status to proceed against Bartram as Crawford's assignee. Any further discovery would appear to be merely consequential, so that the motion fails, and will be dismissed with costs to the defendant in the cause." S. R. Clarke, the plaintiff, in person. F. E. Hodgins, K.C., for the defendant.

LAURENTIAN STONE CO. v. BOURQUE—SUTHERLAND, J.—APRIL 19.

Costs of Counterclaim—Claims Allowed in Report as on Counterclaim—Confirmation by Lapse of Time—Appeal from Taxation too Late.]—Appeal by the plaintiffs from the certicate of the deputy registrar at Ottawa on the taxation of the costs of the defendants Joseph Bourque, and Joseph Bourque & Cie, of their counterclaim. The ground of the appeal was that there was no counterclaim of which any costs could be allowed, and it was conceded that if any costs were allowable, they must be upon the High Court scale. The learned Judge held that the appeal must fail. While ostensibly an appeal from the deputy regis-

trar's taxation, it was in substance an appeal from a report which has been confirmed by lapse of time, and as to which no appeal now lies. By the report certain claims made by these defendants, appearing in that portion of their pleadings termed a counterclaim, were allowed by the Master to whom the matters in question between the parties under the pleadings had been referred. These claims were expressly allowed to the defendants as claims on their counterclaim. That is the finding and decision in the report; and the finding as to costs is that they are entitled to the costs of their counterclaim on the proper scale. If the matter had come up before the report had been confirmed by lapse of time, and on a motion to confirm it, or by way of appeal from the report before its confirmation, it might have been decided, as now contended by the plaintiffs, that under the authority of such cases as Cutler v. Morse, 12 P.R. 594, the counterclaim was not in reality such; but the plaintiffs having failed to appeal from the report upon the question which is really in issue upon this application, and that report having become final before the taxation occurred, the appeal must be dismissed with costs. W. L. Scott, for the plaintiffs. J. A. Ritchie, for the defendants.

CORRECTIONS.

In McDonald v. Grand Trunk R.W. Co., page 748, ante, 5th line from top, for "plaintiff" read "defendants," and for "defendants' " read "plaintiff's."

In Wilson v. Hicks, page 962, ante, 14th line from top, for "W. H. Best" read "J. M. Best."