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BRITTON, J. AUGUST 1ST, 1902.

TRIAL.

PIGGOTT v. TORONTO RUBBER SHOE MANUFACTURING CO.

Building Contract — Materials Supplied not Covered by Contract —Damages—Arbitrator—Bias of—Lien.

Action tried at Hamilton and Toronto, brought by the plaintiff, a contractor, against the defendant company to recover the cost of work done and materials supplied, which were not covered, or only partly covered, by the contract for the construction of certain works for a hydraulic power system at Port Dalhousie. The plaintiff also sought to have the defendant Hillman declared disqualified to act as arbitrator on the ground of bias against the plaintiff, and to enforce his registered lien against certain other defendants who claimed some interest in the property in question.

Wallace Nesbitt, K.C., G. Lynch-Staunton, K.C., and E. F. Lazier, Hamilton, for plaintiff.

R. C. Clute, K.C., and J. A. MacIntosh, for defendant company.

J. V. Teetzel, K.C., and G. C. Thompson, Hamilton, for defendant Hillman.

BRITTON, J., held, that the defendant Hillman before and at the time of making his final estimates had a bias against the plaintiff and had not acted impartially towards him. The plaintiff, therefore, was entitled to have his claim further investigated, and he was allowed a reference with respect to his claim, in so far as not otherwise disposed of, to ascertain what amount was due him from the defendant company. The plaintiff was further entitled to a mechanic's lien upon the property in question, but only for the amount found

due by the Master, said lien to rank in priority to the estate or interest of the defendants or mortgagees, in so far as the work done and materials provided by the plaintiff have increased the selling value of said lands. Judgment for the plaintiff with costs, but costs of the reference reserved. If necessary to enforce his lien by sale, the plaintiff may apply for further order and directions.

Lazier & Lazier, Hamilton, solicitors for the plaintiff.

Clute, Macdonald, & MacIntosh, solicitors for the defendant company.

Teetzel, Harrison, & Lewis, solicitors for defendant Hillman.

MacMahon, J. AUGUST 1ST, 1902.

TRIAL.

OMAN v. COPP-CLARK CO.

Copyright — Infringement of — Imperial Act 5 & 6 Vict. ch. 45 — Injunction—Damages.

Action brought by the plaintiff, a professor of ancient history at Oxford University and author of a work "A History of Greece from the Earliest Times to the Macedonian Conquest," published in 1890, against the defendants, the Copp-Clark Co., W. J. Robertson, and John Henderson, for alleged infringement of the plaintiff's copyright in part of the book entitled "High School History of Greece and Rome," published in 1896. The plaintiff's work was registered pursuant to Imperial Copyright Act 5 & 6 Vict. ch. 45. Defendants the Copp-Clark Co. consented to a perpetual injunction against their further dealing with the book and agreed to deliver up all unsold copies. Defendants Robertson and Henderson contended that their history, except maps and plans, is the bonâ fide result of their labour and research among standard authorities, and that the maps and plans were utilized by the Copp-Clark Co. on the company's own authority without their consent.

G. F. Shepley, K.C., and J. F. Smith, K.C., for plaintiff.

D. E. Thomson, K.C., for defendants Copp-Clark Co.

C. A. Moss, for defendants Henderson and Robertson, cited Speirs v. Brown, 6 W. R. 352; Scrutton's Law of Copyright, 3rd ed., 138; Bromwell v. Halcomber, 3 My. & Cr. 738; Folsam v. Marsh, 2 Story 115; and Copinger's Law of Copyright, 3rd ed., 63.

MacMahon, J.—Held, that the plaintiff had used the historical facts common to all, but had shewn originality in

the treatment of the subject, proved by its reproduction to the extent of nine editions. A comparison of the two histories leaves the irresistible conclusion that the defendants adopted the plan of the plaintiff's work; that they used or allowed the Copp-Clark Co. to use the plaintiff's maps; and that they compiled material parts of their work from the plaintiff's history with colourable alterations and variations, always regarded as cogent evidence of animus furandi. Judgment for the plaintiff granting an injunction restraining the defendants Robertson and Henderson from further infringing plaintiff's history and directing them to deliver up to plaintiff's solicitor under oath all copies of the said book in their own or their agents' possession. Reference as to profits made by defendants Robertson and Henderson out of their book unless plaintiff consents to damages being assessed at a nominal sum. Defendants Robertson and Henderson to pay costs, less costs of making the Copp-Clark Co. defendants to the action.

Smith, Rae, & Greer, solicitors for the plaintiff.

Thomson, Henderson, & Bell, solicitors for defendants the Copp-Clark Co.

Barwick, Aylesworth, Wright, & Moss, solicitors for defendants Robertson and Henderson.

AUGUST 1ST, 1902.

DIVISIONAL COURT.

RE BRAMPTON GAS CO.

Company — Winding-up — R. S. C. ch. 129 — Master in Ordinary— Jurisdiction of, in Winding-up—Valuing Securities—Liquidator.

Appeal by Bank of Montreal and C. Blayney from ruling of Master in Ordinary that he had jurisdiction to determine the claims made by appellants and also the matters raised by the liquidator in his notice of contestation served on appellants pursuant to direction of the Master in Ordinary, and that he ought to exercise that jurisdiction. The Brampton Gas Co. is being wound up under the Dominion Winding-up Act, and the Bank of Montreal claim to be the holders of ten mortgage debentures of the company for $500 each, secured by a mortgage on the assets of the company, and to hold them as security for two promissory notes made by the company and indorsed by L. E. Dancey. Appellant Blayney claims to be holder of other ten mortgage debentures similarly secured, and also to be an unsecured creditor for $208.61. The liquidator disputes the validity of the mortgage debentures and the mortgage purporting to secure the

same, and alleges that if valid the debentures were used by one of the officers of the company in fraud of the company.

G. F. Shepley, K.C., for appellant Bank of Montreal.

W. A. Skeans, for appellant Blayney.

Hamilton Cassels, K.C., for liquidator.

Judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MEREDITH, C.J.:—I am unable to agree with the ruling which has been made. It is plain, I think, that the debts, for the proof of which provision is made by sec. 56 and the following sections, which deal with the subject of proof of debts, are unsecured or only partly secured debts, in respect of which the creditor seeks to rank upon the general estate of the company in the liquidation, and have no application to fully secured claims where the creditor is content to rely upon his security and that only, and does not seek to share in common with other creditors in the distribution of the general assets of the company.

The provisions as to valuing securities (secs. 62, 63) are in entire harmony with this view.

Nor are these provisions applicable where there is a contest as to the right of the creditor to the security which he claims to hold for his debt. They are in their very nature applicable only where the right to the security is not disputed, and, as I have already said, are designed for the purpose of ascertaining for what sum the creditor is to be entitled to prove in the liquidation as an unsecured creditor.

Nowhere in the Act do I find any power conferred upon the Court in the winding-up to call upon any one who does not claim to rank as a creditor and to be entered upon the dividend sheet, to submit his right or title to any security he claims to have upon the property of the company to adjudication by the Court, or anything which confers upon the Court jurisdiction to try the question of right in the winding-up.

The course taken by the appellants in sending in their claims has led, I think, to the complications which have arisen; and though the ruling appealed from should be reversed, it is not, I think, unreasonable that the appellants should bear their own costs of the appeal. The costs of the liquidator will be paid out of the estate.

Proudfoot & Hayes, Goderich, solicitors for the appellants the Bank of Montreal.

E. G. Graham, Brampton, solicitor for appellant Blayney.

Cassels, Cassels, & Brock, solicitors for the liquidator.

MACMAHON, J. AUGUST 2ND, 1902.

WEEKLY COURT.

RE MEDLER AND CITY OF TORONTO.

Arbitration and Award—Appeal from—Costs—Closing of Street—Railways—55 Vict. ch. 90, sec. 2 — 56 Vict. ch. 48.

Appeal by Medler and Arnot from an award of arbitrators and cross-appeal by the city of Toronto as to allowance of $100 damages. Appellants allege that their lands on Berkeley street, Toronto, have been injured by the laying of tracks for shunting purposes, and by the closing of Berkeley street pursuant to tripartite agreement between the city, the Grand Trunk and Canadian Pacific Railway Companies, and ratified by 55 Vict. ch. 90, sec. 2.

J. M. Reeve, K.C., for plaintiff.

J. S. Fullerton, K.C., for defendants.

MACMAHON, J., held that the city cannot be held liable in damages, because prior to the tripartite agreement the Railway Committee of the Privy Council had granted, February 23rd, 1892, leave to the railway companies to construct their lines along Mill, Parliament, and Berkeley streets, and permitted a deviation of Berkeley street, and this leave had been ratified by 56 Vict. ch. 48; nor does sec. 2 of the former Act make the city liable because the injury complained of is not within the meaning, as a liability could only arise where some person's lands are injuriously affected, and here they are not, the injury not being to the land but consisting in personal inconvenience to the owners: Caledonian v. Ogilvie, 2 Macq. 229; Beckett's case, L. R. 3 C. P. at p. 94; Powell v. Toronto H. & B. R. W. Co., 25 A. R. 209. Appellants are not entitled to damages by reason of loss from filling in the lots south of the new windmill line, because they have no title to the water lots in question; they are not entitled to damages for the closing of Berkeley street because their lands do not abut thereon: Falls v. Tilsonburg, 23 C. P. 167. Held, also, that the arbitrator had no discretion to direct the costs, including stenographer's fees, to be paid by the city. Appeal dismissed with costs and cross-appeal allowed.

AUGUST 6TH, 1902.

DIVISIONAL COURT.

CROSBY v. BALL.

Life Insurance — Disposition of Moneys between Two Wives both Living—"Dependent"—Judgment ex Aequo et Bono.

Appeal by plaintiff from judgment of BOYD, C., in defendant's favour as to who, as between plaintiff and defendant,

was entitled to $939. 07 insurance moneys, payable under an endowment certificate issued by the Supreme Tent of the Knights of the Maccabees of the World. The plaintiff married Philip Crosby, deceased, in 1860. In 1886 he married the defendant. The trial Judge found that defendant did not know of a former marriage, and held that the ownership of the fund, which was to be paid to the insured's "wife," Mary Crosby, should be decided ex aequo et bono, and since it was perfectly manifest from the evidence that the deceased never intended the money to go to the plaintiff, he gave judgment in defendant's favour.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

W. M. Douglas, K.C., for plaintiff.

A. Weir, Sarnia, for defendant.

FALCONBRIDGE, C.J.:—There is no question, on the evidence, but that the insurance was effected for the defendant, Mary Ball. She is the person designated as beneficiary, although she may, strictly speaking, be misdescribed as wife; and the only point for decision by us is whether she can be a legal beneficiary under the rules of the association. By sec. 174 of the Revised Laws of the K. O. T. Maccabees, edition of 1899, it is provided: "No life benefit certificate shall be made payable to any person other than the wife, husband, children, dependent, mother, father, sister, brother, aunt, uncle, nephew, niece, cousin, step-child, step-parent, half-sister, or half-brother of the member . . ." The defendant claims as dependent, and it was argued to us, on the part of plaintiff, that the dependent in the section should be a person related by blood or affinity to the member. I am of the opinion that there is no room for the application of any doctrine of ejusdem generis or noscitur a sociis. . . . It is perfectly manifest that it was intended that a dependent, that is, one who is sustained by the member or who relies on the member for support or maintenance, ranks next after wife, husband, and children, apart from any question of legal relationship.

She is entitled to the fund in Court. The position of a "dependent" has been considered in the following cases: Main Colliery Co. v. Davies, [1900] A. C. 358; McCarthy v. New England Order of Protection (1891), 153 Mass. p. 314; and the unreported, but well considered, portion of the judgment of Meredith, J., in Styles v. Supreme Council Royal Arcanum (1897), 29 O. R., referred to in the note on page 40.

STREET, J.—Under the rule 174 of the Order under which the policy was granted a policy may be made payable to a wife or a dependent; it might have been made payable in the first place to the defendant as a dependent had the facts been known. The person being ascertained, and she being a person who might take under the rule referred to, I can see no sound reason why she could not take in the character of dependent although she cannot do so in the character of wife.

The appeal should, therefore, in my judgment, be dismissed with costs, and the money in Court should be ordered to be paid out to the defendant.

BRITTON, J., concurred.

LOUNT, J. AUGUST 13TH, 1902.

TRIAL.

RYAN v. CATHOLIC ORDER OF FORESTERS.

Life Insurance—Mutual Benefit Society—Contract Uberrimæ Fidei—Untrue Representations in Application—Agency.

Action by the mother of James Ryan, deceased, to recover $1,000. A certificate was never issued. The application of deceased for membership in St. Leo Court, Toronto, was dated October 20, 1899, and by it he agreed that any untrue or fraudulent representations made in it or any concealment of facts "shall forfeit the rights of myself and my family to all benefits and privileges," etc. The approval of the High Medical Examiner to the application was given November 4, 1899, and, as required by the rules, the applicant was notified to attend a regular meeting for initiation within thirty days. He did not attend within that time, but was initiated at a meeting on December 6, 1899, by the officers of the court who did not know that the thirty days had expired. The recording secretary forwarded applicant's roster to the high secretary at the head office in Chicago, U.S., and he replied December 21, 1899, that as the time that had elapsed between the time limit and initiation was so short—two days—he would accept a medical certificate of health if filed within ten days. Notice of this letter was sent to appellant by the recording secretary, but was never received by the applicant, who had died December 19.

J. Kyles, for plaintiff.

J. Tytler and C. J. McCabe, for defendants.

LOUNT, J., held, that the action of the court in initiating the applicant after the expiration of the thirty days was beyond their agency and illegal and contrary to the constitution of the order. Subordinate courts are the agents of the

order and have no right to waive any of its rules: Bacon on Life Insurance, 2nd ed., secs. 117 et seq.; Heffernan v. Friends, 29 O. R. 125; Devine v. Templars, 22 A. R. 259. Held, also, that some of the answers in the application being untrue, and the application being part of the contract, the plaintiff could not recover: Russell v. Canada Life, 8 A. R. at p. 723. Action dismissed with costs; thirty days' stay.

J. Kyles, solicitor for plaintiff.

Tytler & McCabe, solicitors for defendants.

LOUNT, J. AUGUST 13TH, 1902.

TRIAL.

SOUTHAMPTON LUMBER CO. v. AUSTIN.

Contract—Unascertained Goods—Appropriation—Passing of Property—Acceptance and Part Payment.

Action to recover balance due on a contract for the supply of cedar railway-ties and 5 to 6-inch pole cedar ties f.o.b. at Pine Tree harbour; and also 15,000 unburnt posts and pavements.

Thomas Dixon, Walkerton, for plaintiff.

J. H. Rodd, Windsor, for defendant.

LOUNT, J., held that the defendant had not at any time inspected, accepted, or received the ties, nor was there any selection or appropriation of them by him, nor were they at any time unconditionally appropriated to the contract either by plaintiffs with defendant's assent or defendant with plaintiffs' assent. The contract is for the sale of unascertained or future goods by description—an executory contract—and the rule in such cases is that the property does not pass until goods in a state in which the buyer is bound to accept them are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the latter with the assent of the former: Chalmers, 4th ed., p. 43; Blackburn, 2nd ed., p. 128; Heilbutt v. Hiskcon, L. R. 7 C. P. at p. 449; Wilson v. Shaver, 3 O. L. R. at pp. 114-5. The property in the ties never passed. The plaintiffs were always in possession. As to the claim for the posts, however, the plaintiffs should recover. After the posts had been got out the defendant requested the plaintiffs to peel them, and agreed to pay one cent per post. The plaintiffs peeled 10,000, and defendant paid $200 on account, and on these facts there was a

plain acceptance and waiver of inspection: Wilson v. Shaver, supra; Leggo v. Welland Vale Co., 4 O. L. R. 45.

Judgment for plaintiffs for $700 with costs.

Counterclaim disallowed. Thirty days' stay.

Thomas Dixon, Walkerton, solicitor for plaintiffs.

Fleming, Wigle, & Rodd, Windsor, solicitors for defendant.

LOUNT, J. AUGUST 13TH, 1902.

TRIAL.

SMITH v. WADE.

Landlord and Tenant—Ejectment—Assignee for Benefit of Creditors —Contract by Telegram—Mistake.

On July 9, 1900, the plaintiff demised to Marion Watkins, wife of Frederick Watkins, certain premises in Hamilton, the lease containing a forfeiture clause in the event of assignment for the benefit of creditors. On December 26, 1901, Marion Watkins made an assignment for benefit of creditors to the defendant Wade. At a meeting of creditors, while an offer of the T. H. Pratt Company, Limited, was being considered, Frederick Watkins telegraphed the plaintiff, "If creditors accept my offer for stock, can I promise that lease will be as if no assignment had been made, and that you will not exact penalty clause?"

"My offer" referred to the offer of the Pratt Company, but the plaintiff was not specifically informed of this, and he accepted the offer. Pratt & Company took over the business and the lease. Plaintiff, then, brought action against Wade, the assignee for benefit of creditors, and Pratt & Company for ejectment.

G. F. Shepley, KC., and C. W. Bell, Hamilton, for plaintiff.

A. B. Aylesworth, K.C., for defendants Pratt & Company.

D'Arcy Tate, Hamilton, for defendant Wade.

LOUNT, J., held that lessees (Pratt & Co.) could stand in no better position than the assignor. The plaintiff has a right as landlord to enforce the forfeiture of the lease, and defendants have made out no case to justify the intervention of the Court to grant relief against the forfeiture: Barrow v. Isaacs, 1 Q. B. D. 417; Eastern Telegraph Co. v. Dent, 1 Q. B. D. 835.

Judgment, accordingly, for the plaintiffs with costs. Reference as to mesne profits and damages.

Bell & Pringle, Hamilton, solicitors for the plaintiff.

Carscallen & Cahill, Hamilton, solicitors for the defendant Wade.

LOUNT, J. AUGUST 13TH, 1902.

TRIAL.

GOULET v. GREENING.

Bankruptcy and Insolvency—Fraud—Power of Attorney.

Action brought by plaintiff, a creditor of one Richmond, to have it declared that certain payments to defendants Greening & Co. of moneys received by Richmond from insurance companies in payment of policies covering his stock of goods destroyed by fire in Portage la Prairie, Manitoba, were in fraud of creditors and unjust preferences.

G. Lynch-Staunton, K.C., and R. R. Bruce, Hamilton, for plaintiff.

G. H. Watson, K.C., and S. C. Smoke, for defendants Greening & Co. and Garland.

W. D. McPherson, for defendant Matchett.

LOUNT, J., held, that the moneys in question were paid by defendant Matchett, who held a power of attorney from Richmond when the latter went to Scotland, in the ordinary way of trade and business and without collusion or fraud or intent to defeat or delay Richmond's creditors, and upon these and other findings, following Molsons Bank v. Halter, 18 S. C. R. 88, Stephens v. McArthur, 19 S. C. R. 446, Davidson v. Fraser, 28 S. C. R. 272, the action is dismissed with costs. Thirty days' stay.

Bruce, Burton, & Bruce, Hamilton, solicitors for plaintiff.

Watson, Smoke, & Smith, solicitors for defendants Greening & Co. and Garland.

T. C. Haslett, Hamilton, solicitor for defendant Matchett.

LOUNT, J. AUGUST 13TH, 1902.

TRIAL.

ANDERSON v. ELGIE.

Dower—Assignment of—Fraud of Mortgagor—Mistake—Subrogation—Merger.

Action for dower in the east half of lot 27 in the 5th concession of the township of Luther, the plaintiff relying on a deed dated 30th September, 1881, in which Sarah Morrison, wife of John Morrison, granted to the plaintiff all her dower rights which she might have in the above premises if she survived her husband. The deed to the plaintiff was registered subsequent to the registration of a mortgage from Morrison to the Agricultural Loan and Savings

Company, in which Sarah Morrison did not join to bar dower.

J. Bicknell, K.C., for the plaintiff.

R. A. Bayly, London, for the defendant.

LOUNT, J., held that the plaintiff does not lose any rights or title acquired by his deed by reason of the fact that the mortgagees were deceived by the mortgagor's declaration to them that he was a widower. It was not a case of mistake on the part of the Agricultural Loan and Savings Company, and the facts do not come under the principle and reasoning in Brown v. McLean, 18 O. R. 533, and therefore the doctrine of subrogation cannot apply, and the doctrine of merger does not apply: Armour on Real Property, p. 235.

Morrison died on the 19th February, 1901; his widow Sarah Morrison is now living. The defendant has refused the plaintiff's demand that dower be set apart.

Judgment for the plaintiff. Reference directed to ascertain and settle dower, arrears of dower, and damages for detention of dower. Costs to the plaintiff; further directions and costs reserved. Thirty days' stay.

LOUNT, J. AUGUST 13TH, 1902.

TRIAL.

HAIGHT v. DANGERFIELD.

Will—Construction of—Executors—Mortgage—Covenant for Payment—Possession.

Action brought by the executors of Samuel Haight, deceased, against Arthur Eugene and Richard Dangerfield for sale and payment of the balance due on a certain mortgage, and for judgment against the mortgagors on their covenant, and for immediate possession, and for construction of the will of James Dangerfield, deceased, father of the mortgagors.

J. V. Teetzel, K.C., and G. C. Thomson, Hamilton, for plaintiffs.

W. H. Barnum, Dutton, for the adult defendants.

John Hoskin, K.C., for the infant defendants.

LOUNT, J., held, that the adult and infant defendants were improperly made parties. Action against them dismissed with costs. Costs of the infant defendants fixed at $25. Question of title need not be considered at this stage, because a complete change through death might take place before the parties came before the Master. The plaintiffs, however, are entitled to judgment for immediate pos-

session of the mortgaged premises, and to a reference to the local Master at Hamilton to take the accounts, and the plaintiffs are entitled to judgment against the mortgagors for the amount found to be due on the account, with costs to be added to the mortgage account. Further directions and costs reserved. Thirty days' stay.

Teetzel, Harrison, & Lewis, Hamilton, solicitors for plaintiff.

W. H. Barnum, Dutton, solicitor for defendants.

LOUNT, J. AUGUST 13TH, 1902.

TRIAL.

WASON v. DOUGLAS.

Trespass—Boundaries—Injunction.

Action for damages for trespass and for injunction restraining defendant from further trespassing on plaintiff's land, part of lot 12 in the 1st concession of the township of Dummer in the county of Peterborough. Both plaintiff and defendant derive title from a common grantor, their respective paper titles being undisputed. The main question is as to the true boundary line between the land of each party.

G. H. Watson, K.C., and G. Edmison, K.C., for plaintiff.

E. B. Edwards, K.C., for defendant.

LOUNT, J., held, that the middle of the creek or stream called the Blind Creek is the true and correct southerly limit or boundary of the plaintiff's land, and that such limit runs along the middle of the most southerly of the said channels at high water mark.

Judgment for the plaintiff for $5 and costs. Thirty days' stay.

Edmison & Dixon, Peterborough, solicitors for plaintiff.

E. B. Edwards, Peterborough, solicitor for defendant.

LOUNT, J. AUGUST 15TH, 1902.

CHAMBERS.

McAVITY v. MORRISON.

Patent for Invention—Trade Mark—Contract for Right to—Breach of—Counterclaim—Injunction.

Motion by plaintiffs to strike out matters pleaded by way of defence and set up by counterclaim. Action for damages and injunction restraining defendants from advertising and

representing that they are the authorized representatives of the plaintiffs the Hancock Inspirator Co. for the sale or manufacture of locomotive inspirators in the Dominion of Canada. The plaintiffs McAvity claim under an agreement made in 1901 with the plaintiff company to have the exclusive right of manufacture, etc., for the Dominion. The defendants set up an agreement made in 1886 with the company and one Morrison, and assigned to them, giving them the right to so manufacture and sell, and counterclaim for its breach and to have the plaintiffs' patent and trade marks declared invalid.

D. L. McCarthy, for plaintiffs.

G. H. Watson, K.C., for defendants.

LOUNT, J., held, that it cannot be said that the pleadings in question do not disclose a reasonable ground of defence; or that the counterclaim is frivolous or vexatious.

Bank of Hamilton v. George, 16 P. R. 418, approved.

Costs in the action to defendants.

(Affirmed by a Divisional Court, 8th Sept.)

LOUNT, J. AUGUST 15TH, 1902.

WEEKLY COURT.

RE LETHBRIDGE.

Infant—En Ventre sa Mère — Insurance — Period of Distribution — Trustee Relief Act.

Motion by trustees under the Trustee Relief Act for an order determining whether an infant *en ventre sa mère* at the death of her father is entitled to share in certain moneys, proceeds of policies of life insurance Under the policy the moneys were payable "to his widow, A. Lethbridge, and his children in equal shares." The insured died April 22, 1897, and the infant was born on August 7, 1897, and is now living.

J. S. Robertson, St. Thomas, for the trustees.

F. P. Betts, London, for infant.

LOUNT, J., held that the infant is entitled to share in the proceeds of the policy : Jarman, 5th ed., p. 1041. Pain v. Miller, 6 Ves. Jr. 349, Whitehead v. St. Johns, 10 Ves. Jr. 152, Re Knapp, 1 Ch. D. 91, do not support the proposition that the period of distribution of the moneys arose at the time of the vesting, which was at the death of the father, and, therefore, that the infant not being "in esse" could not take. In those cases the period of distribution is fixed; in this case it is not fixed. Costs out of estate.

LOUNT, J. AUGUST 15TH, 1902.

WEEKLY COURT.

RE WICKETT.

Solicitor—Costs—Consolidation of Actions.

Appeal by the client from the certificate of the taxing officer at St. Thomas allowing costs of two actions upon a taxation between solicitor and client. The appellant contended that the solicitor should have consolidated her two actions into one, alleging that both actions rested on the same transactions.

F. A. Anglin, K.C., for appellant.

Shirley Denison, for respondent.

LOUNT, J., held, that the officer was right: see Niagara Grape Co. v. Nellis, 13 P. R. 181, 258, per Osler, J.A., and Street, J. The questions in the two actions were not all substantially the same. The fact that the cases were tried together does not advance this. The nature of the actions must be considered, the facts before the solicitor, the pleadings in both actions, and the evidence in preparing for trial, to determine the solicitor's course. A change of solicitors took place after issue of writs, but before appearance, but neither at this stage nor any stage before trial would the solicitor have been justified in moving to consolidate, nor would it have been ordered, and consolidation is a matter of discretion, and made as a favour to and for the benefit of defendants. The solicitor acted with reasonable judgment and discretion in not moving to consolidate, and should not be deprived of his costs. See Smith v. Harwood, 17 P. R. 36. Appeal dismissed with costs.

Murphy, Sale, & O'Connor, Windsor, solicitors for appellant.

McLean & Cameron, St. Thomas, solicitors for respondent.

LOUNT, J. AUGUST 15TH, 1902.

TRIAL.

BAXTER v. JONES.

Contract—Negligent Performance—Fire Insurance—Compromise.

Action for damages sustained by plaintiffs through the negligence of defendant, who promised and undertook with plaintiffs, that if certain insurances against loss by fire were effected through him he would see after the insurance and

the correctness of the policies, and give all the necessary notices of any changes that might be made. Subsequently the plaintiffs made changes through defendant, and placed $500 of further insurance through defendant, who neglected to notify the companies of the additional risk, and after a fire the companies adjusted, and plaintiffs compromised with them for $1,000.

W. R. Riddell, K.C., and L. F. Stephens, Hamilton, for plaintiffs.

G. F. Shepley, K.C., and S. F. Washington, K.C., for defendant.

LOUNT, J., held, that the defendant had approved of the compromise; and that having undertaken the duty of giving notice, etc., and proceeded with it, he was liable for misfeasance: Cass v. Barnard, 2 Raym. 910, referred to in 1 Sm. L. C. 182; Stratton v. London, etc., R. W. Co., L. R. 2 C. P. 631, per Wills, J.; Addison on Contracts, 9th ed., p. 789. Judgment for plaintiffs for $1,000 and costs.

Lees, Hobson, & Stephens, Hamilton, solicitors for the plaintiffs.

Washington & Beasley, Hamilton, solicitors for the defendant.

FALCONBRIDGE, C.J. AUGUST 18TH, 1902.

WEEKLY COURT.

JAMIESON v. MACKENZIE, MANN, & CO.

Injunction—Practice as to Interlocutory Injunctions—Completion of Elevator—Delivery of Possession—Rights of Parties.

Motion to continue an injunction granted August 5, 1902. The plaintiff is an elevator engineer and contractor, and entered into a contract with the defendants to build an elevator at Port Arthur, Ont. This contract, the plaintiff alleges, was not the real agreement between the parties, but was entered into under protest. The plaintiff, however, has completed the elevator with the exception of a few details, and the injunction was obtained to restrain the defendants from interfering with the elevator building in any way, or the plaintiff or his servant until August 13, 1902. The plaintiff contends that the defendants have no right to interfere until it is shewn by an inspection of the building that it fulfils the plans and specifications.

Wallace Nesbitt, K.C., and C. A. Moss, for plaintiff.

A. W. Anglin, for defendants.

FALCONBRIDGE, C.J., held, that this was not a case for an interlocutory injunction. The elevator is the property of the defendants, and they have acted bona fide in endeavouring to do what they consider to be necessary for the protection and preservation of their property. He referred to Smith v. Peters, L. R. 20 Eq., per Jessel, M.R., at p. 513, as to practice with regard to interlocutory injunctions, and Finlay v. Chirney, 20 Q. B. D. at p. 498.

Injunction dissolved. Costs in the cause unless trial Judge otherwise orders.

F. H. Keefer, Port Arthur, solicitor for plaintiff.

Blake, Lash, & Cassels, solicitors for defendants.

FALCONBRIDGE, C.J. AUGUST 19TH, 1902.

TRIAL.

THOMPSON v. TOWNSHIP OF YARMOUTH.

Contract—Quasi-contract — Municipality—Non-repair — Indictment.

Action by plaintiff on behalf of himself and other ratepayers. The plaintiff alleges a contract or quasi-contract between himself and other ratepayers and the defendants, made on or about January 16, 1892, by which the defendant corporation agreed to maintain and repair Hughes street bridge, to be used as an egress to and exit from St. Thomas. The plaintiff seeks specific performance of the contract, and a declaration that the defendant corporation is liable to maintain and repair the approaches to Hughes street bridge, and a mandamus compelling the defendant corporation to repair and maintain same, or in the alternative the plaintiff claims the return of certain moneys which he paid to the defendants towards a fund to purchase an approach to the bridge

J. H. Moss, for plaintiff.

J. M. Glenn, K.C., for defendants.

FALCONBRIDGE, C.J., held, that the plaintiff cannot maintain this action, because individually he has no interest in the matter except as a ratepayer of the township. An indictment is probably the appropriate remedy. Held, further, that the defendant corporation cannot lawfully enter into the contract alleged by the plaintiff, and that the representations which the plaintiff claims were made to him, and the conversations in 1891 with the then reeve and deputy reeve were not of such a character as to bind the defendant corporation. Action dismissed with costs. Thirty days' stay.

McCrimmon & Wilson, St. Thomas, solicitors for plaintiff.

W. L. Wickett, St. Thomas, solicitor for defendants.

FALCONBRIDGE, C.J. AUGUST 21ST, 1902.

TRIAL.

HOLDEN v. TOWNSHIP OF YARMOUTH.

Railway—Negligence of Servants—Crossing—Non-repair of Road—Municipal Corporation—Damages—Loss of Consortium.

Action tried at St. Thomas brought by the plaintiff for $8,000 damages for injuries received by him and his wife, while driving across the Michigan Central Railway tracks on Talbot street, near St. Thomas. Plaintiff alleges that accident was caused by the non-repair of the township road and the negligence of the servants of the railway company.

W. R. Riddell, K. C., and C. F. Maxwell, St. Thomas, for plaintiffs.

J. M. Glenn, K.C., and W. L. Wickett, St. Thomas, for defendant Township.

D. W. Saunders and E. C. Cattanach, for defendants the Michigan Central Railway Company.

Angus MacMurchy, for defendants the Canadian Pacific Railway Company.

FALCONBRIDGE, C.J., held that the plaintiff was entitled to damages. The accident was due to some sudden noise of the railway cars as the plaintiff crossed the tracks which startled the horse, and to the absence of a necessary railing at that point on the highway. Toms v. Whitby, 35 U. C. R. 195, Sherwood v. Hamilton, 37 U. C. R. 410, approved of in Foley v. East Flamborough, 26 A. R. 43, Bell Telephone Co. v. Chatham, 31 S. C. R. 61, referred to. Damages to male plaintiff $50 for his own injury, $350 for loss of consortium and service, to female plaintiff, $1,200. Judgment accordingly with costs. Thirty days' stay.

Maxwell & Maxwell, St. Thomas, solicitors for plaintiff.

W. L. Wickett, St. Thomas, solicitor for defendant township.

Kingsmill, Hellmuth, Saunders, & Torrance, solicitors for Michigan Central R. W. Co.

MacMurchy, Denison, & Henderson, solicitors for Canadian Pacific R. W. Co.

FALCONBRIDGE, C.J. AUGUST 21ST, 1902.

TRIAL.

SCOTT v. BARRON.

Private Way—Building—Mandatory Injunction.

Action tried at Sandwich brought by the plaintiff for an injunction restraining defendants from further proceeding with the erection of a building on a strip of land used as a highway, which the plaintiff claims as belonging to him. Plaintiff also seeks a mandatory order directing defendants to remove the building and all other obstructions placed on the land in question.

J. H. Rodd, Windsor, for plaintiff.

D. R. Davis and F. Davis, Amherstburg, for defendants.

FALCONBRIDGE, C.J., held, that the evidence does not establish that the strip of land in question is a public highway, and, moreover, the structure is no obstruction to the free passage of traffic along the said strip, since it is constructed over a depression which forms no part of the travelled road. The deed by the predecessors in title to the plaintiff, dated December 5th, 1873, granted the said strip "to be used as a carriage way by all the parties hereto forever."

Action dismissed without costs. Judgment for defendants for $25 damages by reason of injunction. Thirty days' stay.

Fleming, Wigle, & Rodd, Windsor, solicitors for plaintiff.

Davis v. Davis, Amherstburg, solicitors for defendants.

FERGUSON, J. AUGUST 22ND, 1902.

WEEKLY COURT.

LAW SOCIETY OF UPPER CANADA v. HUTCHISON.

Bankruptcy and Insolvency—Assignee—Further Directions.

Motion for further directions. Judgment for the plaintiffs in the original action against the defendants Rowsell & Hutchison for $4,287.90. Plaintiff by original action granted subsequent costs.

Hamilton Cassels, K.C., for plaintiff.

George Bell, for defendant Clarkson.

FERGUSON, J. AUGUST 22ND, 1902.

TRIAL.

LAWRENCE v. TOWN OF OWEN SOUND.

Water and Watercourses — Municipal Corporation — Acting without By-law.

Action tried at Owen Sound, brought by the plaintiff, a market-gardener living in Owen Sound, to recover damages for injury to his lands caused by water flowing through a cutting constructed by the defendants without the authority of a by-law.

W. S. Middlebro, Owen Sound, for plaintiff.

G. F. Shepley, K.C., and J. W. Frost, Owen Sound, for defendants.

FERGUSON, J., held, that the defendant corporation are liable for damages. Reference to ascertain the amount thereof. Judgment accordingly with costs.

W. S. Middlebro, Owen Sound, solicitor for plaintiff.

J. W. Frost, Owen Sound, solicitor for defendant corporation.

FERGUSON, J. AUGUST 22ND, 1902.

TRIAL.

McDONALD v. HENNESSY.

Fraudulent Conveyances — Good Consideration — Administrator ad Litem.

Action brought by the plaintiff to set aside certain conveyances made by the defendant to his wife as fraudulent and void and intended to defeat, hinder, and delay creditors. The plaintiff, in July, 1901, recovered a judgment against defendant for $1,074.83, for money lent in 1896. In September, 1892, October, 1892, and April, 1893, the defendant purchased land and conveyed to his wife voluntarily without valuable consideration. His wife died in March, 1900, and the defendant has been appointed administrator ad litem of her estate. In January, 1892, defendant and wife made a voluntary conveyance of all their lands to defendant A. L. Cameron, the defendant Hennessy's daughter. The defendant A. L. Cameron, at defendant Hennessy's request, mortgaged part of the said lands for $700, with which money Hennessy purchased a boat.

A. C. Boyce, Rat Portage, for plaintiff.

F. A. Anglin, K.C., for defendant.

FERGUSON, J., held, that the evidence failed to shew that at the time of the conveyances in question any debts were owing by the defendant Hennessy, except a debt fully secured by mortgage, since satisfied.

Held, also, that there is no evidence of fraudulent intent nor efforts from which fraudulent intent can be inferred. The conveyances to the defendant's wife cannot be disturbed, and consequently the conveyance by her to her daughter Mrs. Cameron cannot be upset.

Action dismissed with costs.

Boyce & Draper, Rat Portage, solicitors for plaintiff.

Moran & Mackenzie, Rat Portage, solicitors for defendant.

FERGUSON, J. AUGUST 22ND, 1902.

TRIAL.

RUTTAN v. BURK.

Assessment and Taxes—Sale for Arrears—Assessment Act, 1892—Tax, when Due.

Action brought by plaintiff to have it declared that the sale of certain lands in Port Arthur for alleged arrears of taxes for 1892, 1893, and 1894 was illegal and void. The by-law of the municipality number 354 imposing the taxes and fixing the rate was passed October 18th, 1892. It was also objected that the plaintiff has no status to maintain the action.

R. C. Clute, K.C., for plaintiff.

F. A. Anglin, K.C., for defendant.

FERGUSON, J., referred to Assessment Act of 1892, latter part of sec. 140 and to sec. 160; and held that what these sections really mean is that the taxes for the year 1892 must be declared to have been due before they were imposed by the said by-law (354), and in this view a part of the taxes for which these lands were sold was in arrear for three years; and again the legislature by 63 Vict. ch. 86, validated sales of lands for taxes in Port Arthur prior to January 1, 1899; consequently the sale was a good sale. Held, also, that in this view of the sale, it is unnecessary to consider the question raised of the status of the plaintiff in the action and his right to maintain it.

Action dismissed with costs.

W. A. Leys, Port Arthur, solicitor for plaintiff.

David Mills, Port Arthur, solicitor for defendant.

FERGUSON, J. AUGUST 22ND, 1902.

TRIAL.

DUPRAT v. DANIEL.

Lease—Fraud in Obtaining—Executed on Sunday—Lessor Signing Improvidently without Independent Advice.

Action to have a certain indenture of lease declared void for fraud, misrepresentation, and deceit, and because it was executed on Sunday, and improvidently, without independent advice. At the trial the allegation of fraud was abandoned.

J. B. Rankin, K.C., for plaintiff.

J. A. Walker, K.C., for defendant.

FERGUSON, J., held, that improvidence and want of independent advice cannot support the plaintiff's case, as these are only circumstances which have been regarded as in a special degree marks of undue influence and fraud: May on Fraudulent Conveyances, 2nd ed., p. 496. Held, also, that the present case does not come within R. S. O. ch. 119, sec. 7, or R. S. O. ch. 246, sec. 9; that the lease was not made on Sunday, at the time of its actual execution, but many days before.

Action dismissed with costs.

Lewis & Richardson, Chatham, solicitors for plaintiff.

J. A. Walker, Chatham, solicitor for defendant.

AUGUST 22ND, 1902.

DIVISIONAL COURT.

MASON v. LINDSAY.

Replevin—Conditional Sales Act—Contract of Hiring with Option to Purchase.

An appeal from judgment of LOUNT, J., in a replevin action tried at London, November 4th, 1901, in respect of a piano belonging to the respondents, which was in the possession of one Thody under an agreement between him and the respondents at the time he mortgaged it to the appellant. The question was whether the respondents were prevented from setting up their title to the piano as against the appellant by reason of the Conditional Sales Act, R. S. O. ch. 149. The respondents, the Mason & Risch Piano Co., Limited, Toronto, were the manufacturers of the piano, and the words "Mason & Risch" were stamped on it.

Joseph Montgomery, for appellant.

J. S. Johnston, for respondents.

The judgment of the Court (MEREDITH, C.J., FERGUSON, J.) was delivered by

MEREDITH, C.J.:—The respondents were the manufacturers of the piano, and their corporate name is The Mason & Risch Piano Company, Limited, and their place of business, Toronto, and there was admittedly a sufficient compliance with the provisions of the Act to which I have referred if stamping of the words "Mason & Risch," Toronto, was a stamping on the piano of the name and address of the manufacturer, bailor, or vendor within the meaning of sec. 1.

I have no doubt that stamping the piano with the name "Mason & Risch" afforded all the means of information to intending subsequent purchasers or mortgagees that the legislature intended to be placed within their reach by the requirements of sec. 1, as to the name of the manufacturer, bailor, or vendor, but unfortunately, as I think, the legislation does not permit of the Court holding that anything other than that which it has prescribed as necessary shall be a compliance with the statute, even though that which is done is in the opinion of the Court as effective for the end which the Legislature intended to attain as that which it has required to be done to protect the common law right of the owner of the chattel.

The decided cases on analogous statutes in my opinion compel us to give this strict construction to the language of sec. 1: Low v. Routledge, 33 L. J. Ch. 717; Penrose v. Marty, El. B. & El. 499; Atkin & Co. v. Wardle, 61 L. T. N. S. 23; Nassau v. Tyler, 70 L. T. N. S. 376.

The provisions of the agreement material to this inquiry are:

(1) The acknowledgment of the receipt by Thody from the respondents of the piano and a stool and drape, the value of which is stated to be $300.

(2) That they are received on hire for 43 months at $7 per month, payable in advance.

(3) That the $300 is to be paid by Thody in the event of the piano being injured, destroyed, or not returned to the respondents on demand in good order, reasonable wear and tear excepted.

(4) That it is agreed that Thody may purchase the piano, stool, and drape for $300, payable in instalments of $25 per three months from date until the whole is paid with interest.

(5) But that until the whole purchase money and interest be paid the piano, stool, and drape shall remain the property

of the respondents on hire by Thody, and shall not be removed from the premises at which they were then delivered without the written consent of the respondents.

(6) That in default of payment of any instalment of the purchase money or of the monthly rental, or in case the piano should be removed or any attempt made or threatened to move it from the premises mentioned without the necessary consent being given, the respondents might resume possession of the property, the agreement for sale being declared to be conditional and punctual payment essential to it.

(7) That if possession should be resumed all instalments of rent to the date of possession being taken should be forthwith paid by Thody to the respondents, together with the damages which the piano might have sustained beyond ordinary wear and tear, and certain expenses, but that any sum received on account of purchase money beyond the rent due and the costs and expenses should be returned to Thody.

(8) That on payment in full of the purchase money and interest no rent or hire was to be charged to Thody.

It will be seen from this synopsis of the agreement that the contract is one of hiring only with the option to Thody of purchasing for $300, and that in the event of his electing to purchase and paying the purchase money and interest in full he is to be charged no rent, which may mean that he is thereafter to be charged no rent, or, possibly, that any payments of rent which shall have been made are to be credited on the purchase money, and no further payments of rent exacted.

Thody does not appear to have elected to purchase, and therefore was never in possession of the piano under a contract of purchase, but always as the hirer of it for the unexpired portion of the forty-three months at the rent mentioned in the agreement.

Upon the whole, in my opinion, the judgment in favour of the respondents is right and ought to be affirmed and the appeal from it dismissed with costs.

Arnoldi & Johnston, Toronto, solicitors for the respondents.

J. A. Robinson, St. Thomas, solicitor for the appellant.

OSLER, J.A. AUGUST 22ND, 1902.

C. A.—CHAMBERS.

RE LINCOLN PROVINCIAL ELECTION. McKINNON v. JESSOP.

Parliamentary Election—Petition—Electoral District—Description of.

Motion by the respondent to set aside the petition and all subsequent proceedings for defect or irregularity. The objection was that there was no such provincial electoral district as Lincoln and Niagara, and therefore no such election.

W. D. McPherson, for respondent, contended that the mistake was fatal to the petition.

R. A. Grant, for the petitioner, while not admitting this, moved for leave, on terms, to amend.

OSLER, J.A.:—I can take judicial notice of the fact that a general provincial election was held in the month of May last, and that a person named Elisha Jessop was returned as having been duly elected thereat to represent the electoral district of the county of Lincoln in the Legislative Assembly of the Province: Ontario Gazette. The affidavit of the respondent filed in support of the motion shews that he is that person.

There having been at the time mentioned in the petition an election for the electoral district of Lincoln at which the respondent was elected, and there being no electoral district of Lincoln and Niagara, I think the words "and Niagara" used in describing or stating the place or electoral district for which the election complained of was holden, and the respondent elected, ought to be regarded as being merely surplusage, or at most a harmless misdescription not fatal to the proceedings, even in the absence of an amendment.

I give the petitioner leave to amend accordingly. I do not think it necessary to say more about the cases of Maude v. Lowby, L. R. 10 C. P., or Aldridge v. Hurst, 1 C. P. D. 410, 417, or Norwich Election, 80 L. T. Jour. 253 (1886), which are always cited on applications of this kind and in which leave to amend was refused, than that they do not touch a case like this. They merely decide that an amendment which in effect seeks to make a new petition will not be allowed after the time for filing the petition has expired.

The petitioner takes an order to amend by striking out of the proceedings the words "and Niagara." I dismiss the application. The costs will be costs in the cause to the re-

spondent in any event, and over and above any other costs which he may ultimately become entitled to.

Kerr, Davidson, Paterson, & Grant, Toronto, solicitors for the petitioner.

Lancaster & Campbell, St. Catharines, solicitors for the respondent.

FERGUSON, J. AUGUST 25TH, 1902.

WEEKLY COURT.

BANK OF OTTAWA v. McLEOD.

Fraudulent Conveyance—Injunction—Receiver — Money in Custodiâ Legis.

Motion by the plaintiffs for judgment in an action to have a certain conveyance declared void as against them and for an account, injunction, and receiver In March, 1902, the plaintiffs issued execution against the defendant W. A. McLeod. McLeod had on January 10th, 1901, conveyed his lands in Rat Portage to the defendant Mary McLeod. She mortgaged the lands for $1,608.96 on January 15th, 1902. On May 1st, 1902, the defendant W. A. McLeod was arrested in Winnipeg on the charge of unlawfully removing his property to defraud creditors, and when arrested $1,808.96 was found on his person and placed in the hands of the clerk of the peace. The plaintiffs alleged that this sum consisted of the aforesaid $1,608.96 and the sum of $200 received by McLeod from the sale of certain stock. The plaintiffs desired to have it declared that the said deed by the defendant W. A. McLeod to the defendant Mary McLeod was fraudulent and void as against them. They desired, also, to have an account of the defendant Mary McLeod's dealings with the land and to have it declared that the sum of $1,808.96 was the defendant W. A. McLeod's property and liable to their claim, and they desired an injunction to prevent the defendants interfering with the said sum of $1,808.96, and to have a receiver appointed as to the money found with McLeod at the time of his arrest.

F. A. Anglin, K.C., for plaintiffs.

J. S. Ewart, K.C., for defendant.

FERGUSON, J., held, that an injunction should be granted restraining the defendant from interfering with the sum of $1,608.96, although it is in custodiâ legis: Lloyd v. Eagle, 28 L. J. Ch. 389, and High on Injunctions, sec. 402 et seq. Receiver also appointed in regard to $484.44, the amount remaining due to plaintiffs.

Boyce & Draper, Rat Portage, solicitors for plaintiffs.

T. R. Ferguson, Rat Portage, solicitor for defendant.

FERGUSON, J. AUGUST 26TH, 1902.

TRIAL.

LAISHLEY v. GOULD.

Contract — Wrongful Dismissal — Subsequent Employment during Period Originally Contracted for—Damages.

Action brought by the plaintiff for wrongful dismissal. Plaintiff entered into a contract on December 3rd, 1897, with the defendants the Goold Bicycle Co. of Branford to act as manager for three years at a salary of $20 per week and a percentage on money sent to the defendants for sales. At the end of the second year of his service, the defendants sold their business and dismissed the plaintiff through no fault of his. Plaintiff sues for $1,140, salary for one year and six weeks, and for three per cent. on collections from sales, his total claim amounting to $2,220.

G. H. Watson, K.C., and S. C. Smoke, for plaintiff.

Wallace Nesbitt, K.C., and H. S. Osler, for defendants.

FERGUSON, J., held, that the plaintiff would be entitled to this amount, had he not immediately on being dismissed obtained appropriate employment in which during the said period of one year and six weeks he was paid $3,300. This amount would in the ordinary case be subtracted from the damages recovered for wrongful dismissal, but here it exceeds the amount of the damages and consequently there are no damages coming to him.

Action dismissed with costs.

Watson, Smoke, & Smith, solicitors for the plaintiff.

McCarthy, Osler, Hoskin, & Creelman, solicitors for defendants.

ROBERTSON, J. AUGUST 27TH, 1902.

TRIAL.

SPOONER v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

Life Insurance—Validity of Policy—Lien against—Transferred Policy —Acceptance of Premium as Evidence of Contract—Foreign Companies—License to do Business in Canada.

Action tried at St. Catharines. Plaintiff is the widow of George Spooner and alleges she is entitled to $1,000 due on a policy payable to her if she survived her husband. He died on or about March 18th, 1901. He took out a policy with the Covenant Mutual dated September 9th, 1895. This policy was transferred by the Covenant Mutual to the North

Western Life of Chicago December 29th, 1899, and they transferred it to defendants, August 1st, 1900. On September 10th, 1900, Spooner received a circular letter from the defendant company stating that they assumed every policy or certificate in good standing on September 1st, 1900, upon the legal reserve basis, the reserve so far as it had not been paid in cash to be a lien against the insurance. On September 14th, 1900, Spooner paid a premium to defendants which was accepted by them. On January 14th, 1901, the defendants issued Spooner a new policy in lieu of the old, a certificate of a lien against it being given by him. Defendants claim that the North Western Life had no license to do business in Canada, that they issued the policy dated Jan. 14th, 1901, by mistake, thinking it a North Western Life Policy, which they submit it was not, that they received said premium by mistake, and that policy was obtained by Spooner and his wife by fraudulent misrepresentations and without consideration.

G. F. Shepley, K.C., and J. C. Rykert, K.C., for plaintiff.

G. T. Blackstock, K.C., for defendants.

ROBERTSON, J., held, that the defendants had not been fraudulently dealt with by the plaintiff and her husband, and that this is not a contest between two companies as to which should pay plaintiff her claim, but a case of contract between plaintiff as beneficiary under the original policy, or under the new policy dated January 14th, 1901, and the defendant company.

The plaintiff is entitled to recover, but her dealings were not altogether fair in their character, and consequently she will have to pay costs. She is entitled to $1,000 less lien against the policy. Reference as to any additional loan or charges.

J. C. Rykert, St. Catharines, solicitor for the plaintiff.

MacMurchy, Denison, & Henderson, Toronto, solicitors for the defendants.

FALCONBRIDGE, C.J. AUGUST 28TH, 1902.

TRIAL.

SAUNBY v. LONDON WATER COMMISSIONERS.

Water and Watercourses — Prescription — Mandatory Injunction — Damages.

Action for injunction, mandatory order, and damages. Plaintiff is the owner of lands bordering on the river

Thames, and alleges that in 1879 and 1880 the defendants obstructed the flow of the river by erecting and maintaining a dam and flash-boards in the river bed which forced back the water so that it was prevented from flowing away from his land and remained at his mill and in his tail-race, compelling the use of steam instead of water power at times. He claims damages for these alleged wrongs, an injunction to prevent a continuance of them and a mandatory order directing the removal of the dam and flash-boards.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for plaintiff.

A. B. Aylesworth, K.C., for city of London.

T. G. Meredith, K.C., for Water Commissioners.

FALCONBRIDGE, C.J., held, that the defendants are in the wrong, and have not acquired a prescriptive right. Plaintiff is entitled to damages both as riparian proprietor and mill-owner. Judgment, accordingly, for plaintiff with costs and reference as to damages, to be confined to the six years prior to the commencement of this action. Injunction granted. Thirty days' stay.

Hellmuth & Ivey, London, solicitors for the plaintiff.

T. G. Meredith, London, solicitor for the defendants.

FALCONBRIDGE, C.J. SEPTEMBER 3RD, 1902.

TRIAL.

HOGG v. TOWNSHIP OF BROOKE.

Way — Non-repair — Injury to Person — Accumulation of Snow— Responsibility of Township Corporation.

Action for damages for injuries received by plaintiff owing to non-repair of a highway in the township. The snow accumulated on the highway, and the plaintiff's sleigh stuck in the snow, and in endeavouring to extricate it the plaintiff was injured.

T. G. Meredith, K.C., for plaintiff.

G. F. Shepley, K.C., and J. Cowan, Sarnia, for defendants.

FALCONBRIDGE, C.J.:—It would be unreasonable to hold the defendants liable owing to the unprecedented fall of snow at the particular season when the accident occurred, it being

practically impossible for them to keep the 80 miles of roadway within the township free of snow. Action dismissed with costs.

Meredith & Fisher, London, solicitors for plaintiff.

Cowan & Towers, Sarnia, solicitors for defendants.

WINCHESTER, MASTER. SEPTEMBER 5TH, 1902.

MACKAY v. COLONIAL INVESTMENT AND LOAN CO.

Writ of Summons—Service out of Jurisdiction—Foreign Company—Transfer of Assets in Ontario to Ontario Company—Action to Set aside.

Motion by defendants resident in Toronto and Montreal respectively for an order setting aside the writ of summons, the order permitting service thereof outside of Ontario, and the service of the writ.

The plaintiffs resided in Nova Scotia. The defendants were: The Colonial Investment and Loan Company, duly incorporated and having their head office in Toronto, Ontario; the Montreal Loan and Investment Company, duly incorporated and having their head office in the Province of Quebec; and the liquidators of the Montreal Loan and Investment Company, also residing in the Province of Quebec.

The plaintiffs sued on behalf of themselves and all other shareholders in the Montreal company to set aside certain agreements and resolutions for the sale and transfer of the assets of the Montreal company to the Toronto company, on the grounds that the meeting of shareholders of the Montreal company at which the resolutions were passed was illegal; that the plaintiffs had no notice of such meeting; that there was no public notice of the sale and transfer; and upon the ground of fraud.

The plaintiffs also claimed an account of the assets of the Montreal company received by the Toronto company, restitution thereof, and the appointment of a receiver.

In the alternative, the plaintiffs claimed a proper distribution of the proceeds of the sale of the assets among the shareholders.

A. B. Aylesworth, K.C., for the defendants the Colonial Investment and Loan Company, and W. M. Douglas, K.C., for the other defendants, contended that the Ontario Courts had no jurisdiction over the subject-matter of the action or

to entertain it or grant the relief claimed; that the action ought to have been brought, if at all, in the Province of Quebec; that the Toronto defendants were improperly joined with their co-defendants with the object of giving the Court jurisdiction; that there was no cause of action against the defendants, and the issue of the writ was an abuse of the process of the Court; that the Montreal defendants were not necessary or proper parties as against their co-defendants; that the subject of the action being land in Quebec, the action was improperly brought under such cases as Merchants Bank v. Gillespie, 10 S. C. R. 312; Henderson v. Bank of Hamilton, 23 S. C. R. 716; Burns v. Davidson, 21 O. R. 547; Purdom v. Pavey, 26 S. C. R. 412; and that the foreign defendants were improperly served with process before service on their co-defendants.

W. E. Middleton, for the plaintiffs.

THE MASTER IN CHAMBERS:—In my opinion, this is an entirely different action from any of those referred to. This is not brought with reference to real estate in the sense that those actions were, and therefore the principles applied in those cases have no bearing on this application. I refer to Duder v. Amsterdamsch Trustees Kanton, [1902] 2 Ch. 132.

With reference to the contention that the Montreal defendants are not necessary or proper parties to this action as against their co-defendants, I cite the remarks of Lindley, L.J., in Witted v. Galbraith, [1893] 1 Q. B. 577, at p. 579.

I therefore hold that the writ of summons and order allowing the service out of the jurisdiction were properly issued, and that the applications must be refused. The costs of the motion made by the Colonial company to be costs to plaintiffs in any event, and the costs of the motion by the Montreal defendants to be costs in the cause in consequence of the irregularity in serving them with the writ before serving the Colonial company. I understood that the only question with reference to the service of the writ on this ground was one of costs.

I should have stated that it appears that the Montreal defendants assigned to the Colonial company securities on lands in Ontario to the value of $1,222.58, and this is in question in this action as an asset of the Montreal company, and therefore Rule 162 (*h*) may be invoked by the plaintiffs.