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COURT OF APPEAL.

JANUARY 17TH, 1912.

MEAFORD ELEVATOR CO. v. PLAYFAIR.

Negligence—Unloading of Barge into Elevator—Breaking of Moorings Caused by Operation of another Vessel—Injury to Elevator Leg—Negligence of Persons in Charge of Vessels—Contributory Negligence—Damages.

Appeals by the defendant James Playfair and the defendants the Montreal Transportation Company from the judgment of TEETZEL, J., 2 O.W.N. 803, in favour of the plaintiffs as against both defendants.

The appeals were heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

F. E. Hodgins, K.C., for the defendant James Playfair.

F. King, for the defendants the Montreal Transportation Company.

A. H. Clarke, K.C., for the plaintiffs.

MOSS, C.J.O.:—This action was tried by Teetzel, J., without a jury, and resulted in a judgment for the recovery by the plaintiffs from the defendants of $5,700 damages. The defendants' interests and defences being almost entirely separate and distinct, they brought separate appeals, which, however, were argued together. The plaintiffs' case was and is, that both defendants are liable to them. Each defendant claims that there is no liability on his part, no matter what may be the case as regards the other defendant. And both contend that the plaintiffs were guilty of contributory negligence, and that for that reason their action should fail.

The plaintiffs, the proprietors of a dock and grain elevator and plant, at or in the harbour at Meaford, complain that,

owing to the combined negligence of the employees in charge of the steam freighters "Mount Stephen" and "Kinmount," owned by the defendant Playfair and the defendant the Montreal Transportation Company, respectively, while the plaintiffs were engaged in unloading a cargo of grain from the "Mount Stephen" into the elevator, and for that purpose using an appliance known as "the elevator leg" in one of the hatches, the "Mount Stephen's" moorings parted, and she drifted backwards, thereby catching and entangling the leg in the hatch, so that it was pulled away from the elevator and smashed and rendered useless during the remainder of the season of navigation, thereby putting the plaintiffs out of the elevating business until the next season.

As against the defendant Playfair, the plaintiffs charge that the "Mount Stephen" was negligently, insufficiently, and unskilfully moored to the docks, and left without proper attention and supervision while the work of unloading was proceeding, with the result that, owing to the strain upon the mooring lines and cables occurring in the process of unloading, and to the violent disturbance of the waters of the harbour occasioned by the efforts of the "Kinmount" to turn in the vicinity of the "Mount Stephen," the latter vessel was torn from her moorings and caused the injury to the leg.

The plaintiffs' complaint against the other defendant is, that the "Kinmount" was so negligently manœuvred and handled while endeavouring to turn in close proximity to the "Mount Stephen" as violently and forcibly to affect the "Mount Stephen" at her moorings. . . .

Upon the whole, having regard to the positive testimony of Robertshaw, to whose evidence the learned trial Judge attached credit throughout, the better conclusion is, that, during the movement of the "Kinmount" alongside the "Mount Stephen," the leg was removed from hatch No. 2 and replaced after the former's stern had cleared the latter's bow. The work of unloading was proceeded with, until it was considered that sufficient grain had been removed from the forward part, when the leg was taken out of hatch No. 2, and the "Mount Stephen" was moved forward a distance of about 72 feet until the leg was over hatch No. 6 in the after part. It was then placed therein and the work resumed and continued at that point until about 4,000 bushels had been removed. Then the "Mount Stephen" commenced to drift or surge rapidly backwards, and, before the leg could be got out of the hold, it was caught and broken. . . .

The learned trial Judge has found, upon conflicting testimony, that, though unable to say that the "Mount Stephen" was not reasonably and sufficiently moored while the waters of the harbour were undisturbed by storm or the movements of other vessels, she was certainly not sufficiently moored to withstand the strain put upon her by the operations of another ship of the size of the "Kinmount," when the force of water from the wheel of such ship would be cast against her bow.

There is no good reason for not accepting this finding, which is well supported by the testimony—nor the further finding that the officer in charge of the "Mount Stephen" knew of the proximity and movements of the "Kinmount." This danger must have been apparent to the officer, at the time when he was moving the "Mount Stephen" forward, for he saw the "Kinmount" then alongside, and knew that she was there for the purpose of turning. He then had an opportunity, when adjusting the lines of the "Mount Stephen" at her new position at the dock, to have used an additional line or additional lines; or, if he found that he could not sufficiently secure his vessel against the effect of the "Kinmount's" operations, he could have warned her, or at least endeavoured to make those in charge of her aware of the situation; and, if he found himself unable to control the "Kinmount's" movements, and felt that his lines could not withstand the action of her wheel, he should have ordered the leg out of the hatch in which it had been placed.

The learned trial Judge has found that in all these respects there was a failure of duty on the part of those in charge of the "Mount Stephen." It is beyond question that the parting of the lines was due, in part at least, to the disturbance of the waters of the harbour caused by the "Kinmount's" wheel. It is not improbable that, even with another line out, in addition to those used, the breaking of the cable and the parting of the line would have taken place eventually; but it is shewn that, with the additional line, the vessel would in any case have been held to her place at the dock long enough to have enabled the leg to have been easily removed from the hatch.

The evidence amply supports the learned trial Judge's conclusion that, in so far as the injury to the leg is concerned, it was due to the negligence of those in charge of the "Mount Stephen" in failing properly and sufficiently to moor her under the existing circumstances. So far, therefore, as the liability of the defendant Playfair is concerned, the appeal must fail.

But, as regards the liability of the other defendants for the actions of those on board the "Kinmount," the question is less easily answered in the plaintiffs' favour. The plaintiffs are bound, of course, to make out, as against these defendants, a reasonable case of negligence in the handling and management of the "Kinmount," but for which the accident would not have happened. . . .

The operation which the "Kinmount" was engaged in was not an unusual or extraordinary manœuvre. It is a common method of turning a vessel in a harbour, and especially in a narrow or comparatively small harbour. It was well known to and understood by mariners and others engaged in and about docks. And those in charge of vessels lying at docks where such movements or movements of a similar nature are taking place, or are likely to take place, must take, and very properly in most instances do take, every reasonable precaution to guard against and prevent any evil effects from the conditions usually engendered by those movements.

According to the evidence, those in charge of the "Kinmount" had no reason to suppose that there was any failure on the part of those in charge of the "Mount Stephen" to take, as they should have taken, into account the conditions existing in the harbour when the "Mount Stephen" was shifted from her first berth to that which she occupied when the accident happened.

In the absence of any intimation to the contrary, or warning from those in charge of the "Mount Stephen," and in view of the unloading operations which were being carried on, those in charge of the "Kinmount" had a right to assume that the "Mount Stephen" was properly secured, and that there was no objection to the "Kinmount" proceeding with her operations.

It appears that, although, according to the mate of the "Mount Stephen," there was danger to be apprehended, neither he nor any one on board the "Mount Stephen," whether in the employ of the plaintiffs or the defendant Playfair, took any step or was at any pains to avert that danger by notifying those in charge of the "Kinmount" and endeavouring to get them to stop the wheel, or by taking steps to remove the leg until the "Kinmount" had ceased to operate her wheel.

The evidence appears to fail to attach any notice of danger to those in charge of the "Kinmount," or any reasonable ground for not supposing that, as well by reason of the well known ordinary practice with regard to securing vessels engaged in

unloading at elevators, as by reason of no warning of danger or intimation of desire that they should suspend operations, they could safely proceed with their operations.

On these grounds, the plaintiffs appear to fail in establishing liability against the defendants the Montreal Transportation Company. That being so, the appeal should be allowed, and the action should be dismissed as against them. They should also receive their costs of appeal.

As to the defendant Playfair, he must pay the costs of the action, in so far as they were properly incurred as against him, together with the costs of the appeal.

As regards the amount of damages awarded, there is ample evidence to sustain the assessment made by the learned trial Judge. The loss in receipts of elevator charges was clearly the result of the inability to proceed with the work caused by the injury to the leg and its equipment, and it is shewn that there were orders given, or elevator space bespoken for quantities quite sufficient to justify the claim allowed for loss of earnings or profits from the operation of the elevator during the remainder of the season.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting), was of opinion, for reasons stated in writing, that the appeal should be dismissed.

JANUARY 17TH, 1912.

*RE HUNTER.

Will—Construction—Residuary Clause—Division of Residue among Children in Proportion to Legacies—Alterations in Amounts by Codicil—Second Codicil—Revocation of Bequest.

Appeal by H. A. Hunter and D. J. Hunter from the order of a Divisional Court, 24 O.L.R. 5, 2 O.W.N. 1166, affirming the order of MIDDLETON, J., 24 O.L.R. 5, 2 O.W.N. 540, declaring the proper construction of the will of William Henry Hunter, deceased.

*To be reported in the Ontario Law Reports.

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

E. D. Armour, K.C., and R. B. Beaumont, for the appellants.

C. R. McKeown, K.C., for the executor.

Shirley Denison, K.C., for the widow.

J. R. Meredith, for the infants.

MOSS, C.J.O.:— . . . A number of questions were submitted and disposed of, but the appeal to the Divisional Court was in respect of one question only, viz., as to the respective shares or interests of two of the testator's sons, Henry Alfred Hunter and David John Hunter, in his residuary estate.

The testator, who describes himself in the wills and codicils thereto as a farmer, was evidently a man of very considerable wealth. Judging from the many parcels of land and the quantity of personal property disposed of in specie, as well as the numerous pecuniary gifts and legacies (amounting to over $40,000) bestowed upon children, relatives, and others, it is safe to say that the will and codicils disposed of an estate the value of which probably exceeded $150,000.

It is evident that the disposition of his estate had been the subject of careful deliberation, and that his desire was fully to express his wishes and intentions in regard to the interest or share in his estate to be taken by each beneficiary named by him. A period of more than two years elapsed between the execution of the original will and the first codicil, but the latter shews the same care, deliberation, and fullness of expression. And the final codicil, executed nearly three years after the first, displays similar characteristics. It may fairly be assumed that, in the changed circumstances, the testator gave full consideration and attached due weight to the position and claims of each of the beneficiaries affected by them, and made his subsequent dispositions with all these matters before him. Neither the original will, nor his ultimate testamentary disposition of his estate, appears to indicate equality of division as the governing consideration. Rather does it indicate careful consideration of all the circumstances.

It is to be borne in mind that the ultimate wishes of the testator are to be ascertained, if possible, by a proper construction of the language in which he has expressed them; and these wishes, when so ascertained, constitute his last will and testament. . . .

[Reference to Douglas-Menzies v. Umphelby, [1908] A.C. 224.]

It is to be borne in mind that, as enacted by sec. 26 of the Wills Act, R.S.O. 1897 ch. 128—now sec. 27 of 10 Edw. VII. ch. 57—every will shall be construed, with reference to the real and personal property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

Further . . . the final codicil concludes with the following declaration by the testator, "In all other respects I confirm my said will." Up to the time of the execution of this codicil, what constituted the testator's will? It cannot be said that the original will did, for the testamentary desires therein expressed had been modified, altered, and varied by the first codicil, and the testator's will expressed up to that time could only be gathered from the original will and the first codicil. That codicil is expressed to be a codicil to the will dated the 13th February, 1904. The final codicil is described as a codicil to the last will and testament of the testator, but makes no reference to date. It is manifest that this codicil was intended to take effect as against preceding testamentary dispositions, whether found in the original will or in the first codicil. . . .

[Reference to In re Fraser, Lowther v. Fraser, [1904] 1 Ch. 726; In re Champion, Dudley v. Champion, [1893] 1 Ch. 101, 111.]

What is to be ascertained in the present case is the position and rights of the appellants Henry Alfred Hunter and David John Hunter under the residuary clause contained in what is the last will and testament of the testator, as executed and declared on the 24th March, 1909. . . . The directions are very simple: (*a*) the whole residue of every nature and kind is given to the testator's children; (*b*) they are to share in it in proportion to the personal property "herein" (that is, in the will of which this is the residuary disposition) bequeathed to his children; but (*c*), in calculating the proportions, the personal property bequeathed to W. H. Earl Hunter is fixed at $2,000.

In order to ascertain the proportions in which the residuary estate is distributed, it is only necessary to find what personal property each child is entitled to receive under the bequests to them to be found in the will as it stood at the testator's death. In seeking to do so, it is, of course, proper to apply the usual rules of construction. . . .

Where, as here, the meaning has to be ascertained by bringing down to the date of the last codicil what remains of all the preceding testamentary instruments, there does not appear to be any objection to looking at the original testamentary directions. But it cannot be a correct method of dealing with the will to accept the original dispositions as guides to the influences giving rise to charges. . . . All that can safely be done is, to take the later directions, apply them to the earlier, and ascertain the result. . . .

[Reference to In re Baden, Baden v. Baden, [1907] 1 Ch. 182, per Fletcher Moulton, L.J., at p. 145.]

Dealing, in the light of the foregoing principles, with the provisions applicable to Henry Alfred Hunter, we find that, apart from the residuary clause, the only provision relating to him is a bequest included among a number of bequests which the testator desires his executors to pay as soon as convenient after his decease. The bequest is in these words: "To my son Henry Alfred Hunter I give the sum of $2,000." Thus stood the will as to him until the execution of the first codicil, which contained a direction as follows: "I hereby order and direct that the sum of $7,000 shall be paid to my son Henry Alfred Hunter in the place and stead of the sum of $2,000 bequeathed to him in my said will." If the testator had died while his testamentary dispositions were in this form, the amount of personal property bequeathed to Henry Alfred Hunter would, beyond question, be $7,000, and the language of the residuary clause would have applied to the $7,000, and not to the $2,000, for the latter bequest was no longer to be found in the will. . . . The only operative bequest was one of $7,000. And nothing was said or indicated to alter the residuary clause, as by the introduction of a provision resembling the restriction placed upon the proportion to be taken by W. H. Earl Hunter.

But, when the testator dealt once more with Henry Alfred's interests, as we find he did in the final codicil, while he revokes the bequest of the $7,000, that being the only one then extant, he expressly provides that the revocation of the bequest is not to apply to Henry Alfred's share of the testator's estate as set forth in the residuary clause. What, at this time, was Henry Alfred's share in posse in the testator's estate, reading the first codicil in connection with the residuary clause? They together formed the expression of the testator's will, which, as expressed, gave Henry Alfred $7,000. Is there anything to be found in modification of that position? . . .

Whatever may have been his motive, he chose that Henry Alfred should remain in the same position with regard to the

residue of the estate as he was when he was to receive a bequest of $7,000 out of his personal property. That was the only bequest in Henry Alfred's favour contained in what was then the testator's will, as gathered from the two papers then constituting it.

As to David John Hunter, the case appears to be even stronger. When the language of the residuary clause is applied to his case, the personal property bequeathed to him must be looked for; and that is found to be $7,000. That is the only sum bequeathed to him; and the only other benefit he is to receive is his proportion of the residue, of which the only measure is the bequest of $7,000.

It is said that the original will indicated a scheme in the mind of the testator that each of his sons should receive personal estate to the extent of $2,000, and the distribution of the residue in proportion to that sum; and that this scheme will be disturbed if the provisions of the codicils as respects Henry Alfred and David John Hunter are given effect to. It may be that the testator, when making the dispositions contained in the original will, had some such design in view; but it is evident that, if he had, it was based upon a view of all the provisions he had then made.

But the first codicil introduced at once a change, not only as respects David John, to whom lands had been given, but as respects Henry Alfred, to whom no lands and nothing except $2,000 had been given by the original will.

If the testator had desired to preserve the proportions mentioned in the original will, he could easily have done so by a process similar to that used in the case of W. H. Earl Hunter.

The appeal should be allowed, and it should be declared that Henry Alfred and David John Hunter are entitled to share in the residue in the proportions that the sum of $7,000 bears to the residue, with the consequent directions.

The costs of the litigation have hitherto been directed to be borne by the estate; and, in view of all the circumstances, it is proper to continue that direction, including the costs of this appeal—the executors' costs between solicitor and client.

MACLAREN and MAGEE, JJ.A., agreed with the judgment of MOSS, C.J.O.; MAGEE, J.A., giving reasons in writing.

GARROW and MEREDITH, JJ.A., dissented, for reasons stated by each in writing, agreeing in the result of the judgment of the Divisional Court.

JANUARY 17TH, 1912.

RUDD PAPER BOX CO. v. RICE.

Principal and Agent—Fire Insurance—Negligence or Breach of Contract by Agent—Breach of Warranty—Failure to Read Letters and Policies—Application—Second Statutory Condition—Reasonable Compromise.

Appeal by the defendant from the judgment of MEREDITH, C.J.C.P., 2 O.W.N. 1417.

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

J. Bicknell, K.C., and W. H. Irving, for the defendant.

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

GARROW, J.A.:—The action was brought to recover damages from the defendant, caused, as alleged, by his negligence in the employment of an insurance broker, in which he had acted for the plaintiffs.

The defendant carried on the business of a real estate and insurance agent or broker, and in the latter character was employed by the plaintiffs, who are manufacturers, to obtain, in addition to the fire insurance which they already had, a further insurance for the sum of $5,000 upon their machinery, office furniture, and stock of merchandise. The defendant undertook the employment (which is not denied), and, after trying one or more companies, who declined, applied to a Mr. Hardman, residing at the city of Toronto, to obtain the required insurance in Lloyds, underwriters, of England. He apparently gave to Mr. Hardman a correct specification of what was required. After some delay, the policy arrived from England, and was received by the defendant, who says he at once forwarded it to the plaintiffs without reading it. This policy was, at the end of the year, renewed by another policy, in similar terms; but in both a mistake had occurred in the proper specification of the prior insurance carried by the plaintiffs, with the result that, after the plaintiffs' loss, they were compelled to compromise at a loss, for which loss they now sue.

In his judgment, the learned Chief Justice seems to have been of the opinion that Mr. Hardman had not been proved to be an agent for Lloyds, but was merely the defendant's agent. The matter is not, I think, vital; but I gather a different im-

pression from the evidence, for I see nothing to contradict the defendant's statement, at p. 21 of the appeal-case, that he "got the insurance finally effected through an agent of Lloyds—A. L. Hardman—the agent of Lloyds at Toronto." This, it is true, appears in the defendant's examination for discovery; but the whole seems to have been put in at the trial by the plaintiffs' counsel.

But, while the judgment deals in the way I have mentioned with Hardman's agency, it does not rest upon that circumstance, which at best bears only upon the minor question, whether the defendant can invoke the second statutory condition as a protection against the consequences of his negligence.

The duty of the defendant was, not merely to make a proper application, but to obtain a valid policy conforming to the application. And it is no answer to say, that, when the policy came, he did not read it. It was his duty to read it; and, if he had read it, or even if he had read Mr. Hardman's letter of advice, he must have seen at once that a mistake had occurred, resulting in a serious misrepresentation as to the prior insurance. And it is for a breach of that duty that he has been held liable—correctly, in my opinion.

It may be that the plaintiffs could have succeeded in recovering the full loss from Lloyds. But the defendant's negligent conduct had clearly rendered an action necessary. After the difficulty arose, he was given the opportunity of carrying on the litigation, but declined; and he is not now in a position to complain of the settlement, which, the learned Chief Justice finds, was a reasonable one to make.

I would dismiss the appeal with costs.

MEREDITH, J.A.:—As this case appears to me, it is a plain one of liability on the part of the defendant to the plaintiffs, for breach of his contract with them.

For valuable consideration he contracted to procure, for them, valid insurance, if any; but failed to do so, the policies which he procured being on their faces invalid: that, I find, was the character of the transaction; and the result.

But, if it is to be put, as it was at the trial, and generally is in cases somewhat analogous, as a question of breach, by an agent, of his duty to his principal, the same result—liability—must follow.

It is, however, contended that, even if that be so, the defendant is relieved from any such liability, because the plaintiffs should have read the policies, and have seen for themselves that

they were invalid; and, I suppose, have procured valid ones themselves, or have paid some one else for doing so. That is to say, that, because they did not do, themselves, that which they had paid the defendant for doing, and which it was his duty to do, they must bear the loss, which was caused by his breach of contract, or failure to perform his duty: which, I feel bound to say, seems to me to be absurd. . . .

[Reference to Denew v. Daverell, 3 Camp. 451.]

I would dismiss the appeal.

MAGEE, J.A.:—The handwriting of the warranty in the policy looks very much as if that alteration had been made in Toronto; and the wording of the policy, "Buildings and for contents," in the absence of the attached specifications, looks very much as if the Toronto agent had a very wide power; but there is not proof of that; and I do not think the evidence for the defendant establishes a right of reformation of the policy as against the insurers, Lloyds; but, at most, a right to return of the premium.

I agree in the result.

MOSS, C.J.O., and MACLAREN, J.A., also agreed in the result.

Appeal dismissed with costs.

JANUARY 17TH, 1912.

*RE MILNE AND TOWNSHIP OF THOROLD.

Municipal Corporation—Local Option By-law—Motion to Quash —Ballot not in Prescribed Form—Misleading Effect—Municipal Act, 1903, *sec.* 204—*Interpretation Act*, 1907, *sec.* 7 (35).

Appeal by David Milne from the order of a Divisional Court, 2 O.W.N. 1157, dismissing an appeal from the order of SUTHERLAND, J., 2 O.W.N. 1009, refusing the appellant's application to quash a local option by-law.

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

J. Haverson, K.C., for the appellant.

G. F. Shepley, K.C., and H. S. White, for the respondents.

*To be reported in the Ontario Law Reports.

Moss, C.J.O.:— . . . The ground on which the by-law was attacked was, that the ballot papers used at the voting did not comply with the provisions of sec. 10 of the Act 8 Edw. VII. ch. 54—amending sec. 141 of the Liquor License Act, R.S.O. 1897 ch. 245—whereby it is enacted that the ballot paper to be used for voting on a local option by-law shall have printed upon it the words "for local option" and "against local option."

Upon the argument of the appeal, counsel for the respondents virtually conceded—and properly so—that the form of ballot used for voting in this instance was not framed in compliance with the provisions of the amending Act, and that, the by-law could be supported, if at all, only under sec. 204 of the Consolidated Municipal Act, 1903, and sec. 7 (35) of the Interpretation Act, 1907. But counsel contended, and the Courts below appear to have given effect to the argument, that it had not been shewn that the deviation from the prescribed form did effect the substance or was calculated to mislead, or that the mistake in the use of the forms did affect the result of the election.

Sutherland, J., in the first instance, and the Divisional Court, on the appeal, appear to have dealt with this case as governed by the decision of a Divisional Court in Re Giles and Town of Almonte, 21 O.L.R. 382, affirming an order made by Meredith, C.J., 1 O.W.N. 698. In that case, the Courts seemed to consider that the onus was on the applicant to shew by evidence that the mistake did not mislead or affect the result of the election. But, where it is shewn that there was a mistake made in the use of the form or that there was a deviation from the form prescribed, it must be that, upon general principles, it lies upon the party seeking to support what was done to make it appear that it was of such a nature as not to affect the substance of the voting or to be calculated to mislead, and did not affect the result. It happened that in the Giles case there was no evidence one way or the other, and so the Courts were apparently able to see their way to upholding the by-law.

But the circumstances which appear in this case are such as to render it entirely different from any of the decisions upon which reliance is placed for supporting this by-law.

The applicant, accepting the view that the onus was upon him, adduced evidence from which it is apparent that voters were misled, and persons who intended to vote were unable intelligently and properly to mark their ballot papers.

The evidence shews that the form of ballot paper used did lead to confusion and create difficulty in the minds of a number of voters as to the proper manner of recording their votes.

The Legislature has deemed it proper specially to provide that, in the case of voting upon local option by-laws, the ballot paper shall be in a form calculated to distinguish it from that to be used in voting upon other by-laws. No doubt, the object of this provision was to prevent just such confusion and difficulty as has been shewn to have occurred in this case.

In the face of the very positive provision to that effect, there should be no question but that the mistake in adopting such a widely different form to that prescribed was a substantial departure from the directions of the Act, and was calculated to mislead.

The appeal should be allowed and the by-law quashed with costs throughout.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

Appeal allowed.

JANUARY 17TH, 1912.

*GRAHAM v. GRAND TRUNK R.W. CO.

Railway—Injury to and Death of Servant—Section-man Killed on Track—Train Running East upon North Track—Absence of Head-light in Fog—Rules of Company—Negligence—Findings of Jury—Contributory Negligence.

Appeal by the defendants from the judgment of SUTHERLAND, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $1,500 damages.

Action by Letitia Graham, widow of David J. Graham, a section-man in the defendants' employment, on the Lyn section, to recover damages for his death by reason of the negligence of the defendants, as alleged. The deceased, while at work, in a

*To be reported in the Ontario Law Reports.

fog, upon the defendants' track, was run over and killed by a moving engine of the defendants, said to have been moving east upon the north track.

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

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

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

GARROW, J.A.:— . . . The accident occurred early in the morning of the 16th September, 1910, described in the evidence as an unusually thick, foggy morning.

The defendants' line of railway at the point in question runs east and west, and is double-tracked. Engines proceeding east use the south track, and those proceeding west use the north track.

The section-men, of whom there were in all three and a foreman, were, on the morning in question, put to work by the foreman at ties in the north track. And it was while working on that track that the deceased was struck.

The engine came from the west—the reason being that an accident had occurred near Mallorytown, nine miles west of Lyn, upon the other track, which made it necessary to use temporarily the north track for east-bound engines.

The jury, in answer to question submitted, found that the defendants had been negligent in (1) "neglecting to switch back train on to right line at Lyn," and (2) not carrying a head-light; that there had been no contributory negligence; and assessed the damages at $1,500.

Counsel for the defendants now contends that there was no proper evidence to support these findings. And, as to the first, the objection is, I think, well-founded. It is probable, as suggested upon the argument, that the jury may have acted upon local knowledge as to the location of switches at or near Lyn, which does not appear in the evidence, which, so far as I have seen, does not indicate that what the jury finds as to switching back to the other track could have been done between Mallorytown and Lyn, where the accident to the deceased happened.

But upon the other ground, while the evidence is certainly meagre, it is, I think sufficient. Cook, one of the section-men, said: "Q. Did you see any head-light on the engine? A. I did not see none at all. Q. Were you in a position where you could

have seen the head-light if there had been one? A. Yes.'' And he was not contradicted nor even cross-examined as to these statements.

The defendants' rules were also put in, and one of them (156) provides that a train running when obscured by fog must display the head-light in front. The fog on the occasion in question was so dense, according to the evidence, as quite to obscure objects more than sixty or seventy feet away. The train was proceeding at a speed of from thirty to thirty-five miles an hour. The proper whistles were proved to have been given, and were, no doubt, heard by the deceased; but he, quite naturally, would assume that, as they came from the west, the approaching train was upon the south track, and so continued at his work, as did both East, who also was killed, and Cook, who at the last moment escaped. There is no evidence that the bell was ringing, and no finding as to it.

The section-men knew nothing of the accident near Mallorytown necessitating a change in the use of the tracks until afterwards. No one at Lyn apparently did, not even the operator. In these circumstances, it was especially incumbent, in my opinion, upon the defendants to have had the head-light displayed. And it was, I think, competent for the jury to infer that, if it had been lit, it probably would have prevented the accident. There would be less likelihood of such a continuous signal miscarrying than there was of those given by mere sound, in the unusual and ambiguous circumstances which we have here. The rays would, of course, extend somewhat beyond the mere line of track on which the engine was proceeding, but they would, naturally, be densest and most visible upon that track.

The point was, without objection, submitted to the jury by the learned trial Judge, in his very full and careful charge, and was, in all the circumstances, one quite proper for their consideration.

I would dismiss the appeal with costs.

MAGEE, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., and MACLAREN, J.A., also concurred.

MEREDITH, J.A. (dissenting), was of opinion, for reasons stated in writing, that the evidence was too meagre, and that, in the interests of justice, there should be a new trial.

Appeal dismissed; MEREDITH, J.A., *dissenting.*

JANUARY 17TH, 1912.

BLACK v. TOWNSEND.

Contract—Document Signed by only two of three Parties—Non-delivery—Action for Breach—Failure to Prove Contract, Written or Oral.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 2 O.W.N. 1273, after trial without a jury, awarding the plaintiff $1,050 damages, but directing that, if either party was dissatisfied with the amount, there should be a reference to a Local Master.

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

F. E. Hodgins, K.C., and W. R. Wadsworth, for the defendant.

R. R. McKessock, K.C., and W. N. Tilley, for the plaintiff.

MOSS, C.J.O.:—The learned Chief Justice was apparently of opinion that the agreement in writing which was signed by the plaintiff and defendant was binding upon the defendant, and that, under the circumstances, he was liable for the damages the plaintiff claimed to have suffered by reason of the failure of the defendant to perform his part of it. But, when the matter is examined in view of the evidence, the agreement, so-called, does not appear to have been binding upon any of the parties to it. Upon its face it was to be an agreement between three parties, the defendant, one John Annes, and the plaintiff. It related to property and dealt with matters in which all three were interested; and it is plain that it could not be carried into effect unless all three were parties and became bound to its performance. The plaintiff was not bound, and could not be held bound by it, nor could he have been compelled to do any act towards giving effect to its provisions, until it was executed by John Annes; and he knew, at the time he executed it, that Annes had not agreed to its terms, and that it was essential to its validity and binding effect as an agreement that Annes should agree to its terms and execute it as a party thereto. He knew, for he had been so advised by a solicitor, that the defendant had not authority from Annes to make such an agreement on his behalf—that the power of attorney which the defendant had from Annes was not broad enough to cover the agreement, and

that it was necessary that Annes should act for himself. And he was willing to trust the defendant to get Annes to enter into the agreement and execute the writing; but in this he was mistaken. The defendant seems to have acted in a manner far from commendable. He appears to have led the plaintiff to suppose that he would do more than he intended to do towards inducing Annes to enter into the agreement. But he went no further; and the plaintiff did not understand him as going beyond an assurance of his belief that Annes would execute the agreement. In the very nature of things, the plaintiff could not believe that the defendant could or would force Annes to agree. All he could expect was, that the defendant would endeavour to persuade Annes to agree. If, in these circumstances, he chose to proceed as if the agreement was completed, he must be treated as having done so at his own risk.

Further, he must have intended that, if Annes did agree and did execute the writing, it was to be returned to him when so completed. It was not intended that the defendant should retain the writing after it was executed by Annes. And when, after the lapse of sufficient time to enable him to receive it back, no word of it came to him, he should have at least considered that he was put upon inquiry as to whether it was executed or not. But he allowed months to elapse without inquiry; and even when, in March, 1907, he met the defendant and Annes, he did not bring the matter to the point of ascertaining definitely the position of affairs. He appears to have chosen to leave the matter at loose ends. Whether the reason of this conduct on his part was, that he considered that what he was doing in the way of sending in supplies was something that he was obliged to do in any case in order to maintain his own position with regard to the properties, does not appear to be material, though the testimony seems to point to that conclusion.

The plaintiff has failed to establish liability under the so-called agreement in writing or otherwise; and the action should be dismissed.

The appeal must be allowed and the action dismissed, both with costs.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

MACLAREN and MAGEE, JJ.A., also concurred.

Appeal allowed.

JANUARY 17TH, 1912.

BROWN v. BROWN.

Contract—Condition Precedent—Non-performance—Misconduct of Defendant—Damages.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 2 O.W.N. 1242, in favour of the plaintiff, for the recovery of damages for breach of a contract for the sale by the defendant to the plaintiff of an hotel equipment and business in the village of Massey.

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

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

W. N. Ferguson, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.:—In considering the agreement, regard must be had to the character of the thing being dealt with and the knowledge of the parties as to the only manner in which the thing to be done could be done.

The parties were contracting for a lease of a public house, and for the sale and purchase of the goods and chattels in it, as a going concern: and the license to sell liquor in it was an essential part of it: it was essential to both parties that the license should be maintained: that is expressed in the provision, contained in the agreement, that the license was to remain with the house and not to leave it: and both parties were, of course, well aware that that could not be effected without a transfer, in the manner required by the liquor license laws and regulations, of the license from the landlord to the intended tenant. The clause of the agreement providing that the contract was not to come into effect until the intended tenant obtained a satisfactory assurance from the license department that he would "secure" the license for the house, must be read in the light of these things.

The thing to be done, the thing which each of the parties intended should be effected, was a transfer of the existing license from the landlord to the intended tenant: and the intended tenant promptly took the proper means to fulfill the agreement, upon his part, in this respect; he applied to the proper officer, the local license inspector, and obtained from him the most

satisfactory assurance possible, in such a case, that the license would be transferred in due course, as it undoubtedly would have been but for the misconduct of the landlord, who, though he made no sort of objection on this score, but, on the contrary, acknowledged in writing that it was then for him to make formal application for the transfer of the license, refuse to carry out his contract unless paid a greater price than he had agreed to take. The intended tenant had done all that he usefully could; the inspector had actively taken the matter up; all that was needed to procure the transfer of the license, so that it should remain with the house and not leave it, was, that the landlord should make the necessary formal application for the transfer of it to the intended tenant; and there was, I have no doubt, under the agreement, at least an implied obligation on his part to do that, as he substantially admitted in his letter of the 7th November, as I have already mentioned.

Non-fulfilment of this condition is really the only defence to this action now seriously relied upon; there is nothing to support the defences pleaded and of which particulars were given.

In my opinion, the judgment which, at the trial, was directed to be entered, in the plaintiff's favour, was right, and ought to be affirmed, for more than one reason.

First: because the condition was substantially performed on the part of the intended tenant: a satisfactory assurance was, in substance, obtained: all that was possible on his part was done, and all that was needed was the consent of the landlord to effect the transfer of the license. No one can for a moment doubt that the transfer would have been effected if that consent had been given.

Second: because that which was done by the intended tenant was accepted by the landlord as a sufficient compliance with his obligation to procure the satisfactory assurance: this seems to me to be fully proved by the testimony at the trial, and the letter to which I have referred.

And third: because, if not fulfilled, the non-fulfilment was caused by the landlord's misconduct alone, of which he cannot take advantage: "it is a principle, very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself:" see Roberts v. Bury Commissioners, L. R. 5 C.P. 310.

Appeal dismissed with costs.

JANUARY 17TH, 1912.

ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.

Contract—Construction—License to Take Water from River for Generating Electricity—Dispute as to Rate of Payment—"Electrical Horse-power"—Sale of Electricity—Rate Proportioned to Vendible Output—Power Used by Defendants for their own Purposes.

Appeal by the plaintiffs from the judgment of RIDDELL, J., 1 O.W.N. 127, 832.

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

Sir Æmilius Irving, K.C., C. H. Ritchie, K.C., and C. S. MacInnes, K.C., for the plaintiffs.

Wallace Nesbitt, K.C., A. Monro Grier, K.C., and A. M. Stewart, for the defendants.

MOSS, C.J.O.:—The question for decision upon this appeal arises under an agreement, or rather a series of instruments which, for the purposes of the appeal, are to be treated as embodying an existing agreement, between the plaintiffs on the one part and the defendants on the other.

They are all summarised or referred to in the judgments of Riddell, J., by whom the case was tried.

The main, and indeed save a very minor one, the only, question is as to the method or basis upon which to ascertain the amount of rentals or payments to be rendered by the defendants to the plaintiffs under the terms of the agreement.

It is, of course, necessary to refer to and consider to some extent all the instruments, but the dispute hinges upon the true construction of clause 2 of the agreement of the 15th July, 1899, which deals with the rentals or payments to be rendered by the defendants for the rights, interests, powers, and privileges granted or secured to them under the agreement. It may not be necessary to define with precision the nature of the rights, interests, powers, and privileges in respect of which the rentals or payments are to be rendered. They are first conferred by the instrument of the 7th April, 1892, by which, after reciting an application by certain individuals (called "the company"), whose position the defendants now occupy, to the

plaintiffs the Commissioners, for the right to take water from the Niagara river at a certain point or points in the park, in order that the company might thereby generate and develope electricity and pneumatic power for transmission beyond the park, and the desire of the company to secure the right to construct their works in the park, there was granted to the company a license "to take water from the Niagara river . . . and lead such water by means of the natural channel . . . and the further extension of the channel to supply works to be erected and constructed by the company in buildings and power houses on the mainland within the park" on a location of which the limits were specified in a general way—"such location of buildings and power houses from time to time to be erected to be settled by the Commissioners" within the limits referred to.

The company was also given "the further right to excavate tunnels to discharge the water led from the Niagara river to the said buildings and power houses, so that such water by means of such tunnels shall emerge below the Horse Shoe Fall at or near the water's edge of the Niagara river." The 8th clause gives the company the power of temporarily constructing coffer-dams and an incline, and at all times to maintain a submerged dam for diverting water from the river to the natural channel. All these privileges, or (to adopt the terms used in the 13th clause) liberties, licenses, powers, and authorities, are granted for the purpose—as expressed in the beginning of clause 1—of generating electricity and pneumatic power to be transmitted to places beyond the park.

It is obvious that the grant contained in this instrument is more than a mere license to take water. Besides those already mentioned, other rights are granted, for example, a right or liberty to the company to occupy with its buildings and power houses land belonging to the Commissioners, and a further right or easement over the Commissioners' lands for the tunnels required in order to discharge the water brought by the company to the buildings and power houses, and to maintain the submerged dam. The parties evidently understood that they were contracting for something more than a mere license; for, while in the 4th clause it is called a license, in the 5th clause it is termed a lease, the expression being, "In case the company desire to terminate the lease . . ."

But, whatever may be the precise nature of the interests granted, whether lease, license, powers, or privileges, they are the rights for which the defendants are obligated to render payment, whether it be or be not strictly "rent" or "rental," as it is called interchangeably in the instruments.

The plaintiffs are not selling electrical horse-power or horse-power, or yielding to the defendants any commodity measured or ascertained by standards of horse-power.

They have granted to the defendants the rights and interests covered by the agreement. In them is included the right, power, privilege, or whatever it may be, of taking and using that which the plaintiffs have and the defendants need "for the purpose of generating electricity, and pneumatic power," viz., the agent by means of which the creation of electrical and pneumatic power is made possible for them. And it is for and in respect of all the rights and interests granted, and not in respect of some or a part, that rentals or payments are to be rendered.

The matter is thus reduced to the one question of amounts to be paid according to the agreement made in relation thereto. Under the instrument of the 7th April, 1892, no real difficulty on this head could have arisen. Clause 4 provided that the term should be twenty years from the 1st May, 1892, at a clear yearly rental of $25,000, during the first ten years, paid and payable in the manner and at the times specified; and, as to the rental for the second ten years of the term, it should be payable half yearly on the 1st days of May and November in each year; the yearly rental to be $26,000 for the 11th years of the term, to increase by $1,000 each succeeding year, the rental for the 20th year being $35,000.

If this method of payment had been adhered to, much of the trouble and difficulty now experienced by the parties would never have arisen. But in the agreement of the 15th July, 1899, a new method was adopted; and, by clause 2, "the agreement of the 7th April, 1892, in respect of the amount of rentals and period for which the same is payable," was amended.

Clause 2 is set out in full in the judgment of the learned trial Judge, and need not be repeated here. The term over which the payments are to extend is fixed as from the 1st May, 1899, to the 1st May, 1949; a fixed sum of $15,000 per annum is made payable absolutely every half year on the 1st days of May and November, and additional rentals or payments are to made according to what appears to be intended to serve as a rate or scale for determining the times when and the circumstances under which such additional payments are to commence. The clause does not say that the plaintiffs are to be paid for each electrical horse-power generated and used and sold or disposed of, but says that they are to receive as part of the rentals or payments to be rendered for the interests, privileges, and powers granted to the defendants, payment at the rate of $1 per

annum for each electrical horse-power generated and used and sold or disposed of by the defendants over 10,000 electrical horse-power up to 20,000 electrical horse-power, and the further (i.e., additional) payment of the sum of 75 cents for each electrical horse-power generated and used or sold or disposed of over 20,000 electrical horse-power up to 30,000 electrical horse-power and the further (additional) payment of the sum of fifty cents for each electrical horse-power generated and used and sold or disposed of over 30,000 electrical horse-power.

Even if the provision stopped here, there would be difficulty in determining the meaning of the contract for payment. The payments to be made in addition to the half-yearly payment of $7,500 are based on generation, use, sale, or other disposal of electrical horse-power, but the times or periods over which such generation, use, sale, or disposal is to extend, during each half-year, are not specified.

There is no practical difficulty in ascertaining every few minutes the exact quantity of electrical horse-power generated, and—as generation involves use in some form either by the defendants themselves or by purchasers or takers from them—the exact quantity used and sold or disposed of during the half-yearly periods. The clause appears to be pointed at providing for what is to happen if at the end of a half-yearly period it is found that the output has been such as to call for payments in addition to the $7,500. If the output has been under 10,000 electrical horse-power, the rental or payment to be rendered for that period is to be $7,500. The difficulty arises the moment it appears that the output is over 10,000. If under 20,000—say, for example, 18,000—electrical horse-power is generated, used, and sold or disposed of, the rental or payment called for would amount to $7,500 plus $4,000, that is, $11,500. If over 20,000 and under 30,000—say 26,000—the rental or payment would amount to $7,500 plus $5,000 plus $2,250, that is $14,750. The illustration given "by way of example," viz., that on generation and use and sale or disposal of 30,000 electrical horse-power, the gross rental shall be $32,500 per annum payable half-yearly, and so on in case of further development, indicates that the view of the parties was that attainment to that stage of development at least would fix the rental at the figures mentioned until there had been further development.

But as to whether the generation, use, sale or disposal beyond the 10,000 electrical horse-power must be continuous over the whole semi-annual period, or be represented by an average or by half-hourly or shorter or longer intervals in the readings of

the meters on the generators, nothing is said. It is apparently assumed that it can be ascertained, and that, as soon as it appears that the generation, use, sale or other disposal exceeds 10,000 electrical horse-power, the rental or payment will thereafter regulate itself in accordance with the rates chargeable for the excess.

But upon the important question of the point of time from which the reckoning of the excess is to count, there is no light from the instrument, save that which is supplied by the illustration. I find great difficulty in gathering from the terms expressed in the clause what was in the minds of the parties with respect to the mode of ascertaining the amounts of the additional payments. Doubtless all parties were familiar with the usual forms of agreements for the supply to purchasers or consumers of electricity for power, light, or heat. If I were at liberty to surmise, I would say that they in all probability had in their minds the system known as the peak-load, as the simplest and most convenient for adoption in this case. It appears to me that, if they had had in mind the elaborate and somewhat complicated system embodied in the formal judgment, they would have endeavoured to give clearer expression to it in the instrument. The illustration is not consistent with the method indicated in the formal judgment. Nor does the provision as to the payment of "additional rentals," following the illustration, assist to that conclusion.

Upon full consideration, however, I am unable to say that the parties have agreed to the adoption of the peak-load system of measurement, as the mode of ascertaining the payments. It is apparent that the change in the payments was being made for the benefit of the defendants. They were being relieved of an obligation to render an annual payment or rental which was to increase from year to year without reference to increase or decrease of development.

On the other hand, it may be said that the plaintiffs were under obligation not to deal with the water power so as to disable them from furnishing the defendants with the quantity needed for their present and future purposes up to the limit of their right of development.

The defendants were naturally desirous of only being called upon to pay according as they developed their capacity; but equally the plaintiffs might not be willing to hold without compensation a large reserve for the defendants' use. And probably it would not have been unreasonable to arrange that, as soon as the defendants had demonstrated their ability to develope

beyond 10,000 electrical horse-power, and so needed to have always at their command for use the necessary power, that should be deemed a new stage of development, and they should begin to render the increased payment or rental upon the footing of that development, and continue to do so until a further stage of development was reached.

But I am unable to gather from the words of the clause an agreement to that effect. The literal reading of the earlier part of the clause appears to me to be more in accord with an intention that payments are to be rendered according to the actual generation as shewn by the meters; and I do not find, in the later parts, language of that definite nature which is necessary in order to effect a clear alteration of meaning.

And to this extent I am in favour of affirming the judgment appealed from.

A minor question, to which, however, not much importance was attached by either side, is, whether the plaintiffs are entitled to have included in the quantities upon the footing of which payments are to be rendered, any quantity used by the defendants for their own purposes. I am unable to perceive any good reason why they should not.

The words "generated and used and sold or disposed of" appear to me to cover and include all the electrical horse-power produced. Since generation involves use or other disposition by the producer, it does not appear to be material to the plaintiffs to consider by whom it is used or to whom it is sold or disposed of. The gauge by which they are to be governed is the shewing of the meters at the generators.

I am of opinion that in this respect the judgment should be varied. The details may be settled in Chambers, in case the parties differ as to them. I venture to express the hope that the parties may be able to agree upon some convenient and simple mode of working out the results, and adopt it for the future, and thus avoid, if possible, all further question as to the amounts to be rendered and received.

Under the circumstances, there should be no costs of the appeal.

GARROW, J.A., gave reasons in writing for the same conclusion.

MACLAREN, J.A., also concurred.

MEREDITH and MAGEE, JJ.A., dissenting upon the main question, were of opinion, for reasons stated by each in writing, that the appeal should be wholly allowed.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. JANUARY 12TH, 1912.

NASSAR v. EQUITY FIRE INSURANCE CO.

Fire Insurance—Proofs of Loss—Overvaluation—Fraud—Finding as to by Trial Judge—Quantum of Damage—Reference as to—Costs—Appeal.

Appeal by the defendants from the judgment of MULOCK, C.J.Ex.D., at the trial, in favour of the plaintiff in an action upon a fire insurance policy.

The appeal was heard by BOYD, C., RIDDELL and SUTHERLAND, JJ.

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

G. F. Shepley, K.C., and G. W. Mason, for the plaintiff.

BOYD, C.:—Having read the material parts of the evidence given for the plaintiff, I can find no ground on which to reverse the conclusion of the Chief Justice that no fraud was brought home to the plaintiff in the preparation of his claim papers. The estimates may be or may not be high; but the plaintiff has no knowledge of the billiard business; cannot read or write; and has had to call in experts or others known as claim-adjusters who have skill and experience in the details of the different articles which were damaged by the water; and the plaintiff places himself in their hands, relying on their estimates as proper. There is no suggestion in the evidence to induce the belief that these people, most of them examined as witnesses, were conspiring to inflame the aggregate financial loss, or that the plaintiff was privy to any plot or conspiracy of that sort.

The defendants elected to call no witnesses, but to let the decision proceed on the evidence given; and on that there could be but one result, i.e., the one arrived at by the Chief Justice.

I would vary, however, his disposition of the costs—all the costs up to the hearing should not be given against the company, but only the costs up to the hearing so far as they have been incurred upon the issue of fraud or no fraud, upon which issue the plaintiff succeeds; but there are other issues which cannot be determined till the Master reports upon the proper sum to be paid by the company. Further directions and costs of reference and costs not now disposed of reserved till after report.

Judgment affirmed (with this variation as to costs occasioned by the charge of fraud) and affirmed with costs to the plaintiff.

SUTHERLAND, J.:—I agree.

RIDDELL, J.:—In this action, which is upon a fire insurance policy, the substantial defence is, overvaluation in the proofs of loss, and this from two points of view: (1) as indicating fraud, and so avoiding the policy; and (2) upon the quantum of damage.

Upon the trial, the Chief Justice of the Exchequer Division said again and again that he would not try the question of value—he found for the plaintiff on the question of fraud, ordered the defendants to pay the costs of the action down to and including the trial, and referred the quantum to the Master in Ordinary.

The defendants appeal.

It seems to me a most material matter, when considering whether there has been a fraudulent overvaluation, to come to a conclusion as to the actual amount of the loss—and, were there nothing more in the case, I should have thought there should be a new trial generally. But the defendants' counsel raised no objection to the course pursued; indeed, rather the reverse; for, when the trial Judge said, "I will give you my view as to the case if you like, and then you can determine on your own course of action"—and thereupon gave his view—the defendants' counsel did not offer any evidence.

The fullest latitude was allowed on the cross-examination of the plaintiff; and the defendants did not see fit to offer any evidence.

I think it is now too late to complain, and that the question of fraud should not be opened up.

But the learned trial Judge should not have directed all the costs to be paid by the defendants—it does not yet appear whether they may not be entitled themselves to costs from the plaintiff. The proper course will be to set aside the award of costs, and let the costs of the action, of the reference, and of this appeal, be disposed of by a Judge after the Master shall have made his report. The order that the defendants pay to the plaintiff the amount found due by the Master should also be set aside, and the proper order to make be determined by the Judge disposing of the costs, and at the same time.

[Note by the Registrar. This means that the judgment appealed from is varied by limiting costs payable thereunder to those up to trial occasioned by charges of fraud; striking out the direction for payment, and reserving further directions and costs not now disposed of till after report; and, with this variation, dismissing the appeal with costs.]

MIDDLETON, J. JANUARY 13TH, 1912.

CAPITAL MANUFACTURING CO. v. BUFFALO SPECIALTY CO.

Interim Injunction—Trade Mark — Infringement — Notice to Customers—Ex Parte Injunction against, Granted by Local Judge—Motion to Continue—Dismissal—New ex Parte Injunction Granted by another Local Judge—Con. Rule 46—*"Emergency"—Con. Rules* 355-357—*Non-disclosure — Appearance of Defendant—Merits of Case—Jurisdiction of Court over Foreign Company.*

Motion by the defendants for an order setting aside an order made by one of the Local Judges at Ottawa, upon the ex parte application of the plaintiffs, purporting to restrain the defendants from unlawfully interfering with the plaintiffs' business by writing to or otherwise notifying customers of the plaintiffs that the sale by such customers of the plaintiffs' goods, known under the plaintiffs' registered trade mark as "Royal Gem" veneer, constitutes an infringement of an alleged trade mark of the defendants, and from threatening customers of the plaintiffs with actions for damages for such alleged infringement.

R. C. H. Cassels, for the defendants.
R. V. Sinclair, K.C., for the plaintiffs.

MIDDLETON, J.:—This is a striking instance of the abuse of the power of the Court to grant an interim injunction.

The defendants are an American company carrying on business at Buffalo. As part of their business they manufacture and sell a substance called "liquid veneer." This is a preparation used for cleaning varnished furniture, etc., and has been on the market for some time. The name was registered under the Trade Mark Act, on the 25th June, 1906.

The plaintiffs were incorporated on the 20th September, 1910, under the Dominion statute, and took over the assets of

a company bearing a similar name which had carried on business for about a year. The plaintiffs are, therefore, clearly the junior concern. The plaintiffs and their predecessors have for a little over a year sold a similar preparation, or at least a preparation of somewhat similar appearance, to answer precisely the same purposes. This they call "veneer."

On the 20th July, 1911, the plaintiffs registered as a trade mark the words "Royal Gem," and have since been manufacturing and selling "Royal Gem Veneer."

I am not in any way concerned now with the merits of the controversy between the parties; but the unnatural use of this word "veneer" and the similar colour of the packages are enough to justify suspicion that the plaintiffs are close to the border line defined by the "fair trade" cases, of which Edge v. Niccolls, [1911] A.C. 693, is the latest.

In December last, the defendants, thinking that the plaintiffs had crossed the line, and that what was being done was infringing their rights, wrote to certain customers of the plaintiffs stating that an action was about to be brought against the plaintiffs for damages, and that the customers would be held liable in damages as infringers.

The latest date of any of these letters is the 19th December. The customers, or some of them, sent these letters to the plaintiffs, who on the 29th December began this action for an injunction against the mailing of such letters and a declaration that the trade mark "liquid veneer" is invalid. In view of Partlo v. Todd, 17 S.C.R. 196, this latter is not of much moment.

Affidavits verifying two of these letters were obtained from two merchants in Ottawa on the 30th December; and on the 2nd January the plaintiffs' general manager made an affidavit. On the same day an ex parte injunction was obtained from Judge MacTavish (senior Local Judge at Ottawa) restraining the defendants from writing or otherwise notifying any of the plaintiffs' customers that they claimed that the goods sold as "Royal Gem" veneer constituted an infringement of the "liquid veneer" trademark and threatening such customers with actions for infringement.

A motion was made to continue this injunction before the Judge presiding at the Ottawa sittings, under sec. 91, O.J.A. This motion was dismissed, because it was not within the section.

On the same day another motion was made, ex parte, to Judge Gunn, the junior Local Judge at Ottawa, who granted a precisely similar order, on the same material, restraining the same acts until the 15th January.

The present motion is made to set aside this order. Several grounds were argued.

The statute now embodied in Con. Rule 46 confers power upon a Local Judge only "in cases of emergency," "on proof to the satisfaction of the Judge that the delay required for an application to the High Court is likely to involve a failure of justice." This cannot be said to be a "case of emergency," i.e., "a sudden or unexpected happening, an unforeseen occurrence or condition."

This Rule must be read in the light of Con. Rules 355 et seq.: every application to the Court for relief must be upon motion, and any person affected by the order must be notified. This is an elementary and fundamental principle, and the only exception recognised by the practice is that found in Con. Rule 357, where the Court is "satisfied that the delay caused by proceeding by notice of motion might entail serious mischief." This is what is necessary before any ex parte order should be made. Before the Local Judge has any jurisdiction, it is further required that there should be such a situation of emergency that a motion to a High Court Judge will, by reason of the delay incident to making the application at Toronto in the ordinary way, involve a failure of justice. The provisions of these Rules are daily ignored in practice, but they still exist and ought to be rigorously enforced. It has become a practice to apply ex parte to a Local Judge in every case; and ex parte injunctions are often granted practically on præcipe, frequently to the great injury of the defendant.

Lindley, J., ([1876] W.N. 12), says: "Primâ facie an injunction ought not to be granted ex parte. In cases of emergency it will be granted, but an injunction is rarely granted without hearing both sides."

Then the fact that an injunction had already been obtained from one Local Judge completely exhausted the local jurisdiction. It is not contemplated that a Local Judge, whose power to restrain is limited to 8 days, should be able to restrain indefinitely by granting a series of 8-day injunctions. It is even more vicious when the plaintiff applies to a second Local Judge for his second ex parte injunction.

Then the injunction is objectionable for the non-disclosure of the prior injunction and its fate, upon the motion for the second injunction. It is said that the Judge was told. This probably is so, but this is not enough. The material used is recited, and it is not allowable to eke it out or supplement it by mere verbal statements to the Judge. The danger is obvious.

The unfairness to the defendant is obvious,—he has no means of knowing upon what statements an ex parte judgment against him was obtained. The former proceedings, if before the Judge, might have been recited in the order as being read. Had they been, I think he would have hesitated to make the order ex parte. See Fitchet v. Walton, 22 O.L.R. 40.

The fact that the defendants had appeared in the action ought to have been disclosed. "It is not usual to grant an injunction ex parte after the appearance of the defendant, though it may be done in some pressing cases. But it is a rule without any exception that, if the defendant has appeared, the plaintiff, on applying for an ex parte injunction ought to inform the Judge of the fact:" North, J., in Mexican Co. of London v. Maldonado, [1890] W.N. 8.

But, quite apart from this, it is clear, on the plaintiffs' own affidavits, that they make out no case for an interim injunction, let alone an ex parte injunction.

To award an interim injunction, under the circumstances, would be contrary to all precedent. The rights of the plaintiffs are by no means admitted, nor are they free from doubt. The facts almost indicate that they, and not the defendants, are the wrongdoers; and there is very serious legal difficulty in their way, so far as an injunction is sought, which must be faced at a hearing. I abstain from discussing this legal aspect of the case lest I should prejudice the parties at a hearing.

In quite another aspect the injunction cannot be supported. The mailing of the circulars—the act complained of—took place out of the jurisdiction. The defendants are a foreign company. Their place of business is out of the jurisdiction; and, though they may transact business in Ontario in such a way as to enable process to be served under our Rules—yet they are still a foreign corporation, and our Courts have no kind of jurisdiction over their acts in the country of their origin.

For these reasons, I think the motion should be granted, and the injunction dissolved, with costs to the defendants in any event.

I have no power over the costs of the proceedings before the Assize Judge, but this order may, unless the plaintiffs object, cover the costs of the motion to continue the injunction now set aside and vacated. This will save the making of a separate order on its return.

LATCHFORD, J. JANUARY 13TH, 1912.

FORBES v. FORBES.

Marriage—Evidence to Establish—Death of Husband—Claim of Alleged Widow—Marriage Ceremony—Reputation—Contract to Marry—Cohabitation—Foreign Law—Presumption.

Issue tried at the Sandwich sittings of the High Court.

F. C. Kerby, for the claimants.

F. G. McHugh, for the administrator of the estate of William Alexander Forbes, deceased.

LATCHFORD, J.:—The issue which I am called upon to decide, under the order made on the 13th November, 1911, is, whether Ida Marney Forbes, Irene Forbes Morrow, Mamie Forbes Cavanaugh, and William Alexander Franklin Forbes, are the widow and children respectively of William Alexander Forbes, deceased.

By the same order the parties were at liberty to put in before me the evidence taken and proceedings had at the trial of the same issue in the Surrogate Court of the County of Essex; and the parties supporting the affirmative have availed themselves of that liberty. I have carefully read this evidence and considered the testimony given before me at Sandwich. It was, in my opinion, clearly established that Irene Forbes Morrow, Mamie Forbes Cavanaugh, and William Alexander Franklin Forbes, are the children of William Alexander Forbes, deceased. In fact, the parentage of these children was not seriously questioned before me or in the proceedings in the Surrogate Court.

The issue really contested was, whether or not Ida Marney Forbes (now Mrs. Daly) is the widow of the deceased; and this turns on whether or not she was the wife of the deceased. Mrs. Daly asserts that she was married to Forbes in Detroit on the 22nd May, 1878. Both, at the time, had their domiciles in Ontario. She was then about fourteen years of age, and Forbes was mate—he later became captain—of a ferry steamer plying between Detroit and Windsor.

The steamers did not run after midnight; and Forbes and one of his brothers carried belated wayfarers across the river in row-boats, and incidentally engaged in the practical free trading so popular after dark in all border communities. On the date mentioned, according to Mrs. Daly, she, Forbes, one Miles King, and "his lady" (whose name is now forgotten by

the witness), embarked in a small boat owned by Forbes, and were rowed across the river. The young girl had no anticipation that he was matrimonially inclined. They had been acquainted for some time; and, while marriage had been talked of, they were not "engaged." Detroit at the time afforded facilities for easy and rapid marriage, similar to those now offered in this province by Windsor and Niagara Falls. "There was," as Mrs. Daly puts it, "no nonsense, no red tape." The quartette on landing repaired, she says, to the residence of Judge Chipman, where Forbes and young Ida were declared man and wife. A certificate of the marriage was delivered to the bride, and the party returned to Windsor. King was not called at the trial. He was last heard of in Chicago some years ago. His unmarried and unknown friend was, of course, not available as a witness. Forbes was living with his mother, a widow, in Pitt street, Windsor, where his two younger brothers, one aged fifteen and the other twenty, also dwelt. He did not bring his bride to his home on the night he was married, nor at any time afterward, but visited her at a room in Windsor, which he rented for her, sometimes in an hotel and sometimes in a private house. During a fire, a jewel case which contained—with other treasures—the certificate of marriage, was thrown into the street and broken open, with the result that the contents were lost. They were, according to Mrs. Daly, advertised for by Mr. Forbes in a local newspaper, but never recovered. After the fire, she returned to Amherstburgh, where she lived for a time with her mother, and where the first fruit of the union, a son, was born in 1883. Forbes visited his wife frequently while she was at her mother's, and expressed to several his delight that a son had been born to him. The child was, in September, 1884, baptized in St. John's Church, Sandwich, as the son of William Alexander Forbes and Ida Forbes, and is the claimant William Alexander Franklin Forbes. Afterward, Forbes brought the woman and her child to Windsor, where they lived together in various houses, one within a block of his mother's house, and in the same street. There is evidence, as satisfactory as such evidence can be, that by general repute Captain Forbes and Ida Marney Forbes were married. There is some evidence to the contrary, but it is very slight and not entitled to much credit. It is certain that the woman was always known in Windsor as Mrs. William Forbes, and not by any other name.

From the date of the alleged marriage in 1878 to the time he fell ill in 1892, he supported her and the three children born in that interval. He procured medical attendance for her when

the girls were born, and paid the physician at Amherstburgh who attended her in her first confinement. He introduced her to his friends as his wife, and after he became ill sent money to her by one of his brothers—a fact which that brother first denies and then admits with manifest reluctance. Captain Forbes did not introduce his wife to his mother, who, it appears, objected strongly—as many another mother has objected—to the daughter-in-law selected by her son. He was the eldest son and his mother's main support. In 1878, her daughters had married, and the younger sons were, from their evidence, clearly not a great comfort to their mother. . . . In the circumstances, the fact that Captain Forbes spent most of his time with his mother, and supported her out of his earnings, is not surprising. He was also maintaining his children and his reputed wife —spending days and nights in their company both in Windsor and Detroit.

I am satisfied that there was some ceremony of marriage at Detroit. It may be that Mrs. Daly is mistaken as to the person who officiated. When first approached by Mr. Wigle, she could not remember the Judge's name. She was, however, at the time, in great distress, owing to the conduct of her second husband. I cannot help thinking that she adopted Judge Chipman's name afterwards upon suggestion, and in her enfeebled condition of health came, as often happens, to regard the suggestion as a fact. Her evidence before me convinced me that she stated nothing but what she honestly believed to be true. There was a distinguished Judge named Chipman in Detroit who held office for many years. He, however, was not elected (or appointed) Judge until 1879, and had not at any time authority to perform the marriage ceremony. Mrs. Daly's description of the person who married her to Forbes does not apply to Judge Chipman, but is definite as to the stature, complexion, and general appearance of the person who did perform the ceremony. On the whole, while the evidence fails to establish a marriage by Judge Chipman, I find that there was a marriage before a person represented to her to be a Judge. It is notorious that in many American cities Justices of the Peace are often called Judges. Such Justices had, in Michigan, in 1878, the power to celebrate marriage; and it was, I think, a Justice of the Peace that officiated and gave Mrs. Forbes the certificate which she lost a few years later.

But, even if there was no marriage in fact, it is undoubted that there was an agreement to marry, followed by cohabitation, within the State of Michigan at various times between 1878

and 1892; and, upon evidence that is undisputed, such agreement and cohabitation constituted a valid marriage according to the laws of Michigan. The parties were not forbidden to contract marriage by the laws of the province.

Even if a doubt existed as to the legality of the marriage, I should feel bound to declare in favour of the alleged marriage. All laws, all morality, require and sanction this view of a doubtful case: see Robb v. Robb, 20 O.R. 591, at p. 597, and the cases there cited.

I, therefore, find that Ida Marney Forbes, as she is named in the issue, is the widow of William Alexander Forbes, and that Irene Forbes Morrow, Mamie Forbes Cavanaugh, and William Alexander Franklin Forbes, are his children. If necessary, the proceedings may be amended by substituting for the name Ida Marney Forbes, the name Ida Marney Forbes Daly. The claimants are entitled to their costs.

MEREDITH, C.J.C.P. JANUARY 15TH, 1912.

*BAILEY v. DAWSON.

Vendor and Purchaser—Contract for Sale of Land—Authority of Agent—Ratification—Formation of Contract—Statute of Frauds—Receipts—Letters—Memorandum Contained in Different Documents—Incorporation of Unsigned Documents by Reference—Parol Evidence—Identification of Subject-matter—Receipt Signed on Sunday—Lord's Day Act—Specific Performance.

The plaintiff sued for specific performance of an agreement between her husband and the defendant for the sale by the defendant to the husband of lots 1, 2, and 3 according to a plan registered in the registry office of the county of York as number 1508.

The defendant was the owner of the land, and placed it in the hands of a land agent named Hemming for sale, limiting the price at which he was to sell to not less than $20 per foot of the frontage.

The plaintiff's husband entered into negotiations with Hemming for the purchase of the land, and these negotiations resulted in an agreement that the land should be sold to the plain-

*To be reported in the Ontario Law Reports.

tiff's husband at $20 per foot. On the 14th May, 1911, the plaintiff's husband paid to Hemming, on account of the purchase-money, $5, and received from him a receipt as follows: "May 14, 1911. Received from Mr. Bailey the sum of five dollars re option on the Mr. Dawson land north west of Bloor Willard. Geo. H. Hemming."

The "option" referred to in the receipt was contained in a letter from Hemming to Bailey, dated the 9th May, 1911, as follows: "Yours to hand in reference to land on Bloor street. I have 156 feet to sell on Bloor. It is a good corner. My client is asking $20 per foot, about $1,700 cash, the balance payable at $30 per month. He would like to sell it en bloc, if not would prefer to keep corner lot. Would be pleased to hear further from you."

After receiving this letter, Bailey saw Hemming and endeavoured to get him to make the price $19.50 per foot; and, upon his refusing to do so, Bailey agreed to take the land at $20 per foot, paid the $5, and received from Hemming the receipt of the 14th May, 1911.

On the Monday following, Hemming saw the defendant and told him what he had done, and the defendant then said that a $5 deposit was not enough; but, as Hemming had sold, he would let the sale go through.

On the 15th May, 1911, Bailey paid to the defendant $25 and received from him the following receipt: "Toronto, Ont., May 15, 1911. Received from Mr. H. T. Bailey thirty dollars to apply on purchase of lots 1, 2, and 3, Lady Mulock estate on Bloor St. west, this transaction to be closed within ten days. This amount to be returned in the event of title not being clear. A. Dawson. Lots on N.-W. corner Bloor and Willard Sts. A. D."

On the 20th May, 1911, the plaintiff's solicitors wrote to the defendant asking for a draft deed, "so as to enable us to search the correct lots. We have searched certain lots which we suppose is the property agreed to be sold, but we do not see any deed to you. Please give this your attention, as the time for closing the matter is fast expiring," etc.

In answer to this letter the defendant wrote on the 22nd May that "the lots to be transferred are known as Nos. 1-2-3-frontage 158.7, according to a plan . . . . These lots are being purchased by me from Lady Mulock under agreement . . . . My agreement will of course be surrendered on payment of the purchase-price less amount still due Lady Mulock."

The plaintiff's solicitors wrote letters to the defendant on the 26th and 29th May, 1911, urging the completion of the sale, and in the earlier one telling him that they had a cheque from Bailey payable to his order which they would deliver to him when they were satisfied with the title.

In answer to these letters, the defendant, on the 30th May, wrote to the plaintiff's solicitors "that the agreement I had with Mr. Bailey dated May 15th expired on the 25th, and therefore there will be no object in forwarding you the document requested in your letter of the 29th. While not recognising that Mr. Bailey is entitled to a refund of his deposit, I am enclosing cheque for $25, being the amount received from him, and the $5 which he paid to Mr. Hemming will no doubt also be returned upon request. If Mr. Bailey still desires to purchase the property, I will be very glad to consider any proposition he may make."

On the 1st June, 1911, the plaintiff's solicitors wrote to the defendant, acknowledging his letter of the 22nd May, and calling his attention to the fact that the contract was an open one, and time was not of the essence.

On the 2nd June, 1911, the defendant wrote to the plaintiff's solicitors: "Your letter of the 1st received . . . . At the time of writing this letter you were no doubt in receipt of my letter of May 30th, but appear to have overlooked making any reference to this letter or to the enclosure. If you will refer to your letter of the 20th ult., you will observe that at that time you considered 'time' a very essential part of the agreement which I had with Mr. Bailey. The agreement was not repudiated. It elapsed through the failure of Mr. Bailey to carry out his part of the agreement within the time stipulated."

The defendant relied on the Statute of Frauds as a defence to the action.

The action was tried by MEREDITH, C.J.C.P., without a jury, at Toronto, on the 6th November, 1911.

W. N. Tilley and A. J. Williams, for the plaintiff.

W. Mulock, for the defendant.

MEREDITH, C.J. (after setting out the facts):—The defendant's action on the Monday after the payment of the $5 was made amounted to a ratification of what Hemming had assumed to do as his agent. . . . In my opinion, the letters and the two receipts constitute or afford evidence of a contract sufficient to satisfy the provisions of the Statute of Frauds.

Granting, as was contended by Mr. Mulock on the authority of Harvey v. Facey, [1893] A.C. 552, that Hemming's letter of the 9th May, 1911, was in itself not an offer to sell, on the terms mentioned in it, which, when accepted by Bailey, would have constituted a contract to sell on those terms, it was evidently treated by both parties, as the receipt of the 14th May, 1911, shews, as an offer to sell; and I do not see why the contracting parties were not at liberty so to treat it. A fair test of the correctness of this view would be afforded if it be assumed that Hemming, instead of being the agent of the owner, was himself the owner of the land; and, that assumption being made, I cannot doubt that, coupled with the receipt which he gave, the letter would at least amount to an offer to sell on the terms mentioned in it, which would have become a binding contract on the verbal acceptance of it by Bailey.

I am right in this view, and in the opinion I have expressed that the defendant subsequently ratified what Hemming had assumed to do as his agent, it follows that the defendant is bound.

In addition to this, the receipt given by the defendant on the 15th May, 1911, is for the $30 "to apply on the purchase of lots 1, 2, and 3, Lady Mulock estate on Bloor St. West;" and the receipt goes on to say, "This transaction to be closed . . . ." To what purchase and to what transaction does this receipt refer? Manifestly, I think, to the transaction which had been entered into by Hemming, as the defendant's agent, with Bailey; and, if this be the case, there is here also the necessary connection between the writing signed by the defendant and the letter of Hemming of the 14th May, 1911; and the two together set forth the terms of the contract in such a way as to satisfy the provisions of the Statute of Frauds.

Besides this, the defendant's letter of the 30th May, 1911, contains this statement, " . . . that the agreement I had with Mr. Bailey dated May 15th expired on the 25th." This, it appears to me, is a sufficient reference to the agreement to connect the previous writings—the letter of Hemming of the 9th May, 1911, his receipt of the 14th of the same month, and the defendant's receipt of the following day—to warrant all of them being used for spelling out from them an agreement in writing sufficient to satisfy the provisions of the Statute of Frauds.

Still further, the defendant's letter of the 2nd June, 1911, contains . . . "the agreement which I had with Mr. Bailey. The agreement was not repudiated." . . .

I do not think that, if Hemming's letter to Bailey of the 9th May, 1911, and the receipt of the 14th of the same month, had been the only writings, a contract sufficiently evidenced to satisfy the Statute of Frauds would have been made out. Neither of these documents mentions the name of the vendor; and the reference in the letter to Hemming's client is not sufficient: per Lord Cairns in Rossiter v. Miller, 3 App. Cas. 1124, 1141; Jarrett v. Hunter, 34 Ch. D. 184, 185. Clergue v. Preston, 8 O.L.R. 84, is distinguishable. . . .

The missing link is, however, supplied by the letters of the defendant, which shew that he was the vendor.

That the particulars required to make a complete memorandum for the purposes of the statute need not be all contained in one document, and that the signed document may incorporate others by reference, is well settled: Pollock on Contracts, 5th ed., p. 162; but there is more difficulty in determining what is a sufficient reference for this purpose. The rule laid down in the earlier cases, of which Boydell v. Drummond, 11 East 142, . . . is an example, has been relaxed in the later cases. . . .

[Reference to Pollock on Contracts, 5th ed., p. 162, note (f); Ridgway v. Wharton, 6 H.L.C. 238; Baumann v. James, L.R. 3 Ch. 508, 511, 512; Long v. Millar, 4 C.P.D. 450, 454; Cave v. Hastings, 7 Q.B.D. 125; Studds v. Watson, 28 Ch.D. 305; Wylson v. Dunn, 34 Ch.D. 569, 575; Oliver v. Hunting, 44 Ch.D. 205; Buxton v. Rust, L.R. 7 Ex. 279; Haubner v. Martin, 22 A.R. 468; Martin v. Haubner, 26 S.C.R. 142; Maybury v. O'Brien, ante 393.]

Applying the principle of these cases to the facts of the case at bar, I am of opinion that the reference in the receipt given by the defendant for the $30 to the purchase of lots 1, 2, and 3, Lady Mulock's estate on Bloor street west (lots on north-west corner Bloor and Willard streets), is to the option contained in Hemming's letter of the 9th May and his receipt of the 14th May.

The parol evidence shews that the only purchase that had been arranged or agreed to was that evidenced by Hemming's letter and receipt; and these, with the defendant's receipt, and at all events together with his subsequent letters, contain all the essentials of a memorandum to satisfy the Statute of Frauds, sec. 4.

It was further objected . . . that the subject-matter of the contract was not sufficiently identified. Apart from the defendant's letters, I think that it is; but these letters make it

abundantly clear what land was being dealt with—the land which was the subject of the written contract between Lady Mulock and the defendant.

It was also objected that, as the receipt of the 14th May appears to have been signed on a Sunday, the contract was, under the Lord's Day Act, void; but this objection is also untenable, as there was, in the view I have taken, no completed contract until the following day.

There will be the usual judgment for specific performance, with a reference, if the plaintiff desires it, to the Master in Ordinary; and the defendant must pay the costs of the action.

MIDDLETON, J. JANUARY 16TH, 1912.

CITY OF LONDON v. TOWN OF NEWMARKET.

Injunction—Municipal Corporation—Bonus By-law Approved by Ratepayers—Action to Restrain Passing by Council—Illegality—Municipal Act, 1903, *sec.* 591 (12)(*e*)—*Injunction Refused—Remedy by Motion to Quash when By-law Passed—Costs.*

Motion by the plaintiffs to continue an ex parte interim injunction, by consent turned into a motion for judgment, in an action by the Corporation of the City of London to restrain the Corporation of the Town of Newmarket from passing a bonus by-law, because, it was said, and not seriously denied, that the by-law was in conflict with the provisions of sec. 591(12)(e) of the Municipal Act, 1903, because the bonus was to an industry already established in London.

E. C. Cattanach, for the plaintiffs.
H. E. Choppin, for the defendants.

MIDDLETON, J.:—The by-law was submitted to the ratepayers of Newmarket on the 20th November, 1911, and was carried by a vote of 530 out of a total vote cast of 544. It is not shewn whether this is sufficient under sec. 366 of the Municipal Act, but the case was argued upon the assumption that it is. The writ was issued on the 26th December—it is said, without any notice to the defendants. In the meantime, it is said, the defendants had considered the situation, and had been advised

not to pass the by-law; and, although they knew that the plaintiffs contemplated attacking the proceedings, they gave no indication of their change of heart. So on the aspect of the case based upon courtesy rather than right, the parties are upon an equality.

The plaintiffs allege that, the by-law having been passed by the electorate, the council is bound to give it its third reading.

The defendants rely upon Canada Atlantic R.W. Co. v. City of Ottawa, 12 S.C.R. 365, as shewing that, notwithstanding the voice of the electorate, the council has a discretion to defeat the by-law on the third reading.

There is a conflict of judicial opinion as to the meaning of the statute in its present form. See Re Dewar and Township of East Williams, 10 O.L.R. 463. I do not find it necessary to express an opinion upon this question, because, in my view, an injunction should not be granted to restrain the passing of a by-law. I do not think the Court has any right to interfere with the action of the municipal council at this stage. An injunction is an extraordinary remedy, and ought not to be resorted to when there is an appropriate remedy in a motion to quash. No doubt, an injunction can be obtained to prevent acting under an invalid by-law, but this is very different from what is now sought.

In Helm v. Town of Port Hope, 22 Gr. 273, the Court restrained the submission of a matter to the ratepayers—a proceeding which was not merely ultra vires but which was being taken for an entirely improper purpose. In Vickers v. Municipality of Shuniah, ib. 410, this case was not extended to cover a case which was intra vires. It was said that the attack on the by-law before it had been voted on was premature.

In Darby v. City of Toronto, 17 O.R. 554, and King v. City of Toronto, 5 O.L.R. 163, the Court restrained a plebiscite upon a question with which the municipal council was itself bound to deal.

I think these cases are well explained and distinguished in Little v. McCartney, 9 W.L.R. 449, 18 Man. L.R. 323; and that the motion and action should be dismissed

The judgment of Mr. Justice Gray in Re Sawyer, 124 U.S. 200, contains a valuable explanation of the limitations of the power of a Court of Equity to interfere by injunction.

There should be no costs. The plaintiffs are premature and have mistaken their remedy. The defendants are wrong in substance, and their action provoked attack.

DIVISIONAL COURT. JANUARY 18TH, 1912.

WALTERS v. WYLIE.

Landlord and Tenant—Lease—Provision for Forfeiture—Keeping Intoxicating Liquors for Sale—Failure of Proof—Possession—Use and Occupation—Wrongful Entry—Damages—Reduction on Appeal—Landlord and Tenant Act, 1 Geo. V. ch. 37, sec. 20(2)—Necessity for Notice of Breach before Enforcement of Forfeiture.

Appeal by the defendant from the judgment of BRITTON, J., ante 177.

The appeal was heard by CLUTE, LATCHFORD, and MIDDLETON, JJ.

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

M. J. O'Reilly, K.C., for the plaintiff.

CLUTE, J.:—Upon a perusal of the evidence, I am of the opinion that the trial Judge was right in finding that the evidence did not amount to a forfeiture. There are undoubtedly many suspicious circumstances, but there is no evidence of liquor having been sold upon the premises, nor that the plaintiff kept a disorderly house.

The defendant should be charged for use and occupation of the premises. For this and his wrongful entry, I think $75 would be full compensation; and the verdict should be reduced to this amount. There was no conversion of the goods, in my opinion, nor was there ever a special demand for the goods; the demand was for the premises.

With the variation of the judgment here indicated, the appeal is dismissed. The appellant having failed upon the main issue, but succeeded with respect to the question of damages, there should be no costs of this appeal.

MIDDLETON, J.:—The 13th section of the Act respecting Landlord and Tenant, R.S.O. 1897 ch. 170 (of sec. 20(2) of 1 Geo. V. ch. 37, if that applies), is fatal to this appeal: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, other than a proviso in respect of the payment of rent, shall not be enforceable, by action or otherwise, unless and until the lessor serves upon the lessee a notice specifying the particular breach

complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

This provision is general, and applies to both positive and negative covenants: Harman v. Ainslie, [1904] 1 K.B. 698.

It is the legislative intention to do away with forfeiture of leaseholds, which may be of great value, even in the case of intentional breach of covenants, and to substitute for forfeiture money compensation. This is not the case of an application for relief from forfeiture under sec. 13(2) (20(3)), where the landlord's right has become enforceable because an adequate notice has been given and the tenant has failed to comply—even then upon proper terms the Court might and probably would relieve: Rose v. Spear, [1911] 2 K.B. 234.

The notice (exhibit 4) is clearly not a notice under the statute.

There has been no conversion of the goods, and the plaintiff ought to be at liberty to take them, and the damages should be reduced, as suggested, to $75.

The attention of the parties is drawn to 10 Edw. VII. ch. 30, sec. 22(c).

I would give no costs of appeal.

LATCHFORD, J.:—I agree.

SCOTT v. BRITTON—MIDDLETON, J., IN CHAMBERS—JAN. 12.

Jury Notice—Motion to Strike out—Order—Con. Rule 1322.]—Motion by the defendant to strike out the plaintiff's jury notice. MIDDLETON, J., made an order, under the new Con. Rule 1322, for trial without a jury; costs in the cause. C. A. Moss, for the defendant. D. O. Cameron, for the plaintiff.

LAMOUREAUX v. SIMPSON—DIVISIONAL COURT—JAN. 12.

Contract—Transfer of Company-share—Undertaking to Re-transfer—Sale or Loan of Share—Findings of Jury.]—Appeal by the defendant from the judgment of BRITTON, J., ante 212. The appeal was heard by BOYD, C., SUTHERLAND and MIDDLETON, JJ. The Court dismissed the appeal with costs. C. J. Holman, K.C., for the defendant. I. F. Hellmuth, K.C., and E. H. Ambrose, for the plaintiffs.

MARTIN v. CLARKE—MASTER IN CHAMBERS—JAN. 13.

Summary Judgment—Con. Rule 603—Action on Covenant in Mortgage—Defence—Release—Long Delay in Bringing Action.]—Motion by the plaintiffs for summary judgment under Con. Rule 603, in an action on a covenant in a mortgage made on the 20th May, 1889. The action was begun on the 15th June, 1911. The Master said that from the affidavit of the defendant and his cross-examination it appeared that there was no defence to the action, unless the release of which the defendant spoke (a draft of which was in the plaintiffs' possession) could be produced. At present it was not forthcoming. The defendant said that he had not made a thorough search among his old papers for it. No payment had been made by the defendant since 1901. The release must be produced within a fortnight. If this was not done, judgment should go, unless the defendant preferred to have the case go to trial in the usual way. This second course was only allowed on the ground of the long delay in bringing this action and the total silence of the plaintiffs for so many years on the matter. The Master did not wish to be understood as recommending any further resistance to the plaintiffs' claim. The costs of the motion to be in the cause. H. J. Martin, for the plaintiffs. J. Shilton, for the defendant.

BROWN v. CHAMBERLAIN—SUTHERLAND, J.—JAN. 16.

Promissory Note—Liability of Maker—Blank Note Filled up and Used for Unauthorised Purpose—Statute of Limitations.]—Action on a joint and several promissory note made by T. F. Chamberlain and W. P. Chamberlain, the defendants, dated the 20th June, 1906, payable one year after date, and purporting to be with interest at 6 per cent. The defendant T. F. Chamber-

lain, who was the father of his co-defendant, appeared on the note as the first of the two makers. It was admitted by the plaintiff that certain payments, amounting in all to $280.95, had been made on account by the defendant T. F. Chamberlain upon various dates in 1906, 1907, and 1909. It was admitted also that the signatures to the note were those of the defendants respectively. The defendant T. F. Chamberlain said, in his statement of defence, that he joined in the note for the accommodation of his co-defendant, for whose benefit the money was procured, and that the note was given to the plaintiff by his co-defendant, and he claimed over against his co-defendant in case the plaintiff obtained judgment against himself. The defendant W. P. Chamberlain, in his statement of defence, alleged that, if the note in question was given in respect of any indebtedness to the plaintiff, it had been paid or discharged; that the note was not given to the plaintiff by him nor signed by him to be given to the plaintiff; that the plaintiff was aware, and received the note with notice, that it was not intended for her; that there was no authority in any person to give it to her; that the note had been altered in a material part after being issued; that, while he and his co-defendant had borrowed money of the plaintiff prior to 1898, it had been arranged between them that the indebtedness should be taken care of by the defendant T. F. Chamberlain, who did make payments from time to time on account thereof, and who, in the year 1898, with the knowledge and consent of the plaintiff, replaced a note previously given to her by the defendant W. P. Chamberlain, in 1897, and indorsed by T. F. Chamberlain, by the latter's own demand note for the amount then due; that thereafter he (the defendant W. P. C.) did not make nor authorise to be made any payments on account of the said indebtedness, nor did he authorise his co-defendant to complete in favour of the plaintiff the note in question herein, which was originally a blank note, given by him to his co-defendant for use in their common business, and to be used for it alone; that he was not aware until just before this action was commenced that it had ever been used for another purpose, or that it had been filled out in the form in which it now appeared. He also alleged that his co-defendant was primarily liable upon the note, and claimed over against his co-defendant in case the plaintiff succeeded in obtaining a judgment against him (the defendant W. P. C.) Each of the defendants served a third party notice on the other. SUTHERLAND, J., after setting out the facts at length, said:—I am not at all convinced by the evidence that the note sued on was made on the date it appears to be. I do not credit the testimony of the plaintiff and

T. F. Chamberlain as to this. I am strongly inclined to believe that the note was filled in after the release between the defendants made in 1899. It is, I think, quite clear that—whenever it was filled in—the defendant T. F. Chamberlain utilised, without the consent of his co-defendant, a blank form of note signed by the latter for their business purposes, and which he had no authority to use to fill in in favour of the plaintiff. The defendant T. F. Chamberlain admits that he made the note and is bound by it, but claims over against his co-defendant. I do not think the defendant W. P. Chamberlain is liable upon the note sued on, nor at this date with respect to the indebtedness existing in 1898 and evidenced by the note made in that year. As to that indebtedness, I think, from the evidence, that the Statute of Limitations would apply. The plaintiff will have judgment for the amount of her claim, with proper interest, against defendant T. F. Chamberlain, with costs; and the action will be dismissed as against the defendant W. P. Chamberlain, with costs, if the same are asked for. D. B. Maclennan, K.C., and C. H. Cline, for the plaintiff. C. A. Moss, for the defendant W. P. Chamberlain. The defendant T. F. Chamberlain, in person.

TAYLOR v. PELOF—BRITTON, J.—JAN. 16.

Interim Injunction—Landlord and Tenant—Trespass by Landlord on Demised Premises — Absence of Damage — Refusal to Continue Injunction.]—Motion by the plaintiff to continue an interim injunction, granted, upon the application ex parte of the plaintiff, by one of the Local Judges at Ottawa, restraining the defendant from excavating and carrying on building operations upon the premises No. 48 Muchmore street, in the city of Ottawa, said to be under lease from the defendant to the plaintiff. BRITTON, J., said that the plaintiff did not make out a case of any actual damage, either present or future. Even assuming that the plaintiff's lease covered the land on which the defendant was doing work, that part of the land was not now of any advantage to the plaintiff; and the lease will expire on the 30th April next. On the whole facts, this seemed to be a case rather for damages, if the plaintiff was entitled to recover at all, than for an injunction. Stopping the defendant's work might be a serious matter for him; and what the defendant had done and proposed to do in the way of building could not seriously injure the plaintiff in any way. Injunction dissolved; costs to be in the discretion of the trial Judge. J. F. Smellie, for the plaintiff. F. B. Proctor, for the defendant.

BREWER v. GRAND TRUNK R.W. CO.—DIVISIONAL COURT—JAN. 16.

Railway—Collision—Death of Person—Negligence—Evidence for Jury—New Trial.]—An appeal by the plaintiff from the judgment of MULOCK, C.J.Ex.D., dismissing the action, which was brought by Louisa Brewer to recover damages for the death of her husband, E. S. Brewer, who was killed in a collision between two of the defendants' trains, alleged to have been caused by the negligence of the defendants. MULOCK, C.J., was of opinion that there was no evidence of negligence to go to the jury. The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ. The Court reserved judgment pending the decision of the Supreme Court of Canada upon appeals from the judgments of the Court of Appeal in McKeand v. Canadian Pacific R.W. Co., 2 O.W.N. 812, and Griffith v. Grand Trunk R.W. Co., 2 O.W.N. 1059. The decisions of the Court of Appeal having been affirmed, the Court directed that the appeal in this case should be allowed and a new trial had, upon the ground that there was some evidence for the jury. Costs of the former trial and of the appeal to the plaintiff in any event. E. G. Porter, K.C., for the plaintiff. D. L. McCarthy, K.C., for the defendants.

[See Richard Evans & Co. Limited v. Astley, [1911] A.C. 674.]

STONE LIMITED v. ATKINSON BROTHERS—DIVISIONAL COURT—JAN. 18.

Appeal—Question of Fact—Finding of Trial Judge—Refusal to Disturb—Evidence.]—Appeal by the defendants from the judgment of Judge Denton, one of the Junior Judges of the County Court of the County of York, in favour of the plaintiffs, in an action, in that Court, to recover $440, the price of 2,500 posters designed by the plaintiffs and furnished by them to the defendants. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and LATCHFORD, JJ. The Chief Justice said that the defendants' counsel very ingeniously endeavoured to take the case out of the rule laid down in Bishop v. Bishop, 10 O.W.R. 177, and to bring it within Beal v. Michigan Central R.R. Co., 19 O.L.R. 502. He (the Chief Justice) had perused the evidence twice with a view of seeing whether the argument that the Judge misapprehended the effect of the evidence, or failed in any way to appreciate the relation of the facts as he found

them to the issue which he was trying, was well-founded; and was of the opinion that it was not. The trial Judge had found distinctly in favour of the testimony adduced by the plaintiffs as against that of the defendants in at least two vital particulars; and there was no reason for finding fault with his conclusions. The case fell within the general rule; and the appeal should be dismissed. LATCHFORD, J., agreed, for reasons briefly stated in writing. BRITTON, J., dissented, being of opinion, for reasons stated in writing, that the trial Judge had failed to consider a material part of the evidence given by the defendants; and, as against the defendants, had given undue weight to the evidence of witnesses called for the plaintiffs, who were or had been in the plaintiffs' employ, and who were interested in putting upon the defendants the job in question. It was the duty of the Divisional Court to rehear the case. In his opinion, the appeal should be allowed and the action dismissed except as to the amount paid into Court. In the result the appeal was dismissed with costs. F. E. Hodgins, K.C., for the defendants. Grayson Smith, for the plaintiffs.

GALLAGHER v. KETCHUM & CO. LIMITED—BRITTON, J.—JAN. 18.

Trover—Conversion of Automobile—Joint Tort-feasors—Damages—Lien for Repairs—Want of Notice.]—Action of trover for an automobile. The plaintiff and one Bannerman had been in partnership in an unsuccessful business in real estate. A dissolution took place on the 7th March, 1911. By the agreement of dissolution, witnessed by the defendant Shaver, the plaintiff assumed the liabilities, estimated at $370, and became the sole owner of the office furniture and the automobile in question. An agreement was made between the plaintiff and the defendant Shaver that the latter should get the automobile repaired, at a cost of not more than $350, and should then sell it for the best price reasonably obtainable; that he should sell the office furniture and should pay all the liabilities of the late firm of Bannerman & Gallagher, and should repay himself out of the proceeds of the sale of the furniture and the automobile, and pay over the balance, if any, to the plaintiff. This was the agreement as found by the trial Judge; but the defendant Shaver said that the real agreement did not limit the repairs to $350, and allowed him to keep out of the proceeds the sum of $300, which, he said, Bannerman owed him. Shaver was connected with the defendant company; and that company made the re-

pairs to the automobile, and claimed $1,342.14 against it. The plaintiff declined to pay more than $350. On the 20th July, 1911, the defendants sold the car to one Gavin for $1,398.14; soon after Gavin got possession, it was destroyed by fire. The learned Judge held, upon the evidence, that the defendants were joint tort-feasors and were liable to the plaintiff. The defendants, of their own wrong, did repairs, as they alleged, to a much greater amount than $350; but only $350 should be allowed by the plaintiff. The defendants paid liabilities of the plaintiff, $288.19; they realised from the furniture $100; leaving a balance of $188.18 due to the defendants. Deducting this balance plus the $350 from the $1,398.14 obtained from Gavin, there remained $859.95, at which amount the plaintiff's damages were assessed. The defendants were wrong-doers; and, even if they had a lien for repairs, they did not assume to sell or attempt to realise the amount of their lien according to law. No proper notice was given to the plaintiff, and no proper means taken to realise the best price. Judgment for the plaintiff for $859.95 with costs. Counterclaim dismissed with costs. W. C. McCarthy, for the plaintiff. T. A. Beament, for the defendants.