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TEETZEL, J. JUNE 22ND, 1906.

CHAMBERS.

RE HENDERSON AND CANADIAN ORDER OF ODD-FELLOWS.

Life Insurance—Wife of Assured Designated as Sole Beneficiary—Death of Wife during Lifetime of Assured—Failure to Make New Designation—Children Entitled in Equal Shares.

Application by the adult children of one Henderson, deceased, for payment out of Court of their shares of a sum paid into Court by the above named Order, being the proceeds of an insurance on the life of the deceased.

W. E. Middleton, for the applicants.

F. W. Harcourt, for the infant children.

S. G. McKay, Woodstock, for Mrs. Beaumont.

TEETZEL, J.:—The wife of the assured having been designated by him sole beneficiary, and having died during his lifetime, and he not having made any further declaration respecting the benefits under the policy, the children of the assured are entitled to the money in equal shares, under subsec. 8 of sec. 159 of R. S. O. ch. 203, as enacted by sec. 7 of 4 Edw. VII. ch. 15. The contention that this section does not apply where there was only one beneficiary originally named, who dies in the lifetime of the assured, cannot be upheld. While the affidavit of Mrs. Beaumont does not disclose any agreement binding upon the adult children for a

division of the insurance, the order will direct payment to the children without prejudice to any action she may be advised to bring either against the adults or the estate. No order as to costs, except those of the adult children and of the official guardian be paid out of the moneys in Court.

CARTWRIGHT, MASTER. JUNE 25TH, 1906.

CHAMBERS.

TRAVISS v. HALES.

(TWO ACTIONS.)

Judgment Debtor—Examination of—Costs of—Examination of Transferee—Disposition of Costs.

Motion by plaintiff for an order disposing of the costs of the examination of one of the defendants in the first action as a judgment debtor and of the examination of a transferee who was made defendant in the second action.

J. W. McCullough, for motion.

James Hales, contra.

THE MASTER:—These examinations resulted in the bringing of the second action, in which the impeached transfer was set aside.

It seems reasonable that these costs should be recoverable against defendants in the first action and against the land.

If it was sought to have them made costs in the second action so as to render the transferee personally liable, I think the application should have been made to the trial Judge. See Tucker v. The "Tecumseh," 7 O. W. R. 377.

As the costs of the second action were fixed by the trial Judge at $40, and plaintiffs' appeal as to this has been dismissed by the Divisional Court, I do not see that I have any power to increase them.

The order will therefore be that the costs of the examination be recoverable against the defendants in the first action, which will bind the land in question.

There will be no costs of the motion, as it has been only in part successful.

CARTWRIGHT, MASTER. JUNE 25TH, 1906.

CHAMBERS.

SERVOS v. LYNDE.

Venue — Motion to Change — County Court Action — Convenience—Witnesses—Counterclaim.

Motion by defendant to transfer the action from the County Court of Lincoln to that of Ontario.

J. W. McCullough, for defendant.

H. E. Rose, for plaintiffs.

THE MASTER:—The action is to recover the value of a quantity of hay which was in a barn leased by defendant from plaintiffs' testatrix.

The defences are: (1) that the hay was worthless; (2) that the testatrix gave it to defendant to use for manure on the farm which was leased by her to him. The defendant also counterclaims for damages for breach of covenants in the lease and asks $600.

Assuming that the affidavits are true, then it appears that the plaintiffs will have 8 witnesses, including two of the three executors. The third plaintiff resides in Ontario, but desires the action to be tried in Lincoln, where all the business of the deceased has been conducted.

The defendant must himself be at the trial. He also says he intends to call 10 or 12 witnesses as to the value of the hay.

Assuming that this is necessary or permissible, it would only leave a balance of 2 or 3 witnesses in favour of the motion. This, under the cases, is not a sufficient preponderance to justify the removal of the action from the county where the plaintiffs have brought it reasonably and not vexatiously.

Except in a case such as Farmer v. Kuntz, 7 O. W. R. 829, the fact of a counterclaim is not to be considered.

The motion fails and is dismissed with costs in the cause.

The case of Saskatchewan Land and Homestead Co. v. Leadley, 9 O. L. R. 556, 5 O. W. R. 449, cited for the motion, does not seem in point. . . .

[Affirmed by CLUTE, J., 29th June, 1906.]

ANGLIN, J. JUNE 25TH, 1906.

TRIAL.

FLYNN v. KELLY, DOUGLAS, & CO.

Sale of Goods—Action for Price—Refusal to Accept—Contract—Telegraph—Agency of Telegraph Company—Mistake in Transmission—Evidence—Destruction of Original Dispatch—Secondary Evidence of Conients—Burden of Proof—Failure to Prove Contract—Non-delivery of Part of Goods Ordered—Delay in Shipment.

The plaintiffs, fruit canners of St. Catharines, sued the defendants, merchants of Vancouver, B.C., for the price of a car of canned fruits and vegetables shipped to Vancouver in September, 1905, which the defendants refused to accept.

M. Brennan, St. Catharines, for plaintiffs.

A. C. McMaster, for defendants.

ANGLIN, J.:—In August, 1905, plaintiffs wrote to defendants a letter quoting prices of various canned goods, including beans, pears, plums, and cherries. Satisfactory proof of the loss of this letter was given, and secondary evidence of its contents received. It concluded with a request or suggestion that defendants should order by wire at the expense of plaintiffs. Defendants' witnesses, examined on commission, though they do not pretend to give the language of the letter, say it contained a distinct request to order by wire at the expense of plaintiffs. The evidence of the only witness called for plaintiffs is not at all clear that the passage in question fell short of a request and amounted merely to a suggestion that defendants should order by telegraph, and he admits that the plaintiffs offered to pay the charges of the telegraph company for any such message sent by the defendants. No copy of this letter appears to have been kept by the plaintiffs. Upon this evidence I should be obliged to hold, if necessary, that plaintiffs did request defendants to telegraph at their expense.

On 29th August plaintiffs received from the Canadian Pacific Railway Company the following despatch, upon which they paid the charges: "Vancouver, B.C., Aug. 29,

1905.—Flynn Bros., St. Catharines. Hundred refuge beans two fifty gallon pears three hundred tomatoes three fifty lombard plums twenty-five red pitted cherries must ship immediately wire car number Canadian Pacific. Kelly, Douglas, & Co."

On 30th August plaintiffs sent in reply this message: "Aug. 30.—Kelly, Douglas, & Co., Vancouver, B.C. Have booked your order, will have same rushed forward. Flynn Bros."

On 1st September plaintiffs received the following despatch: "Vancouver, B.C., Sept. 1st, 1905. To Flynn Bros. Goods must be shipped at once or cancel, advise Canadian Pacific car number, rush. Kelly, Douglas, & Co."

On 5th September plaintiffs shipped 300 cases of tomatoes, 350 cases of plums, 100 cases of refugee beans, and 25 cases of red pitted cherries, and mailed an invoice for this "car-load" to defendants. On receiving this invoice on 13th September defendants telegraphed: "Vancouver, B.C., Sept. 13, 1905—Flynn Bros., St. Catharines, Ont. Cannot accept goods, only ordered fifty plums, wanted pears, you dispose elsewhere."

On the same date defendants wrote explaining that their order had been for 50 cases of plums, and that they could not take any of the fruit because the pears ordered had not been sent. To this plaintiffs did not reply. The car reached Vancouver on 23rd September. On 2nd October defendants wrote plaintiffs confirming their telegram and letter of 13th September and informing plaintiffs that the car lay awaiting their disposition. On 7th October plaintiffs telegraphed defendants: "Goods shipped strictly according to order received; pears are ready to ship; you must accept goods; have written." Defendants answered this message on 9th October, reiterating their refusal to accept. On 17th October they again wrote declining to accept and informing plaintiffs they would resist any attempt to hold them liable for the car of fruit.

The pears were in fact never shipped. Plaintiffs, in excuse for non-shipment of this part of the order, say that the balance of the order filled a car, and that the custom of the trade, their course of business with defendants, and the tenor of the telegraphic orders on which they acted, required shipments to be in car-loads, and justified their withholding

the pears for a reasonable time until another car-load for Vancouver should be ready for shipment. They add that, owing to difficulties in the printing trade, they could not get labels for canned pears, and therefore could not ship them. They do not appear to have been ready to ship the pears until about 7th October, before which time defendants had definitely refused to accept any of the goods.

Defendants maintain that there was no contract because of a mistake of the telegraph company in transmitting their order, by which the words, "three hundred tomatoes threes fifty lombard plums," in the despatch handed by them to the Canadian Pacific Railway Company were converted, in the transcript delivered by that company to plaintiffs, into "three hundred tomatoes three fifty lombard plums," resulting in their being sent seven times the quantity of plums they intended to order. They also maintain that the failure to deliver the pears ordered entitled them to reject the rest of the goods shipped.

Plaintiffs, on the other hand, contend that the Canadian Pacific Railway Company were agents of defendants in transmitting the message of 29th August; that, as against defendants, therefore, plaintiffs were and are entitled to treat the transcript delivered to them, and admitted in evidence without objection, as the order of plaintiffs; that there is no admissible evidence to prove any other order or any mistake in the transmission of the telegram, because the original despatch delivered by defendants to the Canadian Pacific Railway Company in Vancouver has not been produced, and, its loss or destruction not being proved, the secondary evidence of its contents taken on commission is inadmissible; that plaintiffs' acceptance of the order contained in the despatch as delivered to them constituted a binding contract; and that the non-delivery of the pears with the rest of the order did not, in the circumstances, justify defendants' refusal to accept the carload shipped to them.

The burden of proving a contract and performance of their part of that contract rests upon plaintiffs. If, as is contended by defendants, because of the request of plaintiffs that defendants should order by wire and at plaintiffs' expense, the Canadian Pacific Railway Company in transmitting the message of 29th August were in reality the agents of plaintiffs, there would be little, if any, weight in the contention that defendants were bound by the incorrectly trans-

mitted message which plaintiffs received. The error of the Canadian Pacific Railway Company would, in that aspect of the case, be the error of plaintiffs' own agents, the delivery of the order to plaintiffs being at Vancouver, when it was handed to their agents for transmission. But if there were no such request by plaintiffs sufficient to constitute the Canadian Pacific Railway Company their agents in the transmission of defendants' order, although some American Courts —see Durkee v. Vermont Central R. R. Co., 29 Vt. 129; Morgan v. The People, 59 Ill. 58; and Scott & Jarnagin's Law of Telegraphs, secs. 351, 360; but see also Smith v. Easton, 54 Md. 139, and Pepper v. Western Union, 87 Tenn. 554—hold that, because the telegraph company is the agent of the sender, defendants would be bound by the erroneous copy of their despatch delivered to plaintiffs, and that the copy so delivered should be deemed the original order of defendants. English and Canadian decisions binding upon me do not countenance this view. . . .

[Reference to Henkel v. Pape, L. R. 6 Ex. 71.]

Assuming the mistake, which defendants in the present case allege, to be proved by proper evidence, I can see no ground upon which this case can be distinguished from Henkel v. Pape. That the telegram was in that case transmitted by the post office cannot make any difference in principle. The authority for the transmission and delivery of the message is in each case the same, and that authority the Court, in Henkel v. Pape, held to be limited to the transmission of messages in the terms in which senders deliver them. It follows that not the copy delivered to the recipient of the message, but the document handed to the telegraph company for transmission, is the original order which must be proven to establish the contract.

In Kinghorn v. Montreal Telegraph Co., 18 U. C. R. 60, the Court held that when a contract is attempted to be made out through the telegraph, the messages signed by the parties must be produced and not the transcripts taken from the wire. See also Verdin v. Robertson, 10 Ct. of Sess. Cas., 3rd series, 35.

But it is argued by Mr. Brennan that because the transcript handed to plaintiffs was put in evidence at the trial without objection, and because defendants have failed to prove by any admissible evidence the contents of the message

delivered by them to the Canadian Pacific Railway Company for transmission, there is no proof that there was any error in the transcript, and its sufficiency as evidence of the offer of defendants is not open to question.

Defendants, instead of proving as a fact the destruction of the message delivered by them to the Canadian Pacific Railway Company for transmission on 29th August, relied upon some presumption, which they conceived arose from a supposed statutory provision permitting the destruction by telegraph companies of such messages after the expiration of 6 months from their delivery for despatch, to establish such destruction for the purpose of rendering admissible secondary evidence of the contents of the message in question. I find no such statute. But neither upon a permissive statute nor upon any custom, if proven, could there arise such a presumption. The fact of destruction must be shewn. It follows that the secondary evidence of the contents of the message delivered by defendants to the Canadian Pacific Railway Company was inadmissible, and, as it was objected to on behalf of plaintiffs, it must be rejected. There is, therefore, no evidence to shew what the order was of which defendants actually directed the transmission, and no evidence that the transcript delivered by the Canadian Pacific Railway Company to plaintiffs was incorrect.

But the burden of proving the contract is upon plaintiffs. It is not for defendants to prove that the transcript produced by the plaintiffs is not a true copy of the order which defendants handed to the Canadian Pacific Railway Company. Plaintiffs must prove its accuracy, which is not presumed in their favour. Neither does the admission of that transcript in evidence without objection render its terms binding upon defendants. It was not and could not be evidence of the order given by defendants, without proof that it was in fact a copy of the order which they had directed to be transmitted, and that the original, of which it purported to be a transcript, had been destroyed or lost. Its production was in any event a link in the chain of evidence requisite to prove that the order handed by defendants to the telegraph company had in fact been transmitted and delivered to plaintiffs. For that purpose it was relevant and admissible primary evidence, and its reception could not have been successfully resisted by defendants. But it by no means follows that its admission in evidence excused plaintiffs from

further proof of the order of defendants, by production of the original signed by them, or by proof of its destruction or loss and secondary evidence of its contents, which, without proof that it was in fact a true copy, the transcript delivered to plaintiffs does not furnish. In the absence of these further and indispensable links in the chain, the fact proved by the production of the transcript, viz., that such transcript was received by plaintiffs, goes for nothing. Yet neither its relevancy nor its admissibility can be doubted.

It follows that plaintiffs have failed to prove any contract by defendants to purchase the goods in question.

Moreover, though secondary evidence was given of a portion of the contents of plaintiffs' letter, quoting prices to defendants, upon which the latter sent an order, plaintiffs have wholly omitted to prove what were the prices so quoted. In their pleadings they allege that the price of the goods shipped amounted to $1,382.50. But this, as well as other allegations, defendants deny. Were this the only difficulty in plaintiffs' way, I should probably allow them to supply evidence of the prices actually quoted. But upon the evidence as it now stands there is no proof whatever of the prices quoted by plaintiffs to defendants upon which they are alleged to have ordered the goods in question. This very material element of a contract is entirely lacking.

If there had been a contract between plaintiffs and defendants established for the sale and purchase of the goods mentioned in the transcript of telegram received by plaintiffs, the non-delivery of the 250 cases of pears ordered would, in my opinion, have justified defendants' rejection of the other goods sent. Instalment delivery was not contemplated. Immediate shipment of the whole was the basis of defendants' offer, emphasized by their second telegram of 1st September. The failure to send the pears with the other goods was not, I think, excused by the alleged custom as to carloads, and certainly not by any inability to procure labels. Plaintiffs had no right to require defendants to accept delivery of part only of what was an entire order. But even if, owing to the carload being complete without the pears, some little delay in forwarding these might be permitted, the delay from 29th August to about 7th October was so unreasonable that it might have justified defendants in returning the other goods, had they taken delivery of them in anticipation of the pears coming within a reasonable time.

The action therefore fails and will be dismissed with costs.

TEETZEL, J. JUNE 25TH, 1906.

TRIAL.

FAULKNER v. CITY OF OTTAWA.

Municipal Corporation—Sewer — Insufficiency—Backing up Water into Cellar of House—Liability of Corporation.

Action for damages to plaintiff's stock in trade and premises by flooding, caused, as he alleged, by an insufficient sewer.

G. F. Henderson, Ottawa, for plaintiff.

Taylor McVeity, Ottawa, for defendants.

TEETZEL, J.:—I find upon the evidence that while the sewer, as originally constructed past plaintiff's premises on Clarence street, between King and Dalhousie streets, was probably sufficient for the territory then intended to be served thereby, yet the subsequent extension to Sussex street and the addition of many subsidiary drains leading into it have completely overtaxed its capacity, so that when there is a very heavy rainfall the contents of the sewer back up into adjoining cellars. The extension and subsidiary drains referred to were constructed by or under the direction of defendants.

According to the weight of expert opinion, the capacity of the original sewer and its outlet is not more than two-thirds of what it should be to accommodate the increased burden imposed by the acts of defendants. Having regard to the size and grade of the original sewer and the service already imposed upon it, I think defendants have acted negligently in so increasing the facilities for running into it storm water and sewage as to cause backing up and flooding during heavy rain storms, and that, in consequence of such negligence, plaintiff's basement was flooded and his goods damaged on the 3 occasions complained of. While the rainfall on these occasions was unusually heavy, none of the storms was so extraordinary as not to have been

reasonably anticipated and with ordinary prudence provided for by defendants.

I think the case comes within such authorities as Coghlan v. City of Ottawa, 1 A. R. 54, and Hawthorn v. Kannulink, [1906] A. C. 105.

I assess plaintiff's damages at $1,700, and direct judgment in his favour for that sum with costs.

BOYD, C. JUNE 25TH, 1906.

TRIAL.

ATTORNEY-GENERAL FOR ONTARIO v. HARGRAVE.

Crown—Mining Leases—Action by Attorney-General to Cancel—Improvidence—Misrepresentations—Affidavit as to Discovery—Untruth of—Evidence—Land Titles Act—Costs—Compensation for Improvements—Notice.

Action for the cancellation of certain mining leases and to recover possession of the lands comprised therein.

C. H. Ritchie, K.C., and R. D. Moorehead, for plaintiff.

E. F. B. Johnston, K.C., for defendant E. C. Hargrave.

J. Shilton, for defendants the White Silver Co.

BOYD, C.:—This action brought . . . (in the public interest) . . . took 10 days to try, with the result that a great mass of material, documentary and oral, has been gathered—much of which abounds in contradictions, inconsistencies, and singular contrasts of recollection, yet upon the essential issue the evidence is sufficiently clear and explicit.

That single point, upon which everything else turns, so far as the jurisdiction of the Court is concerned, appears to be this: Is the affidavit as to discovery upon which the claim rests, and upon which the Crown proceeded, a true or an untrue document? No one can give primary evidence as to the actuality of the discovery of valuable minerals on the particular locations except the man who claims to have

made the discoveries, for he was alone on the field without companion or witness, or existing memorandum made at the time. Yet his own admissions are practically conclusive that to support his claim he must shift the time of discovery to an earlier period by at least one month. The affidavit on which the claim is based fixes the date as 19th December, 1904, as to the three lots now in question. But his own evidence shows that he was at none of the lots in December, 1904, save only one; that is, being somewhere opposite lot 3 in the 4th concession, and casting his eyes over the snow, he saw upon the face of a rock some "cobalt bloom." This, however, is not the mineral which he claims to have discovered on that day on that lot in his affidavit; his sworn claim is for "cobalt arsenide." Now these two are of marked difference in colour, appearance, formation, and quality. "Cobalt arsenide" is otherwise known as "smaltite," and "cobalt bloom" or arsenate has a scientific name "erythrite" to mark its distinctive hue. One of the strongest witnesses for the defendants (Grover) doubts if the cobalt bloom could be seen in this locality in the month of December.

Besides this, serious doubt is cast upon Hanes being at this particular spot on that day, by the contrast between the evidence of Mr. Blair (whose recollection was fortified by a contemporaneous official diary) and the varied discoveries claimed by and on behalf of Hanes about this time. To exemplify: Blair states that Hanes came from Toronto to see him at New Liskeard on Friday evening 16th December. Blair occupied all the next day, Saturday 17th December, in taking Hanes round to visit the various mines then being worked in the Cobalt region, introducing him at different places, and collecting samples of ore to be given by Hanes to Professor Bain on his return. They parted at 10 p.m., Hanes saying that he was going home next day on a train which was to leave on Sunday. According to the affidavits filed—which supply the only definite information adduced emanating from the discoverers—to Hanes are attributed mineral discoveries on the 16th, 17th, 19th, and 20th December, at spots very remote from the Blair itinerary.

Again, and apart altogether from this, is the distinct statement by Hanes that all his discoveries were made some time in November, 1904. It was in that month that he walked down the transit line between sections, discovered

valuable minerals on either side his path, measured, by pacing from the survey posts, the exact location of his "finds;" was certain by inspection and from his scientific knowledge concerning their intrinsic value; could and might have made formal claim in November, inasmuch as nothing appears to be lacking on his own evidence to give him at that time the status and privileges of the first discoverer. He was familiar with the provisions of the Mining Act; knowing it was not necessary under the then existing law that the claim should be staked, he took the risk of criticism or of skepticism by abstaining from the obvious precaution of putting some mark on the ground to indicate his "finds."

As a competent person who was just finishing his fourth year in the School of Practical Science, and had completed his apprenticeship as a provincial land surveyor, it is impossible to disregard his statement that each item of discovery on the many locations was then made and was then complete. The excuses put forward rather by way of suggestion than explicitly that he waited to make an assay and that he returned next month (after the assay had certified values which he had before approximated) to see if there was any adverse claim or occupation, and that the discoveries are not to be accounted complete until all these factors concurred—these excuses are not relevant to postpone the date of the alleged actual discoveries.

Some stress has been laid upon the looseness of practice in the lands office prior to the creation of this district into a mining subdivision in April, 1905. It may be assumed that had application been made merely for 2 or 3 forty-acre lots before stricter regulations were imposed, these applications, accompanied by the usual affidavit, would have gone through the department unquestioned and almost as a matter of course. But early in the year 1905 the attention of the department was drawn to various circumstances by different persons (Professor Miller, among others, whose report first brought the district into notice in its mineralogical aspect), casting suspicion upon the genuineness of the Hanes explorations. Seventeen applications were sent in to the department based upon discoveries claimed to be made by Hanes (the son) ranging from 16th to 20th December, 1904; and, in addition, a smaller cluster claimed to be made by Hanes (the father) almost contemporaneously. It was further pointed out that the ground was covered with snow in that

part of the month, which would either prohibit or not permit of such rapidity in successful prospecting. This unusual combination of circumstances certainly raised doubts in the department—led to inquiries being made . . . . led to requests or demands that the alleged discoveries should be verified in situ. This course of inquiry and investigation was cut short by the issue of the patents or mining leases under the direction of one of the subordinate officers in the Crown lands department, but without the direction or sanction of the Commissioner. The attention of the applicants claiming by virtue of the Hanes discoveries was drawn to the number of applications by letter in January, 1905 (16th January). Hanes himself admits that he thought there would be a row growing out of so many applications being put forward on discoveries made in so short a time. Yet when he received a letter from the Deputy Commissioner Gibson, dated 13th May, 1905, and received a day or two later, calling on him to make good his discoveries on the ground, he returned no answer. And being seen a fortnight or so after by Mr. Gibson, and the matter being again pressed upon him, he declined the undertaking and remarked that he did not know if he could go to the places again or not.

About contemporaneously with this came the interview with the then Commissioner of Crown Lands (Mr. Foy), who invited Hanes to explain how so many discoveries could be made in so short a period with the snow on the ground. But Hanes acted the reticent part—talked round the question and vouchsafed no explanation. So was the difficulty left unsolved, and the Commissioner said that upon and after that interview he would not have sanctioned the issue of the patents. (The Crown leases were dated 4th May and recorded 23rd May. Mr. Foy became Attorney-General on 31st May, and upon learning what had been done, he telegraphed warning to the Master of Titles at North Bay on 31st May, and caused the caution to be registered 8th June, 1905.)

Mr. George Hanes admits in his evidence that the snow was half way up to his knees when he was in Cobalt in December, 1904, but as to November he can give no date when he made any particular discovery.

(It may be noted parenthetically that Mr. Hanes (the father), being likewise called upon by the department to point out his alleged discoveries on the particular locations, made the attempt but failed therein, according to the report

of the government officer who accompanied him. This was spoken of in the interview between Mr. Gibson and Hanes (the son) towards the end of May, 1905.)

The reasonable desire for explanation and investigation on the part of the Crown, which was frustrated by the inertia of Hanes and the improvident issue of the mining leases, is now in effect being prosecuted before the Court, to such an extent at least as will remove any obstacle to the free and just action of the Crown, in case it appears that the present leases should not stand as valid concessions to the present holders.

It is argued that an honest or unwilling mistake in dates should not prejudice one who is in fact the first discoverer. Good reason may exist for recognizing his claim to priority, though it be presented in a mistaken manner. I am not persuaded that this argument should weigh with the Court, though it may be proper to urge before the Commissioner while yet the land is under his control or has been restored to his control. It is the practice of the Crown to issue patents to rightful claimants; the Crown may also ask the Court to investigate and determine who is the rightful claimant; but this litigation is solely to vacate the patents because wrongly granted. The department or the Commissioner will then, if the grant is declared void, proceed to deal with the land returned to its jurisdiction, under the provisions of the late Ontario statute, or in any other competent manner as may seem just and appropriate under all circumstances.

But under the belief perhaps on both sides that much or something might be gained by transferring the date of discovery to an earlier month, when the ground was not covered with snow, and by proving that the actual discoveries were then made by Hanes, the area of investigation has been enlarged far beyond the bounds of what was needful for the determination of the vital issue between the litigants.

On this head the grave difficulty encountered by the defence has been to find a week in November during which Hanes could be clearly proved to be absent from the city, and wherein his visit could be fitted reasonably well. That is the problem propounded by Hanes himself. His nearest approach to accuracy as to times is that he left Toronto on a Thursday night and would be in the Temiscaming district on the evening of the next day; that he was four days in the Cobalt region; that he returned on a Wednesday, which would bring

him to Toronto again on Thursday night. The journey, therefore, embraced a full week, and at the outset of his examination he thought that his trip began early in the month and before the 15th November. By this reckoning his excursion would begin on Thursday 3rd November and end on Thursday 10th November. But the witnesses called to substantiate a visit in November favour a later date, after "Thanksgiving day," which was 17th November, 1904, although all (like Hanes himself) speak with excessive vagueness. As to time they all agree in testimony of uniform uncertainty; but in other details they disagree. Miss Turner says that Hanes told her he was going north twice in November and then in December; as to what time it was in November, cannot remember; is certain he told her in November—hesitates—thinks it must have been in November, but is clear that he was not a week absent from her boarding house in November. Mr. Grover met Hanes about 18th or 20th November; had room and meal at Kerr Lake together, then both went to Cobalt and had dinner together; slept on floor together and had breakfast next morning at Sansterre; only met him that once. Fixes time by his shifting camp from Kerr Lake on 25th November up to near Cobalt, and saw Hanes before camp shifted. Mr. McGregor saw Hanes at the Grover camp at Kerr Lake around middle or towards end of November. Saw Hanes a few times in 3 days. He and Grover saw Hanes the second day after Hanes had dinner in Grover tent. He fixes dates by having made note of a big snow storm on 2nd December, which appears to have been omitted from the meteorological observations at Haileybury. Mr. Herman was introduced to Hanes by Grover in the latter part of November, 1904, and he put up Hanes for two nights in his (Herman's) camp. Grover's camp was then a quarter of a mile off at Cobalt. This rather conflicts with Grover's dates, as he puts his camp at Kerr Lake at the time of Hanes's visit. If Herman is right, the visit would be after 25th of November (which was a Friday).

Leaving this state of uncertainty and turning to the evidence on the other side, we find by the record of attendance kept at the School of Science something presumably more accurate as to the student Hanes's movements. First of all he asked and obtained leave of absence in December; not so in November. Next, he is marked as being present for all the week ending on Friday 11th November, and as being

present from 14th to 16th November, and again present from 21st to 25th November, and also on Monday 28th November. These records are verified by the teachers Mickle and Bain, and, as the scholars in Mickle's class were only 6 and in Bain's only 5 (Hanes being in each), they could readily keep track of who was present.

Raymond says that Hanes, his school-mate and fellow-boarder, told him that he was going to his home in Windsor over Thanksgiving day; he met Hanes on Monday (21st November) on his return, and made inquiries and received answers as to certain friends in Windsor whom Raymond knew.

And still further Mr. Blair was at Cobalt on 17th, 18th, and 19th November, 1904, slept at Sansterre, and saw no sign of Hanes being there. He saw Hanes in Toronto on 25th November, 1904, who told Blair that he intended to take a trip into Cobalt and see the country. As to Mr. Blair's accuracy, I have no doubt; so that all this cumulative evidence by the plaintiff as to the whereabouts of Hanes in November renders it difficult to be assured of his presence at Cobalt in that month.

Hanes could recall in the witness box no person, no place, no event connected with his November visit by which his movements could be checked or followed. Now it is passing strange that the comely presence of Madame Sansterre (who tipped the scales at 220 lbs., as her brother remarked) should have slipped clean out of his memory. She presided over the mining camp where he slept once (according to Grover) and had some meals, and into her hand was paid the 25 cents for each item of bed and board. Strange that he forgot the incident graphically described by Mr. Grover, with whom he rested on the floor of a small chamber off the dining camp one sharp November night, with the one blanket furnished by Madame as a covering for both. And the two nights following when the hospitality of Mr. Herman supplied Hanes with the free use of a bed in his shack; the contrast of that cosy bunk with springs—all to himself—and the cold comfort of the former night on the floor—could that have escaped the ordinary mind?

Three or four persons called for the defence, in addition to the above instances, had much more vivid recollections of Mr. Hanes's visit to Cobalt in November than he

had himself. Many blanks were filled up by their bold touches. For instance, one voluble witness recalled the novel appearance Hanes presented wearing the white collar of civilization in combination with the pick of the prospector. The incongruity impressed his memory. Hanes, however, by his account carried and had no pick, but contented himself with using his boot to kick off tractable specimens of rock.

Taking together the whole of the evidence for and against . . . with all its contrasts and contradictions, I find no substantial residuum which supports the claim of Hanes in regard to his November discoveries.

Hanes's own conduct, his remarkable nescience as to any person, place, or event which might enable one to trace his course or check his visits to the various lots in November (manifested during the two days of his examination at the opening of the case) appears to me to be the strongest factor against him. His rejection of the three opportunities given him to explain his course of prospecting or to indicate the manner of his finds, in the call made upon him by the department to go over the territory, in the further request made during his interview with the Attorney-General, and again during the trial his inability to trace upon the map his course of travel in the district—these add to the general air of unreality which surrounds the narration of his explorations.

The antagonistic attitude he took in response to Mr. Gibson's letter as being in the nature of an arbitrary demand was surely ill-advised. It is quite obvious that the Crown, i.e., the government, had the right to require from Hanes proper explanations and verification in a case where the pretensions of the discoverer might be fairly challenged. His failure to comply or to attempt to comply with the call is a strong indication that he dared not risk the crucial test. If it be, as put in the defence, that the path along the transit line by the side or marking the boundary of these lots in the 4th is plain and well defined, of 2 or 3 feet in width, through the woods and over the hills (as Hargrave testifies); if it be, that the evidences of mineral wealth are so abundant and to the searching eye so obtrusive along the way side (as Grover affirms); if it be that the conditions for observation are as favourable in May as in November from the absence of herbage and foilage (as Herman declares); and if it be,

that Hanes is an experienced woodsman familiar with lumbering operations in the brush from his earliest years (as Mr. Johnson points out); why then did he hesitate to repeat in May what he had so easily achieved in November?

These salient points of difficulty are not obviated by the explanation offered in argument as to the secretiveness of Hanes and his "peculiar mentality." Why should he be reticent to the professors who promoted his scientific studies and suggested the visit to Cobalt and the assay of its products?

Why conceal what he had found from his associates in the venture (Williams and Rutherford), which took shape in October and in whose behalf he made the exploration? Why disclose to Miss Turner that he was going to visit Cobalt in November and on his return why tell her of his discoveries there?

Why mislead his fellow boarder and fellow student Raymond by telling him at the same time in November that he was going to his home in Windsor?

Why lead Mr. Blair and the professors to believe that in December was his first and only visit to the Cobalt district?

Why is his memory so vacant as to incidents and persons in Cobalt, and so full of detail as to the making of the Rodd affidavit in September, 1905—details which Mr. Hargrave fails to recall?

The "peculiar mentality" theory is an ingenious suggestion, but does it explain? Does it convince? I am content to leave this branch of the November inquiry in this interrogative stage; for it may possibly still be open to prove by incontestable evidence that Hanes visited those places in November, 1904. If the leases are set aside, the whole matter will then be open for the government to deal with, on the merits of the competing discoverers, or as otherwise advised.

To return to the starting point, the matter mainly in issue as to the sufficiency of the affidavit has now to be critically viewed, and satisfactory evidence given that the material laid before the Crown on which the grant was based is true in substance and in fact. Even in ex parte applications to the Court, special care is called for that no relevant information should be withheld and that no misleading information should be given, to the end that a fair and full presentation be made of all the material facts. This rule of ethics applies a fortiori when the Crown is approached for the concession of

valuable rights, properties, and privileges. There must be no attempt to disguise the true nature of the transaction; no false or untrue statements made to evade or to conceal, and especially so when the essential matters to be established require to be authenticated by sworn testimony. The all important point here is the affidavit of actual discovery of valuable minerals in situ, that is, upon the lot or parcel which may be claimed. This involves a specification of the locality, the date of discovery, and the nature or particulars of the "find." There must be such particularity in the actual discovery that the person making claim shall be able to go to the spot, and if required, point out what he has discovered. There must be particularity both as to the precise site of the ore or mineral and as to its character or quality. There must be besides priority in point of time as to discovery in order to bring the applicant within the meaning of a first discoverer; all these are pre-requisites to be established if the applicant's pretensions are questioned by the Crown.

There has been a line of ex post facto evidence presented which has been urged as a reason for accepting Hanes as the actual discoverer whose priority should be recognized by the Crown. This again is an argument not for the Court to support a faulty affidavit, but to be used for the consideration of the Crown. But I may briefly advert to this argument derived from the blue print or sketch enclosed in Hanes's first letter to Hargrave of 3rd March, 1905. This blue print has been lost, but the diversity of recollection as to what it displayed deprives it of much evidential value. Hanes was asked to re-draw this sketch, of which he had made the original, and his production varies greatly from the description of the sketch by other witnesses. The other witnesses all disagree among themselves. I think that greater reliance may be placed upon his fac-simile made in Court than on the uncertain memory of others who saw the original.

Hargrave said that Hanes told him of no discoveries he had made except as marked on this map or sketch. Hargrave said he located Hanes's discoveries on the lots on the place indicated by Hanes, but he had not the sketch with him. It was, he says, "very rude," and the government map had come out in the interval before his first visit to Cobalt in the middle of May, and he used a copy of the government map to guide him. The vein was found he says on the north-east corner of 3 in the 4th, near the boundary line, and just

as near as you could make it on the plan, and that was called the verification of Hanes's discovery.

As to variations of recollection about this blue print; Hargave says lot 3 in the 5th was not marked on the blue print; a straight line was over both lots (2 and 3 in the 4th) to mark the site of the ore. Bisland says the blue print had a number of marks, 9 in all, each a quarter of an inch long, shewing where the properties were on which finds had been made and being worked; lines marked where the veins were supposed to be, and their direction. Lines shewed the trend of the vein as found in the district up to that time. The lots shewing veins had heavier lines round their boundaries—that is, all the 9 lots.

White says that the heavier blue lines were only round the three lots in question, which were thus easily distinguishable. He says there was a short line near the centre of 3 in 5. He says the line of white did not go to Jacob's lot on blue print.

According to Mrs. Hargrave, Hanes explained in April the white line as being "the point of discovery."

Wallbridge says the lines round the three lots in question were the same as round all the others, and Hanes pointed out his discovery by a line close to the north-east boundary of lot 3; he makes the size of the blue print much smaller than any of the others who speak of it, and he says there was a short line coming from Jacob's lot on to the other (i.e., 3), and that the boundary lines of the 640-acre section were heavier than the others.

Now Hanes's sketch made in Court is wide apart from all these descriptions in this, that the one line of white in his map is about an inch in length, and runs from about the lower third of Jacob's lot south to about the middle of lot 3 in 4th, and there is no mark on lot 2 in 3rd. I have no doubt that this mark was to indicate what he told Hanes about the place orally, and also set forth in his affidavit of September, 1905, viz., that the line shewed the vein beginning in Jacob's property, which was supposed to extend into the lots he offered to sell. Not that he had discovered the vein, but was rather going upon what he had heard from others, viz., his father and Professor Miller—that the vein in Jacob's lot to the north had its extensions in the land to the south of Jacob's lot. The idea of his pointing to the place of his discovery by means of this mark in the sketch on a map in which one inch

would represent about a quarter of a mile, only shews the general vagueness of his information. This sketch altogether repels the idea of specific local discovery which could be identified in anything but the most vague way. The sketch, therefore, does not seem to me to carry the proof any further than if it had not existed.

Another matter calls for brief comment. It is said that Hanes stated "incidentally" in the government office after or about the time Whitson passed the claim, that he had made the discovery in the first place in November. Being asked by the solicitor why he had not made the affidavit when he made the discovery, Hanes said that the other affidavits had been made in December. It did not occur to the solicitor to have the affidavit corrected. It was left as it was because "the Crown judged it and passed it." It was said that this conversation was heard by the officer Whitson. He denies it, and says, had it been so, he would not have proceeded at that time to complete and sanction the application. But then was the time, when this November phase of the matter was first disclosed by Hanes, to have had the application corrected and not glossed over. The Crown judges indeed of the affidavit, but let the judgment be passed upon honest and substantial material according to the very truth of the transaction, and not according to something that somebody deems its equivalent.

In my opinion, the affidavit in this case is not a true disclosure of the real facts of the discovery. The issue of the leases thereon by the subordinate officers, pending inquiries made and explanations sought by the Commissioner and another branch of the office, was improvident, and the grants should be vacated. I do not find proved any conspiracy or fraud on the part of the defendants who now own the mine. As stated in Attorney-General v. McNulty, 8 Gr. 324, 11 Gr. 281, 581, they were right in doing all they could to uphold a patent issued in their favour, and their conduct is not such that they should be visited with costs.

They are also entitled to be compensated by the Crown for the expenditure made by them on the property, in so far as it has enhanced its value as a mining property; this to be ascertained by the Master, without costs to either in case they cannot agree as to amount.

The protection afforded to purchasers by the Land Titles Act does not really apply to this controversy—where the root

of the title is struck at in the grant to the first holders and those in the same interests with them, and where no purchaser for value has intervened. The defendants who obtained the Crown leases by means of a misrepresentation of facts in the essential affidavit cannot hold as against the Crown (however innocent they may be), and thereby take advantage of their own motion in misleading the Crown. Any transfer of interest subsequently was made and taken with notice of the Crown's intention to impeach the transaction being placed on record.

ANGLIN, J. JUNE 26TH, 1906.

WEEKLY COURT.

MITCHELL v. MACKENZIE.

Costs—Action—Injunction—Partnership — Fraud — Master and Servant—Disclosure by Servant of Master's Business Secrets — Use in another Action — Action Becoming Unnecessary—Summary Disposition of Costs.

Motion by plaintiffs for an interim injunction, turned by agreement into a motion for judgment.

H. Guthrie, K.C., and W. E. Middleton, for plaintiffs.

E. D. Armour, K.C., for defendants.

ANGLIN, J.:—This action was brought to restrain the defendant Mackenzie, a bookkeeper in the employment of plaintiffs, from disclosing to his co-defendants, Cutten and England, information concerning the business of plaintiffs, obtained by Mackenzie in the course of his employment, and from giving such information in evidence in a then pending action, wherein his co-defendants were plaintiffs and the present plaintiffs were defendants, and to restrain the defendants Cutten and England from using any such information already obtained by them from Mackenzie for the purpose of such other action or otherwise.

A motion for an interim injunction was heard by Meredith, J., and referred by him to the Judge who should try the action of Cutten v. Mitchell. The judgment of Meredith, J., is reported in 6 O. W. R. 564. In Cutten v. Mitchell the plaintiffs, Cutten and England, sought a declaration that they were partners of the defendants in that action, Mitchell

and Foster, and an account, etc., on that basis; and, in the alternative, claimed to set aside as fraudulent certain statements furnished to them as servants of the defendants entitled by agreement to share in the profits of the defendants' business, and an account of such profits.

Upon the motion for an interim injunction in this action the present defendants resisted the plaintiffs' claim, on the grounds that, if Cutten and England were, as they and Mackenzie alleged and believed, partners of Mitchell and Foster, Mackenzie's right to communicate the information was clear, and that, because they disclosed fraud on the part of Mitchell and Foster against Cutten and England, Mackenzie was at liberty to inform his co-defendants of facts which they could call upon him to prove at the trial of the action of Cutten v. Mitchell.

The action of Cutten v. Mitchell was tried at Guelph in November, 1905, and resulted in the plaintiffs failing to establish that they were partners of Mitchell and Foster. They, however, succeeded in shewing that the statements of profits, furnished them as servants entitled to share in profits, were false and fraudulent, in that the defendant Mitchell had deducted from gross earnings a salary for himself of $2,500 per annum, in lieu of $1,500, to which he was by agreement with plaintiffs entitled—a fact which did not appear on the statements, and was intentionally and fraudulently concealed from plaintiffs. Other charges of fraud the plaintiffs failed to establish. They recovered judgment for the proportion of the salary wrongfully taken by Mitchell to which under their agreement they were entitled as profits, but were denied the right to a general accounting by the defendants: 6 O. W. R. 629. See also S. C., 6 O. W. R. 497.

The hearing of the injunction motion in this action of Mitchell v. Mackenzie was adjourned sine die, and now comes before me for disposition, the parties agreeing that it shall be turned into a motion for judgment, and that, because its further prosecution can serve no purpose, the action should be dismissed, and asking me to deal with the costs of the action, to which they both claim to be entitled.

In so far as plaintiffs sought to restrain the defendant Mackenzie from giving evidence at the trial of Cutten v. Mitchell, or to prevent the other defendants calling him as a witness, the present action was misconceived: Beer v. Ward, Jacobs 77. There was also serious difficulty in the applica-

tion of plaintiffs to restrain the defendant Mackenzie by interim injunction from disclosing information concerning the business in question to persons by whom he claimed to be employed, alleging, and, it may be, really believing, that they were partners with plaintiffs. Without disposing upon affidavit evidence of this issue of partnership, which stood for trial in the other action, Meredith, J., could not well have granted the motion made to him. But, as a result of the trial of Cutten v. Mitchell, it is now apparent that the claim of partnership had no foundation. Moreover, the charges of fraud, in respect to which the plaintiffs in the present action sought to prevent Mackenzie giving information to his co-defendants, were not established. It is also admitted by Mackenzie that he had given to his co-defendants information extracted by him from the books of his employers as to their business transactions anterior to the time at which it was claimed by these defendants that they became partners with the plaintiffs. Indeed, it is reasonably clear that Mackenzie remained in the employment of plaintiffs for some months after Cutten and England had severed their connection with the business, with their knowledge and concurrence, if not at their instigation, for the purpose of obtaining and furnishing to them information from books and papers to which his employment gave him access. This conduct of the defendants was certainly highly reprehensible.

Although they may not have been entitled to all the relief they sought, and their motion for interim injunction was probably ill-advised, the plaintiffs, Mitchell and Foster, seem to have had some very substantial grounds for bringing this action. In these circumstances, I think the proper course in dismissing it is to refuse costs to either party, and I direct that judgment be entered accordingly.

FALCONBRIDGE, C.J. JUNE 27TH, 1906.

WEEKLY COURT.

RE FOLEY.

Will — Construction — Annuities — Deficiency — Arrears — Death of Annuitants — Application of Accumulated Income—Residuary Bequest to Charities.

Motion by the executors and trustees under the will of Almira Grover Foley, deceased, for an order determining a

question arising under the will concerning the estate of the testatrix, namely: "Is any and if so what part of the residuary estate of the testatrix applicable to charitable uses at the present time or during the lifetime of any of the annuitants named in the will and codicils, and, if not so applicable, what is the proper disposition after the death of any of the annuitants named in the will and codicils of the proportion of the income or revenue theretofore required to pay the annuity of any deceased annuitant?"

The testatrix died on 22nd September, 1892. Her will was dated 17th November, 1877, and there were 4 codicils, dated respectively 23rd November, 1880, 16th September, 1885, 20th October, 1886, and 10th February, 1892.

The material portions of the will and codicils were as follows:—

"Sixth, I will and direct that any part of my estate not definitely disposed of shall be held in trust as part of my residuary estate by my executors, for the benefit of the sober and industrious but destitute or needy widows and orphans of the county of Peterborough, who must have been bona fide residents of the said county before becoming destitute or needy. . . .

"Eighthly, . . . I also give and bequeath to . . . Mary A. Grover $50 yearly and every year during her natural life. . . . .

"Ninthly, I give and bequeath to John Almers Butterfield, of Norwood, an annuity of $500 during his natural life. From and after the decease of the said John Almers Butterfield, I give and bequeath to the wife and each of the daughters of the said John Almers Butterfield $125 yearly and every year during life; at the decease of each the annuity shall lapse and become part of my residuary estate and used as herein directed. . . ."

[Then followed the bequests of a number of other legacies.]

"All the herein mentioned annuities are to commence immediately after my decease, and end with the life of each legatee, and each and all are to become part of my residuary estate, and shall be kept by my executors and carefully invested for the benefit, comfort, and support of poor and needy widows and orphans or other suffering but worthy persons. No claim for legacy shall be paid until one year

after my decease. . . The interest alone is to be used, the principal must be kept invested and be a fund forever, and if not immediately needed, let it accumulate for the benefit of future generations, and let the accumulated interest become capital or principal. . . .

"In consequence of the fluctuation in the value of stocks and interest, the said estate may be more or less than expected by me, so in any case I will and direct that each of the different legacies be increased or diminished per ratio, that each may gain or lose in proportion to the amount bequeathed in said will. . . ."

It appeared by an affidavit sworn 22nd May, 1906, and filed in support of the present application, that several of the annuitants had died, but others were still alive; that the executors and trustees had on hand $960, representing the total income or revenue of the estate that would have been paid to the deceased annuitants if they were still alive, with certain interest accrued thereon, that a committee had been organized to manage the funds provided by the will for the relief of the poor in the county of Peterborough, and a demand had been made on behalf of the committee for payment over of the $960 and any further sums that might be in the hands of the trustees in consequence of the death of any of the annuitants.

J. B. Holden, for the executors and trustees.

E. A. Peck, Peterborough, for the committee appointed to manage the funds applicable to charity.

H. D. Hall, Peterborough, for the annuitants under the will.

FALCONBRIDGE, C.J.:—It was the intention of the testatrix that the payment of annuities should commence immediately after her decease, but, as a matter of fact, the annuitants received nothing for about 3 years, and have not except during the last year or two received the whole amount of their annuities. It was not the intention of the testatrix that the sum which represents the income or revenue which would have been paid to deceased annuitants should be applicable for charitable uses during the lifetime of any annuitant claiming under the will who has suffered any deficiency. The amount, therefore, of $960 and any further sum which may accrue by reason of the death of annuitants should

be placed to capital account, and the income thereof applied to supplement pro rata the past shortage in annuities until the last mortal annuitant shall have departed this life or shall have received the full amount of his or her arrears.

Order declaring accordingly. Costs of all parties out of the fund.

ANGLIN, J. JUNE 28TH, 1906.

WEEKLY COURT.

BROCK v. CLINE.

Bankruptcy and Insolvency — Assignment for Benefit of Creditors—Motion for Removal of Assignee—Interim Injunction against Acting—Order Appointing Additional Assignee to Sell Assets of Estate—Terms—Reference—Costs.

Motion by plaintiffs for removal of the assignee of an insolvent estate—the defendant Cline, who had been restrained by order of FALCONBRIDGE, C.J., from acting as assignee, except for the preservation of the assets of the estate, until the trial of this action. The present motion was based solely upon the importance of a speedy sale of the assets, and in no wise upon misconduct or unfitness of the assignee.

H. Cassels, K.C., for plaintiffs.

C. A. Moss, for defendants.

ANGLIN, J.:—To grant the motion of plaintiffs would be, in effect, to give them judgment in the action—except as to costs. This is not, in my opinion, warranted by the material. The order of the Chief Justice, having regard to the provisions of Rule 617, impliedly determines that the right of the defendant Cline to the office of assignee is a proper subject for trial rather than for summary disposition upon motion.

The desirability of an immediate sale is not questioned. I have seen the Chief Justice and have his full approval of any variation of his order requisite to permit of such sale being had.

After a careful consideration of all the matters urged upon me, I have determined that the order will best protect the interests of all the creditors, with the slightest prejudice to the position of the defendant Cline, is that which I should make.

The defendants' counsel suggested a sale by Cline as assignee, or a sale under the supervision of the Court. Plaintiffs object strenuously to a sale by Mr. Cline—and urge that a sale by the Court, besides being costly, has disadvantages not incident to a sale by an assignee. They urge that Mr. Clarkson or Mr. Barber be appointed to sell the assets, acting as assignee for that purpose, if the Court will not substitute one of these gentlemen for Mr. Cline as assignee for all purposes.

I think the proper course, to attain the ends I have indicated as desirable, is to appoint Mr. Clarkson as an additional assignee, under sec. 8 of the statute, limiting his powers and duties to a sale of the assets, and payment into Court of the proceeds of such sale to the joint credit of the accountant and Robert S. Cline. The order appointing Mr. Clarkson will direct that he may sell the assets in any such manner as is usually adopted for the sale of insolvent estates by assignees, and at such time and place as meets the approval of the chief clerk in the office of the Master in Ordinary, to whom this matter will be, for that purpose, referred. Costs of this motion and of the reference will be reserved to be disposed of by the Judge presiding at the trial of this action, and, if not so disposed of, will be costs in the cause.

The defendant Cline will, of course, facilitate the sale of the assets by Mr. Clarkson, and will deliver possession to the purchasers at such sale upon Mr. Clarkson's order.

This sale may proceed during vacation. Mr. Clarkson's reasonable fees and disbursements will be a charge upon the moneys to be paid into Court, and will be fixed by the chief clerk under the reference to him.

CARTWRIGHT, MASTER. JUNE 29TH, 1906.

CHAMBERS.

O'LEARY v. GORDON.

Counterclaim—Exclusion of—Terms—Action for Conspiracy against Three Defendants — Counterclaim by One Defendant on Promissory Note—Division Court Jurisdiction.

Motion by plaintiff for an order striking out the counterclaim of defendant Kidd.

Gideon Grant, for plaintiff.

A. B. Armstrong, for defendant Kidd.

THE MASTER:—The action is for an alleged unlawful conspiracy and registration of a deed which had been left by plaintiff with one of three defendants to be held in escrow until certain arrangements had been made.

Defendant Kidd has put in a counterclaim on a note claiming a little less than $100.

No doubt, every motion of this kind must be decided on its own facts, and where plaintiff's claim is of the same class as the counterclaim, and the counterclaim itself would enure to the benefit of all the defendants, no objection could ordinarily be raised.

Here, however, plaintiff's action is for unliquidated damages, and is to be tried by a jury. The counterclaim is apparently within the jurisdiction of a Division Court, and could easily be disposed of before the action can be tried at Barrie on 24th September.

Under these circumstances, it might prejudice plaintiff's case to have a comparatively trivial matter, in which only one of the three defendants is interested, gone into at the trial. The claim itself, as I understand, is of some standing, and was apparently not thought by Kidd to be of any great importance.

Even if the counterclaim were established, it might not avail the other defendants—though it could be used as a shield by Kidd in case plaintiff was seeking to enforce a recovery for damages against him.

It would seem that the best order to make is that the counterclaim be struck out without prejudice to any action that Kidd may bring, and that plaintiff shall not, without leave of the Court or a Judge, issue execution against Kidd on any judgment he may obtain in this action until the counterclaim has been disposed of.

The costs of the motion will be in the cause as between plaintiff and defendant Kidd.

MABEE, J. JUNE 29TH, 1906.

WEEKLY COURT.

RE ALMONTE BOARD OF EDUCATION AND TOWNSHIP OF RAMSAY.

Public Schools—Motion to Quash By-law Altering Boundaries of School Sections—Forum for Determining Validity—County Court Judge—6 Edw. VII. ch. 53, sec. 29, sub-sec. 4 (O.)—Dismissal of Application to High Court.

Motion by the Almonte Board of Education to quash a by-law of the municipal council of the township of Ramsay.

G. Wilkie, for applicants.

W. E. Middleton, for respondents.

MABEE, J.:—On 3rd March, 1906, the township council of Ramsay passed a by-law No. 563, intituled "A by-law altering the boundaries of School Section No. 13 (Almonte) and 12 in the Township of Ramsay," and by this by-law purport to enact that lots 13 and 14 in concession 10, Ramsay, be detached from school section No. 13, Almonte, and attached to school section No. 12. It is recited in the by-law that power is given to municipal councils by the Public Schools Act to alter the boundaries of school sections. The by-law is to come into effect from and after 25th December, 1906. The secretary of the Board of Education, in an affidavit dated 13th June, states that a copy of this by-law was served upon him on 21st May, 1906, by the clerk of the township of Ramsay. The notice of motion to quash this by-law was served on 20th June instant.

The statute 6 Edw. VII. ch. 53 (O.), assented to on 14th May, 1906, materially changes the procedure upon matters of the kind involved in this motion, and I am of the opinion that sub-sec. 4 of sec. 29 has deprived the High Court of jurisdiction to entertain this application, except in the event of an appeal as provided for in the section. The only matter arising for the consideration of the Court is as to the validity of this by-law touching the alteration of this school section, and the Act provides that this shall not be raised or determined by a proceeding in the High Court, but shall be raised, heard, and determined upon a summary application to the

Judge of the County or District Court in which such school section, or some part thereof, is situate, provision being made for an appeal, subject to the limitations of the section. This Act was in force prior to the service of the by-law upon the applicants, and long before the service of the notice of motion.

I think the application should have been to the County Court Judge, and I dispose of it upon that ground alone.

The motion must be refused with costs.

BOYD, C. JUNE 29TH, 1906.

TRIAL.

IMPERIAL BANK OF CANADA v. ROYAL INS. CO.

Fire Insurance—Breach of Statutory Condition—Subsequent Insurance without Assent of Defendants—Notice—Knowledge of Sub-agent—Dismissal of Action on Policy—Refund of Premium—Costs.

Action upon a policy of fire insurance.

BOYD, C.:—The condition of this contract of insurance, which is also the statutory condition (R. S. O. ch. 203, sec. 168, No. 8, p. 2044), provides that the company shall not be liable if any subsequent insurance is effected by any other company unless and until the company assents thereto, etc. There was no notice given in writing of the subsequent insurance, nor any communication thereof by the insured to the company, or to any agent of the company having power in that behalf to receive such notice. There was in fact no notice given to the company in any way that such subsequent insurance had been made or existed before the loss. The attempt to fix constructive notice on the company, through the circumstance that the subsequent insurance was effected through one Cummings, who had also acted in procuring the insurance with the defendants, as a sub-agent or broker in insurance for their recognized general agent at Winnipeg, and that because he, Cummings, knew of the amount of prior insurance with the defendants, and was also the person who obtained the subsequent insurance, therefore his common intermediate agency for both companies should bring home

knowledge of what he had done to the head office of the defendants—is altogether too sweeping a conclusion. It would be a dangerous development and stretch of the doctrine of agency which would deserve to be called destructive rather than constructive. The cases cited . . . and others are all against this attempt to control the policy of the company as to the extent and nature of the risk to be assumed by delegation to an unknown somebody, who worked in secret as to this subsequent insurance, and made no communication of it to any officer or agent of the company. The fact of its existence was only disclosed to defendants when their adjuster appeared upon the ground after the fire, and they at once promptly repudiated any liability.

As to authorities, I would confine myself to citing Western Assurance Co. v. Doull, 12 S. C. R. 454 (per Strong, J., particularly), and an affirmation of the same rule in the Supreme Court of the United States, Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 319.

The company should make a refund of the last payment of premium, $112.50, which was received in ignorance that the policy was no longer in force by reason of the subsequent insurance. And as to costs, the company should get the costs of action, less costs incurred in the other issues as to fraud, which were abandoned at the trial; these to be set off, and judgment framed accordingly.

BOYD, C. JUNE 29TH, 1906.

TRIAL.

HERRIMAN v. PULLING & CO.

Trespass to Land—Boundaries—Water Lot—Road Allowance—Encroachment—Right of User—Navigable Water—Injunction—Damages—Reference—Costs — Parties — Indemnity —Guarantee.

Action for trespass to land.

BOYD, C.:—According to the record, plaintiff has no controversy with defendant Collins. He is brought in at the instance of his co-defendants Pulling & Co. in order to indemnify the latter on his alleged guarantee. I do not find that

Collins gave any such guarantee, and he is, therefore, an unnecessary party, and should be dismissed with costs to be paid by his co-defendants.

As between plaintiff and Pulling & Co., I find that the latter have trespassed upon plaintiff's land, and should have damages therefor, and that all the defendants should be enjoined from their continued user of plaintiff's land as a piling and loading ground both on land and on the water lot in front. To avoid the expense of a reference, I find that damages should be assessed only for the one year preceding action, and I fix the amount at $100; but subject to that being increased or lessened upon a reference, if either party desires to have a reference to the Master. In the event of a reference, the Master will deal with the subsequent costs. The costs of action up to judgment to be paid by defendants to plaintiff.

I do not find sufficient evidence here as against the Crown and the municipality to say that the chain reservation along the shore has become the property of plaintiff. That title, if it exists in plaintiff, should be manifested by by-law, and also, I think, by some evidence of assent on the part of the Crown: see Municipal Act, 1903, sec. 640, sub-sec. 11, which, though in terms only applying to a sale of road allowance, would seem to imply a like precaution in the case of an exchange with an adjoining owner under sec. 641. The reservation along the shore is not only for travel by land, but also contemplates public access by navigable water, and the complete control which a municipality might have over an inland road would not necessarily be extended to one along the shore of navigable water. Apart from this, I think the land between the chain along the shore and the level (rising or falling) of the water is, as against trespassers, the property of plaintiff, and as to which he is entitled to exclude defendants—as well as to exclude them from his land which extends for the chain reservation up to the boundary of Bay street and Grand Manitoulin road, and also to exclude them from the land covered with water embraced in plaintiff's deed of the water front. On all these points defendants have more or less encroached, and they should be restrained from so doing in the future till they arrange with plaintiff for making proper payment for the use of the land in lumbering operations.

It may be upon a matter of nice law that the road reserved along the shore, if it exists still as a road, would shift to the water's edge upon and over the accretion of 40 or 50 feet which is said to exist there between the road allowance as it was when the patent issued and the present water's edge, but this was not argued, nor is it essential to determine the precise point in this controversy. If it so shifts, it would only give plaintiff so much more soil on the landward side of the original allowance.

BOYD, C. JUNE 29TH, 1906.

TRIAL.

OWEN v. MERCIER.

Vendor and Purchaser—Contract for Sale of Land—Right of Vendor to Repudiate before Completion—Illegal and Immoral Purpose of Purchaser — Delivery of Conveyance — Insufficient Description — Amendment and Insertion by Vendor of Forfeiture Clause—Cancellation of Conveyance—Equitable Relief—Terms.

Action by vendor to enforce a provision for forfeiture contained in a deed conveying land to defendant.

BOYD, C.:—This case is unique, but its difficulties may be solved, I think, by the application of some familiar doctrines of equity.

Divested of all immaterial details, the substance of the transaction was this: the owner (plaintiff) through his agent negotiated the sale of the land in question with another land agent, who put forward a servant of his as the ostensible purchaser, though I find as a fact that the object in acquiring the land was to secure it for the purposes of a woman who was a prostitute. The vendor signed a conveyance, but actually received no part of the price before he became aware of the use to which the property was to be put. He refused to go further in the way of completion unless some assurance was given that the land should not be used in the illicit traffic. Meanwhile the conveyance had been sent to the registry office and returned unregistered, for the reason that the description was so uncertain that the deed could not be registered. It

was then handed to the vendor with a request that he would insert words sufficient to identify the land properly. These words he added, but, to protect himself, also inserted a provision by which the land should be forfeited and returned to the owner in case a house of ill-fame should be erected and maintained thereon. The deed thus altered was taken and registered by the purchaser, and the transaction completed by payment to plaintiff. The purchaser asserts that this restrictive charge was not noticed at the time of the completion nor for some months afterwards, when the first woman was about to sell to another in the same trade.

Application was then made by the purchaser to the local Master of Titles in order that the objectionable clause might be expunged and the title cleared, and the Master having directed an action to be brought, it was brought in its present shape, in which the vendor is in form seeking relief, though essentially the litigation has been initiated by the purchaser. In any direct application by the proprietor of the house to free it and the land from the restriction, the Court would, no doubt, hold its hand; but to leave the property as it is with this restrictive registration and to leave the parties in statu quo is what neither party desires.

Apart from the question of the uncertain description and the Statute of Frauds, which would be open if the alterations in the conveyance are not accepted—a legal situation which would not be helped by the possession of defendant, for that was taken of her own motion and not under this contract of sale—I think the matter may be dealt with in another way.

I regard the transaction as not completed by a proper and legal conveyance at the time when the vendor raised his objection as to the use intended. Under our land system, with its method of statutory surveying and statutory registration, it is one of the terms of a contract of sale (when nothing is said to the contrary) that the sale should be completed and perfected by a proper conveyance susceptible of registration. This necessitates an accurate and certain local description by which the place can be identified on the ground, as well as its transfer recorded accurately in the register of conveyances. In this case there were two lots in close proximity to each other, on opposite sides of the river, and each answering the general and only description given, so that the deed was rightly rejected by the registrar in its original shape as not registrable. Till a proper registrable deed is executed, the

contract of sale is not complete, and to enforce the giving of such a conveyance would be the subject of a suit for specific performance. That is, I think, the correct situation in law of these litigants, though the pleadings are not framed on this theory. Still all the facts are before me, so that appropriate relief can be administered.

Given this condition, the Court will not only decline to enforce the contract further, it will also vacate and cancel it.

When the knowledge of the illegal purpose for which the property was being purchased came to the vendor—the contract yet being incomplete—he had an option to repudiate it. This he did, in legal effect, by inserting the words prohibiting such unlawful use and completing the conveyance in that shape. This was completing a different contract from that which was contemplated by the purchaser, and, in the circumstances, I do not think the purchaser should be held to this manner of completion. The purchaser repudiating this term inserted to legalize the dealing, it is quite competent for the owner to recede from the whole contract. . . .

[Reference to Pringle v. Napanee, 43 U. C. R. 306.]

And in such a case he is not liable to answer in damages.

Without invoking the authorities applicable to a contract uncompleted or in fieri, it may well be that this is a case where the Court would exercise its power to cancel a transaction bottomed in illegality so far as the purchaser is concerned, by analogy to the cases where relief is given to one not in pari delicto with the chief offender: Reynell v. Spry, 1 DeG. M. & G. 660. The reasons for replacing the parties in their original state are akin to those in W. v. B., 32 Beav. 574, and I come to the conclusion that the deed should be cancelled, its registration vacated, possession of property delivered to plaintiff upon terms that the purchase money, $1,000, be repaid, and all permanent improvements made upon the property paid for by plaintiff after deducting occupation or other rent received by defendant since possession was taken. All proper outlay for taxes, etc., and allowances of interest to be taken into account, and the balance adjusted as between the parties by the Master, if they cannot agree. This judgment should be without costs, and so should the reference be conducted (if any) before the Master.

JUNE 29TH, 1906.

C.A.

RE DALTON AND CITY OF TORONTO.

Landlord and Tenant—Lease of Property of Municipal Corporation—Expiration of Term—Payment by Corporation for Buildings and Permanent Improvements—Filling-in of Water Lots—Work Done under Prior Leases—Evidence as to Meaning of "Permanent Improvements"—Admissibility—Work Done by Sub-tenant—Arbitration—Value of Buildings—"Worth"—Costs—Powers of Official Arbitrator—Statute—Retroactivity — Practice and Procedure — Discretion—Appeal.

Appeal by C. C. Dalton and cross-appeal by the city corporation from an award of the official arbitrator for the city of Toronto fixing the amount to be paid to Dalton for buildings and improvements upon land leased to him by the corporation for a term of years.

J. H. Macdonald, K.C., and G. W. Mason, for Dalton.

J. S. Fullerton, K.C., and H. L. Drayton, for the corporation.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, JJ.A.), was delivered by

GARROW, J.A.:—The claimant was the lessee from the city of property on and near the Esplanade, under an indenture of lease dated 21st September, 1887, for a term of 21 years from 1st June, 1883, which contained a provision for payment by the city for the buildings and permanent improvements at the end of the term in case the city should refuse to renew—the amount to be settled by arbitration. The city refused to renew, and the present proceedings were taken to fix the amount to which the claimant is entitled for such buildings and improvements. The arbitrator, after hearing evidence, fixed such amount at . . . $19,188.50, and awarded the costs of the arbitration proceedings to the claimant, to be paid by the city.

The arbitrator refused to allow for the improvements on and north of the Esplanade and for the improvements made

by one Evans south of the Esplanade; the former because such improvements were not made under the lease, but under prior leases, and the latter because they were made by Evans and not by the claimant.

The real difficulty in dealing with the improvements made on and north of the Esplanade is caused by a term contained in the lease in these words: "And it is hereby declared and agreed that the buildings and permanent improvements now on the said demised premises are the property of the lessees." The improvements in question consist of "filling-in" with earth, the lots having been originally what are known as water lots. And it is not disputed that "filling-in" is in the nature of a permanent improvement for which in a proper case the tenant would be entitled to payment. But the contention of the city is that the "filling-in" on and north of the Esplanade was done in performance of agreements contained in the prior leases, by or for the tenants, and that when made they at once and as made became simply a part of the freehold, and not in any proper sense a "permanent improvement" within the meaning of the before-quoted clause. And this is the view adopted by the arbitrator, correctly in my opinion.

Objection was made by the claimant to the reception of evidence to explain the meaning of the term "permanent improvements" contained in the before-quoted clause, the arbitrator having referred to the terms of the prior leases and to the proceedings under them as explaining or tending to explain that this filling-in was not intended to be within the clause in question. The term "permanent improvements" is, of course, in a sense simple enough, but it is not by any means self-explanatory. It is not, of course, used in the lease in question in its broad sense, but in the sense in which the term is used as between landlord and tenant. The landlord might permanently improve his property by filling in or raising up its surface level, but what he did in that way could scarcely be called a "permanent improvement," within the proper meaning of the term as used in the lease in question, which meaning should, I think, be confined to improvements made and in a sense owned by the tenant.

What is really equivocal is not so much the language as the parcel, and the evidence objected to was, I think, properly received for the purpose of applying the language to its proper subject matter.

And the evidence shews that the improvement in dispute was really made by the landlord in performance by arrangement of the covenants of the lessees in the prior leases, who must otherwise have done the work at their own expense. And it follows, I think, that the work so done was not in fact a "permanent improvement" within the meaning of that term as used in the lease in question.

The filling-in done by Evans, however, stands on a quite different footing. This was work done after the date of the last lease. Evans's sub-lease apparently expired before the end of the claimant's term. Evans had a right under his lease to remove his buildings, but could not, of course, remove the filling-in, which he had done or which had been done upon his parcel during his term, and the benefit of that should, I think, enure to the claimant, it being plainly no answer by the city to the claim to say that the work was done by Evans and not by the claimant. Nor could the city intercept this claim by settling with Evans. He had the right to dispose of his buildings to the city, but he had no control over the filling-in. Nor is the contention that the claimant abandoned this claim borne out by the evidence, nor by the judgment, in which it is apparently dealt with on the merits. The Evans filling-in was there upon the demised premises. If the lease had been renewed, the lessee would have had its use for the new term exactly as he would have had the use of the filling done directly by himself. And in losing the renewal he loses the benefit and use of that improvement exactly as he loses the benefit and use of the other filling.

The quantity of filling done by Evans was, I think, 1,845 yards, which, at 25 cents per yard, would amount to $461.25, to which extent the appeal should be allowed and the award increased.

With reference to the cross-appeal upon the question of value or amount allowed, I have not been convinced, after, in addition to the argument, a careful perusal of the evidence, that any error has been established. The exact language of the lease as to the improvements and their valuation is—"such reasonable sum as the buildings and permanent improvements made and erected thereon shall then be worth, such value to be determined," etc.

If the lease had been renewed, as the lessee desired, instead of terminated, the lessee would have been entitled to such renewal, under the express terms of the lease, without

regard to the value of the improvements. So that for the new term at least the lessee would have got the full benefit of the improvements without paying rent for them.

The term "worth" is perhaps a little vague. An article may be "worth" a great deal to one in much need of it, and very little to another who has no use for it. A permanent improvement or construction is sometimes of more actual value to use than it is to sell or to lease to another. It is, for instance, notorious that expensive farm buildings never increase the selling or leasing value of a farm by anything near the amount of the cost of such buildings. Here the tenant had and was using the improvements, and desired to continue to do so. They may have been "worth" more to him than to any one else, and yet the landlord should not be asked, in exercising his rights under the contract, to pay for something out of the ordinary and therefore not within the scope of the contract. Upon the whole I think that, in the circumstances, the arbitrator has attributed the correct meaning to the word "worth" in this sentence, which I quote from his judgment, as "a fair and reasonable market value, as would result from the bringing together of a willing buyer and a prudent seller," and, having regard to the meaning, I think the evidence warrants the conclusions reached.

Upon the other question raised by the cross-appeal, namely, the allowance of costs to the claimant, if these were in the discretion of the arbitrator, I should not be disposed to interfere. But it is contended that he had no power over the costs.

An agreement out of Court to refer is like any other agreement in this respect, that the rights of the parties are to be ascertained from the terms of the written agreement. Under the agreement in question, as it stood apart from the Municipal Arbitration Act, R. S. O. 1897 ch. 227, there was, in my opinion, no power to award costs. The legislature, however, has, no doubt for good cause, seen fit to invade the domain of such agreements, and to declare that, whether the parties desire it or not, the official arbitrator shall be the only arbitrator: see sec. 2, sub-sec. 1. And in providing the arbitrator the legislature has also defined his powers and the procedure to be followed in arbitrations before him. And in express terms has given him power over the question of costs: see sec. 2, sub-sec. 6. If the agreement of submission had conferred this power, resort to the statute would not have

been necessary, but where, as here, the agreement is silent upon the subject, it appears to me to be the reasonable conclusion that it was intended that the concluding words of sub-sec. 6 of sec. 2 were intended to apply in the case of all references in which the parties had not expressly stipulated to the contrary. The question is largely one of practice and procedure, in which case the rule . . . is apparently that the construction is retrospective unless there be some good reason against it: see Freeman v. Moyes, 1 A. & E. 338; Wright v. Hale, 6 H. & N. 227; Kindray v. Draper, L. R. 3 Q. B. 160. And "practice and procedure" apparently include the granting or withholding of costs: see Wright v. Hale, supra. It certainly would be scarcely logical to hold that the statute applied for the purpose of substituting the official arbitrator for the arbitrators stipulated for in the submission, but did not apply in also carrying into the submission the statutory powers of that official, including his control over the question of costs.

I am, for these reasons, of the opinion that the question of costs was within the control of the arbitrator, and I see no good reason why we should interfere with the discretion which he has exercised in awarding them to the claimant.

The cross-appeal should, therefore, be dismissed with costs, and the appeal allowed as to the Evans claim. . . . No costs of the appeal.

JUNE 29TH, 1906.

C.A.

NICKLE v. KINGSTON AND PEMBROKE R. W. CO.

Railway Company—Loan of Money to—Bill of Exchange—Acceptance—General Manager of Company—Statute of Limitations—Effect of Payment of Interest by General Manager in Reality on His Own Behalf—Absence of Knowledge of Holder of Bill—Inference as to Source of Payment.

Appeal by defendants the railway company from judgment of BRITTON, J., 6 O. W. R. 51, in favour of plaintiffs.

in an action to recover $4,600 and interest upon a bill of exchange.

W. R. Riddell, K.C., for appellants.

J. L. Whiting, K.C., for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, JJ.A.), was delivered by

GARROW, J.A.:—The statement of claim alleges that on 8th May, 1893, plaintiff Ellen Nickle lent to defendants the railway company $4,600; that she assigned the debt to her son and co-plaintiff Hugh C. Nickle, and on 24th January, 1895, defendant B. W. Folger drew his draft for $4,600, payable on demand, upon defendants the railway company, which was on the same day accepted for defendants the railway company, by defendant T. W. Nash, the secretary-treasurer of the railway company, and that the same was indorsed over to plaintiff Hugh C. Nickle in respect of the loan referred to; that interest on the loan was paid to 27th October, 1900; that payment of the draft was demanded on or about 31st August, 1904, and payment was refused, and notice of refusal was given to defendants; and plaintiffs claimed payment of the draft by defendants the railway company, or, in the alternative, payment of the loan by the company; and, in the event of it appearing that defendant T. W. Nash had no authority to accept the draft, that he might be held liable for having misrepresented his authority to do so. And it also set forth that judgment in default of appearance had been signed against defendant Folger.

Several defences were pleaded by defendants the railway company and also by defendant Nash, the latter pleading that he had authority, an issue found in his favour, and the action was accordingly dismissed as to him with costs.

The defences of defendants the railway company were: a denial of the loan to them; payment; a denial of the acceptance of the draft by them or by their authority; that if they did accept they paid the amount of the acceptance to the holder thereof upon demand, and that, if the same was indorsed over to plaintiff Hugh C. Nickle, it was so indorsed after payment had, to his knowledge, been made to the holder upon demand; and the Statute of Limitations, R. S. O. 1897 ch. 324, sec. 38.

Britton, J., held, upon amply sufficient evidence, that the loan was actually made as alleged by plaintiff, and that it had not been repaid, and he also held that the payments of interest which had been made from time to time were sufficient to defeat the defence of the Statute of Limitations.

Defendant Folger is a brother of plaintiff Ellen Nickle, and the uncle of the other plaintiff. He was at the time of the loan the general manager or highest executive officer of defendants the railway company. In that character he applied to plaintiff Ellen Nickle for the loan, not to himself, but to the railway company, and to such a loan she agreed. When the draft to secure the loan was prepared, under the direction of defendant Folger, it was, in accordance with their usual form and custom, made payable to the order of defendant Folger, and was by him indorsed over to plaintiff Ellen Nickle. It formed no part of the agreement with her, however, that defendant Folger should indorse or in any way guarantee the loan, and his doing so was his own unsolicited and entirely voluntary act.

The money was duly advanced by plaintiff Ellen Nickle to the company, and was used for their purposes, but, strange to say, by some faulty bookkeeping, the amount of the loan was placed to the credit of defendant Folger in the books of the company, although a negotiable instrument representing and securing the loan had been issued by the company to plaintiff Ellen Nickle. Why the entry was so made, or by whose directions, does not clearly appear, but a reasonable inference is that it was by the direction of defendant Folger.

The draft first issued was renewed from time to time until the final one in the series, that mentioned in the statement of claim, was issued.

On 31st March, 1899, the amount standing in the books of the company at the credit of defendant Folger, including the amount of the loan in question, was transferred in the books of the company to the credit of the firm of Folger Bros., of which defendant Folger was a member, presumably by the direction of defendant Folger, although that, too, is not very clear. But he was still the general manager, and remained so throughout the transactions in question, and his private account would probably not have been tampered with without his express direction. And this transfer is the payment pleaded by the company, for in no other way was the loan in any way repaid.

But plaintiff could not be affected by these manipulations of entries by defendant Folger for purposes of his own. They were and remained in entire ignorance of them, resting in the well-founded belief that the loan had been made to the company whose bill of exchange they or one of them held when these entries were made.

Down to the transfer to the credit of Folger Bros. the company paid the interest. The payments were actually made by the company to defendant Folger, of course by his direction, and were by him handed to plaintiffs or to one of them. After the transfer defendant Folger continued to pay the interest, apparently exactly as before, but really out of his own money. But of this of course plaintiffs were also wholly ignorant. They had no transaction with defendant Folger. They did not look to him personally for payment. It is even doubtful if they supposed that he was in any way liable upon the bill of exchange, and it is, at all events, clear upon the evidence that they believed the payments relied on to keep the claim alive were being made from time to time by defendant Folger simply in his character of agent for . . . the company. Of all which defendant Folger was well aware, and his knowledge must, in the circumstances, be imputed to . . . the company.

Indeed, on one occasion disclosed in the evidence, and not contradicted, he seems to have resorted to an unnecessary and gratuitous piece of deception to foster the idea that the interest payments were being made by the company; I refer to the payment in April, 1900, when he informed plaintiff Hugh C. Nickle that he could not make the payment until he received in his character of banker for the company a deposit from the company which he was expecting to be shortly made by another officer of the company.

Each payment made carried with it the implied promise to pay the balance. Defendants, by their general manager, induced plaintiffs to believe that the payments, and therefore the promise, came from . . . the company, and, relying and resting upon such belief, they refrained from calling in the principal. In these circumstances, it would be inequitable, in my opinion, to permit the company to set up the defence of the statute, a fraud in fact, and that they are and ought to be held estopped by the conduct of their officer from alleging that the payments in question were not in fact made by them.

But, even if the matter fell short of absolute estoppel, the company would still fail in their defence.

Under the secret dealings between the company and their general manager, the latter, no doubt, as between themselves, undertook the liability in question. But they were careful to conceal the facts from plaintiffs. . . .

[Reference to In re Tucker, [1894] 3 Ch. 429.]

Appeal dismissed with costs.

JUNE 29TH, 1906.

C.A.

LENNON v. EMPIRE LOAN AND SAVINGS CO.

Loan Company—Loan Corporations Act—Sale of Assets and Undertaking of Company to Another Company—Ratification by Shareholders—Rights of Holder of Terminating Stock—Substitution of Permanent Shares in Purchasing Company—Assent of Lieutenant-Governor in Council—Certificate of Attorney-General—Finality of—Absence of Schedule of Shareholders—Status of Holder—Creditor or Shareholder—Right of Withdrawal—Amendment of Statute—Securities.

Appeal by defendants the Empire Loan and Savings Co. and the Sun and Hastings Savings and Loan Co. from the judgment of MEREDITH, J., at the trial, declaring that plaintiff, a holder of terminating shares in the former company, was not bound by the provisions of the agreements between these companies to take permanent stock in the Sun and Hastings Co.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, JJ.A.

McGregor Young, for appellants.

J. Bicknell, K.C., and W. J. McWhinney, for plaintiff.

MOSS, C.J.O.:—The Empire Loan and Savings Co. until the transactions and proceedings to be mentioned was a building society duly incorporated under the Loan Corporations

Act. The Sun and Hastings Savings and Loan Co. is a building society duly incorporated and now carrying on business under the same Act. A question was raised on the argument of the appeal whether these companies were incorporated and authorized to carry on businesses of a like character. An examination of the respective declarations and certificates of their incorporation and registration removes any doubt as to this. Indeed the statement of claim virtually admits that they are building societies of the same class, with the like powers, and the point was not suggested before the appeal.

These two companies entered into an agreement dated 8th August, 1903, for the sale by the Empire Co. to and the purchase by the Sun and Hastings Co. of all the assets and undertakings of the former company, subject to ratification and acceptance by the respective shareholders. This transaction was entered into under the provisions of R. S. O. 1897 ch. 205, enabling corporations answering the description of the two companies to sell or purchase their respective assets.

The provisional agreement was submitted to and received the ratification, confirmation, and assent of the shareholders of each of the companies. It was then, pursuant to the Act, filed with the Corporations Registrar, and was assented to by the Lieutenant-Governor in council on 9th December, 1903. Thereupon the Attorney-General for the province, being the Minister under whose directions the Act was being administered, gave his certificate, under the provisions of the Act, certifying the assent and the date thereof, and declaring that on, from, and after 9th December, 1903, the agreement took effect as the sale, transfer, and conveyance to the Sun and Hastings Savings and Loan Co., to its own use, of all the assets, undertaking, goodwill, business, property, interests, and rights of the Empire Loan and Savings Co., as in the agreement more fully set out, and that on, from, and after 9th December, 1903, all the terms, conditions, and provisions of the agreement and of the Loan Companies Act relating thereto went into full force and effect.

Section 45 of the Act enacts that the certificate shall be conclusive evidence of all matters therein certified or declared.

In the statement of claim plaintiff treats the transaction between the companies as a valid and effectual sale and trans-

fer by the Empire Co. to the Sun and Hastings Co., and his claim in the action, as against the latter company, is based upon the validity and effective operation of the agreement. At the trial evidence was received, against objection made on behalf of defendants, with the view of shewing that a schedule or list of shareholders of the Empire Co. and the amount they would receive in the event of the agreement being carried into effect, was not annexed to the agreement at the time it was approved by the shareholders or assented to by the Lieutenant-Governor in council. No amendment of the pleadings was allowed, and, so far as the evidence discloses, the want of the schedule occasioned no substantial prejudice to the shareholders. Its absence was explained at the shareholders' meeting, and it does not appear that the vote upon the question was affected one way or the other by what occurred. There is nothing in the Act requiring such a schedule to be attached to the agreement, and it was clearly intended as a protection to the Sun and Hastings Co.

In view of all the circumstances, and having regard to the certificate and its conclusive nature as declared by the Act, no reason exists for going behind it and inquiring into the antecedent proceedings.

It is quite apparent that the trial Judge attached no importance to the matter; the relief which he granted was on the footing of the agreement being valid and effective as a sale and transfer between the companies. And for the purposes of this action it must be so regarded.

Before and during the time of the transactions referred to, plaintiff was the holder of 5 certificates of stock in the Empire Co., known as "terminating prepaid stock," representing payments amounting to $2,800, and one certificate of stock known as "dividend bearing terminating stock," representing a payment of $200. This stock, as well as the stock held by a number of others, was the subject of a guarantee given by defendants the Trusts and Guarantee Co., under an arrangement with the Empire Co., whereby certain of its securities were to be held by the Trusts and Guarantee Co. for the benefit of the holder of certificates.

Plaintiff was notified of the meeting of shareholders called to ratify the agreement, and received with the notice a copy of the agreement, but he did not attend the ratification meeting which was held on 24th September, 1903.

On 18th September, 1903, he wrote the manager of the Empire Co., referring to the notice of the meeting which he had received, and stating that he would withdraw his money from the company before the "merging takes place," and expressing the hope that all the people who had given applications to him would be treated fairly and not be forced to take permanent stock in another company contrary to their wishes.

On 21st September he wrote the Trusts and Guarantee Co. notifying them of his holding, and that he positively refused to let the certificates pass into the hands of any other in exchange for permanent stock, and would hold the Trusts and Guarantee Co. responsible for due repayment of same.

Much correspondence followed before and after the final consummation of the sale and purchase. Plaintiff received from the Sun and Hastings Co. two dividend cheques in respect of stock allotted to him in that company, the first of which he retained and used; the second he retained for some months, but ultimately, after the commencement of the action, he returned it unused, together with the amount of the first cheque.

This action was commenced on 8th February, 1905. Plaintiff's claim is that he lent and advanced the moneys represented by the certificates to the Empire Co., and that he is a creditor of that company, and is now entitled to be paid the amount of his claim by both the companies, and that the securities held by the Trusts and Guarantee Co. are subject to his claim.

Defendants' answer is that plaintiff was a shareholder of the Empire Co.; that by the terms of the sale to the Sun and Hastings Co. the consideration for the purchase was that the latter company should allot and issue to holders of shares in the Empire Co., whether such shares were permanent or terminating stock, permanent shares of the Sun and Hastings Co. at $104 per share of $100, being at a premium of $4 per share, as fully paid up and non-assessable, for an amount exactly equal to the net value of the assets of the Empire Co., less the amount of the debts, liabilities, and obligations of the latter company, these shares to be divided among the shareholders in proportion to their several holdings; that the agreement was finally completed in accordance with the Act, and the shares were duly allotted, and amongst the

others to plaintiff; that plaintiff is bound by the agreement; and that his position is now that of a holder of permanent stock in the Sun and Hastings Co. Estoppel by acceptance of the dividend cheques, and acquiescence and delay, are also urged against him.

Defendants also counterclaimed and asked for an order on plaintiff to deliver over the certificates of stock in the Empire Co.

The trial Judge held that plaintiff was a creditor of the Empire Co., and that as such his claim to be paid was not affected by the sale and transfer to the Sun and Hastings Co. The Judge did not decide whether plaintiff had any rights directly against the latter company, which he considered a difficult question. Nor did he determine anything as between plaintiff and the Trusts and Guarantee Co. He made a declaration that plaintiff was not bound by the provisions of the agreement to take permanent stock in the Sun and Hastings Co., nor otherwise prejudiced by the agreement or precluded thereby from taking any steps he might be advised to recover the money alleged to be due to him from the Empire Co. He dismissed the counterclaim and ordered the defendants the loan companies to pay the costs of plaintiff and defendants the Trusts and Guarantee Co.

The first question to be determined is whether plaintiff's status is that of creditor or shareholder. Upon this . . . plaintiff's right to maintain this action substantially depends. If he is a creditor, his rights are plain. But, if he is a shareholder, then . . . different considerations apply.

The provisions of the Loan Companies Act, the by-laws of the company, and the words of the certificates on which plaintiff bases his claim, must be considered.

The Empire Co. was a company having authority to raise a fund or stock by means of terminating shares under sec. 10 of the Loan Corporations Act, which enables such a company to issue terminating shares of one or more denominations, either fully paid or preferred stock or to be paid by periodical or other subscriptions, and to "repay such funds when no longer required for the purposes of the corporation." Article VII. of the by-laws of the Empire Co. deals with the capital stock. After declaring the amount of the authorized capital stock, and providing for its division into two distinct kinds, viz.: first, terminating or withdraw-

able stock, which may be of three kinds, i.e., instalment, prepaid, or fully paid dividend bearing; and second, permanent or non-withdrawable stock, which may be of two kinds, i.e., instalment or subject to call: it provides (secs. 7 and 7 (a)) with reference to prepaid terminating stock (shortly described as class E.): Persons desiring to take this class of stock do so by paying at issue $50 per share. They are to receive out of the profits earned and available for dividend a semi-annual dividend not exceeding 6 per cent. per annum on the said sum of $50 per share, and the balance of profits, if any, earned by such stock "shall until the maturity of the stock be carried to the credit of the stock after it is charged with the annual deduction for expenses in this section mentioned." The deduction for expenses may for the first year, in the discretion of the directors, equal but not exceed 5 per cent. of the maturity value of the shares and 1¼ per cent. of the maturity value for each subsequent year until maturity. Any terminating shares not borrowed against shall be deemed to mature when the payments made to the loan fund of the company on the share, together with the profits standing to the credit of the share, amount to . . . $100.

The 4 first mentioned certificates set out in paragraph 2 of the statement of claim, viz., No. E. 042, No. E. 066, No. E. 070, and No. E. 086, and the certificate referred to in paragraph 3 of the statement of claim, represent terminating prepaid stock issued under the foregoing by-laws, and none of them had matured at the date of the commencement of the action.

Section 8 of art. VII. of the by-laws provides for the issue of fully paid dividend bearing stock. This stock is sold at $100 per share, and a semi-annual dividend is to be paid on it, at a rate agreed upon in writing between the company and the holder when application is made, and the said $100 per share is to be returned to the holder at the end of the period for which the stock is issued, such period not to be less than one year and not more than 5 years from the date of issue, such term to be agreed upon when application for the stock is made. No further profits than the dividend agreed upon are to be paid to the holder of this class of stock. Under the certificate last set forth in paragraph 2 of the statement of claim, plaintiff is the holder of two shares of this class, equal to $200, and, by the terms of

the certificate, dividends at the rate of 6 per cent. per annum are payable out of the profits earned semi-annually until 2nd June, 1904, when dividends cease, and . . . $200 may then be withdrawn upon surrender of the certificate.

Although these two shares appear to partake more of the character of an advance or loan than the other shares, yet it cannot be said that, even in respect of them, plaintiff was a creditor in the ordinary sense of that term. The moneys were not advanced as a loan pure and simple, and it is doubtful if the company had any power to obtain loans of that description. The object and purpose of the formation of companies of the character of the Empire Co. seem opposed to dealings of that kind: see secs. 28 to 39, inclusive, of the Loan Corporations Act.

Plaintiff was not a depositor with the company or a purchaser of loan debentures issued by it, in pursuance of or in accordance with its powers.

There is nothing to place him on an equal footing with the ordinary creditors such as depositors or holders of debentures. Even in respect of these two shares, the highest right he would have at any time would be to withdraw his money at the expiration of the time stated in the certificate. He would then be entitled to a priority as against the other shareholders if the company was still a going concern.

His position is not dissimilar to that of a holder of terminating shares who has given notice of intention to withdraw under by-laws permitting him to do so. . . .

[Reference to Sibun v. Pearce, 44 Ch. D. 354, 371; Walton v. Edge, 10 App. Cas. 33.]

As regards the other shares, a fortiori plaintiff is not an ordinary creditor. If he could ever attain the position described by Lindley, L.J., in Sibun v. Pearce, at p. 371, it would not be until the time for withdrawal had arrived, and he had given notice of intention to withdraw, or the company, without having done so, exercised its right to retire the shares under sec. 13 of the Loan Companies Act. That section enacts that when any terminating shares have been fully paid up according to the by-laws, or have become due or payable to the holder thereof, then and in such case the holder may withdraw the amount, or may, with the consent of the corporation, convert the amount into permanent shares

or stock of the corporation; and if, after notice to a shareholder that terminating shares standing in his name have matured and become due or payable to him, the shareholder neglects for 3 months to draw the amount, the directors may, at their option, convert them into permanent shares. Sections 11 and 12, as well as other parts of the Act, seem inconsistent with the notion that the holding of shares such as represented by the certificates held by plaintiff constitutes the holder a creditor. In respect of them he is a member of the corporation, and so remains until he has . . . "been paid out."

Neither when the agreement of sale and transfer to the Sun and Hastings Co. was finally consummated, nor at the commencement of this action, did plaintiff occupy a position other than that of shareholder, and as such his rights must be measured in this action.

Beyond question, the effect of what has been done is to work a most material and important change in plaintiff's position. But the legislation enables it to be done. The Loan Corporations Act authorizes a sale and purchase of the assets of the one company by the other, and the making of an agreement to that end: secs. 40 and 41, as amended by 3 Edw. VII. ch. 16, sec. 4 (1). The amendment makes an important change in the former law. It provides that in any agreement under the Act for the purchase and sale of assets the consideration may consist in whole or in part of fully paid shares of the permanent capital stock of the purchasing corporation. Provision is made for submitting the agreement to a vote of the shareholders and obtaining the sanction and assent of the Lieutenant-Governor in council, and for registration of the agreement when finally consummated: sec. 42, as amended by 3 Edw. VII. ch. 16, sec. 4 (3); secs. 43, 44, 45, 46 (as substituted by 63 Vict. ch. 27, sec. 8), 47, and 48.

In this instance the companies have availed themselves of the provisions enabling the purchasing company to pay the consideration in fully paid up shares of its permanent capital stock. The agreement contains a provision to that effect, and provides for the distribution of the permanent shares among the shareholders of the Empire Co. The Sun and Hastings Co. has provided and allotted the shares in accordance with the agreement, and plaintiff's position has been changed from a holder of shares subject to withdrawal

in the Empire Co. to that of a holder of permanent shares in the Sun and Hastings Co. But this transition of his rights has been accomplished by the votes of the shareholders and by virtue of legislation which allows it. And as a shareholder he appears to be bound by what has been done. It may, perhaps, afford no consolation to plaintiff to say that the evidence seems to shew that, having regard to the position and circumstances of the Empire Co., the sale appears to have been an advantageous one, but whether or not it was so cannot affect the merits. It was one authorized by the Act both as to its nature and extent and the consideration to be paid and received.

Some stress was laid . . upon the 12th clause of the agreement, which, it was argued, preserved to holders of certificates of stock certified by the Trusts and Guarantee Co. some rights against the securities in the hands of that company; but it seems manifest that it was only intended for the protection of that company by placing on the Empire Co. the burden of procuring the handing over or release of the certificates or indemnifying the Trusts and Guarantee Co. against any demands or actions such as the present. . . .

Appeal allowed and action dismissed with costs throughout.

The judgment as regards the counterclaim was not complained of.

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

GARROW, J.A., also concurred.

JUNE 29TH, 1906.

C. A.

KEILLER v. JOHN INGLIS CO.

Master and Servant—Injury to Servant—Negligence of Master—Defective Scaffolding—Liability at Common Law—Workmen's Compensation Act—Want of Inspection.

Appeal by plaintiff from judgment of a Divisional Court (6 O. W. R. 334), allowing appeal from judgment of ANG-

LIN, J., and directing judgment for defendants as of nonsuit. Plaintiff was a boilermaker in the employ of defendants, and while engaged at the boiler house of the Toronto Railway Company he assisted in erecting a scaffold, through which, some six weeks later, he fell, receiving serious injuries, for which the jury assessed damages at $1,500.

G. F. Shepley, K.C., for plaintiff.

E. E. A. DuVernet and R. H. Greer, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., CLUTE, J.), was delivered by

OSLER, J.A.:—There was, in my opinion, no evidence at the trial which would support a verdict for plaintiff either at common law or under the Workmen's Compensation Act.

As regards the first, the jury found that the negligence consisted in not sending competent men to erect the scaffold. It appeared that the men usually employed for that purpose were for some reason not available, and that plaintiff was told by the foreman of the shop to do the best he could, and that on applying to the president of the defendant company he was told to take the lumber for the scaffold from a pile in the yard, which contained an abundant quantity of good sound material proper and sufficient for the purpose. Plaintiff undertook the job without demur. It seems to have been a simple one, and the scaffold was made by the person whom plaintiff instructed to do it properly and securely in all respects but one, viz., that one of the planks of the flooring was weak and defective by reason of a large knot in the middle and the grain of the wood running cross to the edges of the plank. This plank, with others, had been taken by plaintiff from the pile in the yard, apparently without the least attempt to examine it, his only excuse being that there was ice and snow on the planks, which would make examination difficult, and anyway he was no judge of lumber. There is, however, neither evidence nor finding that either the foreman or the president knew that plaintiff was not competent to build such a scaffold either as regards its construction or the selection of the materials, and that, I think, is a conclusive answer to the contention that there was negligence on the part of the employers as at common law: Gallagher v. Piper, 16 C. B. N. S. 669, 688.

Then as to the Workmen's Compensation Act. The jury made no findings, nor were they asked to make any, which would establish a cause of action under the Act, but the learned Judge, on motion for judgment, assumed to make the supplementary findings that the foreman ordered the construction of the scaffold; that he was a person to whose orders and directions plaintiff was bound to conform and did conform; and that it was because of the conforming to such orders that the accident took place. Here again the case falls short of proving negligence on the part of the foreman. He had nothing to do with the direction given by the president as to where the material for the construction of the scaffold was to be obtained, but I do not see how any negligence can be attributed to him because of the order he gave to plaintiff, unless (which was not proved) he had reason to believe that plaintiff was not competent to perform it, and that the order might therefore lead him into danger. The supplementary findings of the learned Judge, assuming, but with all respect not agreeing, that he was, on the evidence, at liberty to make them, therefore carry the case no further. Neither do I think that they are supported by the evidence, because plaintiff, instead of performing the order himself, or overseeing its performance, intrusted its execution entirely to others to whom the foreman had not intrusted it, and he therefore cannot say that he was conforming to the order of the foreman and that his injury resulted from his having so conformed. The foreman may well have been content to intrust the duty to plaintiff himself, an intelligent workman accustomed to the appearance of and to working upon scaffolds, and for whose own use the scaffold in question was designed and constructed, but it would be extending the liability of defendants beyond reason to hold them responsible for the carelessness or ignorance of others upon whom plaintiff chose to devolve the performance of the duty which he had himself undertaken, and which, so far as anything to the contrary is shewn, he might have competently performed had he himself done or supervised it.

It was much pressed . . that there was negligence by reason of the absence of inspection . . . This contention is a mere tabula in naufragio, and more defective than the others. No case of that kind was made in the pleadings or on the evidence, and a new trial ought not to be granted, on mere suggestion, for the purpose of setting it up.

I am unable to see any error in the judgment complained of, and, for the above reasons, would dismiss the appeal.

JUNE 29TH, 1906.

C.A.

REX v. DAUN.

Criminal Law—Seduction of Girl and Illicit Connection under Promise of Marriage—Election of Prisoner as to Trial—Amendment of Information as to Date of Offence—Prisoner Compelled to Re-elect—Corroboration—Material Particulars—Implication of Prisoner.

Crown case reserved by the Judge of the District Court of Thunder Bay upon the indictment and conviction of the prisoner for having under promise of marriage seduced and had illicit connection with one Annie Melina Bates, a woman under 21, of previously chaste character, contrary to sec. 182 of the Criminal Code. The two questions reserved were: (1) whether upon the evidence there was sufficient corroboration of the complainant's testimony to satisfy sec. 684, subsec. (c), of the Criminal Code; and (2) whether the Judge had power to allow the district attorney to prefer an indictment for an offence committed on 25th March, 1905, and to have the prisoner elect to be tried on that charge, he having previously elected to be tried on the charge that the offence had been committed in October, 1905.

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

T. D. Delamere, K.C., for the prisoner.

J. R. Cartwright, K.C., for the Crown.

MACLAREN, J.A.:— . . . When defendant was first brought before the Judge, the date of the offence was, owing to a misconception of the complainant's evidence, laid in the indictment as being in the month of October, 1905. On this charge he elected to be tried before the Judge without a jury. When the day fixed for the trial arrived, the district attorney had learned that the date of the offence should have

been laid as 25th March, 1905, and obtained leave to so amend the charge. Counsel for the accused contended that the amendment could not be made. The Judge held that it could be made under sec. 773 of the Code, but promised to reserve a case on that point. Subject to his objection, the accused elected to be tried by the Judge without a jury. After hearing the evidence, the Judge found the accused guilty on the amended charge; but reserved . . . a further question as to whether there was the corroborative evidence required by sec. 684 of the Criminal Code. . . .

As to the second of the questions (the amendment and new election), it was conceded . . . that, in view of the decision of this Court in Rex v. Lacelle, 11 O. L. R. 74, 6 O. W. R. 911, the prisoner could not ask for a negative answer to this question.

The first question, however, presents considerable difficulty. We have to interpret and apply sec. 684 of the Criminal Code, which reads as follows: "No person accused of an offence under any one of the hereinafter mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused: . . . (c) Offences under part XIII., sections 181 to 190 inclusive."

Section 182, under which the accused was charged, reads as follows: "Every one, above the age of 21 years, is guilty of an indictable offence and liable to two years' imprisonment, who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under 21 years of age."

It is to be observed that under the first question reserved for us the sole point we have to consider is the question of law, whether, under the summary of the evidence as given to us by the District Judge, the complainant is corroborated in some material particular implicating the accused. No question is reserved for us regarding the testimony of the complainant or its sufficiency, save as to whether there is such corroboration of it as is required by sec. 684. . . .

According to the testimony of the complainant, the seduction and first illicit connection took place about 25th March, 1905, and a second connection, from which pregnancy resulted, took place about 25th October, 1905.

The summary of the evidence given in corroboration of the complainant is set out as follows in the stated case: "In January, 1906, she was ill with typhoid fever, and the doctor being called in discovered that she was pregnant and had been so for between 4 and 5 months. She then told the doctor and her mother that the prisoner was the father of her child. This was about the last Friday in January, 1906. That night the mother accused the prisoner. He did not deny it, but said there were others. On the next following Sunday the prisoner said to the father and mother of the girl, who was also present, that he always intended to marry her, and a date was then fixed for the wedding. He knew the condition she was in. Her brother was then ill with typhoid fever in the same house, and the prisoner took the girl up to the brother's room and talked of the intended marriage. The prisoner and the brother had worked together in the round house at Fort William prior to 15th January, 1905, and this brother, William Bates, testified that whilst so working there the prisoner told him that he was fond enough or thought enough of Annie to make her his wife; and that upon a subsequent occasion, the date not being fixed, the prisoner asked William Bates how he would like him for a brother-in-law. The prisoner and the girl, Annie M. Bates, had their photograph taken together on the 5th day of February, 1905, and this is produced and put in as corroborative evidence that he had promised to marry her."

I am of opinion that the foregoing evidence is quite sufficient to satisfy the requirements of sec. 684. Full corroboration is not required. The complainant only needs to be "corroborated in some material particular by evidence implicating the accused." There can be no doubt about the above evidence implicating the accused. It points directly to him and to him alone. And I am equally of opinion that it corroborates the complainant not only in a material particular, but in material particulars. It has been laid down that where there are several issues, and the statute requires "corroboration by some material evidence," it does not mean corroboration on each issue: Parker v. Parker, 32 C. P. 113. What is required is corroboration in some material respect that will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon if it is believed and is sufficient. The corroboration

required is not unlike that required in the case of accomplices. . . .

[Reference to Regina v. Boyes, 1 B. & S. at p. 320; Regina v. Piercy, 19 L. T. 238; Cole v. Manning, 2 Q. B. D. 611; Bessela v. Stern, 2 C. P. D. 265.]

I am consequently of the opinion that the first question should also be answered in the affirmative.

MOSS, C.J.O., GARROW and MEREDITH, JJ.A., concurred.

OSLER, J.A., dissented, giving reasons in writing. He held that there was no corroboration of the girl's story as to the connection in March, and that there was no seduction in fact, within the meaning of the statute.

JUNE 29TH, 1906.

C. A.

FINLAY v. RITCHIE.

Contract—Construction—Sale of Shares in Company—Terms of Payment — Instalments — Agreement under Seal—Absence of Covenant or Promise to Pay for Shares—Refusal of Court to Imply Obligation to Pay—Provision for Forfeiture of Down Payment on Default in Subsequent Payments—Mere Option of Purchase.

Appeal by plaintiff from order of a Divisional Court (22nd January, 1906), dismissing plaintiff's appeal from judgment of MEREDITH, J., at the trial, dismissing the action and counterclaim without costs. The action was brought by Edward Finlay, a paper manufacturer residing at Georgetown, against Fred. A. Ritchie, a merchant residing at Toronto, to recover $845.55 alleged to be due by virtue of an agreement under seal for the sale by plaintiff to defendant of 302 shares in the Kinleith Paper Co. The agreement was in writing, and $500 was paid under it by defendant. It did not contain any covenant or promise on the part of defendant to pay for the shares. The trial Judge and the Divisional Court construed the document as giving the defendant the right to acquire the shares upon making certain payments, but not as obliging him to make the payments.

W. Nesbitt, K.C., and G. H. Kilmer, for plaintiff.

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

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., BRITTON, J.), was delivered by

BRITTON, J.:—The agreement between the parties made on 11th August, 1903, recites that plaintiff was the owner of 302 fully paid up shares of the common stock of the Kinleith Paper Company, Limited, each of said shares of the par value of $100, and that plaintiff had agreed to sell these shares to defendant for the consideration therein named, and subject to the terms therein expressed. "Terms" in contracts "are conditions, propositions stated or promises made, which, when assented to or accepted by another, settle the contract and bind the parties:" see Imperial Dictionary.

The whole document must be looked at, to see what its terms are, and these are as follows:—

1. That plaintiff should deposit the certificates for these 302 shares, indorsed in blank, in the Bank of Nova Scotia, Toronto branch, to be delivered to defendant upon payment by defendant (and only upon such payment) of the full sum of $18,120 ($60 a share for the 302 shares) and interest at 6 per cent., such payment to be made (if made) as set out in the agreement.

2. That defendant should, upon that deposit of certificates being made, pay to plaintiff $500; and defendant expressly agreed to make the payment.

3. That defendant should have the right to pay the further sum of $500 on 11th November, 1903, $83.33 on the 15th day of each month of the 12 months next ensuing, first payment on 15th September, 1903; $125 for each of the next ensuing 24 months; and the remainder with interest on 11th August, 1906.

4. That defendant had the privilege, at any time within the 3 years, of paying in full.

5. That defendant might pay into the Bank of Nova Scotia, Toronto, instead of to plaintiff personally, and that such payment (to the extent of such payment) should be a full discharge to defendant, and upon payment in full the Bank of Nova Scotia should deliver to defendant the certificates of shares, even if plaintiff should be dead or absent from Toronto.

6. That plaintiff should covenant and agree that for 5 years he would not erect in Canada a mill, etc., and that he would not during that time accept certain employment, etc.

7. That if defendant should not pay on the day, or within 5 days from the dates mentioned for payment, all sums theretofore paid by defendant should be absolutely forfeited to plaintiff, and all interest of plaintiff under the agreement should thereupon cease.

This seems to me a perfectly clear and intelligible agreement, although possibly it may not be such an agreement as plaintiff intended to make. . . . It means that defendant had the right to pay for plaintiff's shares and get them, but not to get them unless he paid in full for them. If the stock was good and continued to be good, plaintiff was not hurt. It continued to stand in plaintiff's name upon the books of the company; he could vote upon it, defendant could not. The stock could not be transferred except upon production and surrender of the certificates, and defendant could not get these certificates to produce and surrender until he paid in full. . . . At the expiration of 5 days after default in making payments which defendant had the right to make, he forfeited to plaintiff all the money he had paid; and then all right to purchase the stock, all interest of defendant under the agreement, ceased. How could that be so, if plaintiff still had the right to collect from defendant in full for the stock at the price named?

The terms of this agreement completely negative the existence of any implied covenant on the part of defendant to pay in any event the full $60 and interest for each share of the stock; and these terms prevent there being read into the agreement what has been called in an agreement for sale an express covenant on the part of the purchaser to pay. Defendant is not a purchaser in fact. This interpretation is consistent with the whole agreement, and explains why the language is that plaintiff gives to defendant the right to pay. . . . If plaintiff's contention is correct, one would naturally look for a clause allowing defendant upon payment of a large part of the purchase price to get a part of the certificates, so that he could use or sell the shares withdrawn.

The agreement must be looked at as a whole: see Montreal Street R. W. Co. v. City of Montreal, [1906] A. C. 100.

It may be that plaintiff did not get enough in getting $500 as a consideration for his covenant not to go into business. Evidence of that and of other things not within the 4 corners of the agreement itself, was excluded. Putting myself, as far

as I am able, in the position of the parties to this agreement, I cannot say that there is anything unnatural or irrational about it. I can quite understand that plaintiff might be willing so to covenant upon getting $500, and to further agree to give to defendant the option to buy all his shares on the terms named. Plaintiff might reasonably expect that the $500 due 1st September would be paid in addition to the monthly instalments, so that, if defendant paid no more, plaintiff might reasonably suppose he would profit by the transaction.

This further view of the case presents itself. Even if there was the express covenant on the part of defendant to purchase, the forfeiture of all money paid, and the abandonment of any right to the shares in case of default, must be assumed, as against plaintiff, as the damages, or in lieu of damages, for such default.

If there is any covenant to be implied against defendant, it is that he would either pay in full, or in the event of paying in part he would make no claim either to the shares or to any money paid by him. If the covenant were in the alternative, it would be satisfied by defendant losing his money—plaintiff holding all his shares. The declaring the money forfeited and making no claim to the shares is nothing more than a settlement between the parties if defendant defaults or elects to abandon the shares and to lose any money paid on account of them.

Appeal dismissed with costs.

JUNE 29TH, 1906.

C.A.

CITY OF TORONTO v. TORONTO R. W. CO.

Street Railways — Agreement with Municipality — Establishment of New Lines—Territory Annexed to Municipality Subsequent to Agreement—Places for Stopping Cars—City Engineer—Judicial Powers — Notice—Determination—Recommendation—Approval of Council — Resolution instead of By-law.

Appeal by defendants from judgment of STREET, J., 6 O. W. R. 871, 11 O. L. R. 103.

W. Laidlaw, K.C., and W. Nesbitt, K.C., for appellants.

J. S. Fullerton, K.C., and W. Johnston, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, JJ.A.), was delivered by

OSLER, J.A.:—The case involves the construction in two particulars of the agreement of 1st September, 1895, between plaintiffs and George W. Kiely et al., set forth as a schedule to 55 Vict. ch. 99 (O.), under which defendants are operating their railway.

The first question is, whether, under sec. 14 of the award, conditions, tender, and by-law referred to and incorporated in the agreement, defendants can be required by plaintiffs to establish and lay down new lines and extend their tracks and car service on and into territory which was not within the limits of the city at the date of the agreement, but which has since been annexed to and is now part of the city and within its enlarged and extended limits.

The question was recently before this Court on appeal from the judgment of Anglin, J. (9 O. L. R. 333, 4 O. W. R. 330, 446), on a special case submitted in another action between the parties, but was not argued because it was considered that it had already been practically disposed of adversely to defendant by our decision in a still earlier action between them, reported 5 O. W. R. 130, which was afterwards affirmed by the Judicial Committee of the Privy Council. The judgment upon the special case on that point was, therefore, affirmed by us (10 O. L. R. 657, 6 O. W. R. 677), and Street, J., in holding in the present action that defendants were bound by the agreement to extend and lay down their tracks and to operate their railway within the added or extended territory, when required by plaintiffs so to do, merely followed that decision. But, inasmuch as the judgment of this Court on the special case has in this respect now been reversed by the Supreme Court of Canada (26 C. L. T. Occ. N. 454), distinguishing it from the earlier decisions, it follows that the appeal from so much of the judgment of Street, J., as declares the obligation of defendants to be what we held it to be, must be allowed, and that for the 2nd, 3rd, and 4th clauses of the judgment as drawn up must be substituted a declaration that defendants were not bound to comply with by-law No. 4520, passed by defendants on 10th April, 1905, and were not bound to lay down railway tracks on Avenue road, as required by that by-law, and have not

committed a breach of sec. 14 of the award, conditions, tender, and by-law mentioned in the 2nd paragraph of the statement of claim, in that respect.

The other question is, whether, under the terms of the agreement, the power to make regulations to be complied with by defendants in respect of the places at which cars are to be stopped for the purpose of taking on or letting off passengers, rests with defendants or with the city engineer and the council of plaintiffs, and, if with the latter, whether the regulation now sought to be enforced was made in accordance with the agreement.

The relative clauses of the award, conditions, tender, and by-law on this point are as follows:—

26. The speed and service necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council.

37. Each car is to be in charge of a uniformed conductor, who shall clearly announce the names of cross-streets as the cars reach them. . . .

39. Cars shall only be stopped clear of cross-streets and midway between streets where distance exceeds 600 feet. . .

For many years defendants stopped their cars at all the places mentioned in sec. 39, but, being of opinion that fewer stops were necessary or desirable for the effective working of the railway, recently ceased to stop at many of them. Complaints having been made of the inconvenience caused by this course, the city engineer examined into the matter and reported to the council's committee on works in favour of the restoration of nearly all the former stopping places, as follows: "I beg to recommend that the Toronto Railway Company be requested to stop their cars at the following points. . . ." The several points or places are then specified in detail. The committee sent on the report in the usual way to the board of control; the board . . . passed it on to the council for consideration; and the latter by resolution of 25th April adopted it without amendment.

Defendants were notified to comply with the resolution and to stop their cars as provided thereby. This they refused to do, on various grounds, contending: (1) that if the matter were within the jurisdiction of the engineer at all, he was

acting in a judicial capacity, and could not determine it without first giving notice to them, and hearing their objections; (2) as expressed by Street, J., that the regulation of the places at which cars are to be stopped is not a matter coming within sec. 26, but is left to be determined by defendants themselves, subject only to the restrictions of sec. 39; in other words, that so long as they stop at cross-streets and midway streets between streets only when the distance exceeds 600 feet, they may stop at such points only as they deem advisable; (3) that the city engineer has not "determined" but only "recommended" that defendants should be required to stop their cars at the points in dispute; (4) that the council have not adopted the engineer's report by by-law but by resolution only, and that they could act in this matter only by by-law.

Some of the most serious of these objections have arisen from the singularly careless and slipshod way in which the council have transacted business of a very important nature; but, upon consideration, I am of opinion that we are not compelled to yield to any of them, and that my brother Street's judgment should be affirmed.

Having regard to the tenor of the whole contract, it appears to me that the engineer does not occupy any judicial or quasi-judicial position between the city and the company in reference to the matters provided for by clause 26. The subject is one which, by the very terms of the clause, the former have retained under their own control, the engineer being the person agreed upon who is to advise them what, in his opinion, is necessary to be done by defendants, though his determination goes for nothing until and unless plaintiffs approve of it. Had the question arisen at the inception of the company's operations, I think it would hardly have occurred to any one to suggest that the engineer was bound to consult with them before determining what service should be supplied. There is nothing to indicate that anything of that kind was in contemplation, and it can make no difference in the rights of the parties and the construction of the contract that what the engineer has now required to be done is something different from what defendants had adopted. The reference of a dispute is not what is contemplated. The agreement says nothing about hearing and determining. On the contrary, the engineer is a person selected by the parties as one upon whose skill and judgment they

could rely, and who from his general qualifications would be capable of determining what should be done by defendants in this as well as in other matters to the performance of which defendants have obliged themselves, upon the adoption by the council of his recommendation, or requisition, or determination. There is no substantial distinction between his "recommendation" in clauses 11 and 12, his "requisition" in clause 24, and his "determination" in clauses 26, 27, 28. None of these is effective without the approval of the council, and equally, I think, none of them legally compels, though they may morally or reasonably invite, discussion or consideration between the engineer and defendants before he refers them to the council. . . .

[Reference to Wadsworth v. Smith, L. R. 6 Q. B. 332, 337.]

2. Subject to the limitation of clause 39, the regulation of the places at which cars are to be stopped seems to me to be a matter within the "speed and service" clause. Subject to such limitation, therefore, plaintiffs had the power, in the manner prescribed by the latter clause, to fix such places. I refer to what was said on this point in the former case between the parties, reported 10 O. L. R. 657, 662-4 (C.A.)

3. I think that the report of the engineer to the council "recommending" that defendants be "requested," and setting forth a list of the points and places at which "they shall be required" to stop their cars, though somewhat informally expressed, is a sufficient "determination" by him of what defendants were to do in this respect. It was more than a mere mental determination. It was his official action, and the only official action he could take to express his determination of what defendants should do. . . . He could not recommend without having first determined, and his recommendation and the language of the report shew that this is what he has done. Nothing further was necessary except for the council to approve of the report, and when they had done so, and the report and approval were communicated to defendants, as they were, it became defendants' duty, under their covenant in the agreement, to comply with what was required.

4. Then, have plaintiffs approved of their engineer's determination? They have done so by resolution, and, though I cannot say that I am entirely free from doubt, I incline to

the opinion that this was sufficient, and that a by-law was not necessary, and that the case is not governed by secs. 325 and 326 of the Municipal Act. Defendants were not exercising powers under that Act. The matter was one dependent upon the contract of the parties, and where a by-law is required as under clause 14, it is so expressed. The action of the council upon the engineer's report in other matters intrusted to his determination is elsewhere variously expressed as "approval," "confirmation," or "indorsation." The thing which becomes operative is the engineer's determination, and the approval of the council may, I think, be manifested by a resolution adopting it. The decision of this Court in Port Arthur High School Board v. Town of Fort William, 25 A. R. 522, warrants us in so holding. And see Lewis v. Alexander, 24 S. C. R. 551, 558. The case is not within the decision of the Supreme Court of Canada in Liverpool and Milton R. W. Co. v. Town of Liverpool, 33 S. C. R. 180. . . .

5. Lastly, I am of opinion that plaintiffs are entitled to an order restraining defendants from running the cars upon their railway except in accordance with the determination of the engineer as to the stopping places. They have covenanted to do so, and there is, in the circumstances of the case, no greater difficulty in enjoining them from committing a breach of their covenant than there was in City of Hamilton v. Hamilton Street R. W. Co., 10 O. L. R. 594, 6 O. W. R. 207, recently before us. I refer to the cases there cited at p. 599 and to . . . Wolverhampton v. Emmons, [1901] 1 Q. B. 515, 522-3.

Appeal dismissed with costs.