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APPELLATE DIVISION.

MAY 26TH, 1914.

RE JONES AND TOWNSHIP OF TUCKERSMITH.

Highway—Closing and Sale of Unopened Portion of Street as Shewn on Plan—By-law of Council—Order Quashing—Appeal—Order Set aside—Motion to be Renewed before Judge at Trial of Pending Action—Terms—Costs.

Appeal by the Corporation of the Township of Tuckersmith from the order of MIDDLETON, J., 5 O.W.N. 759, quashing a by-law of the township for the closing and disposal of part of Mill street in the village of Egmondville.

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

R. S. Robertson and R. S. Hays, for the appellants.

W. Proudfoot, K.C., for certain ratepayers, the respondents.

PER CURIAM:—Order set aside; the motion may be renewed before the Judge at the trial of the action of Jones v. Township of Tuckersmith; on such motion the Judge is not to be bound by the judgment of Middleton, J. Costs of motion to quash and of this appeal to be in discretion of the trial Judge.

If the said trial be not proceeded with at the first sittings at which it can be heard, the motion may be renewed before a single Judge, on such additional material as the applicants may be advised to bring before the Court. Costs of the motion and of this appeal to be in the discretion of the Judge.

If the application be not proceeded with, the appeal is allowed with costs here and below.

[The above is the order of the Court as finally settled: see ante 71.]

MAY 26TH, 1914.

MAHER v. ROBERTS.

Assignments and Preferences—Chattel Mortgage—Money Advanced to Insolvent Firm to Pay Creditor—Absence of Knowledge of Insolvency—Action by Assignee for Benefit of Creditors—Validity of Chattel Mortgage—Bona Fides—Findings of Fact of Trial Judge.

Appeal by the plaintiff from the judgment of LENNOX, J., 5 O.W.N. 603.

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

F. M. Field, K.C., for the appellant.

W. F. Kerr, for the defendant, the respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

HODGINS, J.A. MAY 26TH, 1914.

GRAINGER v. CANADIAN ORDER OF HOME CIRCLES.

Injunction—Interim Order—Balance of Convenience—Injunction Granted until Trial upon Terms—Payment into Court by Plaintiff of Sums in Dispute—Speedy Trial—Change in Constitution of Benevolent Society—Increase in Rates of Insurance Assessment—3 Edw. VII. ch. 15—2 Geo. V. ch. 35, secs. 184, 185—Invasion of Vested Rights.

Motion by the plaintiff for an injunction restraining the defendant society until the trial of the action from enforcing their amended premium or assessment rates for life insurance against the plaintiff, a member of the society.

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

J. E. Jones and N. Sommerville, for the defendant society.

HODGINS, J.A.:—The formalities adopted in carrying the amendments are not objected to on this motion. That is re-

served for the hearing. It is not disputed that these amendments are drastic, and affect the right of the plaintiff to get what the defendants had originally contracted to give him. The plaintiff asserts that under the new regulations he has practically to rejoin, at seventy-four, the Order he entered at fifty, and to lose the insurance benefits of early entry, and that the old age or life expectancy payments are postponed for five years. The defendants contend that the amendments are necessary for the well-being of the Order, and that in his application the plaintiff agreed to abide by the constitution and laws then in force or which "may hereafter be enacted."

The point argued was whether the statute 2 Geo. V. ch. 33, secs. 184, 185, requires official approval of the changes made under the defendants' constitution, or indicates the limit to which a change could go in invading vested rights; or, on the other hand, whether, under the law in force previous to 3 Edw. VII. ch. 15, the defendants might proceed unaffected by that or the later enactment. This is a pure question of law, and its decision is bound to affect many other members.

It is not the course of the Court to decide a legal right upon an application for an interlocutory injunction. In this case the law is, to my mind, not clear; so that it resolves itself into a question of comparative convenience or inconvenience.

Here the plaintiff, if he does not pay and elect before the 1st June, is liable to suspension, and loses his right to elect. His share in the funds of this Order is imperilled. The defendants, if they lose meanwhile his assessments, do not urge anything but that the moral effect of a decision questioning their right to make the amendments will affect their revenue. I think the proper order to be made is that, upon the plaintiff paying into Court the assessment (said to be about $17) due on the 1st May last, and continuing to pay the said sum monthly until the trial or other disposition of this action, and undertaking so to proceed as to enable either party to apply to the Judge holding the Toronto non-jury sittings for the week beginning the 31st May, to allow the trial to take place during that week, an injunction should go restraining the defendants, till the trial, from acting upon or taking any steps to enforce against the plaintiff the amendments in question or any rights based upon what is contained therein, and from putting the plaintiff to any election thereunder. The plaintiff should file his statement of claim on the 27th May and the defendants their defence on the 29th, the reply being delivered on the 30th, and the case set down

on the 1st June, and to be then deemed ready for trial. The examinations already had to stand for discovery, with the right to either party to examine on other points. The payment into Court of the assessment to be no admission by the plaintiff of any right. The costs of the motion will be costs in the cause unless otherwise ordered by the trial Judge.

This order ought to meet the objection of the defendants that they will be unable to collect assessments if an injunction is granted, for it is granted only on terms that the plaintiff pay meanwhile, while the latter is protected, as the Court will see that his money is applied according to the result of the case.

I refer to Shaw v. Earl of Jersey (1879), 4 C.P.D. 120, 359, East Lancashire R.W. Co. v. Hattersley (1849), 8 Hare 72, 94; Newson v. Pender (1881), 27 Ch.D. 43; and Jones v. Pacaya Rubber and Produce Co. Limited, [1911] 1 K.B. 455.

HODGINS, J.A. MAY 26TH, 1914.

RE ROOKE AND SMITH.

Vendor and Purchaser—Agreement for Sale of Land—Title—Objection of Purchaser—Deed—Building Restrictions—Covenants Running with Land—Release—Conveyance Free from Restrictions—Application under Vendors and Purchasers Act—Evidence—Reference.

Motion by the vendor (upon an agreement for the sale and purchase of land) for an order, under the Vendors and Purchasers Act, declaring the vendor's title good as against the objection of the purchaser.

A. J. Russell Snow, K.C., for the vendor.
W. A. McMaster, for the purchaser.

HODGINS, J.A.:—The only objection argued before me was that requiring a release of the building restrictions contained in the deed of a block of land on the south side of Bloor street, in Toronto, from Moses H. Aikens to the York County Loan and Savings Company, dated the 8th June, 1901.

These are as follows and are in the form of a covenant:—

"And the said party of the second part, for itself, its successors and assigns, covenants, promises, and agrees to and with the said party of the first part, his heirs, executors, administrators, and assigns in manner following, that is to say:—

"(a) That no buildings shall be erected on the said lands hereby conveyed or any part thereof except buildings built of brick or stone or partly of brick and partly of stone or of some material equivalent to brick or stone.

"(b) That no buildings shall be erected on the said lands hereby conveyed or any part thereof except buildings adapted and intended for and used as and for private dwelling-houses only and for no other purpose.

"(c) That no buildings shall be erected on the said lands hereby conveyed or any part thereof which shall cost less than $3,000, that is to say, each single dwelling-house shall cost not less than $3,000, exclusive of out-buildings.

"(d) That no manufacture or trade shall be carried on on the said lands hereby conveyed or any part thereof.

"Provided, however, that the above restrictions as to the use to which any buildings may be put shall be and remain in force for twenty years from the date and no longer, and that the above restrictions as to the materials to be used in the erection of any buildings shall not apply to necessary outbuildings used in connection with said dwelling-houses."

It is stated that the York County company subsequently subdivided this block, exacting covenants from its purchasers differing somewhat from those in the Aikens deed, and providing "that the houses erected by them would be of a certain character and would cost not less than $3,500 each or thereabouts, and that no trade or manufacture should be carried on on any of the lots, and that the property purchased should be used for residential purposes only."

In the deed to the vendor there is the following covenant: "And the said party of the second part, for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said party of the first part, its successors and assigns, that he will not, within the period of ten years from the date hereof, erect or cause or suffer to be erected upon the said lands any dwelling-house or houses to cost less than $3,500 each, nor

any dwelling other than detached, and each dwelling so erected shall be on a portion of land not less than 30 feet frontage, but this restriction shall not apply to the Bloor street frontage to a depth of 90 feet on which stores may be erected."

The covenants in the deed from Aikens to the York County Loan and Savings Company run with the land, as they deal with the occupation and user of the land. Consequently, they may be enforced against the company or its purchasers, of whom the vendor is one, by Aikens or those claiming under him.

If Aikens chooses to release the vendor and his lands, he may do so effectually, but the letter signed by him promising to take no action is not sufficient to eliminate the covenants, and the purchaser is entitled to a proper release from him.

But I see nothing in the facts, as presented in the material filed, to indicate that any other purchaser is in a position to enforce those covenants.

Aikens, so far as disclosed, neither contemplated nor carried out any building scheme, and there is nothing before me to suggest that any purchaser bought upon the footing that the restrictions were to enure to his benefit.

Therefore, the case may be reduced to the elements stated by the Master of the Rolls in Reid v. Bickerstaff, [1909] 2 Ch. at p. 320, thus: "A subsequent purchaser of part of the estate does not take the benefit of the covenant unless (a) he is an express assignee of the land, or (b) the restrictive covenant is expressed to be for the benefit and protection of the particular parcel purchased by the subsequent purchaser."

As there is no evidence that any subsequent purchaser can qualify in either aspect, the question submitted, so far as it involves the rights of parties other than Aikens, may be answered in favour of the vendor.

I was not asked to deal with the rights arising out of the covenants, if any, exacted by the York County Loan and Savings Company, and do not do so.

While the incidence of restrictive covenants is properly the subject of an application under the Vendors and Purchasers Act (e.g., Re Nesbitt & Potts' Contract, [1905] 1 Ch. 391, [1906] 1 Ch. 386), I ought to call attention to the propriety of fuller information than appears in this case being given to the Court. An affidavit by the solicitor is in most cases not enough evidence to enable the Court to pronounce upon questions involving possibly a large number of persons not before the Court, whose rights may be founded upon a complicated set of facts.

See per Parker, J., in Elliston v. Reacher, [1908] 2 Ch. at p. 384.

For this reason, if the purchaser desires it, the matter may be referred to the Master in Ordinary, before whom evidence may be taken. If not, an order will go declaring that the vendor, on obtaining a release from Aikens, can convey the lands in question free from the restrictions in the Aikens deed.

It is not a case for costs.

LATCHFORD, J., IN CHAMBERS. MAY 27TH, 1914.

MARSHALL v. DOMINION MANUFACTURERS LIMITED.

Writ of Summons—Service out of the Jurisdiction—Conditional Appearance—Rules 25(*g*), 48—*Nature of Plaintiff's Claim.*

Appeal by the plaintiff from an order of the Master in Chambers allowing the defendant Patton to enter a conditional appearance under Rule 48.

Grayson Smith, for the plaintiff.

M. L. Gordon, for the defendant Patton.

LATCHFORD, J.:—The plaintiff brings this action to recover from certain persons outside this Province shares which they obtained from him in the Dominion Manufacturers Limited without value or consideration or upon misrepresentation of fact. He further seeks to restrain the Dominion Manufacturers Limited, whose head office is in Toronto, from transferring upon their books, or permitting to be transferred, any such shares.

All the defendants, except Patton, who resides in New York and has no assets in Ontario, have appeared to the writ and filed defences. Patton filed an affidavit stating that he resides outside the jurisdiction, and that all the matters referred to in the statement of claim and all negotiations in reference to them took place in Montreal. He deposed further that all obligations in regard to the matters mentioned in the statement of claim were to be performed in the Province of Quebec and not in Ontario. The Master thereupon made the order appealed from.

So far as the action seeks to prevent by injunction the

transfer of the shares within Ontario, it is one in which service may be properly allowed out of Ontario under Con. Rule 25(g). Is the claim against Patton cognate to the claim against him and the Dominion Manufacturers Limited jointly? An additional claim may be made against a defendant not within the jurisdiction if cognate to the primary cause of action: Bain v. University Estates Limited (1914), ante 79.

No fraud or misrepresentation on the part of the Dominion Manufacturers Limited is alleged. The primary cause of action is against Patton and his associates, and only in the event of Marshall succeeding in his contention will an injunction be granted against the Ontario defendants. The injunction may be cognate to the relief sought against Patton, but the relief sought against Patton cannot, in my opinion, be said, upon the material before me, to be cognate to the injunction. The case is one which must go to trial here, and, when fully presented, will enable the presiding Judge to determine whether there is jurisdiction or not as to the principal issue involved. In the meantime the safe course is to afford the defendant Patton an opportunity to shew at the trial that the order for service out of Ontario on him should not have been made.

Appeal dismissed. Costs in the cause.

BOYD, C., IN CHAMBERS. MAY 27TH, 1914.

WAGNER BRAISER & CO. v. ERIE R.R. CO.

Writ of Summons—Action against Foreign Corporation—Service on Agent in Ontario—Rule 23—Transacting Business for Company—"Traffic Soliciting Representative."

Appeal by the defendants from an order of the Master in Chambers dismissing their application to set aside the service of the writ of summons upon one McGregor for the defendants, a foreign corporation.

R. C. H. Cassels, for the defendants.
H. E. Rose, K.C., for the plaintiffs.

BOYD, C.:—The defendants are an American corporation, and have an office in the city of Toronto, in the Board of Trade

building, for which rent is paid by the company. That office is occupied by one Malcolm McGregor, who is described as "General Canadian Agent" in connection with the words "Erie Railroad Company" on the outside of the office door and on the face of the letter-paper used in the business carried on by the agent. That business consists in going round to secure freight traffic for the defendants by visiting shippers and soliciting them to ship or route their goods coming in or going out of the country via the Erie road. Rates are quoted by the agent based on fixed tariffs to the United States, and, if the shipment is to foreign countries, the agent adds an ocean rate to the other figures. He does all that has to be done in order to have goods freighted from this Province into the States without reference to the head office. Substantially his business is to forward the interests of the company by securing all the trade possible from this locality to go by that line, and he calls himself traffic soliciting representative of the company for the Province of Ontario. This line of operation works as an important feeder to the general traffic business of the company from Ontario, and appears to me of sufficient consequence to be rightly regarded as the carrying on of its business by this agent who has been served with the writ.

The words of Rule 23 are large and comprehensive: "Any person who, within Ontario, transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without Ontario, shall, for the purpose of being served as aforesaid" (i.e., with a writ), "be deemed the agent thereof." It would minimise the fair meaning of ordinary words to say that the solicitation of freight traffic for some 12 or 13 years by this agent for his company is something less than transacting business for the company. The question is one of fact, and the inference I draw from these facts is that this man is an agent for service: La Compagnie Générale Transatlantique v. Thomas Law & Co., [1899] A.C. 431, 433.

In Murphy v. Phoenix Bridge Co. (1899), 18 P.R. 406 and 495, the company had practically ceased to do business within the Province, and the person served was merely employed to settle up some trifling matters consequent on the cessation of business (p. 503).

The latest English case is Thames and Mersey Marine Insurance Co. v. Societa di Navigazione a Vapore del Lloyd Austriaco (1914), 30 Times L.R. 475, shewing business a good deal like the kind of business done by the agent in the present

instance. What was done here would appear to be sufficient under the English decisions—but the language of our Rule carries the compass of business over a larger area than the English practice.

The Master's order should be affirmed with costs in the cause to the plaintiffs.

BOYD, C. MAY 27TH, 1914.

HEWARD v. LYNCH.

Vendor and Purchaser—Agreement for Sale of Land—Restrictions as to Use—Possession Taken by Purchaser—Default in Payment of Purchase-money—Injunction against Removal of Gravel—Forfeiture—Relief against—Terms—Restriction of Excavation—Declaration—Payment of Purchase-money—Costs.

Action to recover possession of land, for an injunction restraining the defendant from removing gravel therefrom, and for a declaration of forfeiture of the rights of the defendant under an agreement for the sale of the land to him.

A. H. F. Lefroy, K.C., for the plaintiff.
A. F. Lobb, K.C., for the defendant.

BOYD, C.:—According to the agreement for sale, the purchaser was to pay by instalments in four years, and then to receive a deed of the land, with certain covenants specified in the writing. It is to be inferred that the whole plot, laid out in lots, was to be occupied by residences, but beyond that there are no restrictions relating to the taking or excavating gravel. There is no express provision for occupation of the premises pending completion of payment, though that may be inferred; and there is certainly no term authorising the purchaser, pending the completion of the contract, to haul off and convert to his own use parts of the premises consisting of gravel. That act was a spoliation of the land, and to be enjoined against at the instance of the vendor. A fortiori, there was no right to remove gravel after default had been made in payment. Default was made, and the vendor exercised his right under the

terms of the contract, cancelling the contract and forfeiting all payments already made. This was the situation when this action was begun; the purchaser offered to pay the amount in default, but claimed his right to go on excavating. At this point of difference the plaintiff could well refuse the tender and move for an injunction.

When the pleadings were put in, the situation was changed by the purchaser offering to pay, not only what was in default, but the whole amount of the purchase-money, $661.50, and paying it into Court. He asked to be relieved from the forfeiture and cancellation, upon such terms as to the Court might seem meet. Had the matter stayed at that point, the defendant would have been reinstated in his contract, but would have been enjoined against any removal of the gravel or other disturbance of the lot. He is entitled now to be relieved from the forfeiture, and thereupon to pay in full for the lot, of which he will then become the owner, with all the rights and privileges of an owner, except so far as restricted by the covenants stipulated for in the agreement and to be contained in the conveyance. The plaintiff asks for a great many conditions to be imposed upon the defendant, which are far beyond any term of the contract, express or implied. The maxim is invoked that he who seeks equity must do equity. The defendant is relieved from this forfeiture, and as a term of relief he should be required to fence his lot and to build his house with the main floor on the street level and to stop the removal of any more gravel. This would be giving the plaintiff a different contract from the one he entered into; and the maxim, elastic though it be, does not extend to matters which are not of equitable import, but savour rather of arbitrary terms which would interfere with the rights of the litigant. Whether a man shall fence his land or not depends upon himself, or, it may be, his neighbour, under the statute respecting boundary fences. Whether he shall build his house in a particular way depends upon his own taste —in a contract such as this where no word is said about the building except that it shall cost not less than $1,000. The only equity that appears applicable to the subject-matter of the suit is, that the defendant should be let in to purchase for the full price on the terms that he shall not use the lot in a way detrimental to it as a residential property. This is, of course, very vague, but I think it may be sufficiently defined by saying that the defendant should not deal with the lot other than as expressed in an affidavit filed on his behalf and made by

George Tyndall, that sand and gravel is not to be taken from the lot to a greater depth than 8 feet along the south part of the lot so that the excavation to that depth, tapered off to the north, will make the surface of a uniform level. This view also accords with the general trend of the evidence.

With this declaration, the judgment will be that, on payment out of Court of the purchase-money, a deed according to the prescribed form is to be made to the defendant; that the plaintiff is to get costs up to the time the money was paid into Court and he was notified of it, and that thereafter no costs should be to either party.

MIDDLETON, J. MAY 27TH, 1914.

*TILL v. TOWN OF OAKVILLE.

Negligence—Death Caused by Electric Shock—Action under Fatal Accidents Act against Municipal Corporation, Operating Electric Lighting Plant, and Telephone Company—Cause of Death—Independent Acts of Negligence of both Defendants—Each Act Innocuous save for the other—Defendants not Joint Tort-feasors—Dangerous Nature of Substance under Defendants' Control—Recovery against both Defendants—Claim for Contribution or Indemnity by each Defendant against the other Negatived—Damages—Expectation of Life—Action for Benefit of Widow and Children of Deceased—Costs—Contribution between Defendants.

Action against the Corporation of the Town of Oakville and the Bell Telephone Company of Canada to recover damages, under the Fatal Accidents Act, for the death of the plaintiff's husband from the effect of an electric shock.

Each of the defendants served a third party notice upon the other, and the issues raised thereby came down for trial with the action.

The action and the other issues were tried before MIDDLETON, J., without a jury, at Toronto.

M. H. Ludwig, K.C., for the plaintiff.

*To be reported in the Ontario Law Reports.

E. F. B. Johnston, K.C., and D. Inglis Grant, for the Corporation of the Town of Oakville.

D. L. McCarthy, K.C., and F. M. Burbidge, for the Bell Telephone Company of Canada.

MIDDLETON, J.:—George Garfield Till, on the 13th April, 1913, while carrying a portable electric light lamp in the cellar of the Murray House, an hotel in the town of Oakville, received a shock from a high voltage current which had improperly obtained access to the lighting wires—resulting in his immediate death. This action is brought by his widow on behalf of herself and his infant children. . . . She claims against both the town corporation, which operates, through a commission, the electric lighting of the town by high voltage current and the supply of low voltage current for the lighting of residences, and the Bell Telephone Company of Canada. . . .

Till's death took place early in the morning of Sunday the 13th April, 1913. . . . A man named Harker had met his death in a somewhat similar way on Friday the 11th. Harker's death was supposed to have been occasioned by the escape of the street-lighting current; and for the safety of the inhabitants of the town the street-lighting current was off from the evening of Harker's death until after the happening of the accident to Till. This indicated that the current which caused Till's death must have escaped from the house-lighting primaries to the street-lighting circuit in some way.

A thorough investigation followed, with the result of the ultimate location of the trouble upon an electric light pole at the corner of Second avenue and Union street. . . . Nothing could well be more dangerous than placing a pole of a high voltage system immediately below and midway between a span of telephone wires. Furthermore, this pole was at such a height as not to afford an adequate clearance to the telephone wires. . . .

I think that negligence on the part of the town corporation existed both in the state of affairs found opposite the Murray House and in the state of affairs existing at Union street, and that there was negligence both in construction and in inspection, particularly in view of the serious storm which it was known had, to some extent at any rate, disarranged the service, and in view of the notice afforded by the electrocution of Harker on the preceding Friday. I am inclined to think that the contact in front of the Murray House must have existed

from a time anterior to the wind-storm; and any reasonable inspection ought to have discovered it without difficulty.

I am also, after careful reflection, impelled to the view that the contact at Union street was caused by the Bell Telephone Company's employees. . . .

Assuming, then, that I have rightly apprehended the facts, and that the death . . . was the result of two independent acts of negligence on the part of the respective defendants, and that each act would have been innocuous save for the other negligent act, what are the rights of the parties? . . .

[Reference to Mills v. Armstrong (1888), 13 App. Cas. 1; Thorogood v. Bryan (1849), 8 C.B. 115.]

As, under our Rules, the plaintiff is permitted to join as defendants those against whom he is entitled to relief, either jointly or severally, some of the difficulties existing under the earlier practice have disappeared. Yet it is important to bear in mind that the defendants cannot be regarded as joint tort-feasors. . . .

[Reference to Clerk and Lindsell on Torts, 6th ed., pp. 66 *et seq.*; Petrie v. Lamont (1842), Car. & Marsh. 96; Halsbury's Laws of England, vol. 27, para. 956; Atchison Topeka and Santa Fe R.W. Co. v. Calhoun (1908), 213 U.S. 1; Rickards v. Lothian, [1913] A.C. 263; Sault Ste. Marie Pulp and Paper Co. v. Myers (1902), 33 S.C.R. 23, 32; Fralick v. Grand Trunk R.W. Co. (1910), 43 S.C.R. 494, 534.]

I think the real test is that indicated in Dominion Natural Gas Co. v. Collins, [1909] A.C. 640, where, at p. 646, it is said: "It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precautions imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of Dixon v. Bell (1816), 5 M. & S. 198, Thomas v. Winchester (1852), 6 N.Y. 397, and Parry v. Smith (1879), 4 C.P.D. 325, are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of

the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

In order to take the case out of the rule laid down . . . it is necessary to find the conscious act of another volition, which I understand to be a deliberate and intentional wrongful act, something which quite exceeds and goes beyond mere negligence on the part of that other. The last case referred to clearly indicates that this principle applies even where a high standard of obligation is created by reason of the dangerous nature of the substance under the defendant's control which either brings the case within the rule of Rylands v. Fletcher (1868), L.R. 3 H.L. 330, or necessitates such a degree of care as to amount almost to an insuring of safety. . . .

[Reference to Sullivan v. Creed, [1904] 2 I.R. 317.]

For these reasons, I think the plaintiff is entitled to recover against both defendants.

I have much difficulty in considering the rights of both defendants as between themselves. Where two defendants are held liable because each has been guilty of an act of negligence which is a proximate cause of the injury, can there be any right on the part of either to claim indemnity against the other?

The case, as I have already indicated, is not one falling within the principle of Merryweather v. Nixan (1799), 8 T.R. 186, for there the tort was joint; but I think the principle is of wider application; for what that case really determines is, that the fact of a recovery against two defendants for a tort for which they are both responsible does not of itself create a right to contribution or indemnity, even if the plaintiff elects to obtain payment solely from one. This law has been modified so as to permit contribution or indemnity if, apart from the fact of the plaintiff's recovery and the payment by one, there can be found any ground upon which to base either contribution or indemnity, so long as the contract, express or implied, upon which the right is based, is not itself unlawful or in contravention of public policy. See The Englishman and The Australia, [1895] P. 212; Dugdale v. Lovering (1875), L.R. 10 C.P. 196; Toplis v. Granes (1839), 5 Bing. N.C. 636; Betts v. Gibbins (1834), 2 A. & E. 57; Corporation of Sheffield v. Barclay, [1903] 1 K.B. 1.

I am, therefore, unable to give either contribution or indemnity as between the defendants. I would, however, suggest that the plaintiff would be doing nothing more than what is

right if she arranges that the judgment shall be levied against the defendants equally.

The question of the amount which the plaintiff should recover remains to be considered. The deceased was earning approximately $75 to $80 per month. He was thirty-two years old; his wife a year older. He left three young children, and since his death posthumous twins have been born. The expectation of life of the husband and wife would be each about thirty-two years; the joint expectation of life would of course be less. The present value of an annuity of one dollar, according to the tables used for computing dower, having regard to the widow's present age, would be $12,771; but this does not make an allowance for the possibility of the husband's earlier decease. Taking the figures suggested by Mr. Ludwig, $600 per annum, this would mean a recovery of $7,662, not $18,000, as he suggests; for $18,000 invested at six per cent. would yield an income of $1,080 per annum, leaving the capital intact at the wife's death. Having regard to all factors that have to be considered in a problem of this kind, I cannot see my way clear to assessing more than $6,000.

The plaintiff should have her costs against both defendants, and I think I have power to direct contribution with respect to costs; so, while I make the defendants both liable to the plaintiff for costs, I direct that as between the defendants each pay one-half. See Fouchier & Son v. St. Louis (1889), 13 P.R. 318.

There will be no costs as between the defendants with relation to the third party proceedings.

BOYD, C. MAY 28TH, 1914.

RE HARRISON.

Will—Construction—Devise to three Daughters Jointly and to Survivor or Survivors—In Event of Death of all without Issue, Devise over—Joint Tenancy for Life and Tenancy in Common in Tail with Cross-remainders in Tail and Ultimate Remainder over—Death of all three, two Leaving Issue—Rights of Issue—Estate Tail in Undivided Moiety to each Family.

Motion by certain of the grandchildren of Frederic Harrison, deceased, for an order determining a question arising upon the construction of his will.

W. R. Meredith, for the applicants.
T. G. Meredith, K.C., for J. F. Brazel.

BOYD, C.:—The third clause of the will reads "that the whole of said real estate . . . be held by my three daughters jointly. On the death of any of them the whole to fall to the survivors or survivor. If they all die without issue, then the whole to fall to the oldest son of John Harrison then living."

The daughter Mary died in 1885, unmarried, leaving a will in favour of her sister Elizabeth. The daughter Margaret died in 1888, leaving a husband and two children. The third daughter Elizabeth died in 1913, leaving three sons and one daughter.

In an action brought by Elizabeth in 1889, against the husband and children of her sister Margaret, Mr. Justice Street construed this clause of the will thus: The three daughters of the testator were joint tenants for life and tenants in common of the inheritance in tail, with cross-remainder in tail among them, with ultimate remainder over to the oldest son of John Harrison.

This construction is now challenged by the children of Elizabeth, the plaintiff in the former suit of Ledley v. Brazel; and it is supported by the surviving child of Margaret, one of the defendants in that suit.

Treating the matter as divested of that authority, I have reconsidered the meaning and effect of the will, and agree in the result of the former decision. When Mary died without issue, her interest ceased and enured to the two sisters who survived her and had issue. These two became seized of moieties as joint life-tenants and as tenants in common of the inheritance in tail with cross-remainders between them. The meaning of the will is more plain by a little transportation of clauses: the whole is to be held by the three daughters jointly; if they all die without issue, the whole property goes out of the family and to the son of Harrison (an event that did not take place). Then as to the joint holding of the three daughters, that was to be changed on the death of any of them. For instance, when Mary died, her life estate fell to the daughters Margaret and Elizabeth, the survivors: when Margaret died, her life estate fell to the survivor, Elizabeth. That was the point determined in the action by Mr. Justice Street, that the ultimate survivor of the three daughters was entitled to all the yearly

rents as against the husband and children of the daughter Margaret. It is only if all died without issue that the estate was to go over; but two died leaving issue, and of that the legal effect is to give an estate tail in a moiety to each parent. The cases referred to, Cook v. Cook (1706), 2 Vern. 545, Machell v. Weeding (1836), 8 Sim. 4, Forrest v. Whiteway (1849), 3 Ex. 367, are decisive as to this result.

I answer the questions as follows: (a) the children of Elizabeth are not entitled to the whole of the testator's real estate; (b) the children of Margaret take an undivided moiety.

In view of the previous construction given by Mr. Justice Street, this was an unnecessary application, and the applicants should pay the costs.

BRITTON, J. MAY 28TH, 1914.

DANNANGELO v. MAZZA.

Vendor and Purchaser—Agreement for Sale of Land—Claim for Reformation—Evidence—Relief against Forfeiture.

Action for reformation of a written agreement for the sale and purchase of land, and for an injunction, and other relief.

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

M. Malone, for the plaintiff.

W. S. McBrayne, for the defendants.

BRITTON, J.:—In November, 1912, the plaintiff entered into an agreement with the defendants for the purchase of parts of lots 3 and 4, being part of block 33 in the subdivision by Sir Allan McNab, in the city of Hamilton. The plaintiff alleges that this agreement was, that he should purchase this land and pay for it as set out in the written instrument produced, except that, in case the plaintiff was out of work or was sick and unable to work at the time any of the instalments fell due, then the time for the payment of such instalment should be extended, and the same should not really fall due until the date when the next current instalment would become due and payable, and that the plaintiff should have the privilege of paying both of the said instalments at the latter date. The plaintiff and defendants (husband and wife) are foreigners, and no one of them speaks

the English language; but the son of the defendants speaks both languages, and it was left to him to interpret the agreement which, upon the son's instruction, was prepared by the defendants' solicitors. The plaintiff states that, when the agreement was read to him in his own language, it purported to be and was so read and interpreted to be in strict accordance with the verbal agreement entered into. The defendants deny this, and say that the agreement, when read and translated into the plaintiff's language and theirs, was as is now set out in English and signed by the parties. The case presents difficulties. The evidence is that of one party, the plaintiff, against three—the husband, wife, and son—but the circumstances and the manner in which the plaintiff gave his evidence almost compel me to accept his evidence as against the others.

The clauses by which the plaintiff attorns to the defendants, and which permit the defendants, upon giving certain notice, to retake possession of the property and to sell it and to have all payments on account of purchase-money forfeited to them, are not complained of by the plaintiff, but these clauses are harsh and unreasonable all the same. In giving his evidence, the plaintiff appeared to me to be truthful and one who did not desire to state anything other than his objection now being dealt with; but, after all and upon all the evidence, I cannot say that I am free from reasonable doubt. In an action for rectification or reformation, no doubt, jurisdiction must be carefully exercised: Barrow v. Barrow (1854), 18 Beav. 529.

This is not a question of mistake—wrongdoing is charged on the part of the son of the defendants. It is possible that the plaintiff took it as a matter of course that so comparatively small a change as he desired would be conceded. The defendants now attach much importance to the change and refuse to make any concession.

The language of Lord Thurlow, as quoted by Armour, C.J., in Clarke v. Joselin (1888), 16 O.R. 68, at p. 78, that to reform an instrument requires the clearest evidence—irrefragable evidence—to be adduced, may be qualified, as stated by the learned Chief Justice, but, so qualified, it is, that the writing must stand as embodying the true agreement between the parties until it is shewn beyond reasonable doubt that it does not embody the true agreement between them.

I must dismiss the action, but it will be without costs. There will be a declaration that there will not, by reason of any past default, be a forfeiture of any money paid upon the land under

the agreement in question to the defendants, and that the defendants shall not proceed to seize or sell for interest or rent or for principal in default, under the notice given by them, until after the expiration of one month, and not then if the plaintiff in the meantime pays all arrears. The plaintiff is given one month to pay such arrears of interest and principal. Upon such payment, the agreement will stand as to money that thereafter may become due thereon, but the old proceedings are at an end, and new proceedings, if taken, will be as to future default, if any. If arrears are not paid within one month, the defendants will be at liberty to proceed as if this action had not been brought.

BRITTON, J. MAY 30TH, 1914.

SIMBERG v. WALLBERG.

Negligence—Death of Servant of Contractor for Demolition of Building—Collapse of Wall—Dangerous Condition—Action against Contractor and Owner—Independent Contractor—Workmen's Compensation for Injuries Act—Findings of Jury.

Action by the administrator of the estate of Jacob Simberg, under the Fatal Accidents Act, to recover damages for Simber's death, for the benefit of his widow and five children. The death occurred on the 7th October.

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

J. M. Godfrey, for the plaintiff.

L. Davis, for the defendant Wallberg.

W. H. Irving, for the defendant Lowes.

G. M. Gardner, for the defendant Gosnell.

BRITTON, J.:—Simberg was in the employ of the defendant Wallberg, who had a contract with the defendant Lowes, the owner of certain property known as number 92 Sherbourne street, in Toronto, to demolish and remove the dwelling-house and out-houses situate thereon. While so engaged, the north wall of an out-house, which it is alleged had been left in a

dangerous condition, collapsed, falling upon the deceased Simberg, causing him injuries from which he died.

It is alleged that the defendant John Gosnell was the owner of the property, and so was liable for the result of this accident.

The negligence charged is that of leaving the wall in a dangerous condition and not having it shored up or properly stayed or strengthened while the work of demolition was progressing.

At the trial, the action was abandoned as against Gosnell, counsel for the plaintiff consenting to judgment going in Gosnell's favour.

At the close of the case, a motion was made by counsel for the other defendants respectively that the action be dismissed against them.

My decision was reserved, and questions, subject to my ruling upon the motion, were submitted to the jury. These questions with the answers thereto were:—

1. Were the defendants or either of them guilty of negligence which caused the death of Jacob Simberg? If one defendant only guilty of negligence, which one? A. Yes.

2. If so, what was that negligence? A. By leaving this wall in a dangerous condition.

3. Was the deceased Simberg in the place and doing the work assigned to him by Wallberg at the time of the accident? A. No.

4. Could the deceased Simberg, by the exercise of reasonable care, have avoided the accident? A. No.

The action is brought against Wallberg under the Workmen's Compensation for Injuries Act; and, as the answer to the third question is that the deceased was not at the place and doing the work assigned to him when the accident happened, the plaintiff cannot recover against the defendant Wallberg.

There was not, in my opinion, any evidence of negligence on the part of Lowes. There was no duty owed by him to any person unless upon the premises as of right either as owner or tenant or licensee, or in some other way. There was no invitation on the part of Lowes, either express or implied, to any one, apart from his contract with Wallberg, to go near this wall so as to be in danger of its falling. This is not the case of a trap or of any danger to which a person not aware of it might be lured or attracted. Lowes, in good faith, gave the work to an independent contractor, Wallberg, a competent man skilled in that kind of wrecking business.

There was no evidence that could properly be submitted to the jury of any interference by Lowes with the work of the contractor. Nothing was done by him that would seem to shew liability on his part, in the circumstances of this case. It is stated that Lowes was on the premises day by day, but he was not on the premises within sight of the dangerous wall. The wall could not be seen by Lowes from his own home or in the ordinary course of coming and going. If the deceased was not in the place where he ought to have been under his arrangement with his employer Wallberg, that is a defence for Lowes as well as for Wallberg. There was no duty on the part of Lowes to the deceased in the place where the deceased was at the time the accident happened.

Action dismissed with costs, if demanded.

WOLSELEY TOOL AND MOTOR CO. v. JACKSON POTTS & CO.—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—MAY 26.

Parties—Third Party Notice—Motion to Set aside.]—Appeal by James D. Turbull and William W. Turnbull, third parties, from an order of the Master in Chambers dismissing the appellants' motion to set aside the third party notice and the service thereof. The learned Chief Justice said that, under Rule 25 (g) and the cases cited, the Master's order was properly made; and the appeal or motion to set the same aside should be dismissed. Costs to the defendants against the Turnbulls in any event. It was not a case for requiring the undertaking imposed in Re Jones v. Bissonette, 3 O.L.R. 54. R. C. H. Cassels, for the appellants. H. S. White, for the defendants.

STEELE v. WEIR—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—MAY 26.

Partition—Application for Order for Partition or Sale—Administration—Rules 612, 613—*Caution—R.S.O.* 1914 *ch.* 119, *sec.* 15 (*d*)—*Executor—Costs.*]—Motion by the plaintiff for an order for partition or sale of lands. The learned Chief Justice said that in its essence the application was for administration, and Rules 612 and 613 declared that it should not be obligatory

on the Court to make such an order. The executor should be granted authority to register a caution under R.S.O. 1914 ch. 119, sec. 15 (d), and the plaintiff's motion should be dismissed. When the estate has been realised, if there shall be a surplus after payment of the obligations referred to in the executor's affidavit, he is to pay the plaintiff's costs of this motion and retain his own costs thereof (the latter as between solicitor and client), and be allowed both in passing his accounts. H. E. McKittrick, for the plaintiff. J. G. Farmer, K.C., for James and William Weir.

JOSS V. FAIRGRIEVE—FALCONBRIDGE, C.J.K.B.—MAY 26.

Practice—Ex Parte Order—Rules 213-216—*Extending Time for Moving against Order—Rule* 217—*Setting aside Order, Execution, and Appointment for Examination of Judgment Debtor—Motion to Commit Judgment Debtor—Renewal of Judgment and Execution.*]—Motion by the defendant to set aside or for leave to appeal from an order of the Master in Chambers of the 15th April last, made upon the ex parte application of the plaintiff, allowing the plaintiff to issue execution; and motion by the plaintiff to commit the defendant for not appearing for examination as a judgment debtor. The learned Chief Justice said that the Master's order of the 15th April ought not to have been made ex parte. Rules 213 to 216 differ from the old Consolidated Rules. Order made extending the time to move to rescind under Rule 217, and setting aside the order of the 15th April and the writ of execution issued pursuant thereto and the appointment for the examination of the defendant as a judgment debtor. The plaintiff's motion for committal of the defendant was dismissed. Costs of both motions to the defendant, to be set off pro tanto against the plaintiff's judgment. O. H. King, for the defendant. M. Wilkins, for the plaintiff.