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HIGH COURT DIVISION.

MEREDITH, C.J.C.P. OCTOBER 3RD, 1913.

RE SCHOFIELD AND CITY OF TORONTO.

Criminal Law—Nuisance—Motion for Leave to Prefer an Indictment against a Municipal Corporation—Application to Judge at Assizes—Jurisdiction of Magistrate—Preliminary Inquiry—Absence of Objection to—Provisions of Criminal Code.

Application by Richard Schofield and others, residents of the city of Toronto in the vicinity of Ashbridge's Bay, for leave to prefer an indictment for a nuisance against the Corporation of the City of Toronto.

The application was made before MEREDITH, C.J.C.P., presiding at the Toronto Autumn sittings of the Court for the trial of civil and criminal cases.

W. E. Raney, K.C., for the applicants. Sections 221 to 223 of the Criminal Code deal with common nuisances. Section 222 provides that "every one is guilty of an indictable offence and liable to one year's imprisonment," etc. Sections 916 to 920 provide for "Proceedings in Case of Corporations." The only proceeding indicated in these sections is by indictment. The law is well settled that where an offence is indictable, and in respect of it there could not be a summary conviction against any individual under Part XV. or a summary trial under Part XVI. of the Code, there is no jurisdiction in a magistrate to hold a preliminary inquiry in a proceeding against a corporation. In Re Chapman and City of London (1890), 19 O.R. 33, Regina v. T. Eaton Co. Limited (1898), 29 O.R. 591, and Regina v. City of London (1900), 32 O.R. 326, prohibition was granted

against Police Court proceedings by way of preliminary inquiry. The last-mentioned case was a decision of a Divisional Court. The subsequent amendments to the Code have left these decisions untouched. By sec. 720 A, which was introduced into the Criminal Code in 1909 (8 & 9 Edw. VII. ch. 9), the doubt that had previously existed as to the jurisdiction of a magistrate over corporations in cases where there might be a summary conviction against an individual (see In re Regina v. Toronto R.W. Co. (1898), 30 O.R. 214, and Ex p. Woodstock Electric Light Co. (1898), 4 Can. Crim. Cas. 107), was resolved in favour of such jurisdiction. By sec. 773 A, also introduced into the Criminal Code in 1909, provision was made for the summary trial of corporations in the cases of indictable offences where individuals might be tried summarily. The list of cases which may be thus tried is contained in sec. 773, and does not include a common nuisance. Whenever an offence is triable summarily under the Criminal Code, that fact is indicated by the section itself. Note the language, "Every one is guilty of an offence and liable, on summary conviction," of secs. 537, 542, etc.; and compare sec. 222. Crankshaw in his Criminal Code, at the end of Part XV., p. 878, gives a list of offences triable summarily. The nuisance sections are not included. Note also sec. 291, for an example of cases triable both summarily and on indictment. The annotators of the Code are all agreed that where an offence is not triable summarily there is no jurisdiction in a magistrate to hold a preliminary inquiry. Vide Crankshaw's annotations under secs. 916-920, 720 A, and 773 A.

E. E. A. Du Vernet, K.C., for the Crown, and G. R. Geary, K.C., for the city corporation, were not called upon.

MEREDITH, C.J.C.P.:—It is plain that the policy of the criminal law is to require a somewhat thorough preliminary investigation of every indictable offence. That is very apparent from many of the provisions of the Criminal Code. And the purposes of it are obvious. For one thing, it lays the facts in a proper manner before this Court so that they can be in a proper manner laid before the grand jury. It has been the practice in some cases not to make such an investigation, but to do what has been called "waive examination." I find no warrant for any practice of that character; it seems to me to be quite improper. What the law requires is a preliminary investigation; and it is only upon the facts thus brought out that ordinarily an indictment can be laid. The Code provides that there may be an indictment

for the offence for which the accused has been committed for trial; and that there may be an indictment for any other offence founded on the facts disclosed in the preliminary inquiry. The policy of the law plainly is, that cases should pass through an inquiry of that sort before being presented to the grand jury. It is true that power is given to the Attorney-General, and to the Judges, to permit an indictment in cases which have not come up in that manner; but I cannot think that that power was intended to be exercised in any but unusual cases. It is necessary sometimes where magistrates have not done their full duty, not made that inquiry into the case which the law required; and there are other cases in which it is plain that, if there were no provision of that character, there might be delay in the administration of criminal justice, if not eventually a miscarriage. That being so, I am not to authorise a departure from the ordinary course without good cause; I am not to permit a departure simply because some person may desire it for his own convenience or any other selfish purpose. There is no royal road for any one; every one must take the common road up to this Court. The only excuse that I can imagine for seeking to proceed in the manner here sought is based upon the assertion that an indictment cannot be had in any other way. It is easy to say that, but I would be very much better satisfied with an application in a case in which the ordinary way had been tried and in which some difficulty had been encountered. The private prosecutors are, I think, beginning at the wrong end. But it is not necessary that I should consider that question yet. It is my duty to turn them back to the Police Court and let them begin there.

There should not be any difference in the criminal law applicable to a person and that applicable to a corporation—fish should not be made of one and flesh of another. Reading the Code from one end to the other, no substantial indication of any other intention will be found. Then what is the difficulty? There is no dispute as to the jurisdiction of the preliminary Court; the only point made is in the assertion that a corporation cannot be compelled to come there. But the corporation may be quite willing to go there, and to have the case investigated there. It will be time enough to take these troubles seriously when they really arise; and they have not arisen in this case. I think it clear that I should refuse this application; that I should say to these persons, who desire to lay a criminal charge: "Take the same course which every one else has to take, and then,

if you meet with difficulty in that way, and cannot get over it, come to me, or go to the Attorney-General and get leave to lay a bill of indictment before a grand jury.

Some reference has been made to amendments of the Code. The object of those amendments is very plain. It was to put it beyond any shadow of doubt that corporations stand in the same position as others against whom criminal prosecutions are taken; that they were not sheltered by technicality or otherwise in any way. But it is said, that, if that be so, then Parliament has omitted to provide for a case in which there is to be an indictment. If so, such a provision may have been left out because it was not deemed necessary. Of course, Parliament may be mistaken in its views of what the law is; but I do not purpose to determine now whether it was or not, if such were the cause of the omission.

Raney. I directed your Lordship to three cases, two of them cases in the Divisional Court.

MEREDITH, C.J.C.P.:—You had better wait till you have gone to the Police Court.

Raney. What would be the use of going to the Police Court? They would refer me to these cases and say there is prohibition here.

MEREDITH, C.J.C.P.:—Have you any objection, Mr. Geary, to this case taking the ordinary course?

Geary. Not at all, your Lordship.

MEREDITH, C.J.C.P.:—I should also point out how inconvenient it would be, if any one who wanted to avoid going to a preliminary inquiry could come here. How would the presiding Judge proceed? Some preliminary inquiry must necessarily be made, and one may think that, in these days, it should be of the same character as that which the Code expressly requires in the preliminary investigation it expressly provides for; and how would anything of that kind be possible while grand jurors, petit jurors, officers, and litigants are waiting for the ordinary business of the Court?

To those at all familiar with the practice and constitution of the Courts, the cases referred to, even if no differences of

opinion were expressed in them, could not be safe guides to-day. The early difficulty arising from the want of power in corporations to appoint attorneys, general or special, in some of the criminal Courts, has assuredly, in these days, no weight. It is now part of the birthright of all corporations to sue and be sued, and to appoint attorneys and agents, just as human entities may; that power is generally given, expressly, in the legislation under which they are incorporated, and given with express provision also for the manner in which they may be served with process. The merger of all the High Courts of the Province in the Supreme Court of Ontario would do away with the old need of a writ of certiorari, if the provisions of the Code had not done so.

Regarding Chapman's case (Re Chapman and City of London, 19 O.R. 33), it may be added that, since it was decided, one of the strongest points made in it in support of the prohibition has been turned the other way by the legislation now contained in the Code, expressly making its provisions applicable to corporations: sec. 2, sub-sec. (13); so that it is difficult for me to imagine any good reason why, to-day, a corporation may not be duly summoned to and appear at a preliminary investigation of a criminal charge against it taken under the provisions of the Criminal Code.

But, as I have said, it is not necessary to determine the question; in view of the willingness of the corporation, expressed by counsel, that the ordinary course of procedure be taken, there is no good reason that I can perceive for pressing this application further; it is dismissed.

See Regina v. Birmingham and Gloucester R.W. Co. (1840), 9 C. & P. 469; and Pharmaceutical Society v. London and Provincial Supply Association Limited (1880), 5 App. Cas. 857.

MEREDITH, C.J.C.P. OCTOBER 13TH, 1913.

HEALEY-PAGE-CHAFFONS LIMITED v. BAILEY AND HEHL.

Trial—Notice of Trial—Time for—Computation—New Rule 248.

Motion by the defendants, made at the Sandwich non-jury sittings, on the 23rd September, 1913, to strike this case out of

the list of cases entered for trial at that sittings, on the ground that it had been irregularly set down.

J. H. Rodd, for the defendants.
F. D. Davis, for the plaintiffs.

Judgment dismissing the motion was given at the close of the argument, and the following memorandum was afterwards sent to the Registrar.

MEREDITH, C.J.C.P.:—Mr. Rodd's contention is that, in effect, sixteen days' notice of trial must now be given, and the recent changes in the wording of the Rule (Rule 248 of 1913, which is Con. Rule 538 amended) give some colour to that contention. It was quite clear before such changes that ten days' notice of trial was enough; there was then nothing that would give any kind of encouragement to this motion.

Clause (*a*) of the changed Rule requires that "ten days' notice of trial shall be given before entering an action for trial," and clause (*c*) requires that an action shall be entered for trial "not later than the sixth day before the commencement of the sittings;" and so the sixteen days are made up; ten days before the action is set down and six afterwards.

But I can have no manner of doubt that there was no intention thus to extend the long standing 10 days' notice; nor am I compelled by the literal meaning of the new words of the Rule to hold that any change in this respect was brought about.

That which the Rule means is this: that no case shall be set down for trial until after a ten days' notice of trial has been given; and then it shall be set down six days before the sittings of the Court.

The motion is dismissed; there will be no order as to costs of it; the costs of the action have not been appreciably increased by it; and the point is a new one; and one which would be of much moment if effect had to be given to it.

MEREDITH, C.J.C.P. OCTOBER 13TH, 1913.

HEALEY-PAGE-CHAFFONS LIMITED v. BAILEY AND HEHL.

BAILEY AND HEHL v. NEIL ET UX.

Vendor and Purchaser—Contract for Sale of Land—Several "Options" upon Same Parcel—Priority—Notice—Husband and Wife—Misrepresentation—Expiry of Time—Pleading—Statute of Frauds—Amendment—Trial in Absence of Defendants—Rescission—Waiver—Evidence—Breach of Contract—Criminal Proceedings—Costs.

The first action was brought to remove from the register a cloud upon the plaintiffs' title to land.

The second action was for damages for breach of a contract.

The actions were tried before MEREDITH, C.J.C.P., at Sandwich, on the 10th October, 1913.

M. K. Cowan, K.C., and F. D. Davis, for the plaintiffs in the first action.

No one appeared for the defendants.

M. K. Cowan, K.C., and E. A. Cleary, for the defendants in the second action.

No one appeared for the plaintiffs.

Judgment was delivered after the hearing, and the following reasons were afterwards sent to the Registrar.

MEREDITH, C.J.C.P.:—These cases have come on for trial, and have been heard, under circumstances by no means those most conducive to that which ought to be the object of all litigation—a just determination of all matters in question between the parties, speedily.

The first-named case was entered for trial at the sittings of this Court, here (Sandwich), beginning on the 23rd September, 1913, when the defendants sought, and in more than one way endeavoured to obtain, delay; and eventually, agreeably to all parties, the trial was postponed until this day (10th October), here, and the sittings of the Court adjourned accordingly.

One of the reasons for granting the delay was that the other of these two cases was pending, but not ripe for trial; and, as it arose out of the same transactions and depended upon the same facts as those involved in the other case, it was desirable that

the two cases be heard together, or at all events at the same sittings of the Court, not only for the purpose of saving expense, time, and inconvenience, but also to avoid inconsistent judgments which might be the result, and possibly—owing to different evidence at the different trials—the necessary result, of such a severance of the trials. And so it was part of the arrangement for delay, agreeable to all parties, that the two cases should be tried here to-day, and they have come on for trial accordingly; but neither counsel for the parties Bailey and Hehl, nor either of them in person, is present; nor is any satisfactory reason for their absence given.

In these unsatisfactory circumstances—attributable perhaps to some unlooked for indisposition—after some delay for the purpose of enabling those who represent the other parties to communicate with those who represent the absent parties, and those present being unwilling that the cases should go over until the next sittings of the Court here, the trial of the first-mentioned case proceeded, and is now concluded, ex parte; and I must now determine it, regardless of the fact that there may be an application for a new trial, and a new and full trial of it.

The land in question became suddenly property of highly speculative value, owing to the possibility of the establishment of a large manufacturing industry near it; and land agents of all sorts began to hover about it; the first two to alight procured, in about 15 minutes, they say, from the owner of the land in question—William Neil, one of the defendants in the second of the before-mentioned two actions—an agreement to sell it to them: Neil's wife was also applied to, but refused to enter into the agreement. These land agents were not able to pay for, and never had any intention to buy, the land, but took that which they called, and is usually called, "an option," with a view to selling their rights under it at a profit. Soon after, another land agent appeared on the scene, and, on the misrepresentation that the "option" already given was "no good," because not signed by the owner's wife, procured for himself another option signed by the wife, as well as the owner, at an increase of $500 in the price. The third to approach the owner and his wife were the land agents Bailey and Hehl, parties to both actions: they were told of the second option, and that they would be notified in case it was not taken up. It was not, but was allowed to elapse; they were sent for, and came, and entered into the third agreement or "option," which was given by both the owner and his wife. The owner and a witness, James

Scott, have both testified that when this agreement was entered into the purchasers were informed of the giving of the first "option," though at this time there can be no doubt that the owner thought it of no effect, because his wife had refused to become a party to it.

The plaintiffs in the first-mentioned action procured an assignment of the first and second "options," and then obtained a deed of the land from the owner and his wife, after paying to them the price mentioned in the first "option;" but all this was done after they had actual knowledge of the third "option."

The third "option" is registered—irregularly, the plaintiffs in the first-mentioned action contend—and that action is brought to have the cloud, which they allege such registration creates upon their title, removed.

The second-mentioned action is brought by the land agents who obtained the third "option"—Bailey and Hehl—to recover damages from the owner and his wife—the Neils—for breach of their agreement to sell—that is, in the event of the plaintiffs succeeding in the first-mentioned action.

There was no need for two actions; all questions ought to have been raised, and should be determined, in one; the questions involved in the second-mentioned action should have been brought out in third party proceedings.

But each case must now be dealt with as it stands.

According to the evidence adduced, the first "option" has priority, for whatever it, the option, may be worth, over the third.

The second option has no effect, and is out of the question, for two reasons: (1) it was obtained by misrepresentation; and (2) it expired without being acted upon; both of which objections to it are open to the holders of the subsequent "option."

Notwithstanding the first "option," the owner and his wife might, of course, sell whatever legal or equitable rights in and in respect of the land remained in them; so that the holders of the third "option" might take the benefit of any defect in the first option that would have been open to the owner—for instance, a defence under the Statute of Frauds—and that might be a formidable defence to the first-named action; but it has not been pleaded, and I can deal with this case now only secundum allegata et probata. An amendment, raising the question, is not to be made unasked for; whatever might be the case if the defendants were present and seeking it.

Then, according to the letter of existing "options," the

plaintiffs in the first-mentioned action have priority in regard to the husband's contract to sell, whilst the defendants have priority in regard to the wife's. There is nothing in the evidence sufficient to warrant a finding that the defendants were to take nothing under their option unless the holders of the first option failed to avail themselves of it; both husband and wife were, and had been from the time of giving the second option, in the belief that the first was "no good;" otherwise they would not have given the second and third, as the withholding of the third until the second had expired, among other things, goes to shew. The most that can be said against the defendants in this respect is, that they had notice of the first "option" sufficient to make their "option" subject to any legally enforceable rights under the first one.

The repayment of the cash payment on the third "option" is not strictly proved, and, if it were, it would not be sufficient evidence of any agreement to rescind or any waiver by both Bailey and Hehl, the joint purchasers, and none the less joint purchasers because, for their convenience, one of them only was named in the option.

My first impression, therefore, was, that the plaintiffs in the first action were entitled to priority, under the first "option," only in regard to the rights and interests of the husband in the land; and that the defendants in that action were entitled to priority to the extent of the wife's rights and interests in it; but I now think, and find, that there never was any intention on the part of any one concerned in the third "option" to sever in any way the rights and interests of husband and wife; that the contract was for all or nothing; and, failing to get all, they take nothing; just as, if an attempt were made to compel them to take the wife's rights and interests in the land only, they would have a complete defence in the assertion that it was to be all or nothing; and, accordingly, the wife was not guilty of a breach of her agreement with these defendants in joining in the deed to the plaintiffs if the husband were bound by the first option so to convey; and in this case, as the pleadings and evidence stand, I must hold that he was.

It ought, therefore, to be adjudged in the first-mentioned action that the plaintiffs' deed has priority over the defendants' option; which judgment, duly registered, will clear the title of any cloud that "option" may now be upon it.

It appears that, whilst these civil actions were pending, criminal proceedings were taken against one of the parties to

them in connection with the registration of the third option; and I can have no doubt that such proceedings were taken for the purpose of indirectly affecting the proceedings in these civil actions; a thing much to be deprecated. There seems to be no reason, nor indeed any excuse, for not waiting until the civil proceedings begun were concluded, and the whole circumstances disclosed in evidence, before making the criminal charge.

There will be judgment for the plaintiffs in the first-mentioned action as I have intimated; but, under all the circumstances of the case, there will be no order as to any of the costs of it.

In the other action, the defendants appearing, and the plaintiffs not appearing, for trial, the defendants have a right to have it dismissed, and they may take that right with costs.

Proceedings in each action, upon this judgment, will be stayed for thirty days.

HODGINS, J.A. OCTOBER 15TH, 1913.

*STRATHY v. STEPHENS.

Vendor and Purchaser—Contract for Sale of Land—Agreement for Resale by Purchaser of Quarter Interest—Registration of Agreement—Quit-claim by Original Purchaser—New Agreement for Sale between Original Vendor and Purchaser—Rights of Subpurchaser—Registry Laws—Notice to Vendor—Specific Performance—Terms—Parties—Judicature Act, 1913, *sec.* 16(*h*)—*Rule* 134—*Costs.*

Action for the removal from the files of the registry office, as a cloud upon the plaintiff's title, of a certain agreement dated the 1st February, 1912, and registered on the 17th February, 1912, made between the defendant and one Gordon, brought in as a third party.

The defendant counterclaimed against the plaintiff for specific performance of the agreement; and claimed indemnity or other relief from Gordon, the third party.

M. J. Kenny, for the plaintiff.
A. J. McComber and A. McGovern, for the defendant
W. A. Dowler, K.C., and W. McBrady, for the third party.

*To be reported in the Ontario Law Reports.

HODGINS, J.A.:—The plaintiff, by agreement of the 1st February, 1912 (exhibit 3), agreed to sell to Gordon, the third party, lots 1 to 17 . . . for $18,080, of which $4,000 was then paid down by Gordon. The defendant afterwards and on the 22nd February, 1912, paid $1,000 to Gordon upon an understanding, but on no definite terms except, that he was to have a quarter interest in the lands Gordon had agreed to buy from the plaintiff. This $1,000 was no part of the $4,000. It was not paid until three weeks afterwards, but Gordon apparently kept it and treated the defendant as being interested in the $4,000 to that extent. No agreement between the defendant and Gordon was drawn up until some time in February, 1912, when exhibit 10, the agreement dated the 1st February, 1912, was prepared and executed by Gordon and the defendant, and registered by the latter on the 17th February, 1912. . . .

Default having been made in the payments under the agreement between the plaintiff and Gordon, the former served notice of cancellation upon Gordon on the 1st May, 1913, and began an action against him on the 3rd May to declare the agreement at an end. On the 22nd May, 1913, the plaintiff accepted a quit-claim deed from Gordon and Brofman (who had become interested with Gordon in the remaining three-quarters interest), which deed is expressed so as to cover the whole title to the lots included in the agreement between the plaintiff and Gordon. The plaintiff then repaid $3,000 out of the $4,000 paid by Gordon; and received a letter (exhibit 8) which is as follows:—

"R. L. F. Strathy, Esq., Port Arthur, Ont.

"Dear Sir:—I hereby acknowledge receipt of three thousand dollars, a portion of the amount which I paid you on a certain agreement dated the 1st day of February, 1912, made between yourself and me, with reference to block 62 McVicar addition in the city of Port Arthur. You are hereby authorised by me to retain the balance of the money which I paid to you on the said agreement, namely, the sum of one thousand dollars, to be applied on account of the interest of H. J. Stephens, of the said city of Port Arthur, real estate agent, in a one-quarter undivided interest in the said lands.

"Yours truly,

"A. Brofman.

"'M. H. S. Gordon.'"

On the same day, the plaintiff agreed to sell an undivided three-quarter interest in the said lands to Gordon and Brofman for the same proportionate consideration as in the earlier agreement with Gordon—the main difference being a much heavier

cash payment. The $3,000 returned was applied on this increased cash payment. The defendant having refused to join in the quit-claim deed, negotiations (without prejudice) were carried on between him and the plaintiff without result, as the defendant insisted upon a divided interest, i.e., an allocation of definite lots, while the plaintiff would do nothing better than an undivided quarter interest. The defendant relies, however, on an interview on the 4th August, 1913, as being a recognition on the plaintiff's part of his status as the equitable owner of an undivided quarter interest, and as resulting in an agreement to receive payment for it.

I cannot find that there was any agreement made at that time. The defendant says that the plaintiff told him that there was no use making a tender unless he tendered the whole amount, i.e., the total amount called for in his original agreement with Gordon, or make another agreement. The defendant did not do either, but spoke to the plaintiff's solicitor on the 6th August, 1913, and told him that the matter was ready to be proceeded with, and asked him to get the plaintiff to telephone. The plaintiff's account is that on the 4th August he intimated that he would accept the whole amount, but that the defendant told him aferwards that he could not carry it through unless he got a divided interest, which the plaintiff declined to give. In any case, the defendant did not do what, according to his own evidence, the plaintiff said he must do, and contented himself with an indefinite message. The writ in the present action was issued on the 18th August, 1913. . . .

The plaintiff admits that he knew before he served notice of cancellation on the 1st May, 1913, that the defendant had a quarter interest in the property covered by Gordon's first agreement; but I cannot find as a fact that the plaintiff knew of the written agreement or of its terms, or had any notice of its provisions other than what may be imputed to him from its registration on the 17th February, 1913. No one has said that its terms were disclosed to him; and, as Gordon deposes that it is not expressed in the way he understood his transaction with the defendant, it would be impossible to hold that, until it was recorded, the plaintiff had any notice other than of the fact that the defendant claimed to be entitled to an undivided quarter interest. Gordon and the defendant had never put their agreement into definite form until they signed the agreement, and they now differ as to whether their arrangement has been properly expressed by the writing. It would be hard to impute to the

plaintiff knowledge which neither of the parties themselves possessed.

The notice of cancellation, therefore, given to Gordon alone, was properly so given, and that action properly constituted. But the effect of both is ended by the arrangement of the 22nd May, 1913, and need not be further considered.

At that time the plaintiff was well aware of the defendant's refusal to join in the arrangement. The plaintiff wanted him to do so, and the quit-claim deed is so drawn as to include the defendant as a grantor. With that knowledge, the plaintiff agrees with Gordon and Brofman, and accepts a transfer from them of all the interest which Gordon had acquired under the agreement with the plaintiff of the 1st February, 1912, and as part of the same transaction resells to Gordon and his partner Brofman a three-quarter undivided interest, retaining the remaining one-quarter interest and the sum of $1,000 which is treated as part of the original purchase-money, on the terms and in the way mentioned in the letter. That letter contains an authorisation from Gordon and Brofman to the plaintiff to apply this money upon the defendant's one-quarter interest.

In my opinion, by becoming a transferee for valuable consideration from Gordon of the whole interest dealt with by the original agreement of sale, the plaintiff took that interest as a subsequent purchaser and with the notice imputed by the Registry Act through the registration on the 17th February, 1913. That the transfer was for valuable consideration cannot be doubted; $3,000 was paid back, and a new transaction entered into which could not have been effective except upon the basis of the retransfer. In itself, this forms a valuable consideration for the grant.

The effect of this was argued before me by counsel. I do not think, however, that the right of the defendant can be likened to those of a purchaser of part of a mortgaged property whose right to redeem the mortgage over the whole property depends, as it seems to me, upon equitable considerations, peculiar to the relationship and largely resting on this fact, that the amount of the mortgage and interest is fixed, and remains a constant factor not subject to fluctuation; so that the mortgagee is not injured or embarrassed by the working out of the equities between the respective owners of the equity of redemption, who are bound to indemnify the mortgagor pro tanto. A subpurchaser of land and the original vendor are not in privity, and the former has no right to compel the latter to carry out the subcontract, nor has the subpurchaser himself any right under the

original agreement. It is a pure matter of contract, and not of equities, unless the original vendor chooses to put himself in a position which gives rise to some new right: Dyer v. Pulteney, Barn. Ch. 160. . . .

[Reference to Fenwick v. Bulman (1869), L.R. 9 Eq. 165; Fry on Specific Performance, 5th ed., p. 85; Sugden on Vendors, 14th ed., p. 232; Waterman on Vendors, p. 83; Williams on Vendor and Purchaser, 2nd ed., p. 571; Browne v. London Necropolis Co., 6 W.R. 188; Shaw v. Foster, L.R. 5 H.L. 321.]

Dealing as he did, and becoming a purchaser from Gordon of the equitable interest which Gordon had under the original agreement, the plaintiff has put himself in a position similar to that of any other transferee of land with notice that his vendor had previously agreed to sell it to another party. He becomes bound to carry out his immediate vendor's bargain. Gordon's agreement was to convey the fee simple in a one-fourth interest to the defendant; and Gordon had a right, upon performing his contract with the plaintiff, to acquire that fee. The plaintiff has in effect released Gordon from that performance, i.e., the payment of the money properly attributable to it. Does this fact enable him to avoid what otherwise seems his clear liability? I do not think so. The effect of the quit-claim deed as a conveyance was to transfer all Gordon's interest in the lands, and it resulted in his being relieved of the liability to pay for them. But it could not operate to convey the interest of the defendant, which was to get the fee from Gordon on payment of the stipulated amount. The notice to the plaintiff, through the registry office, was of the defendant's full rights (Gilleland v. Wadsworth, 1 A.R. 82; Gray v. Coughlin, 18 S.C.R. 553); and, when the former acquired Gordon's equitable interest, he could only merge it effectively with his legal interest by relieving Gordon from the payment, upon receipt of which that interest was to be conveyed to Gordon. He could not release Gordon, while acquiring Gordon's entire interest, so as to prejudice the right which Gordon had given to a third party. And, under the circumstances, and having by his dealings rendered it impossible for the defendant to perform the original contract, I think that the plaintiff became liable to perform Gordon's contract with the defendant upon assuming the position of a purchaser with notice: Flinn v. Pountain (1889), 37 W.R. 443; Chesterman v. Gardner, 5 Johns. Ch. (N.Y.) 29; Meux v. Maltby, 2 Swans. 277; Taylor v. Stibbert, 2 Ves. 437; Lightfoot v. Heron, 3 Y. & C. Ex. 586; Reilly v. Garnett, I.R. 7 Eq. 1; Waldron v. Jacob, I.R. 5 Eq. 13.

But, that being so, his only liability is to perform Gordon's contract according to its terms, and he is, therefore, entitled to the protection of all the stipulations therein: O'Keefe v. Taylor (1851), 2 Gr. 95.

By the terms of that agreement, $1,175 was due on the 1st August, 1913, with interest, and it is provided that, in default of payment of any of the instalments, the vendor may, at his option, on giving thirty days' notice, cancel the agreement. No such notice was given, and the writ herein, if it could be treated as equivalent to such notice, was issued on the 18th August, 1913. . . .

In view of the opinion of an experienced Judge in Edison v. Holland, 41 Ch.D. 28, I propose to exercise what I think is the right of the Court to add Gordon as a defendant under the powers conferred by sec. 16(*h*) of the Judicature Act, 1913, and by the Rules of Court (see Rule 134). This works no injustice to him, as his counsel supported the defendant's counsel in his argument, and it cannot prejudice the plaintiff to have Gordon before the Court when his rights as grantee from Gordon are being dealt with.

I do not see any valid reason for refusing specific performance of the agreement. The defendant, however, is well in default; he has accepted the title, but has made no tender of money nor of a conveyance; and, being in default, can only obtain specific performance on paying up the instalment and interest in arrear. I think he should be held to the offer made in his pleadings to pay the whole; and judgment will go for specific performance against the plaintiff on that basis.

Under the circumstances, I am fully warranted in giving no costs, except that the defendant must pay the costs of the third party up to and including judgment. There was, in my opinion, no justification for the claim against the third party, who was entirely ignored by the defendant and never asked to perform the contract made between him and the defendant. Nor am I satisfied that the claim put forward against the third party is properly the subject of a third party notice, under our Rules, in the circumstances disclosed in evidence.

MIDDLETON, J. OCTOBER 16TH, 1913.

*RE FULFORD.

Will—Construction—Investments by Executors—Retention of Investments Made by Testator—Authority to Hold "Increased Stock Received by Way of Stock Dividends"—"Similar Additions to my Holdings"—Securities Substituted for Original Investments—Re-organisation of Companies—Duty of Executors—Shares Held by Testator not fully Paid-up—Realisation of Unauthorised Securities—Discretion—Advice of Court—Accretions to Estate—Apportionment between Capital and Income—Power to Retain Investments—Implication of Power to Make Similar Investments.

Motion by the executors of the will of George Taylor Fulford, deceased, upon originating notice, for an order determining certain questions arising upon the will and in the administration of the estate.

E. T. Malone, K.C., for the executors.

H. S. Osler, K.C., for the Official Guardian, representing the infant son and infant grandsons of the testator and grandchildren who may hereafter be born.

M. C. Cameron, for Mrs. Hardy, life-tenant.

MIDDLETON, J.:—During his lifetime, the late Mr. Fulford had been largely interested in various industrial undertakings, and held a large amount of stock and other securities of a more or less speculative and uncertain value. By paragraph 4 of his will he provided: "I authorise my executors to keep any of the investments which I may have at my decease and I direct them to invest the moneys of my estate as they come in in Government bonds and securities and in municipal debentures of the Dominion of Canada and the Provinces and municipalities therein and of the United States of America and the States and municipalities thereof and I also authorise them to hold any increased stock received by way of stock dividends or similar additions to my holdings."

The question that is now raised arises with reference to the duty of the executors under this clause. The executors have retained the stock and other securities held by the deceased;

*To be reported in the Ontario Law Reports.

but in the course of time the nature of these holdings has been changed in many respects . . . and the main question is, whether the executors are now entitled to hold securities which have become substituted for the original investments.

Everything depends upon the meaning to be attributed to the clause in question. In the earlier part of the clause the authority to retain is confined to "the investments which I may have at my decease." Outside of these investments the testator has made it clear that he desires his estate to be invested in securities of the highest possible character—Government bonds and municipal debentures. Then follows the clause which was much discussed on the argument: "And I also authorise them to hold any increased stock received by way of stock dividends or similar additions to my holdings."

It is argued on behalf of the trustees and the life-tenant that this authorises the executors to invest now in securities of a similar nature to those in which the testator had invested and held at the time of his death. I cannot accept this as being the correct interpretation of the clause in question, which seems to me plain and free from all ambiguity.

As a rider to the first direction, permitting retention of the testator's own investments, he permits the retention of (a) "any increased stock received by way of stock dividends" or (b) "similar additions to my holdings."

It is said that there can be no addition to the testator's holdings similar to stock dividends. This may be so, though I am by no means prepared to admit it; but that would not alter the construction or meaning of the clause. All that this clause authorises to be retained is any stock dividend received, or something akin to it. A stock dividend is stock distributed to those already holding stock by way of dividend upon their then holdings. It is not a new investment in any sense; it is a mode of distributing accumulated profits in the shape of new stock, which, pro tanto, reduces the value of the stock held.

To illustrate: if the testator held ten shares of stock in a company, worth twice par by reason of accumulated profits, the company might declare a stock dividend of ten shares, which would transmute the holding from ten shares worth $200 each to twenty shares of $100 each. The testator desires to make it plain that if this were done there was no obligation to sell the ten new shares.

In my view, the operation of the clause is strictly limited to the retention of shares received as stock dividend, or other securities which may fall within the designation of "similar additions." . . .

[Reference to In re Smith, Smith v. Lewis, [1902] 2 Ch. 667; In re Anson, [1907] 2 Ch. 425.]

I think it is a question of fact in each case: is what has taken place merely a change in the investment made by the testator inherent in the investment itself, or is the change, although a change effected by a vis major, quite apart from the volition of the holders, a substitution of something different from that which the testator invested in?

The earlier case is based upon the finding of fact that the shares in the reconstructed company were in substance the same investment. The finding in the latter case was that the distributed assets reaching the executors on the dissolution of the holding company were not an investment made by the testator.

With much deference, I agree with the finding in both cases; and the question here is, with reference to each item, under which head does it fall? . . .

The testator held certain stock. The right or option to subscribe for additional stock at a price less than the market value was given to the executors by reason of the testator's holding. The executors took up the new stock, thus converting into the stock of the company in question certain assets of the estate held as cash or invested in Government and municipal securities. In taking up this stock the executors were discharging their duty; a duty which might just as well have been discharged by selling the "rights;" but they have no right to retain the stock so taken up. It became an asset of the estate which it was their duty to convert.

With reference to the stock taken on re-organisation of several companies named, sufficient does not appear before me from the present material to enable me to pronounce upon the question of substantial identity. No doubt, in accepting the stock in the new company upon a re-organisation, the executors have exercised their best judgment, and no attack is made or suggested upon the wisdom of what has been done. But, as already said, before the stock so received could be retained as a permanent investment, there must in each case be a finding of fact as to the substantial identity of the two corporations. The testator may well have been content to invest a certain sum of money in a company carrying on a small business; and, if he made such an investment, he authorised his executors to continue it; and, if all that has been done is to re-organise that same company, even though the re-organisation involves the substitution of stock in a new concern, the case relied upon shews that this is really the same investment. But, if the re-

organisation means the swallowing up of that small company by some merger and the substitution of an equivalent holding in some widely different concern, then the investment is not, either in substance or in form, that made by the testator; and, although the transmutation takes place without the consent or against the will of the executors, their right to retention is at an end. From the memorandum handed in, I am at present inclined to think that the bulk of the stocks of this estate, where there has been a reconstruction or change, can be no longer retained. The material is inadequate to allow the individual stocks to be finally dealt with.

In re Anson is conclusive against the right of the executors to retain the distributed assets received as the result of the dissolution of what are commonly known as "the trusts," in consequence of the legislation and action of the United States and its Courts, decreeing their dissolution. This covers all the stocks received in lieu of the holding in the American Tobacco Company.

A further question is raised as to holdings that had been subscribed for but not fully paid-up by the testator at the time of his death. I think that these are investments made by the testator, and that the fact of the executors being called upon to implement his obligation to pay the balance remaining upon his subscriptions makes these none the less his investments.

It may be that the parties will be able to agree as to the effect of these findings upon the different stock held. If not, supplemental material may be put in.

The question is then raised as to the duty of the executors to realise. I do not for one moment suggest that these stocks should be hastily and improvidently thrown upon the market. The executors are intrusted by the testator with a discretion as to realisation, and they must exercise that discretion, realising as best they can upon the stocks which they are not authorised to hold.

It is suggested that some scheme should be devised by which the Court should approve of realisation in each particular case, taking the opinion of some advisory committee if necessary, upon each particular transaction. I do not think any such scheme can be authorised. The executors are protected from all liability if they honestly and with due care exercise the discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the Court. The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered

is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.

Another matter was suggested with reference to which no formal question is asked. The executors must keep in mind the principles governing the apportionment between capital and income; and, as indicated in In re Anson, the accretions to the shares by the exercise of the options belong to the capital and not to income. The entire income received upon an unauthorised security, or upon a security retained for profitable realisation, does not go to the life-tenant; but everything beyond the legal rate of interest is regarded as an accretion to the corpus to compensate for the risk incident to the particular investment.

The executors argue that a power to retain implies a power to invest in similar securities. No authority is cited for that proposition. The holding of Mr. Justice Hodgins in Re Nicholls, Hall v. Wildman, 29 O.L.R. 206, 4 O.W.N. 1511, that a power to invest in particular securities implies a power to retain where the testator has already invested, is quite beside the mark.

The costs of all parties may be allowed out of the estate.

MIDDLETON, J. OCTOBER 16TH, 1913.

STOCKS v. BOULTER.

Damages—Fraud and Misrepresentation—Rescission of Sale of Farm—Damages Suffered by Purchaser—Shortage in Acreage and in Fruit Trees—Loss of Income from Investment—Remoteness of Damage—Improvements to Property—Loss in Operating—Expenses of Moving—Expenses of Searching Title—Occupation Rent—Quantum.

Appeal by the defendants and cross-appeal by the plaintiff from the report of the Local Master at Picton.

The appeal and cross-appeal were heard by MIDDLETON, J., in the Weekly Court at Toronto, on the 29th September, 1913.

A. W. Anglin, K.C., and C. A. Moss, for the defendants.

D. Inglis Grant, for the plaintiff.

MIDDLETON, J.:—The action was brought to rescind an agreement by which the defendants sold a farm to the plaintiff. By the judgment of Mr. Justice Clute, dated the 24th November, 1911 (3 O.W.N. 277), the agreement, and deed and mortgage executed in pursuance thereof, were rescinded, and the property, real and personal, was directed to be reconveyed and returned; and the vendor was directed to repay the sum paid on account of the purchase-price together with interest. There was a reference to the Master to ascertain the value of any chattels which could not be returned or replaced. No question arises in respect to any of these matters. The judgment then declared that the plaintiff was entitled to recover from the defendant Wellington Boulter the damages which he (the plaintiff) had suffered by reason of the misrepresentations leading to the rescission of the contract, and to ascertain what would be a reasonable allowance to be made to Wellington Boulter by reason of the use and occupation by the plaintiff of the property in question.

The defendants appealed from this judgment, and their appeal was dismissed (3 O.W.N. 1397); and the case was finally determined in the Supreme Court only on the 18th February, 1913 (Boulter v. Stocks, 47 S.C.R. 440). Pending these appeals, the plaintiff remained in possession of the property.

By his report, dated the 8th August, 1913, the Master has allowed as damages $9,041.38, and has allowed for rent, use, and occupation $1,425. It is in respect of these two allowances that the present appeals are had.

At the hearing, Mr. Justice Clute found that there had been misrepresentation with respect to three matters, sufficient to justify rescission: the quantity of the land; the number of apple trees in the orchard; and the condition of the farm. So as to avoid difficulty, if it should be thought there should not be rescission, and that damages alone could be allowed, Mr. Justice Clute assessed the damages with respect to these matters: for the shortage of acreage, at $2,530; for the shortage of trees in the orchard, at $3,100; for the foul condition of the land and shortage of the wheat crop, $2,000: a total of $7,630; so that, if there had been no rescission, the plaintiff's damages would have been $7,630. There having been rescission, these items in great measure disappear, yet the Master has allowed $9,041.38—a result which immediately suggests that the Master must have fallen into some error.

For the shortage of acreage and the shortage in the orchard the plaintiff has sustained no damage save that he has had less

land to crop and fewer trees to bear. These,it seems to me, are factors in fixing the occupation rent with which he is chargeable. He has received back the amount paid for purchase-money, and the interest upon it, and in fairness he is directed to pay occupation rent. This occupation rent will be based upon the real value of the thing occupied; and the foul condition of the land would also reduce the amount with which he was to be charged for rent; and, if it be shewn that during his occupation he expended money resulting in the betterment of the condition of the land, an allowance might be made to him upon that head.

The Master has proceeded upon a totally different theory; he says that the plaintiff was in prosperous circumstances in British Columbia, having investments of $30,000, yielding an income of ten per cent. He gave up these and came here, realising upon his investments, and stayed upon the Ontario property, not only after he had discovered the misrepresentation within a few weeks after his arrival, but throughout the litigation, including the hearing of the appeals; and the Master has allowed $7,500 as representing this supposed loss of income, although claimed as "loss of time or salary for plaintiff for two and a half years at $3,000, $7,500." The Master has, among other things, ignored the fact that the defendant has had to pay interest upon so much of this capital as was invested in the farm, also the fact that the balance of the capital was not shewn to have been idle in the meantime.

But, quite apart from this, after the best consideration I can give to the case, I feel clear that this is not the kind of damage which can be recovered at all. Chaplin v. Hicks, [1911] 2 K.B. 786, does not at all determine that damages heretofore regarded as being too remote can now be recovered. All it determines is that damages may in proper cases be allowed notwithstanding that there may be difficulties in satisfactorily ascertaining the amount of damage. In this respect that decision is identical with the view given effect to in our own Courts in Goodall v. Clarke, 21 O.L.R. 614, 23 O.L.R. 57.

Among other items which have been allowed by the Master is $258.05, expenses moving from British Columbia to the property. I think that this is properly allowable. The objection taken is that the plaintiff availed himself of the opportunity to go to Scotland, and that he would have gone to Scotland at any rate. Notwithstanding this, I think that the amount is properly allowable.

Then a series of terms are allowed for some changes made in the operation of the factory. If these operations had been

shewn to result in any permanent improvement to the property, I think the amount by which the value of the property was increased might be allowed as an allowance under clause 2 of the judgment. It is clearly not damages sustained by reason of the misrepresentation; and there is no evidence to shew that any permanent improvement has resulted. While I allow the appeal upon this ground, I would allow the plaintiff to have a reference back at his own expense to shew whether the value of the property has been increased by reason of any of the matters set forth in these particulars.

Then the plaintiff seeks to charge, and has been allowed, the sum of $400 as loss in operating the property. It is not shewn that this loss was caused by the misrepresentation alleged. Possibly part of it might be attributable to the foul condition of the land, but I think the proper place to deal with this is in the adjustment of the occupation rent.

There then remains the question of the occupation rent. It seems to me that the Master has approached this from the wrong standpoint, and that the sum with which he has charged the plaintiff is altogether inadequate. Yet it would not be fair to charge him with the full rental payable under normal conditions. After the judgment at any rate, possibly after his repudiation of the contract, the retention of possession by the plaintiff was purely voluntary; but the precarious nature of the holding and the bad condition of the ground, owing to the weeds, are factors to be considered. Giving the best weight I can to the evidence, and giving the plaintiff the benefit of every doubt, and making the most generous allowance to him in respect of all matters which can be allowed, I have come to the conclusion that he ought to pay at least $2,000 net for the time during which he was in occupation of the property.

The result is, that, subject to the plaintiff's right to a further reference as to any increased value by reason of the matters included under the head of outlays, the appeal is allowed to the extent of reducing the damages to $458.05, and the occupation rent is increased to $2,000.

The defendant should have the costs of both appeals.

No claim was made in respect of an item of damage which one would have expected to have been put forward, namely, the expense of searching the title. If this has been overlooked, I would allow the claim now to be made and would allow the result to be modified accordingly.

MIDDLETON, J., IN CHAMBERS. OCTOBER 16TH, 1913.

RE KLOEPFER.

Life Insurance—Beneficiary—Wife or Surviving Children—Mention of Wife by Name—Death of Wife—Remarriage of Insured—Rights of Second Wife Surviving Insured—Rights of Surviving Children—Ontario Insurance Act, 2 Geo. V. ch. 33, secs. 178, 181—Trust—Executors.

Motion by the executors and widow of Christian Kloepfer, deceased, for payment out of Court of moneys arising from an insurance policy upon the life of the deceased.

W. J. Boland, for the executors and widow.

F. W. Harcourt, K.C., for the infant children.

A. J. Thomson, for Nellie K. Bongard, daughter of the testator.

MIDDLETON, J.:—The insurance money is payable to "Bessie Kloepfer, wife of Christian Kloepfer, for her sole use, if living, in conformity with the statute, and, if not living, to the surviving children of said Christian Kloepfer." The policy was issued on the 25th May, 1885. Bessie Kloepfer died, and on the 10th June, 1910, the insured directed the amount secured by the policy to be paid to his executors.

In the meantime the insured had, on the 1st June, 1904, married again. He died on the 9th February, 1913, leaving his second wife and children surviving.

All admit that the executors cannot take; and the latter part of clause 4 of sec. 178 of the Ontario Insurance Act, 2 Geo. V. ch. 33, cannot aid the executors, as the children are preferred beneficiaries.

The children claim as beneficiaries named in the policy. The widow claims on the theory that the policy must be read, under the statute, as though she, and not the first wife, was named in it, relying on what is said in Re Lloyd and Ancient Order of United Workmen, ante 5: "The insurance contract must be read as creating a trust . . . in favour of the wife of the assured only, such wife being, by force of the statutory definition, the wife living at the maturity of the contract, notwithstanding that the first wife was designated by name."

I read these words as applying to a case which had already been held to come within clauses 3 and 4, and not as determining

that these clauses provide that in the construction of an insurance policy "wife" (or a named wife) means the widow of the insured.

In the Lloyd case the policy was for $2,000: $1,000 to be paid to the widow and $1,000 to be paid to the daughter. I thought this was not, within the words of the Act, a policy payable to the wife or payable to the wife and children generally. The Court of Appeal took the view that the $1,000 was a separate insurance payable to the wife; and, this being so, clauses 3 and 4 applied.

The real question in this case is, whether this policy is for the "wife and children generally," within the meaning of the statute; for, if it is, the word "wife" means the wife living at the maturity of the contract, even though the first "wife is designated by name."

The benefit of the policy is for the testator's wife and children, and it makes no difference that the wife, if she lives, takes absolutely, and, if she is dead, the children take absolutely; it is still a policy for the benefit of the wife and children. In such cases the Legislature has given to the policy a statutory construction. The wife to be benefited is the wife at the time of death, even though the wife at the time of insurance is mentioned by name. In no other way can effect be given to the awkward words of sec. 181.

The money will therefore go to the wife. The Official Guardian's costs must be paid out of the fund. The executors can well look to the estate.

BOYD, C. OCTOBER 16TH, 1913.

RE ONTARIO BANK PENSION FUND.

Bank—Winding-up—Pension Fund—Bank Act, R.S.C. 1906 *ch.* 29, *sec.* 18, *sub-sec.* 2—*Inchoate Scheme—Claim on Assets of Bank—Money Raised by Assessment of Shareholders for "Double Liability"—Charitable Trusts—Order of Referee Disallowing Claim—Appeal—Costs.*

Appeal by certain persons who were members of the staff of the bank from an order of KAPPELE, Official Referee, in the winding-up of the bank, disallowing the claim of the appellants to a share of the assets of the bank in respect of a pension fund.

J. A. Worrell, K.C., for the appellants.
J. A. Paterson, K.C., for the shareholders.
A. McLean Macdonell, K.C., for the liquidator.

BOYD, C.:—Passing over preliminary matters set forth in the judgment of the Referee, the substantial question remains as to the $30,000 pension fund of the Ontario Bank. This amount is now represented by that much money levied as under the double liability call made by the liquidator. Is that money impressed with a trust for the benefit of the officers of the bank, or is it to be returned to the shareholders as being unnecessarily levied? The petitioners, former officers of the Ontario Bank, ask that it be impounded and administered under the direction of the Court, and the judgment of the Referee is against that contention. I see no good reason for disagreeing with his conclusion.

Looking at all the evidence, and having regard to the action and inaction of the bank, the proper inference seems to be that there was an intention on the part of the shareholders and directors of that bank to establish a pension fund under the Bank Act, R.S.C. 1906 ch. 29, sec. 18, sub-sec. 2, which was frustrated in its progress by the insolvency and liquidation of the bank. The scheme was cut short before its completion, and never was made ready for operation. Everything as to the ascertainment of the beneficiaries is left at loose ends; whether the claim for pensions is to depend on the length of service, or sickness, or old age, or inability to work, or contribution to the fund by the officers—these and such like details are all left unconsidered, because nothing had been determined as to the status of the possible beneficiaries. One cannot think that the fund was meant for the benefit of a person who had left the service of the bank, nor can it be supposed that, when the term of service was cut short by an order to wind-up, the portion of the fund then existing should be made more efficacious for the extruded staff than it was in the hands of the body that had created it, for all the money set apart came from the shareholders. No claim now exists by any officer as to this fund, and I fail to see how any such claim can hereafter arise, because no one can tell under what conditions the pension was to be paid, or was intended to be paid, out of the $30,000. The Court cannot undertake such an indeterminate task and supplement all that is needed, and even that in an arbitrary way, before it can be said that the pension fund has been established. At most there is but the nucleus of a fund which was being established before the liquidation.

The appellants relied on the doctrine of charitable trusts, and referred specially to a case of pensioning as decided by Byrne, J., in Re Gosling, 48 W.R. 300 (1900). But in that case the testator had left a clearly defined fund for a clearly defined purpose, which was deemed to be charitable. The benefit intended was for a class of "old and worn out clerks," who were to be "pensioned off." These expressions brought the donation within the statute in that behalf. Here is no ascertained fund—the creation of the fund was in progress with an ultimate view of having it increased by contribution from the officers of the bank, and there is no means of defining who of all the officers and their families are to be the recipients of the pension. In this regard the decision of Cozens-Hardy, J., in Re Gassiot, 70 L.J. Ch. 242 (1901), is pertinent. He held that the testamentary gift of income to be applied for the benefit of persons answering a certain description in the wine trade, without any reference to age or poverty, could not be supported as a charitable gift, and therefore failed wholly as infringing the rule against perpetuities.

In brief, the whole scheme as projected is as yet inchoate, and it was interrupted in the making by the compulsory liquidation of the bank.

The judgment should be affirmed and the money returned to the shareholders. The Referee has awarded costs against the petitioners. But, as the point is a new one under the Bank Act and is one calling for judicial decision, I think the better course will be to relieve the petitioners from the payment of costs, and to direct that the costs of the liquidator be paid out of the fund.

MIDDLETON, J. OCTOBER 17TH, 1913.

*TORONTO HARBOUR COMMISSIONERS v. ROYAL CANADIAN YACHT CLUB.

Landlord and Tenant—Lease—Covenant of Tenant—Restricted Use of Demised Premises—Right to Remove Sand—Waste—Injury to Reversion—Injunction—Damages—Forfeiture of Lease.

Action for an injunction restraining the defendants from removing sand from certain parcels of land leased by the Corporation of the City of Toronto to the defendants the Royal

*To be reported in the Ontario Law Reports.

Canadian Yacht Club, and for an account of the value of the sand already removed, and for a declaration of forfeiture of the lease.

A. C. McMaster, for the plaintiffs.

W. M. Douglas, K.C., and F. M. Gray, for the defendants the Royal Canadian Yacht Club.

C. A. Moss, for the defendants Sand and Supplies Limited.

MIDDLETON, J.:—On the 1st June, 1905, the Corporation of the City of Toronto leased to the Royal Canadian Yacht Club certain parcels of land at Toronto Island for the term of twenty-one years from the 22nd June, 1901, the annual rental being $5. This lease by recital refers to report number 19 of the Committee on Property, adopted by the City Council on the 8th October, 1904, recommending the granting of this lease.

The lease, in addition to ordinary covenants, contains the following proviso: "Provided also, and the said lessees, for themselves, their successors and assigns, covenant with the said lessors, their successors and assigns, that the said demised lands shall only be used for mooring purposes and for the purpose of obtaining reasonable access to the club house property of the lessees on the said island, by the construction of wharves or other proper approaches thereto by and with the consent of the Governor in Council, as provided in chapter 92 of the Revised Statutes of Canada, and also that no filling shall be done upon the said water lots to interfere with navigation, except what may be necessary in constructing wharves and approaches hereinbefore provided for."

It is quite clear that the lease was for a nominal rental only; the Yacht Club being regarded as a quasi-public institution and one which by the improvements it would make upon the demised premises would increase the value of the city's island property.

The Yacht Club have now made an arrangement with their co-defendants for the dredging of a large amount of sand from that portion of the demised premises covered by water; and the plaintiffs, who have succeeded to the city's title, seek an injunction restraining any further removal of sand and an accounting for the value of the sand already removed. A declaration that the lease has been forfeited by reason of the breach of covenant in assigning and subletting is also claimed; but no breach of this covenant has been established.

The issue in the action is narrowed by the statement of counsel for the defendants that the defendants are content to confine their operations within the limit of what is reasonably necessary for the beneficial enjoyment of the demised premises by the Yacht Club as a mooring ground for its use.

As I understand the attitude of the Harbour Commissioners, no objection will be made to any dredging necessary to afford reasonable access to the docks and premises of the Yacht Club; but, as the Harbour Commissioners are about undertaking extensive works for the protection of the harbour, and in the execution of these works all sand that can be excavated from the bay will be needed for proposed filling-in, they object to the removal of sand.

It appears that by arrangement in writing the Yacht Club and the company have agreed that the company shall take from the water lots in question whatever sand they require, to a depth of sixteen feet, at a nominal price of $1 per annum for the next fifteen years; the minimum amount taken to be at least 15,000 cubic yards annually.

The bona fides of this arrangement was attacked at the hearing. It was shewn that officers of the Yacht Club were the main shareholders of the company, and that the contract-price was entirely inadequate; the sand, which was being taken for nothing, having a large commercial value.

I am in no way concerned with the situation as between the defendants, nor as to the righteousness of the conduct of the officers in question; and the evidence in regard to this is only of importance if the contention of the defendants is accepted, that they have the right to excavate sand to the extent necessary for the beneficial enjoyment of the lots in question as a mooring ground, for then the bona fides of the defendants would be in question, and it would have to be seen whether the excavation was for the purpose of making a proper mooring ground, or whether it was merely set up as a cloak to enable a large profit to be made by the removal of sand not really necessary for that purpose.

Before passing to the consideration of the more important question of the right to remove, I may perhaps state that it was shewn that sand could be sold at 75 cents per yard; and I am satisfied, upon the evidence, that of this fifty per cent. is profit; as the cost of dredging is only 23 cents, plus an allowance for overhead charges.

The determination of the main question depends, in the first

place, upon the lease itself. By it, the lands demised are to be used only for mooring purposes and for the purpose of obtaining reasonable access to the club house property by the construction of wharves or other proper approaches thereto. This provision is found in the lessees' covenant.

It is argued, on the one hand, that this in effect permits anything to be done to the demised premises which looks to the use of them for mooring purposes. On the other hand, it is argued that this does not confer any right upon the tenants; they take the premises as demised, and covenant to use in the manner set forth and in no other way.

I think the latter is the true construction of the lease. It is of moment that this is a lessees' covenant, and to that extent is a restriction upon the effect of the general demise.

The rights of the parties would then depend upon the effect of the demise itself. Upon a demise of a water lot, has the tenant the right to take and remove sand?

The tenant answers affirmatively, relying upon the decision of a Divisional Court in Lewis v. Godson, 15 O.R. 252, where it was held that a tenant who, for the purpose of clearing land and rendering it more fit for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them and is liable for their value if he takes and disposes of them.

A very careful consideration of this case convinces me that it throws little light upon the problem here presented. . . . The case does not determine that a tenant has the right to take and remove the body of the soil itself, which is what is being done here.

The law of waste, as applied to the case of landlord and tenant, has greatly developed. Originally the utmost strictness prevailed, and the tenant's right to interfere in any way with the condition of the demised land was kept within the narrowest possible bounds. In Termes de la Ley, for example, it is said: "Waste is where a tenant for term of years pulls down the house or cut down timber or suffers the house willingly to fall or digs the ground." The modern view is best exemplified by the decision of the Lords in Hyman v. Rose, [1912] A.C. 623, where the decision of the Court of Appeal, [1911] 2 K.B. 234, was reversed and the dissenting opinion of Buckley, L.J., was adopted as a correct exposition of the law. . . In the Court of Appeal, Buckley, L.J., had placed the matter upon what appears to be an entirely satisfactory basis. What was being done to the de-

mised premises was not, in his opinion, waste, because no injury was being done to the reversion. . . . "It would be waste to make such alteration as to change the nature of the thing demised. . . . The Court, no doubt, looks jealously to see whether the acts done are such as to diminish the value of the reversion."

Applying this test to cases such as Lewis v. Godson, and the timber cases upon which it is founded, it is clear that the removal of stones and the clearing of timber from land leased for agricultural purposes cannot be regarded as waste. The purpose is contemplated by the lease; and the reversion is not injured, but improved. . . .

[Reference to Tucker v. Linger, 21 Ch. D. 18, 8 App. Cas. 508.]

That which is suggested as the test, namely, is there injury to the reversion or not? has long been recognised as the touchstone. The old cases are collected in Doe dem. Grubb v. Burlington, 5 B. & Ad. 507, which adopts the statement: "The law will not allow that to be waste which is not anyways prejudicial to the inheritance." . . . See cases collected in Dashwood v. Magniac, [1891] 3 Ch. 306.

Perhaps the most complete statement of the law is found in the judgment of Buckley, L.J., in West Ham Central Charity Board v. East London Waterworks Co., [1900] 1 Ch. 624, where he states the test of injury to the reversion in practically the same words as in the later judgment which has the approval of the Lords.

In the case at bar it is established, I think, beyond peradventure, that what is proposed by the tenant will, in the circumstances which exist, be a most substantial injury to the reversion. Further, if it be material to the case, I do not think that the lease in any way contemplated any excavation. It contemplated a user of the water lots as they were at the time of the demise. If these were unsuitable for the purposes of the Club, that was the Club's misfortune. No right was given to take away the sand—something far more analogous to the opening of a new mine than to the prudent conduct of husbandry, and in no sense permissible under such a lease as that in question.

The plaintiffs are, therefore, entitled to the injunction sought, and to a reference as to damages, if the parties cannot agree upon an amount. If it is desired to avoid a reference, I am ready to hear any evidence necessary to enable the damages to be now assessed.

MIDDLETON, J., IN CHAMBERS. OCTOBER 17TH, 1913.

REX v. VINCENT AND FAIR.

Criminal Law—Application for Bail before Committal for Trial —Jurisdiction of Judge of Supreme Court—Criminal Code, sec. 698—Remedy of Accused—Writ of Habeas Corpus—Admission to Bail on Return—Amount of Bail—Vagrancy.

Motion by the defendants for bail.

W. M. German, K.C., for the defendants.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—The accused were arrested and committed for trial upon a charge of fraud; and upon this charge they were admitted to bail. An information was then laid against them, charging them with vagrancy, and upon this charge they have been remanded four or five times, no evidence being taken before the magistrate. The magistrate refuses to grant bail except for a prohibitive amount—$5,000 for each prisoner.

An application is now made for bail upon the vagrancy charge.

I do not think that, under the Criminal Code, a Judge of the Supreme Court has jurisdiction to grant bail until the accused has been committed for trial. See Criminal Code, sec. 698. Nevertheless, a prisoner is not without remedy. Under the Habeas Corpus Act, upon the return of a writ the Court may "determine touching the discharge, bailing, or remanding the person."

In Rex v. Hall (1907), 8 W.L.R. 642, Craig, J., in the Yukon Territorial Court, held the contrary; but he evidently misread the case of Regina v. Cox, 16 O.R. 228. The section of the statute referred to there by MacMahon, J., has been eliminated and is not now found in the corresponding section of the Code as it now stands. Compare R.S.C. 1886 ch. 174, sec. 83, with the present sec. 699 of the Code.

I think the alternative course suggested by MacMahon, J., is the proper one to follow; and I, therefore, grant the writ of habeas corpus, and upon its return will admit the prisoners to bail.

To save the further attendance of counsel on the return of the writ, the amount of bail was discussed; and I think that cash bail $500 for each is adequate.

The facts surrounding this case suggest that the charge of vagrancy is laid, and the remand granted, because the magistrate and police officials disapprove of the bail granted upon the more serious charge. It is obvious that, if this is so, such conduct cannot be too strongly condemned.

STANDARD BANK OF CANADA v. BRODRECHT—MIDDLETON, J.—OCT. 13.

Bank—Customer—Account — Compound Interest—Proceeds of Security—Costs—Reference—Report—Appeal.]—Appeal by the defendant from the report of CHISHOLM, Co.C.J. of Waterloo, as Special Referee. The defendant was a customer of the plaintiffs for many years; and this action was brought to recover the amount of his overdrawn bank account. The defendant asked for an account; and at the trial the action was referred. The findings of the Referee were all in favour of the plaintiffs; the report was that $1,024.50, the amount claimed by the plaintiffs, was the true amount due. Several questions were argued on appeal. First, it was said that the plaintiffs had charged compound interest at the rate of 6½ per cent. per annum, with monthly rests. Counsel for the plaintiffs stated that attention was not drawn to this matter upon the reference, and that he did not attempt to defend the mode of computation. The difference was said to be $107. Appeal allowed as to this; the amount to be checked.—Second, there was a controversy as to the proceeds of a certain promissory note, which it was said that the plaintiffs had received or should have received. As to this, the learned Judge refused to interfere, the evidence being contradictory, and the Referee having seen and heard the witnesses.—Third, it was said that costs were improperly charged against the defendant without taxation. The learned Judge, having looked at the bills of costs, said that there was nothing in them to justify any interference; and a moderation should not be directed where no beneficial result would follow.—Appeal dismissed save as to the interest. Costs to be paid by the defendant, but $20 to be deducted from the plaintiffs' costs in view of the defendant's success in that one regard.—Judgment for the plaintiffs upon the report as varied. J. A. Scellen, for the defendant. R. S. Robertson, for the plaintiffs.

PAGE AND JAQUES V. CLARK—LENNOX, J.—OCT. 13.

Fraud and Misrepresentation—Sale of Farm — Fraud and Conspiracy of Purchasers—Void Agreement—Cancellation—Refusal of Specific Performance—Forfeiture of Deposit—Counterclaim—Damages.]—Action for specific performance of an alleged contract by the defendant to sell his farm to the plaintiffs, or for damages. The learned Judge gives judgment for the defendant, upon the broad ground that the plaintiffs are not entitled to any assistance from the Court, because the so-called contract was induced by fraudulent misrepresentations of the plaintiffs and their agent, knowingly made to the defendant, and in pursuance of a fraudulent scheme; these representations were material, and were ignorantly accepted and acted upon by the defendant as true.—The defendant counterclaimed, and claimed to retain as damages the $200 deposit paid to him by the plaintiffs. The learned Judge finds that the defendant, by the delay, the tieing up of his property, and the disorganisation of his plans, has sustained actual damage to the extent of $200 or more. Judgment dismissing the action with costs, declaring the agreement sued on to be fraudulent and void, setting it aside and vacating the registration thereof, and directing that it be delivered up to be cancelled, and declaring that the $200 deposit is forfeited to the defendant as damages. Reference to Beckman v. Wallace, 29 O.L.R. 96. E. D. Armour, K.C., and A. R. Bartlet, for the plaintiffs. E. S. Wigle, K.C., for the defendant.

CLARK V. ROBINET AND HEALEY—LENNOX, J.—OCT. 13.

Charge on Land — Agreement — Duration — Payment of Claims—Discharge of Land—Payment into Court—Costs.]—Action for a declaration that the plaintiff's farm is free from any claim or claims by the defendants or either of them, under what was called "the syndicate agreement" or otherwise. No time was fixed for the duration of the agreement, which was made in September, 1909. The learned Judge, for reasons briefly stated in writing, was of opinion that, upon payment of $451, being the aggregate of the claims of the defendants, the plaintiff was entitled to the relief which he asked and to the costs of this action. The money had been duly tendered to the defendants. Judgment to be entered as follows. The plaintiff's

costs to be taxed and set-off pro tanto against the $451, and the excess (if any) to be paid into Court by the plaintiff, to the credit of this action and subject to the further order of the Court. Upon payment of the amount of excess into Court, or if there is no excess, judgment is to be entered for the plaintiff declaring that the land in question is released and discharged from the syndicate agreement and from all claims and demands arising out of or connected with it, except the interest or claim if any, of William Parker, who was not before the Court, and the balance of the taxed costs if they exceeded $451. E. S. Wigle, K.C., and J. H. Rodd, for the plaintiff. F. D. Davis, for the defendants.

RE STANDARD COBALT MINES LIMITED—FALCONBRIDGE, C.J.K.B. —OCT. 16.

Company—Winding-up—Claim on Assets—Assignments — Evidence—Finding of Referee—Notice of Adjudication—Appeal.]—Appeal by the Railey Cobalt Mines Limited from the report of an Official Referee, in a winding-up matter, allowing a claim. The learned Chief Justice said, referring to the complaint of want of notice of the adjudication by the Referee, that it appeared by the record that the matter was gone into and elaborately argued by one of the present counsel for the appellants—no application being made by him for postponement of the hearing for the purpose of calling evidence. The assignments were on file and were produced. There was evidence sufficient to prove the claim adduced before the Referee. Appeal dismissed with costs. G. H. Watson, K.C., and Grayson Smith, for the appellants. W. R. Smyth, K.C., for the liquidator. H. E. Rose, K.C., and J. A. McEvoy, for the Security Transfer and Register Company.