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APPELLATE DIVISION.

FEBRUARY 3RD, 1913.

*COLQUHOUN v. TOWNSHIP OF FULLERTON.

Highway—Nonrepair—Injury to Traveller—Obstruction at Side of Road—Absence of Actual Contact—Want of Notice to Municipality—Liability.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Perth dismissing the action, with costs to the defendants, and without costs to the third party, Clark.

The action was for damages for the loss of a horse by reason of an obstruction in a highway.

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

R. S. Robertson, for the plaintiff.

Glyn Osler, for the defendants and the third party.

MULOCK, C.J.:—At about 9.30 p.m. of the 11th October, the plaintiff was driving southerly on the Mitchell road, in an open buggy; and, on reaching the concession road, turned westerly. At the north-west corner formed by the intersection of the two roads, was a pool of water about six inches deep; and, in order to avoid it, the plaintiff drove along the southerly side of the travelled road, and close to a milk-stand standing on the road allowance, but a foot or two south of the travelled portion. The night was dark, and the plaintiff was unable to see the milk-stand. The horse, however, saw it, was frightened by it, and

*To be reported in the Ontario Law Reports.

shied to the right, whereby he broke his leg and had to be destroyed; and the plaintiff seeks to recover from the township corporation damages for the loss of his horse.

The third party, Clark, without authority from the township corporation, the defendants, placed the stand where it was at the time of the accident; and the defendants, if responsible, claim indemnity over against him.

There is no evidence to shew that the horse touched the stand; and I accept the learned trial Judge's finding of fact that the accident was caused by the horse shying because of being frightened by the stand.

Mr. Robertson argued that the position of the stand in such close proximity to the travelled portion of the highway created a condition of nonrepair, and he cited Rice v. Town of Whitby, 25 A.R. 191, as supporting his contention that, in the case of an obstruction to the highway, actual contact with it is not necessary in order to render the corporation liable. . . . It was not necessary for the Court to decide, and it did not decide by that judgment, that such an obstruction where it merely frightens horses and thereby causes damage, creates a condition of nonrepair within the meaning of sec. 606 of the Consolidated Municipal Act. On this point we are bound by Maxwell v. Township of Clarke, 4 A.R. 460, followed by O'Neil v. Township of Windham, 24 A.R. 341; and, following those cases, I am of opinion that the existence of the milkstand, off but close to the travelled portion of the road in question, did not, in itself, constitute a breach of the municipality's statutory duty to keep the road "in repair." Still, what is at one time a lawful may grow into an unlawful obstruction of a highway; and perhaps be then properly construed as creating a condition of nonrepair; and, if it be shewn that the municipality consented to its continuance when it became such unlawful obstruction, although the municipality was no party to its being originally placed there, still it might be liable: Barber v. Toronto R.W. Co., 17 P.R. 293; Castor v. Town of Uxbridge, 39 U.C.R. 113; Howarth v. McGugan, 23 O.R. 396; Rice v. Town of Whitby, supra.

In the present case the evidence shews that the milk-stand, at the time of the accident, was a dangerous obstruction to the highway; and the question is, whether the defendants can be held to have had such reasonable notice of its existence as to render them liable for not causing its removal. It was erected without the knowledge or consent of the defendants, and they were at no time aware of its existence. It had been in place two

or three weeks. It may be assumed that the members of the council reside in different parts of the township, and that the meetings of the council are held at intervals of several weeks. It is not shewn that any member or officer of the municipal council, except Pathmaster Pridham, knew of the milk-stand being where it was at the time of the accident; and it is not shewn that he communicated its existence to any member of the council, or that it was his duty to guard or remove it. He did neither; and the council, neither collectively nor individually, had any knowledge of its existence.

I, therefore, fail to see how, under such circumstances, the defendants can be charged with notice which would render them liable for negligence in permitting the stand to remain where it was.

I, therefore, think the learned trial Judge was right in his disposition of the case, and that this appeal should be dismissed with costs.

SUTHERLAND and LEITCH, JJ., concurred.

RIDDELL, J., also concurred. He said that, unless the Court was prepared to overrule Maxwell v. Township of Clarke, 4 A.R. 460, and O'Neil v. Township of Windham, 24 A.R. 341, and other such cases (referred to in Judge Denton's valuable work on Municipal Negligence, pp. 83-85), it could give judgment for the plaintiff. Speaking for himself, he was not satisfied with the reasoning or result of these cases, but the Court could not reverse them—that must be done, if at all, by the Legislature or a higher Court.

Appeal dismissed with costs.

FEBRUARY 3RD, 1913.

BINGHAM v. MILLICAN.

Guaranty—Payments Made by Guarantor—Recovery from Principal Debtor—Account—Interest—Appeal—Costs — Counterclaim.

Appeal by the defendant from the judgment of WINCHESTER, Senior Judge of the County Court of the County of York, in

favour of the plaintiff, for the recovery of $572.78, in an action in that Court for moneys paid by the plaintiff for the defendant.

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

A. C. Heighington, for the defendant.

J. W. Bain, K.C., and M. L. Gordon, for the plaintiff.

The judgment of the Court was delivered by SUTHERLAND, J.:—The action is based on a written guaranty given by the plaintiff to the Imperial Bank of Canada with reference to premiums payable by the defendant under policies of insurance assigned to the said bank.

The plaintiff alleged that, under the said guaranty, he "had been obliged to pay certain premiums, and, the policy having matured and the prior liens thereof, including the indebtedness to the Imperial Bank of Canada, having been deducted therefrom, the balance was paid to him, but was insufficient to repay his advances and interest."

During the argument of the appeal it was determined that the proper way to take the account between the parties was to ascertain what payments the plaintiff had made under his written guaranty and allow interest thereon at the rate of seven per cent., being the rate payable by the defendant to the bank.

At p. 5 of his evidence at the trial, the plaintiff said that exhibit 3 contained a statement of such payments. It shews a total of $5,954.58; but, upon the argument of the appeal, it was directed that two items should be struck out, namely, $3,668.69, the amount of a loan obtained by the plaintiff on one of the policies, and $17.94 interest: in all $3,686.63. Deducting this, the balance would be $2,267.95.

The matter was referred to Mr. Holmested, Registrar of the Court, to take the account and figure the interest upon the advances. He did this. It was agreed by counsel that the sum of $540.18, found by him to be the interest up to the 8th November, 1909, was correctly computed. Adding this sum to the $2,267.95 would make a total of $2,808.13.

The plaintiff, in a statement prepared by his solicitor, exhibit 10, admits that he received a cheque on account of the insurance policy, under date of the 8th November, 1909, for $2,675.42. Deducting this amount, the net balance is $132.71. Subsequent interest on this has been figured by Mr. Holmested at $28.50. Balance due to the plaintiff, $161.21.

The judgment in favour of the plaintiff will, therefore, be reduced to this sum, with County Court costs of trial. The costs of the appeal will be to the defendant, who has succeeded to a substantial extent.

The judgment will be stayed for the remainder of the six months mentioned in the judgment of the trial Judge, to enable the defendant to proceed on his counterclaim; and, in the event of his not doing so, it will then be dismissed.

FEBRUARY 3RD, 1913.

LONG v. TORONTO R.W. CO.

Street Railways—Injury to and Death of Person Crossing Track —Negligence—Contributory Negligence—Findings of Jury —Evidence—Cause of Injury—Recklessness of Deceased.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, Mary Long, in an action for damages for the death of her husband, Francis Long, who was killed by one of the defendants' cars upon Queen street, in the city of Toronto, on the evening of the 3rd April, 1912. The jury assessed the plaintiff's damages at $4,000, and judgment went in her favour for that sum and costs.

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

H. H. Dewart, K.C., for the defendants.

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

The judgment of the Court was delivered by MULOCK, CJ.:— There is evidence to the following effect. Shortly after eight o'clock in the evening, the deceased endeavoured to cross from the south to the north side of Queen street, proceeding in a slightly north-easterly direction, and, when he had about reached the north rail of the north track, was struck on the legs by the north-west corner of the car-fender of a west-bound car. The effect of the impact was to take his feet from under him, causing his body to fall towards the car to the pavement—he being killed either by striking the car or the pavement.

At the place were the deceased was crossing Queen street,

there are two lines of railway—one, the southerly one, being used for east-bound, and the northerly one for west-bound cars. Immediately prior to the deceased stepping off the kerb, at the south side of the street, an east-bound car had passed him, and a west-bound car was proceeding westerly on the northerly track; and there was nothing to prevent the deceased, if he had looked, from observing the approaching car from the time of his leaving the kerb until he stepped in front of it; but he walked across the street slowly, looking downwards, and finally stepped upon the track within ten feet of the approaching car.

The motorman was examined on behalf of the plaintiff, and testified that when about fifty yards away from the deceased he saw him leave the kerb, and that he watched his movements and sounded the gong continuously from that moment until the collision; that he threw off the power shortly after the deceased stepped off the kerb, and had his car under control, but did not stop it, not anticipating the deceased stepping in front of it; that, when the car was about ten feet away from the deceased, he, for the first time, thought the deceased might step in front of it, and that he then reversed the power, and had the car under such control that it stopped within less than one-half of its length, which was about thirty feet. The deceased was not thrown forward by the collision; and his body was found lying, feet foremost, alongside the forward trucks of the standing car and slightly under the portion of it which overhung the northerly rail.

The following are the questions submitted to the jury, with their answers:—

"1. Was the death of the plaintiff's husband caused by any negligence of the defendants, prior to negligence of plaintiff's husband? A. No.

"2. If so, wherein did such negligence consist?

"3. Was the plaintiff's husband guilty of negligence which caused the accident, or which so contributed to it that but for his negligence the accident would not have happened? A. Yes.

"4. If you answer 'yes' to the last question, wherein did his negligence consist? A. In not looking for a car.

"5. Notwithstanding the negligence, if any, of the deceased, could the defendants, by the exercise of reasonable care, have prevented the collision? A. Yes.

"6. If so, what should they have done which they did not do, or have left undone which they did do? A. By putting on the brakes, and having the car under proper control.

"7. Could the motorman and the deceased, each of them, up to the moment of collision, have prevented the accident by the use of reasonable care; in other words, was the negligence of the deceased the contributing act up to the very moment of the accident? A. Ten say no, two say yes,

"8. If the Court should, on your answers, think the plaintiff entitled to damages, what sum do you assess as damages, distributing it: (a) to the mother of the deceased, aged 71 years: (b) to the wife, aged 32 years; (c) to the daughter, aged 8 years? A. Ten for $4,000."

The learned trial Judge, in explaining question 7 to the jury, said: "In other words, was the negligence of the deceased the contributing act up to the very moment of the accident? . . . Did, in fact, the deceased's act contribute up to the very moment of the accident? . . . Did he become aware that the car was approaching, and was he able to avoid the danger? That is the sense in which that question is put. . . . Now, you will understand the sense in which the question is launched . . . It is true that, physically, as far as his actions went, he did contribute to it up to the last moment, but did he do it in that negligent sense that he was aware that the car was approaching, and was he able to avoid the danger?"

There is, I think, no evidence to support the jury's answer to question 6, to the effect that the accident could have been averted after the deceased's negligence in stepping in front of the car, by the motorman then "putting on the brakes and having the car under proper control." The evidence of the motorman—that, when the deceased stepped off the kerb at the south side of the street, he threw off the power; that it remained off from that time until the reverse power was applied, when the car was brought to a stop; that, as soon as he supposed that the deceased contemplated stepping upon the track, he reversed the power, a method more effective in stopping the car than applying the brakes; and that he brought the car to a stop within less than half of its length—is uncontradicted and its correctness not challenged, and is in material parts corroborated by witnesses who spoke as to the movement of the car. Nor was there any attempt to shew that, at this stage, anything could have been done to prevent the accident happening. The motorman was, I think, justified up to a certain point in assuming that the deceased would exercise reasonable care; and nothing is shewn that would suggest a different conclusion until the deceased actually stepped upon the track.

As to the answers to questions 3 and 4, their evident mean-

ing is, that the deceased failed to exercise reasonable care, by not looking for an approaching car, and by negligently stepping upon the track and endeavouring to cross in front of it, thereby causing, or contributing to, the accident. If these answers stood alone, the plaintiff, notwithstanding the answer to question 6, even if supported by evidence, must fail, the rule being that where damage is the direct, immediate result of two operating causes, viz., the negligence of the plaintiff and that of the defendant, the plaintiff cannot recover. It was, however, argued that the answer to question 7 relieved the plaintiff of the consequences of the deceased's negligence. But there is, I think, no evidence to support the answer to question 7. The deceased was guilty of but one act of negligence, viz., endeavouring, under the circumstances of this case, to cross the track almost immediately in front of the car; and its negligent character was continuous. From the time of his stepping upon the track until the accident, he, in fact, undertook to clear the track before the car, which was within ten feet of him, would strike him.

The evidence shews that, under the circumstances, the motorman used all reasonable means to avert the accident, but that it was not preventible. I, therefore, think there is no evidence to justify reasonable persons in finding, as the jury in their answer to question 7 have found, that the negligence of the deceased did not contribute to the accident up to the very moment of its happening. Thus eliminating the answers to questions 6 and 7, there remains the finding (which cannot be successfully attacked) that the deceased's negligence caused the accident.

I, therefore, think the appeal must be allowed with costs and the action dismissed with costs.

FEBRUARY 4TH, 1913.

ELLIS v. ZILLIAX.

Vendor and Purchaser—Contract for Sale of Land—Building Restrictions—Written Consent to Relaxation of Restrictions Obtained upon Condition as to Position of Building—Refusal of Purchaser to Fulfill Condition—Action for Specific Performance—Costs.

Appeal by the plaintiff from the judgment of MIDDLETON, J., of the 6th November, 1912, dismissing without costs a purchaser's action for specific performance of a contract for the

sale and purchase of land or for damages for breach of the contract. The judgment required the defendant to return to the plaintiff the sum of $100 paid as a deposit.

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

John King, K.C., for the plaintiff.

E. D. Armour, K.C., for the defendant.

The judgment of the Court was delivered by LEITCH, J.:—Action for specific performance. The plaintiff, on the 15th July, 1911, in writing, offered to purchase from the defendant lot No. 14, plan No. 382, on the south side of College street, in the city of Toronto, for the price of $2,600.

N. K. McKibbin, a real estate agent, was authorised by the defendant to sell the property. By the terms of his written offer, the plaintiff was to take the property, subject to any covenants that ran with the land.

The deed from Elizabeth Stewart to the defendant contained a covenant that the grantee and his assigns would not erect or maintain upon the land, during a period of ten years from the 8th June, 1908, any building or erection except one dwelling-house and the usual necessary outbuildings.

The plaintiff refused to take the property with this restriction. He wanted to build stores. The defendant objected to stores; and, after some negotiation, the agent, McKibbin, got the defendant to consent to the plaintiff building an apartment house if it was built out to the verandah line, instead of to the street. The agent reported to the defendant that the plaintiff had agreed to build to the verandah line.

The agent obtained from Mrs. Stewart a consent to the building of an apartment house instead of a single dwelling. The defendant then signed a document in writing consenting to the erection of an apartment house by the plaintiff. This document was signed by the defendant, on condition that the plaintiff was to build to the verandah line only instead of the street line.

The learned trial Judge found as a fact that the plaintiff had agreed to keep his building back to the verandah line, and that the agreement was signed by the defendant on this condition.

A perusal of the evidence satisfies us of the correctness of the view taken by the learned trial Judge. The reason for building to the verandah line, instead of to the street line, was,

that this was a residential neighbourhood, and that to build out to the street line would injure other property in which the defendant and others were interested.

The agent, through neglect, omitted to include the condition as to building to the verandah line in the document containing the defendant's consent to the erection of an apartment house.

When the plaintiff learned from the agent that the defendant had signed a consent to the erection of an apartment house, he proceeded to stake out the lines of the excavation for the foundation to the street line, instead of to the verandah line.

The defendant prevented the plaintiff from proceeding with the work. The plaintiff is not willing to carry out the condition that he is to build to the verandah line.

The plaintiff has no right to have the part of the agreement that was reduced to writing performed, unless the condition upon which it was obtained is carried out. The learned Judge at the close of the trial so held; and, as the plaintiff was not prepared to carry out the verbal condition, the action was dismissed without costs. The laxity of the parties in connection with the transaction was, in the opinion of the learned Judge, a sufficient reason for withholding costs.

The appeal should be dismissed with costs.

FEBRUARY 7TH, 1913.

LEVITT v. WEBSTER.

Vendor and Purchaser—Contract for Sale of Land—Authority of Agent—Alteration in Material Term—Specific Performance.

Appeal by the plaintiff from the judgment of KELLY, J., ante 554.

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

A. M. Lewis and F. F. Treleaven, for the plaintiff.

H. E. Rose, K.C., and T. Hobson, K.C., for the defendant, were not called upon.

MULOCK, C.J., said that the members of the Court were unanimously of opinion that the judgment appealed from was right.

RIDDELL, J., in concurring with the judgment, remarked that, in his opinion, the dictum of Eve, J., in Bromet v. Neville (1908), 53 Sol. J. 321 (cited on behalf of the appellant and referred to in Fry on Specific Performance, 5th ed., para. 525, p. 269), to this effect (as stated in the head-note), that "it is not every excess of authority by an agent that will vitiate a contract, and where such excess is not unreasonable, it will not operate to prevent specific performance of the contract," was not a binding authority, as it was obiter and not necessary to the decision arrived at.

Appeal dismissed with costs.

FEBRUARY 7TH, 1913.

BURROWS v. CAMPBELL.

Assessment and Taxes—Tax Sale and Deed—Action to Set aside —Irregularities in Sale—Landlord and Tenant.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 249.

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

L. C. Raymond, K.C., for the plaintiff.

F. W. Casey, for the defendant.

THE COURT dismissed the appeal with costs, agreeing with the judgment below.

HIGH COURT DIVISION.

MIDDLETON, J. JANUARY 31ST, 1913.

*REX v. NESBITT.

Criminal Law—Indictments against President of Bank for Fraudulently Making False Returns under Bank Act, sec. 153—Extradition—Extraditable Crime—Fraud by a Banker —"Wilfully"—"Fraudulently"—Criminal Code, secs. 412 et seq.

Motion by the defendant to quash several indictments against him at the winter assizes, 1913, at Toronto.

*To be reported in the Ontario Law Reports.

H. H. Dewart, K.C., for the defendant.
W. G. Thurston, K.C., for the Crown.

MIDDLETON, J.:—This motion was heard before me on the 31st January, and at the conclusion of the argument I gave judgment quashing the indictments; saying that my reasons for so doing would be given later. Afterwards, on the same day, I was informed that the accused had died. Nevertheless, I think I ought formally to state my reasons for the action taken.

The accused was president of the Farmers Bank of Canada, now in liquidation; and, after having left Canada, he was extradited from the United States upon several charges of having made false returns to the Minister of Finance, under the Bank Act.

The provision of the Bank Act applicable is sec. 153, which renders penal "the making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank."

The Extradition Treaty schedules a list of the extraditable crimes. The Crown relied for extradition upon number 9, which is as follows: "Fraud by a bailee, banker, agent, factor, trustee, or by a director or member or officer of any company, which fraud is made criminal by any Act for the time being in force."

It is said by counsel for the accused that the offence of "wilfully making a false return" is not "fraud by a banker," within the Extradition Treaty, and that the Crown cannot improve its position by charging, as is done in these indictments, that the false return was fraudulently made.

With this contention I agree. The Extradition Treaty does not purport to make every offence committed by a banker against the law of the land an extraditable offence, but only fraud which "is made criminal by any Act for the time being in force." This prevents the Crown from resorting to the device of charging an offence of which fraud is not an essential ingredient and adding to that charge the word "fraudulently."

The offence with which the accused might be charged is the statutory offence of *wilfully* making a false return. The Crown has substituted for the word "wilfully" the word "fraudulently;" and so, for the purpose of bringing the matter within the Extradition Treaty, charges the accused with something differing from the statutory offence of which he may or may not have been guilty.

If this were an ordinary case, not complicated by the necessity of bringing the matter within the Extradition Act, the dif-

ference between the offence as defined by the Bank Act, and that as charged by the Crown might be regarded as immaterial, or at all events as subject to an amendment; but where, as here, the use of the words is deliberate and in no way immaterial, the situation is wholly different.

The kind of fraud falling within the Extradition Treaty is that indicated by secs. 412 et seq. of the Criminal Code, which bear a general caption "Fraud and Fraudulent Dealing with Property." These sections, I think, point to the kind of thing which was intended to be made extraditable. . . .

These serve as illustrations of the kind of fraud which is thus rendered punishable under the law to which the Extradition Treaty applies. It is not everything which is criminal or reprehensible that is intended to be included; for we find, separately catalogued, forgery, larceny, embezzlement, obtaining money or securities by false pretences, robbery, threatening with intent to extort, and perjury—all more or less akin to fraud; which it would be unnecessary to catalogue separately if intended to be covered by the same general words.

Therefore, the indictments must be quashed, as they depart from the Bank Act and charge an offence different from that thereby created.

LENNOX, J., IN CHAMBERS. FEBRUARY 3RD, 1913.

BANK OF HAMILTON v. DAVIDSON.

Summary Judgment—Con. Rule 603—Action on Judgment Recovered against Partnership Firm—Partner not Served nor Appearing in Original Action Made a Defendant in New Action—Con. Rule 228—Special Endorsement—Con. Rule 138—Unconditional Leave to Defend.

Appeal by the defendant Charles Hilton Davidson from an order of one of the Local Judges at Hamilton allowing the plaintiffs to sign summary judgment under Con. Rule 603 in an action against John Davidson & Sons and Charles Hilton Davidson upon a judgment recovered against the firm of John Davidson & Sons, of which Charles Hilton Davidson was alleged to be a member.

W. Laidlaw, K.C., for the appellant.
C. J. Holman, K.C., for the plaintiffs.

LENNOX, J.:—The plaintiffs recovered judgment against the defendants John Davidson & Sons in an action upon their promissory note, on the 9th June, 1892. The defendant Charles Hilton Davidson was, at the time the writ issued in that action, a member of the firm; but the plaintiffs shew that at that time this defendant was a fugitive from justice and out of Ontario. He was not served with the writ, did not appear, did not admit himself to be and was not adjudged a partner or member of the firm. The plaintiffs sue upon this judgment; the writ is endorsed for recovery of the amount of the judgment and interest, and purports, and is contended to be, specially endorsed, within the meaning of Con. Rule 138. The plaintiffs, applying under the provisions of Con. Rule 603, have obtained judgment against the defendant Charles H. Davidson. This defendant claims to have a good defence to this action upon the merits, duly entered an appearance, and desires to defend.

With great respect I am of opinion that the learned Local Judge erred in granting the plaintiffs' application. I have not been referred to any case in which the Rule has received judicial construction; but, to my mind, the concluding part of Con. Rule 228 is clearly sufficient to prevent the entry of judgment under Con. Rule 603. The last clause of Con. Rule 228 is as follows: "Except as against any property of the partnership, a judgment against a firm shall not render liable, release or otherwise affect any member thereof who was out of Ontario when the writ was issued, and who has not appeared." Adding —and these qualifications have no application here—"unless he has been made a party under Rules 162 to 167 or has been served within Ontario after the writ was issued." This is, I think, sufficient to bar the way to a summary judgment.

Con. Rule 603 is for clear cases: see authorities collected in Holmested and Langton's Jud. Act, 3rd ed., p. 802; Jacobs v. Beaver, 17 O.L.R. 496, at p. 501; Bristol v. Kennedy, ante 537, 539; and Farmers Bank v. Big Cities Realty and Agency Co., 1 O.W.N. 397, in which Mr. Justice Riddell says (p. 398): "It must not be forgotten that Rule 603 is to be applied only with caution and in a perfectly plain case." Reference may also be made to Jones v. Stone, [1894] A.C. 122, in which Lord Halsbury, delivering the judgment of the House of Lords, and dealing with a similar provision, said: "The proceeding established by that Order is a peculiar proceeding, intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay."

But, although resting my judgment, as I do, upon Con. Rule 228, it is not the only point. Here again I am not referred to any authority; and, in the absence of authority to the contrary, I question whether a judgment can be made the subject of a special endorsement under Con. Rule 138. If it can, it can only be under clause (*a*), and this seems to be limited to a "simple contract debt," whether "express or implied." It is enough if it is doubtful—and every reasonable doubt is a reason for trial in the ordinary way.

The order and judgment of the learned Local Judge will be set aside, and the defendant Charles Hilton Davidson will be at liberty to defend the action, unconditionally.

The costs of the proceedings before the Local Judge and on this application will be costs in the cause.

On the judgment being vacated, the plaintiffs will have the option, before further costs are incurred by this defendant, to dismiss the action as against him individually without costs.

MIDDLETON, J. FEBRUARY 3RD, 1913.

*RE PHILLIPS.

Will—Construction—Power of Appointment—Rule against Perpetuities—Attempt to Tie up Property during Lifetime of Unborn Grandchildren—Void Provision—Effect of Gift—Intestacy or Absolute Interest—Avoidance of Intestacy.

Motion by the executors of Francis J. Phillips, deceased, for an order determining a question arising upon the construction of his will.

E. G. Long, for the executors.
W. N. Tilley, for the children of the deceased.
A. W. Ballantyne, for the widow.
F. W. Harcourt, K.C., appointed to represent those opposed in interest to the present claim put forward by the children.

MIDDLETON, J.:—By his will, dated on the 28th January, 1908, Francis J. Phillips, after certain specific legacies, devised all his estate to his executors upon trust to pay the income to his wife during her life or until her second marriage, charged

*To be reported in the Ontario Law Reports.

with the maintenance and education of his children during minority. Upon the decease or marriage of the wife, the trustees are directed to hold in trust for the children then alive, and the issue of any children who may then be dead, and to pay them the income of their respective shares.

The will then provides, by clause 9: "And on the death, after the death or second marriage of my wife, of any of my said children or of any of my grandchildren who shall have been receiving the income of any share of my said estate as hereinbefore provided, I hereby direct my said trustees to pay over the share of the residue of my estate of which such child or grandchild had been receiving his income during his or her life to such person or persons and in such manner as such child or such grandchild respectively shall by his or her last will and testament appoint, and in default of such appointment to such person or persons as would be entitled to the same under the provisions of the statutes which may be in force in this Province for the distribution of the estates of intestates if the said child or grandchild should die possessed of such share and intestate."

There is no doubt as to the validity of the provisions of the will relating to the gift to the children and to the grandchildren, issue of any children who may die during the lifetime of the mother. The interest of the children and of such grandchildren vests during the mother's life estate.

It is, however, contended that the provisions of clause 9, above-quoted, by which a general power of appointment, exercisable by will, is given to the members of this class, and by which the property goes over in default of appointment, are void as offending the rule against perpetuities, as such power is given to grandchildren who may be born after the death of the testator at any time during the life of the widow, and the gift over takes effect upon the death of such unborn grandchildren.

It is clear that, in determining the validity of a provision such as this, it is not enough that the estate or interest may vest within the period limited by the rule. If it is possible that it may not do so, the possibility of the provision in question exceeding the limit allowed by law renders the whole provision void ab initio; so that in this case the validity of the whole clause must be determined in view of the possibility of some one or more of the daughters dying in the lifetime of the widow and leaving them surviving—and surviving the widow—issue born after the death of the testator.

Moreover, the clause cannot be split up and so treated as to

render valid the provision so far as it relates to the testator's daughters and invalid so far as it relates to the after-born grandchildren. This, I think, is the effect of the decision of the Court of Appeal in In re Bence, [1891] 3 Ch. 242. . . .

The precise point is clearly stated in accordance with Mr. Tilley's contention in authoritative text-books: e.g., Halsbury's Laws of England, vol. 22, p. 354; where Mr. Justice Barton says: "A general power of appointment conferred on an unborn person, who must necessarily be in existence within the proper period—for example, the child of a living person—exercisable by deed or will, but not when exercisable by will only, being equivalent to absolute ownership . . . is not invalid. . . . A power exercisable only by the will of a person unborn at the creation of the power is invalid, since it ties up the property until the death of such person, and therefore beyond the perpetuity period."

Gray on Perpetuities, 2nd ed., par. 378: "A power given to the unborn child of a living person is too remote, that is, if it is a power to be exercised by will only, or a special power to be exercised by deed; but, if such unborn child has a general power to appoint by deed, he has an absolute control exactly as if he had the fee, since he can at once appoint to himself."

The opposite view is taken in Farwell on Powers, 2nd ed., p. 286, where the learned author says: "On principle, it is submitted that, for the purposes of the rule against perpetuities, a general power to appoint by will, following a life estate in the donee of the power, is equivalent to absolute ownership." . . .

[Reference to Wollaston v. King (1868), L.R. 8 Eq. 165; In re Powell's Trusts (1869), 39 L.J. Ch. 188; Morgan v. Gronow (1873), L.R. 16 Eq. 1; Rous v. Jackson (1885), 29 Ch. D. 521; In re Flower (1885), 55 L.J. Ch. 200; Cook v. Cook (1887), 38 Ch.D. 202; Whitby v. Mitchell (1889), 42 Ch.D. 494, 44 Ch.D. 85; articles in 14 L.Q.R. 133, 234, 15 L.Q.R. 71, 27 L.Q.R. 150; In re Frost (1889), 43 Ch.D. 246; Hutchinson v. Tottenham, [1898] 1 I.R. 403, [1899] 1 I.R. 344; Tredennick v. Tredennick, [1900] 1 I.R. 354.]

The conclusion at which I have arrived on this branch of the case is, that the attempt to tie up the property during the lifetime of grandchildren not born in the lifetime of the testator brings the case well within the rule against perpetuities, and is void. Had the power been a general power, capable of being exercised at any time during the lifetime of the grandchildren, this would have been equivalent to an absolute ownership, and

the provision would have been good. But the cutting down of the power and making it exercisable by will only carries the provision beyond what is permitted, and it is void.

I think this conclusion is supported by the great weight of authority, and no good purpose could be served by attempting a criticism of the authorities opposed to this view.

I can, however, see a clear distinction between the case in hand and cases in which there is a gift for life, with a power to the life-tenant of appointment by will. In that case, necessarily, those taking under the appointment my will must be in esse during the life of the life-tenant, who was in esse at the testator's death; but what is here sought is to give an unlimited power of appointment by will to one not born at the testator's death. This is what is objected to, and which I think is impossible.

This is in accordance with the view well stated by Joyce, J., in In re Thompson, [1906] 2 Ch. 199. . . .

So far as personal estate is concerned, the rule of Whitby v. Mitchell cannot apply, but the rule as to perpetuities does apply, and makes void the provision in question: see per Farwell, L.J., in In re Bowles, [1902] 2 Ch. 653.

Assuming, as I hold, that everything after the gift to the children and grandchildren on the wife's death is invalid, is there an intestacy, or does the case fall within the principle of Hancock v. Watson, [1902] A.C. 14? In other words, is there a sufficient gift to the children and grandchildren, on the death of the life-tenant, to give to them an absolute interest when these limitations and provisions fail?

I think there is; for there is more than a gift of a mere life estate. By clause 7 the testator directs that, after the death or second marriage of his wife, his trustees shall hold the residuary estate "in trust for my children who shall be then alive, in equal shares;" and by clause 8, in the event of the death of any of his children before the decease of his wife, leaving issue, such issue shall stand in the place of its parent. See also Cook v. Cook, 38 Ch.D. 202.

There is enough here, I think, to make the principle applicable and to avoid that which the testator certainly did not intend—an intestacy.

Costs of all parties may come out of the estate.

FALCONBRIDGE, C.J.K.B. FEBRUARY 3RD, 1913.

MALONE v. CITY OF HAMILTON.

Municipal Corporations—Section of Township Added to City—Water Supply—6 Edw. VII. ch. 31—*Order of Ontario Railway and Municipal Board—Remedy—Action—Mandamus—Application to Board.*

Action for a mandamus to compel the defendants, the Municipal Corporation of the City of Hamilton, to supply water to a district annexed to the city.

M. Malone, for the plaintiff.
F. R. Waddell, K.C., for the defendants.

FALCONBRIDGE, C.J.:—The only question submitted to me for adjudication was, whether, if the plaintiff has any rights in the premises, he can invoke the aid of this Court or whether his proper and only remedy is by application to the Ontario Railway and Municipal Board.

I am of the opinion, after review of the statute 6 Edw. VII. ch. 31, and of the cases cited, that the plaintiff is rectus in curiâ on this point.

The order of the Board of the 3rd September, 1908, annexing this section of the township of Barton to the city (sec. 7), did not impose any obligation on the defendants. It simply provided that, until the defendants should introduce and have in operation a water supply for the section annexed, the defendants should not increase the amount of taxes above the rate fixed for 1908; but, after water is introduced and ready for supply, properties in the annexed section shall be assessed and taxes levied in the same manner and at the same rates as apply to property-owners within the original city limits.

Thus, I take it, the Board has never laid hold of the matter, to use the Chancellor's phrase in Town of Waterloo v. City of Berlin, ante 256, 257, so as to be seized of it for purposes of working out details.

There will be judgment for the plaintiff on this issue, with costs. Thirty days' stay—which is not to apply to the trial of other issues at the Court to be held on the 17th inst.—my intention being that there shall be only one appeal to the Appellate Division.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 4TH, 1913.

RE CANADIAN PACIFIC R.W. CO. AND TOWN OF WALKERTON.

Costs—Taxation—"Costs of and Incidental to the Reference"—Costs of Application for Appointment of Referee—Dominion Board of Railway Commissioners—Policy as to Awarding Costs.

Appeal by the railway company from the taxation against the company of the town corporation's costs awarded by a Referee.

Angus MacMurchy, K.C., for the railway company.
G. H. Kilmer, K.C., for the town corporation.

MIDDLETON, J.:—The question raised is a narrow one, of some difficulty, but of no great practical importance.

The Dominion Railway Board, in Curry v. Canadian Pacific R.W. Co., 13 Can. Ry. Cas. 31, has determined that, as a matter of general policy, it will not award costs of any proceedings taken before it.

I am not concerned with the wisdom of this decision, opposed as it is to the principles laid down in other high places: see, for example, the statement of Sir George Jessel in Cooper v. Whittingham (1880), 15 Ch.D. 501, and in Johnston v. Cox (1881), 19 Ch.D. 17, and of Lord Esher in In re Monkseaton (1889), 14 P.D. 51.

By an agreement made the 30th December, 1908, the railway company agreed with the town corporation to pay the town corporation, and all persons who might be injured by the construction of a railway bridge and embankment through the town, all damages sustained from flooding which it was anticipated might be occasioned thereby; the damages to be ascertained in a summary manner by a Referee to be appointed by the Board for the purpose, upon the application of the company or the town corporation or of any person injured.

Pursuant to this agreement, an application was made to the Board, and, on the 2nd May, 1912, a County Court Judge was appointed Referee. It was provided "that the costs of and incidental to the reference, including those of the Referee, shall be in the discretion of the said Referee." The Referee has found damages and has awarded to the town corporation against the railway company all the costs over which he has power.

It may be that unintentionally the Board has departed from the general principle laid down in the case of Curry v. Canadian Pacific R.W. Co. My function is simply to determine the meaning of the words used, quite apart from any presumption arising from the general policy of the Board; and I think that the Taxing Officer was right in giving to these words a wide meaning, and that they are sufficient to include the costs of the application to the Board for the appointment of the Referee.

There was an agreement for a reference. The only thing to be done, when a claim was made, was to apply to have the Referee named. It seems to me clear that the costs of this application fall within the general expression "the costs of and incidental to the reference."

In Re Bronson and Canada Atlantic R.W. Co., 13 P.R. 440, the Chancellor indicates the general principles which here apply. Upon the taxation held under his order in that case the costs of the appointment of the arbitrators were allowed as falling within the expression "all costs incidental to the arbitration."

The appeal will, therefore, be dismissed with costs, which I fix at $10.

LENNOX, J. FEBRUARY 4TH, 1913.

RE ROSENBERG AND BOCHLER.

Vendor and Purchaser—Objection to Title—Registered Agreement—Authority to Sell—Registry Act, 10 *Edw. VII. ch.* 60, *sec.* 75—*Cloud on Title—Removal—Release.*

Application by the vendor, Rosenberg, under sec. 4 of the Vendors and Purchasers Act, for an order declaring that a certain registered agreement was not a cloud upon the applicant's title to land which he had agreed to sell to Bochler.

L. M. Singer, for the vendor.
R. S. Robertson, for the purchaser.
C. E. Newman, for the Queen City Realty Company.

LENNOX, J.:—The vendor asks to have it declared that a certain agreement, dated the 5th November, 1912, made between the vendor and the Queen City Realty Company, registered as No.

118685, is not a cloud upon and does not constitute a valid objection to the title to land agreed to be sold by Rosenberg to Bochler.

I cannot so declare. On the contrary, I am clearly of opinion that, whatever may be the questions to be settled between the vendor and the realty company, the registered instrument referred to is a cloud upon and constitutes a valid objection to the title of the property in question. The wording of the instrument itself, and sub-secs. (d) and (e) of sec. 2, and secs. 33, 35, 50, 70, 71, 72, 74, and 75 of the Registry Act, 10 Edw. VII. ch. 60, completely answer the argument of counsel for the vendor that this is not an instrument capable of being registered. And Ontario Industrial Loan and Investment Co. v. Lindsey, 3 O.R. 66, 4 O.R. 473, cited in support of this, is clearly against the vendor, as it shews that an instrument improperly registered must be removed from the registry. . . . This case is more like Baker v. Trusts and Guarantee Co., 29 O.R. 456, but clearer than the Baker case. Even if the instrument in question is only a bare authority to sell upon commission, it is expressly provided for by sec. 75, and is effective for a year at all events; and, in any case, take it that it was improperly registered, still it is registered, and the company is asserting a claim, and the purchaser has actual notice of it. I have hesitated on account of the pending action for specific performance. As, however, this results from the vendor's improper threat of rescission, as the present motion is made by the vendor after action, and as the disposal of this question may prevent further litigation, I have decided to deal with the matters submitted upon this application.

I find and declare that the instrument above referred to is a cloud and incumbrance upon and objection to the title of the lands in question; and a release or discharge thereof must be procured and registered by and at the expense of the vendor.

The costs of all parties shall be paid by the vendor.

There are questions between the realty company and the vendor which the parties should have an opportunity of having inquired into before final adjustments of the account as between them. If these parties do not otherwise arrange before the order is issued, the order will provide that upon payment of the $125 commission—undisputed—and upon payment of $200 into Court, the Queen City Realty Company will execute and deliver a release, capable of being registered, of all their claims upon the land in question.

KELLY, J. FEBRUARY 7TH, 1913.

RE SNELL AND DYMENT.

Deed—Assignments and Preferences—Assignment for Benefit of Creditors before Assignments Act—Conveyance of Land by Assignor and Assignee—Knowledge and Assent of Creditors—Revocable Deed—Limitations Act, 10 *Edw. VII. ch.* 34, *sec.* 48—*Implication of Power of Sale—Vendor and Purchaser—Objection to Title.*

An application by Snell, the vendor, under the Vendors and Purchasers Act.

The objection raised by Dyment, the purchaser, was, that the creditors of William Hewitt were necessary parties to a conveyance made by him and William Thomson to one Wellstead on the 2nd November, 1880. Hewitt, on the 8th June, 1880, granted and assigned to Thomson all his assets and effects for the benefit of his creditors, so that they should "rank thereon for their respective claims ratably and proportionally and without preference or priority."

W. A. McMaster, for the vendor, contended that Thomson had power to make the conveyance of the 2nd November with the assent or concurrence of the creditors; that, from the nature of the assets assigned to him, and the purposes for which the assignment was made, a power of sale was implied.

A. C. Heighington, for the purchaser.

KELLY, J.:—The effect of the decision in Flux v. Bell, 31 L.T.N.S. 645, is, that a power of sale will be implied wherever duties are imposed on the trustee which cannot be performed without it. That may well be considered the case here. But I do not find it necessary to rest my conclusions upon that ground, for there are other reasons from which I conclude that the objection to title is not well taken.

It has not been shewn that Thomson, who also executed the deed from Hewitt to him, was a creditor of Hewitt's; or that any knowledge of the deed was communicated to Hewitt's creditors, or that they assented to it. That being so, that deed was revocable: Andrew v. Stuart, 6 A.R. 495; Cooper v. Dixon, 10 A.R. 50, referred to in Ball v. Tennant, 25 O.R. 50, at p. 55.

Moreover, the purchaser is entitled to the protection given by sec. 48 of the Limitations Act, 10 Edw. VII. ch. 34.

I declare that the objection raised by the purchaser is not such as entitles her to reject the title; and, in so far as it is concerned, the vendor has shewn a good title.

There will be no costs to either party.

LENNOX, J. FEBRUARY 6TH, 1913.

RE CAMPBELL.

Will—Construction—Creation of Trust Fund—Amount of—Charge on Land Devised—Exoneration of General Estate—Investment of Fund—Directions of Will—Loan to Devisee—Insufficiency of Estate to Provide Trust Fund and Pay Legacies—Proportionate Abatement.

Motion by the executors of the will of Charlotte Campbell, deceased, for an order determining the construction of certain clauses of the will, and for advice and direction under the Trustee Act, 1 Geo. V. ch. 26(O.)

D. T. Symons, K.C., for the executors.

A. J. Russell Snow, K.C., for the Reverend F. Wilkinson and the general legatees

J. A. Scellen, for Moses Bricker.

R. U. McPherson, for Wycliffe College.

Donald B. Campbell, though duly served, was not represented.

LENNOX, J.:—The executors . . . specifically ask:—

(a) Have the trustees, before payment of the general legacies, to set aside any sum to form a trust fund for the benefit of Donald B. Campbell, or, in the event of the said Donald B. Campbell dying before the 1st August, 1920, without having been married, for the benefit of Wycliffe College, and, if so, what amount?

(b) Does Moses Bricker take the property 265 Jarvis street charged with the sum of $9,000, or any smaller sum, to be held in trust for Donald B. Campbell, thus exonerating the general estate of the testatrix from providing for the same?

Reversing the order in which the questions are put, I am clearly of opinion that Moses Bricker, in taking the property 265 Jarvis street, does not take it charged with the sum of

$9,000, or any smaller sum, to be held in trust for Donald B. Campbell. It is quite clear, I think, from the language of the will, that the testatrix had it in her mind that a sum of money derived in some way from her estate should be paid to Donald B. Campbell on the 1st August, 1920, or upon his marriage if he marries before that date—also the income of this money while thus outstanding—and to be paid to Wycliffe College if Campbell should die unmarried before August, 1920.

Again, whether the language used is or is not sufficient to create a trust, it is reasonably clear that the testatrix proposed that the money to be devoted to this purpose should be as much as $9,000, and that this money should be so employed as to produce an income.

It is also clear upon the will that Moses Bricker was a person standing high in the confidence and regard of the testatrix.

If these conclusions are well founded and are kept in mind, it is easy to understand that a suggestion or direction as to a method of profitably and securely employing the trust funds, with possible benefit or accommodation to Moses Bricker, and not the imposition of a burden upon him, was what prompted the testatrix to insert the provisions: "I hereby authorise my trustees to lend the sum of $9,000 or any smaller sum to the said Moses Bricker on the security of a first mortgage on my residence 265 Jarvis street, Toronto, for a period not later than the 1st August, 1920, the interest upon the mortgage to be at the rate of six per centum per annum payable quarterly." "And I hereby relieve my trustees from all responsibility in connection with such loan to the said Moses Bricker if the security should for any reason prove insufficient."

But it is not easy to understand that a testatrix, who has just used clear, exact, and apt expressions in charging a legacy in favour of Mildred Bell upon the same land, would, in the next paragraph of her will, use the expressions above set out, including the exoneration of her executors from responsibility, and by it intend to charge another and larger sum upon the property of Moses Bricker; and, if this property is impressed with a trust at all, it is here and by this clause, and nowhere else.

I know, of course, that, coupled with the devise of 265 Jarvis street, is this clause, "subject, however, to the above-mentioned charges on the said lands and premises in favour of Mildred Bell and also in favour of the said trust for Donald B. Campbell."

The fact that there is a definite charge in favour of Mildred

Bell, and that the Campbell trust is here joined with it, and the same language used, is certainly significant. But a reference to a non-existent or assumed charge will not of itself constitute a charge.

There is only one other paragraph in the will referring to the matter of this trust, as it affects the estate of Moses Bricker, and I shall refer to it in connection with the other question. It, however, goes to emphasise what, I think, is already abundantly clear—that the only contemplated connection of Moses Bricker with the trust funds was as a possible borrower of the whole or a part of it; and, when the testatrix refers to a charge "in favour of the said trust," I read it as a reference to a mortgage charge voluntarily assumed by Moses Bricker, if assumed at all, and for which he gets an equivalent in the use of money of the estate for so long as it continues to be a charge.

Additional evidence that the testatrix did not intend to charge the Jarvis street property with this trust fund is found in the fact that the testatrix contemplated the possibility of a deficiency of personal estate for payment of the pecuniary legacies in full; and this could only be possible if the trust fund is treated as a pecuniary legacy payable out of the general personal estate.

The next consideration is, has there been a trust created at all? I have already stated that undoubtedly the testatrix had it in her mind to establish a trust; and, after some hesitation, I have come distinctly to the conclusion that she has used language sufficiently definite for that purpose.

That the testatrix aimed at the creation of a trust fund, and that its existence or the amount of it was not to be dependent upon whether Moses Bricker borrowed or how much he borrowed, is clear, for the testatrix says: "I hereby declare that my trustees shall stand possessed of the income derived from the said investment, including the mortgage from the said Moses Bricker, upon the following trusts, that is to say: upon trust to pay the income derived therefrom to my grandson Donald B. Campbell, quarterly, until the 1st day of August, 1920, then to pay and transfer to the said Donald B. Campbell the said trust fund;" with provisions for contingencies which need not now be referred to.

Here it is clearly stated that there is to be an investment; but the amount of it has to be otherwise or elsewhere ascertained. It is stated, however, that the investment includes "the mortgage from the said Moses Bricker;" that is, that it is a part of the trust fund.

Turning back, then, I find, from a clause already quoted, that this mortgage, as to the times for payment of interest and the time within which the principal money must be paid, fits in exactly with the provisions in favour of Donald B. Campbell, and that any sum up to $9,000 of the funds so to be invested may be lent to Moses Bricker.

The result, as I understand, is, that the will shews that the testatrix intended to create a trust fund for the purposes specified; and, as the trustees are authorised to lend as much as $9,000 out of this trust to Moses Bricker, the total trust investment must at least be as much as $9,000.

As to the first question, therefore, I am of opinion that the trustees must set aside a fund out of the estate of the testatrix not specifically disposed of, for the benefit of Donald B. Campbell, and contingently for the benefit of Wycliffe College; and that, subject to the question of a deficiency of assets, the sum to be set apart or set aside as such trust fund is the sum of $9,000.

If the estate of the deceased not specifically devised or bequeathed, after payment of the debts of the deceased and of her funeral and testamentary expenses and of the costs of administering her estate, and after payment of the pecuniary legacy of $3 per month to Bella Doherty, as mentioned in the will, and after providing for payment of legacy and succession duties as mentioned in the will, is not sufficient to provide for the setting apart of the whole of this sum of $9,000, and for payment in full of all the pecuniary legacies or bequests set out or provided for in the will—other than the legacy to Bella Doherty as aforesaid and other than the $4,000 bequeathed to Mildred Bell, which is specifically charged upon and payable out of the real estate—the said trust sum or fund of $9,000 and the said several pecuniary legacies or bequests shall all abate pro rata, and the sum to be set aside as a trust fund shall be $9,000, less its said proportionate abatement.

The annuity or annual payments to Sarah McGarven may delay final distribution, but can create no embarrassment, as the principles above stated apply to the fund set apart to produce income for this purpose, when it falls in.

I am not aware that anything further is desired of me. If there is, I may be spoken to before the judgment is entered up.

There will be costs to all parties out of the estate; to the executors as between solicitor and client.

FALCONBRIDGE, C.J.K.B. FEBRUARY 5TH, 1913.

BARCLAY v. TOWNSHIP OF ANCASTER.

Highway — Nonrepair — Injury to Traveller — Negligence of Township Corporation—Want of Guard-rail at Dangerous Place—Cause of Injury—Contributory Negligence—Res Ipsa Loquitur—Damages.

Action by husband and wife against the Municipal Corporation of the Township of Ancaster for damages by reason of injuries sustained by the wife by being thrown out of a buggy while driving along the first concession line in the township of Ancaster, by reason, as the plaintiffs alleged, of the want of a guard-rail or other protection at a dangerous place.

The action was tried before FALCONBRIDGE, C.J.K.B., without a jury, at Hamilton.

G. Lynch-Staunton, K.C., for the plaintiffs.

J. L. Counsell, for the defendants.

FALCONBRIDGE, C.J.:—The question as to the necessity of guard-rails or barriers at dangerous places along township roads has been the subject of many decisions both in the United States and in Ontario. The leading authorities up to 1906 are collected by Judge Denton in his valuable book on Municipal Negligence, pp. 113 to 120. On p. 119, he gives a summary of the tests to be applied in cases of this character. I refer further to my brother Teetzel's careful judgment in Kelly v. Township of Carrick (1911), 2 O.W.N. 1429.

Every case of this kind must depend on its own particular circumstances. The defendants here urge that it is not reasonable to ask them to supply guard-rails here or at like places in the township. Officials of the municipality admit that it is a rich and well-settled township, as well able, perhaps, as any township in Ontario to take care of its highways.

The photographs filed as exhibits shew that a guard-rail had been erected on one side of the road a long time before this accident, and had been allowed to fall into decay.

I am of opinion, therefore, that the defendants are liable, unless there is any defence on the ground of contributory negligence—which, by the way, is not specifically pleaded. I do not think that the doctrine res ipsa loquitur is applicable. The accident was caused by the whippletree of the buggy parting

from the plate or cross-bar. The connecting link between these two objects was a bolt, and the accident was caused by the bolt giving way or coming out. The buggy was an old one, but it is sworn by both plaintiffs to have been in good condition. The horse ran off and left the female plaintiff in the buggy, which at once began to move backwards down the slope of the hill until it went over the bank. It was moving back so slowly that a trifling obstruction would have arrested its course. She was alone in the conveyance and had no means of stopping or checking its backward career. She made some effort to get out, but at her time of life she could not do so; and, if she had succeeded, she might have suffered severer injuries.

I find, therefore, that the direct cause of the injury was the want of a guard-rail at that point.

The road foreman swore that he called the reeve's attention to the necessity of a guard-rail at that point at every meeting of the council; he said, further, that this point and another, 150 yards further on, were the two worst places in the township, or at any rate on his beat.

I assess the damages to the male plaintiff at $100 and to the female plaintiff at $500, with costs of suit on the High Court scale.

FEBRUARY 4TH, 1913.

*STRANG v. TOWNSHIP OF ARRAN.

Highway—Nonrepair—Failure to Replace Bridge Carried away by Freshet—Liability of Township Corporation—Status of Highway—Dedication—Acceptance by Council—Statutory Duty to Repair—Municipal Act, 1903, *secs.* 606, 607—*Application of sub-sec.* 3 *of sec.* 606 *to Cases other than "Accident" Cases—Necessity for Notice—Damages—Costs.*

Appeal by the plaintiffs from the judgment of the Senior Judge of the County Court of the County of Bruce, dismissing (with costs) an action brought in that Court by residents of the unincorporated village of Allenford, in the township of Arran, in the county of Bruce, for damages because of the nonrepair of a highway known as Mill street and failure to replace a bridge which formerly stood upon Mill street where it crossed the

*To be reported in the Ontario Law Reports.

Sauble river, in the said village, but which had been carried away by a freshet.

The plaintiffs alleged that Mill street, with the bridge formerly thereon, was the only practical highway to and from their respective lands situate on the south side of the river; and that, because of the nonrepair of the highway and bridge, they had been damnified.

The defences were that Mill street, with the bridge thereon, was laid out by private persons, and never became a public highway; and that, even if it did, the defendants were not liable.

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

C. A. Moss, for the plaintiffs.

D. Robertson, K.C., for the defendants.

The judgment of the Court was delivered by MULOCK, C.J., who, after setting out the history of the case and reviewing the evidence, proceeded:—

On the facts disclosed in this evidence, one question to be determined is, whether Mill street, including the bridge, is a highway under the jurisdiction of the defendant corporation, and which they are bound to keep in repair. It was not an original road allowance, but was laid out by private individuals; and, before the corporation can be liable, under sec. 606 of the Consolidated Municipal Act, it must appear that Mill street was "established by by-law of the corporation or afterwards assumed by public user," as provided by sec. 607 of the Act. The question of dedication is one of fact. The registration of the plans shewing Mill street; the specific reference on the plan of the 27th June, 1881, providing for its continuance southerly to the lane; the sale of lands according to these plans; the uninterrupted user of Mill street by the general public as a highway since the year 1868; and the performance of statute labour on it over a considerable number of years—constitute unmistakably an offer of dedication. And the action of the council, in the years 1894 and 1899, in voting money for the repair of the bridge, in causing those repairs to be done, and in paying therefor, are, I think, referable to one thing only, viz., acceptance of the order of dedication, and constitute an assumption of the bridge and street for public user by the defendant corporation, within the meaning of sec. 607: Hubert v. Township of Yarmouth, 18 O.R. 458; Holland v. Township of York, 7 O.L.R. 533.

Accordingly, the defendants are bound to keep that portion of Mill street within the township limits, and the bridge, in reasonable repair. For the purposes of this case, it may be assumed to be the law that, except for sec. 606, a municipality is not liable in damages because of the nonrepair of a public road; but the learned trial Judge held that, because the plaintiffs had not complied with the requirements of sub-sec. 3 of sec. 606, they were not entitled to maintain this action.

With all respect, I do not find myself able to accept his interpretation of the section. Sub-section 1 of sec. 606 comes down to us from the Consolidated Statutes of Upper Canada. At that time the various sub-sections of sec. 606 formed no part of the statute-law; and, as the section thus originally stood, a municipality was "civilly responsible for all damages sustained by any person by reason of such default" (failure to keep in repair), "but the action must be brought within three months after the damages have been sustained."

The scope of the section was not limited to damages to the person, or to damages arising from some accident, but included any cause of action resulting from the municipality's default. The same language is found in sub-sec. 1 of sec. 606; but it is contended that the addition of sub-sec. 3 limits sub-sec. 1 to an "accident case," and this contention is based on the words of sub-sec. 3, "No action shall be brought to enforce a claim for damages under this section, unless notice in writing of the accident," etc., has been given.

In passing sub-sec. 3, the Legislature was not dealing with sub-sec. 1, but was considering accident cases only, and was endeavouring to provide for a municipality being given prompt notice of the accident; evidently with a view to its having the opportunity of investigating the attendant circumstances before they had become dimmed by the lapse of time. In order to secure the giving of such notice, the Legislature enacted that failure to give it might, in that class of case, bar the claim for damages. But sub-sec. 1 includes damages to property not the result of accident: Cummings v. Town of Dundas, 9 O.W.R. 107, 624; and the Legislature has not pretended to amend that section. It is not to be inferred that the Legislature intended in a very important respect to alter a state of the law by depriviog persons of a cause of action growing out of (say, by way of illustration) damage to property or business, by the indirect method of apparently dealing with a subject of causes of action arising out of accident merely; and, where the cause of action,

as in the present case, is of that nature, the requirements of sub-sec. 3, as to notice, do not apply.

I, therefore, am of opinion that the scope of sub-sec. 1 has not been limited by sub-sec. 3; and, the present cause of action not being an "accident" case, notice is not necessary. In other words, sub-sec. 3 does not apply.

The facts of this case shew continuing damage. The plaintiffs' grievance is not that they were injured by the accident of the bridge being swept away, but because of its non-restoration. Each day, so long as the condition of nonrepair continues, the plaintiffs have a new cause of action, and they are entitled to recover three months', less one day's, damages prior to action begun.

As to the amount of damages: the plaintiff Strang's mill was out of repair when the bridge was carried away, and it is not shewn when it was repaired; and, therefore, he is not entitled to damages for interruption to his milling business; but, as access to his property was cut off, he is entitled to damages for the inconvenience thus occasioned. Further, it is probable that he was somewhat inconvenienced, in the work of repairing the mill, by reason of the absence of the bridge, and I would allow him the sum of $75 damages.

Hewitson, who resides at the south side of the river, is entitled to reasonable damages, and I would fix the same at $25, which appears to me a proper sum.

Arnott shews no special damage, but is entitled to nominal damages, say $5.

As to the costs of this action, the defendants denied liability; and the plaintiffs were, therefore, justified in bringing suit at the earliest moment, without giving, as they otherwise should have done, a reasonable time within which to allow the defendants an opportunity to restore the bridge.

Under the circumstances, the plaintiffs are entitled to the costs of the action, on the County Court scale, and to the costs of this appeal.

SHEARDOWN v. GOOD—MASTER IN CHAMBERS—JAN. 31.

Pleading—Reply—Withdrawal—Amendment of Defence—Right to Deliver New Reply—Costs.]—On the 20th December, 1912, the plaintiff obtained an order to withdraw his reply and amend his statement of claim. This was acted on, and the defendant delivered an amended statement of defence on the 10th

January, 1913. Four days later, the plaintiff delivered a reply to this statement of defence. The defendant moved to set this aside as delivered too late without an order allowing it to be delivered. The Master said that when the statement of defence was amended this gave a new right to the plaintiff to reply thereto, if so advised. Even if this was not so, the first reply having been withdrawn by leave, no reply was in effect delivered. Wright v. Wright, 13 P.R. 268, shews that such motions are not to be encouraged. That was on a motion similar to the one now in question. It must, therefore, be dismissed with costs to the plaintiff in any event, as was done in that case. L. V. McBrady, K.C., for the defendant. C. W. Plaxton, for the plaintiff.

McALPINE v. PROCTOR—MASTER IN CHAMBERS—FEB. 3.

Evidence—Foreign Commission—Motion for—Affidavit in Support—Clerk in Solicitor's Office—Information and Belief—Practice—Con. Rules 312, 518.]—Motion by the defendant for a commission to take evidence at St. John, New Brunswick. The affidavit in support of the motion was that of a clerk in the office of the defendant's solicitors, who spoke only on information and belief, of which "counsel" was the source. The Master said that this was not desirable, even if it did not in substance contravene Con. Rule 518. That Rule was never intended to allow the too common practice of supporting an interlocutory motion by the affidavit of a clerk in the office of the applicant's solicitor. Here the defendant resided in Toronto, and there was no difficulty in getting him to make the affidavit. For this reason, if the strict practice was followed, the motion should be dismissed with costs. But, following the principle of Con. Rule 312, the Master did not apply the rigour of the Rule; because, first, the case was ready for trial, and it was not in the interest of either party that it should be delayed by requiring another motion to be made; and, second, because in the defendant's depositions he spoke of some arrangement between the plaintiff and the purchaser which would have the effect, if proved, of defeating the plaintiff's claim for a commission upon the sale of land. Under Ferguson v. Millican, 11 O.L.R. 35, an order for a commission is almost of right if the requirements there pointed out are complied with, as they had been here substantially. Order made for a commission, returnable in ten days. Costs of the motion to the plaintiff only in the cause,

and costs of the commission left to the Taxing Officer, if not disposed of by the trial Judge. Attention was called again to In re J. L. Young, [1900] 2 Ch. 753, Nieminen v. Dome Mines, 4 O.W.N. 301, and Todd v. Labrosse, 10 O.W.R. 773, as applicable to Con. Rule 518. M. L. Gordon, for the defendant. H. H. Davis, for the plaintiff.

WARREN GZOWSKI & CO. V. FORST & CO.—MIDDLETON, J.—FEB. 3.

Broker—Shares—Pledge — Contract — Breach — Tender of Shares—Time.]—An action by a firm of brokers against another firm of brokers for damages for breach of a contract with respect to 10,000 shares of Temiskaming Mining Company stock, of which the defendants refused to take delivery. The second trial of the action took place before MIDDLETON, J., at Toronto. At the first trial, before SUTHERLAND, J., there was judgment for the plaintiffs (2 O.W.N. 222); but the judgment was set aside and a new trial ordered by a Divisional Court (22 O.L.R. 441, 2 O.W.N. 404); and the order of the Divisional Court was affirmed by the Court of Appeal (24 O.L.R. 282, 2 O.W.N. 1312). There was a conflict of evidence as to the nature of the transactions between the parties and as to what was said and done. The learned Judge (reviewing the evidence) accepts the statements of the plaintiffs and their witnesses, and finds that the stock was tendered by the plaintiffs to the defendants within a reasonable time. Judgment for the plaintiffs for the amount claimed, $2,082, with interest thereon from the 29th June, 1909, to the date of judgment, and costs. No costs of the former trial nor of the appeal to the Divisional Court. F. Arnoldi, K.C., and E. F. B. Johnston, K.C., for the plaintiffs. I. F. Hellmuth, K.C., and A. McLean Macdonell, K.C., for the defendants.

GRAY V. BUCHAN—DIVISIONAL COURT—FEB. 3.

Judgment—Motion to Vary—Dealing in Company-shares—Brokers—Proof of Actual Sale—Refusal to Give Further Evidence.]—Motion by the plaintiff to vary the minutes of the judgment of a Divisional Court, ante 220. The motion was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ. RIDDELL, J., gave the judgment of the Court in these words:

We gave leave to the defendants to prove by affidavits an actual sale, which the plaintiff says he disputes; the defendants decline the offer—and, when an opportunity is once more offered them, they again decline. We did not think that, under the circumstances at the trial, more proof was needed. The defendants refuse to give further proof now, and the plaintiff will have full advantage of this refusal upon the appeal. But we cannot change our judgment. No costs. J. J. Gray, for the plaintiff. H. S. White, for the defendants.

PRATT v. ROBERT HYLAND REALTY CO.—LENNOX, J.—FEB. 4.

Fraud and Misrepresentation—Rescission of Contracts for Purchase of Lands—Return of Moneys Paid—Evidence—Findings of Fact.]—Three actions, by Bower E. Pratt, Moore, and Wesley Pratt, against Robert Hyland and Robert Hamilton, doing business as a partnership under the name "Robert Hyland Realty Company," to have certain agreements made between each of the plaintiffs and the two defendants declared null and void and cancelled and to recover back the moneys paid by the plaintiffs to the defendants. The agreements were for the sale by the defendants to the plaintiffs of lots in a tract of land described as "Woodland Park, Wainwright, Alberta." The plaintiffs alleged fraud and misrepresentation by the defendants and their agents. The learned Judge reviewed the evidence, in a written opinion of some length, and made findings of fact thereon, all in favour of the plaintiffs. He said that the case was one of "flagrant and unmitigated fraud." Judgments for the plaintiffs, with costs, declaring the contracts null and void and directing the return of the moneys paid. A. E. Fripp, K.C., for the plaintiffs. W. J. Kidd, for the defendants.

RE GILBERT—MIDDLETON, J.—FEB. 6.

Will — Construction — Charitable Bequest — Distribution among Charities—Costs.]—Motion by the executors of Mary Gilbert for an order determining the charitable institutions entitled to take under the terms of a charitable bequest. The learned Judge determined that the fund, after payment of the executors' costs, should be divided equally among the following institutions in the city of Toronto: the Infants' Home and Infirmary; the St. Vincent Infants' Home; the Children's Home (Salvation Army); the Children's Aid Society; the Children's

Aid Society of St. Vincent de Paul; the Boys' Home; the Protestant Orphans' Home; the Sacred Heart Orphanage; and the Home for Incurable Children. The societies to pay their own costs. J. E. Jones, for the executors. W. B. Raymond, F. C. L. Jones, J. M. Ferguson, T. L. Monahan, and S. S. Mills, for various societies.

RE LANKIN—MASTER IN CHAMBERS—FEB. 5.

Interpleader — Application by Stakeholder — Rival Claimants for Commission on Sale of Land—Want of Neutrality.]—Application by one Lankin for an interpleader order in respect of an agent's commission claimed by Winyard Cooch & Co. and by J. B. Levy & Co. The affidavit of the applicant stated that on the 3rd December, 1912, he agreed to sell some land in Toronto, for $38,000; that this agreement was brought to him by Winyard Cooch & Co., to whom he agreed to pay a commission of two and a half per cent., if and when the sale was completed; but that subsequently, and before the sale was completed, J. B. Levy & Co. notified him that they were the agents who had really brought about the sale, and were, therefore, entitled to the commission of $950. The applicant admitted that he had had some conversation in September with J. B. Levy & Co., at their office, in reference to a proposed buyer—some time before Winyard Cooch & Co. came into the matter. On the 11th January, 1913, the sale was completed. The Master said that the judgment in Barber v. Royal Loan and Savings Co., 4 O.W.N. 91 (which was affirmed by Riddell, J., on the 11th October last), shewed that the application must be refused, on the applicant's admission of his promise to pay Winyard Cooch & Co. It might possibly be open to the applicant to defeat the claim of Winyard Cooch & Co., on the ground of misrepresentation as to their services; or that of J. B. Levy & Co., on the ground of no retainer by him. But it might also be, as pointed out in the Barber case and authorities there cited, that he was liable to both. Before committing himself to Winyard Cooch & Co., the applicant should have taken an indemnity from them against any claim from J. B. Levy & Co., as was done in a case recently in Chambers. Motion dismissed with costs to Winyard Cooch & Co., fixed at $20, unless the applicant wished a taxation. J. B. Levy & Co. did not ask for costs. K. F. Mackenzie, for the applicant. Grayson Smith, for Winyard Cooch & Co. R. H. Greer, for J. B. Levy & Co.

BROOM v. DOMINION COUNCIL OF ROYAL TEMPLARS OF TEMPERANCE—MASTER IN CHAMBERS—FEB. 5.

Pleading—Statement of Claim—Restriction—Claim to Set aside Release—Other Claims—Con. Rule 298—*Judicature Act, sec.* 57(12).]—Motion by the defendants to restrict the statement of claim to a claim to set aside a release given by the plaintiff, which, as they alleged, was a bar to any action in respect of the other matters set out in the statement of claim; and that, therefore, they should not be litigated until the release had been set aside. The motion was based on what occurred before RIDDELL, J., on the 2nd October, 1912, when the plaintiff moved for an order to be allowed to proceed in an action begun on the 25th October, 1899. No order was made on that application, but it was pointed out to the plaintiff, as one "inops consilii," that it was no use to proceed with the first action, in view of the release given by him on the 2nd November, 1902, which must first be set aside. The Master said that this did not prevent the plaintiff from bringing the present action to set aside that release and joining with it a claim to such relief as he thought himself entitled to, if he should succeed in having the release declared void. In Bristol v. Kennedy, ante 537, it was said: "Under our present system of pleading it is difficult to maintain an order striking out a part of a pleading." Here there was no ground for making such an order; there was nothing here calling for the application of Con. Rule 298. To leave it open to the plaintiff to bring another action, if the release was set aside, would be contrary to the very beneficial directions of the concluding part of clause 12 of sec. 57 of the Judicature Act. Motion dismissed, with costs to the plaintiff in any event. The Master added that the defendants could still move, under Con. Rule 531, to have the validity of the release tried out first; but he was not to be understood as recommending that course: see Stow v. Currie, 14 O.W.R. 62, 154, 248. Lyman Lee, for the defendants. The plaintiff in person.

MURRAY v. THAMES VALLEY GARDEN LAND CO.—HOLMESTED, SENIOR REGISTRAR—FEB. 8.

Particulars—Statement of Claim—Misrepresentations—Contract—Rescission—Demand—Costs.] — Motion by the defendants for particulars of the matters referred to in paragraphs 8, 9, 10, and 17 of the statement of claim, in an action to set aside

an agreement made by the plaintiff to purchase twenty acres of land from the defendant company and to recover the purchase-money paid on account, on the ground that the plaintiff was induced to enter into the contract by fraudulent misrepresentations. The Senior Registrar, sitting in Chambers, in lieu of the Master, held that in such an action a defendant is entitled to specific information as to the representations on which the plaintiff relies; a general statement that the defendant made false statements is insufficient. In the statement of claim in this case the alleged misrepresentations were stated to have been made in two ways: (a) by printed pamphlets issued by the defendants; and (b) by verbal statements made by the individual defendants. The plaintiff in his statement of claim set out certain representations which he alleged were made verbally or in certain pamphlets which he mentioned, but he did not specify which of them were made in the pamphlets and which were made verbally, or which were made by both means—neither did he specify any date when the alleged misrepresentations were made or specify the person or persons by whom the verbal misrepresentations were made. The action was also brought to recover damages for the breach of an alleged contract to take back the land and reimburse the plaintiff his outlay. The defendants' solicitor demanded particulars of the matters referred to in paragraphs 8, 9, 10, and 17 of the statement of claim; and, in answer to this demand, the plaintiff delivered particulars; but the defendants, being dissatisfied therewith, moved for an order for the delivery of particulars as required by their demand. The Registrar said that, after a careful perusal of the particulars delivered by the plaintiff, he was of the opinion that they were not a reasonable or sufficient compliance with the defendants' demand, and that the defendants were entitled to particulars as demanded. Paragraph 1 gave no information as to the person making the representation or the time when it was made, nor did it indicate what the particular representation was which induced the belief referred to in that paragraph. Paragraph 2 did not supply what was lacking in the particulars given in the statement of claim, paragraph 11. It did not give the time at which the representations were made; it did not specify which of these were printed, or which were verbal, or which of these were both printed and verbal. The defendants were entitled to a specific statement of the representations, when and by whom and how made, which the plaintiff alleged to have been false. Paragraph 3 was also too indefinite and failed to supply what was lacking in paragraph 2. Paragraph 4 was in-

sufficient; it did not appear whether the agreement referred to was in writing, or verbal, whether under seal, or parol; and, moreover, it departed from the statement of claim, which set up an individual agreement with the defendants other than the company, whereas the particulars set up an agreement with the company also. The order for particulars as demanded must, therefore, go; and, as the plaintiff should have delivered the particulars when demanded, the costs must be in the cause to the defendants. There was no affidavit shewing that the defendants' solicitors were unable to file the defence without first communicating with the defendant in England. It was, therefore, not a case for granting any further time than a week after the delivery of the particulars. W. J. Elliott, for the defendants. N. F. Davidson, K.C., for the plaintiff.