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COURT OF APPEAL.

DECEMBER 7TH, 1911.

*KAISERHOF HOTEL CO. v. ZUBER.

Mortgage—Power of Sale—Duty of Mortgagee—Sale at Fair Value—Conduct of Sale—Conditions—Withdrawal of Bid—Collusion between Mortgagee and Purchaser—Slight Evidence of.

Appeal by the plaintiffs from the judgment of a Divisional Court setting aside the judgment of CLUTE, J., at the trial, which was for the plaintiffs, and dismissing the action: 23 O.L. R. 481, 2 O.W.N. 941.

The action was to set aside a sale, under the powers of sale in mortgages, of an hotel property in the town of Berlin.

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

M. A. Secord, K.C., for the plaintiffs.

G. H. Watson, K.C., for the defendants Zuber and Roos.

MEREDITH, J.A.:—Though it may be that there are some circumstances calculated to excite some suspicion as to the good faith of the mortgagee in the sale of the mortgaged property; yet, when the whole circumstances are reasonably considered, the judgment at the trial cannot be supported.

If the property had been sold at a great undervalue, the things calculated to excite suspicion would become more weighty; but, when it is made quite plain that a reasonable price was obtained, so large an one that no one even now offers more; and when it appears, as it plainly does now, that the purchaser had very good reasons for buying for himself, that indeed, in a business sense, he may fairly be said to have been

*To be reported in the Ontario Law Reports.

driven so to purchase; such suspicions fade away entirely, or at least become very faint.

No sort of objection was made before or at the sale by or on behalf of the plaintiffs to the conditions of sale or to the proceedings at the sale, in regard to which so much is sought to be made now. No attempt seems to have been made, by them or in their behalf, to get a higher bid, or better price, for the property; indeed, the whole of this litigation seems to me to have arisen out of the fact that the purchaser eventually bought for a sum several thousand dollars less than he at one time bid for it; but, as that bid was forced by one who was unable to carry out his purchase when the property was knocked down to him, and was really not a bid in good faith, it is difficult for me to find any fair ground for holding the purchaser to the bid so forced up, and which was retracted before acceptance, or to any other loss on that account.

The admissions said to have been made by both vendor and purchaser, after the sale, are quite subject to a reasonable and innocent interpretation. The purchaser's interest required that the business of the hotel should be carried on and that he should have some sort of a "tie" upon it. Keepers of such hotels are not as easily found "as stumps in a field;" and the mortgagee might fairly and properly be looked upon as a possible future keeper, manager, tenant, or even purchaser, without any offence against any rule of law or equity on the part of the real purchaser, who had bought in good faith, for himself, and in his own interests.

There is no reason, in my opinion, for disturbing the conclusion of the Divisional Court; the case is not one in which much depended upon the demeanour of the witnesses; and the learned trial Judge erred in principle in treating the vendor as if he were nothing but a trustee for the sale of the property for the mortgagor's benefit.

Moss, C.J.O., gave reasons in writing for the same conclusion.

Garrow, Maclaren, and Magee, JJ.A., concurred.

Appeal dismissed with costs.

DECEMBER 7TH, 1911.

*BENNETT v. HAVELOCK ELECTRIC LIGHT CO.

Company—Shares—Agreeement—Sale of Property to Company —Payment by Allotment of Shares—Action by Shareholders to Set aside—Directors—Fraud.

Appeal by the defendants from the order of a Divisional Court, 21 O.L.R. 20, 1 O.W.N. 751, setting aside the judgment of BRITTON, J., 21 O.L.R. 20, 1 O.W.N. 352, by which the action was dismissed, and directing that judgment be entered against the defendants the directors (other than Mathieson) for $1,000.

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

R. R. Hall and S. T. Medd, for the defendants.

D. O'Connell, for the plaintiffs.

MACLAREN, J.A.:—A careful examination of the evidence in this case leads me to the conclusion arrived at by the trial Judge, rather than to that of the Divisional Court. With great respect, I am of opinion that the latter erred in looking at the form rather than at the substance of the transaction in question. The form through which the parties went seems to be a clumsy contrivance, apparently resorted to by them from a mistaken view of the law. If they had put the transaction through in the form in which their actual agreement, as found by the trial Judge, was made, I am of opinion that it would have been unassailable and not open to the objections brought against it by the Divisional Court.

It has been found that the company paid only a fair price for the property; and, if the defendant Mathieson had simply sold it for that sum, and then had compensated the other defendants for the valuable services they had rendered him, there would have been no reasonable ground of complaint.

The price paid for the property was well known, as there was no secret about it; and there was no fraud.

Any irregularities in the matter were, I consider, such as might be condoned by the company; and, the company having, with full knowledge, ratified all that was done, the plaintiffs, who are only urging the claims of the company, can have no higher rights; and their action should be dismissed.

*To be reported in the Ontario Law Reports.

The judgment of the Divisional Court should be reversed and that of the trial Judge restored.

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

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

Appeal allowed, with costs in the Court of Appeal and in the Divisional Court.

DECEMBER 7TH, 1911.

RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO.

Street Railways—Switches and Turn-outs—Municipal Corporations—Order of Ontario Railway and Municipal Board—Question of Law—Leave to Appeal—Scope of—Terms.

Motion made to the Court of Appeal, on the 23rd November, 1911, by the Corporations of the City of Toronto and Town of North Toronto, for leave to appeal from an order of the Ontario Railway and Municipal Board, dated the 2nd October, 1911, whereby, among other things, plans of switches and turn-outs submitted by the railway company were approved and the construction thereof authorised.

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

H. L. Dayton, K.C., for the Corporation of the City of Toronto.

I. F. Hellmuth, K.C., and T. A. Gibson, for the Corporation of the Town of North Toronto.

C. A. Moss, for the railway company.

D. I. Grant, for Herbert Waddington.

The judgment of the Court was delivered by MOSS, C.J.O.:—Application was made on the 23rd November last, on behalf of the City of Toronto and the Town of North Toronto, for leave to appeal from an order of the Ontario Railway and Municipal Board, dated the 2nd October last.

Pursuant to the intimation then made, the Court directed application to be made to the Board for a certificate as to the circumstances under which the order complained of was issued. A certificate has now been received, from which it appears that the order is the formal final judgment of the Board on the questions of law raised on the application to the Board, and was issued only in order that these questions might be fairly presented for consideration upon appeal; and, when the questions of law are settled, the length of the switches and the breadth of the devil strip will be determined by the Board as a whole, in accordance with the provisions of the Act. That being so, leave is granted to appeal from the decision or order, upon the questions of law set forth in the first and second paragraphs of the order, upon the grounds set forth in the 4th, 5th, 6th, and 7th paragraphs of the notice of motion on behalf of North Toronto, or grounds to the like effect. The appeal will proceed upon the usual terms.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. DECEMBER 7TH, 1911.

*ROCHFORD v. BROWN.

Municipal Corporation—Application of Funds in Payment of Costs of Constable of Action against him—Class Action by Alleged Ratepayer against Councillors to Recover Moneys Paid—Status of Plaintiff as Ratepayer—Tenant—Liability for Taxes—Breach of Trust—Trustee Act—Application of.

Appeal by the plaintiff from the judgment of DENTON, one of the Junior Judges of the County Court of the County of York, dismissing the action, which was brought by Thomas Rochford, alleging that he was a ratepayer of the town of North Toronto, suing on behalf of himself and all other ratepayers of the town, to recover from the defendants, who on the 16th March, 1909, were members of the town council, the sum of $240.02 paid out of the funds of the town, by the vote of the defendants, to the solicitors for one Morris, who was a constable of the town, for defending Morris in an action brought against Morris and the town corporation. The plaintiff alleged that the money was illegally voted and paid, and claimed it as

*To be reported in the Ontario Law Reports.

money which should have been kept to and for the use of himself and the other ratepayers.

The County Court Judge held that, if there was a breach of trust, the defendants had acted honestly and reasonably, and were entitled, under the Trustee Act, 62 Vict. (2) ch. 15, sec. 1, to be excused.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

J. B. Mackenzie, for the plaintiff.

T. A. Gibson, for the defendants.

The judgment of the Court was delivered by BOYD, C.:—This is a class action, in which the plaintiff undertakes to sue as a ratepayer representing and on behalf of all the ratepayers of the town of North Toronto. This method of procedure is permissible on the ground stated by Lord Lyndhurst in Hichens v. Congreve, 4 Russ. 577, where all the class stand in the same situation and have one common right and one common interest: then one of such class can sue for the benefit of all the others. And it is laid down that in dealing with such actions the Court must ascertain by strict proof that the party by whom the cause is conducted has the interest which he alleges and upon which his title to sustain the suit is founded: Clay v. Rufford, 8 Hare 281.

The question here is (as put by the plaintiff's counsel), was the plaintiff a ratepayer at the time of bringing the action, i.e., on the 16th March, 1911? He is on the assessment slip for that year as one of the tenants on a property assessed to the landlord, as freeholder, and the tenants, as occupants; the total amount of taxes being $15.75 . . . apportioned as between the tenants. There is no proof given that the tenants have to pay the taxes as between them and the landlord, and *primâ facie* and in the absence of evidence, the landlord is the real ratepayer. Without stipulation to the contrary, the law regards the landlord as the person to pay. Dove v. Dove, 18 C.P. 424, so decides, and the law is still the same, though the present provision in the statute (Act of 1903, ch. 23, sec. 92) appears in a form abbreviated from that in use at an earlier period.

The owner is primarily liable, and if the tenant is called on to pay taxes he pays only *sub modo*, for he can deduct the payment out of his rent or otherwise be recouped by his landlord. . . . In contemplation of law, the landlord is, in such circumstances, the ratepayer, and not his tenant. . . .

This plaintiff is not a proper representative of the body of ratepayers, who alone are interested in the money now sought to be recovered as assets of the municipality. The evidence given is in accord with this result. The witness called by the plaintiff (who was also the town clerk) said that the plaintiff is not and is not looked on as a ratepayer for this year, 1911; and it has not been proved that he is or that he will be. Hence his alleged status of ratepayer is of too vague and fugitive a character to justify his interference on behalf of the class he undertakes to represent.

I prefer to place my judgment on this ground rather than on that which appears in the judgment below. Many grave questions arise as to the pertinence of the Trustee Act, 62 Vict. ch. 15(O.), to a municipal corporation applying municipal funds to the payment of costs of their chief constable, in an action against him as an officer of justice acting in the enforcement of the Liquor License Act. I do not find it needful to discuss these questions on this record and at the suit of this plaintiff.

Judgment affirmed with costs.

MIDDLETON, J. DECEMBER 8TH, 1911.

O'NEIL v. TOWNSHIP OF LONDON.

Highway—Obstruction—Injury to Traveller—Cause of Injury—Negligence of Municipality—Contributory Negligence—Weigh-scales Erected on Highway by Licensee—Injury not Caused by.

Action by Melvin O'Neil, a farmer, against the Corporation of the Township of London and one Clatworthy to recover damages for personal injuries sustained by the plaintiff by reason of an obstruction in a highway in the township, the existence of which was alleged to be owing to the negligence of the defendants or one of them.

T. G. Meredith, K.C., for the plaintiff.

E. Meredith, K.C., and W. R. Meredith, for the defendants the Corporation of the Township of London.

J. M. McEvoy, for the defendant Clatworthy.

MIDDLETON, J.:—The evidence in this case discloses the following situation:—

In April, 1906, the township council passed a resolution permitting Clatworthy to erect weigh-scales on the north side of the road in question, extending some 12 feet upon the road allowance. This permission to use and obstruct part of the road allowance was ultra vires and improper; and, had the accident resulted from the erection placed upon the highway, the case would have been simple. The place where the scales were erected is near to the village of Ilderton, and they have been and are a great convenience to the public.

The travelled portion of the road, i.e., the central strip, some 20 ft. in width, is a well-constructed road, having a crown of about 1 ft., and is drained by well-constructed tile drains, in good repair. The municipality have fully discharged their duty so far as the construction and maintenance of this portion of the road is concerned. Outside of this via trita, the road allowance was left in a state of nature. The soil, a clay loam, in dry or frosty weather is hard—in spring and fall, when travelled on, it readily forms mud. On the 30th November, 1910, the day of the accident, the road between the gravelled portion and the scales was very soft and covered with some inches of snow.

Those desiring to use the scales drove from the crown of the road down the slight incline and up an inclined approach to the scale platform, and then down a similar incline and through the slight hollow or ditch up on to the travelled portion again. There was no defined way—each left the made road and returned to it again at the place he chose. The road between the gravel and scales was undoubtedly in a very bad condition and quite unfit for travel.

Under ordinary circumstances, this road, regarded as a township road, was quite adequate even when the nearness to the village is kept in mind, but the erection of the scales amounted to an invitation to the public to leave the portion of the road prepared for travel; and, I think, imposed upon the township the obligation to make the portion of the road allowance which they so invited the public to use reasonably safe for public use. I think that this portion of the road, under all the circumstances, ought to have been gravelled and to have been made passable even in bad weather; but this is not, in my view, the real turning point of the case.

There had been, some fifteen years ago, a crossing or path placed on the road, leading from a shop or house just west of the scales, across the mud to the gravelled road. When this side portion of the road allowance was not used for travel, this formed no real source of danger; but, when the traffic was turned

over the scales, it became an obstruction which might produce serious results.

This walk was very decayed and most of it was covered with earth, so that it was most inconspicuous at any time, and quite invisible, by reason of the snow, on the day of the accident.

The plaintiff, after his load had been weighed, drove west, and sought to ascend the raised road leading to the village, just beyond the spot where this old walk was. His front runners passed safely across; but, when his hind runners passed over the boards, the north runner sank in the mud, while the south still was on the board, as his course was diagonal; and the result of this was, to throw the load over to the north, and he fell, striking the upturned bob, and was severely hurt.

Having regard to the circumstances already indicated, the invitation to use this road, the absence of any attempt to make a proper way of access to the scales, etc., the municipality had a duty to remove this board, which made a trap and was calculated to bring about just what occurred here. Hundreds might drive in and out without an accident; yet this board, when surrounded by deep mud and slush, would be very apt to overturn a sleigh, particularly when the sleigh was inclined to the north in making the ascent to the crown of the road.

This obstruction had been permitted to exist for fifteen years; and, though originally not a source of great danger, the erection of the scales and consequent divergence of traffic from the beaten road made it a real peril; and this, I think, the municipality ought to have guarded against by its removal.

The load which the plaintiff was driving was not well built—it was listed to the north—and, no doubt, this to some extent contributed to the accident. The plaintiff's method of ascending the raised crown was also one of the contributing causes of the accident. Instead of turning to the south, and ascending this slope at right angles, and then turning to the west when on top of the road, he sought to ascend by taking a diagonal course to the south-west.

I find that neither of these causes, the original list to the north due to faulty loading, nor the incline added to this list by reason of this mode of ascent, nor both combined, would have been sufficient to overturn the load. This was brought about by the descent of the north runner of the hind bob some 6-8 inches in the soft mud and slush.

The course taken by the plaintiff would have been safe enough, even with the list, had the road been in such a condition as the plaintiff had the right to expect, i.e., a soft muddy road, free from concealed obstacles.

I do not think his conduct in either respect amounts to contributory negligence. I think he was, at the time of the accident, exercising reasonable care, having in mind that this hidden board was not known to him: Butterfield v. Forrester, 11 East 60; The Bernina, 12 P.D. 58, at p. 70.

I accept the evidence of Coral Smith as absolutely reliable.

No case is made as to Clatworthy: the accident is in no way attributable to anything he did upon the highway. His position is the same, in substance, as if the scales had been on his own lands, and a customer in driving away had been injured by a defect in the highway.

Judgment for the plaintiff against the township corporation for $1,250 and costs; and dismissing the action as against Clatworthy with costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 9TH, 1911.

STAVERT v. BARTON.
STAVERT v. MACDONALD.

Parties—Substitution of Plaintiff—Transfer of Cause of Action—Order to Proceed—Motion to Set aside—Validity of Transfer—Locus Standi of Plaintiff—Pleading—Amendment—New Defence as against Substituted Plaintiff—Notice of Trial not Affected—Stay of Trial pending Appeal in Similar Action—Additional Defences—Practice.

An appeal by the plaintiff from the order of the Master in Chambers, ante 265, setting aside the notice of trial given by the plaintiff and permitting an amendment of the pleadings sought by the defendants.

F. R. MacKelcan, for the plaintiff.
G. H. Kilmer, K.C., for the defendants.

MIDDLETON, J.:—The order made by the Master, in his view, rendered it unnecessary for him to determine another branch of the motion, viz., the defendants' application to stay all proceedings until the appeal to the Privy Council in Stavert v. McMillan (21 O.L.R. 245, 24 O.L.R. 456), is determined. This motion he gave the defendants leave to renew after issue joined on the amendments. These actions are similar to Stavert v. McMillan in some respects, and, if the judgment at the trial is

restored, then the plaintiff in these actions must fail. Other and most important issues are raised in these actions quite foreign to those in Stavert v. McMillan and personal to these defendants.

Dealing first with the narrow and technical view of the matter. Stavert, the plaintiff, held the claim sued upon as part of the assets of the Sovereign Bank vested in him as trustee for certain "assisting banks." Pending the action, and after issue joined, Clarkson was appointed sole trustee of these assets in Stavert's place. The instrument appointing him is dated the 5th May, 1911. On the 26th October, 1911, an order of revivor was issued on præcipe, not based on this appointment, but upon the allegation that on or about the 31st July, 1911, the notes in question were delivered to Clarkson. This allegation probably has reference to an arrangement made, and embodied in an agreement of that date, by which the assets of the Sovereign Bank are to be held by Clarkson and realised by the "International Assets Limited" in such a way as to recoup the "assisting banks" and save the shareholders of the Sovereign Bank from loss.

The notes in question are payable to bearer, and Clarkson will shew his title at the hearing by shewing that he is then the holder of the notes.

The defendants have all along contended that they have a right of indemnity against the Sovereign Bank, if they are liable on the notes; and they now seek to contend that Clarkson has in truth become a mere trustee for the Sovereign Bank and its shareholders, and is for this reason not entitled to recover against them. This defence they must be at liberty to set up, and it is proper that it should be dealt with at the hearing. This is the amendment permitted by the Master.

I cannot agree that this should be permitted, as of course, to reopen the pleadings and to invalidate a notice of trial already given.

Upon the order to proceed being taken out, the action is to continue in the same plight and condition as it was at the time when the "abatement" or devolution of title occurred.

When, by reason of the transfer of the claim sued upon, a state of facts arises constituting what the defendant regards as a new defence, he may set the defence up under Con. Rules 291 et seq.; but this would not re-open the issues already joined.

Here the defendants would know nothing of the matters now relied on within the time limited by these Rules; and leave to amend should now be granted as a matter of course, and

with due provision to prevent the cause coming on for hearing at such an early date as would result in embarrassment. The amendment should be made in eight days from the order, and the plaintiff should have liberty to reply in eight days if this is regarded as necessary. The entry for trial and notice of trial should stand, but the action should stand off the trial list till after the 6th January next, so as to permit any necessary discovery, etc. The record must be amended to include the added pleading.

Then, should the action be stayed pending the appeal in Stavert v. McMillan? That action, as already said, will determine only one of the defences set up by the defendants. These defendants are the son and daughter of the late R. Macdonald, and they set up a defence similar to that relied upon by the daughter in Cox v. Adams, 35 S.C.R. 393, namely, that the notes were signed by them at the instance of their father and in such circumstances of fraud and duress, to the knowledge of the bank and its officers, as to preclude recovery. The plaintiff says that, as the defendants will not agree to be bound by the result of Stavert v. McMillan, but insist on reserving to themselves the right, in the event of an adverse decision in the Privy Council, of having this defence and the defence now permitted to be set up tried, he ought not to be delayed.

This branch of the case is governed by Township of Tilbury West v. Township of Romney, 19 P.R. 242, which is in line with many other decisions on analogous points. See, for example, First Natchez Bank v. Coleman, 2 O.L.R. 159.

The order should be varied as indicated; costs in the cause.

MULOCK, C.J.Ex.D. DECEMBER 11TH, 1911.

MARTIN v. GRAND TRUNK R.W. CO.

Master and Servant—Injury to Servant—Railway—Liability—Negligence of Fellow-servant—Person in Position of Superintendence—Person in Control of Points or Switch—Workmen's Compensation for Injuries Act, sec. 3, (2), (5)—Findings of Jury.

Action for damages because of injury sustained by the plaintiff whilst in the service of the defendants.

W. S. Brewster, K.C., for the plaintiff.

I. F. Hellmuth, K.C., and W. E. Foster, for the defendants.

Mulock, C.J.:—The plaintiff was, at the time of the accident, yard foreman of the defendants' railway yard at the city of Brantford, and as such foreman it was his duty to control the movements of trains within the yard. McNaughton was his assistant and subject to his orders. On the morning of the 16th October, 1910, the plaintiff and McNaughton were on duty. A loaded car was standing on Ryerson's siding, and the plaintiff required this car to be moved to the south side of the yard. The south side of the yard is a place lying to the south of all the railway tracks at this station. In the yard are a number of tracks, running easterly and westerly; two of them are main line tracks, the southerly one being the east-bound main line track, and the one lying immediately to the north of it being the west-bound main line track. North of this track are a number of sidings, the most northerly one being called Ryerson's siding, which runs in a south-easterly direction. To carry out the plaintiff's order to McNaughton to place this car at the south side of the yard, it was necessary to move the car easterly on Ryerson's siding until it reached a point where it could be switched on to the east-bound main line. Then it would proceed by the east-bound main line westerly until it reached a siding called the south lead, which led off the east-bound main line in a southerly direction to the place indicated by the plaintiff, viz., the south side of the yard.

Having given McNaughton the order, the plaintiff proceeded westerly along the west-bound main line for the purpose of stopping trains from the west until the car had taken the south lead, and thus was clear of the east-bound main line; and, whilst thus walking westerly, he was overtaken and struck by the engine which was pulling the car, causing the injury complained of in this action.

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

1. Were the defendants guilty of negligence causing the accident? A. Yes.

2. If so, in what did such negligence consist? A. Mr. McNaughton failing to carry out his orders from the plaintiff, Martin.

3. Was McNaughton competent for the position he filled as yard helper? A. No.

4. Was the accident caused by reason of the negligence of any person in the service of the defendants, who had any superintendence intrusted to him, whilst in the exercise of such superintendence? A. Yes.

5. If your answer is "yes," who was the person and what was the negligence? A. (a) Mr. McNaughton; (b) in not carrying out his instructions from the plaintiff in taking the west-bound track, instead of the east-bound track.

6. Was the accident caused by the negligence of any person in the service of the defendants who had the charge or control of any locomotive or engine upon the defendants' railway? A. Yes.

7. If your answer is "yes," who was such person? A. Mr. McNaughton.

8. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

9. At what sum do you assess the damages? A. Common law, $4,000; Workmen's Compensation Act, $2,600.

McNaughton being a fellow workman, the plaintiff cannot recover at common law; but the case comes, I think, within the provisions of both sub-secs. 2 and 5 of sec. 3 of the Workmen's Compensation for Injuries Act.

For the work then in hand, McNaughton was in superintendence over the engineer who controlled the movement of the engine. This brings the case under sub-sec. 2. For the like purpose, McNaughton had charge or control of the points or switch whereby the engine could take the proper track, and also had control (through the engineer, a servant under him) of the engine, which brings the case within sub-sec. 5.

In Gibbs v. Great Western R.W. Co., 11 Q.B.D. 25, affirmed in appeal, 12 Q.B.D. 208, which was an action against a railway company for injury caused by negligence of a man alleged by the plaintiff to have charge of the points of a railway. Field, J., dealing with the section of the English Act which, in its general language, corresponds with sub-sec. 5, says that it "provides that the common master shall be liable for the negligence of the particular persons who have charge, that is, who have the directing hand to carry out the general instructions of the master with respect to the specified things."

On receiving the plaintiff's order, McNaughton proceeded to carry it out. He got on the foot-board of the engine and directed the engineer to move the car easterly. On reaching a certain point, the engine and car stopped in order to proceed westerly when McNaughton turned the switch; but, instead of setting it for the east-bound main line, he made a mistake,

setting it for the west-bound main line, along which the engine proceeded, overtook the plaintiff, and injured him.

The defendants are, I think, liable, under the statute, for McNaughton's negligence, unless the plaintiff has been guilty of contributory negligence.

For the defence it was urged that the plaintiff by walking between the two tracks would have escaped injury. He had no reason to suppose that the engine would come along the northerly track, which, therefore, was, in his judgment, a place where he might safely be. The only danger that he supposed it necessary to guard against was from the engine, which he expected on the southerly track. Thus, in his opinion, he was safer when walking along the northerly track than along the space between the two tracks. The jury have found him not guilty of contributory negligence; and there is ample evidence, in my opinion, to support this view.

I see no common law liability.

The judgment will, therefore, be entered for the plaintiff for $2,600, with costs of action.

BOYD, C., IN CHAMBERS. DECEMBER 12TH, 1911.

*REX v. MUNROE.

Criminal Law—Vagrancy—Criminal Code, sec. 238(*a*)—*"Visible Means of Maintaining himself"—Money Derived from Begging—Previous Conviction for Begging in Public Places.*

Motion by the defendant, on the return of a habeas corpus, for an order for his discharge from custody under a conviction for vagrancy.

M. Lockhart Gordon, for the defendant.

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

BOYD, C.:—The vagrancy clauses of the Canadian Criminal Code are derived from the English general Vagrancy Act (still in force, 5 Geo. IV. ch. 83, secs. 3 and 4), and in small part from the later Act 1 & 2 Vict. ch. 38, sec. 2: see marginal note to Dominion statute 49 Vict. ch. 157, sec. 8; Rex v. Johnson, [1909] 1 K.B. 439. . . .

*To be reported in the Ontario Law Reports.

It is inherently evident from this legislation that the man who makes a living by begging or by gambling or by trickery is not regarded as a person who maintains himself by honest work or other lawful means. Begging is stamped as being a disreputable mode of life and an offence against the good order of society.

Our Code declares a man to be a vagrant who, not having any visible means of maintaining himself, lives without employment. The maintaining himself by means of begging and the gathering of such gains to the extent of a few dollars would not seem reasonably sufficient to exonerate him from punishment because with the dollars he might be said to have visible means of maintaining himself for a few days or weeks. He would be still living as a beggar, not having any legal means of subsistence, the same as before he had begun to save. As said by Mr. Justice Osler in Regina v. Bassett, 10 P.R. 306, it is the general tend of his life that is to be looked at, the sort of character he is exhibiting.

I am persuaded that the true meaning of the section in the Code 238 (a), that every one is a vagrant "who . . . not having any visible means of maintaining himself, lives without employment," is, visible *lawful* means of support. This word "lawful" is explained in the criminal laws of Australia relating to idle and disorderly persons or vagrants: Appleby v. Armstrong, 27 Vict. L.R. 136, and Lee Fan v. Dempsey, 5 Com. L.R. 310. . . .

[Reference to Regina v. Riley, Q.R. 7 Q.B. 200; Regina v. Organ, 11 P.R. 500.]

In Rex v. Collette, 10 Can. Crim. Cas. 286, there was evidence that the defendant had means of earning a livelihood.

The defendant moves for his discharge, on the ground that, as he had $28 in his possession at the time of his arrest, he was not "without visible means of maintaining himself," and so is wrongly convicted as being a loose, idle vagrant under the Criminal Code of Canada, sec. 238(a).

The sole authority relied on is a decision of Hunter, Chief Justice of British Columbia, The King v. Sheehan, 14 Can. Crim. Cas. 119, 120 (1908), in which he held that a person who had some $27 in his possession at the time of his arrest was not without means of support, though this money had been derived from gambling.

In the present case, the money found on the defendant was derived from begging on the cars and in the streets, and he has also been convicted, under a by-law of the town of Kenora, of

the offence of begging in the streets, and sentenced to 20 days' imprisonment (now expired.) The argument is, that he has been punished for begging, has expiated his offence by serving his time, and is now lawfully in possession of the money. A conviction for both offences, i.e., that of begging in the streets against a by-law, and that of being a vagrant under the Criminal Code, is not inconsistent. The one is addressed to a particular act; the other, to a manner of life. If the defendant has no visible means of maintaining himself, in the ordinary sense of the phrase (except by begging), and if he leads an idle, wandering life in that employment, and is not able to give a good account of himself, one cannot but feel that he is within the mischief against which the statute is directed. Begging is one of the ingredients of vagabondage—the old time collocation was, "rogues, vagabonds, and sturdy beggars." I would not give effect to such a reading of the Act as this: that a man unlawfully engaged in gambling or begging, who is possessed of a few dollars collected from that source, is to be treated as meeting the requirements of the statute as one who has an employment and is in possession of visible means of maintaining himself. His means and his employment and his maintenance are all attributable to his disreputable life, and the more he bestirs himself in this pursuit the greater nuisance he becomes.

I do not feel disposed to follow the case from British Columbia as a correct exposition of the Code; and will dismiss this application.

BOYD, C. DECEMBER 12TH, 1911.

RE TRENHAILE.

Will—Devise of Land and Houses for Home for Friendless Women—Charitable Gift—Sale of Land in Lifetime of Testatrix—Part of Proceeds Undisposed of Retaining Character of Realty—Application in Furtherance of Wishes of Testatrix—Cy-près Doctrine.

Motion by the executors of the will of Emma Trenhaile for an order, under Con. Rule 938, determining a question arising in the administration of the estate.

W. E. Raney, K.C., for the executors.
J. R. Cartwright, K.C., for the Attorney-General for Ontario.
A. Ogden, for the next of kin.

Boyd, C.:—The testatrix made her will when living at Toronto in December, 1892. She gives all her real and personal estate in manner following:—

"My two houses on William street I leave as a home for women single or widows left alone not having any one to provide a home for them. I name the following conditions I wish to be carried out. I leave all other necessary arrangements to the wisdom and discretion of my executors and a committee they may choose who are willing to confer with them for the establishing such a home namely to be called The Trenhaile Home for Women. . . . I only advise as to the charge of admittance: I would rather not make an arbitrary charge but each applicant to pay a fair price towards the support according to her means. I wish it to be within the reach of any one who is worthy and in need of such a home as far as accommodation will permit."

The houses indicated are stated to be in the city of Kingston, and that was the intended site of the Home contemplated by the testatrix. But she became insane after the making of the will, and died in Kingston Asylum in June, 1910. It became necessary to sell the land to pay for her support in the Asylum, and this was done by the Inspector of Public Charities in 1905; and from the proceeds of sale there now remains the sum of $1,841. The value of all the assets, real and personal, in the hands of the executors, is now $3,357, of which $1,716, about a half, is personalty. The proceeds of the sale of the land under the lunacy proceedings retains its character of realty, and all the other incidents attached to it by the will; so that, if possible, it should be made available for charitable purposes akin to those directed by the testatrix. It is impossible, of course, to carry out, in any measure, the scheme of the will, by setting apart the houses as a Home for friendless women.

The Attorney-General does not press for the application of the personalty in aid, cy-près, of the charity, but is willing that that share of the assets should go to the next of kin of the testatrix. The question is, therefore, how the proceeds of the land are to be applied.

Counsel for the next of kin contends that the words do not go far enough or are not specific enough to constitute a charitable purpose, and that the Court ought not to eke out the insufficiency of the will.

There was but one object in the mind of the testatrix: that was, to establish a Home for women, single and widows, in a state of comparative destitution. They were to be such as were

left alone with no one to provide a home for them; they were to be of good character and to be adherents of some Christian church. The donor prefers that no charge should be made for admission or support, but at most only such as may be within the means of the applicants.

The general intention is that of benefit for poor, deserving women who are in need of the comforts of a home; and, though the particular building cannot be used, the same kind of benefit may be conferred by a kindred institution in the same locality. The Court favours giving effect to charitable dispositions of property, even if the particular mode fails, when it appears that a substantial equivalent may be found.

On this head, the case cited of Biscoe v. Jackson, 35 Ch.D. 460, applies. There is no vagueness as to those for whom the charity is intended; it is for a class of deserving poor; and there is no discretion vested in the executors as to the destination of the fund in their hands.

The counsel for the next of kin cites Kendall v. Granger, 5 Beav. 300, 303; but more in point is, I think, a case in the same volume, Nash v. Morley, 5 Beav. 177, which supports (as charitable) a gift "among poor pious persons, persons male or female, old or infirm, as the executors may see fit."

I think the Master at Kingston should report as to whether the money can be applied in general accord with the testatrix's wishes to the support of destitute women in any established charity in that place,, or if not in a like way in Toronto; and let the balance, after paying costs, be so applied.

TEETZEL, J., IN CHAMBERS. DECEMBER 13TH, 1911.

BECHER v. MILLER.

Money in Court—Payment out to Trustees—Investment of Trust Fund.

Motion by the Synod of the Diocese of Niagara for an order appointing them trustees of a fund in Court and for payment out to them of the fund.

George T. Denison jun., for the applicants.

TEETZEL, J.:—The will of the late Thomas Clarke Street contains the following clause: "I will and direct that my trustees

shall invest in some good and safe securities the sum of one thousand pounds and the annual interest dividend or income thereof pay semi-annually to the Rector and Churchwardens of Trinity Church, Chippawa, for the sole use and benefit of the incumbent of said church for the time being."

Upwards of thirty years ago, the trustees paid the £1,000 into Court, pursuant to the judgment in this case; and the interest has in the meantime been applied as directed by the will.

At a vestry meeting of the church, the Rector and Churchwardens were authorised to apply to the Court for a direction that the money in question should be paid out of Court and given to the Synod of the Diocese of Niagara as trustees to hold and invest for the purposes mentioned in the will; and, pursuant thereto, Mr. Denison, for the Rector and Churchwardens, moves for an order appointing the Synod trustees of the fund, and for payment out to them of the money in Court.

The chief reason behind the application, of course, is the prospect of a greater revenue being derived, if the money is invested by the Synod, who are at present trustees of other funds for Trinity Church, than the interest allowed on money in Court would produce.

Under the system adopted by the Court for the investment of trust funds, it is practically impossible for a loss to occur.

While losses may rarely occur in the investments of church funds by Synods, such a misfortune has more than once happened, owing to unavoidable shrinkage in security values; and, when it does happen, there is no fund, so far as I am aware, out of which the unfortunate cestui que trust may be recouped.

Another fact to be borne in mind is, that this fund is to be held in perpetuity to provide an income for a specific object; and, while the possibility of that object becoming extinguished is very remote, such an exigency is possible, and difficult questions as to the disposition of the corpus of the fund may arise, should it ever happen.

Taking all the circumstances into consideration, and after consulting with other Judges, I must refuse the application.

BRITTON, J. DECEMBER 13TH, 1911.

CANADIAN BANK OF COMMERCE v. GILLIS.

Promissory Note—Absence of Consideration—Sale of Worthless Shares—Misrepresentations—Defence to Action on Note by Indorsees for Value—Indorsement on Note Restricting Negotiability—Notice to Transferees—Indorsement Part of Contract between Maker and Payee—Transferees Taking Subject to Equities.

Action to recover the amount of a promissory note made by the defendant on the 1st December, 1906, payable to the order of the International Snow Plough Manufacturing Company Limited, five months after the date thereof, for the sum of $1,000, with interest at six per cent. per annum.

G. G. McPherson, K.C., for the plaintiffs.
J. C. Makins, for the defendant.

BRITTON, J.:—It appears that this note and other notes were transferred to the plaintiffs under a general letter of hypothecation, under seal, of the International Snow Plough Manufacturing Company Limited, signed by the president and secretary.

It was admitted that this note was delivered to the plaintiffs before its maturity.

This note was given for shares in the company—as were many other notes. Actions were brought by the plaintiffs upon some of the other notes. The cases are reported 23 O.L.R. 109.

The defence relied upon in the present case is, that, by reason of an indorsement upon the note made at the time of making the same, the plaintiffs took the note subject to all the equities as between the maker and the company.

The facts are shortly as follows. A person named Pigou, who was a canvasser for the sale of stock in the company, solicited the defendant, and, upon certain representations made to him, induced him to promise to buy ten shares of the par value of $100 each, and to give the note sued upon therefor. The canvasser prepared the note and offered it to the defendant for his signature—the defendant took the paper, and wrote upon the back of it, close to the right hand end of the paper, these words: "Note to be held by E. J. Litt until due." Mr. Litt was then the secretary of the company. The canvasser (Pigou) would not accept the note with that indorsement without Mr. Litt's con-

sent, so he, Pigou, took the paper, not signed as a note, but indorsed as stated, to Mr. Litt, and asked him if he would be satisfied to accept the note for stock with these words upon it. Mr. Litt was satisfied. The paper was then taken back to the defendant, and he signed it.

I find as a fact that this indorsement was part of the original contract of the defendant for the purchase by him of stock in the International Snow Plough Manufacturing Company Limited. If it was, then the defences raised by the defendant are available to him in this action. It was hardly questioned by the plaintiffs that, if the law allowed the defendant to attack the consideration of the note and shew fraud and misrepresentation in the sale of stock to him, the defendant was entitled to succeed. I find that the defence as pleaded by the defendant was made out.

It was contended by the plaintiffs that, as this memorandum was not signed by the defendant, it was of no avail. The plaintiffs had no notice or knowledge of the actual contract or of it being part of the contract on which the note was accepted. It was argued that the plaintiffs had no right to assume that the indorsement was put there by the maker of the note. It might have been put there by Litt himself or by any person in whose custody the note might be. The material fact is, that the indorsement, as placed there, was part of the contract in regard to the giving of the note. The intention was that the indorsement was to guard against Litt or the company disposing of the note before it became due to any person who would become a holder for value.

Swaisland v. Davidson, 3 O.R. 320, seems expressly in point. The effect of the indorsement was "to preserve to the maker all defences and equities as against the first holder and volunteers under him." "The indorsement thus qualifies the negotiability of the note, and, as affecting its commercial character, forms a material part of each of them."

I cannot usefully add anything further to what was stated by the learned Chancellor in his judgment in the case cited.

Upon the evidence, the defendant would have a good defence against the International Snow Plow Manufacturing Company Limited. There was absolutely no consideration for the note. The stock scrip was worthless paper. The company had no assets worth mentioning—it was not a going concern. The note was obtained by misrepresentation, which could be characterised only as fraudulent. The plaintiffs' manager who accepted the note did not notice the indorsement mentioned. I am not sur-

prised at that. There was, in my opinion, a deliberate attempt to obscure it by the stamp of the company in their indorsement of the note to the plaintiffs. In my opinion, that makes no difference. The defendant is not to blame for that.

The action should be dismissed, and with costs.

Boyd, C. December 14th, 1911.

PULLAN v. JONES.

Damages—Breach of Contract—Fittings for New Store not Supplied in Time—Loss of Trade and Profits—Evidence to Shew that Store not Ready for Business—Admissibility.

Appeal by the plaintiff and cross-appeal by the defendants from the report of an Official Referee, upon a reference to assess the damages for breach of a contract.

W. D. McPherson, K.C., for the plaintiffs.
Casey Wood, for the defendants.

Boyd, C.:—The principle of law in the awarding of damages for breach of contract as laid down by the Court of Appeal in Corbet v. Johnson, 10 A.R. 564, is, I think, succinctly stated by Mr. Justice Burton, at p. 575: "Damages to be recovered for breach of contract must be shewn with reasonable certainty, and profits are not necessarily excluded in the computation. If it can be shewn that they would certainly be realised but for the contracting party's default, they are reasonable, but not if they are speculative or contingent."

The element of certainty is conspicuously absent in the case of one who is setting up a new business, the probable profits of which are likely to be wholly incapable of calculation or even of approximation, when so much depends upon fluctuations incident to trade and location, to local conditions of competition, varying weather, individual whims and caprices of fashion.

Such is here the situation—a man in the wholesale line opening a new store where he can work off by retail the women's wear manufactured in his main place of business. The new store was for the sale of suits, coats, dresses, waists, skirts, and the like, supplemented by a supply of millinery drawn from outside sources "to make up a complete store."

The chief complaint here is, that the Easter trade was lost in great part because of the delay in completing the contract for fitting up the store by the defendants. One branch of the contract, that pertaining to the requirements for the sale of goods manufactured by the plaintiffs, was to be finished on the 17th March, 1910, and the other, as to the millinery department, to be finished on the 18th March. The main contract was completed on the 22nd March; substantially finished all but two panes of glass in the fitting rooms, two panes of glass in the partition shutting off the work-room, one pane of glass in the manager's room, which were put in on the 1st April; some mirrors, otherwise sufficient, were not bevelled till the 12th April, and the woodwork of the fittings had not been rubbed down (which would cost $20 to do), nor was it of the exact shade of colour provided by the sample.

The second contract, which provided for show cases, was not carried out till the 5th April. This absence of cases prevented a full display of the millinery, and counters had to be substituted on the opening day. It is said that all these omissions would impress customers unfavourably as presenting an unfinished appearance, and would damage what was called the "prestige" of the new undertaking.

On account of the unsatisfactory business, or not getting such a business as was expected, the plaintiffs made changes and enlargements in their premises in the atuumn of 1910, at an expense of about $2,000, and put in further new fixtures, which were of the same colour and character as those supplied by the defendants. The colour shades may be safely discarded as an element of damage, though, as I understand, the Master has allowed $75 on that head. The other omissions, which were remedied on the 1st April, cannot be seriously considered as affecting the success or volume of the new business.

On the other hand, there is evidence (not explained or rebutted) that the plaintiffs were not in a position to enter upon the premises for the transaction of business till after the 21st March, for the tiling in front of the store was not completed and the scaffolding and streamers in front were not in place on that day. Further than this, it is provéd that it was out of the question for the plaintiffs to expect an Easter trade that season, because of their opening being too late, even if it had been on the 19th (Saturday). It was in fact on the 24th they opened (Thursday), and Good Friday was on the 25th April. . .

Now (setting aside for the moment the millinery branch), the store was opened on the 24th March, practically complete for

the season's trade. It could not be opened earlier, for reasons common to both parties: though the defendants had not finished their work till the 22nd March, yet the plaintiffs had not the tiling at the entrance done on the 19th March, nor had they the hoarding outside removed on the 21st March. These things were remedied, no doubt, on the 22nd March, the day the plaintiffs finished their work; and it would take necessarily another day to let the dust settle and for the removal of débris and for the getting in, unpacking, distributing, and displaying of the goods. I see no room, therefore, for any loss of profits between the 19th and 23rd March. After that, there was no appreciable loss or no loss capable of reasonable estimation, because of the unfinished minutiæ, down to the 12th April.

There is more opening for the possible loss of profits in the millinery department on account of the failure to install show cases until the 5th April. This failure occasioned a less efficient display of hats and other articles, but there was some display of these things; and, according to the best deductions we can make from the evidence, there was as much sold as could reasonably be expected, having regard to the late opening. It is not to be forgotten that the Easter current of trade in the millinery line has exhausted itself before the 24th March. The cream of the trade had been swept off by the established houses, who had made the usual preparations for capturing the Easter business, and only the leavings were shared in by the newcomers. . . .

The Master has allowed more than I should have done, in his total award of $274; but on the cross-appeal of the defendants it was said that they did not seek to reduce that amount if the plaintiffs' appeal failed in recovering the claim of profits as damages. The claim does fail on the law; and, so far as I can see, on the facts; and it should stand dismissed with costs. No costs of cross-appeal.

Two other points may be mentioned. It was held at the trial that the plaintiffs were not responsible for any delay by the defendants in completing their contracts. This was negativing the defence raised that the defendants were not able to obtain access to the premises on account of their condition. But on the question of damages the point is raised or suggested in the pleadings, and it is open to the defendants to shew that the plaintiffs themselves could not occupy the place from the beginning of their business on account of other work unfinished, i.e., the tiling and the scaffolding *in situ,* and this with a view of reducing or eliminating the damages which would be otherwise sustained.

The Master received this class of evidence, though objected to, and I think he was right. It was open to meet this state of affairs by shewing that the other work might have been earlier completed if the defendants had been ready to complete this work in contract-time. This the plaintiffs' counsel said he could do, but therein failed to produce such evidence.

True it is that in the contract it is stipulated that, if the work was not done at the time fixed, the defendants should be liable for damages. But this means only liable in respect of damages legally estimable, and not for damages of speculative and uncertain character. The contract, so expressed, was in respect of damages which would grow out of the contract as the direct and immediate result of its not being properly fulfilled, i.e., such as have been termed primary damages, as contrasted with the secondary damages which arise from remote and uncertain circumstances, as those claimed in the present case: see Corbin v. Thompson, 39 S.C.R. 575, 580, a case which affirms the doctrine of Corbet v. Johnson, though that authority was not cited to the Supreme Court.

SUTHERLAND, J. DECEMBER 14TH, 1911.

ALLEN v. TURK.

Fraud and Misrepresentation—Sale of Shares—Action of Deceit—Evidence of Similar Misrepresentations in Making other Sales—Evidence of Statements of Deceased Person—Inadmissibility—Conflict of Evidence—Failure to Prove Representations Alleged—Delay in Bringing Action.

Action for damages for fraudulent representations alleged to have been made by the defendant whereby the plaintiff was induced to purchase certain shares or an interest in certain shares of the stock of the Toronto Roller Bearing Company Limited, which proved to be of no value.

A. G. MacKay, K.C., for the plaintiff.

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

SUTHERLAND, J.:—. . . I think it is clear, upon the evidence, that the claims of the plaintiff under paragraphs 11, 12, 13, and 14 of the statement of claim must fail, as it appears from the plaintiff's own admissions at the trial that the sales of

the shares therein mentioned were made by the defendant, through the plaintiff, to one Ewens, without any knowledge that the plaintiff was interested in such sales, and in the belief on the part of the defendant that Ewens was the sole purchaser thereof; and, therefore, any complaint that could properly be made with respect to the representations of the defendant in connection with these sales should be made by Ewens alone, who is not complaining in this action nor a party thereto.

The plaintiff also admitted that he received from the defendant a commission of $50 on the sale of one of the shares, without disclosing the fact to Ewens, who, he says, was a fellow-purchaser thereof with him; and his conduct in this respect somewhat resembles the alleged conduct of the defendant of which he seeks to complain in this action.

The defendant denies all charges of fraudulent conduct on his part, and asserts that he made no fraudulent statements or misrepresentations to the plaintiff in connection with the sale of the share of stock to the plaintiff at the price of $1,500. . . .

At the trial, the plaintiff laid stress upon two representations as those which mainly affected his judgment in connection with the purchase of the share of stock in question and induced him to enter into the contract, and both of which, he says, were fraudulent and untrue to the knowledge of the defendant:—

(1) That the defendant stated that he had seen a signed and executed contract in which the Toronto Railway Company had agreed with the Henderson Roller Bearing Manufacturing Company to purchase bearings sufficient to equip thirty cars . . . and that the railway company were about to equip all their cars with the roller bearings.

(2) That the defendant had no interest in the share he was obtaining for or selling to the plaintiff, nor in the sale thereof to him.

His main reliance appears to have been placed upon the matter of the signed contract, because he says, in one place, "It was the contract that affected me."

The defendant is equally definite in his evidence that he did not say that he had seen a contract in writing. He also says that he did not talk to the plaintiff about whether he had or had not any interest in selling the share, and did not say that he had no interest in selling it.

At the trial of the action, evidence was tendered on behalf of the plaintiff to shew that similar representations were made by the defendant to persons other than the plaintiff, in connec-

tion with sales of the same kind of stock to them, and with particular reference to the allegations that the defendant spoke of a signed contract that he had seen, and spoke of having no interest in the other shares he was selling to such other persons. After some discussion of the question by counsel, I was disposed to think that the evidence was possibly admissible, and allowed it to be put in, subject to objection.

The defendant, when called on his own behalf, was asked specifically if he had made statements to other persons when selling them similar stock, to the effect that he had seen the signed contract and that he had no interest in the sale of the stock; and he denied that he had. In reply, certain persons named were called for the purpose of contradicting him.

On consideration, I have come to the conclusion that the evidence of other persons of the character indicated was not properly admissible, and cannot be considered by me in the disposition of the case. . . .

[Reference to Blake v. Albion Life Assurance Co., 4 C.P.D. 94.]

Eliminating the said evidence, the question as to whether the plaintiff did or did not make to the defendant, when selling him the share of stock, the said two representations, must largely be determined upon the evidence of the plaintiff and the defendant.

As a general thing, a plaintiff should proceed promptly where he thinks he has been fraudulently dealt with. If the plaintiff "is seeking to enforce a legal right, no amount of delay short of the statutory period of limitation would be an objection to his claim." On the other hand, however, "where fraud is charged, lapse of time, or delay on the part of the person complaining, is in itself some evidence that the transaction was understood by the parties at the time and was not fraudulent, and makes it incumbent on the Court to weigh all the circumstances of the case, and to consider what evidence there may have been in favour of the honesty of the transaction, which from lapse of time may be lost:" Darby & Bosanquet, Statute of Limitations, p. 264, and cases cited.

There was undoubtedly great delay on the part of the plaintiff in commencing the action. It appears reasonably clear from his evidence that some time during the year 1905 he had come to realise that he had been deceived by the defendant. He apparently had learned during that year or very soon thereafter that the stock was worthless or of very much less value than he had paid for it. Nevertheless, he did not commence his action

until the year 1908; and, even after it was commenced, was very slow in bringing it to trial.

The defendant says that much of the information which he obtained with reference to the company and which formed the basis of his representations to the plaintiff on the sale of the stock was obtained from Dr. Potts. Prior to the hearing, Dr. Potts had died; and his evidence might have been of considerable importance to the defendant. At the trial, and on his behalf, evidence was tendered as to statements made by Dr. Potts in his lifetime to other persons with reference to the affairs of the company and the value of its stock, in order to shew that the same statements which the defendant says were made to him with reference thereto by Dr. Potts were also made to such other persons. I rejected the evidence, considering it inadmissible.

In the main, the plaintiff largely admits that the defendant made to him the representations which the defendant states were made by Dr. Potts to him; and, under the circumstances, I can very well assume that they were so made to the defendant by Dr. Potts.

I am not prepared, however, to say that the defendant has not been somewhat prejudiced by the death of Dr. Potts, and his inability to have him at the trial of the action to corroborate his statements in some respects. Apart altogether from this, the plaintiff is responsible for permitting such a length of time to elapse before initiating his action and bringing it to trial. It is difficult to determine between the plaintiff and defendant, each of whom is speaking from memory of the details of conversations which occurred six years ago, which is the more accurate. There can be no doubt, on the one hand, that the defendant did approach the plaintiff as a friend, and that, in urging him to purchase the share of stock in question, he represented that he was anxious to benefit the plaintiff in selling to or obtaining for him the said share. There is no doubt that, in addition to any friendly disposition he had towards him, he had definitely in his mind the commission on the sale of the stock which he was at the same time desirous to secure.

It appears plain that the plaintiff had some little knowledge of the company before the 10th December, 1904, and that soon after that date, and at or about the time he paid $600 on account of the share, and before he paid the balance of the purchase-money therefor, he learned much more about the company and its stock from Mr. A. E. Henderson. At that time he could have verified, if he had seen fit to ask Mr. Henderson, a statement which he says the defendant made to him as to

whether there was a signed contract with the street railway company or not. But, in any event, in view of the fact that I have come to the conclusion that the other evidence put in at the trial should be excluded, it comes down to the question whether I am to believe the plaintiff or the defendant on the two questions as to the signed contract and as to the defendant representing that he had no interest in the sale of the share of the stock.

The onus is upon the plaintiff. The charge is a serious one: a charge of fraud. The plaintiff himself does not come into Court in connection with a portion of the claim he has made in the action under a very favourable light. I refer to the concealed commission which he received and failed to disclose to Ewens, a co-purchaser with him of other shares.

I, therefore, have come, with some hesitation, to the conclusion that the action must be dismissed. I do not think it is a case for making any order as to costs.

DARKE V. CANADIAN GENERAL ELECTRIC CO.—MULOCK, C.J.Ex.D. —DEC. 9.

Master and Servant—Injury to and Death of Servant—Liability—Negligence—Contributory Negligence—Findings of Jury—Evidence.]—Action by the widow of Hugh Darke to recover damages for his death while in the employment of the defendants, in their works at Peterborough, as a machinist's helper. The defendants were manufacturing a generator; and, before shipping it to the buyer, desired to submit it to an electrical test. The deceased was in attendance to render certain services, if necessary, after the power was turned on. Thinking the machine not sufficiently secured, he proceeded to bolt it further to the floor; and, in order to get a better purchase on the wrench with which he was turning a nut on the bolt, knelt on a broad belt, which the power, when turned on set in motion. Thereupon, the electrician, not knowing that the deceased was on the belt, and misunderstanding a signal that was given, turned on the power, whereby the deceased was carried between the belt and the pulley and crushed to death. The action was brought under the Workmen's Compensation for Injuries Act, the Factories Act, and at common law. In answer to questions, the jury found, among other things; (7) that the defendants were guilty of negligence which caused the accident; (8) that

such negligence consisted in: (a) lack of proper code of signals; (b) lack of electrician's assistant so placed as to intelligently signal "all clear" before application of power; (9) that the accident was caused by the negligence of a person in the service of the defendants who had superintendence intrusted to him, whilst in the exercise of such superintendence; (10) that Thompson was such person, and that his negligence consisted in not making a careful examination of machine and surroundings immediately prior to applying the power; (11) that the deceased was not guilty of any negligence which caused or contributed to the accident; (13) that the accident was not caused by reason of the negligence of any person who had the charge or control of any points, etc.; (15) that the deceased, when endeavouring further to secure the machine just before the accident, was acting under the general order of Jeffrys, his foreman, to look after the machine; (16) that, prior to turning on the power, Thompson did not know that Darke was on the belt. The jury gave no damages at common law, and assessed the damages under the Workmen's Compensation for Injuries Act at $1,800. The Chief Justice said that there was no evidence to support the 9th finding; and, therefore, there was no liability under sec. 3(2) of the Act. There was no evidence to support finding 15, and no liability under sec. 3(3). At common law, the defendants would not be liable for the negligence of Thompson. The evidence shewed that Darke's duty was to do nothing until after the machine was set in motion; and, though he knew that Anson (who was Jeffrys's superior) and Jeffrys had carefully examined the condition of the machine and pronounced it satisfactory, and that he was removed from the job, he, by some mistake of judgment, of his own motion, perhaps encouraged by the opinion of Thompson, who had no authority over him, undertook further to secure the machine, and, whilst so engaged, met with the accident. Action dismissed without costs. D. O'Connell, for the plaintiff. G. H. Watson, K.C., and L. M. Hayes, for the defendants.

MAJOR V. TURNER—DIVISIONAL COURT—DEC. 9.

Sale of Goods—Contract—Breach by Vendor—Repudiation —Damages.]—The defendant contracted to deliver, in Toledo, to the plaintiffs, 20,000 bushels of flax seed at $2.22 per bushel. After delivering 6,888$\frac{22}{56}$ bushels, the defendant repudiated the contract, and sold the seed at a profit elsewhere. Upon an action

brought and a trial had before SUTHERLAND, J., judgment was given for the plaintiffs for $2,151.35 and costs. The defendant appealed. He admitted that a contract was entered into, but contended that he had a right to repudiate; and that, in any case, the damages were excessive. The Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) were of opinion that there was no ground upon which the defendant could repudiate the contract, and that the assessment of damages could not be interfered with. Appeal dismissed with costs. F. Erichsen Brown, for the defendant. R. S. Hays, for the plaintiffs.

HYATT V. ALLEN—DIVISIONAL COURT—DEC. 9.

Company—Directors—Secret Profits—Trust for Shareholders—Class Action by Certain Shareholders—Fraud—Account of Profits.]—Appeal by the defendants from the judgment of SUTHERLAND, J., 2 O.W.N. 927. The Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) agreed in the main with the judgment appealed from. They directed two variations, viz.: that the declarations as to cestuis que trust should not include Bately nor any one not a party to the record; and that the scope of the reference should be extended so that the Master should inquire and report the amount which each of the plaintiffs should receive, and that in such inquiry the defendants should be entitled to shew any ground, by way of estoppel or otherwise, why any particular plaintiff should not receive money. With these modifications, appeal dismissed with costs. J. Bicknell, K.C., E. M. Young, and M. Lockhart Gordon, for the defendants. E. G. Porter, K.C., and J. A. Wright, for the plaintiffs.

YELLAND V. TOWNSHIP OF OLIVER—BRITTON, J.—DEC. 11.

Municipal Corporation—Construction of Drain—Action to Restrain—Dismissal—Costs.]—Action for an injunction restraining the defendants from carrying out and completing a proposed 30-inch street tube drain for the old drain or culvert across and under Oliver street. At the close of the trial at Port Arthur, the learned Judge intimated that his decision would be against the plaintiff, for reasons which he gave, but desired further to consider the question of costs. He now

says that there are not, in his opinion, any sufficient reasons for a departure from the ordinary rule; so the action is dismissed with costs. W. D. B. Turville, for the plaintiff. W. A. Dowler, K.C., for the defendants.

MELYNK V. CANADIAN NORTHERN COAL AND ORE DOCK CO.—
BRITTON, J.—DEC. 12.

Master and Servant—Injury to Servant—Negligence of Person in Position of Superintendence—Amendment at Trial—Findings of Jury.]—The plaintiff, on the 26th May, 1911, was in the employ of the defendants and working for them in the hold of a large freight vessel lying at the defendants' dock at Port Arthur, assisting to unload coal. Planks, part of the vessel's equipment for carrying ore, not used at all in loading or unloading coal, were fastened just inside the hatchway at which coal was being taken out by means of "clam shell buckets." These buckets were, by means of machinery, lowered, empty and open, down into the vessel. They closed upon a large quantity of coal, and were then hoisted and transported to that part of the dock or coal pile where the coal was to be dropped. Generally the "clam shell bucket" passed up and down through the hatchway without striking or touching any part of the dock or hatchway of the vessel. On the day abovementioned, the "clam shell bucket" did strike the planks mentioned, causing them to break away from their fastenings and to fall and strike the plaintiff, breaking his leg. The plaintiff brought this action to recover damages for his injuries, and it was tried at Port Arthur before BRITTON, J., and a jury. The learned Judge allowed the plaintiff to amend his statement of claim by charging negligence on the part of the person or persons having superintendence in the operating of the machinery hoisting coal out of the vessel. Questions were submitted to the jury, and they found that there was negligence which caused the injury to the plaintiff, and that such negligence was by a person in the service of the defendants who had superintendence intrusted to him, whilst in the exercise of such superintendence, and that the negligence was "careless operation of machinery by the person in charge of the work." They assessed the damages at $800. Upon the findings of the jury, the learned Judge directed judgment to be entered for the plaintiff for $800 with costs. A. E. Cole, for the plaintiff. W. F. Langworthy, K.C., for the defendants.

ASHICK V. HALE—BRITTON, J.—DEC. 12.

Negligence—Death of Person Lawfully on Highway Caused by Automobile—Burden of Proof—Motor Vehicles Act, 1906, *sec.* 18 *—Findings of Jury—Grounds of Negligence—Absence of Contributory Negligence—Insurance against Loss—Evidence as to—Dispensing with Jury.*]—Action by the widow and children of Martin Ashick to recover damages for his death, which, it was alleged, was occasioned by an automobile owned by the defendant. The trial was commenced with a jury, and so continued almost to the end of taking evidence, when, owing to a question put by the plaintiffs' counsel to the defendant, and answered by the defendant, as to the defendant's being insured against loss, the defendant's counsel moved to strike out the jury notice, and to have the trial concluded without the aid of a jury. Following Loughead v. Collingwood Shipbuilding Co., 16 O.L.R. 64, the learned Judge granted the motion, and discharged the jury. —The deceased, on the 13th July, 1910, was working in a hayfield. When he quitted work, he took two horses from the field, with their harness on, and held together by a neck-yoke; he rode one and led the other along the road. The defendant's automobile, driven by his chauffeur, came along the road in the same direction as that in which Ashick was moving. When the automobile was approaching, but before it overtook him, the two horses began to rear and plunge, and one of them fell upon Ashick, so injuring him that he died as the result. The learned Judge said that there was no doubt that the death of Ashick was occasioned by the motor vehicle. The horses were frightened by it. Nothing else was suggested as present to frighten them. Ashick and the horses were rightfully upon the road when the defendant's motor vehicle was heard and seen approaching. The horses becoming unmangeable, Ashick thrown and injured because of the motor vehicle, there was cast upon the defendant "the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle:" Motor Vehicles Act, 6 Edw. VII. ch. 46, sec. 18(O.) And the defendant had not satisfied that onus. The learned Judge found negligence on the part of the chauffeur in that he did not keep such a watch over the horses in charge of the deceased as to notice that the horses were frightened at the car and its approach—and so that he could keep the vehicle away until the horses were quieted or the deceased out of danger. Further, there was negligence in not stopping the motor, as well as the car, when the car was being

stopped in such close proximity to the horses ahead. The chauffeur was guilty of negligence, in regard to the deceased and the horses, in not keeping them in view and being ready to assist in caring for and steadying the frightened horses. The accident could have been avoided by reasonable care on the part of the driver, had he exercised it from the time when he saw or could have seen the deceased and the horses he had in charge. There was nothing upon which contributory negligence on the part of the deceased could be found. Damages assessed at $1,000 and apportioned among the widow and children, the plaintiffs. W. R. White, K.C., for the plaintiff. Peter White, K.C., for the defendant.

FOISY v. LORD—DIVISIONAL COURT—DEC. 12.

Limitation of Actions—Deed to Several Persons as Tenants in Common—Exclusive Possession by one—Pleading—Amendment.]—Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 2 O.W.N. 1217. The Court (FALCONBRIDGE, C.J.K.B., BRITTON and LATCHFORD, JJ.) dismissed the appeal with costs. M. J. Gorman, K.C., for the plaintiffs. J. U. Vincent, K.C., for the defendants.

NORTHERN CROWN BANK v. MATZO—MASTER IN CHAMBERS—DEC. 13.

Practice—Trial of Preliminary Question Arising in Action—Refusal of Order for—Validity of Alleged Settlement—Motion for Judgment.]—The plaintiffs having given notice to proceed with a pending motion for judgment as against the defendant Garfunkel, that defendant moved for an order to have the question as to the validity of an alleged settlement made by the plaintiffs with that defendant tried before any further proceedings should be taken. The Master referred to Stow v. Currie, 14 O.W.R. 62, 154; Graham v. Temperance and General Life Assurance Co., 16 P.R. 536; and remarks of Falconbridge, C.J., in Hawes Gibson & Co. v. Hawes, ante 312, 313; and said that it is quite common in actions against corporations for injury to the person to find a release set up in the statement of defence; but this issue is always left to the trial, and tried by the Judge first; and he (the Master) was not aware of any instance in which a separate trial had been had of this question. Such an

order, he said, could not be usefully made unless the decision of the issue, however decided, would dispose of the action so far at least as to dispense with a second trial. The proper order was to dismiss the plaintiffs' motion, and let the defendant Garfunkel set up the release in his statement of defence, without prejudice to his renewing his motion hereafter (though the Master did not wish to be understood as encouraging any such attempt). The costs of both the plaintiffs' and defendant's motion to be in the cause.

PEARS v. STORMONT—MASTER IN CHAMBERS—DEC. 14.

Costs—Lien of Solicitor on Judgment for Costs—Settlement and Release of Judgment without Notice to Solicitor—Fruits of Litigation—Notice of Claim of Lien.]—After the judgment of BOYD, C., in this case, 3 O.W.N. 56, 24 O.L.R. 508, negotiations took place for a settlement, part of which, as the plaintiff insisted, was to be a release to him by the defendant Querrie of the costs given him by the judgment. These had been taxed at $155.54, and had not been paid. The defendant Querrie's solicitors now moved for an order that the plaintiff pay them these costs, on the ground that this release was taken without their consent, and after notice of their lien for costs previously given to the plaintiff and his solicitors. The Master referred to De Santis v. Canadian Pacific R.W. Co., 14 O.L.R. 108, and cases cited; McCauley v. Butler, 1 O.W.R. 72, 343; and said that the Chancellor's judgment was given on the 25th September, and the final settlement was not made until the 1st December. On the 12th or 13th November, the plaintiff's solicitor told the defendant Querrie's solicitors that a settlement was being made, and asked if Querrie had been paid his costs, and was told that he had not. The plaintiff's solicitor said that Querrie's solicitors had better take steps at once to protect their costs, and offered to help them. Next day, the plaintiff's solicitor and the plaintiff received formal notice that these costs had not been paid. In these circumstances, the Master said, the only possible answer to the motion would be the contention that these costs were not fruits of the litigation. This was strenuously argued by Mr. Snow, his view being that, as nothing was paid by Querrie to the plaintiff, the latter was not benefitted. This, however. the Master did not agree with. The question of fruits or no fruits, he said, is to be decided with reference to the party whose solicitor is moving. Here there clearly were fruits

to Querrie. He had a judgment for costs against a perfectly solvent plaintiff, and this relieved him from the obligation to pay his solicitors to that extent. Here there was a judgment for $155.54. That it was for costs only, if that made any difference, would seem rather to strengthen the right of the solicitor to a lien on the judgment and to enforce it in due course. If the plaintiff's solicitor had inquired of Querrie's solicitors whether their costs had been paid, instead of relying on the assurance of the solicitor for the other defendants that these, though not then paid, would be arranged; or if, before closing the transaction, he had notified Querrie's solicitors, the present difficulty would not have arisen. But, though this may have been an error in judgment and a mistaken reliance on the action of the other defendants, his conduct throughout was entirely free from even a shadow of blame, as far as Querrie's solicitors were concerned. The motion must be allowed, with costs, fixed at $20, to save any taxation. No order need issue for a week, so as to give the plaintiff time to consider what his rights will be against Querrie and the other defendants. It may be that he can still recover from them or some of them anything he may have to pay under this order. T. N. Phelan, for the solicitors. A. J. Russell Snow, K.C., for the plaintiff.