THE
ONTARIO WEEKLY REPORTER

VOL. 25 TORONTO, DECEMBER 31, 1913. NO. 7

HON. MR. JUSTICE MIDDLETON. NOVEMBER 28TH, 1913.

RE ACHESON.

5 O. W. N. 361.

Will—Construction—Gift to "Brothers and Sisters and their Children" — Right of Children of Deceased Brother and Sister to Share—Use of Plural Term — Only one Surviving Sister—Context.

MIDDLETON, J., *held*, that where one brother and one sister of a testator had died before the date of the will leaving children, and there were alive at the date of the will several brothers and one sister of the testator, that a gift to "Brothers and Sisters and their Children" did not include in the beneficiaries thereof children of the deceased brother and sister of the testator.

Motion for the construction of a will.

M. Grant, for the executors.

W. N. Tilley, for the brothers and sisters of the deceased and their children.

W. Proudfoot, K.C., for the children of brothers and sisters of the deceased whose parents died before the will.

HON. MR. JUSTICE MIDDLETON:—The question now arising upon the construction of this will lies in narrow compass. The testator at the date of his will had brothers and sisters then living. His brother John had predeceased him, leaving six daughters. His sister Elizabeth had predeceased him, also leaving a family. The testator gave legacies to the different members of these families as well as to his surviving brothers and sisters and their children, giving to each family sums aggregating about $9,000. Then he directs the residue to be "divided equally between my brothers and sisters and their children." The question is whether under this the children of the deceased brothers and sisters take.

After very careful consideration I have concluded that they do not. Subject to the two considerations yet to be mentioned the case is clear. Where the testator speaks of his "brothers and sisters" unless there is something in the context to indicate otherwise, he is speaking of brothers and sisters then alive. See *Re Fleming*, 7 O. L. R. 651. And when this expression is varied by the words "and their children" these words are clearly confined to the children of brothers and sisters then living.

Against this it is urged in this case that the testator in the will has spoken of his nieces as "daughters of my brother John." I do not think that this shews a contrary intention or an intention that they should share.

Much more formidable is the difficulty arising from the fact that the testator had only one sister who survived him, and yet he uses the plural "sisters." I do not think that this is sufficient to indicate an intention to give anything to the sister already dead. Unless this is so, the children of that sister cannot take under the will.

Had the direction in the will been to divide the residue between "children of my brothers and sisters," then I think there would have been sufficient to indicate that the children of the dead brother and sister should be included. But I cannot read the will as being equivalent to this. The controlling words are the earlier words of the clause. The division is to be between the brothers and sisters, i.e., those living, and their children.

I am not asked to determine how the fund should be divided between the brothers and sisters and their children. The parties it is said can agree to that, they are all adults.

Costs may come out of the estate.

HON. MR. JUSTICE LENNOX. NOVEMBER 27TH, 1913.

WEBSTER v. HENDERSON.

5 O. W. N. 373.

Fraud and Misrepresentation—Sale of Farm—Damages.

LENNOX, J., awarded plaintiff $950 damages for fraud and misrepresentation whereby he was induced to purchase defendant's farm.

Action to recover $2,000 damages for false and fraudulent misrepresentations whereby, as the plaintiff alleged, he was induced to purchase the defendant's farm.

J. A. Hutcheson, K.C., for plaintiff.

W. E. Raney, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—It follows upon the conclusions of fact stated at the trial yesterday that the plaintiff is entitled to recover damages against the defendant. I am satisfied that the plaintiff is sincere in saying that he would rather be free of the contract than to receive $2,000 by way of damages. He is not, however, the best judge upon this question.

There will be judgment for the plaintiff for $950 damages and the costs of the action and a stay of execution for 30 days.

HON. R. M. MEREDITH, C.J.C.P. OCTOBER 3RD, 1913.

RE SCHOFIELD AND CITY OF TORONTO.

5 O. W. N. 109.

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

MEREDITH, C.J.C.P., *held*, that a Judge should not grant leave to a private prosecutor to prefer an indictment at the assizes against a corporation until the applicant has failed in his efforts to have a preliminary hearing before a magistrate.

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

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

W. E. Raney, K C., for the applicants. Sections 221 to 223 of the Criminal Code deal with common nuisances. Section 222 provides that "every one is guilty of an indictable offence and liable to one year's imprisonment," etc. Sections 916 to 920 provide for "Proceedings in Case of Corporations." The only proceeding indicated in these sections is by indictment. The law is well settled that where an offence is indictable, and in respect of it there could not be

a summary conviction against any individual under Part XV. or a summary trial under Part XVI. of the Code, there is no jurisdiction in a magistrate to hold a preliminary inquiry in a proceeding against a corporation. In *Re Chapman and City of London* (1890), 19 O. R. 33; *Regina* v. *T. Eaton Co. Ltd.* (1898), 29 O. R. 591, and *Regina* v. *City of London* (1900), 32 O. R. 326, prohibition was granted against Police Court proceedings by way of preliminary inquiry. The last-mentioned case was a decision of a Divisional Court. The subsequent amendments to the Code have left these decisions untouched. By sec. 720 A, which was introduced into the Criminal Code in 1909 (8 & 9 Edw. VII. ch. 9), the doubt that had previously existed as to the jurisdiction of a magistrate over corporations in cases where there might be a summary conviction against an individual (see *In re Regina* v. *Toronto Rw. Co.* (1898), 30 O. R. 214, and *Ex p. Woodstock Electric Light Co.* (1898), 4 Can. Crim. Cas. 107), was resolved in favour of such jurisdiction. By sec. 773 A, also introduced into the Criminal Code in 1909, provision was made for the summary trial of corporations in the cases of indictable offences where individuals might be tried summarily. The list of cases which may be thus tried is contained in sec. 773, and does not include a common nuisance. Whenever an offence is triable summarily under the Criminal Code, that fact is indicated by the section itself. Note the language, "Every one is guilty of an offence and liable, on summary conviction," of secs. 537, 542, etc.; and compare sec. 222. Crankshaw in his Criminal Code, at the end of Part XV., p. 878, gives a list of offences triable summarily. The nuisance sections are not included. Note also sec. 291, for an example of cases triable both summarily and on indictment. The annotators infer there is no jurisdiction in a magistrate to hold a preliminary inquiry. Vide Crankshaw's Annotations under secs. 916-920, 720 A, and 773 A.

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

HON. R. M. MEREDITH, C.J.C.P.:—It is plain that the policy of the criminal law is to require a somewhat thorough preliminary investigation of every indictable offence. That is very apparent from many of the provisions of the Crim-

inal Code. And the purposes of it are obvious. For one thing, it lays the facts in a proper manner before this Court so that they can be in a proper manner laid before the grand jury. It has been the practice in some cases not to make such an investigation, but to do what has been called "waive examination." I find no warrant for any practice of that character; it seems to me to be quite improper. What the law requires is a preliminary investigation; and it is only upon the facts thus brought out that ordinarily an indictment can be laid. The Code provides that there may be an indictment for the offence for which the accused has been committed for trial; and that there may be an indictment for any other offence founded on the facts disclosed in the preliminary inquiry. The policy of the law plainly is, that cases should pass through an inquiry of that sort before being presented to the grand jury. It is true that power is given to the Attorney-General, and to the Judges, to permit an indictment in cases which have not come up in that manner; but I cannot think that that power was intended to be exercised in any but unusual cases. It is necessary sometimes where magistrates have not done their full duty, nor made that inquiry into the case which the law required; and there are other cases in which it is plain that, if there were no provision of that character, there might be delay in the administration of criminal justice, if not eventually a miscarriage. That being so, I am not to authorise a departure from the ordinary course without good cause; I am not to permit a departure simply because some person may desire it for his own convenience or any other selfish purpose. There is no royal road for any one; every one must take the common road up to this Court. The only excuse that I can imagine for seeking to proceed in the manner here sought is based upon the assertion that an indictment cannot be had in any other way. It is easy to say that, but I would be very much better satisfied with an application in a case in which the ordinary way had been tried and in which some difficulty had been encountered. The private prosecutors are, I think, beginning at the wrong end. But it is not necessary that I should consider that question yet. It is my duty to turn them back to the Police Court and let them begin there.

There should not be any difference in the criminal law applicable to a person and that applicable to a corporation —fish should not be made of one and flesh to another. Read-

ing the Code from one end to the other, no substantial indication of any other intention will be found. Then what is the difficulty? There is no dispute as to the jurisdiction of the preliminary Court; the only point made is in the assertion that a corporation cannot be compelled to come there. But the corporation may be quite willing to go there, and to have the case investigated there. It will be time enough to take these troubles seriously when they really arise; and they have not arisen in this case. I think it clear that I should refuse this application; that I should say to these persons, who desire to lay a criminal charge: "Take the same course which every one else has to take, and then, if you meet with difficulty in that way, and cannot get over it, come to me, or go to the Attorney-General and get leave to lay a bill of indictment before a grand jury.

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

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

His Lordship: You had better wait till you have gone to the Police Court.

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

His Lordship: Have you any objection, Mr. Geary, to this case taking the ordinary course?

Geary: Not at all, your Lordship.

His Lordship: I should also point out how inconvenient it would be, if any one who wanted to avoid going to a preliminary inquiry could come here. How would the presiding Judge proceed? Some preliminary inquiry must necessarily be made, and one may think that, in these days, it should be of the same character as that which the Code

expressly requires in the preliminary investigation it expressly provides for; and how would anything of that kind be possible while grand jurors, petit jurors, officers, and litigants are waiting for the ordinary business of the Court?

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

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

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

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

HON. MR. JUSTICE BRITTON. NOVEMBER 29TH, 1913.

WALKER v. SKEY.

5 O. W. N. 366.

Vendor and Purchaser—Action for Specific Performance—Dispute as to Interpretation of Agreement — Claim of Purchaser for more Land than Vendor Willing to Give—Rescission by Vendor—Evidence—Correspondence—Right of Purchaser to Claim in Alternative—Return of Deposit—Damages—Costs.

BRITTON, J., *held*, that where purchasers refused to complete a purchase of certain lands, claiming that they were entitled to more land under the agreement of purchase than the vendors were willing or able to give, and as a result thereof, the vendors rescinded the agreement, the purchasers were not entitled to ask the Court for specific performance of the agreement according to their interpretation and in the alternative for specific performance according to the vendor's interpretation which in the opinion of the Court was the proper one.

Preston v. *Luck*, 27 Ch. D. 497, distinguished.

Action for the specific performance by the defendants of an agreement by them for the sale of land in Toronto, tried at Toronto without a jury.

A. C. MacMaster, for plaintiff.

E. E. A. DuVernet, K.C., for defendants.

HON. MR. JUSTICE BRITTON:—The plaintiff sets up an offer by him to purchase from the defendants for $21,840, of the premises at the N. E. corner of Dufferin and Dundas streets, which premises have a frontage of about 182 ft. on Dundas street and of about 111 ft. on Dufferin street, and having a depth at its easterly limit of 140 ft. to a lane, running at right angles to Dufferin street, the south limit of which said lane was to form the northerly limit of the land in question. This offer, as the plaintiff alleges, was accepted by the defendants, but they now refuse to carry it out. The plaintiff paid $1,000 deposit on account of the purchase. The plaintiff avers a readiness and willingness to pay the balance and to carry out all the terms of the contract.

The defendants set out the offer of the plaintiff in full, and the acceptance of it. In this offer the land is described as follows: "All and singular the premises situate on the north side of Dundas street, the parcel of land known as lot No. ...., plan No. ...., as registered in the registry office for the said city of Toronto, having a frontage of about 182 ft. by a depth of about 111 ft. more or less, starting

from the north-east corner of Dufferin and Dundas streets running east 182 ft. on Dundas street." the price was fixed at $21,840 made up at $120 a foot frontage by 182 = $21,840.

The defendants deny that the plaintiff was ever ready or willing to accept the property according to the real contract between the parties, but on the contrary the plaintiff repudiated the real contract—and asserted and continued to assert —as he did in his bringing this action, that he was entitled to land to the depth of 140 ft. at the eastern end of said lot. The defendants gave a formal notice of cancellation of the contract, and they now ask for a declaration that the contract is cancelled and at an end, and that the deposit of $1,000 is forfeited to the defendants.

In reply the plaintiff denies that the defendants tendered any mortgage; denies that the agreement was properly cancelled; asserts that the defendants had not properly cleared the title so as to be in a position to convey to the plaintiff. The plaintiff also objects that the letter of the defendants attempting to cancel the agreement was not a reasonable notice. As an alternative, and by way of counterclaim, the plaintiff states his willingness now to accept the land according to the defendants' interpretation of the contract, viz., the land to be of the depth of 111 ft. throughout.

The plaintiff has failed to establish a contract for the sale, by defendants, of the land described in the plaintiff's statement of claim. The evidence does not satisfy me that there was any verbal agreement or understanding on the part of the defendants, that the plaintiff was to get a lot of land to the depth of 140 ft. at the eastern end of it, so the plaintiff has failed.

The remaining question is, can the plaintiff now, by his late willingness to accept the contract, according to the defendants' interpretation, and I think correct interpretation, compel the defendants to complete the sale. The defendants are trustees, and they and those for whom they act, are entitled to have all the terms and conditions strictly complied with on the part of the purchaser. The situation is apparently somewhat changed since the defendants accepted plaintiff's offer. The offer was made on the 28th October and accepted on the 30th. On the 14th November plaintiff's solicitor sent to one of the defendants requisitions on title.

On the 3rd December plaintiff's solicitor asked for, and on the 17th December received a draft deed. There was a good deal of correspondence, and there were many conversations in regard to certain restrictions to be embodied in the conveyance or to be provided for by separate agreement. On the 18th December defendants' solicitors asked for return of draft deed at earliest convenience, stating that it was a matter of much importance to have sale closed. On the 23rd December defendants' solicitors wrote again, principally about restrictions, but again asked for return of draft deed and approval of it. On 3rd January plaintiff's solicitor returned draft deed approved, and on the 6th January defendants' solicitors answered requisitions on title.

On the 9th January defendants' solicitors wrote to plaintiff's solicitors as follows:—

"Referring to the many interviews we have with reference to the restrictions herein, we enclose herewith further draft deed which contains the whole of the restrictions agreed upon by your client Mr. Walker, when the sale was arranged for. We have gone over these restrictions, and our clients tell us that they are absolutely correct in form, and they further tell us that your client will endorse them in the form in which we have put them. This matter has hung fire now for a very long time, and we must have this deed returned either approved or not before Saturday morning, as if it is not approved in the form in which we have drawn it, our clients will not carry out the sale."

The draft deed was not returned on the Saturday and defendants' solicitors on Monday the 13th January, wrote again to plaintiff's solicitors postponing the time for return of draft deed until the following Thursday. Plaintiff's solicitors wrote to defendants' solicitors on Wednesday the 15th January, but the letter had reference to restrictions, rights of parties, etc. After that letter, the parties were at arm's length. On the 20th January plaintiff's solicitors wrote to defendants' solicitors, and for the first time raised the question that the description of the land should give to the plaintiff a depth of 140 ft. on eastern limit. The defendants did not consent to this, and negotiations as to other details continued. The conveyance was executed, and on the 21st February plaintiff's solicitors wrote stating that the conveyance must be amended so as to make the description conform to plaintiff's contention. They said that Mr. Walker insisted

upon getting the additional 40 ft. After telephone conversations and conferences between solicitors, the defendants on the 25th February wrote appointing the following Thursday to close. Plaintiff was not ready to close, did not recede from his contention that he should get the 140 ft. on eastern limit so the plaintiff's solicitors on 27th February wrote cancelling the agreement. After all the negotiations and delay and plaintiff's continued refusal to accept the case is not one for specific performance of the contract as defendants interpreted it. The plaintiff was unwilling to carry out, and resisted carrying out the real contract, until his reply to the statement of defence. The position taken by plaintiff is, that he was right in his interpretation of the contract—that he was right in refusing to complete purchase when defendants ready, but that now, if he fails in his contention he is willing to accept defendants' interpretation as there will be a profit to him in so doing. If a profit to him, there will be a corresponding loss to the *cestui que trustent*. As between the parties, the defendants are entitled now to consider the agreement at an end. The plaintiff's case is built upon *Preston* v. *Luck*, 27 Ch. D. 497. The present case goes much further in standing for, and asserting, an alleged contract not proved. The negotiations between the respective solicitors for the parties were exceptionally full and protracted. The plaintiff took his stand upon a contract the existence of which defendants denied. The plaintiff took his chance to get more than the defendants intended to sell, and he should not now complain if the defendants called off the whole agreement.

I find that the plaintiff did repudiate the contract, and that the defendants did not refuse to carry out the sale until after such repudiation.

I am of opinion that the defendants did all that was necessary to cancel the contract, and that the notice of such, to the plaintiff, was sufficient as to form and substance, and that the notice in point of time was reasonably sufficient under the circumstances.

The defendants, by the letter of their solicitors of the 25th February, 1913, stated that they would return to the plaintiff the check for $1,000 deposit. Counsel for defendants, at the trial, said he did not ask to have that deposit forfeited to the defendants.

The plaintiff should get a return of his deposit. If the check was used the defendants should pay interest at 5 per cent. upon the amount from the 25th February, 1913. If not used the claim for $1,000 will be satisfied by a return of the check so deposited.

Upon the evidence it is clear that there would have been no difficulty in clearing the title if plaintiff had accepted the contract. The matters in that respect, complained of by plaintiff, were matters of adjustment.

The defendants counterclaimed for damages. They have sustained no damages other than the trouble of litigation. There will be a declaration that the contract was properly cancelled, and is now at an end.

There will be judgment for the plaintiff for $1,000, deposit as above stated, without costs.

The counterclaim of defendants will be dismissed without costs. Thirty days' stay.

HON. MR. JUSTICE LENNOX. NOVEMBER 29TH, 1913.

RE CLAREY v. CITY OF OTTAWA.

5 O. W. N. 370.

Municipal Corporations—Waterworks By-law — Motion to Quash—City of Ottawa Special Act—3 & 4 Geo. V. c. 109—Sum Fixed by Act as Limit of Expenditure — Projected Scheme to Exceed such Sum — Debentures not Sufficient to Complete Work—Discretion.

LENNOX, J., *held*, that 3 & 4 Geo. V. c. 109, authorising the City of Ottawa to raise a sum not exceeding $5,000,000 for the construction of waterworks, did not authorise the city to pass a by-law providing for the issue of debentures for $5,000,000 to be applied on a waterworks scheme which would cost at the least estimate $8,000,000.

By-law quashed with costs.

Motion by Thomas Clarey, a ratepayer of the city of Ottawa, to quash a by-law of that municipality authorising the issue of $5,000,000 debentures to partially defray the cost of a waterworks system.

T. McVeity, for applicant.

F. B. Proctor, for respondents.

HON. MR. JUSTICE LENNOX:—In the month of May, 1913, the Legislature of Ontario, by 3 & 4 Geo. V. ch. 109, authorised the corporation of the city of Ottawa to construct

waterworks for the use of the inhabitants of the city, partly within and partly beyond the limits of the province of Ontario, and amongst other incidental powers conferred the right to take and hold land, lakes and water powers in Ontario, and also in the county of Ottawa in the province of Quebec. The city of Hull is not mentioned, although it is intended that the water mains shall be carried through that city and probably water disposed of there. Subsequently a special Act was passed by the Dominion Parliament, which I need not examine; and the municipal council of Ottawa is endeavouring to obtain legislation in the province of Quebec, and to make arrangements with the city of Hull.

In October last Sir Alexander R. Binnie, having taken into consideration and estimated the cost of various waterworks schemes, reported in favour of obtaining a water supply from Thirty-one Mile Lake, Pemichangaw Lake, and Long Lake in the province of Quebec, and that the undertaking would cost $7,985,200. The Mayor of Ottawa thereupon transmitted the report, and a great number of other estimates, reports, and proceedings relating to a waterworks system for Ottawa, to the city council, and strongly recommended the adoption of the Binnie report, and the prompt carrying on of the work on these lines. Amongst other things the mayor's report stated:—

"The estimated cost of the whole proposition including the acquisition of the lakes, lands and watershed of 150 square miles, right-of-way, etc., is $7,985.200, say $8,-000,000. . . . Under the Special Act obtained at the last session of the Ontario Legislature, fifty year debentures can be issued for the scheme. The annual interest and sinking fund on $8,000,000 is $412,000, as per the letter of the city treasurer attached. To this is to be added $15,000 per annum for maintenance, making a total annual expenditure of $427,000."

At a special meeting of the council holden on the 17th of October, 1913, called for the sole purpose of considering the Binnie report and waterworks question, the report of Sir Alexander R. Binnie was approved and adopted, and thereupon, following and based upon this report and the matters reported by the mayor, and on the same day—whether at the same meeting or not I do not know—the by-law in question, authorising the construction of these

works was introduced, read a first, second and third time and passed by a two-third vote of the council.

This by-law is moved against, and a great many reasons are pointed out why it should be quashed, but although many of these objections may be well taken, I still think, as I thought upon the argument, that the broad outstanding question, and one which goes directly to the merits, is: "Can this by-law be said to be a *bona fide* and legitimate exercise of powers conferred by the Ontario Legislature under the Act referred to? A careful perusal of the provisions of the statute leads me to the conclusion that the Act does not authorise the doing of what the respondents have done. The Legislature confers upon the municipal council power to pass a by-law, with the approval of the board of health, and without the consent of the electors, to raise a sum not exceeding $5,000,000 for the construction of waterworks of the same general character as in the by-law is provided for. It is true that this by-law only provides for the issue of debentures to the amount of $5,000,000, but it is founded upon the Binnie report, recites it, and provides for the carrying out of a work which is to cost at the lowest $8,000,000; and once the money is borrowed, the work entered upon and the $5,000,000 expended, the city must go on and complete it, cost what it will, or lose these millions. Did the Legislature intend this, a limited borrowing power, but an unlimited commitment? I would require clear language to make me believe it. I think the language is clearly the other way. Sub-section 4 of sec. 2, says the corporation may issue debentures at 50 years and borrow "a sum not exceeding $5,000,000 to provide for the cost of the construction of the said works and the acquisition of the water, lake or lakes, land and water powers."

Can this mean that the council can enter upon and put the money into a billion dollar scheme so long as the initial borrowing does not exceed $5,000,000? The undertaking admittedly exceeds the borrowing power by 60 per cent., and in the working out another 60 per cent. may be added, but the point is that if the undertaking is not limited to $5,000,000 it is not limited at all.

The council have availed themselves of the special privileges of the statute, and the privileges are exceptional and generous; they must accept the limitations as well.

It was argued that the council could have effected their purpose in another way. I have nothing to do with that. I have to deal only with what was done. The by-law purports to be under this Act; they must justify under it.

I have not overlooked the almost supreme importance of an early supply of pure water in Ottawa, but this must be obtained by regular and authorised methods. This work is earmarked; it is of an exceptional character; it is a proposal to go out 50 miles or so into another province, and the cost had not been even approximately ascertained when the Legislature was appealed to. Surely it was not intended that, without consulting the ratepayers, the council would have power to commit them to an unlimited expenditure. What the Legislature certainly meant was: "You may do this work, as a council, if you find you can do it for $5,000,000, but not otherwise."

I was reminded of my discretionary powers. The discretion is well exercised where the violation of law is merely technical, where no right is violated and the by-law will work substantial justice; but here the property of every land-owner in Ottawa is being pledged for a sum equal to the total debenture debt of the city as it now is, and this, as I understand it, without legal sanction.

Entertaining this opinion, whatever the merits of the scheme, and however urgent the need of it may be, I have no discretion, I have no right to say that the people's right to pronounce upon the expenditure as actually proposed and disclosed, either directly at the polls or through their representatives in the Legislature, shall be denied.

The by-law will be quashed with costs.

HON. MR. JUSTICE MIDDLETON. DECEMBER 1ST, 1913.

FRITZ v. JELFS.

5 O. W. N. 416.

Contract—Procuring Breach of—Action for—Police Magistrate Acting as Solicitor—Advice to Landlord — Eviction of Tenant—Letter to Tenant—Dual Capacity—Lack of Malice—Findings of Jury—Evidence—Improper Conduct—Costs.

Action against defendant, police magistrate of Hamilton, who also practised as a solicitor, for wrongfully inducing or aiding in the plaintiff's eviction as tenant from premises demised to him. Defendant on being consulted by plaintiff's landlord as to the manner of evicting him for non-payment of rent wrote plaintiff ordering him to leave and threatening to assist his landlord in forcibly ejecting him if such orders were not obeyed. As a matter of fact plaintiff was not legally in arrears but nevertheless his landlord attempted unsuccessfully to evict him.

MIDDLETON, J., *held*, that defendant's act was not a procurement of breach of contract as it was disinterested advice and not interested inducement.

Action dismissed without costs.

Action to recover damages for inducing or aiding in the wrongful eviction of the plaintiff and his family from premises in the city of Hamilton of which the plaintiff was tenant. Tried with a jury at Hamilton, 22nd October, 1913.

L. E. Awrey, for plaintiff.

F. R. Waddell, K.C., for Green.

S. F. Washington, K.C., for Jelfs.

HON. MR. JUSTICE MIDDLETON:—On the answers of the jury I dismissed the action as to Green, the liability of Jelfs has now to be determined.

Mrs. Bell was tenant of a house on Florence street, Hamilton. On 7th May, 1912, she sublet certain rooms to the plaintiff for one month for $10. The plaintiff, his wife and son moved in and proved most undesirable tenants. Mrs. Bell made up her mind to get rid of them. Her landlord threatened to determine her tenancy unless she rid herself of such offensive subtenants. She was a woman in humble circumstances and quite unversed in law. On 6th June she gave the plaintiff notice in writing that the rent would be $20 per month in advance. No money was paid till 15th June, when the plaintiff paid, and Mrs. Bell received $5, signing a receipt for $5 for one half month, June 7th to June 21st. Mrs. Bell expected the plaintiff to vacate by the

21st, but on the 20th, finding he had no such intention, she went to the office of the defendant, who is police magistrate of Hamilton.

Mr. Jelfs as magistrate had no concern in the matter, but he is allowed to practice as a barrister and solicitor. He does not carry on a general practice, but advises many who consult him without any fee or reward. I have before this commented upon the difficult position in which those who occupy public office and at the same time carry on a private practice must often find themselves, and this case affords another striking example of the dangers attendant upon the system.

In all that Mr. Jelfs did I am quite satisfied there was no intentional wrongdoing, but like all who permit themselves to be placed in situations of delicacy and peril, his conduct in unguarded moments was such as to indicate the danger of the situation and to invite adverse comment.

The woman told her story. The man in occupation of her rooms would neither pay rent nor vacate. This was enough, and Mr. Jelfs wrote the letter which is the cause of all his trouble. The printed heading sufficiently indicates the mental confusion incident to his position. The law permits him to be a barrister and solicitor as well as police magistrate, but the law expects him to keep his official position and private business apart. Yet the letter is headed with the municipal arms and motto: "I advance in Commerce, Prudence and Industry," and proceeds:—

"George Fred Jelfs, Telephones: House No. 1239.
Barrister, Solicitor, &c. Office No. 136.
Police Magistrate.

Central Police Station,
Hamilton, Ont., 20th June, 1912.

Mr. Fritz,
127 Florence St.

Sir:

Mrs. Bell has given you notice to quit the rooms occupied by you. You are not entitled to any particular notice. If you do not leave by Saturday I shall have to assist Mrs. Bell in forcibly ejecting you.

Yours truly, &c.,
Geo. Fred. Jelfs."

This was given to Mrs. Bell with the idea that the sight of it would be enough, and that Fritz, his wife, son and a bulldog that accompanied the family would quietly fade away and Mrs. Bell's troubles would be over. Mr. Jelfs was quite mistaken. Mr. Fritz was by no means unskilled in certain branches of the law, and held it and magistrates in a contempt that suggests familiarity. He knew all about implied terms arising from overholding and receipt of rent, etc., and that a tenancy from month to month could not be ended by a magistrate's letter, and so intimated to Mrs. Bell. She then went back to the magistrate, and he feared the situation was more complicated than appeared and put off promising to send a detective to investigate. He did instruct a detective; this one handed the task over to another and that one went, saw, and forgot to report, and the magistrate heard no more of the matter till the trespass alleged had been committed.

On 27th June Mrs. Bell decided on action, and Fritz, his son and his bulldog being away, and only the wife, a comparatively harmless woman, being in the castle, Mrs. Bell called her sympathetic friends and neighbours to her aid and proceeded to remove the furniture from the house and to place it in the road. While this was being done with all possible diligence Mrs. Fritz went to seek her husband and Mrs. Bell's courage failing, she telephoned to the police station and two constables were sent to prevent a breach of the peace. The magistrate had no knowledge of this and cannot be responsible for their conduct.

The jury have found that the defendant sent the letter and the detective and that he was responsible for the sending of the police because "by his letter he implied that Mrs. Bell would have his official assistance in the eviction of the tenant Fritz." This is not enough, as the uncontradicted evidence is that he did not have anything to do with sending them, beyond this the whole eviction was the act of Mrs. Bell and the constables really took no part in it.

Other questions and answers are as follows:

"4. Did the defendant Jelfs induce Mrs. Bell to evict the plaintiff from the house in question? A. Did not induce, but he encouraged her to evict the plaintiff.

5. If so, did he do so (a) In order to injure the plaintiff? No. (b) Or to procure some indirect advantage to himself or others? No.

6. Was the defendant Jelfs, in all that he did, acting in good faith and without malice? No.

7. If you think he acted maliciously—why do you think so? Because he wrote the letter of June 20th on the official letterhead of the police magistrate's office without first enquiring into the plaintiff's rights."

The first two questions were submitted on the lines of those submitted in *Hutley* v. *Simmons,* 1898, 1 Q. B. 181. The following questions were put because I did not regard the second question as covering all possible grounds upon which an act may be regarded as malicious.

The jury seem to have been much impressed with the impropriety of the letter in question, and I agree with them, but this is not enough to create liability.

The eviction was the act of Mrs. Bell and Jelfs did nothing more than advise her, and to use the language of the jury he "encouraged her to evict the plaintiff." In evicting as she did she was guilty of a breach of contract, and on the findings of the jury the defendant not only advised, but encouraged that breach and acted improperly in so doing as he failed to make any due enquiry into the plaintiff's rights. The abuse of his official position by placing in Mrs. Bell's hands the letter in question couched in language which seemed to imply "that Mrs. Bell would have his official assistance in the eviction" cannot increase his liability as that assistance was not in fact given.

I have come to the conclusion that what was done here falls short of what is necessary to create liability.

Without justification to persuade or procure another to break his contract is no doubt an actionable wrong. This implies an active interference for the purpose of bringing about a breach of the contract. The distinction is between interested inducement and disinterested advice. All that was done by the defendant was free from any intent to injure the plaintiff or to secure any undue or indirect advantage.

Then there remains the question, not necessary to decide, as to the existence of justification. Does the fact that the defendant is a solicitor and that he did no more than advise Mrs. Bell relieve him from liability? In giving this advice he acted without malice, but without making due inquiry, he might be liable to an action at the suit of Mrs. Bell, but I cannot see on what principle he can be made liable to the plaintiff. Any indirect or improper motive, anything amount-

ing in law to malice, would no doubt make the solicitor liable, but in the absence of malice the duty to advise would afford a complete answer.

See *Read* v. *Stonemasons*, 1902, 2 K. B. 732; *Glamorgan, &c.* v. *S. W. Miners*, 1905, A. C. 239, and comments on these cases, 19 L. Q. R. 116; *Brauch* v. *Roth*, 10 O. L. R. 284.

Had the action been based upon an abuse by the defendant of his official position other questions would have arisen. The plaintiff has throughout disclaimed this possible line of attack.

The action fails, but, to mark the disapproval of the defendant's conduct, costs should not be given.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. DECEMBER 1ST, 1913.

RE NATIONAL HUSKER CO.

E. P. WORTHINGTON'S CASE.

5 O. W. N. 375.

Company—Winding-up — Contributory — Subscription—Absence of Fraud—Loss of Patent — Evidence — Leave to Move against Winding-up Order.

MEREDITH, C.J.C.P. (24 O. W. R. 385) dismissed an appeal by one Worthington from the order of the Master-in-Ordinary in the winding-up of the company under the Dominion Winding-up Act placing him upon the list of contributories, holding that there had been no fraud or misrepresentation in connection with the obtaining of his subscription to stock of the company.

SUP. CT. ONT. (1st App. Div.) dismissed appeal without costs.

Appeal by E. P. Worthington from an order of HON. R. M. MEREDITH, C.J.C.P. (24 O. W. R. 385), dated 8th April, 1913, dismissing an appeal from the report of the Master in Ordinary, dated 13th January, 1913, settling the appellant on the list of contributories.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

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

J. M. Ferguson, for the respondent.

Their Lordships' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O.:—The winding-up order was made on 6th July, 1911, and the appellant had on the 27th of the previous January begun an action in the High Court to rescind and set aside his subscription for 50 shares made on the 12th January, 1907, as having been obtained by fraud, and the action was at issue when the winding-up order was made. The action was tried before the Master in Ordinary on the 28th March, 14th and 27th June and 4th October, 1912, and he found the issues in the action in favour of the defendants and settled the appellant on the list of contributories in respect of 66 shares.

The evidence as to the alleged misrepresentation by which as the appellant alleges he was induced to become a subscriber for the shares was conflicting and the Master gave credit to Adams, a witness for the respondent, preferring it to that of the appellant and three of his relatives, all of whom are seeking to be released from their subscriptions for shares on practically similar grounds to those relied upon by the appellant, and the Master's finding was concurred in by the Chief Justice, from whose judgment the appeal is brought.

In such a case as this an Appellate Court is rarely warranted in reversing the findings of fact, but if the question were merely one as to the weight of evidence the appellant would not have satisfied us that the Master's conclusions were wrong, on the contrary, I think that he came to a right conclusion on the evidence.

Having come to this conclusion the appeal fails, but if there were doubt as to its being a proper conclusion, the further fact which the Master has found that the appellant with full knowledge of the true facts as to the matter with respect to which the representations are alleged to have been made elected to remain a shareholder, that his finding is concurred in by the Chief Justice and that there was ample evidence to warrant it is fatal to the appellant's case and the appeal must be dismissed.

We were asked by the appellant's counsel if we should be against him to vacate the winding-up order, but it is not open to us to do so even if we were of opinion that it is wrongly made. This decision will not, however, prejudice any

application which the appellant may be advised to make to vacate or set aside the order.

For the same reasons which influenced the Chief Justice to give no costs of the appeal before him we may properly leave the respondent to bear his own costs of this appeal.

HON. MR. JUSTICE BRITTON. DECEMBER 1ST, 1913.

LAMBERTUS v. LAMBERTUS ET AL.

5 O. W. N. 420.

Insurance — Life Insurance — Wife made Beneficiary and Named— Death of First Wife and Re-marriage of Insured — Right of Second Wife to Proceeds of Policy—No Further Designation.

BRITTON, J., *held*, that where an insurance policy was made payable to the insured's "wife Bridget Lambertus" and she predeceased him and he married again, that upon his death his second wife became entitled to the proceeds of the policy.

Re Lloyd & A. O. U. W., 29 O. L. R. 312, and *Re Kloepfer*, 25 O. W. R. 101, followed.

Action by the widow of Christopher Lambertus to establish her right to moneys arising from an insurance policy upon the life of her husband, tried at Goderich without a jury.

M. G. Cameron, K.C., for the plaintiff.

C. Garrow, for the defendant.

HON. MR. JUSTICE BRITTON:—A certificate was issued by the C. M. B. A. on the 31st December, 1892, for $1,000 upon the life of Christopher Lambertus for $1,000, payable to his wife "Bridget Lambertus."

Bridget Lambertus died, and Christopher married a second wife who survived her husband, and who now brings this action. Christopher died on the 27th day of March, 1913. The Act of 1913 amending the Insurance Act was not passed until after the last mentioned date, and so cannot affect any question arising in this action.

The plaintiff signed an order upon the C. M. B. A. for payment of this money to the executor of her husband—the executors received the money—but afterwards paid the money into Court pursuant to an order herein, dated the 9th day of October. By this order the executors were discharged from

this action, and the only question is whether or not the plaintiff is entitled to the money.

I am not able to distinguish the case from the cases of *Lloyd* v. *A. O. U. W.*, O. L. R. ; and *Re Kloepfer*, 25 O. W. R. 101, and must therefore find for the plaintiff.

The judgment will be for a declaration that the proceeds of the certificate or policy now in Court belong to the plaintiff and payment should be made of the same to her.

Considering that the estate was not large, and that plaintiff gets $1,500 by the will of her husband, the judgment may well be without costs, if the case goes no further, notwithstanding the correspondence between the solicitors in regard to the same.

HON. MR. JUSTICE LENNOX. DECEMBER 1ST, 1913.

SMITH v. WILSON.

5 O. W. N. 437.

Vendor and Purchaser — Reference — Appeal from Local Master— Tenants in Common—Joint Owners — Executions—Enlargement of Motion.

LENNOX, J., varied the report of the Local Master at Ottawa on a vendor and purchaser application.

Appeal by purchasers in a vendor and purchaser matter from the report of the local Master at Ottawa.

J. E. Caldwell, for the purchasers.

W. C. McCarthy, for creditors.

Chas. L. Bray, for the vendors.

HON. MR. JUSTICE LENNOX:—I am satisfied that the finding of the learned local Master that the deed in question from the vendor to the purchaser has not been delivered is correct. I do not however, agree with the local Master that the vendor and purchaser are entitled in equal shares in the equity of redemption in the lands in question, if that is what is meant by the finding that they are tenants in common. They are joint owners, but manifestly not in equal proportions. The several executions are encumbrances upon the interest or share of the vendor. Considerations arise, however, which have

not been specifically dealt with by the Master or argued which will cause trouble and great expense if not disposed of now. I will therefore enlarge the motion until Saturday, the 13th inst. Meantime, I am forwarding to the clerk of the Court a memorandum of the questions to be taken up.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. DECEMBER 1ST, 1913.

RICHARDS v. LAMBERT.

5 O. W. N. 388.

Reference—Accounts—Appeal from Master—Automobile Company—Sale of Assets—Mode of Taking Accounts—Appeal—Variation.

LATCHFORD, J. (23 O. W. R. 780) on an appeal from the report of the Local Master at Sandwich upon the state of accounts between the parties reduced the amount found due plaintiff from $12,130.72 to $11,634.20 and gave judgment for plaintiff for latter amount with costs of action and reference.

SUP. CT. ONT. (1st App. Div.) varied above judgment, holding that upon the facts as disclosed upon the reference the defendants did not owe plaintiff anything.

Judgment declaring that neither party is indebted to the other, no costs to either party.

Appeal by the defendants from a judgment of HON. MR. JUSTICE LATCHFORD, 23 O. W. R. 780, dated 13th January, 1913, affirming with a variation a report of the local Master at Sandwich dated 8th April, 1912, made pursuant to the reference directed by the judgment at the trial dated 23rd May, 1911, and directing that the appellant the Regal Motor Car Co. should pay to the appellant the Regal Motor Car Co. of Canada, Ltd., $11,634.20, with interest from the date of the report, and that the appellants should pay the respondent his costs of the trial, reference, and of the appeal.

The appeal to the Supreme Court of Ontario (First Appellate Division), was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

I. F. Hellmuth, K.C., and A. R. Bartlett, for the appellants.

J. H. Rodd, for the respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The action is brought by the plaintiff, suing as the only shareholder of the Regal Motor Car Company of Canada, Limited, which I shall afterward refer to as the Canadian Company, other than the defendants C. R. Lambert, J. A. Lambert, Bert Lambert, and F. W. Haines, against these defendants, the Regal Motor Car Co., afterwards referred to as the Detroit Company, and the Canadian Company.

The Detroit Company carries on business in Detroit, and its principal, if not only shareholders, are the four individual defendants.

The allegations contained in the statement of claim, after setting out the proceedings leading up to the incorporation and the incorporation of the Canadian Company, and its organization early in February, 1910, are that in breach of an agreement between the respondent and the four individual appellants that he should be appointed manager of the Canadian Company, they appointed the appellant Haines to that position, and that afterwards in consequence of the respondent having protested against this he was appointed resident or assistant manager and put "in charge of the work;" that the manufacture of automobiles was continued until about the middle of June, 1910; that the appellants continually interfered with the respondent in the management of the business and wrongfully took charge of the finances of the company, and about the middle of June, 1910, "wrongfully conspired together to deprive the plaintiff of any voice whatever in the management of the affairs of the said company with the fraudulent intention of disposing of the assets and of winding up the company," and that in pursuance of such conspiracy they assumed to dismiss the respondent from his position; that the manufacture of automobiles was immediately stopped, and those that had been manufactured were sold at and below cost; that the appellants "proceeded to appropriate the other assets of the company to their own use and to the use of the Regal Motor Car Company of Detroit, assuming to pay non-existent debts and by the end of December last had removed from the premises of the company and disposed of practically all of the assets except the land and buildings, leaving a considerable indebtedness still unpaid, although there was in the beginning more than ample assets for the satisfaction of all liabilities, with a reasonable margin besides;" that the result of these wrongful acts was

that not only was the Regal Motor Car Company of Detroit, enabled to obtain payment "for a large non-existent liability by which the said defendants benefited, but said company got possession also of stock and machinery at an improper price and the value of the interest of the plaintiff in the company so formed was greatly reduced if not entirely wiped out and the plaintiff thereby lost the money invested and the time expended by him in connection therewith;" and the Regal Motor Car Company, of Detroit, was a party with the individual appellants to these wrongs, and that they and the company are liable in damages to the respondent and to the Canadian Company; and the respondent claims to recover from the appellants other than the Canadian Company, damages for the wrongs complained of.

By their statement of defence, in addition to a general denial of the allegations of the statement of claim, the appellants say that the directors of the Canadian Company did not cease to manufacture automobiles until they found that they had manufactured more than they could sell; that this had resulted in the company becoming financially embarrassed, and in its being necessary to sell the cars at less than the "list" prices in order to meet pressing liabilities; that the Canadian Company had not intended to cease operations until an action was brought against it on a contract which had been entered into for the purchase of 250 automobile bodies, only 100 of which had been taken by the company; that then believing that it was in the interest of the company and its creditors that its debts should be paid, which could be done only by the sale of its assets, the individual appellants proceeded to sell the assets and "to turn back such of the assets as they could to the persons who had sold them to the company, receiving in return the full market value thereof;" that the Canadian Company "did turn over to the Detroit Company a considerable amount of the assets, but received in return the full market price for the same;" and that the Detroit Company was prepared at any time to make a full statement of the receipts and credits in respect of the same; that the individual appellants had in all things acted in good faith, and in such a way as to realize as much as possible out of the assets of the company for the benefit of its creditors and shareholders, and that it was always "the intention of the company to so dispose of the assets of the company as to pay the creditors of the company in full, and they were proceeding to do this

until stopped by the order of this honourable Court in this action."

On this defence issue was joined; and the action came on for trial on the 23rd of May, 1911. From the statement of the counsel in opening, it appears that the action was begun for the purpose of preventing the stock of the Canadian Company being removed to the factory of the Detroit Company, and to compel the bringing back of what had been removed, for an accounting, and for damages for wrongfully causing the respondent "to lose all the money he had put in the concern;" that when the injunction motion came on to be heard it was found that "the stock had practically all been taken away" and the motion was dismissed with a direction that "of anything further that was sold, the proceeds were to be returned here;" and counsel conluded as follows: "I do not suppose they can bring back the stuff they took away, but we do ask an accounting, which we have never been able to get from the defendants, and we are asking your Lordship to enlarge the prayer of the claim to the extent that the evidence justifies us in asking. It is a complicated case, my Lord."

The respondent was the only witness examined. After his cross-examination had gone on for some time the Chancellor pointed out that the effect of the order made on the injunction motion was to give effect to a resolution that had been passed by the shareholders of the Canadian Company to wind it up; and added "and the company is wound up, subject to whatever claims this plaintiff has; he claims damages, and accounts. You concede the account, and the damage is the only question left;" and later on the Chancellor, addressing counsel for the appellants, said: "Do you propsoe to proceed further, and let all things depend upon the taking of the account. Are you willing. . . . Mr. Rodd is willing to let it go as a matter of accounting."

This appears to have been assented to, and Mr. Rodd then asked that the appellants should be ordered to give the respondent the account between the two companies, "shewing the exact account between the two parties, so that we will see how that $20,000 is made up, and how they have dealt with the running stock of the company. We have asked for that, but have never been able to get it. . . I want to be furn-

ished with a detailed account from the books of the company in Detroit."

The endorsement on the record made by the Chancellor is as follows:—

"It is agreed by counsel that all matters in question may be allowed to depend on the report of the Master as to the state of the account in the matters set up in the pleadings. Refer it to Master at Sandwich on all matters affecting accounts. F. D. and costs reserved."

The judgment as entered recites the agreement of counsel "that all matters in question may be allowed to depend on the report of the Master as to the state of the accounts in the matters set up in the pleadings:" and the order and judgment is that "all necessary enquiries be made and accounts taken respecting the accounts in the matters set up in the pleadings delivered herein and a report be made thereon and for such purposes this cause be referred to the Local Master at Sandwich."

It is clear, I think, that what was referred to the Master was the accounts between the Canadian Company and the Detroit Company, and that it was intended that the account should be taken on the footing that the Detroit Company should account for everything belonging to the Canadian Company, which had come into the possession of the Detroit Company.

It is evident from the course of the proceedings in the Master's office that this was the view of all parties. By direction of the Master the Detroit Company brought in its account, in which it purported to give credit for the proceeds of everything that it had received from the Canadian Company, and according to which that company was indebted to the Detroit Company in the sum of $6,245.53.

It is somewhat singular that an application made by the appellants' counsel, that the respondent should be called upon to surcharge and falsify the account brought in by the appellants, was refused by the Master. That was obviously the proper course to have been taken, and one that would have simplified the proceedings in the Master's office and on this appeal, and it was besides unfair to the appellants to require them to meet the claims of the respondent without having had any particulars of them furnished to them.

The only item on the debit side of the Detroit Company's account that was the subject of controversy, was one of

$5,607.20, made up of two items; $2,841.41 representing a charge of ten per cent. on the amount charged to the Canadian Company for articles supplied to it by the Detroit Company, and $2,765.79, charged for advertising the business of the Canadian Company. This item was wholly disallowed by the Master, but no reasons are given for its disallowance beyond the statement that it is "improper and wholly unwarranted by the facts." The business of neither of the companies included the manufacture of the parts which go to make up an automobile, but these parts were purchased from other manufacturers, and the business of the companies was to "assemble" them, as it is termed, and to sell the completed vehicle. According to the testimony, and there is practically no dispute as to this, it was decided by the Canadian Company that in the inception of its business it would be better to procure these parts through the agency of the Detroit Company, which had machinery and appliances, and a staff of skilled employees for inspecting and testing the parts when received from the manufacturer of them; and an arrangement was made that they should be procured in that way.

According to the testimony of the four individual appellants the arrangement made was that these parts should be supplied by the Detroit Company and should be charged for at cost price, and that that company should be paid ten per cent. of the cost price as compensation for its services and outlay in connection with the purchase, inspection and supplying of the parts.

The agreement as to the ten per cent. was denied by the respondent; but the weight of evidence as well as the probabilities warrant a finding that it was made.

As I have said, there is nothing before us to shew the ground upon which the Master proceeded in disallowing it. There is reason to think that he may have reached his conclusion because there was no evidence of any formal meeting of the directors of the Canadian Company at which the arrangement was made or sanctioned; and much appears to have been made of this by the respondent's counsel. If that was the ground upon which the Master proceeded, he erred. The appellant Haines was the general manager of the Canadian Company, and was a party to the arrangement; and there can, I think be no question, there being no evidence of any limitation of his authority, that it was competent for him as general manager to enter into the arrangement on behalf

of his company, and that it was bound by the arrangement, if it was in fact made by him.

Though it may be that the expense entailed on the Detroit Company by the services it performed for the Canadian Company, for which it was said the ten per cent. was to be the compensation, was somewhat magnified by a witness called on behalf of the appellants, there can, I think, be no question that the services were important and involved considerable expense to the Detroit Company, as well as the use of its premises and the machinery and appliances which were used in making the requisite tests for the purposes of the inspection. I see no reason for thinking that these services were to be rendered gratuitously, and indeed none was suggested by the respondent, who confined his testimony to a denial that any express agreement was made. I am inclined to think that even he must have thought that an allowance for the service ought to be made, and that his quarrel was only with the amount charged; for the only question his counsel ventured to ask him on this point was as to the propriety of a charge of twenty-five per cent. (pp. 242-3) and the furthest he went was in answer to the question: Q. From your knowledge of the managing of the automobile business, would you say that it (i.e., inspection) could cost twenty-five per cent?" To which his answer was: "It could not." In the notes it is "I could not;" but that is evidently a mistake of the stenographer.

It was proved, I think, satisfactorily that the expense incurred by the Detroit Company in performing the services was much more than ten per cent.; and one witness went so far as to say that it was at least twenty-five per cent.

In my opinion, therefore, on the ground of the express agreement, as well as upon a *quantum meruit* the item of $2,841.41 should not have been disallowed.

As to the item of $2,765.79 there is more difficulty. It is not shewn that there was any agreement as to the advertising or any arrangement that any advertising for the Canadian Company should be done by the Detroit Company. All that was done in the way of advertising for the Canadian Company was to include in the advertisement of the Detroit Company's business a short statement to the effect that there was a factory for the manufacture of Regal Motor Cars at Walkerville, and perhaps, although that is not clear, to allow the services of its advertising department in the

preparation of advertisements published by the Canadian Company. This item was, I think, properly disallowed.

The other items in question affect the credit side of the account, and the contention of the respondent is that a much larger sum than was credited to the Canadian Company should have been credited to it for the property that was taken from its factory to the factory of the Detroit Company; and the Master found in favour of this contention, and has charged the Detroit Company with everything that, according to the account kept at the Walkerville factory, was shipped to that company, at cost price, with the duty added on articles that had been imported from the United States.

The Master has found that these things "consisting of running stock, merchandise, tools, etc." . . . were carefully counted, checked and invoiced at reasonable and proper prices to the Regal Car Company of Detroit . . . "but after they were received by the latter company a number of claims were made for over-valuation of the same and for shortages which have no foundation in fact." Here again it is unfortunate that we do not know the basis for these conclusions, but it is not, I think, unfair to draw the inference that the Detroit Company and the individual appellants were treated as wrongdoers and the assumption was made that had the business of the Canadian Company not been stopped it could have been carried on successfully.

If that is a fair inference, the Master was, in my judgment, wrong. Having regard to what took place at the trial, and the form of the judgment, the account should not have been taken on the basis of the appellants other than the Canadian Company being wrongdoers, but the Detroit Company should have been charged for what it actually received, at a fair value, having regard to all the circumstances, and the assumption that the business of the Canadian Company could have been carried on successfully is wholly unwarranted; the Canadian Company had but a small capital, much of which was sunk in buildings, machinery and plant. It had a large number of motor cars, which it was supposed had been sold, thrown back on its hands, and it was being sued for large damages for breach of a contract it had made for the purchase of 250 "bodies" which it was unable to take delivery of and pay for, and was in other financial difficulty; and there is no reason for

thinking that the conclusion that was come to, to wind up the business, was not honestly reached in the belief that it could not profitably be carried on longer. The individual appellants had much more invested in the company than had been invested by the respondent, and it is difficult to suggest any reason for sensible business men putting an end to a successful business in which they had embarked so much capital, unless there must be attributed to the individual appellants the fraudulent design of appropriating to their own use, or to the use of a company in which they were holders of most of the stock, the property of the Canadian Company; and of that there is not, in my opinion, any evidence.

There was no doubt a conflict of testimony as to the value of the property taken over by the Detroit Company, and as to what property that company received. When it was decided to close the business and to ship to Detroit the running stock, merchandise, tools and other articles belonging to the Canadian Company, an inventory was made of them, and the invoices were made out charging the Detroit Company with them at cost price, including the duty that had been paid on such of them as had been imported.

A man named Pratt, had for part of the time charge of the counting and checking, and was assisted by three others. According to their testimony the articles were all counted except some consisting of nuts and other like articles, which were weighed and the number ascertained by counting into a box enough of them to fill it, then weighing the box and its contents, and judging the number of the remaining articles by the number of times the box was filled with them. Slips of paper were used to record the result, and the articles were identified by writing down the serial numbers by which they were known, which in some cases were marked upon the articles, and in others on the receptacle in which they were kept. The slips were then taken to the bookkeeper, Clarence R. Hartman, who made out the invoices. He was able by means of the serial numbers to identify the articles, and from the invoices of them received when the purchases were made or an inventory in most cases, to ascertain their cost price.

Practically everything portable was invoiced and shipped to the Detroit Company. The machinery and tools had been

in use for some months, and some of the "running stock" as it was called, was broken and damaged, and according to the testimony of Hartman "a good deal of the stuff was in pretty bad condition, due to handling in the shop and the way it was kept." The men who did the counting and checking, and were called by the respondent to prove that it had been done correctly, were not skilled men. Two of them, Leischied and Pratt, practically admit that mistakes may have been made by giving some of the articles wrong names or wrong serial numbers.

How it was possible for the learned Master, on this state of facts, even if the evidence on behalf of the appellant to which I shall afterwards refer, had not been given, to have come to the conclusion that all these articles "were carefully counted, checked, and invoiced at reasonable and proper prices" it is difficult to understand; but in the face of the evidence adduced by the appellants how it was possible for him to do so passes my comprehension. According to that evidence, what was received in Detroit was carefully inspected, counted and checked, not by unskilled men, but by men who performed that work in the Detroit factory, with the result that some of it was accepted by the Detroit Company and the rest of it not being fit for use in the factory or otherwise saleable was thrown into the scrap heap and sold by tender as "scrap." It is difficult to conceive what motive the appellants could have had for selling as scrap, anything that was otherwise saleable. The individual appellants, as I have said, had a very much larger interest than the respondent in the property that was being disposed of: the only inspection of what was sent to Detroit that was made, was made at the factory of the Detroit Company, and there is nothing in the evidence to suggest that it was not fairly and honestly made. The fact that as the result of the inspection and checking, credit was given to the Canadian Company for a large number of articles not included in the invoices made out by Hartman, indicates good faith, and at the same time points to the conclusion that mistakes were made in the counting and checking on the Canadian side and that what was done in that way in Detroit is the more reliable.

It may be that some of the articles were damaged in transit, but for that the appellants should not be made

answerable, as that may have been the result of insecure packing in the cars or of carelessness of the railway company, or of both. It may be observed also that it appears from the evidence that some of the articles were sent over to Detroit in motor cars and that no evidence was given as to their having been delivered to the Detroit Company or landed on the Detroit side of the river. It was stated by one witness that a man named Labadie took over some of them, but he was not called as a witness.

There is a considerable difference in the prices at which the articles were taken over by the Detroit Company, were invoiced by Hartman and those at which they were allowed for to the Canadian Company. In my opinion the respondent failed to shew satisfactorily that there could have been realized for them by a sale in any other manner more than has been allowed for them by the Detroit Company. The respondent did not attempt to prove their value in any other way than by shewing what it had cost the Canadian Company to obtain them; which, for the reasons I have already given, formed no satisfactory basis for determining their value at the time they were sent over to Detroit. It would be rare, I apprehend, in the case of a sale of machinery and tools that had been in use, and running stock such as that of the Canadian Company, to one buying the manufactory as a going concern and intending to carry on the business for which they had been provided, that the full cost price of them would be obtained. In this case they were not sold as part of a going concern, but were being disposed of because it had been found unprofitable to carry on the business, and, owing to the very nature of the running stock, little of it could be used in the manufacture of automobiles other than the Regal. It was, in my opinion, under all the circumstances the best thing for everyone interested in the Canadian Company to sell to the Detroit Company what was saleable, if that company was willing to buy it at the price for which similar articles could be bought in the United States.

An effort was made by the respondent to shew that some of the articles were standard articles and were saleable to any manufacturer of automobiles, and that they might, therefore, have been sold in Canada. It may be that a few of them were standard articles, in the sense that they could be used in the manufacture of any make of automobile, but

even that is doubtful on the evidence, and if it had been clearly proved that some of the articles were of that nature, it by no means follows that it was not a more prudent thing to sell the whole of the running stock that was saleable to the Detroit Company on the terms upon which the sale was made, than to sell, part in Canada at the risk of not being able to sell the remainder for as good a price as was obtained from the Detroit Company. Another circumstance that depreciated the value of the running stock was that it was designed for a car of the 1910 model, which was not any longer to be manufactured owing to its being superseded by the model of 1911, for which some of the articles were not adapted.

Upon the whole I am of opinion that the respondent failed in his attack on the accuracy of the appellants' accounting for the property of the Canadian Company which was sent to Detroit, except as to two items, one of $198.15 and the other of $298.37. The item of $198.15 is for articles amounting in value to that sum, which were received by the Detroit Company but were not included in the invoices made out by Hartman. By an error this item was debited instead of being credited to the Canadian Company; and, when the error was discovered a cross-entry was made which merely cancelled the debit entry. The item should also have been credited to the Canadian Company. The Master, under the erroneous impression that the Canadian Company had been improperly credited with it, deducted it from the sum for which he found the Canadian Company to be entitled to credit; and upon appeal to my brother Latchford, instead of rectifying the error the sum was again debited to the Canadian Company.

The item of $298.37, as was admitted by counsel for the appellants, should have been, but was not, credited to the Canadian Company. By mistake, upon the appeal to my brother Latchford, instead of crediting it to the Canadian Company, that company was debited with it.

If we had agreed with the conclusion of the Master in other respects, the amount in which the Detroit Company has been found to be indebted to the Canadian Company should be increased by three times the amount of the item of $198.15, and by twice the amount of the item of $298.37; but as we do not agree with the conclusion, $198.15 and $298.37 should be deducted from the balance at the credit

of the Detroit Company as shewn by their account filed in the Master's office, $6,245.53, and there should also be deducted from that balance the amount of the advertising account, $2,765.79; and, these deductions having been made, the balance is reduced to $2,983.22, which is apparently the sum in which the Canadian Company is indebted to the Detroit Company.

Counsel for the appellants upon the argument said that all that they desired to obtain by the appeal was to wipe out the balance which, according to the report and the judgment in appeal, is owing by the Detroit Company to the Canadian Company; and, in view of this, there will be no declaration that the Canadian Company is indebted to the Detroit Company, but a declaration that neither company is indebted to the other in respect of the matters in question in the action, and each party will bear his own costs of the litigation throughout.

The result of this will be that the Canadian Company will receive the benefit of $2,983.22 as compensation for any errors which, though not proved to exist, may have been made in the credits to which it was entitled in respect of this property shipped to Detroit.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. DECEMBER 1ST, 1913.

CANADIAN LAKE TRANSPORTATION CO. v. BROWNE.

5 O. W. N. 376.

Contract—Principal and Agent — Moneys due by Agent—Terms of Contract—Evidence — Counterclaim — Statute of Frauds—Leave to Amend by Setting up on Appeal—Discretion of Court—Memorandum in Writing—Oral Assent to Alterations—Reference—Costs.

FALCONBRIDGE, C.J.K.B. (24 O. W. R. 149) gave plaintiffs judgment for $1,447.72 moneys had and received by defendants as agents for plaintiffs, but found in defendant's favour as to a counterclaim set up for damages on account of plaintiff's alleged wrongful acts and directed a reference to ascertain the amount of such damages.

Costs of action to plaintiffs, of counterclaim to defendants.

SUP. CT. ONT. (1st App. Div.) refused plaintiffs leave to set up the Statute of Frauds on appeal as a defence to the counterclaim holding that the allowance of the amendment was within the discretion of the Court.

Sales v. *Lake Erie & Detroit River Rw. Co.*, 17 P. R. 224, followed.

Semble, that a draft agreement sent by plaintiffs to defendants and altered by the latter, to which alterations plaintiffs gave their oral assent was in any case a sufficient memorandum in writing to take the case out of the operation of the Statute of Frauds.

Appeal of plaintiffs from judgment at trial dismissed with costs.

Appeal by the plaintiff from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., 24 O. W. R. 149, dated 25th February, 1913, directed to be entered on the counterclaim of the defendants, after the trial without a jury at Hamilton on the 13th and 14th of January, 1913.

The appeal to the Supreme Court of Ontario (1st Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

J. Bicknell, K.C., and T. Hobson, K.C., for appellant.

E. F. B. Johnston, K.C., and J. G. Gauld, K.C., for respondents.

HON. SIR WM. MEREDITH, C.J.O.:—The appellant is a transportation company having its head office in Toronto, and the defendants are wharfingers carrying on business at Hamilton.

By their counterclaim the respondents claim damages for breaches by the appellant of an agreement between the parties, in respect of the following matters:—

1. Wrongfully unloading at another wharf a shipment of wire from the steamship Regina, which resulted in a loss to the respondents of $134.34 which they would have earned if the wire had been unloaded at their wharf.

2. Failing to unload at the respondents' wharf 6,000 tons of "freight" in each of the years of 1911 and 1912.

3. Failure to pay one-half of the checker's wages in the years 1908, 1909 and 1910.

The learned Chief Justice found in favour of the respondents as to the whole of their counterclaim, and directed a reference to the local Master at Hamilton "to inquire, ascertain and state what damages the defendants have sustained by reason of the matters in the defendants' counterclaim mentioned."

The evidence was very conflicting as to the terms of the contract, which both parties agreed had been entered into between them; and we are unable to say that the learned Chief Justice erred in coming, as he did, to the conclusion that the evidence preponderated in favour of the respondents.

That the contracting parties met in Toronto in the spring of 1908 and there arrived at an agreement by which the respondents, who had acted as wharfingers for the appellant in the previous year, were to be continued in that employment on terms which were then settled, was not disputed; but there was a direct conflict of testimony as to the terms of the agreement. According to the testimony of Edward H. Browne and Edward J. Jordan, the employment was to be for five years (1908 to 1912 inclusive), and the agreement was that the appellant was to be bound to unload at the respondents' wharf at least 6,000 tons of "freight" in each year, and was to pay one-half of the wages of the checker who was employed at the respondents' wharf, but according to the testimony of Hugh Young, the traffic manager of the appellant, the agreement was for the years 1908, 1909, and 1910 only, and there was no agreement as to the quantity of "freight" to be unloaded at the respondents' wharf and no agreement that the appellant should pay any part of the checker's wages. Young's evidence was corroborated as to the term of the employment and as to the checker's wages

by Frank Plummer, the vice-president of the appellant company; though, as the Chief Justice pointed out, Mr. Plummer's testimony is open to the observation that at first his statement was that three years was the term of the employment, and it was qualified by the statement "as far as I recollect," though he afterwards said "Browne wanted a longer term and we would not agree." Young's testimony was, I think, not satisfactory. His statements as to the material points when examined for discovery differed from those made at the trial, and no satisfactory explanation was given for the difference.

Six persons were present at the interview at which the agreement was come to; the four persons whom I have mentioned, Mr. Charles Plummer, who is dead, and Captain Fairgrieve, who appears to have been ill at the time of the trial and was not called as a witness.

Of the witnesses called, Jordan is the only one who is not more or less interested in the result of the litigation. He was at the time the agreement was made and down to January, 1910, in the employment of the appellant, and his testimony was clear and positive.

That four of the steamers of the appellant unloaded at the respondents' wharf in the spring of 1911, and that the name of the respondents appeared on the advertising cards for 1911 of the appellant, are circumstances that tend to strengthen the respondents' case, and for which no satisfactory explanation, if the agreement terminated with the year 1910, was given.

The most surprising part of the evidence was that as to the written agreement, which was undoubtedly prepared shortly after the interview in Toronto. What was said by Young to be a copy of it is produced by him. It is typewritten, and unsigned. The term of the employment is stated to be the seasons of 1908, 1909, and 1910. It contains no provision as to the quantity of "freight" to be unloaded at the respondents' wharf, and none as to the payment by the appellant of any part of the checker's wages; but it does contain a provision that the respondents were to supply all checkers, which appears to be inconsistent with an obligation on its part to pay one-half of the wages of the checker. Young testified that he caused the agreement to be reduced to writing and "sent two copies to Mr. Browne;" that he thought they were executed by the appellant, that he did not receive them back, and that he re-

tained a copy (the one which he produced). No letter to the respondents accompanying the copies said to have been sent to them was produced by the respondents, nor was a copy of it produced by the appellant. That some agreement was sent to the respondents is clear; for on the 8th of May, 1908, the respondents wrote to Young returning, as they said, "the contract between ourselves and the Canadian Lake Line, with a few alterations; if they meet with your approval, add them to the enclosed copy and return it to us." It would appear from this letter that two copies of the agreement had been received and that on one of them certain alterations had been made which are mentioned in the letter, and it is probable that, as Browne testified, the altered copy was signed by him and returned, and that the other copy was also returned, but unaltered, leaving the alterations to be made by Young, and that the request to return the contract has reference to this unaltered copy.

Two of the alterations suggested appear to be concerning matters as to which no provision had been made in the verbal agreement, viz., as to the position in which the "freight" was to be stored, and as to moving the boats when they interfered with a steamer desiring to unload.

All the other suggested alterations are as to matters which are stated to have been already agreed on. According to the testimony of Browne, the agreement sent to the respondents provided for a term of five years, and he explains his reference in the letter to something happening in four years by saying that as they were then in the first year the reference was to the remaining four years.

The letter makes no reference to the wages of the checkers, and I do not find in Browne's testimony any statement that the agreement which he received from Young contained a provision that the appellant was to pay half these wages. If it did not, it is strange that an alteration as to it was not made or suggested in the letter. According to Young's testimony he never received this letter; and no evidence as to the mailing of it was given by the respondents. There is evidence, however, from which it may be inferred that it was received by the appellant; for Browne testified that after returning the agreement to Young he saw Mr. Charles Plummer twice, and "asked him if he would be kind enough to send them down, and he said he was very busy at the time and they were trifling alterations," but that he never got them.

It was argued by Mr. Bicknell that the agreement being, as it was, one not to be performed within a year and not being as he contended, in writing, was not enforceable, and he applied for leave to set up the Statute of Frauds as a defence to the action.

I am inclined to think that there was a sufficient memorandum in writing to satisfy the statute. According to Young's testimony, the agreement sent to the respondents was signed by the appellant. The alterations were made on the face of one of the duplicates which was signed also by the respondents, and there was a sufficient assent to the alterations by the appellant. The documents were not under seal, and although an unauthorised material alteration of them, would have vitiated them, I apprehend that a verbal assent to the alterations which were made would be sufficient to make the document as altered binding on the appellant and that re-execution was not necessary.

If, however, that is not the proper conclusion, I do not think that the appellant should be allowed to amend by setting up the Statute of Frauds as a defence. If, however, such leave to amend had been asked at the trial it should have been granted. The respondents in their pleading rely upon a written agreement, and if at the trial they failed to prove such an agreement, and sought to rely on the parol agreement of which they gave evidence, the authorities are clear that the appellant should have been allowed to amend by setting up the statute if application to amend had then been made.

This Court no doubt has power to allow the amendment; but the exercise of the power is in its discretion, and an amendment should not be allowed except to secure the advancement of justice, the determining of the real matter in dispute, and the giving of judgment according to the very right and justice of the case, (Rule 183) and in *Sales* v. *Lake Erie and Detroit River Rw. Co.,* (1890), 17 P. R. 224, acting on the corresponding rule then in force, the Court of Appeal refuse to permit the defendants to set up a defence which they had not raised at the trial.

I may point out here that one of the cases cited in the judgment *Odhams* v. *Brunning* (1896), 12 T. L. R. 303, was reversed on appeal to the Lords (1896), 13 T. L. R. 65.

The Statute of Frauds is a defence which a litigant need not avail himself of, and there may be litigants who decline

to use it as a defence against a just claim; and, it appears to me that where, as in this case, is was obvious at the trial that the Statute of Frauds would be a complete defence to the respondents' counterclaim if they had failed to prove an agreement in writing and no application for leave to amend was made, the appellant may fairly be assumed to have deliberately refrained from making the application and should not now be permitted to amend.

Although the respondents' case as to the wages of the checker was not made out very satisfactorily, for the reasons I have already mentioned and the additional reason that no claim for them was made until December, 1910, I am unable to say that the learned Chief Justice was clearly wrong in allowing them. It may be that he accepted the excuse given by Browne for not claiming them sooner, and there was evidence that it was part of the agreement made in Toronto that the appellant should pay one-half of the checker's wages.

The only other item allowed was that in respect of the wire unloaded at another wharf, and as to this there was evidence that amply warranted the conclusion that there was no justification for not unloading the wire at the respondents' wharf.

HON. MR. JUSTICE MAGEE:—I agree that the weight of evidence leads to the conclusion that there was a written contract for five years. As to the plaintiff's application to plead the Statute of Frauds against the counterclaim it is, I think, unnecessary and therefore should not be allowed. The counterclaim alleged a written contract. If the defendants could not prove one they would need to amend. Having proved one they did not require, and do not now ask any amendment. If they were being allowed to amend now in order to do justice, then the plaintiffs should, I think, have liberty also to amend by setting up the Statute, which hitherto, as against the defendants' allegation of a writing, was not called for.

HON. MR. JUSTICE LENNOX. NOVEMBER 28TH, 1913.

BROCKVILLE & PRESCOTT ROAD CO., v. COUNTIES OF LEEDS & GRENVILLE.

5 O. W. N. 362.

Way—Highway—Tolls Road Expropriation Act, 1 Edw. VII. c. 33—Amendment 2 Ed. VII. c. 35—Expropriation of Road—Award of Arbitrators—Road not Taken or Paid for in Year—Action for Costs of Arbitration—Parties to Arbitration—Liability of County—Liability of Township—Tolls Road Act, 2 Geo. V. c. 50, sec. 76, 80—Application of—Retroactivity—Construction of Statutes.

LENNOX, J., *held*, that under the former Tolls Road Expropriation Act, 1 Edw. VII. c. 33 as amended by 2 Ed. VII. c. 35 where a toll road is expropriated the county is a necessary party to the arbitration proceedings and is liable to the owners of the road for the costs thereof in case the road is not taken and paid for within one year.

United Counties of Northumberland and Durham v. *Township of Hamilton and Haldimand*, 10 O. L. R. 680, approved.

Action to recover $875.30, the costs of arbitration proceedings under the Toll Roads Expropriation Act 1901, to ascertain the amount to be paid by the defendants as compensation for the abolition of tolls on the plaintiffs' road from Brockville to Prescott. The arbitrators found that the defendants must pay $17,321, and the plaintiffs' road not having been taken or paid for within a year, plaintiffs sued to recover these costs.

F. J. French, K.C., for plaintiffs.

J. A. Hutcheson, K.C., for defendants.

HON. MR. JUSTICE LENNOX:—This case is not distinguishable in principle from the *United Counties of Northumberland and Durham* v. *Townships of Hamilton and Haldimand*, (1905), 10 O. L. R. 680. There the counties paid the owners' costs and brought action to recover them from the townships in which the petitions originated; here the owners bring action for costs exactly of the same class, and the defendants say we are not liable to pay these costs, you should recover them from the townships in which the petitions originated. In this case, differing in this respect from the Northumberland case, the petitions were presented to the county council and the county council took the proceedings provided by The Toll Roads Expropriation Act without the intervention of the township councils. If

this circumstance were material it would go to assist the plaintiffs, but I agree with the learned Chancellor that it does not affect the rights or liabilities of the parties.

There is another point of difference, namely, that upon the arbitration proceedings in this case the township municipalities were represented by counsel, but this was in spite of the protest of the plaintiffs.

It would not be proper to say here whether this may or may not affect the obligations, if any, the one to the other, of the township and county municipalities; It is enough for the purposes of this case to say that the representation of the township under such circumstances cannot prejudice the rights of the plaintiffs.

The defendants contend that they are not or should not have been treated as parties to the expropriation proceedings, that in all they did they merely executed a duty imposed upon them by statute, and they were not, in law at all events, represented upon the arbitration proceedings. The clerk of the county and the warden gave evidence to shew that counsel was not authorized to appear for the county. As a matter of fact H. A. Stewart, K.C., the county solicitor, appeared at the arbitration stating that he represented the counties and one of the townships, and the subsequent proceedings appear to have been conducted upon this understanding. Mr. Stewart no doubt acted in good faith, but he was not called as a witness to state how the error occurred, if any there was. This circumstance again is immaterial.

It is quite true that the duty of doing what the defendants did is imposed by statute, but this to my mind, so far from relieving them, makes them the actors on one side in the transaction; and there being no other source of payment indicated by the statute, and it being clearly provided that these costs, in the event which has happened, are to be paid to the plaintiffs, the inference is very strong, and I think conclusive, that as between the parties to this action these costs are to be paid by the defendants.

I am referred to 2 Geo. V., ch. 50, secs. 76 and 80, and it is urged that these provisions were in force at the time the costs became "certainly payable." Subject to appeal, the rights and liabilities of the parites were determined when the award was filed and to hold otherwise would I think be clearly contrary to principle and in conflict with

the Interpretation Act 7 Edw. VII., ch. 2, sec. 7, sub-sec. 46, sub-clause (c). I have endeavoured to trace the legislation since 1901 and I am of opinion that this case is to be decided under the statutes which governed in the *Northumberland Case,* namely:—1 Edw. VII., ch. 33, and 2 Edw. VII., ch. 35. The difficulty arises, I think, from a failure to link the sections with their amending sections and to distinguish clearly between principal and subordinate sections. By the Act of 1902, ch. 35, above referred to, secs. 3, 4 and 5 of the Act of 1901 are repealed and secs. 3 and 4, each having a number of sub-sections, take their place. These sections are to take the place, by substitution and number, of the old sections, but there is no longer a sec. 5. Then it must be kept clearly in mind that the new sections are broader than the old ones and provide for a distinctly new class of expropriation not touched at all by secs. 3, 4 and 5 of ch. 33. Further, it must be noted that sec. 3 alone with its sub-secs. (1) and (2) cover the whole ground formerly covered by secs. 3, 4 and 5, namely, the case of a single township within a county desiring to expropriate—in which the township and the owners are the only actors in the transaction and the case of the county, or the ratepayers in two or more townships within a county, desiring to expropriate—in which case the sole actors are the county upon the one side and the owners upon the other. The result is that secs. 4 and 5 of the Act of 1901 are carried up into sec. 3 as introduced by the new Act, and there ceases to be a sec. 5. Then as to sec. 4, the number is retained and takes its place in the old Act by virtue of the new Act as sec. 4, but it no longer deals with a township or two or more townships within the same county, but with an entirely new subject, namely, a toll road lying partly in a county and partly within a city or separated town, or partly in another county and provides for expropriation in such case and the procedure by which it can be effected. A new section is also substituted by the Act of 1902 for sec. 9 of 1901, and sec. 10 is amended, but there is nothing to be said about this except that the change is necessitated by the new field opened up by sec. 4, and these changes go to prove what I have pointed out.

The whole contention in this case however arises out of a misconception of the meaning and office of the next amendment, namely: "4. Sub-sec. 8 of sec. 8 of the said

Act is amended by adding thereto the following: In any case falling under sec. 4 the road shall be taken and the amount agreed on or awarded shall be paid within one year as aforesaid unless both municipalities elect that the road shall not be taken and so notify the owner and in that case the cost to which the owner has been put shall be paid by the municipalities in equal shares." What municipalities are to pay "in equal shares," and what sec. 4 is referred to? Manifestly the sec. 4 introduced into the old Act by the new Act and the municipalities dealt with by that section. It has no reference whatever to two or more townships within the same county. This meaning is further manifested in sec. 68 of 4 Edw. VII., ch. 10; and as to sec. 80 of the Act of 1912, if it could be regarded as affecting an award made before it was passed, it would be enough to say that the townships passed no by-laws of any kind and the counties did, albeit they were compelled to do so under the Act as contended.

Then as to the contention that the defendants should not have been made parties. I have already intimated that they are statutory parties and so far as I can see, there is no authority for treating the townships as substitutes. But aside from this how can effect be given to this objection now? The award was made on the 23rd and filed with the defendant's clerk on the 24th of January, 1912. It came to the notice of the county council and was discussed. The defendants are parties to the award on the face of it and the arbitrators state that the majority of them "do hereby determine and award that the price or compensation to be paid by the county municipality to the owners of the road in order that the tolls on each road may be abolished is the sum of $17,321," and they fix the costs at $875.30.

The defendants have not appealed. That was their remedy, if any, it seems to me.

The costs in detail are not disputed. It was agreed at the trial that the defendants if liable at all are liable for the sum claimed. There was a demand for payment served, but I do not know when. I cannot see that a demand was necessary. The costs are payable at a time certain, that is a year after the making of the award.

There will be judgment for $875.30 with interest thereon from the 25th of January, 1913, and the costs of the action.

HON. MR. JUSTICE LATCHFORD. DECEMBER 4TH, 1913.

TOWN OF WALKERVILLE v. WALKERVILLE LIGHT & POWER CO.

5 O. W. N. 429.

Municipal Corporations—Electric Light and Power Franchise—Grant of Permission to Erect Poles in Lanes of Town — Approval of Council to be Obtained to Location—Unreasonable Withholding of—Ulterior Motives—Right to Carry Wires across Streets Implied—Interim Injunction—Dissolution of.

LATCHFORD, J., *held*, that where a company were granted a franchise by a town for the distribution of light and power, and by the terms thereof were given power to erect poles in the lanes of the town, subject to the direction and approval of the council, that the council were not legally justified in delaying the granting of such approval for ulterior motives.

Motion to continue interim injunction granted *ex parte* on November 22nd by the Senior Judge of the county of Essex, restraining the defendants from completing the construction of their electric line in the alley between Monmouth and Walker roads, in the town of Walkerville.

E. F. B. Johnston, K.C., and J. Sale, for plaintiffs.

A. W. Anglin, K.C., and J. H. Coburn, for defendants.

HON. MR. JUSTICE LATCHFORD:—The material upon which the injunction was granted was the writ of summons issued on the same day, and an affidavit of Harold E. Hatcher, a member of the municipal council. The writ claims an injunction restraining the defendants from erecting and constructing electric lines in Walkerville, especially the line between Monmouth and Walker roads without the permission of the town.

Mr. Hatcher's affidavit sets forth that in 1909 a certain franchise was granted to the defendants for the distribution and sale of electricity in the town of Walkerville, containing provisions that no poles or wires shall be placed along any public street without the consent by resolution of the municipal council first had and obtained; but that all wires and poles shall be erected in the lanes of the town, and the location of every such pole shall be subject to the direction and approval of the council. It then states that a line is being erected from the boundary of W. to the distributing station of the defendants, for the purpose of carrying power from

Sandwich; that such line is not the ordinary distributing line for the customers of the defendants, and that in several parts of the town poles and wires had been placed in the past by the defendants without the permission of the council.

Mr. Hatcher then says that a by-law has been passed for the submission to the electors of the question whether or not a contract shall be made with the Hydro-Electric Commission for the supply of Hydro-Electric power within the town: and that the "town has under consideration," should such vote be favourable, the desirability of expropriating the plant of the defendants.

Paragraph 6 of his affidavit follows: "That permission was applied for at the meeting of the council held about the 11th of November for this line." Presumably "this line" means the line of the defendants who had previously been erecting their poles without the express direction or approval of the plaintiffs.

At the meeting of November 11th, the approval of the location of the poles and wires of the defendants was withheld, Mr. Hatcher says, "Until after the submission of the question to the people on December 6th, 1913."

The fact that the defendants about the 20th November proceeded without the permission thought necessary to erect their poles in the lane is then stated and is not denied.

The secretary of the Hydro-Electric Commission informed Mr. Hatcher that to allow the defendants to complete their line would jeopardize the interests of the town should the Hydro-Electric contract be accepted.

The learned County Judge in granting the injunction, gave the plaintiffs leave to supplement the affidavits upon which the order was made.

Two additional affidavits are before me—one made by Mr. Hatcher, and the other by the mayor, Mr. Rovel. They add little or nothing of moment to what was before the Court in the first instance, except possibly that the high voltage—22,000—which is to be conducted along the defendants' line is regarded as a source of danger to the public.

An affidavit filed on behalf of the defendants identifies the by-law granting the franchise, and discloses a fact not disclosed to the County Judge, that the defendants had on October 17th applied for approval of the location of their line on the west side of the lane between Monmouth and Walker roads. The defendants had previously erected a

line on the east side, and in their application expressed their intention of removing the existing poles as soon as the new lead was completed.

I regard this application for permission as material, and I greatly doubt that the interim injunction would have been granted had the County Judge been informed that the application had been made fully three weeks before the date mentioned by Hatcher. The terms of the franchise held by the defendants do not appear to have been before the learned Judge.

One franchise gave the defendants permission and authority "to transmit, distribute, and sell electricity—and to erect and maintain such . . . poles, wires, etc., as it may require for the purposes of its business . . . subject to the reservations, provisions, and conditions (among others) that no poles or wires shall be placed along any public street without the consent by resolution of the council first had and obtained; but all such poles shall, as far as possible, be erected in the lanes of the town, and the location of every such pole shall be subject to the direction and approval of the council."

The works—whether of construction, maintenance or repair—authorized or required by the by-law "are to be done . . . so as to cause . . . the least possible . . . danger or damage . . . to persons or property."

The company under its franchise from the plaintiffs has the right to erect poles and wires for the purposes of its business. It is erecting poles and wires for such purposes. It is not erecting them along a street, but along a lane. In so doing it may cross a street or streets with its wires; but the consent of the plaintiff to be expressed by resolution is made necessary only in the case of poles and wires erected along any public street. It would be impossible, in a town like Walkerville, or in any similar town, to erect an electric transmission line without crossing some streets. This fact must have been present to the minds of the plaintiffs' counsel when the placing of "poles and wires . . . along any public street" was made subject to the condition that the formal consent of the council should be first obtained; while, on the other hand, the erection of poles in the lanes of the town is subject only to the "direction and approval

of the council" in regard to the "location of every such pole."

The location or situs occupied by the poles of the defendants in the lanes mentioned in the injunction is the only matter in the circumstances disclosed requiring the sanction of the plaintiffs. That sanction should not be unreasonably withheld. The defendants cannot grant a right and prevent by undue delay the proper exercise of that right. The application made on October 17th was a proper request for "direction and approval" of the location of the poles in the lane between Monmouth and Walker roads, and should have been complied with without undue delay. The reasons given for not granting the required consent are unreasonable.

The motion to continue the injunction is refused with costs.

HON. MR. JUSTICE LENNOX. DECEMBER 2ND, 1913.

ORTON v. HIGHLAND LUMBER CO.

5 O. W. N. 438.

Contract—Work and Labour—Manufacture of Lumber—Quantity — Voluntary Bonus—Novation — Evidence — Counterclaim—Trespass.

LENNOX, J., in an action for a balance due for work alleged to have been done by plaintiffs for defendants under a lumbering contract gave judgment for the plaintiffs for $1,426.55 with costs.

Action to recover the amount alleged to be due for work done under a contract for getting out lumber for defendants.

M. E. Tudhope, for plaintiff.

A. E. H. Creswicke, K.C., and A. B. Thompson, for defendants.

HON. MR. JUSTICE LENNOX:—I do not propose to allow the defendants anything on account of the alleged trespass. This is not alone by reason of the fact that no claim is made in the pleadings. There is no satisfactory evidence that there was a trespass—no survey made, and no boundary line established. It was the duty too of the defendants to instruct the plaintiff, and to my mind, the evidence pre-

ponderates in favour of the conclusion that plaintiff's men did not exceed their instructions in this respect. At all events there is no damage shewn. The defendants got the timber and unless they paid beyond its value in the trees, which is not shewn, they practically sustained no loss.

I have come to the conclusion that the plaintiff is entitled to recover the extra $1 a thousand, agreed to by the letter of 14th May, 1910. It is significant that although this arrangement was not concluded until September, the original date is retained—a date, I think, perhaps intended to carry the matter back to the date of executing the main contract. I regard this as distinctly an amendment of the contract as to prices to be paid. On the contract produced by the defendants I find endorsed "Gave him a letter dated May 14th, 1910, stating we would voluntarily give him $1 (50 cents is struck out, shewing that endorsement was promptly made when 50 cent increase agreed to) per 1,000 ft. more than agreement calls for—for the season of 1910-11 only." It was treated as an engrafted term of the agreement and payments were made upon this basis; otherwise it is difficult to see how the alleged overpayment of $604.49 could arise.

This was intended to stimulate the plaintiff, and was acted upon and it is a fact that the arrangement was come to before any work was begun by the plaintiff.

It is argued that the cancellation agreement of May 29th, 1911, cannot help—is in fact prejudicial to this part of the plaintiff's claim, particularly because it acknowledges that the plaintiff has not cut the stipulated one million feet.

I cannot agree with this contention. The agreement is clearly intended to effect an amicable settlement of all matters between the parties upon an amicable basis and for securing to the defendants chattels and goods which they could not otherwise have got, and to provide that the plaintiff will at his own expense procure full and peaceable possession for the defendants including the ouster of one Morrison from the premises; and the defendants thereupon paid over to the plaintiff $529.17 in cash, for the chattels then given up. If the defendants had not then understood that the extra $1 a thousand was to be paid, this money should have been applied on the alleged overdraft.

There were outstanding questions between the parties. The plaintiff was not bound to sign anything, not bound to

sell his chattels—practically perhaps, whether legally or not, not bound to take active steps to put the defendants again into full enjoyment of their property, and they amicably and "mutually agree":—

"1. The said recited agreement of May 11th, 1910, is hereby cancelled and determined as of this date by mutual consent, provided that this shall not be deemed to affect the rights of the said party of the first part to recover payment of the balance owing him (if any) for lumber cut and delivered under the said agreement prior to this date;" I think the meaning clearly is: we will settle up and part now as if the agreement between us covered only the quantities actually cut and delivered; you will not ask to go on and we will not ask you to go on further.

Then as to the quantity of lumber to be paid for, I think in the circumstances of this case I am bound to take the best evidence of quantity even if it is not arrived at in the specific method primarily contemplated by the contract. I am of opinion, however, that what I propose to be governed by is within the specific terms of the contract. The agreement relates more to the time and manner of payment than ascertainment of quantities, but there is no doubt that both points were intended to be covered. The primary method was measurement, the secondary method an estimate satisfactory to both parties. In the result I find the quantity partly by reference to both of these methods. It is not said by whom the measurement is to be made, and in such a case the buyer's measurement is not to be accepted if another measurement is manifestly more reliable. Advances are to be made "and the balance shall be paid when the lumber is shipped away by actual measurement or an estimate may be made satisfactory to both parties," etc. Retaining the obvious meaning, but transposing the words for the sake of clearness, the contract is: "the balance, by actual measurement, shall be paid when the lumber is shipped away." I find that there was an actual and careful measurement made by Napoleon Gouin of the whole season's cut as the lumber passed over the trimmers at the mill—that Gouin is an exceptionally competent man, that he kept a record of the quantities, that he knew the grades the defendants were liable to be charged with, and included only these grades in his measurements, and that these measurements were regu-

larly returned to and kept track of by the plaintiff and his foreman Armstrong on the one hand, and Weaver, who was cutting by contract, on the other; and I am satisfied that the quantities which Gouin returned and which he swears he regularly graded and measured from day to day, namely:—

Hardwood	710,444
Softwood	77,750
Culls	95,124
Total	883,318

are, subject to a possible variation in grading, substantially correct. But the conditions entitling the plaintiff to payment are present in another way. The defendants made an actual measurement of part of the season's cut and an estimate of the remainder of it, of the grades to which they were entitled, and a significant circumstance in connection with this is that they both go to confirm the accuracy of Gouin's inspection, grading and record. Gouin did not, he says, count or measure scouts, and if I make a reasonable reduction for scouts which were shipped to Sundride the totals will be almost identical. If the plaintiff is "satisfied" with the defendants' estimate, the defendants cannot very well complain.

It was argued that the estimate made by Mr. O. D. Tait and his assistant was a rough estimate. Mr. Tait does not say this. He says, and others say as well, that these estimates come pretty close, and that he realized when making them that the plaintiff was drawing pretty close.

I find as a fact that the plaintiff was assured that he need not be anxious about the culling being made by the New York buyers and that what they put out would be gone over again. This was not done. I find, too, that plaintiff relied upon being notified when shipping out would be resumed, and he was told he would be, but he was not notified.

The evidence shews me that quantities of lumber were taken away of which the defendants only made discovery after suit or shortly before the trial, and I am far from believing that they have discovered all the discrepancies of this character. I have come to the conclusion that there is lumber gone of which the defendants have no record.

Upon this question, too, the payment $530 in May, 1911, and the subsequent offer to waive the alleged overpayment and pay an additional, may be invoked as shewing that the defendants were doubtful as to the accuracy of the returns made them, but this is not by any means an unanswerable argument. The scouts belonged to the plaintiff. The defendants must account for what they sold at the price they received. namely: 14,620 ft. at 4c. per M.=$58.48.

It is admitted that the defendants are entitled to credit for:—

Cash payments	$9,100 00
Goods	79 66
Rent of Bolter as agreed	6 00
	$9,185 66

The goods and the rent are both items of payment, not counterclaim. The defendants also set up by way of counterclaim to be paid $60.40 for piling lumber and drawing pickets to complete the work, which the plaintiff undertook to do. This, if established, would merely go in reduction of plaintiff's claim. But I cannot find any satisfactory evidence in support of these items.

There were 7,000 feet of the timber measured by Gouin not drawn to the track. The expense of hauling should be allowed to the defendants. There is no evidence as to what this is worth—$30 will more than cover it.

I am not sure that the extra dollar a thousand was to include culls, and, being uncertain, I have decided not to allow it. As I have already indicated, Gouin did his work carefully and well, and other circumstances in the case shew that his total quantity is practically beyond dispute. The daily cut was a comparatively light one, 11,000 or 12,000 feet a day, and the grading was of the easiest character. The evidence conflicts as to whether this gives the man at the trimmer a better chance to be accurate than in the case of rapid cutting and numerous grades, but I am satisfied that it does. There is evidence, too, that the grading is liable to be out a little, and this seems so reasonable that I have decided to give effect to this evidence by reducing the higher grades measured by Gouin before calculating what the plaintiff is entitled to. Weighing the evidence carefully, I think

there should be seven per cent. deducted from the hard and soft wood and carried into the culls. The 95,000 culls should not be reduced by counting seven per cent. of them as scouts as the total of culls augmented by the percentages is still far below the 180,000 admitted by the defendants. Reduced by seven per cent. Mr. Gouin's figures are: Hardwood 660,714; soft wood 72,308; and culls 95,124 + 49,730 + 5,442 = 150,296, making total of 883,318 feet as before.

The plaintiff is entitled to recover for:—

660,714	feet of	hardwood	@ $13.25	per M.....	$ 8,754 93
72,308	" "	softwood	" 11.50	"	831 54
150,296	" "	culls	" 6.00	"	901 57
14,620	" "	scouts	" 4.00	"	58 48
Items admitted amounting to.....					95 69
Total					$10,642 21
Less haulage of 7,000 ft.....				$ 30.00	
Payments				9,185.66	9,215 66
Leaving a balance of.....					$ 1,426 55

There will be judgment for the plaintiff for $1,426.55 with interest from the 12th of September, 1912, and the costs of the action.

The counterclaim will be dismissed without costs.

Stay of execution for 30 days.

HON. SIR JOHN BOYD, C. DECEMBER 1ST, 1913.

CAIRNS v. CANADA REFINING & SMELTING CO.

5 O. W. N. 423.

Nuisance—Smelter—Noxious Fumes and Vapours—Special Damage to Plaintiff—Death of Cow—Public Nuisance—Attorney-General—Voluntary Abatement of Nuisance by Defendants—Evidence—Damages—Refusal of Injunction.

BOYD, C., refused to grant plaintiff, a resident near a smelter, alleged to be a nuisance, an injunction, as the nuisance had been abated by the defendants prior to the issuance of the writ and in any case the nuisance was a public one and the plaintiff suffered no special and peculiar inconvenience therefrom, but allowed plaintiff $80 damages in respect of the death of a cow occasioned through defendant's operations.

Soltan v. *De Held*, 2 Sim. N. S. 133, referred to.

Action for an injunction and damages in respect of an alleged nuisance caused by the operation of a smelter.

A. E. H. Creswicke, K.C., for plaintiff.

M. B. Tudhope, for defendants.

HON. SIR JOHN BOYD, C.:—A public nuisance is distinguishable from a private nuisance only in this, that the latter is an injury to the property of an individual, while a public nuisance is an injury to the property of all persons who come within the sphere of its operation; though it may be injurious to a greater or lesser degree as to different people within the area effected. The case is put by way of illustration (and pertinent to the present controversy) by Kindersley, V.C., in *Soltau* v. *De Held* (1851), 2 Sim. N. S. 133, 142: "Take the case of the operating of a manufactory in the course of which volumes of noxious smoke or of poisonous effluvia are emitted. To all persons who are at all within the reach of these operations it is more or less objectionable, mor or less a nuisance in the proper sense of the term . . . to those who are nearer it may be a greater inconvenience that it is to those who are more remote from it; but still, to all who are within the reach of it, it is more or less a nuisance."

Such is the present case as to the operation of this smelter for silver ore in the town of Orillia; its operations in the way of emitting or exhaling smoking vapour and fumes are liable to affect more or less prejudicially all persons living or owning property in that neighbourhood.

This is a case of alleged public nuisance, in regard to which the plaintiff take individual action, on the ground of particular damage. That means that he must prove some grievance of his own which is other and beyond that suffered by the general community in the vicinage.

In the case of a common ground of complaint from a public nuisance, *e.g.*, injury to trees or vegetation or to human comfort by the distribution of noxious vapours, the law does not permit each individual to bring his action for relief. The proper person, in such cases, is the Attorney-General, representing the community affected.

Though the pleadings in thhe action take a wide range, the material complaint is, that vapour emitted from the defendants' smelter is injurious to the life of animals, by reason of which the plaintiff has suffered the loss of a cow. That is a tangible deprivation of property, which, if proved, is capable of being estimated in money, and in that respect this action is maintainable.

The evidence proved, as I find, that there had been an excessive discharge of vapour from the defendants' works in 1912, and more or less deposit of arsenical dust upon the plaintiff's premises and his vegetables, such as corn and the like; and these, being fed to the cow, occasioned her death from arsenical poisoning. The analysis of the internal parts of the animal and the expert's evidence established this result. It is true that other animals are proved to have died in that neighbourhood in that year, but no examination was made as to the cause, and, though I may conjecture the cause, I do not judicially pass upon it. Nor is it necessary so far as the plaintiff is concerned and his item of damage. The evidence leads to the conclusion that the discharge from the vents of the smelter has been so greatly minimised by the introduction of improved modern methods as to do away with any substantial ground of complaint. This was the outcome of the partial destruction of the plant by fire and its enforced replacement in the early part of this year.

So far as the evidence touches on other topics, such as the dwindling and dying of trees and bushes and the tainted atmosphere, the plaintiff has suffered no injury or no special damage which would justify his separate action. For himself he gives evidence that there was some smell from the stuff that came from the smelter, which he describes as "nauseat-

ing like the smell of a cow's breath." His wife's account is that the smell affected her eyes, nose, and throat, and that they were almost suffocated at night. This refers to 1912, and it does not appear that such a state of things existed when action was taken in August, 1913. Other witnesses speak of the smell in curiously diverse ways, but this line of evidence as a whole only goes to shew a general cause of complaint, with no particular danger to any individual.

The plaintiff had no trees or shrubs and grew nothing on his place. Owners of other lots spoke of trees and bushes dying and dwindling; but proof is lacking as to the real cause in these instances. It may be that the cause is attributable to the vapour or powder discharged from the smelter, but some affirmative proof by testing or otherwise should have been given. Other witnesses are called for the defence—and some of them living closer to the smelter than the plaintiff—who say that their vegetables, bushes, and fruit trees have sustained no injury whatever. One cow was seen grazing near-by, and there is no complaint as to animals suffering this year.

The plaintiff's wife also complains that she washed her face once last year in rain water that was gathered in a barrel from the roof, where the dust is said to have drifted with the wind, and that her face became blotched and pimpled. The sediment in the barrel was afterwards analysed and found to contain about one grain of arsenic to about 44 gallons of water. Dr. Rogers (called for the plaintiff) was unable to say what would be the affect of this kind of water on the human body.

The evidence took a very wide range, but was lacking in pointed application as to the precise nature of the dust deposited and as to the precise nature and origin of the smells, *i.e.*, whether from arsenic or from some combustible used in the process; but the general impression left on my mind was that, if the situation continued as it was in 1912 in the working of the smelter, there would be a sufficient case made for an injunction; but the matter should be brought before the Court at the instance of the Attorney-General as for a public nuisance. The area said to be injuriously affected is all around the neighbourhood of the smelter in the town of Orillia, and if the smelter is carlessly handled or gets out of good repair, so that noxious fumes or vapours are sent forth, the health and comfort and conditions of life as to animal and

vegetable existence in that locality would suffer to a material extent.

Having regard to the constitution of the suit and to the failure of the plaintiff to prove any special damage except as to the cow, and having further regard to the evidence of the defendants that no appreciable damage can or will result from the smelter as now equipped and operated, unless it be the result of accident, I arrive at the same conclusion, after consideration, as I expressed at the close of the evidence and the argument, viz., that the plaintiff should recover damages to the extent of $80 for the cow, with costs of action on the lower scale and no set-off; but as to the injunction no order is made. This disposition of the main matter, however, to be without prejudice to further litigation in that respect, should circumstances justify it.

HON. MR. JUSTICE LENNOX. DECEMBER 15TH, 1913.

WASHBURN v. WRIGHT.

5 O. W. N. 515.

Master and Servant—Sharing of Profits—Action for Declaration of Partnership and Accounting—Master and Servant Act—10 Edw. VII. c. s. 3, s.-s. 2—"Statement or Return"—Meaning of—Evidence—Fraud—Reference.

LENNOX, J., gave judgment for plaintiff for an accounting in an action brought by the administratrix of the manager of a business against the proprietor under a contract whereby the profits were to be shared between them, holding that the facts did not bring a statement furnished by the defendant within the provisions of sec. 3, s-s. 2 of the Master and Servant Act 1910, so as to protect it from attack and that in any case it was fraudulent within the meaning of that Act.

R. R. McKessock and G. M. Miller, for plaintiff.

R. McKay, K.C., and Joseph Fowler, for defendant.

Action by plaintiff as administratrix of the estate of her husband Benjamin Washburn, for a declaration of partnership and an account, the action being founded upon an agreement dated July 2nd, 1911, for the carrying on of a semi-ready tailoring business in Sudbury, in which the defendant was described as the employer and Washburn as

employee and manager. The defendant set up that the relation created by the agreement was that of master and servant only, that he has duly accounted for the share of profits to which the deceased was entitled, that the account rendered to the administratrix shewing a balance of $585.41 coming to the defendant is correct, and that, at all events, the plaintiff was bound by sub-sec. 2 of sec 3 of the Master and Servant Act (1910), and must be content to accept the share of profits appropriated to the estate by the statement or return made by the defendant of the net profit of the business.

HON. MR. JUSTICE LENNOX:—This is a drastic provision and should be construed strictly. It is a provision for the benefit of the employer, and the employer must bring himself clearly within its provisions. The agreement was prepared by the defendant's solicitors, and it speaks in the language of the defendant. Under the present statute the statement is impeachable for fraud. A similar provision in R. S. O. ch. 157 did not contain this qualification, in words, but Mr. Justice Anglin held in *Cutten* v. *Mitchell* (1905), 10 O. L. R. 734, that this was to be inferred as the intent of the legislature. The learned Judge said: "Notwithstanding the sweeping terms in which the statute declares the finality of statements furnished by the employer, I cannot conceive that it was thereby intended to render fraudulent statements conclusive and unimpeachable;" and when the case subsequently came on before him for trial he found actual fraud in that the defendant contrary to the agreement, had withdrawn $5,000 from the sum appropriated as profits. A similar condition of things is presented in this case.

This is not an ordinary case of master and servant. The business carried on as "Washburn & Co." after the execution of the agreement was the continuation, though on a more extensive scale, of a business carried on in the same premises for many years before the making of the contract by Benjamin Washburn alone. The statute declares that an arrangement of the kind here made shall not constitute a partnership, "unless the agreement otherwise provides, or a contrary intention may be reasonably inferred therefrom." I have come to the conclusion that a "relation in the nature of a partnership" was not created.

The statutory provision upon which the defendant relies is as follows: "(2) Any statement or return by the employer

of the net profits of the trade, calling, business, or employment upon which he declares and appropriates the share of profits payable under such agreement shall be final and conclusive between the parties and all persons claiming under them, and shall not be impeachable upon any ground whatever, except fraud." The agreement provides that the net profits actually realized from month to month shall be divided monthly. To carry out this provision and comply with the statute the defendant would have to make a full statement or return of the net profits of the business down to the end of first month, and so from month to month, and appropriate Washburn his share of the profits upon that basis. This was never done. It may be that, not having been done in the lifetime of Washburn in the way contemplated by the agreement, that the defendant could yet invoke this statutory immunity from full disclosure by furnishing a statement of the kind prescribed by the statute before the matter comes to be dealt with by the Court, but if he has failed to do this, I think it is my duty even aside from the question of fraud to direct that the true state of accounts between the parties according to the actual facts shall now be ascertained. First, then, I find that the defendant never has furnished a statement of the net profits of the business carried on as "Washburn & Co." The net profits of this business are whatever it was worth at the time of Washburn's death over and above all sums of money properly paid out and all liabilities incurred on account of it and this sum less any stock added after the death of Washburn is the sum for which the business was sold. There has been no pretense of furnishing a statement of profits or appropriating one-half thereof to the Washburn estate upon this basis, but on the contrary, while the defendant charges up the total freight and express charges and all improvements, alterations and repairs and all expenses for fixtures to the business, and although the good will of the business, which was brought in by Washburn as late as July, 1911, produced a net profit upon the entire stock of 20 per cent., all this is eliminated from what purports to be statutory statement "of the net profits of the trade, calling, business or employment" and his appropriation of the estate's share thereof. The test of the profit to the defendant, if it was his business alone, is how much he was better off by going into it—and this is what Washburn was to get one-half of for turning over the good-will of his

business, and name and his services, to the new concern. He would be a loser if the stock depreciated in value or if the custom drifted away and the business became worthless as a going concern, and he must share in the profits too on the final winding up, if there is an appreciation in values.

Then what is meant by fraud in the statute? I have referred already to the judgment of Mr. Justice Anglin. What could it mean except a wilful withholding or misrepresentation of the profits on the basis of profits. The defendant appeared to be a fairly respectable man, though keenly alive to his own interests, and there are a lot of them who fail to be judicially impartial when it comes to separating their moneys from the moneys of some one else. The statement was not a fair one, and the defendant knew it, it was not an honest one, and he knew it, and, exercising this statutory judicial function of finally deciding between himself and his associate, and much more deciding between himself and the widow of his associate, necessarily ignorant of the facts, I cannot come to any other conclusion than that this statement in which the defendant charged up everything as if it had been a permanent business, whether the deceased got the benefit of it or not, omitted all the profits on sale, and omitted even the money received on the sale of fixtures and all the outstanding book debts—I say that I cannot come to any other conclusion than that the statement was intentionally misleading, and was fraudulent within the meaning of the statute.

There will be a reference to the Local Master to take an account upon the lines above indicated.

Further directions and costs reserved.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. DECEMBER 10TH, 1913.

CRICHTON v. EWYER.

Brokers—Agreement for 20 per cent. Commission—Sales of Mining Properties — Commission Payable only in Respect of Property Owned by Defendants at Time of Contract.

Appeal by the plaintiffs from a judgment of HON. MR. JUSTICE MIDDLETON, pronounced 10th October, 1913.

Action by plaintiffs, mining brokers, under an alleged agreement for a 20 per cent. commission upon all sales of mining properties made by defendants through persons introduced or sent to them by plaintiffs.

HON. MR. JUSTICE MIDDLETON, at trial, dismissed the action with costs.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR. WM. MULOCK, C.J.EX. HON. MR. JUSTICE LATCHFORD, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH, on 10th December, 1913.

D. O. Cameron, for the plaintiffs, appellants.

R. McKay, K.C., and W. J. Clark, for the defendants, respondents.

Their Lordships' judgment was delivered by

HON. SIR WM. MULOCK, C.J.EX. (V.V.).—In this case we are of opinion that we should not disturb the judgment entered by Hon. Mr. Justice Middleton, dismissing the plaintiff's action.

It is a pure question of fact, and the evidence shews that the commission was to be payable only in respect of the property owned by the defendants at the time of the contract.

The plaintiff cannot complain because of that view being taken of the evidence, as he has so sworn himself.

We do not find any reason for discrediting him, and he must take the legal consequences.

Further, if the agreement that was contemplated between the parties in the following February had been carried out, it was only applicable to the future, and would not have put the plaintiff in any better position than he was in previously, as the sale had already taken place.

This appeal will, therefore, be dismissed with costs.