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APPELLATE DIVISION.

MARCH 9TH, 1914.

NEOSTYLE ENVELOPE CO. v. BARBER-ELLIS LIMITED.

Contract—Sale of Right to Manufacture and Sell Patented Envelopes—Agreement to Pay Royalties—Breach — Justification—Representations—Post Office Regulations — Evidence —Repudiation of Contract—Grant to Another of Exclusive Right to Manufacture and Sell—Duty to Mitigate Loss.

Appeal by the plaintiff company from the judgment of FALCONBRIDGE, C.J.K.B., 4 O.W.N. 1585, dismissing the action, which was brought for damages for breach of a contract.

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

C. S. MacInnes, K.C., and Christopher C. Robinson, for the appellant company.

G. H. Kilmer, K.C., for the defendant company, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O., who, after setting out the agreement and referring to the pleadings and the findings of the trial Judge, proceeded:—

It may be assumed in favour of the respondent that what the parties were negotiating about was the right to manufacture and sell envelopes that, to use the language of the Chief Justice, "would answer the requirements of the Canadian post office department so as to send the matter enclosed therein at the lower rate of postage;" and it may be that, if the only envelope that was covered by the patent and which the respondent had acquired the right to manufacture and sell was the envelope exhibit 7, a, b, c, and d, it would have been proper to conclude

that, inasmuch as that form of envelope could not be used for sending matter at the lower rate of postage, the consideration for the agreement would have wholly failed; but that was not the only form of envelope covered by the patent which the respondent acquired the right to manufacture and sell. An envelope of the form of exhibit 9 is, I think, covered by the patent, and there is no question that it could be used for sending third-class matter by post. There are, as it appears to me, as wide differences in the form of the hook between exhibits 7, a and b, and exhibit 7, c and d, as there are between exhibit 9 and any of these exhibits. . . .

There is also uncontradicted evidence that millions of envelopes of the same form as exhibit 9 have been and are in use in Great Britain and the United States; and, according to the testimony of Mr. Dawson, his firm has made a sale of 150,000 of these envelopes, and no complaints have been made by purchasers that there was any difficulty with the post office; and his firm has also sent a few of them through the post office, and there has been no difficulty with them.

There is, therefore, in addition to the testimony of the appellant's vice-president that the envelopes are safe, secret, and secure, the corroboration of it by the evidence to which I have just referred, which is, in my opinion, more to be relied on than the theories propounded by Mr. Maybee, the respondent's expert witness; and I cannot think it possible that such large numbers of the envelopes would be used in Great Britain and the United States, or such large numbers of them would have been sold by Mr. Dawson's firm, if they were open to the objection made by the respondent that they were not safe, secret, and secure.

My conclusion is, that the respondent has wholly failed to prove that envelopes made in accordance with the specifications and claim of the letters patent cannot be used without contravening the postal regulations of Canada, and that the respondent also failed to prove that envelopes of the form of that marked exhibit 9 are not "safe, secret, and secure," and that the contrary is the proper conclusion on the evidence.

It is, I think, open to grave question whether, if the respondent had fairly presented the case to the post office authorities, it would not have obtained a favourable ruling as to the envelopes marked 7, a, b, c, and d.

The postal regulations of the United States as to third-class matter do not substantially differ from the Canadian regulations; and I cannot think that millions of these envelopes would

have passed through the post offices of the United States if the objections to them which the respondent practically invited the Canadian post office officials to raise had really existed. It is plain, I think, from the testimony of Mr. Ellis, that he, after sleeping over the matter, rued the bargain he had made, and at once set about to find means by which the respondent could escape from the obligation it had entered into.

In addition to the reasons which, as I have stated, lead me to the conclusion that the defence of the respondent fails, I am inclined to think that the respondent relied upon Mr. Ellis's judgment as to the envelopes shewn to him answering the representations that are said to have been made to him. They were large manufacturers of envelopes, and presumably understood the postal regulations of Canada as well if not better than the appellant's vice-president, who was a resident of the United States, and Mr. Ellis examined the envelopes 7, a, b, c, and d, and was competent to judge whether, when the envelope was sealed, the flap could be withdrawn without tearing or destroying the envelope. Even the learned Chief Justice, who is not an expert, was able to form an opinion, an erroneous one, I, with great respect, think, upon the matter, by the ocular demonstrations which were made during the progress of the trial.

For these reasons I am of opinion that this defence fails.

It was apparently argued at the trial, as it was before us, although it is not set up in the statement of defence, that by having on the 10th August, 1911, given to M. V. Dawson & Co., of Montreal, an exclusive license for the manufacturing and sale of the patented envelope for part of the territory covered by the license to the respondent, the appellant had acquiesced in the position taken by the respondent, and was, therefore, not entitled to claim damages for the breach of the agreement of the respondent to pay the royalties.

That contention is clearly not well-founded. Before the dealing with Dawson & Co., the respondent had repudiated the agreement, and it was the right of the appellant, as it did, to treat the repudiation as a wrongful putting an end to the contract, and at once to bring an action as on a breach of it, and to cover such damages as would have arisen from the non-performance of the contract at the appointed time, subject to abatement in respect of any circumstances which might have afforded the appellant the means of mitigating its loss; and the agreement with Dawson & Co. was but the availing itself of that

means of mitigating its loss which it was not only the appellant's right but its duty to do.

I would reverse the judgment of the learned Chief Justice, and substitute for it a judgment for the appellant for the damages sustained by reason of the respondent's breach of the agreement, with a reference to the Master in Ordinary to ascertain the amount of the damages; and the respondent should pay the costs of the action and of the appeal.

MARCH 9TH, 1914.

*TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.

Assessment and Taxes—Lien on Land for Unpaid Taxes—Action to Enforce by Sale—Assessment Act, 1904, *sec.* 89—*Acceptance of Promissory Notes for Taxes—Abandonment of Other Remedies—Validity of Assessments—Non-compliance with sec.* 22 *of Act—Other Provisions of Act—*10 *Edw. VII. ch.* 88, *sec.* 23 — *Description of Properties — Registered Plans—Subdivisions—Evidence—Judgment—Costs.*

Appeal by the plaintiffs from the judgment of KELLY, J., 4 O.W.N. 178.

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

G. H. Kilmer, K.C., for the appellants.

S. H. Bradford, K.C., for the defendants the Imperial Land Company and Clarkson, liquidator of that company, respondents.

H. W. Mickle and A. D. Armour, for the defendants the Trusts and Guarantee Company, respondents.

The judgment of the Court was delivered by HODGINS, J.A.:—The rights given by sec. 89 of the Assessment Act, 1904, enable the plaintiffs to invoke the aid of the Court to enforce the lien given by that statute. The Court is not called on to declare the lien, but to assist the plaintiffs to realise it by decreeing a sale.

If the plaintiffs established their right to judgment for the taxes, their special lien, created by statute, can be made effective

*To be reported in the Ontario Law Reports.

either by a judgment which will carry the right to sell under the Execution Act, or by an order providing for a sale. I see no greater practical difficulty in joining claims for liens on separate lots belonging to one owner than in joining claims upon separate mortgages; and I think that Rule 69 permits what was done here.

While I agree with what is said in Mutrie v. Alexander (1911), 23 O.L.R. 396, I do not think that that case applies to or affects the plaintiffs' rights under sec. 89. Nor does the lien give by that section seem to be limited to a mere possessory lien, as the judgment in appeal seems to treat it. The words of the section are "enforceable by action;" and, although, if so enforced, the owner may lose the right given by those sections which deal with tax sales, to redeem the tax purchaser, he has no cause to complain if his default is taken advantage of either by distress, action, or realisation of lien, without waiting for three years before a sale is had.

As to the years 1906 and 1907, the judgment holds that the plaintiffs, by taking promissory notes and recovering judgments upon two of them, have waived their statutory lien.

The notes are for a total of $2,957.93, made up of balance of "unpaid taxes on note of 1906," $1,372.58, and for 1907, a total of $1,640.69, less $55.34. This last total is made up of four items, the first three being taxes in Holdich, Merchants, and Cockburn wards, without specifying lots or amounts thereon, and the last being a sum of $209.38, made up of twelve items apparently due by tax-payers upon certain lots or parts thereof.

The notes are five in number, all dated the 1st September, 1908, and are for $500 each, except the last one, which is for $957.93. They bear six per cent. interest, and run at 3, 6, 9, 12, and 12 months respectively. Upon two of the $500 notes the plaintiffs have judgment for the amount thereof, interest, and costs.

It is impossible to distinguish the specific lands or lots or the taxes relating thereto which entered into the amount of any one of these notes. Payment of, or obtaining judgment upon, two or them, is, therefore, inconsistent with the right of lien preserved or established by sec. 89, or the charge imposed by assessment. It is clear, I think, that by taking the notes and obtaining judgment for the $1,000 and interest, the plaintiffs have elected to proceed under sec. 90 and treat the taxes as a debt. If the notes had been given and received as covering speci-

fic taxes upon specific lots, it may be that the lien would still exist, notwithstanding the taking of notes, and would be only suspended; but the effect of a judgment for part of the debt, leaving the rest indistinguishable as to definite taxes or lots, is so to alter the situation as to put it beyond the power of the plaintiffs to realise in any other way than the one selected by them. Execution upon a judgment obtained gives a charge upon all the property of the debtor, and not only upon the specific lots covered by the taxes due in 1906 and 1907. The essence of the charge by assessment and of the lien under sec. 89 is, that it is specific upon each separate lot. The essence of the consolidation of the indebtedness by notes is, that the total is regarded as due by the company as a whole, and judgment for any part of it renders it impossible to say upon what lots and to what extent the remainder is or represents a specific charge or lien. The case in this respect seems to come within the words of Lord Watson in Bank of Africa v. Salisbury Gold Mining Co., [1892] A.C. at p. 284, "a new arrangement incompatible with the retention of the lien," referred to in In re Morris, [1908] 1 K.B. 473.

With regard to the objections that in 1908-9 the collector was the same person as the clerk, and that there was therefore no person to make proper demand, I am unable to understand why, if the collector is at the same time the clerk, he is disabled from making a demand. No doubt, difficulties may occur, caused by the dual position; but this is not one.

It is also argued that in 1910, the assessor failed to make his affidavit as required by sec. 47 until after action brought; and that, consequently, the taxes were not due when sued for. I think this is answered, if it be the fact, by secs. 66 and 67 of the Assessment Act of 1904, and by sec. 409 of the Municipal Act, 1903 (sec. 300 in the present revision.)

In considering the individual assessments, sec. 22 of the Act of 1904, 4 Edw. VII. ch. 23, provides that (1) land "known to be subdivided" is to be "designated by the numbers or other designation of the subdivisions, with reference, where necessary, to the plan of survey thereof;" (2) land "not subdivided into lots" shall be "designated by its boundaries, or other intelligible description;" (3) each "subdivision" shall be assessed separately, and every parcel of land, "whether a whole subdivision or a portion thereof . . . in the separate occupation of any person, shall be separately assessed." The only other reference is to what is to appear in the collector's roll. . . .

By sec. 33, sub-sec. 2, unoccupied land, the owner of which is resident in the municipality, shall be assessed against him.

By sec. 36, land is to be assessed at its actual value.

By sec. 40, sub-sec. 2, regarding the assessment of vacant land, it is provided that "such vacant land, though surveyed into building lots, if unsold as such, may be entered on the assessment roll as so many acres of the original block or lot, describing the same by the description of the block or by the number of the lot and concession of the township in which the same is situated, as the case may be. In such case the number and description of each lot comprising each such block shall be inserted in the assessment roll, *and each lot shall be liable for a proportionate share as to value and the amount of the taxes, if the property be sold for arrears of taxes.*"

In 1910, by 10 Edw. VII. ch. 88, sec. 39 was remodelled and the above sec. 40 repealed, but the clause as given above was re-enacted in two sub-sections, except that the last words, which I have italicised, were omitted, and in place thereof the words "and the provisions of sec. 127 shall apply" were substituted, and the provisions were restricted to lands in a town or village held and used as a farm, garden, or nursery only, and in blocks of not less than five acres, by any one person.

Dealing with the particular assessments, the following taxes appear to be properly assessed, and in the particulars directed to be filed after the argument in this Court by both parties are not objected to (setting them out.)

There are a few whose descriptions I am inclined to think are sufficiently definite, though objected to (setting them out.)

The taxes on lots grouped thus, 1908, West King north half, 17, 18, 19, East King, 32, 33, 34, should be disallowed, following Blakely v. Smith (1910), 20 O.L.R. 279, and Christie v. Johnston (1866), 12 Gr. 534. It was contended that these cases do not now apply, owing to the amendment made in 1910 by 10 Edw. VII. ch. 88, sec. 23.

Section 127, sub-sec. 1, of 4 Edw. VII. ch. 23, which was the Act in force when the assessments were made, permits an apportionment of taxes in arrear, whenever it is shewn to the Court of Revision or to the council that taxes have become due upon land assessed in one block which has subsequently been divided, and this provision is retroactive. By the statute of 1910 the words "which has subsequently been divided" are struck out.

I am unable to see how this amendment helps the appellants. The section as altered still presupposes an assessment in one

block, and that the taxes upon the block so assessed are due and in arrear.

The cases to which reference is made deal with the grouping of lots, any one of which may be "one block" within the meaning of sec. 127, but two or three of them grouped as lots in one assessment, cannot possibly be properly described as "land assessed as one block." The enactment is in ease of an owner of one or more parcels of the undivided block, who, finding taxes due and in arrear over the whole area, desires to redeem his holding by paying a proportion of the arrears. The apportionment is not made by the assessor, but by the council or Court of Revision after notice to all the other owners, and having regard to all the circumstances. Nothing of that kind appears here, and there is no allegation in the statement of claim that either the council or the Court of Revision altered the assessments as they appear on the rolls in this respect.

There are a number of lots whose description is too indefinite, such as in 1908 "East main part Market square" and "Main to Market 16 lots," and these are properly disallowed.

The result is as follows. The judgment in appeal will be set aside, and the appellants will have judgment for the amounts of taxes allowed, with ten per cent. added each year up to the end of 1913, less the rents, if any, referred to below.

I make the total, without the ten per cent., to be $2,780.72, and this amount may be checked by the Registrar and the ten per cent. calculated and added. The judgment will provide for payment of the amount of these taxes within one month, and, in default, the appellants may proceed to realise their specific liens upon the separate properties assessed, by sale, for which purpose it will be referred to the Master in Ordinary, unless any of the parties desire a reference to an officer in the provisional district: the purchase-money to be paid into Court, and the amount of the taxes and of the ten per cent. thereon and the costs of realisation as hereinafter directed, on each separate lot, to be paid out to the appellants upon the confirmation of the Master's report, and the balance, if any, on each lot to the respondents in the order of their priorities.

The arrangement made at the trial that, in case it is found that any of the lands against which the appellants are allowed a lien are owned by person not parties to this action, the appellants would abandon their claim thereto in this action, reserving their right to proceed for their lien against such persons in other proceedings, will be observed. If the parties cannot agree

as to these lands, the Registrar of this Court will ascertain the facts and omit from the judgment the lands covered by that arrangement. In case any lands are so omitted the judgment may contain a provision reserving the appellants' rights in regard to the same.

The judgment will also be without prejudice to the appellants' rights upon all the notes and judgments thereon already referred to.

I do not think that this Court has anything to do with the effect of this judgment in or on the winding-up proceedings. . . .

As the appellants have not established their right to the taxes other than those covered by this judgment, they should not be debarred thereby from taking any other steps open to them, if there are any, under the Assessment Act.

The respondents should pay to the appellants the costs of the action and appeal, except so far as these have been increased by the inclusion of claims for taxes which have been disallowed.

The appellants should have the right to add the proper proportion of the costs of realising their lien to the taxes upon the several lots which are subject to the lien.

The appellants must pay the rents referred to in the judgment, less the amounts received from the lands for which the taxes are allowed by this judgment, to such of the respondents as the Master in Ordinary shall find to be entitled thereto, and the amounts thereof to be ascertained by him unless agreed to by the parties.

Appeal allowed.

MARCH 9TH, 1914.

*RE BELLEVILLE DRIVING AND ATHLETIC ASSOCIATION.

Company—Transfer of Paid-up Share—Refusal of Directors to Allow—Ontario Companies Act, sec. 54(2)—Absence of Authority in Letters Patent Incorporating Company to Restrict Right of Transfer—Agreement by Incorporators—Agreement between Shareholders and Company—Evidence of—Validity of—Notice—Absence of By-law or Resolution—Mandatory Order to Record Transfer—Form of.

Appeal by the association from the order of LENNOX, J., 5 O.W.N. 520, requiring the appellant association forthwith

*To be reported in the Ontario Law Reports.

to cause to be transferred to Hartford Ashley, the respondents, one share of fully paid-up stock in the association, being the share "at present standing in the name of James A. Wheeler," and forthwith to cause a certificate for the share to be issued to the respondent as trustee.

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

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

A. H. F. Lefroy, K.C., for the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . On the 24th June, 1903, letters patent were issued under the Ontario Companies Act, whereby Lewis Redner Terwilliger . . . (and others, one being James Albert Wheeler) and any others who had become subscribers to the memorandum of agreement of the company, and their successors, respectively, were created and constituted a corporation by the name of the Belleville Driving and Athletic Association, with a capital stock of $2,200 divided into eleven shares of $200 each.

The letters patent contain no provision authorising the directors or the association to restrict the right of a shareholder to transfer his shares, but it is contended that the right of the shareholders to transfer their shares is restricted by an agreement said to have been entered into by the incorporators before the issue of the letters patent, by which it was agreed that none of the shares should be transferred without the consent of all the shareholders.

It is also alleged by the appellant that at the first meeting of the shareholders held after the issue of the letters patent a similar agreement was entered into between the shareholders and the company, and by each shareholder with the others, and the appellant relies upon this alleged agreement as a justification for its refusal to register the transfer from Wheeler to the respondent.

The evidence as to the making of these agreements is not satisfactory, and that he was a party to them is denied by Wheeler.

I entirely agree with what was said by Osler, J.A., in Berkinshaw v. Henderson (1909), 1 O.W.N. 97, 14 O.W.R. 833, 834, as to the evidence which should be required in order to establish the making of such agreements. . . .

But, assuming that the making of the alleged agreements has been established, I am of opinion that they afford no valid

ground for the refusal of the appellant to register the transfer to the respondent.

Apart from any other objection to their validity, there was no consideration for the agreement said to have been entered into between the shareholders and the company, and the agreements of the shareholders, inter se, in my opinion, did not attach to the shares the incident of non-transferability without the consent of all the shareholders, and the only remedy for a breach of the agreement is an action for damages, or, in the case of a threatened breach, possibly an injunction to restrain it. . . .

[Reference to Buckley on Companies, 9th ed., pp. 35, 39; Borland's Trustee v. Steel, [1901] 1 Ch. 279; New London and Brazilian Bank v. Brocklebank (1882), 21 Ch.D. 302.]

The case of an agreement between intended incorporators and between shareholders after incorporation, in my opinion, stands on a footing very different from that on which an agreement contained in a company's articles of association or deed of settlement stands. In the latter case the agreement forms part of the very constitution of the company, and every one who deals with the company or with respect to shares in it has an opportunity of examining it; while in the former it is a collateral agreement and is not embodied in its constitution, and such a person would have no means of knowing of its existence.

To hold that a purchaser of shares, having no notice of the existence of such an agreement, is to be bound by it, would most seriously and unnecessarily, I think, hamper dealings in shares, and practically make it impossible for any one to buy shares in the open market except at the risk of finding out that, when he presented his transfer for registration, he acquired nothing by his purchase except a right of action against his vendor.

If the law were as it is contended by the appellant it is, if a group of shareholders in a company were to agree among themselves not to sell or transfer their shares without the consent of all the members of the group, the incident of non-assignability without consent would at once be attached to the shares, and any one buying shares from the members of the group would find himself in the position of having acquired nothing except a right of action against his vendor, unless he were fortunate enough to succeed in getting his transfer entered upon the books of the company, and perhaps even in that case.

On the other hand, if it is desired by the incorporators of a company that restrictions should be placed upon the right of

the shareholders to transfer their shares, it would be a simple matter to have a provision of that nature embodied in the letters patent, or, if it were desired by a group of shareholders to keep their shares "off the market," that could be accomplished by transferring them to a trustee, or, as I believe is sometimes done, to a holding company.

So far as the appellant's contention depends on the by-law of the directors or the action said to have been taken at the first meeting of the shareholders, Re Good and Jacob Y. Shantz Son & Co. Limited (1911), 23 O.L.R. 544, which is binding on this Court, is conclusive against that contention, the corresponding provisions of the Ontario Act being substantially the same as the provisions of the Dominion Act which were in question in that case. In addition to this, there is the further difficulty that the terms of the arrangement said to have been made at the first meeting of the shareholders were not put into the form of a by-law or even of a resolution, and, as I have said, no record of the arrangement was made in the minute book of the appellant.

In the view I have taken, it is unnecessary to consider whether the effect of sec. 54 of 2 Geo. V. ch. 31 is not to render invalid the by-law relied on. Sub-section 2 of sec. 54 provides: "Subject to section 56, no by-law shall be passed which in any way restricts the right of a holder of paid-up shares to transfer the same, but nothing in this section shall prevent the regulation of the mode of transfer thereof."

Nor is it necessary to consider whether in Re McKain and Canadian Birkbeck Co. (1904), 7 O.L.R. 241, was rightly decided, although, if rightly decided, it is conclusive against the appellant, upon the ground that the respondent was a purchaser of the share for value without notice of the restriction said to have been imposed upon the right of Wheeler to transfer it, and was, therefore, entitled to have the transfer to him, when presented, as it was, in due form, entered on the books of the appellant.

The form of the order made by my brother Lennox is open to objection. It should be that the appellant "do forthwith, upon presentation of the transfer of the one share standing in the name of J. A. Wheeler, from him to the respondent, enter it or cause it to be entered in the proper book of the appellant, and do issue to the respondent a certificate in accordance with the provisions of section 52 of the Act of 2 Geo. V. ch. 31;" and, with that variation, I would affirm the order and dismiss the appeal with costs.

MARCH 9TH, 1914.

SMITH v. RANEY.

Deed—Conveyance of Sixty Feet of Land—Claim of Vendee to Sixty-Nine Feet Enclosed by Fences—Possession—Action of Ejectment for Nine Feet—Counterclaim for Rectification—Absence of Agreement.

Appeal by the plaintiffs from the judgment of the Junior Judge of the County Court of the County of Simcoe, dismissing an action to recover possession of land, and allowing the defendant's counterclaim for rectification of the conveyance of the land made to the defendant by the plaintiffs.

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

A. E. H. Creswicke, K.C., for the appellants.

M. B. Tudhope, for the defendant, the respondent.

The judgment of the Court was delivered by MIDDLETON, J.:—One Marion H. Dallas, now deceased, the plaintiffs' predecessor in title, owned lots 9 and 10 on the north side of Brant street, in the town of Orillia. According to the plan, these lots had a depth of 210 feet. The southerly 150 feet of lot number 9 had been sold to one Scott, while the south 150 feet of lot 10 had been conveyed to the plaintiff Charlotte B. Smith. This left, according to the paper title, the rear sixty feet still vested in the heirs of the late Marion H. Dallas. This sixty feet would have a frontage upon Matchedash street. The fence between the lots in question and the lots immediately to the north had not been erected upon the true boundary line, and a possessory title had probably been acquired to some four feet six inches immediately to the north.

Scott had been accustomed to obtain access to the rear of his lot by crossing over the land immediately to the north of the portion conveyed to Mrs. Smith, to Matchedash street, through a gate in the fence there.

Mr. Evans, a practising solicitor in Orillia, had charge of the affairs of the estate. Mrs. Smith, as already mentioned, resided in Orillia. Her brothers and co-plaintiffs resided in Victoria, British Columbia, and Lamont, Alberta, respectively. Mr. Evans had placed a "for sale" sign upon the rear land;

and the defendant, seeing this, called at his office with a view to negotiate for its purchase. After having inspected the property, and after having ascertained that the frontage between fences on Matchedash street was between 65 and 70 feet, the defendant signed an agreement to purchase the northerly sixty feet of the two lots in question. There is a good deal of difference in the accounts given as to what took place. The agreement was mislaid, and only found shortly before the trial; but the recollection of the defendant was that there was no agreement, and that he had paid $10 on account, taking a written option. The option is not forthcoming; and, from the fact that when the transaction was closed the defendant did not claim credit for this supposed payment, and that Mr. Evans is very clear that no such payment was made, it is evident that the defendant is mistaken in his recollection.

The account given by Mr. Evans is clear and in accordance with the written evidence. He says that, upon the defendant coming to his office and inquiring as to the property, he told the defendant that the estate was ready to sell sixty feet off the north end of these two lots; that the defendant then tendered $10 to bind the bargain, but that he said he would prefer to have a written agreement, and desired the defendant to inspect the property again before signing the document. The defendant did go and inspect the property, and came back and expressed himself as satisfied, when the contract for the sale of the sixty feet was executed.

Mrs. Smith, who had a half interest in the property, signed the document as vendor. Her brothers were communicated with, and they signed the deed prepared in pursuance of the contract, conveying sixty feet only. The defendant then took possession not only of the sixty feet of land, but of sixty-nine feet, which, it is found on survey, actually lay between the fences. The nine feet additional consisted of two strips of approximately equal width, the one to the north of the sixty feet being the one as to which possessory title had been acquired, and the one to the south represented an overrun in the depth of the lot. The defendant has now built upon the property, some portion of his verandah being upon the northern strip, no part of his building being upon or near the southern limit of the land. He has interrupted Scott's access to the rear of his lot.

The plaintiffs brought this action for ejectment, claiming that the conveyance operated only to convey sixty feet. They are ready to allow the defendant to take the sixty feet from the

north of the lots according to the actual survey, or from the north of the lots according to the actual occupation, but they are not willing to give him title to nine feet more than his deed calls for.

The learned County Court Judge has directed the deed to be reformed by adding to the land thereby conveyed the two strips, describing them as parcels 2 and 3. . . .

We do not think that the judgment in review can be sustained. The law is well stated in the case of McNeill v. Haines, 17 O.R. 479, cited by Mr. Tudhope: "In order that a deed may be reformed by the Court there must be at least two things established, namely: an agreement differing from the document, well proved by such evidence as leaves no reasonable ground for doubt as to the existence and terms of such agreement; and a mutual mistake of the parties by reason of which such agreement was not properly expressed by the deed."

In this case the defendant's difficulty is, that there never was any agreement save that evidenced by the written contract of the 3rd May, 1909. Whatever took place between the defendant and Mr. Evans was entirely preliminary to the document which was drawn up. Mr. Evans did not pretend to have any right to bind the parties beneficially interested in the estate. The only thing that they ever did or were asked to do was to sign the contract and the conveyance in pursuance of it. Quite apart from the Statute of Frauds, there never was any agreement by any of the plaintiffs save an agreement relating to the sixty feet.

It may be that the defendant thought that he was getting the sixty-nine feet, and that under the circumstances the Court would not decree specific performance against him; but the transaction is no longer executory. A deed has been given, and the situation is so changed that rescission is impracticable.

The appeal must be allowed, and judgment entered for the plaintiffs. The plaintiffs should, however, be held to their offer to allow the defendant to take either sixty feet according to the literal interpretation of the conveyance of sixty feet according to the possession on the ground.

There is no reason why costs should not follow the event.

MARCH 9TH, 1914.

*RE RABINOVITCH AND BOOTH.

Landlord and Tenant—Overholding Tenant—Tenancy from Year to Year upon Terms of Expired Lease—Provision in Lease for Determination of Tenancy by Notice—Consistency with New Tenancy—Assignee of Reversion Entitled to Benefit of Provision—Landlord and Tenant Act, sec. 5—Time for Giving Notice—"At the End of any one Month."

Appeal by the tenants from an order dated the 5th December, 1913, made by the Judge of the County Court of the County of Dufferin under the overholding tenant provisions of the Landlord and Tenant Act, requiring the appellants to deliver up possession of the demised premises.

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

W. M. Douglas, K.C., and W. J. L. McKay, for the appellants.

A. A. Hughson and H. H. Shaver, for the landlord, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—Fanny Gottesman was the owner of the property in question (an hotel in the town of Orangeville and the furniture in it), and she and her husband on the 12th April, 1912, demised the property to the appellants by a lease dated on that day.

The lease is made under the Short Forms of Leases Act, is for a term of one year to be computed from the 12th April, 1912, and contains the provisions of the short form set out in the Act, and some other provisions, among which are the following: "And it is declared and agreed that either party shall have power to terminate this tenancy at the end of any one month by giving to the other one month's notice to that effect and on such notice being given said tenancy shall be terminated in the same manner as if the original demise had ended at said date and will at the end of the term give up and deliver to the lessors all the furniture goods and chattels delivered by the lessors to the said lessees under this agreement and in good condition or equal to the present condition."

*To be reported in the Ontario Law Reports.

By deed dated the day of November, 1912, Fanny Gottesman conveyed to the respondent the hotel property, and on the 10th December, 1912, she and her husband gave to the appellant J. E. Booth written notice that they had sold the property and its contents to the respondent, and requested him to send the rent from the 12th instant to the respondent.

Acting upon this notice, the appellants paid the rent which fell due after the date mentioned in it, except the rent for the first month, which was paid to Gottesman and by him to the respondent, to the respondent, and continued to pay rent to him at the rate stipulated up to the 12th November, 1913.

On the 7th October, 1913, the respondent gave to the appellants a written notice stating that the respondent, as owner of the Queen's Hotel property leased by them from Nathan Gottesman and Fanny Gottesman, by lease dated the 12th April, 1912, gave them notice that he would require full and free possession of the property on the 12th November, 1913, and stating also that he gave them notice pursuant to the terms of the lease; and, the appellants having refused to give up possession as demanded, the proceedings which resulted in the order appealed from being made were taken.

Apart from the question as to an agreement alleged to have been made by the appellants with the respondent to give up possession of the property, as to which no evidence was given, because it was held by the learned Judge to be inadmissible, the facts are not in dispute.

That the appellants held over after the termination of the lease and continued to pay rent in accordance with the terms of it is not disputed, nor is it disputed that the result of this was, that the appellants became tenants from year to year of the respondent, upon the terms of the lease so far as they are not inconsistent with the new tenancy.

That the provision of the lease for its termination is not inconsistent with the new tenancy was the view of the learned Judge, but it is contended by the appellants that his conclusion was erroneous.

I am of opinion that the learned Judge came to the right conclusion. . . .

[Reference to In re Threlfall (1880), 16 Ch.D. 274; King v. Eversfield, [1897] 2 Q.B. 475, 481; Dixon v. Bradford, [1904] 1 K.B. 444; Lewis v. Baker, [1905] 2 K.B. 576, [1906] 2 K.B. 602; Bridges v. Potts (1864), 17 C.B.N.S. 314, 330; Thomas v. Packer (1857), 1 H. & N. 669; Tooker v. Smith

(1857), 1 H. & N. 732; Doe d. Warner v. Browne (1807), 8 East 165.]

It was also contended that the respondent, as assignee of the reversion, was not entitled to the benefit of the provision for determining the lease, but that contention is not, in my opinion, well founded. Section 5 of the Landlord and Tenant Act is wide enough to embrace, and in my opinion does embrace, that provision of the lease, and the benefit of it was, in the language of the section, "annexed and incident to" and went "with the reversionary estate in the land immediately expectant on the term granted by the lease." . . .

[Reference to Roe d. Bamford v. Hayley (1810), 12 East 464.]

It was further contended on behalf of the appellants that the words "at the end of any one month" mean at the end of any calendar month, and not at the end of any month of the tenancy; but I am not of that opinion. The rent reserved by the lease is payable monthly in advance, and it is much more probable that the contracting parties intended that the lease might be terminated at the end of any month of the tenancy than that the intention was that it might be terminated at the end of any calendar month during the term, especially as the lease contains no provision for the apportionment of the rent, which, if the latter contention were adopted, would be necessary whenever the right to determine the tenancy was exercised.

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

MARCH 9TH, 1914.

*PAGE AND JACQUES v. CLARK.

Fraud and Misrepresentation—Sale of Farm—Action by Purchasers for Specific Performance of Contract—Fraud and Conspiracy of Purchasers—Representation as to Matter Affecting Value of Property—Finding of Fact by Trial Judge—Reversal by Appellate Court—Admission of Incompetent Testimony Contradicting Witness—View of Trial Judge Based on—False Representation as to Person of Purchaser—Materiality—Effect of—Finding of Fraud—Affirmance—Ground for Refusal of Specific Performance—Election to Affirm Contract—Action by Vendor Based on Different Agreement—Repudiation of Contract by Vendor—Counterclaim for Damages—Retention of Deposit.

Appeal by the plaintiffs from the judgment of LENNOX, J., 5 O.W.N. 143.

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

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

E. S. Wigle, K.C., for the defendant, the respondent.

MEREDITH, C.J.O.,:—The appellants sue for specific performance of an agreement, dated the 28th October, 1912, by which the respondent agreed to sell to the appellant Jacques a farm in the township of Sandwich West for $13,300, and which was assigned by Jacques to the appellant Page by deed dated the 6th January, 1913.

By his statement of defence the respondent alleges that it was represented to him by A. F. Healy, a solicitor, that the United States Steel Company intended to establish a plant in the township of Sandwich West, in the vicinity of the respondent's farm, and that the respondent was induced to enter into an agreement dated the 9th September, 1909, referred to as "the syndicate agreement," with Jules Robinet, William Parker, and Healy, by which it was agreed that the respondent's farm should be subdivided into lots and placed upon the market for sale, and that the appellants had knowledge of the agreement; . . . that Healy, pretending to be acting in the interest of the respondent, but in reality acting on behalf of the appel-

*To be reported in the Ontario Law Reports.

lant Page and himself, on or about the 23rd October, 1912, falsely represented to the respondent that the steel company had abandoned all thought of establishing its plant in the township of Sandwich West; . . . that he had obtained a purchaser for the farm in the person of the plaintiff A. Jacques, . . . and that he was willing to give $13,300 for the same, urging that that was all it was worth for farming purposes; . . . and that the respondent, relying upon these representations, entered into the contract sued on; . . . that the appellants, through the misrepresentation and fraud alleged . . . did obtain said contract, and the respondent had suffered damage by reason thereof; and the respondent counterclaimed for damages for the misrepresentations, fraud, and conspiracy alleged, and to retain the money received by him on account of the purchase-price as damages. . . .

The agreement sued on, besides providing for the sale of the farm to Jacques, contains a provision in these words: "And we, Jules Robinet, A. F. Healy, and William Parker, having an agreement with David Clark registered against the lands . . . hereby agree to sign a release of the same at any time, on being paid the following amounts . . ." The agreement is under seal, and is signed by the respondent and Robinet and Healy, but not by Parker. . . .

The learned trial Judge accepted the respondent's evidence as true . . . ; and he gave judgment dismissing the action with costs, and for the respondent on his counterclaim for the retention of the money paid on account of the purchase-money as damages . . . and he set aside the agreement of sale and ordered it to be delivered up to be cancelled and the registration of it to be vacated. . . .

There is a direct conflict between the testimony of the respondent and that of Healy as to the alleged representation with regard to the intentions of the steel company having been made. . . . The learned Judge accepted the testimony of the respondent in preference to that of Healy. Ordinarily, where a finding of fact is based upon the credit given to the witnesses, an appellate Court is not justified in reversing it; but there are circumstances in this case which, in my opinion, warrant us in not applying this rule. In the other action (that is, the action of Clark v. Robinet, post, also tried before LENNOX, J., at the same sittings) the learned trial Judge permitted evidence to be given to contradict the testimony that had been given by Healy on cross-examination, when asked whether, after the interview

with the respondent on his farm, where it is alleged the representations were made, he had gone directly to the farm of Mrs. Boyd and told her that the steel plant was not coming. After the close of the defence and against the protest of counsel for the defendants, the learned trial Judge allowed Mrs. Boyd and her husband to be called to contradict this testimony of Healy, which they did. . . .

Apart from any difficulty arising from the omission to lay a proper foundation for calling a witness to contradict Healy, and the nature and form of the questions which counsel was permitted to put to Mrs. Boyd and her husband, the evidence was not admissible under any circumstances or conditions. The matters as to which it is sought to contradict Healy were matters not material to the issue, and his answers to them were conclusive.

It is clear from the observations of the learned Judge, in ruling that the evidence was admissible, that he deemed that it would be material as to the credibility of Healy; . . . and there can be little doubt that because of this evidence the learned Judge was led to give credit to the respondent rather than to Healy; but it is enough to displace the rule, that it was admitted; and, if the action had been tried by a jury, it would have been enough to entitle the defendants to a new trial if the evidence wrongly admitted might have influenced them in coming to their conclusion.

I am unable to agree with the conclusion of the learned Judge as to alleged misrepresentation with regard to the attitude or intentions of the steel company. The only evidence to support the allegation that the misrepresentations mentioned in the statement of defence were made by Healy is the testimony of the respondent, which is met by the positive testimony of Healy to the contrary. The probabilities are, I think, in favour of the view that the testimony of Healy is in accordance with the fact. It seems impossible to reconcile with the respondent's testimony his admissions on his examination for discovery and again at the trial. . . .

I am of opinion that, so far as these alleged misrepresentations are concerned, the defence failed.

I am, however, of opinion that the respondent was entitled to succeed upon the other ground of misrepresentation set up by him.

That Jacques was sent by Page to buy for him, and that he untruly stated to the respondent that he was buying for

himself, and intended that his sons should use the land for farming and gardening purposes, is not denied; nor is it open to question, upon the evidence, that the respondent would not have sold to Page upon any terms, and that this was known to the appellants and to Healy. Admittedly, the sending of Jacques as the ostensible purchaser, and doubtless the story he told as to his buying for himself and the use to which he intended to put the land, were part of a plan to which the three of them were parties, designed to conceal from the respondent the fact that the prospective buyer was Page; and it was quite immaterial, I think, for the purpose of the application of the principle of the cases to which I shall refer, whether this plan was adopted and carried out because it was known that the respondent would not sell to Page on any terms, or because, as testified by Healy, if the respondent had known that Page was the intending purchaser, he would have demanded a larger price. . . .

[Reference to the rule of the civil law as to error with regard to the person with whom another contracts: Pothier's Law of Obligation, par. 19; and to the common law of England, in this respect the same as the civil law: Smith v. Wheatcroft (1879), 9 Ch.D. 223, 230; Gordon v. Street, [1899] 2 Q.B. 641, 647.]

This is the rule of law applicable to error, apart from any question of fraudulent misrepresentation as to the person with whom the contract is about to be entered into; and the rule as to this is, that, where there is fraud material to the inducement which brought about the contract, the person defrauded may set up to an action on the contract the defence that he was induced by fraud to enter into it. . . .

[Reference to Gordon v. Street, supra; Smith v. Kay (1859), 7 H.L.C. 750, 759; Pulsford v. Richards (1853), 22 L.J.Ch. 559, 562; Archer v. Stone (1898), 74 L.T.R. 34; Bonnett v. Sadler (1908), 14 Ves. 526, 528; Phillips v. Buckingham (1683), 1 Vern. 227; Lord Irnham v. Child, 1 Bro. C.C. 95; Harding v. Cox (1750), 1 Vern. 227, note 1; Nelthorpe v. Holgate (1844), 1 Coll. 203.]

In the case at bar, the representation made by Jacques as to the purchase being for himself and as to the use to which he intended to put the farm was . . . "a lie appurtenant," that is to say, a lie relating to part of the contract or the subject-matter, which induced the respondent to deal with the property in a way he would not have done if he knew the truth. . . .

It is unnecessary to express an opinion as to whether, if Jacques had been silent, and had not made any representation,

the respondent would have been entitled to refuse to perform the contract. . . .

If it be necessary, to entitle the respondent to succeed, that it should be shewn that the representation was made fraudulently, that, according to the finding of the trial Judge, has been shewn; and I see no reason for differing from his conclusion. That it was also material to the inducement to the respondent to enter into the contract, I have no doubt. . . .

There remains to be considered the question whether the respondent, by bringing the action against Robinet and Healy (Clark v. Robinet, post), has elected to affirm the agreement with the appellant Jacques. That action, according to the statement of claim, was not based upon the agreement of the 24th October, 1912, but upon an agreement made on that day between the respondent and Robinet and Healy; and the agreement of the 24th October, 1912, was used at the trial only as evidence of the agreement upon which the action was based. Viewing what was done by the respondent in the light of this, I do not think that, by bringing the action against Robinet and Healy, the respondent elected to affirm the agreement. . . .

Upon the whole, I am of opinion that the action was properly dismissed, and that the appeal from the judgment, in so far as it dismisses the action, should be dismissed without costs.

The counterclaim should also, in my opinion, have been dismissed. There was no proof of any damages having been sustained by the respondent owing to the misrepresentations by which he was induced to enter into the agreement with Jacques; and I doubt whether, if there had been, the respondent, having elected to repudiate the agreement, would have been entitled also to damages; and it is clear that there was no ground for forfeiting the deposit which had been paid by Jacques.

I would, therefore, allow the appeal as to the counterclaim, without costs, and substitute for the judgment directed to be entered upon it a judgment dismissing the counterclaim with costs.

MACLAREN and HODGINS, J.J.A., agreed.

MAGEE, J.A., agreed in the result.

Appeal as to claim dismissed, and as to counterclaim allowed.

MARCH 9TH, 1914.

CLARK v. ROBINET AND HEALY.

Contract — Construction — Agreement for Release of Rights under Previous Agreement—Nature and Effect—Dependency on Agreement for Sale of Land—Cancellation of Latter Agreement—Effect of.

Appeal by the defendants from the judgment of LENNOX, J., 5 O.W.N. 143. See the preceding case, Page and Jacques v. Clark.

This action was for a declaration that the plaintiff's farm was free from any claim or claims by the defendants, or either of them, under what was called "the syndicate agreement," or otherwise.

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

F. D. Davis, for the appellants.

E. S. Wigle, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . It is clear, I think, that, whether or not the agreement for the release of the rights of the appellants and Parker under the syndicate agreement was an agreement with the respondent or only with Jacques, it was intended that it should be dependent on the agreement for the sale to Jacques, and that it should not be obligatory on the appellants and Parker if the sale should not be completed.

There is no evidence of any antecedent agreement, although an unsuccessful attempt was made to shew that the syndicate agreement had been previously abandoned. The agreement in question treats the syndicate agreement as being still in existence, and its language is inconsistent with there having been a previous abandonment of that agreement. It is: "And we . . . having an agreement with David Clark registered . . . hereby agree to sign a release of the same at any time on being paid . . ."

What took place between the parties during the negotiations with Jacques leads to the same conclusion. According to the testimony of Healy, which on this point was uncontradicted, he spoke of himself and Robinet and Parker as being entitled under the syndicate agreement to part of the purchase-money;

but, upon its being pointed out by the respondent that the house and lot which he had reserved under that agreement was included in the sale to Jacques, Healy recognised the fairness of the position taken by the respondent, and did not press the claim. What I understand by this is, that, taking out of the price Jacques was to pay the value of the house and lot that the respondent had reserved under the syndicate agreement, he would not realise from the sale more than the $10,000 he was to be entitled to receive before the members of the syndicate would be entitled to anything.

If the view I have expressed as to the nature and effect of the agreement in question is correct, it follows that, the action for specific performance having been dismissed and the agreement with Jacques having been set aside, this action should also have been dismissed.

I would, therefore, allow the appeal with costs, and substitute for the judgment pronounced by the learned trial Judge a judgment dismissing the action with costs.

MARCH 9TH, 1914.

KOHLER v. THOROLD NATURAL GAS CO.

Contract—Agreement to Take and Pay for Natural Gas—Breach—Damages—Contract-price—Cost of Production—Profits—Evidence.

Appeal by the defendants from an order of BOYD, C., of the 13th October, 1913, dismissing an appeal by the defendants from the report of the Local Master at St. Catharines of the 9th August, 1913, by which the appellants were held liable for a breach of contract to take and pay for natural gas to the extent of 44,853,170 cubic feet.

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

H. H. Collier, K.C., for the appellants.

W. T. Henderson, K.C., for the plaintiffs, the respondents.

The judgment of the Court was delivered by HODGINS, J.A.:— . . . Damages were assessed on the basis of the

price contracted to be paid, namely, at 16 cents per cubic foot, which, after crediting the amount ($197) received by the respondents for some 1,300,000 cubic feet sold with the appellants' consent, amounted to $6,979.50.

The appellants maintain that they committed no breach of contract; but that, if they did, damages are not properly proved, are excessive, and are based upon an erroneous principle.

The respondents are gas producers, and had, when the contract was made, 15 wells in the Canboro fields extending over 1,000 acres, and own an 8-inch pipe line from the field to Dunnville; while the appellants own a transmission line through Dunnville and Winger, where the gas is delivered to the United Gas Company to be supplied to consumers in St. Catharines and elsewhere. . . .

[Examination of the contract and the evidence.]

The damages are, to my mind, if any were recoverable, assessed upon a wrong principle. They were allowed for at the contract-price, and no deduction is allowed for the cost of production. See Silkstone and Dodsworth Coal and Iron Co. v. Joint Stock Coal Co. (1877), 35 L.T.R. 668.

It is asserted that the cost of producing this particular gas was nil, or practically nil, because all the expenditure had been gone to previously; but that is not sufficient, I think, to dispose of the question. The wells were closed and opened during that period; two wells were drilled in September; and a proportion of the initial cost of producing must be attributed to this supply. It is only their profit that can be recovered as damages, and no evidence was given on that head, nor was anything said as to whether they could not have supplied others with the gas meanwhile.

On the whole, I think the appeal should be allowed with costs, and the action dismissed with costs.

MARCH 10TH, 1914.

*REX v. RAPP.

Criminal Law—Prisoner Serving Sentence Released on Bail—Escape—Recommittal—Interruption of Period of Imprisonment—Liability to Serve out Sentence—Habeas Corpus—Prisons and Reformatories Act, R.S.C. 1906 *ch.* 48, *sec.* 3—*Criminal Code, secs.* 185, 196.

Appeal by the defendant from an order of MIDDLETON, J., refusing a writ of habeas corpus.

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

G. R. Roach, for the defendant.

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

MULOCK, C.J.Ex.:—On the 17th October, 1913, the prisoner was convicted by the Police Magistrate of an assault causing bodily harm, and was sentenced to 30 days' imprisonment in the common gaol, and on the same day entered upon his sentence. On the 18th October, he applied for and was admitted to bail, pending an appeal to the Court of Quarter Sessions. On the 2nd December, he attended before the Court of Quarter Sessions, when his case was dealt with by the presiding Judge, who held that no appeal lay to the Sessions. The prisoner was not, however, returned to the gaol; and, no one interfering, he left the Court and remained at large until the 3rd March, when, in consequence of notice from the Court of Quarter Sessions, he appeared before that Court, and, on the order of the presiding Judge, was returned to the gaol to complete his sentence.

On the appeal before us the prisoner's counsel contended that, the prisoner having entered upon his sentence on the 17th October, the subsequent occurrence had not the effect of interrupting the running of his sentence, and that accordingly it had expired prior to his re-arrest on the 3rd March. The case is really concluded against the prisoner by Robinson v. Morris (1909), 19 O.L.R. 633.

From the 18th October until the 2nd December the prisoner was out on bail. The order liberating him on bail was made on his own motion, and he complied with its terms by entering into a recognizance to appear at the Sessions. Having obtained his

*To be reported in the Ontario Law Reports.

liberty by reason of these bail proceedings, even though they were unauthorised, he cannot now be heard to say that he was not out on bail. They constituted a lawful excuse for his being at large.

Section 3 of the Prisons and Reformatories Act, R.S.C. 1906 ch. 148, provides . . . as follows: "The term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced."

I, therefore, think that his term of imprisonment did not run from the day he was admitted to bail until he surrendered himself on the 2nd December. From that day until his re-arrest on the 3rd March he was at large, but not on bail.

When he surrendered himself to the Court on the 2nd December, he then became a prisoner in respect of his unexpired term of imprisonment, which then again began to run, and his legal obligation was to return to the gaol to serve there the remainder of his sentence. . . .

[Reference to 2 Hawk. P.C., ch. 17, sec. 5; 1 Hale P.C. 611.]

And now, by sec. 185 of the Criminal Code: "Every one is guilty of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him."

No lawful excuse appearing for the prisoner being at large on or after the 2nd December, this section makes it abundantly clear that it was his duty to have remained in custody. Did his failing to do so constitute an escape within the meaning of sec. 196 of the Criminal Code? That section is as follows: "Every one who escapes from custody shall, on being retaken, serve, in the prison to which he was sentenced, a term equivalent to the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape."

The following is the generally accepted definition of what constitutes an escape: "An escape is where one who is arrested gains his liberty before he is delivered by the Courts of the law:" Termes de la Ley, 1 Russell on Crimes and Misdemeanours, 6th ed., p. 889.

The prisoner was under arrest when he surrendered on the 2nd December, and on that day unlawfully gained his liberty,

that is, he had not been "delivered by the course of the law." Thus he was guilty of an escape, and sec. 196 applies, and he must serve a term equivalent to the remainder of his unexpired term.

I, therefore, think that Mr. Justice Middleton was right in refusing the writ, and this appeal must be dismissed.

CLUTE, SUTHERLAND, and LEITCH, JJ., concurred.

RIDDELL, J., also concurred, for reasons stated in writing.

Appeal dismissed.

MARCH 11TH, 1914.

HOPKINS v. CANADIAN NATIONAL EXHIBITION ASSOCIATION.

Contract—Exhibition "Concession"—Restriction on Sale of Certain Kind of Food—Sale Stopped by Manager of Exhibition—Sole Judge and Interpreter—Bona Fides—Reasonable Conduct—Domestic Forum—Action for Damages—Dismissal.

Appeal by the plaintiff from the judgment of LATCHFORD, J., 5 O.W.N. 639.

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

R. U. McPherson, for the appellant.

G. R. Geary, K.C., and Irving S. Fairty, for the defendants.

THE COURT dismissed the appeal with costs.

MARCH 12TH, 1914.

RE JONES AND TOWNSHIP OF TUCKERSMITH.

Highway—Closing and Sale of Unopened Portion of Street as Shewn on Plan—By-law of Council—Motion to Quash—Reference to Judge at Trial of Pending Action—Appeal—Costs.

Appeal by the Corporation of the Township of Tuckersmith from the order of MIDDLETON, J., 5 O.W.N. 759, quashing a by-

law of the township for the closing and disposal of part of Mill street in the village of Egmondville.

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

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

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

THE COURT set aside the order quashing the by-law, and referred the matters in question upon the appeal and motion to quash to the Judge assigned for the trial of the action of Jones v. Township of Tuckersmith, and directed that the Judge should not be bound by the decision of MIDDLETON, J., upon the motion to quash. Costs of the motion to quash and of this appeal to be in the discretion of the trial Judge.

MARCH 13TH, 1914.

MULHOLLAND v. BARLOW.

Trespass to Land—Access to Land—Right of Way—Fences—Boundaries—Counterclaim—Injunction—Damages—Costs—Appeal—Variation of Judgment.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., 5 O.W.N. 654, dismissing the action and finding in favour of the defendant upon a counterclaim.

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

W. M. McClemont, for the appellant.

S. F. Washington, K.C., for the defendant, the respondent.

THE COURT varied the judgment below by striking out paragraphs 2, 3, and 4 thereof, and by declaring that neither party shall build a fence on the centre line north and south of lot 180 further north than a point 11 ft. 2 in. north-westerly from the corner of the plaintiff's house; and also (by consent) declaring that no part of the plaintiff's house is on the defendant's land, and directing that the plaintiff shall, within one month, re-erect and maintain the fence that formerly extended from the north-west corner of her house. In other respects appeal dismissed. No costs of appeal.

HIGH COURT DIVISION.

MIDDLETON, J. MARCH 9TH, 1914.

*SHIPMAN v. PHINN.

Supreme Court of Ontario—Jurisdiction in Cases of Negligence Resulting in Collision in Inland Waters—Concurrent Jurisdiction of Exchequer Court of Canada, Admiralty Side.

Question of law set down for hearing (by leave).

The action was brought by the owner of the schooner "Winnie Wing" against the owner of the steam-tug "Maggie R. King" to recover damages resulting from a collision in the Napanee river.

The question was whether the Supreme Court of Ontario had jurisdiction to entertain the action.

The case was heard in the Weekly Court at Toronto on the 3rd March.

T. H. Peine, for the plaintiff.

H. A. Burbidge, for the defendant.

MIDDLETON, J.:—The defendant contends that this Court has no jurisdiction over the subject-matter of the action, and that the plaintiff's remedy must be sought in the Exchequer Court of Canada, which is a Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890. The plaintiff, on the other hand, contends that, although he undoubtedly might resort to the Exchequer Court, yet this Court has a concurrent jurisdiction in all cases of negligence resulting in collision in inland waters. It is sought to renew the ancient and at one time bitter controversy between the Admiralty and Common Law Courts.

In the Fourth Institute, ch. 22, will be found, under the head "Articuli Admiralitatis," the complaint of the Lord Admiral of England to the King's most excellent Majesty against the Judges of the Realm concerning prohibitions granted to the Court of Admiralty, and the answers of the Judges to such complaint. . . . Lord Coke triumphantly vindicates the exclusive jurisdiction of the Common Law Courts in all such cases, and the right to prohibit the encroachments of the "Admirall." . . .

*To be reported in the Ontario Law Reports.

[Reference to the statutes 2 Hen. IV. ch. 11 and 15 R. II. ch. 3.]

Story, in his judgment in the celebrated case of De Lovie v. Boit (1815), 2 Gallison 398, defends the jurisdiction of the Admiral. . . .

It is important to note that Story claims no more for the Maritime Courts than concurrent jurisdiction with the Common Law Courts.

Story's judgment, though at first not universally accepted, is now generally regarded as an authoritative exposition of the law upon the whole subject. Twenty-seven years later, in Hale v. Washington, 2 Story 176, he reaffirms what is stated in the earlier case. The most learned and hostile criticism is probably to be found in the judgment of Mr. Justice Johnson, 12 Wheaton 611; but the point there in controversy is far removed from that now before me.

Statutes were from time to time passed in England enlarging the Admiralty jurisdiction; but, throughout, the concurrent common law jurisdiction, save as to occurrences on the high seas, was always recognised. These statutes may be found collected in the preface to the 1st edition, reprinted in the 3rd edition, of Pritchard's Admiralty Digest, and in the introduction to Roscoe's Admiralty Law.

In Ontario the High Court was given all the jurisdiction possessed by the Courts of Common Law in England on the 5th day of December, 1889. See the Judicature Act, R.S.O. 1887 ch. 51, sec. 25. This jurisdiction has been now vested in the Supreme Court of Ontario, R.S.O. 1914 ch. 56, sec. 3.

Before the 5th December, 1859, the Admiralty jurisdiction in England had been greatly enlarged by the Acts of 1848 and 1854; but, so far as actions such as this are concerned, the jurisdiction was still entirely concurrent. Cases in the Common law Courts for negligence in navigating a ship are found collected in the 2nd edition (1863) of Bullen and Leake, p. 319.

In 1873, in England, the Court of Admiralty became an integral portion of the Supreme Court of Judicature; and by the Judicature Act of 1875 provision was made for the hearing in that Division of all actions of which it had hitherto taken cognizance concurrently with the Courts of Common Law. This change, having been made subsequent to 1859, would not in any way affect the jurisdiction of the Supreme Court of Ontario.

While the Exchequer Court is given very wide jurisdiction under the Colonial Courts of Admiralty Act, that jurisdiction

is concurrent, and there is nothing to displace the jurisdiction of the ordinary common law Courts.

I, therefore, determine the point of law raised in favour of the plaintiff; and, in pursuance of the arrangement made at the argument, this judgment will be embodied in the formal judgment disposing of the case upon the merits, so that the whole question may be open upon one appeal. Costs occasioned by the raising of this legal question will be paid to the plaintiff in any event.

KELLY, J. MARCH 10TH, 1914.

SCRIMGER v. TOWN OF GALT.

Municipal Corporations—Construction of Drain or Sewer—Drainage of Surface-water into Creek—Pollution of Waters of Creek—Injury to Riparian Owners—Evidence—Consent—Findings of Fact of Trial Judge—Joinder of two Plaintiffs in Respect of Injury to Respective Lands—Injunction—Mandatory Order.

Action by Scrimger and Williamson for an injunction restraining the defendants, the Municipal Corporation of the Town of Galt, from constructing or maintaining a sewer or drain from the easterly part of the town in a southerly direction to Moffat's creek, and from bringing water into the creek in excess of the natural flow; from injuriously affecting the plaintiffs' rights in respect of the water of the creek; and from laying down a drain across the land of the plaintiff Scrimger; and for a mandatory order for the removal of tiles or other material from that land.

P. Kerwin, for the plaintiffs.

R. McKay, K.C., and J. B. Dalzell, for the defendants.

KELLY, J.:—Questions are here involved which are common to both plaintiffs; the joinder of the plaintiffs has neither embarrassed nor delayed the trial; and I see no reason for giving effect to the defendants' plea that the plaintiffs are improperly joined. . . .

Moffat's creek runs in a westerly direction and discharges into the Grand river, its course being through the plaintiff Scrimger's lands, which lie a short distance west of the line of

the proposed sewer, and also through the plaintiff Williamson's lands further down the stream. The northerly part of Scrimger's land, about 14 acres in extent, is within the limits of the town of Galt, the remainder of it being in the township of North Dumfries. None of Williamson's land is within the town limits. Adjoining Scrimger's lands on the east is the land of McKenzie, also running southerly from the limits of the town to and across Moffat's creek. Scrimger is also the owner of or interested in a lane running easterly from his other lands through McKenzie's lands to Elgin street (or St. George road). The course of the sewer or drain, the construction of which was begun before this action, is southerly from the town limits through McKenzie's land to the creek, a distance of about 2,500 feet. It passes through or under this land of Scrimger's. The plaintiffs use the water of the creek for purposes connected with their lands, Williamson being engaged in dairying and for that purpose keeping cows on his lands (about 170 acres in extent), and Scrimger being a farmer. For many years Williamson has leased to another person a part of his lands, not far distant from his westerly boundary for use in obtaining ice for commercial purposes, the lessee having the right to dam the creek; the lease has still several years to run.

The object of the proposed sewer or drain is to collect the surface-water from an area of the town about 140 or 150 acres in extent, and to carry it to and discharge it into Moffat's creek; and the defendants have attempted to shew that, if their project be carried through, it will not subject the plaintiffs to conditions to which they have a right to object, contending that the sewer, if constructed, will carry towards the creek only what under present conditions flows towards or into it, the general grade of the land in the locality being in that direction. That proposition is far from being substantiated. There is a marked difference between leaving the surface-water from the area intended to be drained to find its own way over or through soil of the character found here, and collecting and passing it through the sewer or pipe to the point of discharge at the creek without the possibility of escape in its course, by percolation, absorption, or other means, of objectionable and dangerous matter. This is borne out by the evidence of competent witnesses whom I unhesitatingly believe, who say that the character of the soil between the area intended to be drained and the creek is very open, gravelly, and porous, in which, by natural filtration, the surface-water is purified; while, on the other hand, by the use of

the sewer, all this water would be carried directly and quickly to the creek, bringing with it substantially all its objectionable and dangerous elements, except such as would be arrested and retained in proposed catch-basins at the inlets to the sewer. I find, on the evidence, that much of the objectionable matter would not be arrested or disposed of by these catch-basins, and that, notwithstanding their use, the flow into the creek would pollute it unless some efficient means, not included in the defendants' proposed scheme, were adopted of overcoming that objectionable feature.

Another position taken by the defendants is, that the waters of the creek are, under present conditions, polluted by the use of the adjoining lands for pasturing of cattle, and by the natural flow from farm buildings and barnyards near-by. It is possible, and indeed very probable, that pollution to some extent arises from these causes, but the evidence shews that the water is now clear and fairly pure. . . . The evidence makes it quite clear that to adopt the expedient of collecting the surface-water from the area it is intended to serve, and carrying it through this sewer to and into the creek, will cause a serious pollution of the waters, as well as unreasonably add to the flow of the creek; and there is nothing to justify the defendants in their contention that the plaintiffs are not entitled to object or insist that they would be subject to the damaging conditions which the building or operation of the sewer or drain would impose on them.

One proprietor of land has no right to cause a flow of the surface-water from his own land over that of his neighbour, by collecting it into drains or culverts or artificial channels: Angell on Watercourses, 7th ed., p. 133.

An owner of land has no right to rid his land of surface-water, or superficially percolating water, by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor; . . . and a municipal corporation has no greater right in this respect than a private land-owner: Gould on Waters, 2nd ed., pp. 529-530. Cities and towns have no greater right than individuals to collect in artificial channels upon their streets and highways mere surface-water, distributed in rain and snow over large districts, and precipitate it upon the premises of private owners: ib., p. 531.

Nor does the Municipal Act, in giving municipalities, in a proper case, power to pass by-laws in relation to the disposal of surface-water, so enlarge the power of the defendants as to justify them in the course they here adopted.

It is of importance to bear in mind that the defendants' scheme does not end with collecting and carrying the surface-water on to the adjoining owner's lands, but provides for carrying it through that land in order that it may reach the land of the plaintiffs.

But it is said that at a meeting in July, 1912, in Galt, the plaintiffs consented to the building of this sewer; I do not find that to be the case. Even had their consent been then given, it was founded on the proposal by the defendants that a settling tank would be installed near the outlet of the sewer in which the water flowing from the sewer would be treated by sedimentation. This was a proposal made by the Provincial Health Inspector, who in his evidence says that he contemplated a proper basin for that purpose being installed. The basin designed by the defendants would not be sufficient to produce the proposed results. The evidence establishes that efficient sedimentation would not have the effect of removing elements which would cause pollution to the water. . . .

As a further defence to Scrimger's claim, the defendants have set up what they contend is a written consent on his part to their plans. This was signed on the 4th March, 1912, and dealt with and referred only to the lane leading from Scrimger's land to St. George road, through which the defendants were thereby permitted to construct a storm drain. Scrimger afterwards delivered to the defendants a document dated the 15th March, 1913, revoking "the license granted by me to you on or about the 4th March, 1912," and forbidding the defendants entering upon the lands. I do not think that that affords any relief to the defendants; apart from any right of Scrimger to revoke what he calls a license, that document did no more than permit the defendants to carry the storm-drain through the lane and give them the right to enter upon the land for that purpose; and, moreover, the method of disposal of the water, as contemplated by the defendants, was not of the efficient kind required there by the health authorities.

What I have so far found to be the facts are quite sufficient, in my judgment, to entitle the plaintiffs to relief. In that view, it is unnecessary to deal with other aspects of the case. . . .

Judgment will be in the plaintiffs' favour, with costs.

MIDDLETON, J., IN CHAMBERS. MARCH 11TH, 1914.

BAIN v. UNIVERSITY ESTATES LIMITED AND FARROW.

CONNOR v. WEST RYDALL LIMITED AND FARROW.

Writ of Summons—Service on Defendants out of Jurisdiction—One Defendant in Jurisdiction—Proper Parties—Rule 25—*Conditional Appearance—Rule* 48—*Refusal of Leave to Appeal.*

Motions by the defendant companies for leave to appeal to the Appellate Division from the orders of LATCHFORD, J., ante 22.

Grayson Smith, for the applicants.
A. B. Cunningham, for the plaintiffs.

MIDDLETON, J.:—Like my brother Latchford, I trust that I may be found ever ready to relieve a solicitor from the consequence of a mistake or default; but in this case I do not think that this question really arises, as the action appears to me plainly to be one falling within the provisions of Rule 25(g), as determined by my learned brother.

To determine the nature of the action it is necessary to look at the statement of claim, and at it alone. From this it appears that the defendant company is incorporated under the laws of the Province of Manitoba, and has its head office there. The defendant Farrow is a real estate agent residing and carrying on his business in Toronto. The defendant company, through Farrow, sold certain lands in Manitoba to the plaintiffs. The greater portion of the purchase-money has been paid. It is alleged, rightly or wrongly, that the plaintiff was induced in each case to enter into the agreements by the fraud of the defendant company and its agent Farrow. The claim is made against both defendants for the refund of the money paid, with interest, and against the company to rescind the contract.

It is plain that both Farrow and the company are liable to the plaintiffs for the moneys received if fraud can be established: Bowstead on Agency, 4th ed., p. 332. So far as this branch of the case is concerned, they are each undoubtedly proper parties to the action against them jointly.

So far as release is claimed against the defendant company, beyond that which can be claimed against Farrow, this is cog-

nate to the action against them jointly. This distinguishes the case from the class of cases of which Collins v. North British and Mercantile Insurance Co., [1894] 3 Ch. 228, may be regarded as a type. There it was sought to add a totally independent and quite distinct claim against the foreign defendant. This is plainly not admissible; but in that case, as in all others, it was said that an additional claim cognate to the primary cause of action may be added.

At present I am inclined to think that the case might be brought under one of the other heads mentioned in Rule 25; but it is not necessary to determine that point in these cases.

The motion must be refused, with costs to the plaintiffs in any event.

MIDDLETON, J., IN CHAMBERS. MARCH 11TH, 1914.

SNIDER v. SNIDER.

Pleading—Reply—Departure—Leave to Appeal from Order of Judge in Chambers.

Motion by the defendants for leave to appeal to the Appellate Division from the order of BRITTON, J., 5 O.W.N. 956.

W. J. Elliott, for the defendants the foreign executors of T. A. Snider, deceased.

F. C. Snider, for the defendant the Canadian executor.

H. E. Irwin, K.C., for the plaintiff.

MIDDLETON, J.:—The facts giving rise to this litigation are simple. The plaintiff alleges that his brother, the late T. A. Snider, having made his will, by which he left the plaintiff a legacy of $10,000, from which was to be deducted the amount of any advances that might be made during the testator's lifetime, made him advances to the extent of the face amount of the legacy, but thereafter his brother, desiring to release him from these advances, so that he might receive his legacy in full, adopted the device of giving him promissory notes to the amount of $10,000, which he was to be at liberty to use as a set-off against the advances, and so leave him free to receive the legacy.

Instead of setting out these facts in simple language, and relying upon them as constituting his cause of action, the plain-

tiff sued upon the promissory notes. When he came to put in his statement of claim, he followed up his claim upon the promissory notes with a long and rambling account of the transaction between his brother and himself.

My Lord the Chancellor, regarding the action as still an action on the notes, struck out this discursive matter, which was apparently intended to be pleaded by way of confession and avoidance of some expected defence (5 O.W.N. 528). The defendants then pleaded, simply stating that the notes in question were without consideration and did not constitute a valid claim against the estate of the deceased; whereupon the plaintiff filed a reply, which is a complete departure from his statement of claim. Put shortly, and stripped of its verbiage, it is no more than an allegation that, if the plaintiff is not entitled to recover upon the notes, he ought to be entitled to recover his legacy. The plaintiff has also done his best to embarrass the situation by issuing another writ claiming the legacy.

Upon the hearing of the motion, I suggested that the actions ought to be consolidated and all necessary amendments made so that the plaintiff's real claim might be placed before the Court in a way that would be calculated to ensure an adjudication upon the real dispute; and this was assented to by counsel. Counsel for the plaintiff now tells me that this was under some strange misapprehension; and I have, therefore, given leave to withdraw the consent so given.

Although the art of pleading has fallen into disrepute, it seems to me that, quite apart from the Rules, reasons and logic are not entirely dethroned, and that a litigant ought to be compelled to present his case decently clothed in appropriate English.

It is said that the due purpose of language is to conceal thought; yet in the preparation of pleadings some evidence of at least rudimentary thought ought to be apparent.

In this case, owing to the fact that the Canadian executor may not be liable and that the American executors, who are directed to pay the legacy, may not be subject to the jurisdiction of this Court at all, so that, whatever the result of this litigation here, other litigation may follow in the United States, it is important that the issue should be clearly defined, so as to make the result of the litigation intelligible. I, therefore, think it is important that the pleadings should be put in better shape, and I give leave to appeal as sought, upon the terms, which must be assented to by the appellants, that, if necessary, the appel-

late Court is to be at liberty to modify or review the order made by the learned Chancellor without a formal appeal being taken.

Costs will, of course, be dealt with by the appellate Court.

I again suggest to the parties the desirability of consenting to some order on the lines already indicated, as I believe it will be found to be in their mutual interest.

MIDDLETON, J., IN CHAMBERS. MARCH 11TH, 1914.

RE HILKER.

Infant—Application of Father for Writ of Habeas Corpus—Infant Removed out of Jurisdiction by Foster Parents—Neglected Child—Children's Protection Act—Children's Aid Society.

Motion by the father of an infant for a writ of habeas corpus.

A. R. Hassard, for the applicant.

J. R. Cartwright, K.C., for the Children's Aid Society of Waterloo, the respondents.

MIDDLETON, J.:—There is no dispute as to the facts which are material, in the view which I take of this matter. On the 28th May, 1907, this child was made a ward of the Children's Aid Society of Waterloo, the Judge having found it to be a neglected child within the meaning of the statute (the Children's Protection Act). The child was then placed in an approved foster home, the foster parents at that time residing within Ontario. The foster parents have now removed out of Ontario, having gone, it is said, to Alberta, taking the child with them. The father now desires to have the child restored to his custody.

I do not think that I should grant a writ of habeas corpus, under the circumstances. In Regina v. Barnardo, 23 Q.B.D. 305, where there was a case of strong suspicion, it was said that the writ ought to be granted so that a return might be made shewing that the child was out of the jurisdiction as alleged, and thus the truth of the return might be tried; but

where the truth and the fact set up are not only admitted, but the facts are stated by the applicant, no useful purpose would be served by the formal issue of a writ and by having a formal return which it is not desired to controvert. Clearly, the applicant must resort to the Courts of the Province where the child now is. These Courts alone have jurisdiction over its person.

In so saying, I do not desire to deny that our Courts might exercise a coercive jurisdiction to compel the bringing back of the child to Ontario, if it was thought that the child had been removed therefrom contumaciously, and with a view of defeating proceedings taken or to be taken in our Courts.

The motion is, therefore, refused. Costs are not asked.

MIDDLETON, J. MARCH 11TH, 1914.

WHITE v. NATIONAL PAPER CO.

Principal and Agent—Agent's Commission on Sale of Goods—Commission-agreement—Construction—"Commission on all Accepted Orders"—Order Accepted, but only Part of Goods Delivered—Fault of Principal.

Action by an agent to recover commission under a contract evidenced by two letters of the 15th and 19th January, 1912.

Hamilton Cassels, K.C., for the plaintiff.

C. A. Masten, K.C., and J. H. Spence, for the defendants.

MIDDLETON, J.:—The sole question between the parties is the right to commission, amounting to $1,491.36, claimed with respect to a contract entered into with the Buntin-Reid Company, under which that company agree to purchase $35,000 worth of paper of a certain class within one year.

Under this contract, paper to about one-fifth of the amount contracted for was supplied and accepted. The right to commission with respect to this is not denied. The contest is over the right to commission with respect to paper that was not in fact supplied. The plaintiff contends that he is entitled to commission "upon all accepted orders," and that the failure of the defendants to supply to the Buntin-Reid Company the full amount contracted for does not affect his right to recover. If necessary to support his claim, he goes further, and says

that the failure is to be attributed to the fault of the defendants, who did not on their part live up to the contract made by the purchasers.

The contract, in the first place, provides for payment of commission on all accepted orders; and this, I think, is the dominating and controlling clause, to which all other provisions are subsidiary. This general provision is followed by a clause providing that the commission is to be payable "immediately the order is shipped, and failing the customer paying the account we shall deduct from the first settlement with you the commission paid on said order."

It is contended by the defendants that this limits the generality of the primary obligation, and shews that the commission is not to be paid unless the subject of the order is actually shipped.

I do not think that this is the true construction of the clause. The parties were contracting upon the assumption that each would perform its obligations. The commission was to be paid upon all orders accepted. Some of these orders would be for immediate delivery, some for future delivery. The commission was not to be paid until the goods were shipped, that is, until the time provided for shipment. The defendants cannot free themselves from liability to pay commission, by breach of contract.

The Buntin-Reid Company are undoubtedly of good financial standing, and, if they are in default, can readily be made answerable for damages. I think that the defendants are in this dilemma: if the failure to complete the Buntin-Reid contract arose from their own fault, then they must pay the plaintiff's commission. If the failure arises from the fault of the Buntin-Reid Company, the defendants have an adequate right of action against them for damages; and this does not relieve from payment of commission.

If driven to determine the issue as to whose fault it was that the contract was not completed, I should find that the defendants and not the Buntin-Reid Company were to blame. In every aspect of the case, the plaintiff, I think, is entitled to succeed.

Little assistance is gained from the cases. There is no difficulty about the law. In each case the plaintiff has to shew that he has complied with his contract.

Austen Bros v. Canadian Fire Engine Co. (1907), 4 E.L.R. 277, shews the danger of attempting to base a general principle

upon a statement originally made with reference to a particular contract. There a citation is made from what is said by Lindley, L.J., in Lott v. Outhwaite (1893), 10 Times L.R. 76, that, in order to entitle himself to his commission, the agent must prove that the purchase had been completed, or that, if it had not been, the non-completion was due to the fault of the vendor. On referring to the case, it will be found that that was spoken with reference to a contract upon which the commission became payable only upon completion; so that the Lord Justice was not laying down any such general doctrine, but only applying well-understood law to the facts of that particular case.

Costs will follow the event.

LENNOX, J. MARCH 11TH, 1914.

BINGEMAN v. KLIPPERT.

Assignments and Preferences—Assignment of Policy of Life Insurance—Consideration—Bona Fides—Absence of Notice or Knowledge of Claim of Creditor—Issue between Assignee and Execution Creditor—Finding against Fraud—Costs.

An issue to determine the ownership of $980 paid into Court by the Mutual Life Assurance Company of Canada.

The plaintiff claimed to be entitled to the money as an execution creditor of Hannah Boehmer; and the defendant claimed it under an assignment from Hannah Boehmer, her sister.

W. H. Gregory, for the plaintiff.

E. P. Clement, K.C., for the defendant.

LENNOX, J.:—Mr. Gregory presented his case with marked ability and earnestness; but the evidence does not establish that the assignment to the defendant was a colourable transaction or that she acted in bad faith. I judge the defendant to be a truthful, honest woman, and feel satisfied that she gave a truthful and substantially accurate account of the transaction down to and including the payment over of the $1,000 to her sister Mrs. Boehmer and the subsequent handing of $750 of this money to her, by her sister, for safe-keeping. Mrs. Boeh-

mer's evidence is certainly trustworthy in every way, and she corroborates the defendant upon nearly every important fact. I accept the evidence of these two ladies that the defendant did not know that Mrs. Boehmer was indebted to any outsider; and the indebtedness to the defendant, if it could be said to exist—for it was not only outlawed, but the defendant had abandoned all claim and destroyed the promissory note—could not vitiate the defendant's security if taken in good faith for an actual cash advance of $1,000; and I find that the policy was assigned and accepted in good faith and for an adequate consideration, and without notice or knowledge of any circumstance suggesting dishonesty.

Excepting as to some minor matters of detail upon which he alone speaks, and which are vouched for by the surrounding circumstances, I am not influenced by Abraham Boehmer's evidence, whether for or against the defendant's interests.

I am not, however, sure that the defendant was able to give a correct statement as to how or when it happened that her husband filled out the cheque for the return of Mrs. Boehmer's money, but I am satisfied that the defendant gave honest testimony as to this transaction. It is quite possible, I think, that the husband's preparation of this cheque before leaving home had some connection with the knowledge that litigation had been commenced. This brings me to the only point upon which I have felt any difficulty. I am convinced that, when the defendant handed over her cheque for $1,000 to her sister, she regarded the transaction as closed—that there was no string upon it, and no understanding, express or implied, that any of it would be handed back, or that she had anything to look to beyond the policy assigned to her; and I am also convinced that afterwards and from first to last she regarded and treated the $750 placed in her hands by her sister as her sister's money. But I have pondered a good deal as to whether the defendant was bound to shift her ground when she learned of the litigation, repudiate her obligation to her sister, and, in effect, fight for the plaintiff. Every dollar of this money has been accounted for, and all of it has already gone to the creditors of Abraham Boehmer. I have come to the conclusion that the defendant was not legally or morally called upon to act otherwise than as she did.

There will be judgment for the defendant.

Mr. Gregory submitted that in any case his client should not be compelled to pay the defendant's costs. These trans-

actions are always suspicious. Abraham Boehmer, by unwarrantably projecting himself into this matter, when his wife opened her bank account—too clever by far, but not too honest—invited suspicion; and, although the defendant was in no sense responsible for this, I have decided not to give costs against the plaintiff.

References: R.S.O. 1914 ch. 334, secs. 1 and 4; Parker on Frauds on Creditors, 1903 ed., pp. 59, 81, 91; Webb v. Hamilton (1908), 12 O.W.R. 381; Hickerson v. Parrington, 18 A.R. 635; Langley v. Beardsley, 18 O.L.R. 67; Campbell v. Patterson, 21 S.C.R. 645; Brown v. Sweet, 7 A.R. 725, at p. 738.

FALCONBRIDGE, C.J.K.B. MARCH 14TH, 1914.

ST. CATHARINES IMPROVEMENT CO. LIMITED v. RUTHERFORD.

Contract—Breach by Default and Delay—Provision for Liquidated Damages Construed as Penalty—Absence of Actual Damage—Judgment for Nominal Damages—Costs on Division Court Scale, with Set-off to Defendant—Third Party—Remedy over for Amount Deducted from Defendant's Full Costs on Supreme Court Scale.

Action to recover $1,200 as liquidated damages for delay and default of the defendant in removing structures from land, as agreed upon between the plaintiffs and defendant.

The defendant brought in one Riley as a third party, and claimed relief over against him.

H. H. Collier, K.C., for the plaintiffs.
G. F. Peterson, for the defendant.
M. Brennan, for the third party.

FALCONBRIDGE, C.J.K.B.:—Notwithstanding the use of the words "liquidated damages" in the agreement, I am of the opinion that this is a case of penalty.

The law is clearly laid down in the Encyclopædia of the Laws of England, vol. 4, p. 325 (cited in full in Townsend v. Rumball (1909), 19 O.L.R. at pp. 435, 436). The contract here is for the removal of several different structures of different

degrees of size and importance, e.g., there is a hen-house still on the premises. In Townsend v. Toronto Hamilton and Buffalo R.W. Co. (1896), 28 O.R. 195, and in Pelee Island Navigation Co. v. Doty (1911), 23 O.L.R. 402, the defendants agreed to do one particular thing, and the sum contracted to be paid had reference to a single obligation.

In the present case there is no actual damage. The plaintiffs wished to get their property "away from the farm effect," and make it look like residential city property. No sale has been lost in consequence of the defendant's default.

I enter a verdict for the plaintiffs for $5 damages, with Division Court costs; the defendant to have the usual set-off of High Court costs.

As regards the third party, he is the one who has made the trouble, and he is adjudged to pay to the defendant a sum sufficient to make good to the defendant whatever deduction he suffers from his full amount of costs as between party and party, including the defendant's costs of and incidental to the third party procedure; otherwise no order as to costs for or against the third party.

HAYNES v. VANSICKLE—CAMERON, MASTER IN CHAMBERS—MARCH 9.

Evidence—Foreign Commission—Action to Establish Partnership—Immateriality of Proposed Evidence in View of Question to be First Tried.]—Motion by the plaintiff for a commission to take the evidence of Anesley Wilcox in Buffalo. It was alleged by the plaintiff that this witness was a necessary and material witness, and would give evidence to shew whether the defendant received a commission on the sale of certain Buffalo lands; as to whether the agreement referred to in paragraph 4 of the statement of defence was produced by misrepresentation; and in support of the plaintiff's allegation that his signature to the document referred to in paragraph 11 of the statement of defence was procured by misrepresentation and concealment of material facts. The defendant was examined for discovery and refused to answer any question in reference to the Buffalo undertaking. That he was strictly within his rights in refusing to answer was decided in Haynes v. VanSickle, 5 O.W.N. 553, by MIDDLETON, J., who held that the case fell within the principle of Bedell v. Ryckman, 5 O.L.R. 670, and that

further discovery should not be granted until the right to participate in the profits of the Buffalo undertaking was established. The Master said that he was clearly of opinion that until this right was established the plaintiff had no right in any way to give evidence as to the Buffalo undertaking. If at the trial the plaintiff should establish such a right, the trial Judge would, no doubt, direct a reference to take an account of the profits of the Buffalo undertaking. The motion for a commission was refused with costs. N. W. Rowell, K.C., for the plaintiff. H. S. White, for the defendant VanSickle.

LAWSON v. HUNT—BRITTON, J.—MARCH 10.

Vendor and Purchaser—Agreement for Sale of Land—Time Made of Essence—Failure of Purchaser to Close Transaction on Day Named—Registration of Plan—Dismissal of Action for Specific Performance.]—Action by vendor against purchaser to compel specific performance of an agreement for the sale and purchase of five acres of land in the township of Scarborough. The agreement was in writing, dated the 10th July, 1913. Time was expressly made of the essence. The adjustment of taxes, interest, and insurance, was to be as of the 15th August, 1913, and possession was to be given on or before that date. On the 22nd August, 1913, the plaintiff not having registered a plan which was a necessary part of the title, and not being ready to close the sale, the defendant "called the deal off" and demanded his deposit. The learned Judge said that the defendant was apparently a fair man. He desired to carry out the purchase and to acquire the property for a market garden, and he wanted it by the 15th August. He placed the matter in the hands of his solicitor, and was quite right in being guided by him. The plan was proposed by the plaintiff, and presumably for his benefit, in regard to the whole subdivision of lot 30 in concession D of the township—part of which the defendant was buying. By it a street or lane or way might have been laid down and dedicated which the defendant might regard as to his prejudice. The defendant was entitled to have the proposed plan prepared and registered, or at all events submitted, before he could be called upon to accept the conveyance. The plaintiff was not ready to complete his part of the contract. Even if the plaintiff could, within the time, have compelled

the defendant to accept the title without regard to the plan of subdivision, the plaintiff was not ready until after the 15th August; and, time being of the essence of the contract, the defendant was not bound to accept. Action dismissed with costs. Judgment for the defendant upon his counterclaim for $52.50. B. N. Davis, for the plaintiff. H. W. A. Foster, for the defendant.

ROBERTSON v. VILLAGE OF HAVELOCK—KELLY, J.—MARCH 14.

Fatal Accidents Act—Children Killed in Sand-pit Owned by Municipal Corporation—Negligence—Liability of Corporation—Findings of Jury—Evidence—Damages—Apportionment.]—An action for damages for the death of the plaintiff's three children, caused by falling sand and earth in a sand-pit on the defendants' property. The jury found that these children and other children resorted to and played in this sand-pit with the knowledge and permission of the defendants; that there was an invitation to the plaintiff's children to use the sand-pit, and that they entered it directly from the highway; that when they went to the pit on the day of the accident there was the excavation or hole in which they were killed; that, previous to the accident, the defendants did not have any knowledge, and they could not as reasonable men have known, that there was a likelihood of children being injured there; that there was no negligence on the part of the parents of the children or others in whose charge they were; that their death was not brought about or contributed to by any act of their own; and that the children's death was caused by the negligence of the defendants, in one Leeson having dug the hole in which the children were killed, and left it unprotected. The defendants' lands in which was the sand-pit adjoined the public highway, and counsel admitted that there was no fence between the two properties except for a short distance at one end. According to the evidence, the place at which the children met their death was about 40 feet from the highway. Leeson's relationship to the defendants was this. The defendants used sand and gravel from this pit of theirs for their own purposes, and they also sold gravel and sand from it to others. Leeson did most of the hauling of the gravel from the pit; he was employed by the defendants, when they needed him, to draw gravel and sand; he ran the snow-plough in the winter months, keeping the sidewalks clean; he was paid

by the day or by the hour for himself and his team for sand and gravel drawing, and by the trip for snow-cleaning; and he also drew sand from the pit for other persons. There was evidence that Leeson, on the day of the accident, was employed in drawing stone and tiles for the defendants, and that, shortly before the accident, one Seabrooke asked him to bring him a load of sand. This Leeson took from the place of the accident, and, while he was delivering it, the children met their death. Kelly, J., said that there was evidence to go to the jury on which they reached their findings; and a reasonable interpretation of the finding of the jury as to Leeson was, that Leeson's negligence in digging the hole and leaving it unprotected was committed in the course or within the scope of his employment; and, in that view, the defendants were liable. In the case of the youngest of the children, who was two years old, the jury negatived any damage. Judgment for the plaintiff for $725, the amount assessed by the jury, and costs. The action was for the benefit of the plaintiff and his wife and surviving children. Counsel may speak to the apportionment. D. O'Connell and D. J. Lynch, for the plaintiff. F. D. Kerr and V. J. McElderry, for the defendants.

SUPREME COURT OF ONTARIO

RULE PASSED SEPT. 15, 1913

773. It is ordered that the following amendments be made in the Consolidated Rules and Tariff of Costs:—

"The prefatory note to tariff B., p. 208, is amended so as to read as follows: 'payable in stamps, except where the officer is not paid by salary, or has not commuted his fees, or unless otherwise expressly provided,' and by adding thereto the following items: 'on renewal of writs, one dollar,' and 'to special examiners, marking exhibits, twenty cents:' these amendments to be retroactive and to be deemed to have been in force since the 1st of September instant;

"And that the form for the endorsement of specially endorsed writs (No. 5) be amended by adding thereto, following the specific claim, the words 'and the plaintiff further claims $ for costs;' and that to the form for the statement of claim (No. 10) be added the following note 'the date of the writ should be given at the head of the statement of claim, thus, Writ issued , 19 .'

"And that form No. 60 be amended by striking out the figures 285 to 295 where they occur on page 175, and substituting the figures 280 to 290;

(2) "That Rules 609 and 615, subsection 2, be amended by inserting in each rule after the word 'infant' the words 'or lunatic who has no committee except the Inspector of Prisons and Public Charities,' and by adding to each of the said rules the words 'notice of such application shall, unless otherwise ordered, also be given to such lunatic.' "

RULES PASSED DEC. 1, 1913

That Rule 494 be amended by inserting in the fourth line, in lieu of the words "a copy" the words "five copies," and in the fifth line, after the word "thereof," the words "and of the reasons therefor, unless reported."

In Rule 477, line 5, substitute the word "directions" for "tions."

In form 3, the last line but one, substitute "defence" for "offence."

In the County Court Tariff, page 207, amend item 20 by striking out the word "senior."

In the County Court Tariff, page 207, amend item 18 by adding after the word "Judge" the words and figures "not exceeding $15.00."

In the Tariff of Disbursements (page 210) after the items relating to Commissioners add the words "upon every commission appointing a commissioner to take affidavits, etc., $5.00."

In Rule 677 add clause 677 (1) as follows:—

"Where the amount realized is small the taxing officer may fix a lesser sum than would be allowed upon taxation."

In Rule 760 insert after the word "assigned" in the second line the words "or of the office being vacant."

In the Tariff of Fees, add a note following item 25, p. 205, "The Judge or officer hearing any motion may allow a smaller fee than above provided."

AMENDMENTS OF RULES PASSED DEC. 24, 1913

56. (6) An affidavit shall not be necessary where an appearance is entered by the Official Guardian for an infant or lunatic.

66. (2) On the signing of default judgment the officer signing judgment may fix and ascertain costs without taxation.

112. (3) Where a defendant who has appeared to a writ which is specially indorsed and filed the affidavit required by Rule 56 does not file a statement of defence within the time limited, his affidavit shall stand as his defence and notice of trial may be at once served.

The tariff of disbursements is amended as follows: On page 210, item, "fees to witnesses residing over three miles from the Court House," strike out figures "1.25" and insert "per diem 1.50."

Amend items relating to fees payable to professional witnesses by striking out the figure "4" where it appears, and insert after the words "per diem" in each item, the words and figures "Unless otherwise provided by Statute, $5.00."

Add to the item relating to witnesses the words: "A reasonable sum may be allowed for the preparation of any plan, model, or photograph, when necessary for the due understanding of the evidence."