The Ontario Weekly Reporter

INDEX-DIGEST

THE

ONTARIO WEEKLY REPORTER

AND

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JULY-DECEMBER, 1904

EDITOR :
E. B. BROWN, ESQUIRE
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TABLE OF THE NAMES OF CASES

REPORTED IN

VOLUME IV. OF THE ONTARIO WEEKLY REPORTER

The figures indicate the pages on which the cases will be found. Two cases reported under different names in the Ontario Law Reports will be found under both names.

SUPPLEMENT

The following cases reported in the first half of 1904 in Vol. III. of the Ontario Weekly Reporter have been reported during the second half of 1904 in the Ontario Law Reports.

Appeal to Court of Appeal: Ray v. Port Arthur, Duluth, and Western R. W. Co., Ray v. Middleton, 3 O. W. R. 724, 7 O. L. R. 737.

Bankruptcy and Insolvency: Elgin Loan and Savings Co. v. Orchard, 3 O. W. R. 781, 7 O. L. R. 695.

Banks and Banking: London Life Ins. Co. v. Molsons Bank, 3 O. W. R. 858, 8 O. L. R. 238.

Broker: Kerr v. Murton, 3 O. W. R. 801, 7 O. L. R. 751.

Carriers: St. Mary's Creamery Co. v. Grand Trunk R. W. Co., 3 O. W. R. 472, 8 O. L. R. 1.

Cheques: London Life Ins. Co. v. Molsons Bank, 3 O. W. R. 858, 8 O. L. R. 238.

Company: Re Atlas Loan Co. (Reserve Fund), 3 O. W. R. 688, 7 O. L. R. 706.

Company: Re Strathy Wire Fence Co., 3 O. W. R. 889, 8 O. L. R. 186.

Consolidation of Actions: Morton v. Grand Trunk R. W. Co., 3 O. W. R. 640, 704, 8 O. L. R. 372.

Constitutional Law: Rex v. Horning, 3 O. W. R. 740, 8 O. L. R. 215.

Constitutional Law: Hewson v. Ontario Power Co. of Niagara Falls, 3 O. W. R. 865, 8 O. L. R. 88.

Copyright: Black v. Imperial Book Co., 3 O. W. R. 467, 8 O. L. R. 9.

Costs: Neely v. Parry Sound River Improvement Co., 3 O. W. R. 601, 778, 8 O. L. R. 128.

Costs: Earle v. Burland, 3 O. W. R. 702, 8 O. L. R. 174.

Costs, Security for: Centaur Cycle Co. v. Hill, 3 O. W. R. 354, 7 O. L. R. 617.

County Court Appeal: Lucas v. Holliday, 3 O. W. R. 732, 8 O. L. R. 541.

Criminal Law: Re Rex v. McDougall, 3 O. W. R. 750, 8 O. L. R. 30.

Criminal Law: Re Chantler and Clerk of Peace of Middlesex, 3 O. W. R. 761, 8 O. L. R. 111.

Damages: Delehanty v. Michigan Central R. W. Co., 3 O. W. R. 788, 7 O. L. R. 690.

Deed: Siple v. Blow, 3 O. W. R. 855, 8 O. L. R. 547.

Division Courts: Turner v. Tourangeau, 3 O. W. R. 74, 8 O. L. R. 221.

Division Courts: Re Barr v. McMillan, 3 O. W. R. 297, 7 O. L. R. 672.

Division Courts: Re Wilkes v. Home Life Association of Canada, 3 O. W. R. 589, 675, 744, 8 O. L. R. 91.

Division Courts: Re Coy v. Arndt, 3 O. W. R. 585, 658, 8 O. L. R. 101.

Division Courts: Re Kay v. Storry, 3 O. W. R. 725, 784, 8 O. L. R. 45.

Dower: Crossett v. Haycock, 3 O. W. R. 616, 7 O. L. R. 655.

Dower: Brown v. Brown, 3 O. W. R. 795, 8 O. L. R. 332.

Drainage: Re Township of Chatham and Township of Dover, 3 O. W. R. 882, 8 O. L. R. 132.

Evidence: Hopkinson v. Perdue, 3 O. W. R. 934, 8 O. L. R. 228.

Execution: Turner v. Tourangeau, 3 O. W. R. 74, 8 O. L. R. 221.

Executors and Administrators: Doyle v. Diamond Flint Glass Co., 3 O. W. R. 510, 921, 7 O. L. R. 747, 8 O. L. R. 499.

Executors and Administrators: Morton v. Grand Trunk R. W. Co., 3 O. W. R. 640, 704, 8 O. L. R. 372.

Fraudulent Conveyance: Elgin Loan and Savings Co. v. Orchard, 3 O. W. R. 781, 7 O. L. R. 695.

Insurance: Haslem v. Equity Fire Ins. Co., 3 O. W R. 614, 8 O. L. R. 246.

Justice of the Peace: Rex v. Mancion, 3 O. W. R. 756, 8 O. L. R. 24.

Landlord and Tenant: Farley v Sanson, 3 O. W. R. 460, 7 O. L. R. 639.

Landlord and Tenant: Smellie v. Watson, 3 O. W. R. 475, 7 O. L. R. 635.

Landlord and Tenant: Re Grant and Robertson, 3 O. W. R. 846, 8 O. L. R. 297.

Libel: Gurney Foundry Co. v. Emmett, 382, 554, 7 O. L. R. 604.

Limitation of Actions: Reynolds v. Trivett, 3 O. W. R. 463, 7 O. L. R. 623.

Local Board of Health: Sellars v. Village of Dutton, 3 O. W. R. 664, 7 O. L. R. 646.

Lunatic: Stanley v. Hayes, 3 O. W. R. 784, 8 O. L. R. 81.

Master and Servant: Doyle v. Diamond Flint Glass Co., 3 O W. R. 510, 921, 7 O. L. R. 747, 8 O. L. R. 499.

Master and Servant: Cooper v. Hamilton Steel and Iron Co., 3 O. W. R. 898, 8 O. L. R. 353,

Master and Servant: McIntosh v. Firstbrook Box Co., 3 O. W. R. 924, 8 O. L. R. 419.

Master and Servant: Brown v. Waterous Engine Works Co., 3 O. W. R. 943, 8 O. L. R. 37.

Mortgage: Laws v. Toronto General Trusts Corporation, 3 O. W. R. 634 8 O. L. R. 522.

Mortgage: Waterous Engine Works Co. v. Livingstone, 3 O. W. R. 670, 7 O. L. R. 740.

Mortgage: McDonald v. Grundy, 3 O. W. R. 731, 8 O. L. R. 113.

Municipal Corporations: Minns v. Village of Omemee, 1 O. W. R. 362, 8 O. L. R. 508.

Municipal Corporations: Re Hunter and City of Toronto, 3 O. W. R. 170, 660, 8 O. L. R. 52.

Municipal Corporations: Sellars v. Village of Dutton, 3 O. W. R. 664, 7 O. L. R. 646.

Municipal Corporations: Re Village of Southampton and County of Bruce, 3 O. W. R. 729, 8 O. L. R. 106.

Municipal Corporations: Williamson v. Township of Elizabethtown, 3 O. W. R. 742, 8 O. L. R. 181.

Municipal Corporations: Re McCrae and Village of Brussels, 3 O. W. R. 868, 8 O. L. R. 156.

Municipal Corporations: Re Kelly and Town of Toronto Junction, 3 O. W. R. 765, 8 O. L. R. 162.

Municipal Corporations: Re Township of Chatham and Township of Dover, 3 O. W. R. 882, 8 O. L. R. 132.

Municipal Corporations: Re Town of Berlin and Township of Waterloo, 3 O. W. R. 903, 8 O. L. R. 335.

Municipal Elections: Rex ex rel. Moore v. Hamill, 3 O. W. R. 642, 7 O. L. R. 600.

Negligence: Cooper v. Hamilton Steel and Iron Co., 3 O. W. R. 898, 8 O. L. R. 353.

Negligence: Brown v. Waterous Engine Works Co., 3 O. W. R. 943, 8 O. L. R. 37.

Notice of Action: Gurney Foundry Co. v. Emmett, 382, 554, 7 O. L. R. 604.

Nuisance: Weber v. Town of Berlin, 3 O. W. R. 812, 8 O. L. R. 302.

Parliamentary Elections: Re North Renfrew Provincial Election, Wright v. Dunlop, 3 O. W. R. 894, 8 O. L. R. 359.

Parties: Agar v. Escott. 3 O. W. R. 421, 719, 8 O. L. R. 177.

Parties: Bank of Hamilton v. Anderson, 3 O. W. R. 301, 380, 7 O. L. R. 613.

Parties: Kingston v. Salvation Army, 3 O. W. R. 556, 7 O. L. R. 681.

Parties: Mason v. Grand Trunk R. W. Co., 3 O. W. R. 621, 810, 8 O. L. R. 28.

Partition: Stroud v. Sun Oil Co., 3 O. W. R. 806, 7 O. L. R. 704.

Payment into Court: Mendels v. Gibson, 3 O. W. R. 551, 7 O. L. R. 611.

Payment out of Court: Centaur Cycle Co. v. Hill, 3 O. W. R. 354, 7 O. L. R. 617.

Pleading: Bank of Hamilton v. Anderson, 3 O. W. R. 301, 380, 709, 7 O. L. R. 613, 8 O. L. R. 153.

Pleading: Webb v. Hamilton Cataract Power, Light, and Traction Co., 3 O. W. R. 384, 7 O. L. R. 607.

Pleading: Long v. Long, 3 O. W. R. 428, 7 O. L. R. 596.

Pleading: Mendels v. Gibson, 3 O. W. R. 551, 7 O. L. R. 611.

Pledge of Railway Bonds: Toronto General Trusts Corporation v. Central Ontario R. W. Co., 3 O. W. R. 520, 7 O. L. R. 660.

Promissory Note: Steacy v. Stayner, 3 O. W. R. 244, 557, 7 O. L. R. 684.

Promissory Note: Bogart v. Robertson, 3 O. W. R. 758, 8 O. L. R. 261.

Railway: Delahanty v. Michigan Central R. W. Co., 3 O. W. R. 788, 7 O. L. R. 690.

Railway: Tabb v. Grand Trunk R. W. Co., 3 O. W. R. 885, 8 O. L. R. 203.

Railway: Toronto General Trusts Corporation v. Central Ontario R. W. Co., 3 O. W. R. 910, 8 O. L. R. 342.

Railway, Pledge of Bonds: Toronto General Trusts Corporation v. Central Ontario R. W. Co., 3 O. W. R. 520, 7 O. L. R. 660.

Railway, Receiver of: Ritchie v. Central Ontario R. W. Co., Weddell v. Ritchie, 3 O. W. R. 609, 7 O. L. R. 727.

Sale of Goods: Craig v. Beardmore, 3 O. W. R. 547, 7 O. L. R. 674.

Sale of Goods: Burton, Beidler, and Phillips Co. v. London Street R. W. Co., 3 O. W. R. 666, 7 O. L. R. 717.

Settled Estates: Re Currie and Watson's Trusts, 3 O. W. R. 776, 7 O. L. R. 701.

Sheriff: Lucas v. Holliday, 3 O. W. R. 732, 8 O. L. R. 541.

Stay of Proceedings: Hockley v. Grand Trunk R. W. Co., Davis v. Grand Trunk R. W. Co., 3 O. W. R. 663, 7 O. L. R. 658.

Surrogate Courts: Re Russell, 3 O. W. R. 926, 8 O. L. R. 481.

Trade Mark: Gillett v. Lumsden Brothers, 3 O. W. R. 851, 8 O. L. R. 168.

Trespass to Land: Reynolds v. Trivett, 3 O. W. R. 463, 7 O. L. R. 623.

Trial: Long v. Long, 3 O. W. R. 428, 7 O. L. R. 596.

Trial, Stay of: Hockley v. Grand Trunk R. W. Co., Davis v. Grand Trunk R. W. Co., 3 O. W. R. 663, 7 O. L. R. 658.

Trusts and Trustees: Re Sargent, 3 O. W. R. 769, 8 O. L. R. 260.

Vendor and Purchaser: Re Kingston Light, Heat, and Power Co. and City of Kingston, 3 O. W. R. 769, 8 O. L. R. 258.

Vendor and Purchaser: Clergue v. McKay, Clergue v. Preston, 3 O. W. R. 860, 8 O. L. R. 84.

Venue: McDonald v. Dawson, 3 O. W. R. 773, 8 O. L. R. 72.

Warehousemen: Miall v. Olver, 3 O. W. R. 749, 8 O. L. R. 66.

Way: Siple v. Blow, 3 O. W. R. 855, 8 O. L. R. 547.

Way: O'Connor v. City of Hamilton, 3 O. W. R. 918, 8 O. L. R. 391.

Will: Re Mumby, 3 O. W. R. 146, 8 O. L. R. 283.

Will: Mutchmor v. Mutchmor, 3 O. W. R. 309, 931, 8 O. L. R. 271.

Will: Re Smith, 3 O. W. R. 380, 7 O. L. R. 619.

Will: Re Fleming, 3 O. W. R. 622, 7 O. L. R. 651.

Will: Martin v. Martin, 3 O. W. R. 930, 8 O. L. R. 462.

THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING JULY 9TH, 1904.)

VOL. IV. TORONTO, JULY 14, 1904. NO. 1

JULY 2ND, 1904.

DIVISIONAL COURT.

BÉLANGER v. PREVOST.

Contract—Assignment or Sub-contract—Variation—Pleading—Amendment—New Trial.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in favour of plaintiff for $349.62 with costs, in an action to recover $500 for hauling wood.

A. H. Marsh, K.C., for appellant.

W. E. Middleton, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MEREDITH, C.J.—The allegations of the statement of claim are of the most bald character, and fail to shew with any clearness the nature of the claim which plaintiff is putting forward. After describing the parties to the action, the statement sets out what is said to be a true copy of a contract in writing entered into between defendant and one Andrew Gallagher, by which defendant undertook to haul 800 cords of wood . . . and also 400 cords more . . . and Gallagher agreed to pay defendant for hauling the 800 cords $500 . . . and for hauling the other 400 cords . . . at the rate of 70 cents a cord. . . . It is then alleged that indorsed on the contract are . . two instruments written in the French language . . translated as follows: "I (defendant) give all my rights mentioned on the face of this contract to (plaintiff)."—"I (plaintiff) contract to take out 200 cords per month beginning at this date up to the amount of 800 cords, at the price mentioned under the contract. As for the 400 cords . . I will haul them out

if they are cut and if I am notified," etc. . . . Then follows an allegation that plaintiff, pursuant to the terms of "said agreement," hauled out "the said 800 cords," and the claim is for payment of $500. . . .

The evidence given at the trial was very meagre, and nothing was shewn as to the circumstances under which the two documents indorsed on the Gallagher agreement were executed. . . .

Defendant's position, as presented before us in argument, does not depend upon novation having taken place. It is this, that the result of the transactions between him and plaintiff is that the latter became the assignee of his rights under the Gallagher contract, and that the second memorandum was intended to limit, and has the effect of limiting, the obligation which, without it, would have rested on plaintiff . . . to perform the contract in all its terms so far as they were to be performed by defendant; and to give to plaintiff the right to perform the contract according to its terms, but obliging him to perform it only in the modified manner mentioned in the second memorandum, and as between defendant and plaintiff without any personal liability on defendant's part to pay for the work to be done, leaving plaintiff to look to Gallagher, and to him alone, for payment. The other view . . is that the second memorandum is in the nature of a sub-contract between plaintiff and defendant, that plaintiff should do for defendant the work which defendant had contracted to do for Gallagher, subject . . to the variation . . between the agreement and the second memorandum. . . .

Much may be said in favour of either view, and it is here that I feel embarrassment owing to the absence of any clear statement in the pleading as to the nature of the contract which plaintiff alleges was formed by the writings . . . and of any light being thrown by the evidence on the circumstances under which the transaction . . was entered into.

The inclination of my mind is against plaintiff's contention, though I have formed no definite opinion either way, and it appears to me that . . the best course to take will be to direct a new trial. . . .

The parties should have leave to amend as they may be advised. It may be that if, having regard to the terms of the second memorandum, plaintiff was not in default as to the 400 cords, but Gallagher is rightly withholding payment of the $500 in respect of the 800 cords because of a claim for damages against defendant for breach of his agreement as to the 400 cords (for defendant may be liable to Gallagher,

although plaintiff is not liable to defendant), plaintiff may have a cause of action against defendant for the loss he has sustained by Gallagher withholding the $500. . . .

Costs of the last trial and of the appeal in the cause unless the trial Judge otherwise orders.

JULY 2ND, 1904.

DIVISIONAL COURT.

RE ARTHUR AND MINTO UNION SCHOOL SECTION 17.

Public Schools—Formation of Union School Section—Award — Appointment of Arbitrators — Amendment of Public Schools Act—Effect on Pending Appeal—Stay of Proceedings.

Appeal by the trustees of school sections Nos. 12 and 13 of Minto from order of MEREDITH, C.J., 2 O. W. R. 930, referring back the award of the arbitrators appointed under sec. 46 of the Public Schools Act, 1901, but confirming the proceedings in so far as regards the formation of union school No. 17 Arthur and Minto.

W. Kingston, K.C., for appellants.

A. Spotten, Harriston, for petitioners.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—After the argument an Act was passed by the Ontario Legislature amending sec. 45 of the Public Schools Act by altering "1901" therein to "1904," and declaring that an award by a majority of the arbitrators appointed under sec. 46 should be good. . . .

In my opinion, school section No. 17 of Arthur and Minto had been formed and existed in fact before 1st April, 1904, and any defects in its formation were cured by the amendment made. . . . An award had been made by de facto arbitrators; they had been declared by the judgment appealed from to have been duly appointed; their award had been confirmed upon all points but one, and, being referred back to them on that point, had been made good by a supplementary award; and all this had taken place before the passing of the amending Act. The Act is expressly made applicable to pending proceedings, so that the fact that an appeal was pending at the time the Act was passed does not prevent it from applying.

It was the duty of the appellants upon the passing of the Act to apply for a stay of proceedings; further arguments, however, have been adduced to us upon the effect of the Act.

In my opinion, the proceedings should now be stayed, each party paying their own costs of the appeal.

JULY 2ND, 1904.

DIVISIONAL COURT.

MORIARITY v. HARRIS.

Assault—Police Constable—Acting Virtute Officii—Malice —Reasonable and Probable Cause—Orders of Superior— —Excess of Violence—R. S. O. ch. 88.

Motion by defendant to set aside the judgment of MEREDITH, C.J., upon the findings of the jury, in favour of plaintiff for $300 and costs, and for judgment for defendant upon the findings, or for a new trial.

The statement of claim alleged that defendant was a police constable of the city of Hamilton, and that he maliciously and without reasonable and probable cause assaulted plaintiff. Defendant pleaded not guilty by statute, R. S. O. ch. 88, secs. 1 to 24, and that the acts complained of were done by him, if at all, in the performance of his duty as police constable and without malice.

It appeared that on 18th August, 1903, plaintiff was driving a watering cart in the streets and public places of the city of Hamilton, and came to the market square, where a crowd was assembled to see a bicycle performance. The market clerk, who had the superintendence of the square, directed defendant, who was on duty as police constable in the square, to cause plaintiff to move his water cart from a position in which it was standing, and in which he thought it was causing an obstruction and possible danger. Defendant went over to plaintiff and directed him to move on. There was a dispute as to what followed, but it appeared clearly that at the end of a few moments plaintiff fell or was pushed by defendant from his seat on the cart and was injured.

Questions were put to the jury, which with their answers were as follows:—

1. Did defendant intentionally throw or push plaintiff off his watering cart? A. No.

2. If not, was plaintiff pushed off or thrown off as the result of violence by defendant? A. Yes.

3. Or did plaintiff fall off while endeavouring to prevent defendant from getting possession of the lines? A. No.

4. Was plaintiff interfering with or preventing the market place from being used for the purpose for which it was designed? A. No.

5. Did plaintiff, after having been ordered by defendant to desist from watering, continue watering and refuse to desist? No.

6. Did defendant use more violence towards plaintiff than was reasonably necessary to prevent plaintiff from incumbering the market place and from wetting the by-standers? A. Yes.

7. Was the use of the market place for the purpose for which it was being used a reasonable one? A. No.

8. Was plaintiff interfering with or preventing the market place from being used for the purpose for which it was actually being used? A. Yes.

9. Did defendant act maliciously and without reasonable and probable cause in doing what he did? A. Not maliciously.

10. Damages? A. $300 for the excess.

The trial Judge found upon these answers that defendant had acted without reasonable and probable cause and entered judgment for plaintiff for $300 and costs.

The motion was heard by FALCONBRIDGE, C.J., STREET, J., IDINGTON, J.

F. MacKelcan, K.C., and G. Lynch-Staunton, K.C., for defendant.

H. Carscallen, K.C., for plaintiff.

STREET, J.—It appears clear that the constable in what he did here, whatever it was, was acting virtute officii, as it is expressed by Lord Kenyon in Alcock v. Andrews, 1 Esp. 542 n. He was on duty at the market square, and was directed by the clerk of the market, who had charge of the premises for the city, to make plaintiff move his watering cart from a position in which it appeared to be creating an obstruction and a danger. The finding of the jury is that plaintiff was in fact interfering with the use of the market place for the purpose for which it was being used. It was while engaged in the effort to make plaintiff move on his watering cart, in pursuance of the order of the market clerk, that defendant caused the injuries complained of. It does

not appear to have been disputed at the trial that defendant was in fact acting virtute officii; for the damages given by the jury have been assessed by them without objection on plaintiff's part, not for the whole assault, but only for the excess of force or violence used in carrying out what defendant might properly have done using only necessary force or violence.

This being the case, it was unnecessary, in my opinion, for defendant to prove that the use being made of the market square was authorized by the city council. The market clerk was the official in charge of it for the city, and the constable, receiving his order to remove a person obstructing the actual use of it, was not bound to search the city by-law for the exact limitations of the market clerk's authority before acting upon his order. It was sufficient that he believed in good faith in the authority of the market clerk, the de facto representative of the city, to prevent the continuance of the obstruction: Griffith v. Taylor, 2 C. P. D. 194; Gosden v. Elphick, 4 Ex. 445; Kelly v. Barton, 26 O. R. 608.

Defendant, having been acting in his office of constable within the meaning of the Act, is brought within the protection of sec. 1 of R. S. O. 1897 ch. 88, and it was necessary for plaintiff to allege, as he has done, and to prove, as he has failed to do, that defendant had acted maliciously and without reasonable and probable cause. The jury have found expressly that he did not act maliciously, and the action, therefore, in my opinion, fails.

I think the judgment entered for plaintiff should be set aside, and that judgment should be entered for defendant with costs of the action and of this motion.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion, referring to Bacon Abr., 7th ed., vol. 2, p. 171; Staight v. Gee, 2 Stark. 445; Theobald v. Crickmore, 1 B. & Ald. 227; Gordon v. Elphick, 4 Ex. 445.

IDINGTON, J., concurred, also giving reasons in writing.

BRITTON, J. JULY 4TH, 1904.

TRIAL.

ANDREWS v. TOWNSHIP OF PAKENHAM.

Way—Highway — Establishment of — Evidence—By-law—Dedication—Statute Labour—Municipal Corporation.

Action for damages for obstructing an alleged highway and for a mandamus compelling defendants to open up this

highway or compel defendant corporation to provide access to plaintiff's land.

J. A. Allan, Perth, and J. E. Thompson, Arnprior, for plaintiff.

J. T. Kirkland, Almonte, and W. H. Stafford, Almonte, for defendant corporation.

A. M. Greig, Almonte, and J. M. Rogers, Perth, for defendant Adam Andrews.

BRITTON, J.—Plaintiff owns lot 15 and the south half of lot 16 in the 5th concession of Pakenham; and the original road allowances leading up to and giving access to this land are not now, and never have been, open to the public for travel. The physical difficulties are so great, owing to the country in the vicinity of this land being rocky and swampy, that to open the original road allowances is practically impossible.

The defendant Adam Andrews owns lots 15 and 16 in the 6th concession of the same township.

As long ago as 2nd October, 1875, the defendant corporation passed a by-law to establish a road across lots 12, 13, and 14 in the 7th concession, 14, 15, and 16 in the 6th concession, and lot 16 in the 5th concession, and the township opened and established a road, if not upon, near to, and apparently intended to be upon, the line across lots 12, 13, and 14 in the 7th concession and lot 14 in the 6th concession, but the question now is as to any public highway across 15 and 16 in the 6th concession. These lots belong to the defendant Andrews, and he has erected fences and gates at certain points on what plaintiff calls the highway.

The defendants say the by-law is bad. If the council had acted upon the by-law as to this part of what is called the highway, and if it had been travelled as such, the council and ratepayers regarding it as a highway, I would at this distance of time be very loth to pronounce the by-law bad merely because formalities required for its passing had not been complied with. The clerk says the notices required were not correctly given. There were four publications of the notice in one newspaper in the county, viz., 23rd and 30th July, and 6th and 13th August, but the notice was of a by-law to be passed on the 7th August, so there were only 3 publications of this notice before the date named. The by-law was not in fact passed until 2nd October, 1875, and there was another newspaper published in the county during that period. There is evidence that persons interested appeared before and were heard by the council—so, as to

anything actually done under this by-law, I should hold the by-law good, and, in the absence of the clearest proof to the contrary, the presumption that the necessary formalities were complied with should prevail.

The plaintiff's difficulty is that, even if by-law good, the road, as now contended for, was not in fact established.

No land above lots 14 and 15 in the 6th concession was taken by the council, nor was there compensation paid, or arbitration in reference to any land north of these lots. It has not been proved that any highway, as now claimed, was established under the by-law mentioned or otherwise. No dedication to the public of this land for a highway.

The road as now claimed is not in fact either in the line as laid down in the by-law, nor is it now as travelled and used when, or shortly after, the by-law was passed.

A very little statute labour was done on a piece still further north on defendant Andrews's land, which, it is contended, is a continuation of the road—but no statute labour has been done upon or near the place where the obstructions have been placed.

The statute labour actually permitted by the council was so insignificant in amount and performed under such circumstances as would not, in my opinion, weigh in establishing a highway.

No useful purpose will be served by my reviewing the evidence, which was given at considerable length, or by reference to the many cases cited. The case was very fully presented and very ably argued. I have come to the conclusion that a highway has not been established across defendant's land. It certainly would not be a matter of regret if I could see my way, upon the law and evidence, to give to plaintiff a road to his land, tilled and used under great disadvantage in a remote and rough part of the country. Plaintiff and defendant Adam Andrews are brothers. The land required from defendant to give to plaintiff the much needed road is of comparatively little value, and yet, because of an unfortunate bad feeling between these brothers, this expensive litigation resulted. I am of opinion that an attempt by the council to settle this difficulty would have been successful, and that it could have been settled at comparatively little expense, and that, in view of the previous action of the council, an attempt under the circumstances would have been justifiable.

Considering all the circumstances, the action should be dismissed without costs, and there should be no costs to either defendant from the other, or from plaintiff, upon the third party notice or proceeding.

BRITTON, J. JULY 4TH, 1904.

TRIAL.

WILCOX v. JOHNSON.

Timber—Sale of—Contract—Re-sale of Tree-tops—Right of Purchaser to go on Land to Take after Time Expired—Extension of Time—Action of Trespass—Costs.

Action for trespass and for an injunction to restrain defendants from taking wood, etc., from plaintiff's land.

J. P. Mabee, K.C., and G. F. Mahon, Woodstock, for plaintiff.

G. H. Watson, K.C., and W. A. Dowler, Tilsonburg, for plaintiff.

BRITTON, J.—The land in respect to which trespass is charged is owned by Mrs. Melvina Copp, a sister of plaintiff, and plaintiff is her tenant. On 22nd July, 1901, Mrs. Copp sold for $450 to the Tillson Co. all the timber then standing on this land. The sale was evidenced by a written instrument, which provided that the company should have until 1st April 1902, to take the timber off, and should have free ingress and egress to the lot for such purposes at all times; also that all brush from timber should be piled and any fence damaged made good. . . .

The timber was all cut in 1901 and 1902. It was agreed between Mrs. Copp and the Tillson Co. that there should be an extension of time for getting the timber off, and plaintiff assented to this. The extension was to be until one week after the ground was dry enough in the spring of 1903 to permit removal.

On 9th April, 1903, the Tillson Co. sold to defendants for $10 all the limbs and tops of trees. . . . In May, 1903, the Tillson Co. removed all the logs and good timber not sold to defendants.

Defendants allege that, having purchased these limbs and tree tops, they entered into an agreement with plaintiff for a further extension of time for their removal. This plaintiff denies. . . . In the summer of 1903 defendant Johnson . . removed one load; later on defendant Kenny desired to get a load, and was prevented by plaintiff. . . .

The case must, in my opinion, turn upon the ownership of the limbs and tree-tops, and if the Tillson Co. became owners by purchase from Mrs. Copp, and defendants by purchase from the company, then defendants have the right to remove them, even after the expiration of the time mentioned in the

original agreement; and negotiating for and obtaining an extension of time did not affect their legal position. I hold that the limbs and tree-tops are included in what the Tillson Co. purchased, and that the tree-tops are not brush, unless the company so determined—and if the company so determined, they were to be left on the land and piled, the object of that manifestly being for the purpose of burning in clearing the land.

I think McGregor v. McNeil, 32 C. P. 538, governs this case. . . . .

[Johnston v. Shortreed, 12 O. R. 633, referred to.]

If obliged to determine the question of fact as to alleged agreement for a further extension of time to defendants, my conclusion would be . . . that defendants have not established that agreement. The onus was upon them. This must be considered in dealing with the costs. Further, as to costs, defendants were warned by the Tillson Co. that in getting the stuff off plaintiff as tenant would have to be considered. . .

In dismissing the action, I limit the costs which plaintiff is to pay to defendants to the sum of $80.

JULY 4TH, 1904.

DIVISIONAL COURT.

RE MUMBY.

Will—Construction—Absolute Gift to Widow unless She Remarries—Death of Widow without Remarrying.

Appeal by Charity V. Mumby and Charles J. Mumby from order of STREET, J., 3 O. W. R. 146, declaring that upon the true construction of the will of the deceased Charles Henry Mumby, his widow, Margaret Ann Mumby, not having married again, had, under and by virtue of the devises and bequests in the will contained, at the time of her death an estate in fee simple in the real estate and an absolute interest in the existing personal estate owned by the testator at the time of his death.

G. H. Kilmer, for appellants.

D. L. McCarthy, for the official guardian and other parties in the same interest.

M. Wright, Belleville, for executors.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.—I am of opinion that my brother Street's view was the right one, and that his order should be affirmed.

It is contended by the appellants that the widow took only an estate during widowhood, but it will be observed that upon that view as to the effect of the will no disposition is made of the remainder expectant on the determination of the widow's estate in the event of her not marrying again, the only disposition of it being that which was to take effect in case she should marry again.

That the testator intended that there should be an intestacy in any event is a priori most unlikely, and the absence of any provision as to the disposition of the property upon the death of his wife in case she should not have married again strongly favours the view that the testator did not intend that the absolute estate which the language of the earlier part of the will indicates that he intended to give to his wife, should be taken from her unless she should marry again.

The apparent difficulty arises from the use by the testator of the word "while" in the sentence following the description of the property: "while the said Margaret Ann Mumby remains my widow." Treating these words as meaning that the estate and interest of the wife are to be absolute if she remains a widow, the language of the will accords with what was the apparent scheme of it, and there is no intestacy in any event.

I am of opinion that the will may be so read, or that, if it may not, the sentence I have quoted should be rejected as repugnant to the estate which is given by the preceding words of the will. A different construction, besides leaving one event unprovided for, requires, as my brother Street points out, the entire rejection of the strong words in which the absolute interest is originally given.

Counsel for the appellants relied on Sheratt v. Bentley, 2 Myl. & K. 149, but that case is useful only as illustrative of the principle of construction upon which it was decided, which was, that where the general intention of the testator can be collected upon the whole will, particular terms which are inconsistent with that intention may be rejected as introduced by mistake or ignorance as to the meaning of them on the part of the testator.

Counsel for the appellants sought to apply this principle as it was applied in Sherratt v. Bentley, by striking out the words "her heirs, executors, administrators, and assigns, to and for her and their sole and absolute benefit according to the nature and quality thereof respectively;" but I would, instead of doing that, in order to carry out what appears to me to have been the general intention of the testator,

apply it by rejecting the words "while the said Margaret Ann Mumby remains my widow."

In Sherratt v. Bentley, words somewhat similar to those which we are asked by the appellants to reject, were rejected. The words which the Court in that case refused to reject were "after the decease of Margaret Harrison," and it was pointed out by the Lord Chancellor that if they were rejected the will would have contained "two gifts quite inconsistent and repugnant." In this case, on the other hand, if the sentence which I would reject be rejected, the will is made consistent in all its parts and contains a complete disposition of the whole of the testator's property, leaving no event unprovided for.

I would affirm the order of my brother Street, and dismiss the appeal with costs.

JULY 4TH, 1904.

DIVISIONAL COURT.

TURNER v. TOURANGEAU.

Execution—Fi. Fa. Lands—Division Court—No Return of Nulla Bona by Bailiff of Court in which Judgment Recovered—Sale under — Execution — Validity—Change in Statute.

Appeal by defendant from judgment of FERGUSON, J., ante 74, setting aside as void an execution against lands, and all proceedings under it, including the sale of the lands of the execution debtor thereunder, with costs.

F. E. Hodgins, K.C., for defendant.

A. H. Clarke, K.C., for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.— . . . My late brother Ferguson, acting upon the assumption that the governing Act was 57 Vict. ch. 23, sec. 8, and following Burgess v. Tully, 24 C. P. 549, held that, inasmuch as there had been no nulla bona return by the bailiff of the Court in which the judgment was recovered, the execution against lands was a void proceeding, and that everything founded upon it was void also.

But for the change which was made in the language of sub-sec. 5 of sec. 8 of 57 Vict. ch. 23, when the statutes were last consolidated, and that provision became incorporated in sec. 230 of R. S. O. 1897 ch. 60, I would . . . agree

in the conclusion of my learned brother that the execution against lands was void because it was not addressed to a bailiff of the 7th Division Court, and there was, therefore, no nulla bona return by a bailiff of the Court in which the judgment was recovered. . . . [Jones v. Paxton, 19 A. R. 163, referred to and distinguished.]

In framing sec. 230 of R. S. O. ch. 60, 57 Vict. ch. 23, sec. 8, is recast, and the provision as to the nulla bona return is at the beginning instead of at the end of the section, and it is not that a return shall be made by a bailiff *of* the Court in which the judgment was recovered, but "by a bailiff *in* the Court in which the judgment was recovered."

I have been unable to find any amending Act antecedent to the Revised Statutes making the change which was made by substituting "in" for "of." The change, however, in my opinion, made an important alteration in the law, and was not the result of a slip in the work of revision. . . .

By sec. 107 of the Division Courts Act, where an execution is required to be executed elsewhere than in the division in which the action is brought, it may, in the election of the party, "be directed to be executed by the bailiff of the division in or near to which it is required to be executed, or by such other bailiff or person as the Judge or clerk issuing the same orders." . . .

The object of the provision (sec. 230), I take it, was to prevent an execution against lands being issued until the goods of the debtor had been exhausted, or it was ascertained that he had no goods within the county in which the judgment was recovered, and to prevent the costs of unnecessary proceedings being incurred—an object which is better attained if the course allowed by sec. 107 is taken than if that of directing the execution to the bailiff of the Court in which the judgment was recovered is adopted.

It may well be that it was to meet this case that the change was made in the course of the revision, and the provision as it now stands may well be taken to mean that the return of nulla bona may be made by any bailiff who may under the Act lawfully execute the process, and that his return is to be made in the Court in which the judgment was recovered, "in" being the equivalent of "into" or "to."

However that may be, upon the point in question the provisions of sec. 230 are not, in my opinion, in effect the same as those of the repealed Act the place of which that section took, and as respects transactions, matters, and things subsequent to the time when the Revised Statutes took effect, the provisions contained in them are to prevail: 60 Vict. ch. 3, sec. 9, sub-sec. 3.

That the case was one in which the provisions of sec. 107 were properly resorted to, is clear. The execution debtor . . resided within the limits of the 2nd Division Court, and . . the summons was issued to that Court for service, and was served by Wright, the bailiff of it to whom the execution against goods was directed.

Upon the whole, I am of opinion that the execution creditor had complied, both in the letter and in the spirit, with the provisions of sec. 230, so as to entitle him to have the execution against lands issued; that it was not a void but a regular proceeding; and that plaintiff's attack upon it . . fails.

. .

Appeal allowed with costs and action dismissed with costs. . .

If defendant offers, upon payment of the judgment debt and costs and the costs of the litigation in this Court, to give up the land, no order will issue for 3 months, to enable plaintiff, if he desires, to take advantage of the offer.

ANGLIN, J. JULY 5TH, 1904.

CHAMBERS.

RE CROSSMAN v. WILLIAMS.

Appeal—Right of—Master's Report in County Court Action —Forum—"Judge in Chambers"—Prohibition.

Motion by defendant by way of appeal from report of local Master at Windsor, upon a reference in a County Court action under secs. 46 and 47 of the County Courts Act, or for prohibition. By sec. 49 of the Act the appeal is "to a Judge in Chambers or to the Court."

W. M. Douglas, K.C., for defendant.

R. F. Sutherland, K.C., for plaintiff.

ANGLIN, J., held that a Judge in Chambers means a Judge of the County Court in Chambers, not a Judge of the High Court; and that the appeal failed for want of jurisdiction to entertain it.

Defendant asked in the alternative for an order of prohibition. As the matter dealt with by the Master was prima facie within his powers, and defendants had a clear remedy by appeal to the County Court or to a Judge of that Court in Chambers—a remedy still available if the Judge should see fit to extend the time for appealing—it was not a proper case for the exercise of the extraordinary remedy of prohibition.

Motion dismissed with costs.

ANGLIN, J. JULY 5TH, 1904.

WEEKLY COURT.

ADAMS v. COX.

Receiver — Equitable Execution — Interest of Debtor under Will — Restraint on Anticipation — Arrears of Income — Contingent Interest — Dependence on Will of Another — Rights of Creditors.

Motion by plaintiff, a judgment creditor of defendants Alice R. Cox and Evelyn S. Cox, for an order appointing plaintiff receiver by way of equitable execution of the interest of Alice R. Cox in the estate of her father, the late J. G. Worts, and of her interest in the estate of her brother, the late T. F. Worts, and of the interest of Evelyn S. Cox in the estate of her grandfather, the late J. G. Worts.

J. J. Maclennan, for plaintiff.

W. Laidlaw, K.C., for defendants Alice R. Cox and Evelyn S. Cox, conceded plaintiff's right to the order as to the interest of Alice R. Cox in her late brother's estate; but contended that the entire interest of Alice R. Cox in her father's estate was subject to restraint on anticipation, and that the interest of Evelyn S. Cox was contingent.

C. W. Beatty, for executors and trustees under wills of J. G. Worts and T. F. Worts.

W. N. Tilley, for H. S. Mara, the holder of a prior receivership order.

ANGLIN, J.—Although by the will of the late J. G. Worts his daughter Mrs. Cox is restrained from alienating or anticipating her income, some portion of that income may have accrued due before the date of plaintiff's judgment and remain unpaid. The material before me does not establish this to be the case. Upon the authorities, only such moneys, if any, under the circumstances of this case, would be a proper subject for such an order as plaintiff seeks: Whiteley v. Edwards, [1896] 2 Q. B. 48; Hood Barrs v. Cathcart, [1894] 2 Q. B. 559; R. S. O. 1897 ch. 163, secs. 3 and 21. The Court should not be asked to make an order which may, for want of a subject for its operation, prove wholly nugatory and useless. To prevent this, plaintiff should have shewn that there is some income of defendant Mrs. Cox of which the Court might properly and effectually constitute him receiver. Having failed to shew this, he is not entitled to the order as to Mrs. Cox's interest.

By the will of her grandfather the interest of Miss Cox is made contingent upon her mother's failing to make a will in favour of some other person, or to restrain her daughter from anticipation and alienation, should she make a will in her favour. A receiver will not be appointed of property the enjoyment of which by the debtor is wholly dependent on the will of another person: Regina v. Lincolnshire County Court Judge, 20 Q. B. D. 167; Re McInnes v. McGaw, 30 O. R. 38.

Order made appointing plaintiff receiver, in the usual form, subject to the rights of H. S. Mara, who has a prior receivership order, and to the claims of all other persons having valid incumbrances, of the interest of Mrs. Cox in the estate of T. F. Worts.

No order as to costs except that plaintiff shall pay those of the executors and trustees of the will of J. G. Worts, which he may add to his claim against Mrs. Cox, as a first charge upon, but only to the extent of, any moneys realized under the order now granted.

It is not advisable or proper to determine now the effect of this order upon rights of other creditors of Mrs. Cox.

BRITTON, J. JULY 5TH, 1904.

TRIAL.

CAMPBELL v. POND.

Contract—Specific Performance — Parent and Child—Maintenance of Parent—Promise to Make Provision by Will—Part Performance—Action against Executors—Damages—Quantum Meruit—Moneys Disbursed.

Action for specific performance, tried at Woodstock without a jury.

J. P. Mabee, K.C., and S. G. McKay, Woodstock, for plaintiff.

J. W. Mahon, Woodstock, for defendants.

BRITTON, J.—The action is by a daughter of the late William Smith against the executors of his will.

The deceased was a widower advanced in years and having no one to keep house or care for him. Plaintiff is a married woman living with her husband, but travelling with him about the country and having no settled home. In the early part of 1903 plaintiff . . . received a letter, written . . . at the request of deceased, requiring plaintiff to go home, and she went at once to her father at Woodstock.

Her sister Mabel was at home sick with an incurable disease. After the arrival of plaintiff at home she and her father made this agreement:—Plaintiff was to stay at home and take care of Mabel until she died, and after the death of Mabel plaintiff was to furnish a suitable housekeeper for deceased, keep the house in repair, pay the taxes, send the money for all necessary maintenance of deceased during his life, and at his death plaintiff was to have the 2 houses owned by deceased, and the contents of the house in which deceased then resided. This agreement was made after consultation with plaintiff's husband and his assent obtained. Plaintiff at once entered upon her duties. Mabel died on 5th April, 1903. Plaintiff then went to Sunderland, and arranged with her mother-in-law, Jane Campbell, to go to Woodstock and take care of deceased and his home.

There was no contract in writing. Plaintiff alleges performance on her part, and further that her father made a will in the early part of 1903 in her favour, upon the lines of this agreement, but on 2nd December, 1903, he made another will giving all his property to his two surviving daughters, namely, plaintiff and Mary Jane Pond, wife of one of the defendants, "equally, share and share alike." William Smith, father of plaintiff, died on 19th March, 1904.

The cases cited by counsel for defendants make it clear that what was done by plaintiff cannot be regarded as sufficient to constitute part performance of the verbal agreement, even if a clearly defined complete verbal agreement has been proved: Turner v. Prevost, 17 S. C. R. 283; Campbell v. McKerricher, 6 O. R. 85; Orr v. Orr, 21 Gr. 397; Tibb v. Tibb, 24 Gr. 487; Smith v. Smith, 29 O. R. 309.

In Maddison v. Alderson, 8 App. Cas. 467, an intestate induced a woman to serve him as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the estate. It was held that there was no contract, and, even if there had been, and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as to take the case out of the operation of the Statute of Frauds.

Plaintiff claims in the alternative damages for breach of the alleged contract, and also for money paid for repairs, taxes, maintenance, expense of nursing, attendance, etc. This

branch of the case must be dealt with. It is, upon the evidence, clear beyond doubt that plaintiff, after going home in response to her father's request, and after ascertaining the need of some one to take charge at home, entered into a business relation with her father. She at once took upon herself the responsibility of house-keeping and of managing. She paid the taxes and set about having repairs done with her own money. After the death of Mabel, plaintiff went to Sunderland and arranged with her mother-in-law to give up business there and go to Woodstock. Jane Campbell and plaintiff went to Woodstock, where Jane was installed as housekeeper, and then a few days after plaintiff joined her husband. Jane Campbell is not related to deceased otherwise than by marriage, and she certainly would be entitled to reasonable compensation from deceased or his estate for her services, were it not that she was there on that work pursuant to arrangement with plaintiff. Jane Campbell makes no claim.

The deceased knew that plaintiff was paying for the repairs, and from the undisputed facts it must be inferred that she was doing these in expectation of being paid in some way for them, and in some other way than in sharing equally with her sister in their father's property. Plaintiff has improved the property by at least the amount she has expended upon it. No reason is suggested for her doing this other than as a matter of business. Plaintiff is not, so far as appears, a person of much means, and the relations between her and her father were, for a while after her marriage, a little strained. The work she was asked to do was not wholly woman's work, but the father, at the time when he employed plaintiff, chose her in preference to the son-in-law, and did so knowing that plaintiff would herself be away, and that, while the money was to be provided by plaintiff, the work would be done by some other person engaged by plaintiff for the purpose. The sister of plaintiff (wife of defendant Pond) had lived at home and kept house for her father, and, although not under the same or a similar arrangement to that alleged by plaintiff, yet under an agreement which was a matter of business between her and her father.

Plaintiff is not entitled to specific performance of the alleged agreement, and she is not entitled to damages for breach of that agreement; she is entitled to be repaid the money paid out by her at the request of her father, and she is entitled to remuneration for service procured by her for her father at his request. See McGugan v. Smith, 21 S. C. R. 263; Biehn v. Biehn, 18 Gr. 497; Walker v. Boughner, 18 O. R. 448; Murdoch v. West, 24 S. C. R. 305; Cross v. Cleary, 29 O. R. 542.

Put upon the basis of quantum meruit, this case is distinguishable from Mooney v. Grout, 6 O. L. R. 521, 2 O. W. R. 978. There is here every reason to suppose that the deceased thought that plaintiff expected to be paid; and there is more; there was an understanding, while the services were being performed, that plaintiff should be remunerated. The evidence of the facts which warrant the inference that plaintiff is entitled to be paid was fully corroborated.

I think plaintiff is entitled to the sum of $500 to cover the repairs, the taxes paid, money expended in papering house, money expended in maintaining the house, and for the nursing, care, and attendance in housekeeping; said sum to be in full of all claims for money and services, to be paid to her with costs out of the estate, before any division, and over and above what plaintiff is entitled to under her father's will.

Judgment for plaintiff for $500 and costs.

JULY 5TH, 1904.

DIVISIONAL COURT.

COHEN v. HAMILTON STREET R. W. CO.

Street Railways—Injury to Person—Collision with Vehicle—Negligence—Contributory Negligence — Proximate Cause —Jury.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., after trial of the action with a jury at Hamilton, dismissing it with costs. The action was brought by the widow and personal representative of William Cohen, deceased, to recover damages for his death, which was caused by a collision between a waggon in which he was driving and an electric car of defendants as it was going westward along Herkimer street, in the city of Hamilton, the collision having occurred, as plaintiff alleged, owing to the negligence of defendants. In answer to questions the jury found: (1) that the death of Cohen was caused by the negligence of defendants; (2) that the negligence was that "seeing Cohen's condition the motorman should have stopped his car sooner;" (3) that deceased was negligent to some extent; (4) that deceased by the exercise of reasonable care might have avoided the accident; (5) that, although deceased was guilty of negligence, defendants by the exercise of reasonable care might have avoided the accident; (6) that Cohen's death was not

due to an inevitable accident for which neither he nor defendants were to blame; and they assessed the damages at $1,700.

G. Lynch-Staunton, K.C., for plaintiff.

D. C. Ross, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.—According to the uncontradicted testimony, the car was proceeding at a reasonable rate of speed, and the motorman was in full control of it, and rang the gong between James street, the street immediately east of McNab street, and McNab street, and again violently when he saw the deceased approaching Herkimer street, towards which he was driving, and when the car was a short distance east of McNab street. According to his testimony, he soon realized that an accident was likely to happen if the deceased did not stop or the car was not brought to a standstill, and he then applied the brake and afterwards reversed his car, but without succeeding in stopping it in time to avoid the collision.

The deceased was probably under the influence of intoxicating liquor, and, at all events, according to the evidence, was paying no heed to the approaching car, but driving or permitting his horse to go on without directing or controlling his movements, and with the lines hanging slack. The deceased was driving down McNab street, and when he reached Herkimer street his horse and waggon were turned west on Herkimer street close to the sidewalk; apparently after this, —though the testimony on this point is not very clear—he without stopping proceeded to cross Herkimer street, and had passed over the south track and was on the north one when the collision occurred.

There was evidence that the deceased had a whip in his hand, and according to the testimony of one of the witnesses given at an inquest which was held immediately after the accident, he struck his horse with it, though the witness who gave that testimony at the inquest withdrew it at the trial, and then said he was not sure that that incident had occurred.

It appears to me that the negligence of the deceased was clearly the proximate cause of the accident, and that no jury could, upon the evidence, acting reasonably, have found otherwise.

Speaking generally, it is, no doubt, the duty of a motorman to regulate the movement of his car, and to hold it under such control that in case of emergency it can be quickly stopped; it is also his duty, at a point when a cross

street intersects the track on which he is proceeding, to be on the look-out for persons on the intersecting street who are approaching the track, either on foot or riding or driving, and in case it becomes apparent to him, or should reasonably be so, that an accident is likely to happen if he does not bring his car to a standstill, it is his duty to act promptly and to use all available means at his disposal to stop his car.

In this case it is to be borne in mind that the motorman had to keep a look-out to his right and ahead of him as well as to his left, and that, as the car was moving at the rate of six or seven miles an hour, and therefore passed over about ten feet of the track every second, he had very little time in which to do all that the jury thought it was his duty to have done. Although he admits that he observed that the deceased was apparently paying no attention to the approaching car, it may well be that the motorman did not apprehend and had no reason for apprehending that the deceased would keep on his way in spite of the ringing of the gong and cross the track upon which the car was moving.

There is, in my opinion, a wide difference between this case, where the motorman, who has not been guilty of any negligence in the first place, is confronted with a sudden emergency due entirely to the negligence of the driver of a horse and vehicle, and a case where the motorman has been guilty of negligence in the first instance, such as running his car at an excessive rate of speed, not having it under control, or the like.

In the one case his duty as to meeting the sudden emergency is much greater than in the other, and in the former case neither justice nor the law demands that he shall, at the peril of his employer having to answer in damages for the consequences of a collision happening between his car and the vehicle, do the very best that it would have been possible for any one to have done under the circumstances.

What was said by Hagarty, C.J., and Burton, J., in Follett v. Toronto Railway Co. (1888), 15 A. R. 346, at pp. 348, 349, and 353, would appear to indicate that, in their view, it was at least doubtful whether the employer would in such a case as this be liable even though the motorman might by the exercise of reasonable care have avoided the accident; but, however that may be, the ratio decidendi of the case was that a motorman who is confronted with a sudden emergency such as the motorman in this case had to face does not render his employer liable for the consequences of an accident, though the motorman err in judgment in the means he adopts to avoid it, and though it might have been avoided had he taken some other course than that which he adopted.

The distinction I have referred to is also recognized by King, J., in Inglis v. Halifax Electric Tramway Co., 30 S. C. R. at p. 261.

I doubt very much whether in this case there was any evidence to go to the jury that the motorman committed an error in judgment, and I am clearly of opinion that at the most the worst that he was chargeable with was an error of judgment not amounting to negligence, for negligence is the failure to take due care according to the circumstances.

I refer also to the recent case of Reynolds v. Thomas Tilling Limited, 19 Times L. R. 539, affirmed in appeal, 20 Times L. R. 57.

The appeal should, in my opinion, be dismissed with costs.

ANGLIN, J. JULY 6TH, 1904.

WEEKLY COURT.

RE PAKENHAM PORK PACKING CO.

GALLOWAY'S CASE.

Company—Winding-up—Contributory — Allotment of Shares —Preference Shares — Common Shares — Delegation of Power of Allotment—Terms of Allotment—Ratification.

Appeal by liquidator from certificate of Mr. McAndrew, official referee, upon a reference for the winding-up of the company, refusing to place Galloway upon the list of contributories in respect of 16 shares of preference stock; and upon cross-appeal by Galloway from the finding of the referee that Galloway should be placed upon the list of contributories in respect of 8 shares of common stock.

S. B. Woods, for liquidator.

R. J. McLaughlin, K.C., for Galloway.

ANGLIN, J.—Upon the liquidator's appeal he conceded that the provisions of sec. 22 of the Ontario Companies Act were not complied with.

The result of this non-compliance is that the entire capital stock remained common stock and was issued as such. In respect of his application for preferred shares Galloway, therefore, was allotted, if anything, common stock. Whatever might be his position if he knowingly accepted such stock, or if there were circumstances shewing any acquiescence by him in its allotment to him, there was no evidence that he was ever aware of any facts upon which an estoppel could be founded against his right to set up that he had not re-

ceived that for which he applied. Upon this ground, he was not liable in respect of the 16 preference shares for which he subscribed, but which never existed.

As to the cross-appeal. The directors professed to exercise the power of allotment conferred by sec. 26 of the statute, by passing a resolution on 30th May, 1902, "that the secretary be instructed to allot all stock as applications are passed in." As a present allotment this resolution was not effective, because Galloway's application was not made till 3rd October, 1902. As a delegation of the power of allotment to the secretary, it would be invalid. The resolution could not be treated as a general or open offer by the company. But, if it might be so regarded, it should be taken to authorize allotments only upon the terms of the prospectus. If such an offer, its terms were not accepted by Galloway, his counter-proposal, upon terms essentially different, was never accepted by any person or body having authority to bind the company. The evidence does not shew sufficient ratification of the secretary's action in accepting terms wholly different from those he was authorized to give. The directors do not appear to have ever considered this application or the action taken upon it. There was never any binding agreement in respect of this stock. Upon this ground Galloway should be relieved from liability.

Liquidator's appeal dismissed and cross-appeal allowed. Costs out of the estate. Liquidator allowed to appeal, upon terms that the respondent's costs of the proposed appeal, as well as of these appeals, shall in any event of that appeal be paid out of the assets of the company in liquidation.

JULY 6TH, 1904.

DIVISIONAL COURT.

HENRY v. GRAND TRUNK R. W. CO.

Railway—Injury to Passenger—Death — Action by Widow—Evidence — Res Gestae — Statements of Deceased — Statements of Defendants' Agent—Discrediting Witness.

Appeal by plaintiff from judgment of MEREDITH, J., directing a nonsuit in an action under Lord Campbell's Act by the widow of J. C. Henry to recover damages on behalf of herself and two infant children for the death of her husband by the alleged negligence of defendants. The deceased entered a car of defendants at the railway station at Palmerston, which car he supposed was attached to a train timed to leave for Clifford about noon; one Shea, the station agent, told him, after the car had begun to move, that it was not

going to Clifford; he endeavoured to get off the car while it was moving, and received fatal injuries.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., TEETZEL, J.

W. M. Douglas, K.C., for plaintiff.

W. R. Riddell, K.C., and H. E. Rose, for defendants.

MACMAHON, J.—Shea was called as a witness and said: "When I entered the car, I said to Henry, 'Hello John, what way are you going to-day?' He said he was going home to Clifford, so I said, 'This coach is coming off here to-day; come back to the next car with me.'" He (Shea) then picked up two "grips" which some one had left in the car, and Henry arose from his seat and followed close to his shoulder as he passed out of the south door to cross over to the next car, and as he reached the door of the next car he turned and saw Henry in the act of getting off or jumping off the lower step of the car they had left; that Henry had his back to the south, and he called to him not to get off that way, and just as he did so Henry stepped off; and that the effect of his stepping off in that way, with his back to the engine, would be to swing him around into the moving object, and if he had stepped off the train with his face towards the engine he would have got off all right. Shea stated the car started to move at the time he spoke to Henry and told him that coach was coming off.

Richard Dowling said he heard of the accident "not a great while after" it occurred, and, knowing Henry, went to the station, where he saw Shea and asked him how it happened; that Shea said he "went into the car to see if there was anybody there and he saw Mr. Henry and told him he would have to get off, as this car would not go north," and that he never mentioned about taking Henry into another car. Alexander Moncreif, of Harrison, was at the Palmerston station when the accident happened, and heard the conversation between Shea and Dowling, and corroborates the latter as to the statements made by Shea.

The only witness called who saw the accident was William Moore, who said that Henry did not seem to be jumping off, but appeared as if he lost his balance or had got a shake and came off. He fell down on the platform and rolled in amongst the wheels.

Moore and Henry Torrance state that after Henry was injured, and while lying on the station platform, he said to Shea that he (Shea) was responsible for his being injured, and that Shea made no reply.

Shea was called by the plaintiff, but, by leave of the trial Judge, counsel for the plaintiff was allowed to call Dowling and Moncreif to prove that he made on another occasion the statement that "he told Henry that he would have to get off the car, as it would not go north," and that he never mentioned that he told him to follow him into the other car. If he did not tell him that, it would be inconsistent with his evidence at the trial.

Had the statement spoken of by Dowling and Moncreif been made directly after Henry was injured, it might have been part of the res gestæ, and therefore receivable in evidence, according to the case of Hermis v. Chicago R. R. Co., 50 N. W. Rep. 584, where it was held, in an action against a railway company for the killing of a child, that evidence as to what the engine driver said about the accident, within a few minutes after the accident, was receivable in evidence as part of the res gestæ. See also Taylor on Evidence, 9th ed., sec. 583.

The statement said to have been made by Shea in the presence of Dowling and Moncreif was a considerable time after the event, as Dowling heard of the accident while in the town of Palmerston and came up to the station to see Henry, at which time Shea could not be considered an agent to make admissions binding on the defendants.

However, apart from these considerations, Shea having been called by the plaintiff gave his account of what he said to Henry; that he told him the car he was in was not going to Clifford; and that he asked him to come into the next car. The evidence of Dowling and Moncreif was therefore for the purpose of discrediting that statement, and if discredited there was no evidence as to how Henry was injured, and the action must fail.

Then as to the accusation made by Henry against Shea, that the latter was responsible for the injury. There was no fact charged against Shea by reason of which it was imputed to him he had caused or contributed to the accident. And Shea said he did not answer because Henry was in great pain, and he did not wish to irritate him by replying. However, Shea is not the defendant, and therefore, even if there had been some fact charged against him as contributing to the accident, his neglect or refusal to answer cannot be evidence against the defendants.

The appeal will be dismissed, but I think it should be without costs.

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

TEETZEL, J., also concurred.

ANGLIN, J. JULY 7TH, 1904.

CHAMBERS.

RE MCLEOD AND TOWN OF EAST TORONTO.

Municipal Corporations—Annexation of Town to City—Petition for Submission of By-law—Investigation as to Numbers and Qualifications of Petitioners—Delegation to Town Clerk—Withdrawal of Names of Petitioners—Addition of New Names—Time—Statute—Directory or Imperative.

Motion by Alexander McLeod for an order in the nature of a mandamus directing the municipal corporation of the town of East Toronto to submit a by-law for the annexation of the town to the city of Toronto, upon the terms set out in a petition presented to the town council within the time limited by the Municipal Act in that behalf.

W. E. Middleton, for applicant.

W. H. Grant, for town corporation.

ANGLIN, J.—On 13th June the petition referred to was presented to the municipal council, bearing 226 signatures of persons purporting to be electors. The Municipal Act, 3 Edw. VII. ch. 19, sec. 26, sub-sec. 4, is as follows: "In case a petition signed by 150 electors of any town or village is presented to the council of such town or village asking that a by-law be submitted for the annexation of such town or village to an adjacent village, town, or city . . . it shall be the duty of such council to submit to the vote of the electors of the said town or village a by-law for the annexation of the said village or town, and the said council shall forthwith prepare a by-law in accordance with the prayer of the petition, and shall submit the same to the said electors for approval or otherwise within four weeks after the receipt of the petition by the said council."

On receipt of this petition, the council, instead of itself investigating the sufficiency in numbers and qualifications of the petitioners, referred this matter to the town clerk for inquiry and report. That officer reported, at a special meeting held on 21st June, that "of the 226 signatories only 162 thereof appeared upon the assessment roll as owners." The

"electors" entitled to vote upon such a by-law include certain leaseholders, as well as freeholders: sec. 26, sub-sec. 8, and sec. 19, sub-sec. 1 (a). The clerk probably used the word "owners" in the sense of freeholders. Of the remaining 104 signatories, some, as leaseholders, may have been qualified to petition. This question was not raised in argument, and I merely direct attention to it as affording a further reason, in addition to those mentioned below, for holding that it has not been satisfactorily established that the petition in question is insufficiently signed.

At the meeting of 21st June one Harvey Moore, an elector, appeared, and, under sec. 336 of the Act, petitioned to be heard in opposition to the proposed by-law. The clerk further reported that of the 162 signatories, whom he found to be duly qualified, 20 had requested him to have "their names cancelled from the petition." If these withdrawals are permissible, the number of remaining petitioners reported qualified is reduced to 142. One William Fenton then addressed the council. He contended that persons who had signed the petition could not withdraw, and also presented a further petition with ten additional signatures, which he swears are those of duly qualified electors. This supplemental petition the council declined to receive, and subsequently passed a resolution that "no further action be taken in the matter."

Mr. Middleton contends:

(a) That the council had no power to refer the question of the qualifications of these petitioners to their clerk for investigation and meantime to defer action.

(b) That petitioners having once signed the petition cannot withdraw their names.

(c) That if withdrawals are to be permitted, additions of signatures must also be allowed.

The presentation of a petition signed by at least 150 electors is the condition precedent upon which the Legislature has said that "it shall be the duty" of the council to act. Some convenient method must be taken of ascertaining whether this condition has been in fact complied with: Chatham v. Township of East Dover, 12 S. C. R. at p. 338. I am not prepared to hold that the reference made to the town clerk was improper for that purpose. For this investigation there should be allowed a reasonable time, necessarily limited, however, if the statutory direction for the submission of the by-law to the electors within four weeks after receipt of the petition is to be carried out. The requirements of sec. 338 must also be considered. It is obvious that, if

the petition is to be deemed to have been received when presented, i.e., on 13th June, the council could not, on 21st June, when it considered the clerk's report, comply with sec. 338, sub-secs. 1 and 2, requiring at least 3 weeks' publication of the proposed by-law before the date fixed for holding the poll—and also carry out the direction requiring the submission of the by-law itself within 4 weeks after receipt of the petition. In my opinion, however, notwithstanding the use of the word "shall" in this latter provision, it may be read as directory only. This view is strengthened by the presence in the same sub-section of the clearly mandatory words, "it shall be the duty of such council to submit."

The law upon the right of petitioners to withdraw their signatures is in an eminently unsatisfactory position. The Court of Appeal in Gibson v. North Easthope, 21 A. R. 504, 24 S. C. R. 707, was evenly divided upon this question, and the ultimate decision in that case did not depend upon its solution. Re Misener v. Wainfleet, 46 U. C. R. 457, is probably now of very doubtful authority. The report of In re Canada Temperance Act, 1878, and The County of Kent, Cass. S. C. Dig. 106, is far from satisfactory. The inclination of my own opinion, in view of the very limited purpose of the petition, is against the existence of such an absolute unqualified right of withdrawal. The office of the petition is merely to set in motion the machinery which ultimately affords to the petitioners themselves, with the other electors, ample opportunity of voting freely for or against the by-law to be submitted.

The provision of secs. 336 and 337, invoked by Mr. Grant on behalf of the municipal corporation, as applicable to this petition, and sanctioning the course taken by the council on the protest of Mr. Moore, satisfy me that only signatures shewn by evidence produced to the council to be "not genuine," or to have been "obtained upon incorrect statements," and to be those of persons to whose wishes the proposed by-law is contrary, can be removed from such a petition. Though the bearing of these sections upon the right of withdrawal does not appear to have been adverted to in Gibson v. North Easthope, I cannot but think they afford a cogent argument against the existence of an absolute and unqualified right of withdrawal after presentation or receipt of the petition upon which the council is directed to act forthwith. The right of removing signatures is, in my opinion, confined to persons whose names are shewn to have been obtained by fraud and in bad faith. The material filed on behalf of the corporation does not suggest that there was any evidence before the coun-

cil upon which it could be satisfied that the signatures of any of the 20 persons who are said to have sought to withdraw their names were obtained fraudulently or in breach of good faith. Such grounds for removing their names are said to have been urged by Mr. Moore in addressing the council, but there is nothing to shew that there was, either in the letters of the persons seeking to withdraw, or in any other form, any evidence whatever to sustain them. Nor does it appear that the council had any other means of knowledge that any signatures to the petition were improperly procured (Re Robertson and North Easthope, 16 A. R. 214), even if such knowledge might be substituted for the evidence required by the statute.

If the views which I have stated be correct, the council on June 21st had before it a petition with at least 162 signatures of electors, for the withdrawal or cancellation of which no case had been made out. This renders it unnecessary for me to consider the question argued as to the addition of further names.

With a sufficiently signed petition before it, the council was bound to proceed to submit the by-law for annexation to the electorate in accordance with the prayer of the petition. This cannot now be done within the 4 weeks allowed by the statute, but that provision being directory merely, the delay occasioned by the mistaken course pursued by the council should not be allowed to defeat the rights of the petitioners.

An order in the nature of a mandamus will therefore issue directing the municipal corporation of the town of East Toronto to comply with the prayer of the petition and submit a by-law to the electors within 4 weeks from this date, and for payment by such corporation to the applicant of his costs of this application.

BRITTON, J. JULY 7TH, 1904.

TRIAL.

BURNS v. McCARTHY.

Fraudulent Conveyance—Action to Set aside—Previous Action in Respect of Same Conveyance—Different Creditors—Res Judicata—Intent to Defraud Creditors—Evidence of—Subsequent Conveyance—Bona Fide Purchaser for Value without Notice—Equitable Relief in Respect of Purchase Money.

Action to set aside a conveyance as fraudulent and for other relief.

Prior to 1897 plaintiff was the collector of taxes for the township of Anderdon, and defendant John McCarthy was treasurer for that township. They were short in their accounts, and an action was brought against them, with the result that John McCarthy was found indebted to the township and to the present plaintiff in a large sum of money apportioned by the report of the Master as $388.66 in favour of the township, and $360.98 in favour of plaintiff. The report was filed on 15th June, 1899; defendant John McCarthy appealed. Judgment was given on 25th September, 1899, confirming the report, and executions against the goods and lands of John McCarthy were shortly afterwards placed in the hands of the sheriff of the county of Essex.

Defendant John McCarthy was in possession of and apparently owned a residence and land, 4 parcels, in all 19½ acres. On 1st August, 1899, he made a conveyance of all his land to his son, defendant Daniel P. McCarthy. The consideration as expressed in the deed was $2,000. Daniel P. McCarthy was a mariner, not living at home, and had never, since the deed was executed, resided upon the property. This property was all that defendant John McCarthy had, and it was said to be worth $2,000.

Plaintiff alleged that this deed was executed with intent to defeat and delay the creditors of defendant John McCarthy.

On 28th September, the day on which the writs of fi. fa. were placed in the hands of the sheriff, an action was commenced by the township of Anderdon to set aside the conveyance mentioned. On 30th September, 1899, this action was commenced.

The action of the township was brought to trial on 20th April, 1900, and the conveyance impeached was set aside as to all the land mentioned in it, except lot 16, containing 6 acres, upon which the dwelling house and other buildings were erected, and the conveyance was confirmed as to this lot 16. An appeal was taken to the Court of Appeal, and judgment was given on 6th November, 1901, dismissing it.

Pending the trial and final disposition of the Anderdon case, this action stood over. It stood by consent, and there was no agreement that the present plaintiff should be bound by the result of that action. This case was entered for trial and was made a remanet at the November non-jury sittings, 1902.

At the spring sittings, 1903, the case was partly tried by Street, J., when an order was made postponing the trial until the then next sittings in order that plaintiff might add James

Kelly as a party defendant. He was added, and his statement of defence put in. He claimed to be a bona fide purchaser for value. He bought in the summer of 1902, while this action was pending, but apparently before it was actually entered for trial, and after the decision of the Court of Appeal in the Anderdon case. The negotiation for the purchase by Kelly was commenced by Kelly's wife. She wrote to her brother Daniel P. McCarthy. McCarthy replied by letter of 14th July, 1902, saying that he would accept $1,000; Kelly to pay, in addition to the $1,000, the balance on the mortgage then standing upon the property. The conveyance was not dated, but it was registered on 15th August, 1902, in the proper registry office.

A. H. Clarke, K.C., for plaintiff.

D. R. Davis, Amherstburg, for defendants.

BRITTON, J.—The matter is not res judicata as to the present plaintiff, and there is no estoppel against him. He brought an independent action, and is entitled to have it disposed of on the evidence given on the trial, and the question now affects only the six acres with the residence, &c.

I assume that all the other lands as to which the conveyance was declared, in the other suit, to be void, were sold and proceeds made available for the township of Anderdon, in that action. I do not know what was done with these other lands.

Mr. Davis, counsel for defendants, relied upon the other judgment. I would be glad to follow the decision in the other action if I could, but I do not know what evidence was there given.

The matter must be dealt with in the present action upon its own merits. At the trial plaintiff was not called, but on plaintiff's behalf defendant John McCarthy was called. He bought the property in parcels, employed the builder to put up the residence, and paid all the money for the house built by him, except $900, and for that sum gave his personal mortgage upon the property.

His story was that in 1890, before the house was built, his son, defendant Daniel P. McCarthy, and he had the following conversation.

The son said: "You have been paying rent; build (or put up) a house." The father replied: "If you advance the money, I will put up the building, and if I am able, I will pay you back, and if not, if you demand deed, I will give it to you." The son assented to this, although the father does not give any clear account of what the son actually did say.

The father says he went on with the building, and did not pay for it with his own money, but got the money from his wife, and did not know where the money came from. Nothing more was heard of the matter until in 1899, after defendant John got into trouble with, and was sued by, the township, and then, at the request of Fred. Davis, a law student, he executed the deed, not only of this residence but of all his property, to his son. The consideration stated is $2,000, but there was no reckoning and no money then paid. This conveyance was made after the finding by the Master that John McCarthy was liable for a large sum of money and costs, and pending an appeal from the Master's report. John's wife was called for the defence. She stated that, when her son Daniel spoke to his father about building, she had $500 of the son's money. She was not very accurate about her son's age, but he was not more than about 22 years of age in 1890, when, according to her statement, he deposited this money with her. She says she afterwards got $504 and then $600 in 3 instalments of $200 each. She kept some money in P. O. savings bank, and yet did not produce any bank book or correspondence, nor did she give the slightest corroboration of her evidence. The defendant Daniel P. McCarthy was not called. I can not accept the evidence as establishing that there was any agreement that Daniel should furnish money to build the house, or that he did furnish it, or that there was even a debt due from his father to him. I think the conveyance was made with intent to defraud and defeat the township of Anderdon and this plaintiff, the creditors of John. If the case stood simply against the original parties, this deed should be declared void, and as against all the defendants except James Kelly I so find.

The case against James Kelly stands upon an entirely different footing. It is not shewn that he in fact knew anything about the taking or giving the impeached conveyance at the time it was executed. He did know of litigation, and it may be assumed that he knew of the claims against John McCarthy and of the action by Anderdon to set aside the conveyance, but in that action the conveyance, so far as it affects the land bought by Kelly, was held good, and it was not until after the determination of that action, that defendant Kelly purchased. He bought agreeing to pay to Daniel P. McCarthy $1,000 over and above balance of mortgage, and he has paid $200 on account of the $1,000. Mere knowledge of John McCarthy's insolvency is not enough, even if Kelly did know it: Molsons Bank v. Halter, 18 S. C. R. 365. I think Kelly had a right to assume Daniel McCarthy's title to be invulnerable, and that he did so assume it, and that he bought in good

faith, is a purchaser for value, and is not guilty of any intent to defraud, and there is no evidence of any knowledge on his part or notice to him of any fraud in fact or intent to commit fraud on the part of others.

Kelly, upon his own shewing, owes $800 to his co-defendant Daniel P. McCarthy; and that balance, if it belongs to Daniel, should be available to plaintiff in satisfaction or part satisfaction of his debt and costs.

There should be judgment for plaintiff as against defendants John McCarthy, Mary Jane McCarthy, and Daniel P. McCarthy, with costs, and James Kelly is entitled to costs against plaintiff to be paid by plaintiff to him.

There should be a declaration that the conveyance from Daniel P. McCarthy to him shall, as against plaintiff, stand, subject to the payment of the balance of the purchase money, and that defendant Kelly shall not pay that balance to defendant Daniel P. McCarthy.

I think plaintiff is entitled to the equitable relief asked: see Buchanan v. Dinsley, 11 Gr. 132. . . .

Defendants could at least have urged that both actions be tried together, or that the present action should abide the result of the other, or that the evidence used in the former should be available in this. No agreement was shewn to have been made, and I am disposing of the action as to the one parcel of land as if the only action in respect of the conveyance of 1st August, 1899.

Judgment for a declaration that plaintiff is entitled to a lien upon the land to the extent of the unpaid purchase price due by defendant Kelly to defendant Daniel P. McCarthy, so far as may be necessary to satisfy plaintiff's claim and costs and costs of defendant Kelly, which are to be paid by plaintiff and added to his own. The account to be taken by the Master at Windsor of what is due to plaintiff upon the judgment for principal money, interest, and costs, and costs of this action, and a time and place to be appointed for payment one month after account taken, and in default of payment land to be sold and proceeds applied: (1) in payment of costs of sale; (2) a sum to be set apart to answer the amount due by defendant Kelly for unpaid purchase money and interest, which amount is to be ascertained by the Master; and (3) the residue is to be paid to defendant Kelly.

Out of the money set apart to answer unpaid purchase money due by defendant Kelly, there is to be paid to plaintiff the amount of his claim for principal, interest, and costs,

such costs to include the costs ordered to be paid by him to defendant Kelly, and balance, if any, is to be paid to defendant Daniel P. McCarthy.

JULY 7TH, 1904.

DIVISIONAL COURT.

ONTARIO PAVING BRICK CO. v. BISHOP.

Mechanics' Liens — Contractor — Lien-holders — Pleading— Amendment — Percentage of Value of Work — Appeals— Costs.

After judgment was given in this case (2 O. W. R. 1063) upon appeal by defendant Singer from the judgment of an official referee in a mechanic's lien action, attention was called to the fact that, though the contractor was not entitled to recover, the lien-holders were entitled to have 20 per cent. of the value of the work done by him applied in satisfaction of their liens, and the case was spoken to upon this point and the question of costs.

W. E. Middleton and D. C. Ross, for appellant.

F. E. Hodgins, K.C., for lien-holders.

W. H. Irving, for plaintiffs.

J. E. Cook, for defendant Bishop.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J.—According to the pleadings of the appellant, as originally delivered, he contested not only the right of the contractor, but also the right of the lien-holders, to recover anything from him, and it was not until 15th December, 1902, that the appellant admitted the right of the lien-holders to anything, even if he then admitted it. On that day he amended his statement of defence by adding to it the following paragraph: "25. The defendant in the alternative pays into Court the sum of $350 in satisfaction of the cause of action of the plaintiff and other lien-holders and their costs herein."

The amendment was made by leave of the official referee before whom the trial of the action took place, and whose judgment is dated 22nd December, 1902.

From that judgment the appellant appealed to a Divisional Court, on the ground that the referee had refused to

consider the claim of the appellant that the contractor had abandoned the work or was properly discharged from it.

The result of the appeal was, that the judgment was set aside and the case sent back to the referee to be tried out, and the costs of the appeal and reference back were directed to be dealt with as part of the costs of the cause by the referee, and paid by the unsuccessful party upon the reference back.

The cause was then proceeded with before the referee, with the result that he found against the contention of the appellant.

From the second judgment the appellant again appealed, with the result that the Divisional Court reversed that judgment, and directed that the action should, as against the appellant, be dismissed with costs.

According to information which we have procured from the referee, only one of the 13 hours occupied in the first trial was spent before the appellant's statement of defence was amended and the $360 paid into Court.

Twenty per cent. of the value of the work done by the contractor is the sum of $317.60, so that the amount paid into Court was probably enough to cover the 20 per cent. and the costs up to the time of payment in.

It is perhaps open to doubt whether the payment in amounted to an admission of liability of the appellant in respect of the claims of the lien-holders to the extent of $350 inclusive of costs; but, however that may be, upon the trial being resumed on 19th December, 1902, it was made clear that to that extent the claim of the lien-holders was admitted by the appellant.

In view of all the circumstances, a reasonable disposition of the costs up to the termination of the first trial will be to leave each party to pay his own costs.

The costs of the first appeal and of the reference back must be borne as directed by the order allowing the appeal. As we understand the terms of the order as to costs, they are to be borne by the party who was unsuccessful on the reference back. The appellant has succeeded on the reference back, and is therefore entitled to be paid these costs.

The costs of the appeal which came before us must be paid by the respondents, as they failed and the appellant succeeded as to the only matters in controversy upon it.

Subject to the right of the appellant to be paid out of it the costs to which he is declared to be entitled, and to be paid out of it the amount paid to wage-earners (about $50), the money in Court will be paid out to the lien-holders according to their respective rights in it.

JULY 7TH, 1904.

DIVISIONAL COURT.

BRIDGE v. JOHNSTON.

Indian Lands—Assignment of Right to Cut Timber—Subsequent Conveyance of Land—Registration in Department of Indian Affairs—Priorities—Actual Notice—Conditions of Sale—Rights of Crown.

Appeal by plaintiff from judgment of FERGUSON, J., 6 O. L. R. 370, 2 O. W. R. 738, dismissing the action with costs.

E. D. Armour, K.C., for appellant.

H. G. Tucker, Owen Sound, for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J. (after stating the facts):—Plaintiff is the assignee of the original purchaser from the Crown, one Freckelton, of the lands in question, which are Indian lands. The assignment is dated 15th November, 1900, and was registered as provided by sec. 42 of Indian Act on 29th November, 1900. . . . Plaintiff paid the last instalment of the purchase money on 16th February, 1903, but it was not made to appear at the trial whether or not the settlement duties had been performed, so as to entitle the purchaser's assignee to the patent, or whether or not letters patent had yet been issued.

Defendant claims to be entitled to the timber on the land, 10 inches and over in size, as assignee of Jamieson Johnston, to whom Freckelton purported to sell it by an instrument dated 27th November, 1899. . . .

Neither the assignment from Freckelton to Jamieson Johnston nor the subsequent transfers under which plaintiff claims were registered pursuant to the provisions of sec. 43 of the Indian Act. . . .

Freckelton, by his purchase and the effect of the provisions of the Indian Act, was placed, as against all the world but the Crown, upon the footing of a full and beneficial owner to the same extent as if the land was granted to him by letters patent. Such is the position of a locatee of public lands whose rights are declared in substantially the same language as is used in the Indian Act in declaring the rights of a purchaser of Indian lands: Church v. Fenton, 28 C. P. 384, 4 A. R. 159, 5 S. C. R. 239. . . .

Doubtless neither the purchaser Freckelton nor his assignee was entitled to the patent for and the full ownership of the land until the settlement duties were performed, and the purchase money had been paid, but, upon obtaining the patent, the full and absolute ownership of the land, with all the timber then upon it, would pass to him.

There is nothing either in the Act or in the conditions of the sale in any way to restrict the right of Freckelton or his assignee to dispose of his whole interest in the land, including the timber, as he might see fit. What, therefore, was there to prevent him from disposing of his rights in the timber, whatever they might ultimately turn out to be, separately from the land itself? Nothing that I can see. All that the conditions restrain him from doing is the cutting for sale before the patent should be issued, unless under license to the person living on the land, any timber, staves, saw logs, etc. . . .

It does not appear that any license existed at the time of the sale, or that the Crown ever exercised the right which it reserved to put the land under license. . . .

The sale of the timber to Jamieson Johnston was not in itself a breach of the conditions of the sale, and I see, therefore, no reason why the assignment of it to him should be held to be invalid; it was, on the contrary, I think, a perfectly good and effectual conveyance of the timber, subject to the conditions upon which the sale of the land to Freckelton had been made.

If the patent had not yet been issued, for defendant to cut any of the kinds of timber and wood mentioned in the conditions of sale would be to contravene these conditions, and, it may be, would entitle the Crown to cancel the sale and forfeit the rights of the purchaser; but it is the Crown only that may do that, and, as far as appears, the Crown has not intervened and does not intend to do so, and the rights of plaintiff to the land have not been put in jeopardy by anything which defendant has done, nor would they be by anything which he proposed to do, with regard to the timber, and I can see no reason why plaintiff should be permitted to invoke the aid of the conditions of sale to prevent defendant from doing the very thing that Freckelton covenanted with defendant's assignor Jamieson Johnston that he should have the right to do.

Thus far I have dealt with the case on the assumption that plaintiff has no higher right as against defendant than Freckelton would have had, and that, I think, is the true position.

The testimony of Jamieson Johnston at the trial was that before plaintiff acquired his rights by the assignment from Freckelton to him, he (Jamieson Johnston) gave plaintiff distinct notice of the agreement as to the timber and of his rights under it. . . .

Upon the whole, it was, in my opinion, proved that plaintiff had actual notice of the agreement with Jamieson Johnston and of his rights as they were declared by the assignment from Freckelton to him. The testimony of Jamieson Johnston on this branch of the case is to be preferred to that of plaintiff, and if accepted puts this beyond question. . . .

Having come to these conclusions, it follows, I think, that the judgment appealed from is right and should be affirmed, for I entirely agree with my late learned brother Ferguson that—actual notice being proved—plaintiff cannot set up the registration of the assignment to him to defeat the prior assignment of the timber to Jamieson Johnston.

There is, in my opinion, no reason why the cases decided upon the Registry Acts should not apply to registration under the Indian Act. The purposes which the Acts are designed to serve are the same, and if in the one case the actual notice of an instrument is the equivalent of the registration of it, it should have the same effect in the other. . . .

Appeal dismissed with costs.

JULY 7TH, 1904.

DIVISIONAL COURT.

SCOTT v. TOWNSHIP OF ELLICE.

Public Schools — Collection of Rates — Protestant Separate School—School Building—By-law — Petition—Status of Plaintiff.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J. (2 O. W. R. 880), dismissing with costs an action brought for a declaration that it was the duty of defendant corporation to correct errors or omissions made in the collection of the rate imposed for public school purposes for 1902, and for a mandatory order upon defendant corporation to correct errors, and for a declaration that a by-law passed by defendant corporation to establish a "Protestant separate school" was illegal and invalid.

R. S. Robertson, Stratford, for plaintiff.

G. G. McPherson, K.C., for defendant corporation.

J. C. Makins, Stratford, for other defendants.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J.), was delivered by

MEREDITH, C.J.—The locus standi of plaintiff to impeach the proceedings which he was attacking depended upon his tenancy of part of lot 4 in the 3rd concession of Ellice, and the learned Chief Justice has found, on evidence which fully supports his finding, that plaintiff took his lease from the owner of the land on the understanding and agreement that the school taxes on it should go to the Protestant separate school, the formation and existence of which his main attack was directed against. We entirely agree with the Chief Justice that, under these circumstances, whatever might be the position of any other ratepayer, not so handicapped, the plaintiff is not entitled to the aid of the Court to obtain the declaration and other relief which he seeks.

Appeal dismissed with costs.

JULY 7TH, 1904.

DIVISIONAL COURT.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLEY.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Company—Use of Name as Plaintiff in Actions—Application to Stay Actions—Meeting of Shareholders—Special Circumstances.

Appeals by plaintiffs from orders of FALCONBRIDGE, C.J., 3 O. W. R. 191, varying orders of Master in Chambers, 3 O. W. R. 133.

A. B. Cunningham, Kingston, for plaintiffs.

A. J. Russell Snow, for defendant Moore.

J. W. St. John, for defendants the Leadleys.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J.), was delivered by

MEREDITH, C.J.—It is unnecessary to decide whether, under ordinary circumstances, and if plaintiff company were a going concern, it would be proper to permit the shareholders at whose instance these actions have been brought to proceed with them in the name of the company.

One of the actions is brought to set aside in part a mortgage made by plaintiff company to one Leadley, and a transaction by which the whole of the assets of the company passed into the hands of a mortgagee, without the authority of the company, and as the result, as is alleged, of an arrangement brought about by one who occupied towards the company such a fiduciary position as, it is said, disentitled him to make a profit out of the transaction at the expense of the company, and who, as it is also alleged, by a secret agreement between him and the mortgagee, was to share in the profits of the arrangement.

The transactions which are impeached took place in 1900 and 1902, and since that time those who were then in control of the company's business have treated it as having been put an end to and the company as practically wound up.

No meeting of the directors of the company has been held, nor any annual meeting of the shareholders for the election of directors, for several years past; of those who were last elected directors several have ceased to be shareholders, and a sufficient number of directors to form a quorum for the transaction of business no longer exists, and there is, therefore, in all probability, no way of calling a general meeting of the shareholders except that of the shareholders exercising their statutory power of calling one.

The remnant of the board of directors has possession of the company's seal, and it is that remnant and defendant Moore who are seeking to prevent the use of the company's name.

A special general meeting of the company has been called by the shareholders, and it has been held. The regularity of the meeting and of the proceedings at it is attacked by those who have moved to strike out the name of the company as plaintiffs. It is urged by them that a number of persons who claim to be shareholders and who voted as such at the meeting, and whose votes were necessary to carry the resolution which was there passed to sanction the use of the company's name, are not shareholders, because the transfers to them of the shares which they claim to own have not, as it is said, been properly recorded in the books of the company, nor, as it is also said, do the names of these persons appear in the register of shareholders. It is manifest, I think, that a large majority, both in number and amount, of those who are registered shareholders or entitled to be entered on the register of shareholders, if they are not already entered on it, are desirous that these actions should proceed in the name of the company as plaintiffs, and under all the circumstances, and especially as those whose conduct of the affairs of the

company is impeached are the persons at whose instance the application to strike out the name of the company has been made, and the persons through whose neglect the names of the shareholders have not been entered in the register of shareholders—if their names are not entered there—the Court ought not, in my opinion, to interfere to prevent the use of the name of the company as plaintiffs.

Appeals allowed, and motions before Master dismissed. Costs here and below to be in the cause, unless the trial Judge otherwise orders.

JULY 8TH, 1904.

DIVISIONAL COURT.

LEE v. CULP.

Sale of Goods—Destruction of Goods before Actual Delivery —Property not Passing to Purchaser.

Appeal by defendant from judgment of Judge of County Court of Lincoln awarding plaintiff $200 as the value of certain apples alleged to have been bargained and sold by plaintiff to defendant. The following facts were undisputed. Plaintiff agreed to sell and defendant to buy all the apples in plaintiff's orchard of first and second quality—the apples then being on the trees—at $1 per barrel for firsts and 75 cents per barrel for seconds; plaintiff to retain the culls; plaintiff to pick the apples and place them in piles in the orchard; defendant to furnish barrels and pack the apples; plaintiff to convey them to station where barrelled. Plaintiff did pick all the apples and placed them in 64 piles in the orchard, and notified defendant that they were ready for packing. This was about 1st November, 1903. No specific time was agreed upon when the apples should be packed or when payment should be made. Defendant was disappointed in securing barrels, and packed only twelve barrels of the apples. These were delivered to him. The others remained on the ground and were frozen and destroyed late in November. There was conflict of evidence as to whether anything was said, when the bargain was made, about protecting the apples against frost; and the Judge found as a fact that that matter was not imported into the bargain as a term thereof. He also found that defendant at no time said anything to plaintiff about lack of barrels, nor did he notify plaintiff before the apples were destroyed that he would not take them or that plaintiff might sell them to some one else; but on 17th November defendant sent his book-keeper to plaintiff to ask plaintiff to cover the apples thicker, and plaintiff

said he had not the straw, or it would take too much. On 24th November the same book-keeper asked plaintiff to get men and to put the apples in the cellar, but this was not done. The Judge held that the apples were selected and appropriated by plaintiff and approved of by defendants and that the property in the unpacked apples passed to defendant with all the risks of destruction before actual delivery.

W. E. Middleton, for defendant.

H. H. Collier, K.C., for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

TEETZEL, J.—The conclusion of the learned Judge below is not warranted. It does not appear by the evidence that anything was said as to who should select the apples and grade them into firsts, seconds, and culls, but it must be inferred from all the circumstances that defendant and his packers were to do this with the co-operation or concurrence at least of plaintiff, and it must also be assumed that payment was to be made on delivery of the apples when packed. There were two circumstances or conditions in the agreement between the parties which combined to defeat plaintiff's contention that the property in the apples passed to defendant, the fact that the sale was of a part only of a bulk quantity, and the fact that to determine the quantity, quality, and total price, defendant was to separate from the bulk and classify the goods to be taken by him, plaintiff retaining the culls; and in this work plaintiff was to co-operate or concur, and had the right to insist upon the selections being made in accordance with the recognized standards of quality. . . .

[Reference to Box v. Provincial Ins. Co., 15 Gr. 337, 18 Gr. 280; White v. Wilkes, 5 Taunt. 176; Shepley v. Davis, 5 Taunt. 617; McDougall v. Elliott, 20 U. C. R. 299; Lingham v. Ecclestone, 27 Mich. 324; Hahn v. Fredericks, 30 Mich. 233; Blackburn's Contracts of Sale, p. 124 et seq.; Benjamin on Sale, 7th Am. ed., p. 313 et seq.]

Before there can be a bargain and sale, as distinguished from an executory agreement, the parties must be agreed as to the specific goods on which the contract is to attach, and it makes no difference that the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. The law gives effect to the intention of the parties in determining whether the property passes, but, in the absence of an unequivocal expression of intention by both parties that the property shall pass, it will not pass where the sale is of an unascertained part of a bulk

which has to be separated and classified by one party with the concurrence or co-operation of the other.

[Reference to Ross v. Hannan, 19 S. C. R. 227; Wilson v. Shaver, 3 O. L. R. 110; Turley v. Bates, 2 H. & C. 200.]

Appeal allowed and action dismissed except as to $10 paid into Court by defendant, which should be paid out to plaintiff. No costs of action or appeal.

ANGLIN, J. JULY 9TH, 1904.

CHAMBERS.

RE MITCHELL.

Will — Construction — Misnomer of Legatee — Intention — Legacy—Vested Interest—Condition Subsequent—Divesting—Death of Legatee—Foreign Domicil—Distribution of Legacy.

Motion by executors and trustees under will of Robert Mitchell for an order declaring construction of his will. The testator died on 5th March, 1886. By his will he provided an annuity for his widow, who lived until 20th March, 1904. Margaret Toms, a daughter, who survived the testator, died intestate in the State of New York, leaving a husband but no issue. The testator's son Thomas died childless on 29th May, 1893, leaving a will of which his widow is executrix. Mary Ann McMillan, Albert J. Mitchell, and Robert Mitchell were children still surviving, as were also Lucinda and Samuel Mitchell, who were only interested as heirs of Margaret Toms. The questions now arising affected only $18,000 set apart to produce the widow's annuity, and arose under the following provisions of the will: (a) "And upon further trust to divide the remainder of my residuary estate (and also the corpus of said annuity after the death of my said wife and the said legacy to my said grandson if and when the same shall fall into my residuary estate) share and share alike among my children Margaret, Mary Ann, Thomas, and Albert J. Mitchell, with full discretion to my said trustees to make such division and pay over the same from time to time as they shall have converted or got in my said estates as hereinbefore directed." (b) "And in case any of my said children, Margaret, Mary Ann, Robert, and Albert J. Mitchell, shall die before the said residuary estate shall have been fully divided, leaving lawful issue him or her surviving, the said issue shall take the share or shares to which their respective parents would have been entitled if living."

J. B. Holden, for applicants.

W. R. Riddell, K.C., for administrators of estate of Margaret Toms.

D. C. Ross, for widow and executrix of Thomas Mitchell.

A. F. Lobb, for Samuel W. S. Toms.

W. H. Blake, K.C., for Albert J. Mitchell and others.

F. W. Harcourt, for Robert Mitchell.

ANGLIN, J.— . . The word "Robert" in paragraph (b) should be read "Thomas," to correspond with paragraph (a). . . .

Paragraph (a) gives to the four named children a vested interest. The event upon which a divesting of the share of any of these beneficiaries would have occurred, viz., his or her death leaving issue, has not happened. The precise condition subsequent upon which divesting is to ensue must be fulfilled, and more contingency than is expressed must not be imported into a will: Kirby v. Bangs, 27 A. R. 17; Ryan v. Cooley, 15 A. R. 379; Re Gardner, 3 O. L. R. 343; Baldwin v. Rogers, 3 De G. M. & G. 649; Strother v. Dutton, 1 De G. & J. 675; Templeman v. Warrington, 13 Sim. 267. The shares of Margaret and Thomas pass therefore to their respective personal representatives.

Margaret Toms having died domiciled in the State of New York, her personal estate is to be administered according to the law of that State, under which, she dying intestate and without issue, her surviving husband is entitled to her estate as against her brothers and sisters.

Order declaring accordingly. Costs of all parties out of the respective estates.

ANGLIN, J. JULY 9TH, 1904.

CHAMBERS.

DESERONTO IRON CO. v. RATHBUN CO. OF DESERONTO.

Indemnity—Appeal by Third Parties in Name of Defendants—Security—Bond—Covenant—Form—Construction of Order—Amount of Indemnity—Costs.

The trial of this action resulted in a recovery by plaintiffs for about $5,580 and costs, and in a judgment requiring the third parties to indemnify defendants against plaintiffs' claim for debt and costs and for defendants' own costs. From the latter part of this judgment the third parties lodged an appeal. By an order of MEREDITH, C.J., they were allowed to appeal in defendants' name against the judgment

in favour of plaintiffs, "upon giving to the defendants proper indemnity to be settled by one of the registrars of this Court."

The senior registrar settled as such indemnity a bond in the penal sum of $400, conditioned to be void upon the third parties "effectually prosecuting such appeal in the name of the Rathbun Company and paying such costs of the appeal (if any) as shall be awarded to be paid by the said Rathbun Company, and in all other respects indemnifying and saving harmless the said Rathbun Company from all loss, costs, damages, or expenses, which the said Rathbun Company may incur or be put to by reason of the bringing or prosecution of this appeal." The third parties accepted this settlement of the form of the bond, and gave a bond accordingly, with the United States Fidelity and Guarantee Co. as sureties. The defendants appealed, contending that this bond was insufficient in form and in amount.

E. D. Armour, K.C., for defendants.

J. W. Bain, for the third parties.

ANGLIN, J.—Both parties stand upon the terms of the order of the learned Chief Justice as issued; the third parties maintaining that indemnity against the costs of the proposed appeal only was intended to be ordered, and that the bond is sufficient in form and amount for that purpose; the defendants contending that indemnity against the entire claim of the plaintiffs is what the order imposes as the condition of an appeal being taken in their name, or, if not, indemnity against any possible increase in the present judgment of the plaintiffs upon such appeal. In any case they say that $400 is not a sufficient sum to properly indemnify them against costs which the plaintiffs may recover upon such appeal over and above the sum of $200 paid into Court by the third parties as security to the plaintiffs.

It is obvious that a little more foresight upon the settlement of the order of the learned Chief Justice would have resulted in its terms being more explicit, and the present difficulty would have been avoided. As it is, I confess that its meaning and the scope of the indemnity which it directs is open to much doubt. Were I at liberty to inquire from Meredith, C.J., what he really intended to order, the difficulty would probably entirely disappear. I am obliged, however, to construe the order as it is drawn up, and from its language to gather, as best I can, its true meaning and effect, if I am now to determine the form and the amount of the penal

sum of any bond to be taken as a compliance with its requirements. The amount of the penalty fixed by the learned senior registrar rather indicates that he has upheld the contention of the third parties.

The difficulties which the defendants' counsel anticipates may never in fact arise. The judgment against his clients may be set aside or reduced in amount upon the proposed appeal. The judgment against the third parties may prove perfectly good as an indemnity pro tanto to the defendants. Were I now to determine the extent and the scope of the indemnity to which this order entitles defendants, I should dispose—possibly to the serious prejudice of one of these parties—of questions with which it seems premature and unnecessary at present to grapple. Without, therefore, holding that the registrar's interpretation of the order of the learned Chief Justice is erroneous, in my opinion the better course will be for that officer, instead of a bond with a fixed penal sum, to settle a joint covenant, in the terms of the condition (mutatis mutandis) in the bond now filed as settled by him, to be entered into by the third parties and their sureties with the defendants. This covenant should be preceded by appropriate recitals indicating that it is intended to give to the defendants such indemnity as the order under which it is entered into contemplates their receiving. The third parties have already accepted the substance of this covenant by acquiescing in the form of the bond as settled. If such a covenant is not satisfactory to the defendants, and they prefer to retain the form of security by bond, the amount of the present bond should, in my opinion, be increased to the sum of $1,000 to cover extra costs for which the proposed appeal may render the defendants liable, and interest on the judgment which will accrue through the delay entailed by such appeal. The costs of this application should be paid by the third parties to the defendants. The present bond may be removed from the files of the Court. As required by the defendants, the new security, whether in the form of bond or covenant, will be accompanied by an affidavit of execution by the third parties and their sureties, and will be filed or delivered to the defendants as they may elect. The defendants should elect whether they will take a covenant or a bond as above indicated, within one week.

MEREDITH, J. JULY 9TH, 1904.

TRIAL.

CITY OF HAMILTON v. HAMILTON STREET R. W. CO.

Street Railways—Agreement with Municipality—Payment of Percentage of "Gross Receipts"—Powers of Company and of Municipal Corporation — Passenger Fares outside Municipality—Unearned Profits.

Action upon a covenant contained in an agreement, under seal, made between the parties to this action, and dated the 26th March, 1892, whereby defendants agreed to pay to plaintiffs a certain proportion of defendants' "gross receipts."

F. Mackelcan, K.C., for plaintiffs.

E. D. Armour, K.C., and G. H. Levy, Hamilton, for defendants.

MEREDITH, J.—Two objections, now requiring consideration, are made to this claim: first, that the covenant was one beyond the power of the parties, or of one of them, to make; and second, that it does not include the moneys in question.

The express and direct legislative authority, of the parties, upon the subject, is contained in the 7th and 15th sections of the defendants' Act of incorporation—36 Vict. ch. 100 (O.)—sec. 7 providing that the defendants might construct and operate a railway upon and along streets and highways within the jurisdiction of the plaintiffs, and of any of the adjoining municipalities, under and subject to any agreement to be made between the council of the plaintiffs, and of the said municipalities respectively, and the defendants, and under and subject to any by-laws of the plaintiffs and municipalities respectively, or any of them, made in pursuance thereof; and sec. 15 giving both parties authority to contract in respect of certain specified subjects, none of which seems to include such a covenant as that in question.

If the first question for consideration had arisen soon after the passing of the Act, there would have been very much to be said in support of the defendants' contention; it might have been found a difficult thing to discover any legal power in the plaintiffs to exact or take for their own use and

benefit a share in the profits, earnings, or receipts of the defendants.

The words "any agreement" contained in sec. 7 must mean any agreement within the corporate capacities of the parties: being both entirely creations of the statute law, endowed with legal existence for certain limited purposes only, their powers must be found in enactments conferring them, including of course the Act in question. Even if not controlled, as they may be, by sec. 15, the words "any agreement" could not include—for one plain instance—a co-partnership agreement for the construction and working of the railway and sharing in the profits and losses of the undertaking.

The highways within a municipality are vested in the corporation thereof, at least largely, to enable them to perform their duties to the public in respect of such ways—mainly to keep them in repair. In days when tolls are commonly called "a relic of barbarism," the purpose of the Legislature could hardly have been to confer on municipalities power to exact a great toll with liberty to apply it at their will; if the imposition of a toll were comprehended, it may well be thought that it would have been accompanied by a provision that the corporation should expend it upon the highways or otherwise in ease of those using them. It is against equity for a trustee to make a profit of his office. It seems against justice that a corporation should be permitted to exact a tax for the use of the highways and to expend it in paying debts incurred by them wholly disconnected from such ways—to use the means thus obtained in filling holes in their financial ways, instead of in the highways, or otherwise in ease of those who have the highest rights in them. The supreme rights in highways are the rights of traffic over them; the rights of all His Majesty's liege subjects to pass and repass over them.

Neither sec. 15 of the enactment in question, nor the general enactments now in force respecting street and electric railways, lend any great encouragement to the exercise of the power in question. In the latter the burden put on the company is applied in ease of the passenger. Nor indeed is there much of such encouragement in the earlier general enactments. Ease of the public in better roads, cheaper fares, and better accommodation, strike one as, generally speaking, the most just way of sharing in the receipts, earnings, or profits of such

companies. The blame for ill kept highways, high fares, and wretched accommodation upon street railways may rest upon the municipalities, if they exact excessive amounts and expend the money for ulterior purposes.

But upwards of twelve years ago the parties, with great deliberation, entered into this agreement, expressly made under and pursuant to the powers conferred upon them in and by the legislation in question, in which agreement payment to the plaintiffs of proportions of the gross receipts of the defendants is very clearly provided for, and the defendants have, up to the present time, regularly made quarterly payments thereof in accordance with the terms of the agreement; and the very agreement has, in a measure at least, been recognized by the Legislature, in a subsequent Act respecting the defendants, passed at their instance and upon their petition, in which the whole of the agreement and of the by-law referred to in it and based upon it are set out; 56 Vict. ch. 90 (O.): and under other similar Acts of incorporation other like agreements have been made and have been recognized and given effect to by legislation. So that we have an interpretation put upon the enactment by the defendants themselves, and by the Legislature, contrary to that now contended for by the defendants. It is therefore quite too late to give effect to this defence, and unnecessary to consider the questions whether by estoppel merely the defendants should fail; and what the effect of their succeeding would be—whether to avoid the whole agreement, or merely to relieve them from an obligation without which, or a valid equivalent for it, no contract between the parties would probably ever have been made.

The second defence covers two quite distinct questions, though each depends entirely upon the meaning of the words "gross receipts" used in the agreement in question. Under that agreement the plaintiffs are entitled to a "percentage" of the defendants' "gross receipts," and the first question is: Does that term include fares paid by passengers without the corporate territorial limits of the defendants, who also began their journey upon the defendants' railway beyond such limits?

The words "gross receipts" are, in their ordinary full meaning, very comprehensive, no doubt designedly so, to leave no room for disputations and cunning devices to which the use of the word "profits" or the word "earnings" might give encouragement. But plainly the words were not meant

to have so full a meaning, were not meant to include every sum of money received by the defendants, and which in the ordinary course of book-keeping would go to the debit side of their accounts, under the heading of "receipts." For one or two examples, to make this plainer, the moneys received from the sale of bonds, authorized by the Act of 1893, though obviously part of their gross receipts of money, quite as clearly are not part of the "gross receipts" in which the plaintiffs are entitled to share; so, too, gifts from any of the adjoining municipalities, or from any person, to induce the defendants to construct and operate a railway in such municipalities, are clearly part of the defendants' "gross receipts," but as clearly are not comprehended in the agreement. So that a line has to be drawn, a division made, somewhere in all that can come under the word receipts. The plaintiffs doubtless rejected the words "traffic receipts" and "earnings" as well as "profits" for the reasons before mentioned, though the word "earnings" would have been a more certain word and is often used in such a case; the words "gross receipts" are however used in the present general enactments before referred to.

Again, it can hardly be that, if the defendants had constructed or should construct one or more quite separate railways in the adjoining municipalities, the receipts, of any kind, from them would be required to pay toll to the plaintiffs—would be within the meaning of the words in question. Reading the agreement in the light of the surrounding circumstances—putting oneself, as nearly as possible, in the position of these parties at the time of making of the contract, it seems to me reasonably clear that the somewhat ambiguous words "gross receipts" include and were intended to include at least all traffic receipts in connection with the defendants' railway system operated in the city of Hamilton, and that the short extensions of the railway beyond the city limits are really a part of that system as much as if the objective points of such extensions had happened to have been within instead of without the city. The extensions were made for the use of the occupants of the city, and for the money to be made out of them. Neither the mere fact that other than city passengers may sometimes use the extensions as part of the city system, nor the possibility that a passenger may by chance begin and end his journey without the city, can make any difference. The extensions are yet in no sense part of a system, either separate from or connected with the city system, of any of the adjoining municipalities, but are in all essentials part of the city railway.

The plaintiffs therefore are entitled to their proportion of the gross receipts of the extensions as well as of the rest of the railway as constructed and operated at present. It is satisfactory to know that this construction of the agreement is in accord with that put upon it, without doubt or question, immediately after the making of it, by the parties themselves, and under which for several years payment has been made voluntarily by the defendants; and also that it is in accord with the contract between the defendants and the adjoining municipality into which the railway has been extended; that agreement contains no covenant to pay any part of the receipts of the defendants to the corporation of that municipality, presumably because the defendants are already under obligation to pay a "percentage" of them to the plaintiffs; so that it is in no sense a case of a double tax upon any part of the defendants' receipts.

The last question is whether the words "gross receipts" include traffic receipts not yet earned, such as receipts from the sale of passengers' tickets still outstanding.

The defendants' contention that moneys thus received are not to be included cannot be given effect to. It would reduce the wide term "gross receipts" to the very much narrower one "earnings for which value has been actually given," and would exclude even proof of the profits, for instance, from tickets sold and lost, or in regard to which for any other reason no value happens ever to be actually given, and tend much to defeat the purposes of the use of the widest term, as well as reduce to some extent the plaintiffs' share in the receipts. All moneys thus received must be part of the defendants' gross receipts, entered as receipts in their books, and used as such in their business; they are in no sense impressed with any kind of trust, but are plainly part of the "gross receipts" of the defendants in which the plaintiffs are entitled to share.

As in the case of wills, each case of this kind generally differs so much in some material circumstance from any other, that great care must be exercised in seeking assistance from the decisions; and this is especially so in regard to those in any of the Courts of any of the United States of America; the statute law, the municipal laws, in the narrower sense, and the terms of the agreements, as well as other material circumstances, are often so different that it is quite dangerous to apply them without the closest scrutiny of every material matter or circumstance. So that, although much

assistance is afforded in a general way by the many English and Canadian cases cited at the trial, as well as from some of the United States cases collected in the article upon Street Railways contained in the 2nd edition of the American and English Encyc. of Law, especially those referred to on p. 22 of vol. 27, and Corn v. United States Express Co., 157 Penn. St. 579, I have found none which quite governs this case. In the Montreal case, for instance, although at first sight so much like this case, there are really many important differences; indeed, many things which seem to have more or less moved Girouard, J., to the opinion expressed by him, are clearly wanting in this case: I shall mention but two out of many differences, of more or less moment, between the cases; there the covenant was limited expressly to gross earnings from "its said railways;" here there is not that limitation, but the covenant is to pay "on their gross receipts" without any expressed limitation; and there at the time of the making of the contract the railway extended beyond the city limits; here it was not so; everywhere the agreement provided for a railway within the city wherever locality was mentioned.

There will be judgment for the plaintiffs upon all points, and the counterclaim will be dismissed, both with costs. If the parties cannot agree as to the amount, that will be ascertained by the proper local officer and inserted in the judgment.