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COURT OF APPEAL.

NOVEMBER 7TH, 1910.

TOWNSHIP OF HAY v. BISSONNETTE.

Highway—Dedication — Municipal By-law Assuming Highway Dedicated by Owners—Surveys Act, sec. 39—Registration of Plan—Consent of Various Owners of Land Included in Plan —Deletion of Part before Registration—Conveyances by Reference to Plan—Objections to By-law—Absence of Motion to Quash.

Appeal by the defendant from the order of a Divisional Court, 1 O. W. N. 287, dismissing an appeal from the judgment of CLUTE, J., 14 O. W. R. 279, in favour of the plaintiffs in an action for a declaration that certain streets laid down upon a plan were public highways.

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

W. Proudfoot, K.C., for the defendant.

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

MOSS, C.J.O.:— . . . On the 6th April, 1900, an instrument expressed to be a plan of subdivision into town lots and streets of a portion of lot 9 and of lots 10 and 11 west of the Lake road, and of portions of lots 9, 10, and 11 east of the Lake road, in the township of Hay, the property of one Josephine Cantin and others, was registered in the registry office for the county of Huron. The land was surveyed and subdivided and the plan prepared by one Alexander Baird, whom the evidence shews and the learned trial Judge found to be an Ontario Land Surveyor; and a certificate, in the form required by the Registry Act, duly signed by him, appears upon the plan.

There also appears upon the plan a certificate, in the form required by the Act, purporting to be signed by the owners of the land, setting forth that the lots and streets shewn on the plan within the limits of the lands owned by them are laid out according to their instructions, and that they desire the same to be registered. There is also a consent, purporting to be signed by certain mortgagees of portions of the lands, to the registration of the plan so far as it covers the land on which they hold mortgages.

A part of the land was owned by one Georgiana Bissonnette, the wife of the defendant. He was not the owner of any of the land, but the owner's certificate was signed by him as well as by his wife, probably in virtue of his marital right, if any. Another owner was Josephine Cantin. The owner's certificate was signed by her, and it appears that her husband, Narcisse M. Cantin, who was acting for her and some other owners, was the person by whom Baird was engaged and instructed. Cantin appears to have been actively concerned in the preparation of the plan and the procuring of the signatures of the owners and mortgagees, and was present in the registry office when the plan was presented for registration.

As it was prepared in the first place, the plan shewed another parcel of land subdivided into lots and streets lying to the north of the subdivided land now affected by it. But before registration it was discovered that a part owner or a mortgagee of some of the north parcel had not signed the certificate or consent to registration. Consequently that part was scored out of the plan. It appeared also that at the request of one Swartz, and with the assent of the owner and mortgagee of the block of land affected, a short street was marked on the plan as in the centre of a tier of lots lying between Bissonnette and Campbell avenues on the north and south respectively, and Lake or Vallee road and Picotte street on the east and west respectively. These changes were made in the presence of some of the owners and of Narcisse M. Cantin, by Baird, who was instructed and authorised by Cantin to attend to the registration. After these alterations, the plan was received and registered by the registrar of the county, and it has ever since been recognised as the duly registered instrument to which reference is to be made in granting, conveying, or otherwise dealing with the lots and streets shewn upon it. A number of lots have been sold and conveyed to the purchasers by reference to the plan in the registry office.

Among other streets laid out on the survey and delineated on the plan are two called respectively Bissonnette avenue and Ar-

chambault street. Each of these ways was used to some extent for public traffic. There was a gate on the west side of Lake or Vallee road at its junction with Bissonnette avenue, placed there, it is said, by the defendant Bissonnette, with the effect of closing the entrance of Bissonnette avenue into Lake or Vallee road, but, notwithstanding this gate, traffic from the latter way down Bissonnette avenue was kept up at intervals.

On the 5th August, 1908, the plaintiffs finally passed a by-law opening up and establishing Bissonnette avenue and a portion of Archambault street running south from Bissonnette avenue to Campbell avenue, as shewn on the plan, and declaring them to be public highways, thus assuming them as provided by sec. 39 of the Surveys Act, R. S. O. 1897 ch. 181.

Following upon the passing of the by-law, the gate and fence obstructions placed there by the defendant Bissonnette across the entrance of Bissonnette avenue into Lake or Vallee road were removed, but were replaced and the gate locked by the defendant Bissonnette; and thereupon this action was commenced.

The answers to the action set up by the defendant are chiefly of a technical nature. He is not an owner or person interested in the lands covered by the plan. He sets up in a vague way a claim as lessee under Josephine Cantin or her husband, but the latter never had any title, and the former could not be heard to allege that Bissonnette avenue and Archambault street were not highways, and made so by the plan; for not only was she a party to the plan, but she has sold and conveyed to purchasers a number of lots fronting some on the one and some on the other side of Bissonnette avenue, and some of them adjoin or abut upon Archambault street, and these have been registered in the registry office. She could, therefore, grant no right or title to the highway to the defendant or give him any status to contest the plaintiffs' rights.

Then it is said that the alterations made in the plan after it was signed by the owners, but before registration, rendered it of no validity. No person whose land is affected by the plan is shewn to have objected to the alteration, and from Cantin's evidence it seems that Baird had general authority from the owners and others interested to do whatever was required in order to register the plan. Apart from this, however, the act of deleting the subdivision to the north of the land now covered by the plan furnished no ground of objection on the part of the owners of the latter portion, unless there was some agreement or understanding that the plan as originally prepared was to be registered as a whole or not at all, of which there is no evidence.

Although a plan in which the lands of more than one owner are subdivided may be registered, yet the plan is the separate plan of each owner as regards his part of the lands, and, even after registration, alterations may be ordered with respect to one part without the consent or against the will of the owner of the other part: In re Ontario Silver Co. and Bartle, 1 O. L. R. 140; and, that being so, it was not open to the owners of the land now covered by the plan to object to the deletion made by Baird.

Then it is said that a part of the lands covered by the plan as registered was at the time of registration subject to a mortgage held by one Coursolles, and that he did not sign a consent. But this does not appear to be the state of the case. The mortgage in question was assigned to Coursolles after the registration of the plan by one Philip Holt, who held it at the time of the preparation and registration of the plan, and he signed it as one of the consenting mortgagees. The mortgage was afterwards assigned to and apparently is now held by the defendant's wife. And it appears that there is in it an exception of Bissonnette avenue and Lake or Vallee road.

No person entitled to object or to receive notice of an intended alteration has ever put forward an objection to the manner of registration of the plan, and it would be out of the question to allow any such objection to be put forward on behalf of a mere trespasser.

Objections to the purposes for which and the want of the statutory formalities with which the by-law was passed are also urged. But no person interested in or entitled to call the by-law in question by motion to quash it has done so, and it stands. It seems to have been properly passed by the council and to be quite sufficient for the purpose for which it was intended. Its effect was to bring the designated streets in as part of the system of highways to be maintained by the plaintiff municipality.

It was not a case of acquiring land for the purpose of making and establishing a new highway, but a case of assuming for public use, under sec. 39 of the Surveys Act, a highway already dedicated to the public by the owners of the land.

The appeal fails and should be dismissed with costs.

No attempt was made to sustain the counterclaim. The result is that the judgment of the Divisional Court stands.

The other members of the Court agreed; MEREDITH and MAGEE, JJ.A., each giving reasons in writing.

NOVEMBER 7TH, 1910.

*SELKIRK v. WINDSOR ESSEX AND LAKE SHORE RAPID R. W. CO.

Company—Electric Railway Company — Powers of Provisional Directors—Special Act 1 Edw. VII. ch. 92, sec. 9 (O.)—General Electric Railway Act, sec. 44—Contract under Seal—Sanction of Shareholders—Performance of Services—Acceptance—Liability of Company—Appeal and Cross-appeal—Costs.

Appeals by the defendants the railway company and the plaintiffs from the order of a Divisional Court, 21 O. L. R. 109, 1 O. W. N. 731, reversing the judgment of RIDDELL, J., 20 O. L. R. 290, 1 O. W. N. 355.

The two appeals were heard together by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

J. M. Pike, K.C., for the defendants the railway company.

A. H. Clarke, K.C., for the plaintiffs.

E. S. Wigle, K.C., for the defendants Newman and Nelles.

The judgment of the Court was delivered by MOSS, C.J.O.:— . . . It is manifest that, if the judgment against the railway company stands, the plaintiffs' appeal must fail. The first question, therefore, is, whether the defendants the railway company were rightly held by the Divisional Court to be liable to the plaintiffs. . . . The Divisional Court differed with the conclusions of the learned trial Judge because of sec. 9 of 1 Edw. VII. ch. 92. . . . Section 9 is plainly an enabling enactment, no doubt inserted in the special Act for the express purpose of enlarging the powers of the provisional directors and enabling them to act for and on behalf of the company to an extent much beyond the scope to which provisional directors are limited by sec. 44 of the Electric Railway Act, R. S. O. 1897 ch. 209.

It is noteworthy that several Acts incorporating railway companies, passed by the legislature during the same session (1901) contain a precisely similar enactment, e.g.: ch. 78 (the railway company of which the plaintiffs were provisional directors), sec. 9; ch. 82, sec. 8; ch. 88, sec. 16.

It would seem to have been considered that, in regard to railways intended for urban or suburban service, the work of con-

*This case will be reported in the Ontario Law Reports.

struction should not be wholly at a stand-still pending the organisation of the company, and that, with a view to preventing delay in the prosecution of the undertaking, the provisional directors should be empowered to engage on behalf of the company in purchases, and make bargains, which otherwise they could not do.

The language of sec. 9 distinctly implies that the provisional directors are authorised to engage the services of engineers and contractors, to purchase right of way, material, plant, and rolling stock, and, with the sanction of shareholders, engage the services of promoters or other persons for the purpose of assisting them in furthering the undertaking. . . .

[Reference to S. Pearson & Son v. Dublin, etc., R. W. Co., [1909] A. C. 217, at p. 227, per Lord Macnaghten.]

It is apparent that the powers thus expressly or impliedly conferred extend far beyond those possessed by the provisional directors whose actions were under consideration in Monarch Life Assurance Co. v. Brophy, 14 O. L. R. 4. . . . .

Section 44 of the Electric Railway Act confines the authority to the purposes of the company. But the purposes in respect of which the provisional directors may act for and bind the defendants the railway company are materially extended by sec. 9 of the special Act. Not only is there the power to pay or agree to pay in cash which the power of purchasing right of way, etc., or engaging services, implies, but there is given a power of paying or agreeing to pay in paid-up stock or in the bonds of the company.

The services of the plaintiffs which were engaged under the agreement sued upon were of such a nature as to be comprehended within the class of purposes requiring the sanction of the shareholders if the agreement had been to pay in paid-up stock or bonds. This power is an extension of the power to pay in cash derived from the combined effect of sec. 44 of the Electric Railway Act and sec. 9 of the special Act. If the sanction of the shareholders was necessary in order to make the agreement binding upon the defendants the railway company, it was given in substance, as pointed out by the Divisional Court.

Upon another ground, also, the defendants have been properly held liable. The learned trial Judge found expressly, upon evidence which fully justified his conclusion, that the plaintiffs had performed their part of the agreement. There is not the least doubt that the defendants the railway company accepted the benefit of the plaintiffs' services. The correspondence appearing in the evidence shews that the defendants the railway company accredited the plaintiffs as their agents to perform work of the

kind mentioned in the agreement, and recognised and acknowledged the value of the services rendered. That being so, there seems to be no good ground for saying that they are not liable to pay for them.

The agreement being under the seal of the defendants the railway company, and the services having been rendered in fact by the plaintiffs and accepted in fact by the defendants the railway company, there is ample consideration to support the claim against them for the sum mentioned in the agreement: see Lawford v. Billericay Rural District Council, [1903] 1 K. B. 772, and Township of East Gwillimbury v. Township of King, 20 O. L. R. 510, where the authorities dealing with this principle are discussed in regard to agreements, whether under seal—as the one in question here is—or otherwise.

Their appeal should, therefore, be dismissed with costs. It follows that the plaintiffs' appeal should also be dismissed, and the plaintiffs must pay to the defendants Newman and Nelles their costs; but, inasmuch as the appeal was the direct result of the appeal of the defendants the railway company, the latter should, in addition to the costs of their own appeal, pay to the plaintiffs the costs they are directed to pay to the defendants Newman and Nelles.

NOVEMBER 7TH, 1910.

HOSKIN v. MICHIGAN CENTRAL R. R. CO.

Railway—Injury to Passenger Alighting—Defective Step—Negligence—Findings of Jury—Finding of Negligence on Ground not Alleged—Absence of Evidence to Support—Dismissal of Action.

Appeal by the defendants from the judgment of a Divisional Court, 1 O. W. N. 503, dismissing the defendants' appeal from the judgment of MAGEE, J., at the trial, upon the findings of a jury, in favour of the plaintiff for the recovery of $1,250 damages for personal injuries sustained by the plaintiff in alighting from a car of a train of the defendants at Amherstburg.

The negligence charged in the statement of claim was: (1) permitting the train to be equipped with defective and improper steps; (2) not providing a platform sufficiently high to permit passengers to alight in safety from the coach; and (3) the conductor carelessly and improperly placing a loose step or box on the platform, intended to overcome the difficulty of the distance

from the lowest step of the car to the platform, in stepping whereon the plaintiff was thrown heavily to the ground and injured.

The questions put to the jury and their answers were as follows:—

1. Was there any negligence of the defendants' conductor in placing the portable step for the plaintiff to get off the train, or was there negligence of the defendants otherwise in relation to the step. A. No negligence in placing the portable step, but the accident would not have happened if the portable step were of the same length as the car step, and that there was negligence of the company in that respect.

2. If so, what was the negligence? A. A portable step the same length as the car steps should have been provided in order to insure safety in alighting from the train.

3. Was the plaintiff injured in consequence of such negligence? A. Yes.

4. Could the plaintiff by the exercise of reasonable care have avoided the injury, A. No.

5. If so, wherein did she fail to exercise reasonable care? (Requires no reply).

6. At what sum do you assess the plaintiff's damages, if she be entitled to damages? A. $1,250.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, JJ.A., and Sutherland, J.

D. W. Saunders, K.C., for the defendants.

J. H. Rodd, for the plaintiff.

Garrow, J.A.:— . . . The case made by the plaintiff in her own evidence was, in cross-examination, very definitely narrowed to one objection only, namely, the mode in which the portable step was placed. . . . .

[Extracts from the plaintiff's testimony.]

No one, not even the plaintiff herself, said in evidence that the portable step was too short or that it was otherwise imperfect or insufficient. Its length was sixteen inches, and it appears from the only evidence on the subject, that called on the part of the defendants, to have been made according to a standard pattern.

In these circumstances, I do not see how the judgment can be supported or how the plaintiff's case could be improved by a new trial. There is no allegation in the pleadings that the step was too short—nothing in fact except the general allegation that the train was equipped with defective and improper steps, which, prima facie at least, would mean the permanent steps of the car,

especially in the light of the specific allegations which follow as to the platform and the placing of the portable step.

But, even assuming that this particular might fall under the general charge, as was apparently the opinion of the learned trial Judge, it was still, with deference, essential to the plaintiff's recovery that some reasonable evidence should have been given to prove the allegation—and of such evidence there is, as I have said, a total absence.

The jury evidently accepted the theory of the defendants, supported by the evidence of the nearest disinterested eye-witness, Mr. Rowland, that the plaintiff, from some unexplained cause, fell from the lowest step of the car, and not from the movable step at all. Accidents do sometimes still happen; and the plaintiff's misfortune, with which it is quite natural and proper to sympathise, must, in the circumstances, be attributed to that cause, and not to any negligence established against the defendants.

The appeal should be allowed and the action dismissed, both with costs, if demanded.

MOSS, C.J.O., and MEREDITH, J.A., concurred, each stating reasons in writing.

MACLAREN, J.A., and SUTHERLAND, J., also concurred.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT.

NOVEMBER 1ST, 1910.

*STERLING BANK OF CANADA v. ROSS.

Buildings — Encroachment on Highway — Legislative Sanction—47 Vict. ch. 50 (O.)—Contract—Party Wall—Removal—Injunction.

Appeal by the defendant from the judgment of MIDDLETON, J., ante 13.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

J. A. Macintosh, for the defendant.

George Wilkie, for the plaintiffs.

MEREDITH, C.J.:— . . . The sole question necessary to be determined in order that the rights of the parties as to the matter

* This case will be reported in the Ontario Law Reports.

in controversy may be ascertained is whether or not, in the events that have happened, the right to maintain the wall in question, so far as it encroaches on Pitt street, conferred by the Act mentioned in the judgment below, has come to an end; and the determination of that question depends upon whether the wall in question, as my learned brother has decided, formed an integral part of the respondents' building, as well as of the appellant's, or, as is contended by the appellant, it formed part of her building only.

Except the part of it which encroaches on Pitt street, the whole of the wall stands on the land of the appellant, and it was, by the lease under which Macdonell, the predecessor in title of the appellant, held from the predecessor in title of the respondents, expressly provided that it should stand on the northerly boundary of the land demised to Macdonell, and in the provision of the lease giving to the lessor the right to fit into the wall beams, etc., it is spoken of as the northern wall of Macdonell's building, and again in the provision for conveying away the water from the roof it is referred to as "his (i.e., Macdonell's) building," and the covenant by Macdonell to erect the building is that he shall erect it on the demised premises.

It is, however, provided that the lessor, Samuel Cline, is to be at liberty to make use of the wall "as a partition wall between the said building of the said James Macdonell and any structure said Samuel Cline may thereafter erect adjoining said building on the northern side thereof."

The effect of these provisions, taken in connection with that which follows—which reads thus, "And that the said Samuel Cline for the purposes aforesaid be at liberty to fit the said northern wall of the James Macdonell building, beams, joists, sleepers, and such other timbers and other building materials of any kind as may be necessary for the purposes aforesaid"—is to confer on the lessor the same right to use the wall as if it were a party wall, and when it was so used as it in fact was by building into it the beams and joists of the lessor's building, it became an integral part and a necessary part of that building without which it would not stand.

This right to use the wall as a partition wall and of fitting into it beams, etc., conferred on Cline by the lease to Macdonell, is more than a mere easement, and, according to the ratio decidendi in Consumers Gas Co. v. City of Toronto, 27 S. C. R. 453, is an interest in the land itself.

According to the terms of the special Act, it is not incumbent upon the owner or occupant of a dwelling-house, shop, or building which encroaches on Pitt street, to remove it off the street "until

the rebuilding or the repairing thereof to the extent of fifty per cent. of the then cash value thereof."

The respondents are not rebuilding, nor is their building being repaired, and the license conferred by the special Act is, therefore, still subsisting, and it is not open to the appellant, in violation of the covenant entered into by her predecessor in title, to pull down the wall; in other words, so long as the wall remains lawfully on the highway, she may not interfere with it so as to deprive the respondents of the benefit intended to be conferred on their predecessor in title by the lease to Macdonell.

The appeal should be dismissed with costs.

TEETZEL, J., concurred.

CLUTE, J., dissented, for reasons stated in writing.

MIDDLETON, J. NOVEMBER 4TH, 1910.

RE BALDWIN AND HUNTER.

Will—Devise—Restraint upon Alienation—Invalidity — Vendor and Purchaser—Objection to Title.

Motion by the vendors for an order, under the Vendors and Purchasers Act, declaring that an objection to title made by the purchaser, that under the will of the late James Hunter the devise to David Hunter did not pass the fee, was not a valid objection.

McGregor Young, K.C., for the vendors.

F. E. Hodgins, K.C., for the purchaser.

MIDDLETON, J.:—The question upon this application is the validity of the restraint upon alienation in the devise of the lands in question to David Hunter, by words sufficient to pass the fee, followed by this provision, "directing my said son not to sell or dispose of the said lands during his life."

Taking the view I do, that this case is governed by Blackburn v. McCallum, 33 S. C. R. 65, I ought not to add to the confusion of the law bearing upon this much-vexed question by any comment either upon that case or the subsequent cases in which it is explained. With much that is said in some of these I am unable to agree, and I desire to remain free to consider the true effect of the Supreme Court decision when the question arises.

The Court there certainly determined two things: (1) that the restraints there imposed—i.e., that "the aforesaid parcels of land shall not be at their disposal at any time until the end of 25 years from my decease," and "no debts contracted by my son shall by any means incumber the same," during the same period—were so general as to be invalid unless saved by the limitation as to time; and (2) that the limitation as to time did not give them validity.

I cannot distinguish the will now before me from the will there in question, and am, therefore, if opinion that the restraint is invalid, and the objection to the vendor's title fails.

It is, perhaps, worth pointing out that the head-note in the Blackburn case is misleading; it speaks of the will as restraining "selling or incumbering."

TEETZEL, J., IN CHAMBERS. NOVEMBER 5TH, 1910.

RE SONS OF SCOTLAND BENEVOLENT ASSOCIATION AND DAVIDSON.

Life Insurance—Benefit Certificate—Moneys Payable to "Wife"—Death of Wife Named at Time of Application—Second Marriage of Assured—Claim by Widow—Opposing Claim by Children of the Assured—Children of Child who Predeceased Assured—R. S. O. 1897 ch. 203, sec. 159, sub-secs. 7, 8—Sec. 151, sub-sec. 6, as Amended—7 Edw. VII. ch. 36, sec. 5.

James Davidson, deceased, held a certificate of life insurance issued by the association, and upon his death the amount thereof was paid into Court by the association. This motion was made on behalf of the administrator of the estate for an order determining the question to whom the money was payable under the certificate, which was dated the 9th December, 1891.

The beneficiary named in the certificate was the wife of James Davidson. In the application for membership, he directed that the money should be payable to Isabella Davidson, his wife. Isabella Davidson died in 1898, and James Davidson afterwards married Marilla Hillson, who survived him.

The moneys were claimed by the surviving children and by the widow; and the infant children of a son who predeceased James Davidson claimed to be entitled to the share which would have gone to their father had he survived.

H. Guthrie, K.C., for the administrator and adult surviving children of James Davidson.

W. W. Osborne, for the widow, contended that his client was entitled to the whole amount, as she was the wife living at the maturity of the certificate of insurance, and was entitled under sub-sec. 7 of sec. 159 of R. S. O. 1897 ch. 203.

J. R. Meredith, for the infant grandchildren.

TEETZEL, J.:—I am of opinion that sub-sec. 7 of sec. 159 does not apply to the case in question, but that sub-sec. 8 of sec. 159, as amended and re-enacted by 4 Edw. VII. ch. 15, sec. 7, applies, and that, when that sub-section is read in conjunction with sub-sec. 6 of sec. 151, as amended by 1 Edw. VII. ch. 21, sec. 2, sub-sec. 7, and by 3 Edw. VII. ch. 15, sec. 6, the effect is that, if there is no survivor of the preferred beneficiaries named in the certificate, the insurance shall be for the benefit in equal shares of the surviving children of the assured, and, if there are no surviving children, it shall form part of the estate of the insured.

I think it is also plain that the words "his wife" in the certificate describing the beneficiary can only mean the person who was his wife at the date of the certificate, and who was described by name in the application upon which the certificate was based, and that it cannot be applied to a different person who answered the description of being his wife at the time of his death; for the law is now made clear by 7 Edw. VII. ch. 36, sec. 5, that, for the purpose of ascertaining the person intended as beneficiary, even a will speaks from the date of signing thereof, and not from the date of the testator's death.

The application of sub-sec. 7 relied upon by Mr. Osborne is limited, so far as it relates to the wife living at the maturity of the policy, to a case where the insurance is for the benefit of "the wife and children generally," and does not extend to a case where the insurance is declared to be for the benefit of the wife only.

Grandchildren of the deceased are necessarily excluded from the benefit by reason of the express provision above referred to, providing only for the surviving chlidren.

The order will, therefore, be that the moneys in Court shall be paid out to the children of James Davidson who survived him.

Costs of all parties out of the fund.

RIDDELL, J. NOVEMBER 5TH, 1910.

*McINTEE v. McINTEE.

Will—Testamentary Capacity—Delusions—Proof of Existence—Effect on Disposition of Property — Contestation of Will — Proof in Solemn Form—Costs—Unfounded Charge of Undue Influence.

Action to establish the will of Mrs. McIntee, a widow. Proof of the will in solemn form was sought in the Surrogate Court of the County of Peel, and the contestation was removed into the High Court.

W. H. McFadden, K.C., for the plaintiff.

H. D. Petrie and W. V. M. Shaver, for the defendant Edward McIntee.

T. J. Blain, for the defendant J. S. McIntee.

RIDDELL, J.:—The testatrix was a widow, who died in the present year, aged about 85 or 86, and the will of which probate is asked was made on the 23rd May, 1907.

The objections taken are two in number: first, the want of testamentary capacity; and second, undue influence alleged on the part of the plaintiff, one of her sons. The latter charge is wholly unfounded—no attempt was made at the trial to support it, and it never should have been made. The former presents more difficulty.

The testatrix had had seven children: (1) Elizabeth Coulthurst, married, of Maryland, U.S.A.; it does not appear whether she is living or dead, but I made an order that she (or her representatives) should be represented by another daughter, Mrs. Montgomery; (2) John Spencer McIntee, who is a beneficiary under the will and is named as an executor therein; he did not join in applying for probate, for a reason which will appear later, and took at the trial a neutral position; (3) William James McIntee, the plaintiff; (4) Mary Victoria McIntee, an unmarried daughter, made a defendant; (5) Emeline Montgomery, wife of John Montgomery, of Montreal, who gave evidence at the trial, and repudiated any idea that she should share in the estate; (6) Edward McIntee, who now calls himself Edward McIntyre, and who is the active contestant of the validity of the will; (7) another son . . . who died some years ago . . . .

* This case will be reported in the Ontario Law Reports.

In a case of this kind the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator: Barry v. Butlin, 2 Moo. P. C. 480.

What constitutes a capable testator is laid down by Cockburn, C.J., in the great case of Banks v. Goodfellow, L. R. 5 Q. B. 549, 565. . . .

So far as concerns understanding the nature of the act and its effects, the extent of the property disposed of, the claims to which effect should be given, there can be no doubt about the full capacity of the testatrix. . . .

There is no contest upon the matter of the capacity—it was in effect admitted that, were it not for what are alleged to be delusions, the testatrix was fully competent. . . . I find as a fact that (apart from the effect of the alleged delusions) there can be no question that the testatrix was competent to make a will when and as she did; nor can there be any controversy that she fully understood the will. . . . As little question can there be that the will was duly executed in accordance with the law.

It is alleged that she suffered from two kinds of delusion. She laboured under the delusion that all women were "bad." . . . "It is not the law that any one who entertains wrong-headed notions . . cannot make the will:" per Taschereau, J., in Skinner v. Farquharson, 32 S. C. R. 58, 60.

Following out this idiosyncracy, the testatrix, in the later years of her life, seems to have had no hesitation in charging her daughter who lived with her, Mary Victoria, with improper designs upon the hired men; in charging her sons John and William with improper conduct with her grandchild, their niece . . . —even going so far as to suggest immorality between brother and sister. . . .

The second kind of delusion alleged is that of poisoning, etc. No doubt, she did accuse her daughter Mrs. Montgomery, in 1905-6, of trying to poison her, and Mrs. Montgomery's young son of sticking pins in her at night. These accusations were made during a visit by her to her daughter, and were quite without foundation in fact.

Her daughter Mary Victoria had life made wretched by constant repetition of the accusation that she may trying to poison her mother; and more than once the old lady threw articles at her, regardless of their dangerous character. . . .

The accusations made against her children of sexual immorality were in large measure, if not wholly, due to her desire to annoy them, and I do not think she really believed in their guilt. . . . She undoubtedly had no real belief that either daughter was trying to poison her or in the vice of son or daughter. . . .

I am unable to find as a fact that the deceased did have any delusions; but find the contrary as a fact. If I had been able, upon the evidence, to find the alleged delusions proved . . it would become necessary to consider how the case would then stand.

The law as to testamentary capacity in cases in which the testator suffered from delusion is not the same as it was formerly laid down. . . .

[Reference to Waring v. Waring, 6 Moo. P. C. 341; Smith v. Tebbitt, L. R. 1 P. & M. 398; Banks v. Goodfellow, L. R. 5 Q. B. 549; Broughton v. Knight, L. R. 3 P. & D. 69; Ingoldsby v. Ingoldsby, 20 Gr. 131; Bell v. Lee, 8 A. R. 185.]

While there are expressions through some of the cases that the will must be held void if the testator suffered from a delusion "capable of influencing the result" and the like, the rule seems to be laid down by our Supreme Court that "it is a question for the jury whether the delusion affected the disposition. . . . ."

[Reference to Skinner v. Farquharson, 32 S. C. R. 58, 60, 87, 92; Smee v. Smee, 5 P. D. 84.]

Whatever may be the law elsewhere, I think I am bound by authority to go into the question—not "Could the 'delusions' possibly have an influence upon a disposition to be made by the testatrix by will,"—but, "Did the 'delusions' influence or affect the disposition actually made?" . . .

Practically all she could dispose of was the farm, under the powers given in her husband's will, and that only to a son or sons. . . . In the will propounded she, after reciting the power in her husband's will, directs that the farm is to go to John and William, in equal shares, as well as her farm stock and implements—they to pay $500 within three years to Mary Victoria; and all the residue of her estate was to go to Mary Victoria.

As to the sons, there is no evidence that she had any feeling—much less any delusion—in respect of Edward. William she was always quarrelling with, and she had accused him of immorality with his niece; John she had accused of the like misconduct; and yet she took away all from the blameless and favoured son, and gave more to these charged with crime. . . .

As to the bequests to Mary Victoria: Mrs. Coulthurst had been married and away from home and country for many years—Mrs. Montgomery also. Mary Victoria, the sole remaining daughter, had been charged with vice and crime time and again; and, if the testatrix really did not have any delusion in fact, notwithstanding her charges against her daughter, what more natural than the legacy of $500 and of everything except what belonged to the farm? . . . She gave her daughter who had stayed at home and looked after her all she could.

It seems to me impossible to think that any delusion such as is sworn to could have influenced this will; and consequently, even if the inquiry were whether the delusion were capable of influencing the will, I should and do find that, even if the testatrix in reality had the delusions she affected to have, they were not capable of affecting her disposition of the property.

The will must be declared valid and admitted to probate.

As to costs, the plaintiff will have his costs as executor between solicitor and client, as will all defendants except Edward. Had he not made the charge of undue influence, I should have given him the same costs; in view of that charge, it would be regular to order that he be paid no costs; but, in the circumstances, he may have his costs party and party. All these costs will be paid out of the land in the hands of the plaintiff and John Spencer McIntee.

BOYD, C.

NOVEMBER 5TH, 1910.

INNIS v. VILLAGE OF HAVELOCK.

Highway—Nonrepair of Sidewalk at Crossing—Injury to Pedestrian—Negligence—Evidence—Inspection — Absence of Actual Notice of Defect—Inference from Time of Continuance —Conflict of Testimony.

Action by husband and wife for damages for injuries sustained by the wife by reason, as alleged, of the nonrepair of a sidewalk in the village of Havelock, and for consequent expense and loss.

The action was tried before BOYD, C., without a jury, at Peterborough.

E. A. Peck and F. D. Kerr, for the plaintiff.

L. M. Hayes, K.C., and E. H. D. Hall, for the defendants.

BOYD, C.:—The female plaintiff was injured on the 22nd May, 1910, on George street, in Havelock, by falling on her back in consequence of having put her left foot into a hole in the sidewalk about ten o'clock at night.

Havelock is a village with 1,350 inhabitants (mostly railway people); its revenue in taxes is $9,000 per year; and it has about seven miles of wooden sidewalks to maintain. George street is not the main thoroughfare, but has between 20 and 30 houses on it, and has a sidewalk on both sides. Many of the near-by residents were examined and gave rather conflicting evidence as to the general condition of the walks in that locality. However, this case is to be determined by the state of repair at the very place—which is marked out plainly as the crossing at Jones's house, where the planks are put in lengthwise, twelve feet long, parallel with the travelled road, whereas the walk on both sides of this crossing are put crossways and of length four feet. The crossing place has a width of four planks two inches thick and twelve feet long, and sloping from it to the roadway for horses and carts is an approach also made of two-inch planks, twelve feet long and five in number; all the structure, approach and crossing, is of hemlock and all resting on fir stringers—three inches wide and five inches from the ground. Two days before the accident a loaded cart or one horse waggon with coal drove several times over this place, taking coal to the Jones house; the weight thus carried consisted of a ton of coal, a horse of 1,200 pounds, a man driving, and the waggon. I am satisfied that this place of crossing was of generally substantial character; and, though the material was about fourteen years old, it had not outlived its usefulness. No doubt, there are surface evidences of some decay and some tokens of wear and tear, and this decay may amount to a state of rottenness in some places out of sight. Spaces of one inch in width may be between the planks and between the outer plank of the crossing and the inner or first plank of the approach, and the evidence leads to the conclusion that there was some breakage or decay or both at the edge of this outer plank of the crossing, existing for some time prior to the accident, at the place where the plaintiff's foot went into the hole.

The extent of this opening is the crux of the case. The nature and size of it and the length of time for which it existed are the material points to be considered in attributing negligence to the corporation. Some evidence for the plaintiff goes to shew that it was in a dangerous state in the summer or fall of 1909;

if so, that would be sufficient to affect the corporation with notice and so to render the defendants liable. I do not pretend to be able to reconcile all the evidence: but I think there is an element of exaggeration in some of those who speak of defects. There is confusion in the plaintiffs' witnesses as to the size and location of the hole that is said to have caused the accident—as compared with the hole said to exist in the plank for some months before the accident. . . .

[Detail of the testimony of several witnesses.]

If the evidence of the plaintiff (deducting that of Howe) stood alone, a case of negligence would be made out, but, taking the whole of the evidence, I think there is not sufficient clearly to establish neglect on the part of the defendants. The village streets are subject to inspection by an appointed officer on an average of twice every week. Here no complaint was made as to the condition of the walk in question, and the officer says that when he repaired one plank on the 11th May there was no other spot near-by that was, in his judgment, dangerous or unsafe for the usual travel thereon.

Had the waggon not disturbed the plank on Saturday afternoon, I am pursuaded that the plaintiff could and would have passed over in safety on Sunday night.

The action, I think, must fail, but the plaintiff had good ground to believe that the walk was so long out of repair as to inculpate the municipality; and, in all the circumstances, I would dismiss without costs.

DIVISIONAL COURT.

NOVEMBER 9TH, 1910.

RE MACDONALD AND MACDONALD.

Arbitration and Award—Determining Price to be Paid for Shares in Company—Basis of Valuation — Terms of Submission — Construction—Books of Company—Value of Assets—Artificial or Real.

Appeal by James Fraser Macdonald from the order of SUTHERLAND, J., 1 O. W. N. 505, dismissing a motion made by the appellant to remit to arbitrators the matters referred to them as to which they made their award on the 16th December, 1909.

The solution of the question raised by the appeal depended upon the meaning of a provision in an agreement dealing with

the terms upon which the shares in the capital stock of the John Macdonald & Company Limited, an incorporated company, of a party to the agreement desiring to sell them, should be purchased.

That provision was: "5. Should the said stock be not purchased by a shareholder within the said thirty days and remain unsold for a period of sixty days after such notice, the said stock shall be taken over by the remaining shareholders, at a valuation to be determined by the award of two out of three arbitrators in the usual way. In arriving at such value the arbitrators shall not go behind the entries contained in the books of the company, but may take other matters into consideration in determining the value of the stock."

According to the practice of the company, periodical balance sheets purporting to shew their assets and liabilities were prepared by the company's auditors. The last of these balance sheets made up before the notice given by the appellant of his desire to sell his shares, was dated the 1st June, 1909, and, according to it, the company had assets amounting to $1,387,683.72, and their liabilities, including a profit and loss account of $10,072.53, and the capital stock of the company, amounting to $750,200, were $1,387,683.73.

This balance sheet was entered up in a private ledger which the arbitrators held to be one of the books of the company.

One of the assets appeared as "York and King street real estate, $149,720.18," another as "Front street real estate, $56,365.09," and a third as "Endowment insurance, $37,092.75."

The accounts from which these items were taken did not shew, and were not intended to shew, the actual value of the real estate or insurance. The real estate accounts were made up by debiting to them the amounts paid and the liabilities assumed when the properties were acquired, the amounts owed by customers from whom properties were taken over, and the excess of expenditures upon the properties after they were acquired over the receipts from them for the same period. The endowment insurance account was made up of the amounts paid for premiums for insurances effected by shareholders for the benefit of the company, not yet matured, and the amount at the debit of the account was much more than the surrender value of the policies.

A number of the accounts owing by customers, and included in "bills receivable on hand" or "accounts receivable," were either wholly worthless or not worth more than a small fraction of the sum they represented.

The arbitrators made an award determining the value of the appellant's stock to be $88,400 at the date of the award.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and RIDDELL, JJ.

W. H. Irving, for the appellant, contended that the balance sheet was one of the books of the company; that, by the terms of the submission, the arbitrators were bound to give effect to the entries contained in it; and that these entries were, therefore, conclusive as to the value of the assets and the amount of the liabilities of the company on the 1st June, 1909.

G. F. Shepley, K.C., and G. W. Mason, for the respondents.

RIDDELL, J.:— . . . . The contracting parties have not agreed for the taking by the remaining shareholders of the shares of one who desired to sell, at the intrinsic value or the true value of the shares, but at a value to be arrived at and fixed on the hypothesis that the assets, etc., of the company are as they may appear by the entries contained in the books of the company, as these entries exist at the time. This may be wholly wrong: the actual assets, etc., of the company may be very largely in excess of or very largely less than the true amount. But all the shareholders know that the books are being kept; and I think these shareholders have agreed that, for the purpose of some buying out one, whatever may be the fact as to the standing of the company, the books are to govern—in other words, the company is to be taken as though its standing, etc., was as shewn by the books. . . . .

In a word, I think the parties were desirous of avoiding an inquiry into the real value of any part of their assets, and arranged and stipulated for an artificial basis—it was not intended that the real value should be paid, but a value fixed upon an artificial basis.

This conclusion is not shaken by the added provision that the arbitrators "may take other matters into consideration in determining the value of the stock." "Other matters" must, I think, be something not already provided for—something of a different kind. For example, the probability of an increase or diminution in trade caused by the one member retiring, the prospects of good or bad seasons, etc. And I do not at all suggest that the rate of past or prospective dividends should not have been given value—and many other matters may be mentioned. But the arbitrators are not to find the "intrinsic value of the assets," and by evidence to shew that this "is much less than shewn by the figures contained in the above statement of the 1st June, 1909," and base a finding upon this "intrinsic value" so found.

That, I think, they have done, as upon finding the intrinsic value to be much less than shewn in the statement, they "therefore found . . . that the statement of the 1st June, 1909, . . . affords an artificial and not a true or real basis for ascertaining the value of the shares." If I understand this language, it means: "We do not consider that we should look upon this untrue value as affording a real basis for ascertaining the value of the shares—we are bound to ascertain the value of the shares, and we must take the real value as the basis." And this, I think, is just what the agreement negatives—the "valuation" is not necessarily, nor has a necessary relation to, the value.

I think the appeal should be allowed and the award remitted to the arbitrators as asked, with costs here and below.

TEETZEL, J.:—I agree.

MEREDITH, C.J., dissented, for reasons stated in writing. He was of opinion that, upon the proper construction of clause 5 above set out, the books should be regarded as conclusive as to the existence of each asset, and its nominal amount, but not as to its value.

DIVISIONAL COURT. NOVEMBER 9TH, 1910.

PARENT v. LATIMER.

Improvements—Honest Belief in Ownership of Land—R. S. O. 1897 ch. 119, sec. 30—Evidence — Agreement — Survey — Boundaries—Wall Built on Strip in Dispute—Knowledge that Right Disputed.

Appeal by the defendants from the judgment of BOYD, C., of the 20th May, 1910, in favour of the plaintiffs in an action to recover possession of land.

The appeal was heard by MEREDITH, C.J.C.P. TEETZEL and CLUTE, JJ.

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

J. Sale, for the plaintiffs.

MEREDITH, C.J.:—At the outset of the litigation the contest between the parties was as to the ownership of a strip of land

about eight feet wide which forms part of lot No. 107 in the 1st concession of the township of Sandwich East. The plaintiffs claim title under Joseph Parent, who was at one time the owner of that part of the westerly half of the lot which lies north of the highway along the Detroit river and fronting on that river.

On the 21st June, 1895, Parent conveyed to the defendant William G. Latimer a part of the land and the water lot in front of the part conveyed, and, owing to an error in the description, a further conveyance was made to him by Parent on the 11th July, 1895, in which the land conveyed is described as that part of the westerly half of lot 107 lying north of the highway along the Detroit river, described as follows: "Commencing on the northerly side of the said highway in the limits between lots 107 and 106, thence easterly along the northerly side of the said highway 110 feet, thence northerly parallel to the line between lots 106 and 107 to the water's edge of the Detroit river, thence westerly or down-stream along the water's edge 129 feet 3 inches, more or less, to the line between lots 106 and 107, thence southerly along said line to the place of beginning, together with the water lot in front thereof to the channel bank."

Latimer and his wife (to whom he subsequently conveyed what he had acquired under these conveyances) are in possession of what the plaintiffs allege to be a part of the lot not included in these conveyances and of which they (the plaintiffs) are the owners.

The defendants plead that the land in question is covered by the description contained in these conveyances, and they also rely on an agreement, dated the 10th July, 1908, made between the defendant William G. Latimer and the plaintiffs, which recites that the line between the property of the heirs of Parent and "the piece sold to Col. William G. Latimer" by him "on the river front of the westerly portion of said lot is in doubt by reason of default of description of said deed," and provides that, to effect a settlement "of said dispute without litigation," a survey should be made by two surveyors, one to be employed by each of the parties to the agreement, and that "the line established and agreed upon by these surveyors shall be accepted by the parties . . . as the proper line of division between said properties," and it further provides that the survey is to be made "to cover a strip of ground exactly 110 feet wide and extending northerly from the road to the river, and that the old description referring to length on road and on river of 129 feet shall be ignored." This agreement, they also further plead, entitles them to the land in question, if it is not included in the conveyances under which

they claim. They also set up that they have made improvements on it in such circumstances as estop the plaintiffs from setting up their title to it if it did not pass by the conveyances, and, in the alternative, they allege that those improvements are lasting improvements made by them on the land under the belief that it was their own, and claim to be entitled to the benefit of sec. 30 of the Act respecting the Law and Transfer of Property, R. S. O. 1897 ch. 119.

The plaintiffs by their pleading impeach the agreement of the 10th July, 1908, as having been made without consideration and fraudulent and obtained by misrepresentation.

The Chancellor found in favour of the plaintiffs as to the ownership of the land in question, and rejected the claim of the defendants to the benefit of sec. 30; and upon the argument before us the judgment as to the ownership of the land was not challenged, and the appeal was limited to the claim made under sec. 30.

The right of the defendants to the benefit of sec. 30 depends upon their having established that the improvements were made under the honest belief that the land was their own: Chandler v. Gibson, 2 O. L. R. 442, 448. As I understand the section, it is not necessary, if it be an honest belief, that the belief be founded on reasonable grounds, though the reasonableness of it may, doubtless, be considered in arriving at a conclusion as to the existence of the belief.

It is quite clear that by neither of the conveyances to Latimer was the width of the parcel conveyed to be greater than the distance betwen the easterly and westerly parallel sides of it, the westerly side being the boundary line between lots 106 and 107, and the easterly side a line drawn parallel to it, starting from a point distant, measuring easterly along the northern limit of the road, 110 feet from the westerly side, which, according to Newman's plan, now that the position of the northern limit of the road has been fixed, gives to the parcel a width of 102.883 feet.

On the 21st January, 1896, Latimer obtained a patent from the Crown of the water lot. A plan was prepared for the purpose of the patent by a surveyor . . . and a copy of it is annexed to the patent. This plan shews the part of lot 107 conveyed to Latimer, as well as the water lot, and makes the frontage on the road 110 feet, and the distance measured along the water's edge between the easterly and westerly limits to be 129 feet 3 inches—corresponding in these respects with the description in the conveyance to Latimer of the 11th July, 1895.

There is no trace of any contention or even of a suggestion by Latimer that the easterly boundary of his parcel was to be ascertained by drawing a line from the westerly boundary and at right angles to it 110 feet in length until it appears in the agreement of the 10th July, 1908, or about that time, and even then, according to the testimony of those of the plaintiffs who were called as witnesses at the trial, they were not told and did not understand that the effect of a survey made in accordance with the agreement would give to Latimer's parcel a greater width than it would have with a boundary on the road of 110 feet.

There does not appear to have been at any time any doubt or uncertainty as to the boundaries of Latimer's parcel, except so far as they were doubtful because of the suggested uncertainty as to the exact position of the road which formed its southern boundary, and, as I have said, there appears to have been no question as to the frontage on the road being 110 feet and no more.

It is unnecessary to determine whether the plaintiffs are or would be entitled to have the agreement set aside, for, as the Chancellor points out, a survey not having been made in accordance with its terms, it came to naught—and both parties stand upon their rights as evidenced by the conveyances. . . . .

Latimer had a survey made by a surveyor named McKay, who was instructed to make it as it would have been made under the agreement. According to this survey, the frontage on the road was made 117 feet 4 inches, and the width of the parcel 110 feet instead of 102.883 feet, and the defendants proceeded to erect the wall, which is the improvement in respect of which their claim is made, as if their true easterly boundary was the easterly boundary as shewn by this survey.

Latimer is a business man, employed in a broker's office in Detroit, and I am quite unable to understand how such a man, in the face of these facts, could honestly have believed that the additional land which McKay's survey would give him was his own. There is, I think, much to lead to the conclusion that in procuring the agreement of the 10th July, 1908, he was taking advantage of the plaintiffs, who are illiterate people, and, under the pretence of having the boundaries of his parcel settled, was trying to obtain from them more land than he was entitled to; but, however that may be, there is no escape from the conclusion that he knew that under his conveyance he was entitled to no more frontage on the road than 110 feet, and that he must also have known that, to entitle him to the additional land that a sur-

vey made in accordance with the agreement would give him, the joint survey for which it provides was essential.

The evidence also leads to the conclusion that the plaintiffs, or some of them, were all the time protesting against the encroachment the defendants were making on their land, and that when the wall was built the defendants knew that that was the attitude of the plaintiffs, and deliberately decided to take the risk of erecting the wall where it was built.

I do not wish to be understood as meaning that in every case and in all circumstances a person making improvements on the land of another must be held not to have done so under the belief that the land was his own, merely because some one else has claimed the land as his; but the knowledge of the defendants that the plaintiffs disputed their right to the land on which the wall was built, in the circumstances of this case, is in itself sufficient to present the application of the statute in the defendants' favour.

I would dismiss the appeal with costs.

TEETZEL and CLUTE, JJ., concurred; CLUTE, J., stating reasons in writing.

DIVISIONAL COURT. NOVEMBER 9TH, 1910.

DOMINION CARRIAGE CO. v. WILSON & HUMPHRIES.

Sale of Goods—Conditional Sale—Title Remaining in Vendors—Vendors' Name Affixed to Goods—Resale by Purchaser—Price not Paid to Vendors—R. S. O. 1897 ch. 150—Agency of Purchaser—Evidence—Onus—Estoppel—Ratification of Resale—Assignment of Promissory Note — Laches—Demand—Conversion—Damages.

Appeal by the plaintiffs from the judgment of the County Court of Simcoe dismissing an action for the return of two buggies and damages for wrongful detention or for the value of the buggies.

The appeal was heard by FALCONBRIDGE, C.J., RIDDELL and SUTHERLAND, JJ.

A. J. Anderson, for the plaintiffs.

W. A. Boys, for the defendants.

The judgment of the Court was delivered by RIDDELL, J.:—John A. Stephenson was carrying on business at Midland as agent for a number of manufacturers, amongst them the McLaughlin Co. of Oshawa, which manufactured carriages, &c. The plaintiffs carried on the business of manufacturing and selling carriages, and desired Stephenson to handle their goods. The secretary of the company went to Stephenson at Midland . . . to induce Stephenson to handle their goods. . . . The arrangement then was made that Stephenson should "cut out" the McLaughlin Co. and deal with the plaintiffs. Stephenson placed an order with the plaintiffs the same day, amounting to over $2,000, for buggies, intending, as of course the plaintiffs were aware, to sell them. The transaction was reduced to writing, and it took the form of an order signed by Stephenson for the supply of buggies, "all to be settled by draft at Nov. 1st, 5 per cent. for all cash up to July 31st, draft to be renewed without interest to cover any goods not sold during season until Nov. 1910. . . It is agreed that the title to the property mentioned on this order and any other merchandise purchased and not paid for shall remain in the Dominion Carriage Co. Limited until the purchase-price and all notes and acceptances given for same have been paid in cash. . . ."

On the buggies in question in this action when supplied to Stephenson there was affixed an oval metal plate with the name of the plaintiffs stamped thereon. An arrangement was made whereby the plaintiffs furnished Stephenson with a number of metal plates, oblong in shape, stamped "Mfd. for J. A. Stephenson, Midland, Ont." The evidence is not very clear whether the plaintiffs expected Stephenson to affix these plates to the buggies in question, but I think it may fairly be considered that they did. Stephenson did attach the plates to the buggies, but did not remove those of the plaintiffs.

Wilson, one of the defendants, an illiterate man, not able to read, bought two of the buggies supplied to Stephenson by the plaintiffs. He cannot say if the Stephenson plate was on the buggies when bought by him, and of course cannot say that he was at all influenced by them, if they were there—he did not and could not read them. In perfect good faith and without any knowledge or express notice of the ownership of the plaintiffs, Wilson gave for the buggies to Stephenson two buggies worth about $60 and a note for $90 dated 30th April, 1909, payable 1st January, 1910.

The plaintiffs, shortly after the sale by them to Stephenson, drew upon him for the amount of the invoice—the draft was accepted but not paid on maturity, the 1st November, 1909. About

the 9th November the secretary of the company came to Midland and made a demand for payment of the draft. Stephenson did not pay. He said all the goods were sold, and he had no money. The secretary inquired where the buggies were, and was informed that the two in question were in the possession of the defendants. A demand was made in writing on the 30th November, but not complied with. On the 9th November the company, by a document in writing, appointed Stephenson their agent to sell, and in the document it was agreed that the terms thereof should apply to all goods then already sold which were still unsettled for. This, of course, does not include the two buggies in question, which had been settled for. On the same day the company took an assignment from Stephenson of all his book debts and accounts and all his bills, notes, &c., as additional collateral security to the existing account. The assignment is perfectly general, and does not specify any note, &c., in particular. On the 10th November, however, the plaintiffs wrote Stephenson for his bill-book, that they might make a list of the notes. This was sent, and a list of the notes was made, including that of the defendants, "Wilson & Humphries, Jan. 10, 2 buggies, $90.00." And it is admitted that the plaintiffs' secretary knew, at the time of the assignment, that this note, unpaid, represented part of the price of the two buggies. But this with other notes was in the Standard Bank, having been given to the bank by Stephenson, and the bank had a claim upon it as against Stephenson, and therefore in priority to the plaintiffs as assignees. The defendants have paid the amount of the note to the bank, but it does not appear that the plaintiffs have received any of the proceeds.

The plaintiffs, upon the defendants' refusal to give up the buggies, brought this action in the County Court of the County of Simcoe for $137, value of the said buggies, as damages for the wrongful detention of same, or for a return of said buggies and damages for wrongful detainer.

At the trial before Ardagh, County Court Judge, on the 20th June, 1910, that learned Judge indorsed the record: "Nonsuit. I assess the damages at $70.00."

The plaintiffs now appeal.

In respect of the amount of damages, it is admitted that there was no conversion until demand was made; as Stephenson had the right to sell, there was no wrong committed by the defendants until they refused to comply with the demand for possession—until that time their possession was rightful. The evidence of the defendant Wilson is that at that time the buggies were worth

$35 each; and, though the plaintiffs' witness swears to a value of $137, I cannot say that the learned trial Judge was wrong in giving weight to the evidence of the defendant. Nor is the fact material that in the written demand the value of the buggies was stated at $137. The plaintiffs cannot cause themselves to be entitled to damages beyond the value of the goods converted by asserting that the goods are of greater value. The estimate of damages then cannot be interfered with.

The learned Judge has not given reasons for the judgment, but we are informed that the decision proceeded upon the ground that Stephenson was an agent of the plaintiffs. This was urged upon us by the respondents, as well as other grounds which will require to be examined.

Upon the finding that Stephenson was agent for the plaintiffs, it is contended that R. S. O. 1897 ch. 150 will apply, as it is said the exception in sec. 3 has not been established. In order that this Act should assist the defendants, it must be proved that Stephenson was the agent of the plaintiffs. "One thing is quite clear, and that is, that an 'agent intrusted' means not somebody else's agent, but the agent of the particular principal intrusted by him as such agent:" per Lord Selborne, C., in City Bank v. Barrow, 5 App. Cas. 664, at p. 671. Cf. Sweeny v. Bank of Montreal, 12 S. C. R. 661, 12 App. Cas. 617. The object of the Act was not at all "to give to all sales . . in the ordinary course of business the effect which the common law gives to sales in market overt:" Cole v. Western Bank, L. R. 10 C. P. 354, per Blackburn, J., at p. 372: Williams v. Colonial Bank, 38 Ch. D. 388, at pp. 404, 405, 15 App. Cas. 268.

In the present case, while there is plenty of evidence that Stephenson was agent for other persons, there is none that he was agent for the plaintiffs. If the evidence as to the transaction is believed, it is clear that the transaction was one of sale, and not one of agency—and, if the evidence is not believed, there is no evidence of agency, and the defendants have not met the onus cast upon them. It has been pointed out in a number of recent cases that, while a Judge or jury may disbelieve any witness in whole or in part, the evidence so disbelieved does not justify the Judge or jury finding as proved thereby the contrary of what is sworn to: Gilbert v. Brown, 15 O. W. R. 673, 679, 1 O. W. N. 652, 654; Rex v. Van Norman, 19 O. L. R. 447, 450;; Rex v. Farrell, 21 O. L. R. 540, 544.

Admittedly the buggies were the property of the plaintiffs, and it rests upon the defendants in this action to prove that the

property passed out of the plaintiffs, or that in some way they became disentitled to the buggies—if they allege agency on the part of the local man Stephenson, they must prove it.

Failing the Act R. S. O. 1897 ch. 150, the defendants set up the supply to Stephenson of the oblong name plates as an estoppel, or as depriving the plaintiffs of their property under the provisions of R. S. O. 1897 ch. 149, as amended by 4 Edw. VII. ch. 10, sec. 37.

That the property is not thereby diverted is clear from the decision of the Court of Appeal in Walker v. Hyman, 1 A. R. 345. . . .

As to estoppel, the purchaser did not know of the existence of the name plate, and his conduct was not influenced by its presence. There consequently can be no estoppel: Dominion Express Co. v. Maughan, 21 O. L. R. 510; Scarf v. Jardine, 7 App. Cas. 345.

Then it was strongly urged that the Act of the plaintiffs in taking the assignment from Stephenson was a ratification of his sale. This cannot be; the sale was not made, and did not purport to be made, by Stephenson as an agent; and there can be no ratification of an act not purporting to be done for the party intended to be bound by an alleged subsequent ratification. And, had the plaintiffs taken the note knowing that it represented even in part the price of the buggies, and themselves enforced its payment, it might have been considered inequitable to allow them to have the price, even in part, of their buggies and also the buggies or their value in an action of trover. But this difficulty vanishes when the facts are made apparent—the note was the property of the Standard Bank, and the Standard Bank had a claim upon the note superior to that of Stephenson and the plaintiffs—all the plaintiffs did was to take a general assignment of the assets of Stephenson as a collateral security to their claim against him. This does not operate to estop the plaintiffs from asserting their property. And all difficulties arising from laches likewise disappear when the facts are examined.

I think judgment should have been entered in the County Court for $70, and the appeal should be allowed to that extent. Under all the circumstances, there should be no costs in the County Court—but, as the plaintiffs had to come to this Court to have their rights declared, they should have their costs of this appeal.

BORRETT v. STEWART—MASTER IN CHAMBERS—NOV. 4.

Judgment — Interlocutory Judgment — Service of Writ of Summons—Notice of Assessment of Damages—Con. Rule 537—Setting aside Judgment—Terms—Costs.]—Motion by the defendant to set aside an interlocutory judgment for default of appearance entered by the plaintiff. The Master said that there was a direct conflict between the parties as to what took place on the 18th May, when the plaintiff says he served the writ of summons on the defendant. Had the service been made in the regular way through the sheriff, no such question would have been raised—or, if raised, would allow of terms being imposed, as was done in Gillard v. McKinnon, 6 O. W. R. 365, and Dancey v. Wighton, 2 O. W. N. 27. There is no necessity to decide between the plaintiff and defendant on the issue as to whether there was good service or not. There is the further objection that, even if there was service and default in appearance, notice should have been given to the defendant of assessment of damages, under Con. Rule 537, by posting up at least. This was not done, and it was contended that the Rule did not apply to an assessment at the Toronto non-jury sittings. It was not necessary to decide this point, but the inclination of the Master's opinion was to the contrary. Order made setting aside the judgment; the defendant to enter an appearance forthwith and expedite the trial. All costs lost or occasioned by the motion and order to be to the plaintiff only in the cause. E. C. Cattanach, for the defendant. John MacGregor, for the plaintiff.

MARTIN v. BECK MANUFACTURING CO.—LATCHFORD, J.—NOV. 4.

Contract—Timber—Measurement — Government Scalers.]—Action for the price of a quantity of logs cut by the plaintiff for the defendants on an island in the Georgian bay, under license from the Ontario Government to the defendants, and shipped to the defendants at their mill at Penetanguishene. By the contract between the parties, the logs were to be measured or scaled by a duly qualified and licensed scaler, and payment at the rate of $6.75 per thousand feet was to be made according to scaler's measurement and report. It was not disputed that the plaintiff cut all the timber off the island, nor that, with the exception of twenty pieces lost in the towing, the timber was delivered at

the defendants' mills. But it was contended by the defendants that the only scaling or measuring was that made for the defendants by one of their employees. The plaintiff relied on the scaling and measurement made by the licensed scalers employed by the Government to ascertain the quantity of timber for which the defendants should pay the Crown. The learned Judge finds that the plaintiff is entitled to recover from the defendants the contract price of the quantity of logs and timber cut, as determined by the Government scalers, less the twenty logs not delivered. If the parties cannot agree as to the amount, there will be a reference to ascertain it at the defendants' expense. Th plaintiff to have judgment for the amount ascertained, with interest and costs. W. A. Finlayson, for the plaintiff. F. E. Hodgins, K.C., for the defendants.

BROWN v. THOMPSON—LATCHFORD, J.—NOV. 5.

Trust—Declaration as to Land — Lien for Moneys Paid—Costs—Lease—Validity — Bona Fides.] — Action by Susanna Brown against her daughter Annie Thompson and her son Wilbert Brown for a declaration that the defendant Thompson is a trustee for her of lot 20 in the 4th concession of the township of Tay, and that a lease of the land by the defendant Thompson to the defendant Brown should be set aside. The learned Judge reviews the evidence, and finds that there was a trust, but for the benefit not of the plaintiff alone, but of herself and her husband, now deceased. As to the lease, that it was made in good faith for the advantage of the beneficiaries. Judgment declaring that the defendant Thompson holds the land as trustee for the plaintiff and the estate of the plaintiff's husband, subject, however, to the lease and to the lien of the defendant Thompson for all moneys paid in discharge of a mortgage on the land and for taxes on the property, with interest, and to her costs of suit as between solicitor and client. Reference to the Master at Barrie to determine the amount of the lien, and the defendant Thompson to be entitled to add her costs of such reference to the amount found. On payment of the amount, the plaintiff is to be entitled to a conveyance of an undivided one half of the land, subject to the lease. As against the defendant Wilbert Brown, action dismissed without costs. W. H. Bennett, for the plaintiff. W. A. Finlayson, for the defendants.

CURRY v. CLARKSON—MASTER IN CHAMBERS—NOV. 7.

Pleading—Statement of Claim—Motion to Strike out—Historical Recital — Res Judicata.]—Motion by the defendant to strike out nearly the whole of the statement of claim as embarrassing. The Master said that the parts complained of consisted of a recital of the previous history of the plaintiff's claim (Curry v. MacLaren, 12 O. W. R. 1108—Re Solicitor, 14 O. W. R. 2, 80, 707, 1 O. W. N. 51); these were, perhaps, unnecessary in one view, but, on the other hand, they shewed why the present action was brought, and why the exact sum of $22,400 was said to be a fair and proper sum to be allowed for the plaintiff's services. Reference to Con. Rule 268; Stratford Gas Co. v. Gordon, 14 P. R. 407; Knowles v. Roberts, 38 Ch. D. at p. 270. Here the paragraphs attacked, even if unnecessary in whole or in part, could not be embarrassing, being historical merely, and explaining the form of the present action. It was contended that the plaintiff was reasserting the claim disallowed in Curry v. MacLaren, 12 O. W. R. 1108, and that this was res judicata. This objection cannot be dealt with at this stage. Motion dismissed; costs in the cause. R. S. Robertson, for the defendant. Harcourt Ferguson, for the plaintiff.

STRATI v. TORONTO CONSTRUCTION CO.—MASTER IN CHAMBERS —NOV. 8.

Security for Costs—Increased Security—Application on Eve of Trial.]—Motion by the defendants for further security for costs. Notice of trial had been given for the sittings at Brockville on the 14th November. The Master said that the plaintiff had given every possible evidence of good faith by first depositing in Court $200 and afterwards paying $301.66, the price of the adjournment of the trial in May (see 1 O. W. N. 877, 1000, and ante 172); and, in these circumstances, he did not think the motion should succeed. It was difficult to see any greater reason now for further security than existed in May, when the application should have been made, if founded in justice: Standard Trading Co. v. Seybold, 6 O. L. R. at p. 380, per Osler, J.A. The costs of the interlocutory appeal to the Divisional Court (1 O. W. N. 1000) being made costs in the cause was not sufficient to warrant an order, on the eve of the trial, which would in all

probability cause further delay and possible loss of evidence. As pointed out in the Seybold case, the plaintiff was entitled to know, before he complied with the order of postponement, the whole of the terms to which he was to accede. Had the question of further security been then raised, he might have preferred a dismissal of the action. Motion refused; costs in the cause to the plaintiff. Grayson Smith, for the defendants, H. S. White, for the plaintiff.

NATIONAL TRUST CO. v. TRUSTS AND GUARANTEE CO.—MASTER IN CHAMBERS—NOV. 8.

Conditional Appearance—Action against Liquidators of Company—Winding-up Act, sec. 133—Objection to Regularity of Proceedings.]—Motion by the defendants for leave to enter a conditional appearance. The action was brought to recover from the defendants, as liquidators of the Raven Lake Portland Cement Co., the proceeds of certain chattels of that company mortgaged to the plaintiffs, before the winding-up order, to secure an issue of bonds amounting to $50,000. The defendants desired to set up that this action was in contravention of sec. 133 of the Winding-up Act, R. S. C. 1906 ch. 144. The reason given for the motion was the fear that the defendants, as liquidators, could not set up against the plaintiffs the defence of invalidity of the mortgage. This was suggested as a doubtful point in In re Rainy Lake Lumber Co., 15 A. R. 749; but in Hammond v. Bank of Ottawa, ante 99, the action was brought for this very purpose by a liquidator, without objection. The Master referred also to In re Essex Centre Manufacturing Co., 19 A. R. at p. 131, and Stringer's Case, L. R. 4 Ch. 475. But, in any case, he said, the motion should not be granted. The object of a conditional appearance is to raise the question of the jurisdiction of the Court over the defendant; and it cannot be made use of for the purpose of objecting to the regularity of the proceedings. Motion refused with costs to the plaintiffs in the cause. W. Laidlaw, K.C., and A. E. Knox, for the defendants. Glyn Osler, for the plaintiffs.

WARREN GZOWSKI & CO. v. FORST & CO.—SUTHERLAND, J.—NOV. 8.

Broker—Shares—Pledge—Transaction by Way of Sale and Purchase—Call for Shares—Offer to Deliver—Refusal to Pay—

Sale at Market Price—Action for Difference—Contract—Breach—Damages—Stock Exchange Rules.]—Action to recover $2,082, as damages for a breach of contract. The plaintiffs (stock brokers) alleged that on the 22nd April, 1909, they sold to the defendants, subject to the rules of the Toronto Stock Exchange, 10,000 shares of Temiskaming Mining Co. stock, at $1.09 a share, to be paid for in ninety days, or sooner if the defendants called sooner for delivery; that the defendants made the call on the 29th June, 1909, and the plaintiffs on that day tendered 10,000 shares to the defendants, who refused to accept or pay; that the plaintiffs thereupon sold the shares at the market price, and realised $8,818; and their claim was for the difference between the contract price and what they actually got. The learned Judge finds that the real transaction was as follows: the defendants wanted $10,000, and obtained it from the plaintiffs; they transferred to the plaintiffs 10,000 shares of Temiskaming stock, and the plaintiffs were to transfer back 10,000 shares within ninety days, on being paid $10,900; it was an ordinary stock transaction, in which, instead of margins being put up in money, the same thing was arranged in effect by lowering the prices in the bought and sold notes. Before selling, the plaintiffs, by letter dated the 29th June, 1909, gave formal notice to the defendants that, if they failed to accept and take delivery, the plaintiffs would sell the shares at the market price and look to the defendants for the balance. The defendants paid no attention to this, and the plaintiffs proceeded to sell, treating the contract as at an end. In these circumstances, says the learned Judge, and in view of the distinct refusal on the part of the defendants to accept the shares after three o'clock on the 29th June, 1909, the plaintiffs appear to have been warranted, under the rules of the Stock Exchange, in selling the stock as they did. The repudiation entitled the plaintiffs to sell and to bring this action for the balance owing: Rhymney R. W. Co. v. Brecon and Merthyr Tydfil Junction R. W. Co., [1900] W. N. 169; Hochster v. De la Tour, 2 E. & B. 678. Judgment for the plaintiffs for $2,082, with interest from the 29th June, 1909, and costs. Counterclaim by the defendants for an account or damages dismissed with costs. F. Arnoldi, K.C., for the plaintiffs. A. C. Macdonell, K.C., for the defendants.

BUCOVETSKY v. COOK—DIVISIONAL COURT—NOV. 9.

Vendor and Purchaser—Contract for Sale of Land—Possession—Improvements — Fraudulent Transfer by Vendor to An-

other—Land Titles Act—Depriving Purchaser of Lien—Personal Judgment against Vendor.]—Appeal by the defendant Cook from the judgment of RIDDELL, J., 1 O. W. N. 998. The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ. The Court dismissed the appeal with costs. R. McKay, for the appellant. W. M. Douglas, K.C., for the plaintiffs.

HORAN v. MCMAHON—RIDDELL, J.—NOV. 10.

Trespass—Boundary — Survey — Injunction—Damages by — Counterclaim.]—Action of trespass to determine the boundary between two parcels of land in the township of Albion. The plaintiff obtained an interim injunction restraining the defendants from removing timber from the land in dispute, a rectangle of six acres, and the defendants counterclaimed for damages occasioned by the injunction. In 1887 one Wheelock, a surveyor, ran the line between the two properties. Upon the evidence, the learned Judge cannot find that Wheelock did not strike the true line; and the plaintiff therefore fails. Action dismissed with costs, including all the costs over which the Judge has power. Counterclaim allowed with costs, with a reference to the Master to assess the damages. Further directions and costs reserved until report. L. V. McBrady, K.C., and R. R. Waddell, for the plaintiff. W. D. McPherson, K.C., and E. J. Hearn, K.C., for the defendants.