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ANGLIN, J. NOVEMBER 10TH, 1906.

TRIAL.

FISCHER v. BORLAND CARRIAGE CO.

Company—Subscription for Stock—Promissory Note given for Price—Misrepresentation — Condition—Absence of Allotment—Acceptance of Plaintiff as Shareholder — Estoppel—Recovery on Note.

Action for delivery up and cancellation of a promissory note given by plaintiff in payment for stock in the defendant company. Counterclaim to recover the amount of the note.

R. S. Robertson, Stratford, for plaintiff.

J. C. Makins, Stratford, for defendant.

ANGLIN, J.:—The making of the note is admitted. Plaintiff pleads that it was obtained by misrepresentation, and also that it was taken upon condition that, if plaintiff should not before maturity of the note receive certain moneys owed him by his brother, the note should be void and should be returned to him, and his obligation to take and pay for stock should be cancelled. The evidence failed to establish either of these obligations. No misrepresentation was proved; and the note was not taken upon any such condition.

But in the course of the trial it appeared that the directors of defendant company had by resolution, not stating any terms, authorized the secretary-treasurer, one Mil-

ler, to issue and sell some $40,000 worth of stock for the company; that he had engaged one Farrow to sell the stock as his sub-agent; that, without any authority from, or communication with the directors, Farrow had made an agreement with plaintiff for the sale to him of the stock in question, taking in payment his promissory note payable to defendants for the whole purchase price, and agreeing on behalf of defendants for renewals of such note if plaintiff should require them. . . . Miller, upon being notified of this arrangement, immediately issued a certificate to plaintiff for the number of shares he had agreed to take as paid-up stock, took his receipt for such certificate, entered plaintiff as a shareholder in the company's stock ledger, and placed the note in question under discount with a bank, its proceeds being put to the credit of defendants. Nothing further occurred until the note matured. In response to demands made by the bank for payment, plaintiff did not dispute his liability, and he now says that the only reason he has not paid, and objects to pay, is that he has not received the money which he had expected from his brother. Indeed when seen by Farrow, after the note had been charged up by the bank against defendants' account, he promised Farrow, whose statement I accept, to come in next day and pay defendants $100 on account.

It is now urged, though no such plea appears on the record, that there was no allotment of stock to plaintiff; that he never became a shareholder; and that the consideration for his note therefore failed. Assuming that plaintiff should be allowed by amendment to seek delivery up and cancellation of his note upon this ground, I am of opinion that it cannot prevail.

While the resolution of the board of directors authorizing Miller to sell stock may have been entirely ineffective as a delegation to him of their discretion, as to the persons to whom and the terms upon which shares should be allotted, and while the handing over of the stock certificate and the taking of plaintiff's note might not have been binding on them, had they promptly repudiated the transaction, defendants in this case have seen fit to confirm what their agent, Miller, did. They accepted and discounted plaintiff's note; they allowed him to hold a shareholder's certificate; they entered him upon their stock book as a shareholder; they even pressed their claim against him upon the note be-

fore he repudiated liability. By all these steps they ratified and confirmed what Miller had done, and estopped themselves from contesting plaintiff's status as a shareholder. Assuming that plaintiff might at some earlier stage have effectively repudiated liability, his attempt to do so was entirely too late to succeed. It was made after the company had, by acts which admit of no other construction, fully recognized his position as a shareholder, and had conclusively ratified and accepted the contract which Miller had purported to enter into on their behalf. . . .

Action dismissed with costs. Judgment for defendants on their counterclaim with costs.

NOVEMBER 12TH, 1906.

DIVISIONAL COURT.

O'KEEFE BREWERY CO. v. GILPIN.

Sale of Goods—Action for Price—Alleged Inferiority of Part of Goods Supplied—Failure to Return.

Appeal by defendant from judgment of County Court of York in favour of plaintiffs in an action for the price of beer, etc., sold and delivered by plaintiffs to defendant.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., MABEE, J.

T. E. Godson, Bracebridge, for defendant.

W. R. Smyth, for plaintiffs.

FALCONBRIDGE, C.J.:—The trial Judge has manifestly given credit to Hill's account of the transaction in preference to defendant's; and I see no reason why he should not have done so. Hill states that on the second occasion of complaint by defendant, he told defendant to leave the beer there, and if it did not come right inside of a year there was no use keeping it, and that if it did not "come back," i.e., mature, defendant would have to ship it back, and he would get credit for it.

Now, defendant never did ship it back, nor take any steps to see that his successor in the business did so; but he left his successor in possession of the goods without giving plaintiffs any further notice of his intention with reference to the goods.

In any aspect of the case, one-half of the value of the consignment is represented by the bottles and cases, and one-half by the liquid contents, and the Judge has correctly found that defendant has not discharged the onus which lay on him of shewing that he had returned these "empties;" and the 22 cases being returned in July, 1901, would seem to indicate that, to that extent at least, the goods complained of were used.

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

MABEE, J., also concurred.

NOVEMBER 12TH, 1906.

DIVISIONAL COURT.

SOVEREEN MITT, GLOVE, AND ROBE CO. v. WHITESIDE.

Company—Directors—Filling Vacancies in Board—Quorum—Special Meeting of Shareholders—Injunction.

Appeal by plaintiffs from order of MACMAHON, J., 8 O. W. R. 279, dismissing motion to continue an interim injunction restraining defendants, shareholders of plaintiff company, from electing at a meeting of the shareholders called for 4th August, 1906, directors of the company to fill the vacancies caused by 4 directors ceasing to be shareholders.

J. Bicknell, K.C., for plaintiffs, the company and the remaining 3 directors, contended that the shareholders had no power to fill vacancies, but only the "board of directors,"

i.e., the remaining 3 directors, who however were by the by-laws of the company, not a quorum of the Board.

G. H. Kilmer and L. F. Stephens, Hamilton, for defendants, contra.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), held that the 3 remaining directors had not power to fill up the vacancies in this case, having regard to the fact that 4 directors were required to constitute a quorum; and the directors having failed, for whatever reason, to fill up the vacancies, the shareholders had the power to do so at a special meeting.

Appeal dismissed with costs, and judgment pronounced dismissing the action with costs, counsel submitting to the appeal being turned into a motion for judgment.

MACWATT, Co.C.J. — OCTOBER 27TH, 1906.

BRITTON, J. — NOVEMBER 13TH, 1906.

CHAMBERS.

REX EX REL. HUNT v. GENGE.

Municipal Elections—Motion to Avoid Election of Reeve — Delay for Nine Months after Relator's Knowledge of Disqualification—3 Edw. VII. ch. 18, sec. 33 (O.)—Construction—Dismissal of Motion—Interest in Contract with Corporation.

Motion by the relator to void the election of the respondent as reeve of the village of Alvinston, in the county of Lambton.

The motion was heard by MACWATT, senior Judge of the County Court of Lambton, on 12th October, 1906.

A. Weir, Sarnia, for the relator.

R. V. Lesueur, Sarnia, for the respondent.

MACWATT, Co.C.J:—As this seems to be the first case to come up under the amendment made by 3 Edw. VII. ch.

18, sec. 33, whereby the following words were added to the section: "or in case at any time the relator shews by affidavit to such Judge reasonable ground for supposing that any member of the council of a local municipality or of a county council has forfeited his seat, or has become disqualified since his election," I consider it advisable to give my reasons for deciding in favour of the respondent. The section as amended is now in the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 220.

Prior to 1903 a relator had to move within 6 weeks after an election, or within one month after acceptance of office by the person elected; and if he did not so move, the person so elected held his seat.

Section 80 of the Consolidated Municipal Act, 1903, reads as follows: " . . . No person having by himself . . . . an interest in any contract with or on behalf of the corporation, or having a contract for the supply of goods or materials to a contractor for work for which the corporation pays or is liable directly or indirectly to pay, or which is subject to the control or supervision of the council or an officer thereof on behalf of the council, or has any unsatisfied claim for such goods or materials, and no person who either by himself or with or through another, has any claim, action, or proceeding against the municipality . . . shall be qualified to be a member of the council of any municipal corporation."

This section was doubtless passed "to prevent any one being elected to a municipal council whose personal interest might clash with those of the municipality:" Rex ex rel. McNamara v. Heffernan, 7 O. L. R. 289, 3 O. W. R. 431. The operation of the section is not to be lightly restricted where it is intended to carry out the spirit of the section by proceeding promptly after knowledge of a violation of its requirements; but where there has been acquiescence, as well as laches and unreasonable delay, I take it the section should not be allowed to stand in the way.

In March, 1903, the municipality entered into a lease with one Pavey by which a hall was leased for the use of the corporation and school board of the municipality for a term of 3 years, at a rental of $25 per annum. This lease expired on 7th March, 1906, and Pavey gave permission about that time for the council to hold one meeting in

his hall after its expiration until arrangements then on foot were carried out. Early in April last the hall was leased for a further period of one year at the same rental, the term commencing from 7th March, 1905. There is no written lease or contract with the respondent, and nothing appears in the minutes at any time as to the supply of gas or light by him or any one else for the council hall.

The relator is the president of the power company which supplies electric light to such of the inhabitants of the municipality as contract for it; and the respondent is the owner apparently of an acetylene gas plant which supplies gas to himself and to one or two halls in the village.

He has been paid, as appears by the village auditors' reports for 1904 and 1905, $5 per year by the municipality for lighting during the years 1903, 1904, and 1905. The cheque for the year ending 7th March, 1906, is dated 5th March, 1906, for the sum of $5.75, of which $5 was for lighting.

The respondent was elected reeve on 8th January, 1906, and had proceedings been taken within 6 weeks of that date, from the evidence and the cheque, I should have been of the opinion that he had forfeited his seat.

It was known to the relator since March, 1903, that the respondent had been paid $5 a year for lighting the hall used by the council of the municipality, as appears by his cross-examination. It was known to many others, among them Mr. Gilroy, who gave evidence before me. He was reeve in 1903, 1904, and 1905, and ran against the respondent for that office for 1906, but was defeated.

The relator also had knowledge that since March last the council room was lighted by gas in the same manner as before, yet until 29th September he does not move, although in his cross-examination he admits that in March or April last he stated more than once that he could unseat the respondent for supplying gas to the council chamber.

The cheque was in payment in full of the contract, if any, which expired on 7th March, 1906. No doubt the respondent was disqualified when elected because he had an unsatisfied claim against the municipality, and this claim was in part at least for services rendered after his election.

A relator should move within a reasonable time after the necessary facts come to his knowledge. I cannot imagine that the legislature by the amendment above quoted intended to allow a person to act at any time when spite, spleen, pique, or any other unworthy motive moved him, and I take it the time in which to move may be fairly taken to have been defined by it as 6 weeks at the outside.

If this be so, the relator is too late in moving on 29th September, on this ground, when he knew the facts in March last.

The respondent is only elected for one year, and has less than 3 months to serve; that is also a reason why the relator should have moved promptly.

The principle of finality was recognized and affirmed by Rose, J., in Regina ex rel. McKenzie v. Martin, 28 O. R. 523.

As to what has been done since March last, I am of opinion that there is not sufficient evidence to disqualify the respondent.

There was no written or even verbal contract, nor any entry in the minutes, and neither the clerk nor Mr. Gilroy knew anything more than that the light has been supplied, but by whom or on what terms does not appear. It may have been still furnished by the respondent; but, even then, he may not be intending to make any charge, and if he wishes to supply it gratuitously I hardly think that would be a ground for his disqualification at this late day.

Under the first lease there was a verbal arrangement with respondent which became executed by supplying gas and being paid for it. Under the new lease there is not a tittle of evidence as to lighting, so that, while the facts may be as contended for by the relator, they have not been shewn.

Why was not the respondent examined, or some sufficient evidence given by examination of other members of the council, or in some way?

The onus is on the relator, and he has not satisfied it, in my opinion. It is not enough for him to say that the

respondent is disqualified, and to require him to disprove it. A learned Chief Justice of our Courts was often heard to say, "The jury must not guess," and I do not feel disposed to do any guessing in this case.

There is no doubt that the relator has been guilty of laches, and that he has acquiesced in the respondent's actions for over 9 months without question. I have not considered it necessary to go into the question of the status of the relator, argued by Mr. Lesueur, as I have decided that the respondent holds his seat on other grounds.

As to acquiescence, see Rex ex rel. Tolmie v. Campbell, 1 O. W. R. 268, 4 O. L. R. at p. 28; Regina ex rel. Mitchell v. Adams, 1 C. L. Ch. at p. 205; Regina ex rel. Pomeroy v. Watson, 1 C. L. J. 48.

As to laches, see In re Kelly v. Macarow, 14 C. P. 313, 457.

As to status of relator, see Regina ex rel. Campbell v. O'Malley, 10 C. L. J. 250.

Mr. Weir cited: Rex ex rel. Moore v. Hammill, 7 O. L. R. at p. 603, 3 O. W. R. 642; Neill v. Longbottom, 1 P. R. 114; Regina ex rel. Shaw v. McKenzie, 2 C. L. Ch. 36; Regina ex rel. Davis v. Carruthers, 1 P. R. 114; and Regina ex rel. Coleman v. O'Hare, 2 P. R. 18.

Mr. Lesueur cited: Evans v. Smallcombe, 37 L. J. Ch. 793; Rex ex rel. Hart v. Street, 1 W. L. R. 202; Regina ex rel. Regis v. Cusac, 6 P. R. 303; and Regina ex rel. Rosebush v. Parker, 2 C. P. 15.

The motion is therefore dismissed with costs to the respondent.

The relator appealed, and his appeal was heard by BRITTON, J., in Chambers, on 13th November, 1906.

Grayson Smith, for relator.

L. G. McCarthy, K.C., for respondent.

BRITTON, J., dismissed the appeal with costs.

BRITTON, J. NOVEMBER 13TH, 1906.

WEEKLY COURT.

RE PORTER.

Will—Construction—Devise — Restraint on Alienation — Validity.

Motion by beneficiary and adult remainderman under will of Hugh Porter for order declaring construction of will.

J. H. Spence, for applicants.

F. W. Harcourt, for infant remaindermen.

BRITTON, J.:—Hugh Porter made his will on 3rd February, 1887, and died on 12th August in same year.

The clause of the will of which construction is asked is as follows: "I give, devise, and bequeath lot number 13 in the 10th concession of the township of Grey, in the county of Huron, to my son Hugh Porter, his heirs and assigns, to have and to hold the same unto the said Hugh Porter, his heirs and assigns, to and for his and their sole and only use forever, subject to the condition that the said Hugh Porter shall not during his lifetime either mortgage or sell the said lot thus devised to him."

Hugh Porter now asks that the condition against his mortgaging or selling be declared invalid.

In Heddlestone v. Heddlestone, 15 O. R. 280, MacMahon, J. decided, 10th February, 1888, that, in the case of lands devised to three sons subject to the condition that these lands should not be disposed of by them, "either by sale, by mortgage, or otherwise, except by will to their lawful heirs," the condition was invalid, and that the devisees were entitled to hold the land freed from the restriction. The difference between the Heddlestone case and the present is that there was in that case the additional restraint upon the devisee against disposing of the land by will except to his lawful heirs. That case was considered, as indeed were all the recent cases upon the point, by my brother Magee in Re Martin and Dagneau, 11 O. L. R. 349, 7 O. W. R. 191.

In that case the words under consideration were, "None of my sons will have the privilege of mortgaging or selling their lot or farm aforesaid described," and the learned Judge held that this restraint on alienation was valid.

I am unable to distinguish between the present case and the one last cited, and so must follow it. In view of the many cases in which the line of distinction and difference is fine, I would not be sorry to have them now considered afresh by an appellate Court.

Restriction valid.

No costs.

NOVEMBER 13TH, 1906.

DIVISIONAL COURT.

HOBIN v. CITY OF OTTAWA.

Highway—Non-repair—Injury to Person—Loose Iron Lid of Catch-basin in Sidewalk — Absence of Defect in Construction — Negligence — Notice — Inference — Municipal Corporation.

Appeal by plaintiff from judgment of MABEE, J., ante 101, dismissing action for damages for personal injuries sustained by plaintiff owing to an alleged defect, or want of repair, in a highway.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

H. M. Mowat, K.C., for plaintiff.

W. E. Middleton, for defendants.

MULOCK, C.J.:—This is an action to recover damages from the corporation of the city of Ottawa, because of an accident sustained by the plaintiff, Mrs. Hobin, under the following circumstances.

On 17th November, 1905, plaintiff was standing on the sidewalk on the north-west corner of Bank street and Gladstone avenue, in the city of Ottawa, waiting to take a street

car. Two children came running down the street with a hand-sleigh, and plaintiff stepped out of their way backward upon what formed part of the sidewalk, being a round iron cover in the centre of an iron frame or grating over a man-hole, which extended down to the sewer. The cover tipped, causing her right leg to go down into the man-hole, when she fell on her side, fracturing two ribs and badly spraining her right knee. This frame is about two feet square and is imbedded in the concrete sidewalk at the outside edge. The cover weighs 40 or 50 pounds, and rests on an iron flange in the frame. No device of any kind was adopted in order to keep the cover in place, its weight and position in the groove of the frame alone being depended upon for that purpose. Directly underneath the cover is the man-hole down which the surface drainage from the street finds its way into the drain. At the lower end of the man-hole is a catch-basin to catch street washings, and the purpose of the defendants in not securing the cover in place by lock, bolt, or other device, was apparently to allow of its easier removal by their servants when desiring to clean out the man-hole. At the time of the accident the flange on which the cover rested, so far as appears, was quite sufficient to support it and to prevent it from tipping, if in place. The accident, therefore, could not have happened if the cover at the time had been in proper position. Its being out of position left the sidewalk in a state of non-repair, and plaintiff seeks to hold defendants responsible for negligence because of such non-repair.

The case was tried before Mabee, J., without a jury, on 11th June, 1906, and he reached the conclusion that the accident was not attributable to negligence on the part of defendants, and dismissed the action, but assessed damages at $500, in case plaintiff should be held entitled to succeed. From this judgment plaintiff appeals.

It being clear that at the time of the accident the cover was not resting in proper position on the flange in the groove of the frame, the question arises, What is the probable explanation of its misplacement? The only evidence of its last removal prior to the accident was furnished by ward foreman Marks, a witness for defendants. According to his evidence, the operation of cleaning the catch-basins by his men was of frequent occurrence. No record was kept as to the dates of cleaning any particular basin, nor as to the

condition in which the work was left, and it would be surprising if, many months after such a transaction, the foreman could from actual recollection testify to the details. On his examination he expressed himself as sure the cover was properly replaced. I understand his evidence to be to the effect that, having regard to his general practice in requiring all such operations to be carried out with proper care, the one in question was so carried out. He was examined on 11th June, 1906, nearly 7 months after the accident, and his evidence shews that he was then speaking not from actual recollection, but from belief. Doubtless he spoke with perfect truthfulness, and, though he may have been mistaken, his credibility is not in question. I infer from his evidence that he has a number of labouring men under him, that they are constantly changing, that they go from man-hole to man-hole throughout the ward, cleaning them out and replacing the covers; that at times he is with them throughout the operation, at other times they precede him, he following them up to see that the work is properly done.

At the trial, as already mentioned, he was quite certain that this particular cover was properly replaced. He could not remember the names of any of the men engaged in the work when the cover in question was last removed, nor the precise day. The following are extracts from his cross-examination:—

"Q. Now, with reference to 17th November last, can you tell me when before that date you cleaned out the basin; what was the last occasion prior to that date you cleaned it out? A. Two weeks, I think it was, I cannot tell exactly the date. But two weeks about.

"Q. Two weeks before that? A. Two weeks before that.

"Q. And how do you get the top of it off to clean it out? A. We have to put a pick in and lift it out with a pick.

"Q. And after you have cleaned it out, what do you do with the top again? Q. Put that back in the same place.

"Q. Now, after you had cleaned it out on the occasion last before 17th November last, when you cleaned it out did you put the cover back in its place? A. Surely, yes."

"Q. Before 17th November, how long had you cleaned it out yourself? A. I cannot state it exactly, but they clean it after every storm.

"Q. And if there is no storm, how often do you clean it? A. Once a month any way; every month. . . .

"Q. And you say you dig it out with a pick? A. With a pick. We cannot get it up any other way.

"Q. It cannot be got up any other way? A. It is too heavy. . . .

"Q. Unless it is picked up, anybody could interfere with it? A. No sir.

"Q. Then when was it last picked up? A. Four days, I think, before this accident happened.

"Q. How long before 17th November last had it been picked up? A. No, that was three weeks before.

"Q. Three weeks before? A. Two weeks before."

Evidently he had no clear idea as to the date, which may have been less than 4 days before the accident.

There is nothing to shew any interference with the cover after its last removal by defendants' servants, and before the happening of the accident, and, in the absence of evidence to the contrary, the inference would be that the accident happening, the men left the cover in an insecure position, a condition which, according to the evidence of the plaintiff, Miss Nichol, and Mr. Gibson, might easily escape detection.

At the trial plaintiff testified that she saw the cover of the man-hole just prior to the accident and observed nothing wrong with it. Marie Nichol, an eye witness of the accident, also testified to the like effect. Wyman Gibson also swore that just prior to the accident he crossed the frame, and it (doubtless meaning the cover) felt loose under his feet, and that it was level with the sidewalk. The following are extracts from his evidence:—

"A. As I stepped it wobbled, and I had stepped on it before, walking back and forth, waiting for the car, and it seemed it was not in a proper condition at the time for to be on a public thoroughfare, where people is waiting and stopping for a car every moment of the day.

"Q. When stepping on it, would it appear all right? A. It did appear all right."

From this evidence it is clear that the cover was out of place just before the accident, though that fact was not apparent to the ordinary passer-by.

Newton Kerr, the defendants' engineer, was called as a witness for the plaintiff, and the following are extracts from his evidence:—

"Q. How do you account for one side going down when a person steps on it? A. That would only happen in case the top had been shaken loose or disturbed in some way, an ordinary passenger would not shove one side down . . . Unless it was knocked out or displaced, I do not know.

"Q. How do you account for that? A. A very heavy rig passing the corner might hit the frame so as to jar it loose, a lorry or dray.

"Q. How would that shove it out? A. Shake it loose. . . .

"Q. Then it must be in a groove? A. It does.

"Q. How deep is that groove from the top? A. About a quarter of an inch.

"Q. So it would have to be a pretty heavy jar to crowd one side up a quarter of an inch? A. Yes, a very severe jar. . . .

"Q. Now it could be fastened down? A. Yes.

"Q. It could be fastened down so that only your employees who have to deal with it could get it up—is that not right? It could be locked down? A. It could be locked down.

"Q. With very little expense? A. Yes, a considerable delay and loss of time in unlocking it or unbolting it, whatever method you would have. We have never seen the necessity of locking them. . . .

"Q. It could be guarded against so it could only be gotten up, the top of it, only by your own employees, is that not right? A. Yes, it is so. . . .

"Q. Did you examine it before that? (that is the accident). A. I never took it out."

He also stated that the removal of this cover to clean the catch-basin is being done constantly by "ordinary street

labourers who are being changed all the time, who are sent to clean out the basin, take off the lid, clean out the pit, and replace it." The engineer also stated that the frame with its cover in question had been in use, to his knowledge, for over 7 years, and it was of a kind in use in Toronto and elsewhere, and that he had not before heard of any such accident having happened.

For the defence ward foreman Marks stated that a pick was necessary in order to lift off the cover.

No question of credibility of witnesses arises, and it is our duty as an appellate Court to review the conclusion of the trial Judge, and to determine what is the proper inference to be drawn from all the evidence: Russell v. LeFrancois, 8 S. C. R. 336.

If the cover was properly replaced by defendants' servants, it could only have been removed by a stranger by the use of a pick, or a similar instrument, or some violent blow causing sufficient disturbance to displace it. There is no evidence shewing interference by a stranger, and I am unable to imagine any motive for a stranger meddling with it. If, therefore, defendants suggest such an improbable theory, it should be rejected in favour of the more probable one of defendants' negligence suggested by the evidence: Czech v. General Steam Navigation Co., L. R. 3 C. P. 19. Nor do I think the suggestion that the cover may have been displaced by a heavy vehicle striking the frame advances defendants' position.

The outer edge of this metal frame extended to and formed part of the round corner of the sidewalk, where it was in a special degree exposed to the risk of being struck by passing vehicles, a danger much increased by the fact that the car tracks run around this corner doubtless frequently, causing vehicular traffic, which at this point was abnormally great, to pass along the narrow strip between the tracks, and the edge of the iron frame. These circumstances called for special care on the part of defendants. The engineer knew that the cover could be thrown out of place by vehicles striking the frame, yet defendants chose to depend upon its mere weight and position in the groove to prevent displacement.

It is argued that because the frame and cover in question are of a pattern in use in Toronto and elsewhere, and

no similar accident had occurred, the defendants had exercised all the care required of them, and had discharged their whole duty towards the public. It appears, however, to me, that if under ordinary circumstances this were an answer, yet, owing to the special position of the man-hole in question, defendants were bound to exercise more than ordinary care, and should not have depended upon a structure of ordinary pattern, which might have proved sufficient under ordinary circumstances, but insufficient under the circumstances present in this case. An extra safeguard such as a lock or bolt might, at no great cost, in the engineer's opinion, have been adopted; but defendants, for the greater convenience of their servants, omitted to adopt such reasonable device. If then the cover was displaced by a vehicle striking the frame, it is reasonable to assume that such result would not, in all probability, have followed, if a proper safeguard had been adopted, and for such omission defendants were, I consider, guilty of negligence. If, therefore, in seeking to ascertain the cause of the displacement of the cover, the improbable theory that it was the act of a stranger is disregarded, defendants are liable whether it was left out of position by their servants or displaced by a blow from a passing vehicle. Under the circumstances plaintiff is not bound to shew what particular negligence on the part of defendants caused the accident: Byrne v. Boadle, 2 H. & C. 728; Scott v. London Dock Co., 3 H. & C. 601.

Returning then to the condition in which the cover was left when last removed by defendants, the proper inference, I think, is that for some reason it was not properly replaced by defendants' servants when they last removed it prior to the accident. Their omission to do so may have been caused by some wet street scourings, when being dipped out of the catch-basin, spilling and lodging on the flange supporting the cover, thus preventing it fitting flush with the street. According to the engineer's evidence, the cover had but a quarter of an inch hold on the groove. This would be lessened by the obstruction caused by any dirt lodging on the flange, and thus the cover would be more liable to be worked from its place by vibration caused by passing vehicles. Moreover, as may have happened from some reason, if one side of the cover were left actually

resting upon the frame instead of on the flange, it would be only a matter of time when the passing foot traffic on the sidewalk might work it so far out of place that the lower side would cease to rest upon the flange. But, whatever be the explanation, such was its position when it felt loose to Gibson, and tipped with plaintiff.

Defendants constructed the work, had control of it, and the sole right to interfere with it, were bound to keep it in reasonable repair, and to maintain a proper system of inspection, particularly in view of the fact that the cover was left in a condition making it possible for strangers or vehicular traffic to misplace it. They do not appear to have adopted any sufficient system of inspection for the discovery of a condition of non-repair. Their servants were the last persons who, so far as appears, interfered with the cover before the accident. It was in a state of non-repair, readily discoverable on a proper examination, and this state of non-repair caused the accident in question. The casual observation of foreman Marks in passing the place daily, which, of course, must include the day of the accident, and which did not disclose to him the then existing state of non-repair, shews that his was not a sufficient system of inspection.

The proper inference to draw from this state of facts is, in my opinion, that defendants' neglect caused the accident, and casts the onus upon them to disprove negligence: Kearney v. London, Brighton, and South Coast R. W. Co., L. R. 5 Q. B. 441, L. R. 6 Q. B. 759; Gee v. Metropolitan R. W. Co., L. R. 8 Q. B. 161.

This they have failed to do, and this appeal should be allowed with costs, and judgment entered for plaintiff for $500 damages, the amount assessed by the trial Judge, and costs of this action.

ANGLIN, J., gave reasons in writing for the same conclusion.

CLUTE, J., also concurred.

NOVEMBER 13TH, 1906.

DIVISIONAL COURT.

RE FOLEY.

Will — Construction — Annuities — Deficiency — Arrears —Death of Annuitants—Application of Accumulated Income—Residuary Bequest to Charities.

Appeal by the committee appointed by the county council of Peterborough to manage the funds applicable to charity under the will of Almira Grover Foley, deceased, from order of FALCONBRIDGE, C.J., ante 141, declaring that upon the true construction of the will it was the intention of the testatrix that the payment of annuities should commence immediately after her decease, but, as a matter of fact, the annuitants received nothing for about 3 years, and had not, except during the last year or two, received the whole amount of their annuities; that it was not the intention of the testatrix that the sum which represented the income or revenue which would have been paid to deceased annuitants should be applicable for charitable uses during the lifetime of any annuitant claiming under the will who has suffered any deficiency; and that the amount, therefore, of $960 and any further sum which might accrue by reason of the death of annuitants should be placed to capital account, and the income thereof applied to supplement pro rata the past shortage in annuities until the last mortal annuitant should have departed this life or should have received the full amount of his or her arrears.

E. D. Armour, K.C., for appellants, contended that upon the death of any annuitant, the poor were to receive the benefit of the sum released under the following clause in the will: "Sixth, I will and direct that any part of my estate not definitely disposed of shall be held in trust as part of my residuary estate by my executors, for the benefit of the sober and industrious but destitute or needy widows and orphans of the county of Peterborough, who must have been bona fide residents of the said county before becoming destitute or needy."

E. H. D. Hall, Peterborough, for the annuitants.

J. B. Holden, for the executors and trustees.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), held that the failure to pay the annuities at the sums named in any year was only because the income of the estate was insufficient. The codicil made it quite clear that the amounts were not absolute but variable. The will fixing the amounts of the annuities, qualified by the codicil, did not entitle the annuitants to any definite sums, but merely indicated the proportions in which the income was to be distributed among the annuitants. No annuitant benefits by survivorship. On the death of an annuitant, the residuary legatees become entitled to the portion of the corpus which furnishes the deceased's annuity, but the corpus is not divisible at present, it must remain till all the mortal annuitants shall have died. It would be premature to do more now than declare what are the annuitants' rights.

Appeal allowed. Costs of all parties out of the estate.

NOVEMBER 13TH, 1906.

C.A.

THOMSON v. MARYLAND CASUALTY CO.

Accident Insurance—Action on Policy—Application for Policy —Untrue Statement by Insured—Findings of Jury — No Finding as to Materiality—New Trial—Costs.

Appeal by defendants from judgment of MABEE, J., upon the findings of a jury, in favour of plaintiff in an action upon a policy issued by defendants, known as an accident and health policy, in which plaintiff was named as the beneficiary.

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

E. F. B. Johnston, K.C., and Eric N. Armour, for defendants.

W. Nesbitt, K.C., and J. Heighington, for plaintiff.

MOSS, C.J.O.:—In one branch of the policy, it insured plaintiff's husband, Robert McDowell Thomson, against bod-

ily injuries for one year from 11th March, 1905, and it was thereby agreed that if death should result from injury independent of all other causes, within 90 days from the happening of the accident, there would be paid to plaintiff the sum of $5,000, and if the assured should meet with bodily injuries, and death should directly result therefrom while travelling as a passenger in or upon a public conveyance propelled (amongst other things) by electricity, there would be paid twice the said sum, or $10,000.

The assured, while travelling upon and about to alight from a street car upon the system of the Toronto Railway Company, was thrown down and injured, and he died a few days afterwards.

The policy bears date 11th March, 1905, and was issued and delivered on 13th March. The accident occurred on 7th August, and the assured died on the 10th of the same month. Notice of the death was given to defendants on 11th August, and a request for forms of claim papers was made on 25th August. To this defendants replied on 8th September, stating that the assured held no policy in the defendant company which was in force, and that they were therefore under no liability by reason of his death, and thereafter this action was brought claiming payment of $10,000.

The defendants made numerous defences, the chief of which were that the application upon which the policy issued contained misrepresentations material to the risk, that the premium was not paid, that before the assured received the injuries in respect of which the claim was made the policy had been cancelled, and that immediate notice of the accident was not given to defendants as required by the conditions of the policy.

Much evidence was adduced at the trial, and the trial Judge submitted a number of questions for answer by the jury, and upon the answers returned entered the judgment now appealed against, awarding plaintiff $10.183.56 and costs.

At the conclusion of plaintiff's case defendants moved to dismiss the action, on the ground that there was no case to go to the jury, but the motion was properly dismissed.

On the argument of the appeal the same and many other objections to the judgment were urged. Without dealing with them in detail, it is sufficient to say that they should fail and the judgment should stand, but for the finding of the jury in one particular, and the unfortunate absence of a further finding consequent thereon, and which we think should have been dealt with by the jury.

Among the questions put to the jury was the following: "(3) Were any of the statements in the alleged proposal for insurance untrue, and if so which ones?" To which the jury answered: "The first part of number 9 untrue, and the second part true."

The statement number 9 in the proposal or application is in the following words: "No application ever made by me for insurance has been declined, and no accident or health policy issued to me has been cancelled except as herein stated; no exceptions."

The jury therefore found, and upon evidence which fully warrants the finding, that the statement that no application made by the assured for insurance had been declined was not true in fact. But, through some unfortunate oversight, although, as clearly appears from the charge, the trial Judge intended to take the opinion of the jury as to whether the statements contained in number 9 were material to the risk, the question actually submitted did not include No. 9. The question submitted was: "(6) Were any of the alleged statements from 15 to 19 material to the risk and if so which ones?" Answer: "Immaterial."

Thus, while defendants have a finding in their favour as to the want of truth, there is no finding either way as to the materiality of the statement. It is urged for plaintiff that the evidence shews and the jury have found that the answers in the proposal were not made by the assured, but were filled up by one Magee, an agent of the defendants, from his own knowledge, and that the assured did not make any representations or warranties on which the policy issued, that if any were untrue they were not made with the intention of misleading the defendants, and that they were not false to the knowledge of the assured. These findings are fully supported by the evidence, but they do not dispose of the point now in question.

The plaintiff is suing upon the policy, which is expressed to be issued in consideration of the warranties made in the application, a copy of which is indorsed and made a part thereof. That part of the policy cannot be ignored while it is put forward as a subsisting contract. And the question is not whether the statements were made by the assured or were filled up by some one else, or whether they were made in good faith and without knowledge of their want of truth, but whether the policy was obtained and a contract entered into upon the basis of the statements. If they form a basis of the contract of insurance, they bind plaintiff when suing to enforce the contract.

It was further urged that this being an accident and health policy, the words "application for insurance" in the first part of number 9 should be read as applying only to accident and health insurance, and not to life insurance, and that, inasmuch as the application that was refused was one for life insurance, there was nothing to support the finding. But the language is too general to be so narrowed, especially in view of the other part of the same statement, in which accident and health policies are specifically mentioned. The language, though general, would not, of course, be extended to cover insurances not of a personal nature, such as plate glass insurance, boiler insurance, or others of that cless, for that would be to give to it an unreasonable effect. But in regard to insurance affecting a man's own person and involving inquiries as to his health and habits, there is nothing unreasonable. Apparently the jury thought it reasonable to apply it to life insurance. The trial Judge dealt with the question in his charge, and told them that if the statement did not include life insurance it would not be untrue, because the assured had never been refused anything but life insurance.

There was nothing, therefore, to have relieved the jury from finding one way or the other on the question of materiality, though it may well be that, in view of the considerations above dealt with, they would have found little difficulty in coming to a conclusion in plaintiff's favour. But, there being unfortunately no finding on the question, there must be a new trial.

The costs of the last trial and of the appeal should be costs in the action generally. The case was very fully and

fairly tried in other respects, and neither party can be said to be more responsible than the other for the omission which has rendered the new trial necessary.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

NOVEMBER 13TH, 1906.

C.A.

ROBINSON v. McGILLIVRAY.

Bankruptcy and Insolvency—Preferential Transfer of Cheque—Deposit with Private Banker—Application by Banker upon Overdue Note—Absence of Pre-arrangement and of Intent to Prefer—Payment of Money to a Creditor—Assignments Act, secs. 2, 3 (1).

Appeal by plaintiffs against the judgment of a Divisional Court (12 O. L. R. 91, 7 O. W. R. 438), affirming the judgment at the trial of FALCONBRIDGE, C.J., who dismissed the action with costs.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., TEETZEL, J.

G. C. Gibbons, K.C., and G. S. Gibbons, London, for plaintiffs.

T. G. Meredith, K.C., and F. R. Blewett, Listowel, for defendants Scott & Son.

GARROW, J.A.—The action was brought by plaintiffs, creditors of defendant McGillivray, to have set aside as preferential and void the transfer by defendant McGillivray to defendants Scott & Son of a certain cheque, in the following circumstances.

Defendant McGillivray was a merchant carrying on business at the town of Listowel. His business was evidently a failing one, and he was probably insolvent at the time of

the transaction in question, although perhaps not fully aware of it, because of the excessive values which he placed on his real property. In September, 1905, he agreed to sell out his business and stock in trade to one J. R. Grant for . . . $1,172.27. Defendants Scott & Son carried on in the same town the business of private bankers, and both the buyer and seller had their bank accounts with the banking firm. And Mr. Grant in payment of the purchase money gave to defendant McGillivray his cheque upon Scott & Son's bank for the price agreed upon. Defendant McGillivray at once deposited this cheque in the same bank, apparently in the usual and ordinary course of business, and the amount was placed to his credit and charged to Mr. Grant in their respective accounts.

When the deposit was made, defendant McGillivray was indebted to defendants Scott & Son upon an overdue promissory note, amounting with interest to $1,040, which had been charged up to defendant McGillivray's account a few days before the sale to Grant, but without the knowledge of defendant McGillivray—a circumstance which, although I mention it, I regard as of absolutely no importance.

Then a day or two after the deposit, or possibly on the same day, for the evidence is not entirely clear, but at all events after, and within two days after, the deposit, defendant McGillivray gave to defendants Scott & Son his own cheque on the Scott bank for $1,040 in payment of the note.

And the action is brought really to set aside such payment as preferential.

Section 3, sub-sec. 1, of R. S. O. 1897 ch. 147, expressly excepts "any payment of money to a creditor" from the restrictive provisions of sec. 2. And I can see no reason why the present inquiry should not be limited to a consideration simply of whether what took place was or was not a "payment of money" within sec. 3.

Nor do I see any reason for looking at less than the whole transaction, as we were urged to do by the learned senior counsel for plaintiffs, who earnestly desired to draw a line between the deposit, which he contended was in itself a fraudulent preference, and the subsequent giving of his own cheque by defendant McGillivray, which he evidently considered to be much less valuable.

So regarding the case, the question is, in my opinion, completely covered by authority binding upon this Court against plaintiffs' contention: see Gordon Mackay Co. v. Union Bank, 26 A. R. 155. No question of set-off or banker's lien, in my opinion, is involved. No such right was asserted by defendants Scott & Son. They did not refuse, it may be because they were not asked, to allow defendant McGillivray to withdraw in cash, in whole or in part, the proceeds of the Grant cheque. Such questions might and probably would have arisen but for the giving of his own cheque by defendant McGillivray. But the giving of that cheque closed the transaction, and, in my opinion, absolutely put an end to all such questions.

So viewing the case, the proposition is reduced to this, that an insolvent debtor may not give his own cheque for the amount of a lawful debt, a proposition not even contended for by counsel for plaintiffs, and not only opposed to the case just cited, but to the reasoning set forth in the judgment in . . . Davidson v. Fraser, 23 A. R. 439, 28 S. C. R. 272.

Appeal dismissed with costs.

OSLER, J.A., gave reasons in writing for the same result.

MOSS, C.J.O., MACLAREN, J.A., and TEETZEL, J., concurred.

NOVEMBER 13TH, 1906.

C.A.

HULL v. ALLEN.

Account—Redemption—Trustee in Possession—Profits—Master's Report—Appeal.

Appeal by defendant from order of a Divisional Court, 6 O. W. R. 961, affirming the decision of MEREDITH, J., upon an appeal from the report of the Master at Woodstock, in respect of one item out of a number which formed the subject of appeal in the first instance.

W. E. Middleton, for defendant.

W. Nesbitt, K.C., and A. M. Stewart, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., TEETZEL, J.), was delivered by

MOSS, C.J.O.:—The judgment pronounced at the trial declared that defendant was a trustee for plaintiff of (amongst other properties) a certain farm and brickyard, . . . and directed the Master to ascertain and state, having regard to the declaration aforesaid, what property came to the hands of defendant as trustee for plaintiff and the application thereof . . . and also to take an account of all moneys properly paid by defendant in respect of said property or for or on account of plaintiff, and what, if anything, was done and owing to plaintiff.

In taking these accounts the Master has found and reported that for 1902 there was a clear net profit in cash received by defendant from the operation of the farm and brickyard of $1,500.

Defendant alleges that the Master did not arrive at this finding as the result of taking the accounts as brought in by defendant, but adopted a statement made by defendant while under examination in the Master's office. This does not appear on the report, nor does the Master state that such was the case.

In his testimony defendant, in speaking of the brickyard, stated that he never balanced his books from year to year. He then proceeded: "I know I am not running it at a loss. I think the profits in 1902 would amount to $1,500; this is an estimate; I think this would be clear over and above all improvements; I mean $1,500 in cash after all payments made except my own time."

When defendant was speaking he had with him and referred to the books kept in connection with the brickyard. And in the face of his positive statement on oath, "I know I am not running it at a loss," it is difficult to understand how he has been able to compile an account which would appear to shew an excess of expenditure over receipts of something like $1,700 during 1902. And he has tendered no explanation under oath. There was much evidence given upon the whole accounts, and the Master had it all before him, including defendant's own testimony above quoted, when he was making his report. He has also reported that defendant did not keep proper books of account,

and did not keep the funds arising from the trust estate separate from his own funds; but used the said trust funds in carrying on his own business at Norwich, and on his examination for discovery defendant said he kept no account between himself and the brickyard. In these circumstances, the matter of the profits would lie largely within defendant's own knowledge. And before the Master he made the further statement quoted by the Divisional Court, "I cannot say if I got over $1,500—I have not figured yet."

It comes to this, that the Master, with all the evidence before him, appears to have come to the conclusion that defendant's statement was correct, and that he should be charged with the sum at which he placed the profits for the year.

The Judge of first instance and the Divisional Court thought that the Master was not wrong in so doing, and we see no reason for not sustaining their conclusions.

Appeal dismissed with costs.

NOVEMBER 13TH, 1906.

C. A.

RE PORT ARTHUR AND RAINY RIVER PROVINCIAL ELECTION.

PRESTON v. KENNEDY.

Parliamentary Elections—Controverted Election—Scrutiny of Votes — Ruling of Trial Judge as to Disqualification of Class of Voters—No Jurisdiction in Court to Entertain Appeal—Provisions of Ontario Controverted Elections Act.

Appeal by petitioner from a ruling or decision of TEETZEL, J., one of the trial Judges, as to the evidence to be received upon a scrutiny of the votes cast at the election in question.

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

I. F. Hellmuth, K.C., and W. J. Elliott, for the petitioner.

H. M. Mowat, K.C., for the respondent.

OSLER, J.A.:—This case was recently before us on an appeal from the decision of the trial Judges dismissing the petition, on the grounds that the charges of corrupt practices had not been made out, and that the attack upon the respondent's majority on a scrutiny of the votes had also failed. We affirmed the decision on the first point and overruled it on the second. The case was again taken up before Teetzel, J., one of the trial Judges, and the scrutiny was proceeded with so far as to place the respondent in a majority of 15. The petitioner then proposed to attack a number of the respondent's votes as being invalid on the ground of the alienage or non-age of the voters, and, without passing upon the case of any individual vote, the learned Judge was asked to rule or to express his opinion whether as against the votes of persons whose names were on the list of voters as finally revised these grounds of objection were open to the petitioner. The learned Judge held that they were, and that the voters' list in this respect was not final and conclusive of the right of such persons to vote. The case therefore remained to be disposed of so far as such votes were concerned by the application of that ruling to the particular votes, few or many, which might be impeached on the grounds mentioned.

The first question is whether an appeal from a ruling or decision of this kind made during the course of the trial, which does not dispose of the petition, is competent.

Whether the decision be regarded as an adjudication, which it is not, upon the case of particular votes, or as a mere abstract ruling or opinion, which is its real character, by which the learned trial Judge proposes to guide himself hereafter when the evidence has been adduced, an appeal therefrom, so far as my experience goes, is an entirely novel proceeding and an experiment for which, with submission, nothing in the Election Act or rules affords countenance.

It can hardly be necessary to cite authority for the proposition that the right of appeal is matter of jurisdiction not of procedure or practice, and that an appeal does not lie unless expressly given by statute. Attorney-General v. Sillem, 10 H. L. Cas. 704, 2 H. & C. 431, Rex v. Hanson, 4 B. & Ald. 519, 521, and Lennox Provincial Election, 1 Ont. Elec. Cas. 422, may be referred to. The only appeals given by the Act (I do not speak of appeals from the decision of

a Judge in Chambers in interlocutory questions and matters —Rules LVII.-LX.), are appeals from the judgments of the trial Judge or Judges, disposing or not agreeing in the disposal of the matter of the petition. Provision is also made for submission to the full Court of a special case when it appears that the case raised by the petition can be conveniently stated in that way.

It is necessary briefly to outline the various relative sections of the Act.

Section 38. Every petition shall, except where it contains allegations of corrupt practices, in which case it must be tried by two Judges, and except where it raises a question of law for the determination of the Court (sec. 65), be tried by one of the Judges on the rota sitting in open Court without a jury.

Section 55. The Judge or Judges trying the petition shall determine whether the member whose election is complained of or any other person was duly returned or elected or whether the election was void, and shall certify in writing such determination to the Speaker or to the Clerk of the House, and upon such certificate being given such determination shall be final to all intents and purposes, subject only to the appeal hereinafter mentioned.

Section 56. In case of a disagreement between the trial Judges they shall certify such disagreement, and either party may bring the matter before the Court of Appeal, which Court shall in disposing thereof have the same jurisdiction in all respects as on an appeal from a decision of such Judges, and may determine all questions of law or fact which the disagreeing Judges might or should have determined, and in the same manner as in the opinion of the Court the disagreeing Judges should have done.

In such case the Registrar of the Court of Appeal is to certify to the Speaker or Clerk of the House the decision of the Court upon the case "in the same manner and to the same effect as according to the judgment of the Court of Appeal the trial Judges should have done."

Sub-section (2) enables the Court of Appeal to refer the case back to the trial Judges to certify to the Speaker or Clerk in accordance with their directions.

Section 58 directs how the appeal in case of disagreement shall be brought; what security for costs shall be given, and

when; "and the proceedings in the matter shall be the same as nearly as may be as in the case of an appeal from a decision of the Judges."

Section 63. If the trial Judges decide that the election or return was void, the member returned shall not sit or vote pending an appeal from the decision.

Section 64. A writ for a new election shall not be issued until after the expiration of 8 days from the decision of the trial Judge or Judges declaring the election or return void, and if the appeal is from the part of the decision which declares the election or return void, the writ shall not issue pending the appeal.

Section 66 and following section then provides for the appeal from the decision of the Judges referred to in sec. 55.

Section 66. Any party to an election petition who is dissatisfied with the decision of the trial Judges on any question of law or fact, and desires to appeal against the same, may within 8 days give the prescribed security for costs, and thereupon the Registrar is to set the matter of the petition down for hearing before the Court.

Section 67. Notice is to be given in the manner prescribed that the matter of the petition has been so set down, and by the notice the appellant may limit the subject of the appeal to any special or defined question or questions.

Section 68. The appeal shall thereupon be heard and disposed of by the Court, and judgment shall be pronounced both on questions of law and fact as in the opinion of the Court it should have been delivered by the Judge or Judges whose decision is appealed against.

Section 69. In cases involving questions of fact, the Court shall review the decision upon questions of fact as well as of law, and shall draw such inferences from the facts in evidence as the Judge or Judges who tried the case should have drawn.

Section 70 confers power upon the Court to make amendments and admit further evidence on the hearing of the appeal.

Section 87. The Court, with or without a report from the trial Judges as to the demeanour of witnesses, etc., may

reverse or confirm the decision appealed against, in view of the whole case as it then appears, or they may require any witnesses to be re-examined, etc.

Section 73. The Registrar of the Court shall thereupon certify to the Speaker or Clerk of the House the judgment and decisions of the Court upon the several questions and matters of fact, as well as of law upon which the Judge or Judges whose decision is appealed against might otherwise have determined or certified, and the judgment or decision shall be final to all intents and purposes.

Section 74. Instead of certifying as aforesaid, the Court, upon such conditions as it thinks fit, may grant a new trial for the purpose of taking evidence or additional evidence, and may remit the case to the Judge or Judges who tried the same, etc., and subject to the directions of the Court of Appeal, the case shall be thereafter proceeded with as if there had been no appeal.

Under the scrutiny clauses, as they formerly stood, the scrutiny was conducted before the registrar of the trial Judges or a barrister appointed by them, whose decision was reviewable before the Judges at the trial. As the Act is amended, the scrutiny takes place before the Judge or Judges themselves as part of the trial.

From the provisions I have quoted I think it clearly appears that the only appeal given by the Act is, as I have said, an appeal from the decision of the trial Judge or Judges which disposes of the whole matter of the petition as mentioned in sec. 55, or from a disagreement of the Judges at the trial upon questions which, if they had agreed in deciding them, would have done so, and which decision would have enabled them, in the absence of an appeal, to have certified to the Speaker or Clerk of the House the result of the trial. If there is an appeal, this became the duty of the Court of Appeal. If they do not direct a new trial or send the case back to the trial Judges (where they have disagreed) to dispose of the case in accordance with their directions, it is their judgment which becomes the final judgment and which is certified to the Speaker or Clerk instead of that of the trial Judges.

In short, the only judgment which the trial Judges are required to certify to the Speaker or Clerk is a judgment which disposes of the whole case, and the only appeal given

by the Act is one from such a judgment or from a disagreement of the trial Judges in respect of matters which if they had agreed would have done so.

I have not overlooked the provisions of sec. 2 sub-sec. (1), of the Controverted Elections Act, which enacts that the Court, which means the Court of Appeal, shall, subject to the provisions of the Act, have the same power, jurisdiction, and authority with reference to an election petition and the proceedings therein as the High Court of Justice would have if such petition were an ordinary action within the jurisdiction of that Court; and see Controverted Election Rule LXIV.

Whether the Court of Appeal or a Judge thereof could have made an order by applying ad hoc the provisions of Con. Rule 373, and directing a special case to be heard before Teetzel, J., or before the Court, raising the question of law which he has decided, is, I think, more than doubtful, seeing that the Controverted Elections Act, in sec. 65, has itself dealt with that method of procedure.

However that may be, it is not the way in which the case came before us. It is an appeal from a ruling of the trial Judge on a single question of law which has been raised before him, the determination of which, as applied to the facts which may afterwards be proved, may have no effect upon the ultimate decision of the case. I do not see how, by any analogy to the conduct of the trial of an ordinary action at law, such a ruling can be appealable. If it is so, and in the line of the procedure which has here been adopted, there may be as many separate appeals as there are different classes of votes to be scrutinized. The inconvenience, delay, and expense which would arise from such a practice need hardly be emphasized, and the fact that it may happen to be quite otherwise in this particular instance will not justify us in sanctioning it. Rules 531, 259, and Pooley v. Driver, 5 Ch. D. 458, 468, may be referred to.

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

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented and was in favour of entertaining and allowing the appeal, for reasons given in writing.

Appeal dismissed with costs; MEREDITH, J.A., dissenting.

NOVEMBER 13TH, 1906.

C.A.

TAYLOR v. OTTAWA ELECTRIC CO.

Street Railways—Injury to Person Crossing Track—Negligence—Excessive Speed—Contributory Negligence — Findings of Jury—Evidence to Support.

Appeal by defendants from order of a Divisional Court (18th May, 1906), affirming a judgment entered by TEETZEL, J., at the trial, upon answers of the jury to questions submitted, in an action to recover damages for injuries to plaintiff, his horses and vehicle, through coming into collision with one of defendants' motor street cars in the city of Ottawa.

Upon the answers of the jury to the questions the Judge entered judgment for plaintiff for $1,000 damages and costs; and upon appeal to a Divisional Court the judgment was affirmed.

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

F. H. Chrysler, K.C., for defendants.

A. E. Fripp, Ottawa, for plaintiff.

MOSS, C.J.O.:—The case had been tried once before and resulted in judgment for plaintiff for the same amount of damages. Upon appeal to this Court a new trial was ordered upon the ground that the findings of the jury were not satisfactory nor so supported by the evidence as to make it proper that they should stand: see 5 O. W. R. 564.

At the former trial the negligence found by the jury was in not properly controlling the car, and we thought that, in

the absence of any finding of excessive speed, and in view of some of the evidence with reference to the position of plaintiff enabling him to see and avoid a car not driven at an excessive rate of speed, the case should be submitted to another jury.

The jury have now found, in answer to questions, that defendants were guilty of negligence, and that such negligence consisted in excessive rate of speed, running over 10 miles an hour; and that plaintiff's injury was caused by such negligence. They have also found that plaintiff could not by the exercise of reasonable care have avoided the injury.

Upon the argument before us it was conceded that the finding of the jury upon the question of speed could not be successfully questioned. But it was argued that the findings that plaintiff's injury was due to defendants' negligence, and that there was absence of contributory negligence, were against the weight of evidence.

It is to be noted that neither at the close of plaintiff's case in chief, nor when all the evidence on both sides had been adduced, did the able and experienced counsel who represented defendants at the trial ask the trial Judge to withdraw the case from the jury, on the ground that there was no evidence to go to them in support of plaintiff's contention that his injuries were due to defendants' negligence, or upon the ground that it manifestly and incontrovertibly appeared that plaintiff had by his own conduct caused his injuries, or had by his negligence contributed to the accident.

It was taken for granted, and properly so, by all engaged in the trial, that the case could not be withdrawn from the jury. It is not a case which affords ground for contending that there was no evidence to support plaintiff's case; and on the argument the main ground taken was that the findings complained of were against evidence and the weight of evidence.

The questions at issue were therefore matters for the jury to determine; and, looking at the whole case, though one might feel that it would have been more satisfactory if the jury had adopted the contrary view, still it cannot be said that their findings are such as a jury, viewing the whole of the evidence, could not make.

The findings of the jury on the present occasion that the car was going at an excessive rate of speed puts an entirely different complexion on the case to that which it exhibited when before us on the former occasion.

The appeal should be dismissed with costs.

GARROW and MACLAREN, JJ.A., concurred.

OSLER, J.A.:—I agree in the result, but with considerable doubt.

The case for plaintiff is a most unsatisfactory one, and it is very difficult to look at the findings of the jury with respect, especially those which acquit plaintiff of neglect and attribute the accident to the neglect of the company. I am not, however, able to say that there was not some evidence in favour of these findings, especially as to the car having been going at an excessive rate of speed; and the fact that this was the second trial of the case, and the result the same as the first, influences me to some extent in declining to interfere.

MEREDITH, J.A., dissented, and was in favour of ordering a new trial, for reasons given in writing.

NOVEMBER 13TH, 1906.

C.A.

PLAYFAIR v. TURNER LUMBER CO.

Contract—Construction—Breach—Supply of Logs—Condition—Driving and Towing—Season for Towing.

Appeal by defendants from judgment of BOYD, C., at the trial at Toronto, declaring plaintiff entitled to recover from defendants damages by reason of the breach of their contract to supply logs to plaintiff, holding that defendants were responsible for the failure to furnish logs, and directing a reference to ascertain the amount of the damages.

R. McKay, for appellants, contended that upon the true construction of the agreement the appellants were not liable to furnish logs to plaintiff for sawing, it being distinctly made a condition of the agreement that all the logs mentioned therein should be safely driven to the mouth of the Spanish river and safely towed to Midland, Ontario.

F. E. Hodgins, K.C., and F. W. Grant, Midland, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MEREDITH, J.A.:—Two answers are made by defendants to plaintiff's claim for damages for breach of the contract in question: (1) that not having brought down all of the logs marked I.O.E. and C.A.T., they were not bound to supply plaintiff with any; and (2) that they are excused by reason of being unable to get the logs down "during the towing season."

But the contract does not, in my opinion, warrant the contention that the defendants were not to be bound to supply any logs unless they got all down. The words "all the logs hereinbefore mentioned" do not necessarily refer to all of the logs marked I.O.E. and C.A.T. Those logs are thereinbefore mentioned as the blocks of logs out of either of which plaintiff's mill was to be supplied only. Plaintiff was not at all concerned in them beyond the quantity necessary to fill this contract. On the contrary, the words "all of the logs hereinbefore mentioned," in my opinion, refer to all of the logs with which the defendants were to supply plaintiff. Such logs are thereinbefore mentioned as "all of the pine logs . . .", and were the subject matter of the contract, and the object to which the mind's eye would be directed chiefly. And the words in question are followed by the words "are safely towed to Midland," and the contract is to furnish plaintiff with the logs at Midland; and then follows the defendants' undertaking to drive "the said logs" and tow them to Midland. It is surely, throughout, the same logs which are meant; those which the parties were contracting about, and which were to be taken to Midland by defendants to enable them to perform the contract on their part.

Why should these words have reference to logs in which plaintiff was in no way concerned, and which defendants could deal with and dispose of as they saw fit? And how could the contract be carried out if defendants' contention in this respect were acceded to? It would not, or might not, be known, until the season was over, whether all the logs could be got down to Midland, and in the meantime the mill was to be kept supplied, and was in fact, until about the 27th August. One can hardly suppose a mill owner entering, or being asked to enter, into such a contract as that, tying up his mill and mill yard for months without anything binding on the other side.

The whole purpose of the "condition" in question seems to me to have been, not to put such a one-sided power in defendants' hands, but rather to guard defendants against liability in regard to the logs, which they were to deliver to plaintiff, if lost in transit—not "safely driven" or "safely towed;" being, as one would expect, immediately followed by an agreement on their part to "safely drive" and "safely tow" them.

But, if this were not so, would not defendants be liable to plaintiff under their contract to safely drive and safely tow "all the logs," whichever meaning is attributed to those words? They were not prevented by "unavoidable accidents, stress of weather, or events beyond their control." They had the sawing done at another mill under a contract made on 6th September.

But they were bound to so drive and tow only during "the towing season of the year 1905;" so are they excused under their second defence?

The finding of the trial Judge was against them on this question of fact. Some evidence was given on both sides with reference to it; but it does not seem to me that even a serious attempt was made to prove that there is a definite towing season ending on 1st September. Proof that any particular person or company did or did not tow logs after that date is very far removed from proof of such a season. The words of the contract make against the defence, referring as they do to the towing season "of the year 1905," conveying, in some measure at all events, the impression that the length of the season of that year might differ from that of another year.

At all events defendants have quite failed to establish in fact this defence.

I would dismiss the appeal.

OCTOBER 31ST, 1906.

DIVISIONAL COURT.

PETTYPIECE v. TURLEY.

Will — Construction—Absolute Devise Followed by Trust or Power of Appointment in Favour of Relatives—Conveyance to One Member of Class Designated—Operation of—Execution of Power.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., of 15th May, 1906, dismissing the action with costs.

The land in question was a farm owned by Thomas Pettypiece, the father of plaintiff and defendant.

By will made on 18th July, 1882, Thomas Pettypiece devised the farm to his wife for life, with remainder in fee to his son Frederick Pettypiece, the estate so devised to his son being subject to the payment of two legacies to his two sisters.

Frederick Pettypiece subsequently died, having made his will on 18th July, 1885, by which he devised his interest in the farm to his mother, the tenant for life, "to her, her heirs and assigns, absolutely and forever. . . . to be disposed of by her as she may deem most fit and proper for the best interest of my brothers and sisters, and enjoining my said mother to pay to my two sisters the legacies binding on me by the aforesaid mentioned will of my deceased father."

The mother, by a conveyance dated 24th October, 1899, conveyed the farm in fee simple to defendant, who was one of the sisters of Frederick Pettypiece. This conveyance was impressed to be made in consideration of $1 and natural love and affection. It contained no reference to the will, nor did it upon its face indicate any intention to execute the power or trust created by the will of Frederick Pettypiece.

This action was brought for a declaration that the land passed to the mother upon an express trust, entitling plaintiff (brother of Frederick) and his sister, the defendant, to have the land divided between them, and that the conveyance to defendant was inoperative, etc.

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

H. E. Rose, for defendant.

THE COURT (MEREDITH, C.J., MACMAHON, J., ANGLIN, J.), held that, assuming in favour of plaintiff that a trust was created, the conveyance by the mother to defendant operated and was intended to operate as an execution of the trust, referring to Farwell on Powers, 22nd ed., pp. 176, 266; that the power or trust was well executed in the manner in which the mother assumed to exercise it, referring to Civil v. Rich, 1 Ch. Cas. 309; Burrell v. Burrell, 1 Ambl. 660; Kemp v. Kemp, 5 Ves. 849, 859; McGibbon v. Abbott, 10 App. Cas. 653; and Crockett v. Crockett, 2 Ph. 553.

Appeal dismissed with costs.

BRITTON, J. NOVEMBER 14TH, 1906.

CHAMBERS.

BELL v. GOODISON THRESHER CO.

Venue — Contract as to — Motion to Change — Effect of Statute 6 Edw. VII. ch. 19, sec. 22 (O.)—Application of—Retroactivity—Costs—Preponderance of Convenience.

Appeal by defendants from order of Master in Chambers, ante 567, dismissing defendants' motion to change the venue from Barrie to Sarnia.

T. N. Phelan, for defendants.

W. A. Boys, Barrie, for plaintiffs.

BRITTON, J.:—This is an action brought by the purchasers of a threshing machine and equipment against the manufacturers. Plaintiffs' cause of action is upon an alleged agreement made on 23rd December, 1905. This was,

as alleged, a distinctly new agreement in reference to an engine which plaintiffs then had in their possession. Such an agreement, if made, would supersede, as to the engine and as to plaintiffs' rights in regard to it, an agreement of 28th February, 1905, made between the parties. According to the new agreement, as set out in the statement of claim, the engine was "to be put in running order, capable of developing 17 horse power under the working and other conditions provided for" in the agreement of 23rd December, 1905, and in all other respects the engine was to fulfil the terms and conditions of the prior agreement.

Plaintiffs, as shewing consideration for this new agreement, state the fact of making the prior agreement, and to ascertain all the terms of the new agreement it will be necessary to look at the former one.

The case is very like Greer v. Sawyer-Massey Co., 6 O. W. R. 594.

The agreement of 28th May, 1905, contains the following clauses:—

(1). "And if any action or actions arise in respect to the said machine or notes or any renewals thereof, the same shall be entered, tried, and finally disposed of in the Court which has its sittings where the head office of the said company (defendants) is located."

This seems to refer to actions of the competency of a Division Court.

It can hardly be said that this action is in reference to a machine sold under this contract.

(2). "Any action brought with respect to this contract or in any way connected therewith, between the parties, shall be tried at the town of Sarnia, and the purchasers consent to have the venue in any such action changed to Sarnia, no matter where the same may be laid."

I do not think the present action is one within the true meaning of that stipulation.

If it can be said that these are terms which must be imported into the agreement of 23rd December, 1905, then they are within and covered by sub-sec. 2 of sec. 22 of 6 Edw. VII. ch. 19.

I think the appeal must be dismissed. Costs to be costs in the cause.

Plaintiffs to have leave to amend at the trial, if necessary, by striking out of the statement of claim anything making any claim under the agreement of 28th February, 1905.

MULOCK, C.J. NOVEMBER 14TH, 1906.

TRIAL.

HARE v. KRICK.

Landlord and Tenant — Oral Agreement for Lease — Tenant in Possession — Disturbance of Possession — Trespass — Lease to Stranger — Notice — Registry Laws — Damages—Injunction.

Action for a declaration of plaintiff's rights in 50 acres of land, being the south-west quarter of lot 16 in the 1st concession of the township of Rainham, and for an injunction restraining defendants from interfering with plaintiff's enjoyment thereof, and for damages for trespass.

G. Lynch-Staunton, K.C., and J. A. Murphy, Cayuga, for plaintiff.

W. M. Douglas, K.C., for defendants Krick and Maines.

S. H. Bradford, for defendant Hoover.

MULOCK, C.J.:—The 50 acres are divided into 4 fields, which are shewn on the plan filed at the trial as fields lettered A, B, C, and D, respectively.

By agreement made in the autumn of 1905, between defendant Hoover, the owner of the 50 acres, and plaintiff, it was agreed that plaintiff should put part of field D in fall wheat on shares. This was done.

In the spring of 1906, by like arrangement, plaintiff put another part of field D in peas on shares. This left a substantial part of field D in stubble.

At an interview between plaintiff and Hoover, when the latter arrangement was made, plaintiff expressed a desire to rent the whole 50 acres for two years. Hoover explained that he was in treaty with one Brett for the lease to him of the whole 200 acres, and would require Brett's consent to a lease to plaintiff for a longer period than one year. The parties differ in their account of the interview. Hoover

says that, dependent on Brett's consent, plaintiff was willing to take 50 acres for one or two years from 1st October, 1906. Plaintiff says he desired a lease for two years certain from June, 1906, and was not prepared to accept a one year lease. On 20th May, Hoover, Brett, and plaintiff discussed the subject, when defendant Hoover reached the conclusion that Brett had assented to a one year term only, whilst plaintiff supposed he consented to a two year term, Brett at the trial swore that he consented to the one year term only. Plaintiff and defendant Hoover, however, omitted to interchange views as to their respective conclusions regarding the extent of Brett's consent, but assumed that they had reached an arrangement for a definite term. Hoover, thus thinking that plaintiff was accepting a term expiring on 1st October, 1907 (so far as rent was concerned to be considered a term for one year), authorized plaintiff (subject to Hoover's interest in the growing crops) to take possession and prepare the land for fall wheat, agreeing to allow him to haul a quantity of manure off Hoover's near-by farm, where he resided, to the 50 acres in question. Thereupon, about the middle of June, 1905, plaintiff took possession of the 50 acres in the belief that he was doing so under a concluded arrangement for a lease for two years, and he began to summer fallow field A and to cultivate other parts of the property, hauling upon it from Hoover's farm between 200 and 300 loads of manure. Throughout the summer, prior to the lease hereinafter mentioned to defendants Krick and Maines, plaintiff, with Hoover's knowledge and consent, ploughed, manured, and otherwise prepared field A, and in September sowed it in fall wheat. From the time of his taking possession in June, 1906, plaintiff remained continuously in undisturbed possession of field A, until about 5th October, when his landlord, Hoover, with defendants Krick and Maines, broke into field A, then in fall wheat, and proceeded to drill for gas.

At the trial plaintiff failed to prove a consent from Brett to a two year term. Under these circumstances the negotiations did not result in a mutual arrangement for a lease for two years. What then is the position of plaintiff? Defendant Hoover says he was to be entitled to hold until 1st October, 1907. About the middle of June, 1906, by mutual agreement, he took possession as tenant, it being then understood that plaintiff would at once proceed to

cultivate and prepare the land for fall wheat, and should be entitled in the following year to reap what he had sowed. This understanding entitled plaintiff to possession of the whole 50 acres so long as he was entitled to possession of any portion of it, for the understanding, under which he took possession, had reference not to a portion, but to the whole 50 acres. Hoover says the term was to expire on 1st October, 1907. Both parties agree that the rent was to be $85 a year and taxes and performance by plaintiff of statute labour. As plaintiff was getting little or no benefit from the occupation of the farm during the summer of 1906, it was not contemplated that he should pay any rent for that period of the term. Under the circumstances above set forth, plaintiff is, as against Hoover and those claiming through him with notice, entitled to retain possession of the 50 acres until 1st October, 1907, paying as rent $85 and taxes and performing statute labour for the year 1907.

Then as to trespass. It appears that immediately adjoining field A, now in fall wheat, is land owned by plaintiff and on which, close to the boundary line between the two properties, a gas well has been sunk and a flow of natural gas has been procured. In August, 1906, defendant Hoover made a lease to defendants Krick and Maines, as trustees for the Erie Gas Company (not then incorporated), of a part of field A for the purpose of enabling them to drill thereon for natural gas. On 5th October, 1906, Hoover and Krick and Maines went to field A and took forcible possession of a portion thereof. Hoover pulled down the fence and admitted the others with their plant into the field that they might there drill for gas. They then erected drilling machinery and proceeded to drill. Thereupon plaintiff instituted these proceedings and obtained an injunction.

I see no possible justification for Hoover's action. He put plaintiff as his tenant in possession; was aware of his expending labour upon the land throughout the summer with the view of sowing it in fall wheat in expectation of reaping the fruits of his labour; and he was in possession with Hoover's consent for an unexpired term, when the latter took forcible possession. In so acting, Hoover was committing a trespass for which I can see no possible excuse.

As to the action of Krick and Maines, they endeavoured to justify as lessees in good faith without notice of plain-

tiff's rights. But, even if, for want of notice, their lease were to prevail over that of plaintiff, that would not warrant forcible entry; but they were not purchasers without notice, for plaintiff was in actual possession under a verbal lease for a term beginning in June, 1906, which, being for a period less than 7 years, was not required by the Registry Act to be registered, possession itself being notice to these defendants. They, therefore, were trespassers, have no right to remain in possession, and should be ejected.

Plaintiff is entitled to have the injunction made perpetual, and to remain in possession as tenant of Hoover until 1st October, 1907, paying as rent $85 a year and taxes, and performing statute labour. I award him $25 damages for the trespass and the costs of the action.

TEETZEL, J. NOVEMBER 15TH, 1906.

CHAMBERS.

RE TAYLOR v. REID.

Division Court — Territorial Jurisdiction — Contract—Statute of Frauds—Cause of Action —Where Arising — Sale of Goods — Acceptance — Place of Delivery—Prohibition.

Motion by defendant for prohibition to the 1st Division Court in the county of York.

Grayson Smith, for defendant.

A. R. Clute, for plaintiff.

TEETZEL, J.:—Plaintiff, a merchant tailor in Toronto, sued defendant, who lives in Belleville, for $45, the price of a frock coat ordered (by word of mouth) by defendant in Toronto to be sent by express to him at Belleville. Defendant filed a notice disputing the jurisdiction, and also setting up the 17th section of the Statute of Frauds. . .

The Statute of Frauds being applicable, the sole question is whether the whole cause of action arose in the territory of the 1st Division Court in the county of York. In order to satisfy the statute in this case, it is not sufficient to prove delivery to the express company, defendant's carriers, but plaintiff must also prove an acceptance of the goods by defendant, or at least some act by defendant in relation to the goods which recognizes a pre-existing con-

tract: Benjamin on Sale, 5th ed., pp. 200-212; Scott v. Melady, 27 A. R. 193. Whatever was done by defendant to constitute an acceptance within the statute was admittedly done in Belleville, and must be proved by plaintiff as an essential element in support of his right to the judgment of the Court, and is, therefore, a part of his cause of action. See Re Doolittle v. Electrical Maintenance and Construction Co., 3 O. L. R. 460, 1 O. W. R. 202; Bicknell & Seager's Division Courts Act, 2nd ed., pp. 131-2.

Order made for prohibition with costs to be paid by plaintiff.

BRITTON, J. NOVEMBER 15TH, 1906.

CHAMBERS.

APPLEYARD v. MULLIGAN.

Dismissal of Action—Motion to Dismiss for Failure of Plaintiff to Attend for Examination for Discovery—Illness of Plaintiff—Medical Evidence as to—Undertaking to Proceed to Trial—Excuse for Delay—Increased Security for Costs.

Appeal by defendants from order of Master in Chambers, ante 500.

J. E. Jones, for defendants.

J. Bicknell, K.C., for plaintiff.

BRITTON, J.:—I quite agree with the learned Master in thinking that the excuse of plaintiff, although not completely satisfactory in every respect, for her failure to attend for examination for discovery, must be accepted. Notwithstanding what has been said by the medical men, it is rather difficult for me to understand why this action should cause plaintiff any worry or why she should fear that there would be put upon her any nervous strain or excitement by an examination for discovery. I suppose she knows why she has brought suit, and what she claims from defendants, and whether she owes anything to defendants or not.

It is just as difficult to understand why defendants are so anxious to have plaintiff's examination for discovery. In my opinion, they know as much about this action now as they will know after such examination if it takes place.

Plaintiff must make out her own case at the trial if she can, and if defendants have a valid counterclaim, they will not rely upon plaintiff for proof of it. For these reasons, the suggestion of the Master that defendants enter the case for trial, give notice of trial, and proceed to trial, unless plaintiff succeeds for good cause in getting the trial postponed, seems to me appropriate.

Appeal dismissed. Costs of the appeal to be costs in cause to plaintiff.

FALCONBRIDGE, C.J. NOVEMBER 15TH, 1906.

WEEKLY COURT.

RE SHARON AND STUART.

Will—Construction—Devise — Life Estate — Remainder — Estate Tail — Rule in Shelley's Case — Rule in Wild's Case — Ascertainment of Class—Period of Distribution —Intermediate Life Estate — Wife of First Tenant for Life—Second Marriage.

Case submitted to the Court under sec. 4 of the Vendors and Purchasers Act.

A. H. Clarke, K.C., for both vendor and purchaser.

FALCONBRIDGE, C.J.:—Gilbert Sharon, the vendor, father of the infants Frank Ernest Sharon and William A. Sharon, contends that he is entitled to an estate tail in the property in question under the will of his father, Pierre Sharon (or Charron) and able to bar the entail so as to make title.

By clause 2 of the will of Pierre Sharon, who died in December, 1860, the lands in question are devised to Gilbert, "to have and to hold to him, etc., as aforesaid, and not otherwise."

The latter words evidently refer to the words in which other lands are devised to other sons in the earlier part of the same clause. These words, so far as material, are: "To have and to hold to each of them for and during their natural life respectively, and if they should marry after their and such of their decease, to have and to hold to their surviving wife respectively, and on the demise of their or each of their wives, to have and to hold to their children

respectively, and their heirs forever." There is also a devise to the three sons of other lands, "to have and to hold to them as is aforesaid mentioned," etc.

One son only was married at the date of the will, and of the testator's death. That son had one child. Gilbert was then only 14 years of age.

The will, considering the use of technical words, seems to have been drawn by some one more or less acquainted with their meaning, but it is evident that their full import was not present to the draftsman's mind. I point to the use of "to have and to hold" in conferring the various interests.

I take it that the plain intention is, to devise the property to the son for life, and if he marry, then from and after his death to his widow for life, and from and after her death to his children and their heirs. Otherwise it does not seem possible to give effect to the words used. . . .

I think the rule in Wild's Case, 6 Rep. 17, is wholly inapplicable to the present case, and that if an estate tail in Gilbert were created, it could be solely under the rule in Shelley's Case.

The rule in Wild's Case is stated in Jarman, 5th ed., p. 1235, as follows: "Where lands are devised to a person and his children, and he has no child at the time of his devise, the parent takes an estate tail; for it is said, the intent of the devisor is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not in rerum natura, and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore, such words should be taken as words of limitation." See also Underhill & Strahan on Interpretation of Wills and Settlements, p. 163, and the statement of the rule by Lord Cranworth in Byng v. Byng, 10 H. L. C. 171, 178.

It would seem to be too clear for argument that this rule can apply only where the gift to both the parent and the children is immediate, for otherwise the reasoning entirely fails. I have not found a reported case in which the devise was not in effect to a man and his children, both interests coming into being at the same time. . . .

[Reference to Grant v. Fuller, 33 S. C. R. 34.]

The point then remains as to whether the rule in Shelley's Case applies. This is covered by the decision of the

Court of Appeal in Chandler v. Gibson, 2 O. L. R. 442, cited with approval in Grant v. Fuller, supra, which was a stronger case than the present one. . . . This is, in effect, the present case.

As to the devise to the children being a devise in fee, the question raised in Chandler v. Gibson does not arise, as the devise is to the "children and their heirs;" as to this see Chandler v. Gibson, 2 O. L. R. at p. 446.

There is another question, viz., Who are the children entitled to the devise in fee? This devise is a gift to a class, and, as the period of distribution is postponed until the death of the prior life tenants, the class will comprise all children coming into existence before the period of distribution: Jarman, p. 1011. Therefore, as the father may marry again, he may have children who will be entitled to share in the fee.

It is evident that title cannot be made without the order of the Court on behalf of the infant and unborn children of Gilbert Sharon.

The first question is, whether Gilbert Sharon took an estate tail, subject to the life estate of his wife, which he is able to dispose of for an estate in fee simple absolute.

The answer is, no.

The second question is, whether, in case of a second marriage by Gilbert Sharon, his second wife would be entitled to a life estate under the terms of the will.

The answer is, yes. Gilbert Sharon being unmarried at the date of the will, the testator must have referred to a future wife, and there is nothing to shew that he did not mean any future wife.

MACMAHON, J. NOVEMBER 15TH, 1906.

TRIAL.

ACME OIL CO. v. CAMPBELL.

Specific Performance—Contract for Lease of Land—Statute of Frauds—No Time Fixed for Commencement or Duration of Term—Alteration of Contract after Execution—Materiality.

Action for specific performance of an agreement for a lease of oil lands by defendant Campbell to plaintiffs, and for other relief against that defendant and defendants the

Central Oil and Gas Co., to whom defendant Campbell had purported to make a subsequent lease.

M. Wilson, K.C., and A. T. Boles, Leamington, for plaintiffs.

W. H. Blake, K.C., for defendants.

MacMahon, J.:—The defendant Campbell, who is the owner of the lands hereinafter referred to, signed the following agreement:—

"Memorandum of agreement made and entered into this 23rd day of September, 1905, by and between the Acme Oil Company and James Campbell.

"For valuable consideration I hereby agree to lease to the Acme Oil Company of Detroit, Michigan, at such time as said company shall remove a drilling rig into this immediate district preparatory to drilling for oil, &c., 49 acres of land more particularly described as follows: south parts of lots 5 and 6, concession 10 township of Tilbury East, county of Kent, Ontario, with the exclusive right of operating for oil, gas, or mineral.

"The terms of lease to be as follows:—Should oil be found in sufficient quantities to be utilized, the Acme Oil Company agrees to give one barrel in every ten barrels produced or obtained on said premises. Should gas be found in sufficient quantities to utilize, said company to allow me the privilege of using sufficient gas to heat and light one dwelling house.

"Should a well not be completed on my premises within one year from date, said company agrees to pay an annual rental of 25 cents per acre, in advance, for each year such completion is delayed.

"It is understood between the parties to this agreement that all conditions between the parties hereto shall extend to their heirs, executors, assigns, and administrators.

"In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

"This agreement shall be null and void if a well is not started in the district within 60 days from date."

After the signing of the agreement it was altered by the following being written in the margin thereof and as forming part of the agreement, by John Kerr, the witness thereto:

"This contract is given with understanding that the first well is put down on north half 10, or on lot mentioned in this contract."

The agreement as altered was deposited by plaintiffs in the registry office for the county of Kent, pursuant to the Custody of Title Deeds Act, and was duly entered by the registrar in the proper abstract index.

On 24th March, 1906, Campbell leased the lands to defendants the Central Oil and Gas Company, for the purpose of drilling for oil and gas, and that company put down a well or wells on the same and produced oil which they sold and shipped.

Plaintiffs claim specific performance of the agreement entered into by defendant Campbell, and a declaration that plaintiff is entitled to the possession of the described lands, and an injunction restraining the defendants, or either of them, from drilling for or producing or carrying away petroleum oil from the premises, and an account of the oil produced.

A lease was prepared by plaintiffs, dated 1st November, 1905, and was about that date tendered to Campbell, who refused to execute it. The demise in the lease tendered for execution is "for the term of 5 years and so long thereafter as oil or gas is produced from the land in paying quantities," &c.

Specific performance is resisted on two grounds: (1) that according to the provisions of the Statute of Frauds there is no sufficient contract; (2) that after the agreement was signed by defendant Campbell, it was altered by plaintiffs, or some person, unknown to defendants, and is, therefore, void; and that plaintiffs have not tendered to defendant Campbell a lease in accordance with the terms of the agreement.

The agreement is lacking in two essential conditions, which disentitle plaintiffs to enforce specific performance; the time from which the term is to commence, and the duration of the term for which the lease is to be granted are not stated therein.

No mention is made in the agreement of the time from which the term is to commence, nor is there anything therein from which it can be inferred what day it is to commence from. It could not be contended that the commencement of the term should be from the date of the agreement, because of these words, "To lease to the Aeme Oil Company . . . . at such time as said company shall move a drilling rig into this immediate vicinity." That might

never happen. And the commencement of the term, in order to satisfy the Statute of Frauds, must be certain.

In Marshall v. Berridge, 19 Ch. D. 223, Lush, L.J., said, at p. 244: "Now it is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning, and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements." . . .

[Reference to Humphrey v. Conybeare, 80 L. T. 40; Carroll v. Williams, 1 O. R. 150.]

Then as to the duration of the term for which the lease is to be granted not being stated in the agreement. As early as 1802, in Clinan v. Cooke, 1 Sch. & Lef. 23, where in an agreement, executed between the plaintiff and the agent of the defendant (authorized to contract), for a lease of certain lands, the term for which the lease was to be made was not mentioned, it was held by Lord Redesdale that the defendant was not bound to perform the contract, there being no evidence in the writing of the term to be demised. . . .

[Reference to Fitzmaurice v. Bayley, 9 H. L. C. 78, 109, 110; Clark v. Fuller, 16 C. B. N. S. 24.]

The essential elements to satisfy the Statute of Frauds are wanting in the agreement on which the action is founded, and it must be dismissed with costs.

As to the defence of the alteration of the agreement, Mr. Kerr says that Campbell was standing there and was verifying the condition under which the contract was given; that is the reason it (the memorandum in the margin) was put there; and presumed that Campbell knew what was being written, and from his silence was assenting to it.

Campbell said he neither saw nor knew of any addition being made to the document after he signed it, and, therefore, could not have assented to its being made.

I find that the addition was made after the agreement was signed by Campbell, and without his consent, and was made by Kerr.

Having for the reasons stated reached the conclusion that the agreement was void, I have not considered it necessary to consider whether the alteration made is a material one.