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HON. MR. JUSTICE HODGINS. MAY 26TH, 1914.

GRAINGER v. ORDER OF CANADIAN HOME CIRCLES.

6 O. W. N. 380.

Insurance—Benefit Society—Increased Rates—Injunction to Prevent—Constitution of Lodge—3 Edw. VII. c. 15—2 Geo. V. c. 33, ss. 184-5.

Where drastic amendments were made in the constitution and by-laws of defendant order, affecting the rights of plaintiff under his original contract of life insurance, and the point of law at issue was whether 2 Geo. V., c. 33, ss. 184-5, requires official approval of the changes made or indicates the limit of the invasion of vested rights, or whether, under the law in force prior to 3 Edw. VII., c. 15, defendants might proceed unaffected by that or the later enactment:

HODGINS, J.A., ordered that, upon plaintiff's paying into Court the assessment due 1st May and continuing to pay said sum monthly until trial or other disposition of action, and undertaking to proceed so as to enable application to be made for trial at Toronto non-jury sittings beginning 31st May, an injunction should go restraining defendants until trial from enforcing amendments against plaintiff or from putting him to election thereunder.

Shaw v. *Earl of Jersey* (1879), 4 C. P. D. 120, 359; *East Lancashire* v. *Hattersley* (1849), 8 Hare 72, 94; *Newson* v. *Pender*, 27 C. D. 43; *Jones* v. *Pacaya Rubber & Produce Co.*, [1911] 1 K. B. 455, referred to.

Plaintiff, a member of defendant society, moved for an injunction restraining defendant society, until trial, from enforcing their amended premium or assessment rates for life insurance against plaintiff.

I. F. Hellmuth, K.C., for plaintiff.

J. E. Jones and N. Sommerville, for defendant society.

HON. MR. JUSTICE HODGINS:—The formalities in carrying the amendments are not objected to on this motion. That is reserved for the hearing. It is not disputed that these amendments are drastic and affect the right of the plaintiff to get what the defendants had originally contracted to give him. The plaintiff asserts that under the

new regulations he has practically to rejoin, at seventy-four, the order he entered at fifty, and to lose the insurance benefits of early entry and that the old age or life expectancy payments are postponed for five years. The defendants claim that the amendments are necessary for the well-being of the order and that in his application the plaintiff agreed to abide by the constitution and laws then in force or which "may hereafter be enacted."

The point argued was whether the statute, 2 Geo. V. ch. 33, secs. 184-5, requires official approval of the changes made under the defendants' constitution, or indicates the limit to which a change could go in invading vested rights or, on the other hand, whether, under the law in force previous to 3 Edw. VII. ch. 15, the defendants might proceed unaffected by that or the later enactment. This is a pure question of law and its decision is bound to affect many other members.

It is not the course of the Court to decide a legal right upon an application for an interlocutory injunction. In this case the law is, to my mind, not clear so that it resolves itself into a question of comparative convenience or inconvenience.

Here the plaintiff, if he does not pay and elect before the 1st June, is liable to suspension and loses his right to elect. His share in the funds of this order is imperilled. The defendants, if they lose meanwhile his assessment, do not urge anything but that the moral effect of a decision questioning their right to make the amendments will affect their revenue. I think the proper order to be made is that upon the plaintiff paying into Court the assessment (said to be about $17) due on 1st May last, and continuing to pay the said sum monthly until the trial or other disposition of this action and undertaking to so proceed as to enable either party to apply to the Judge holding the Toronto non-jury sittings for the week beginning 31st May, to allow the trial to take place during that week, an injunction should go restraining the defendants, till the trial, from acting upon or taking any steps to enforce against the plaintiff the amendments in question or any rights based upon what is contained therein, and from putting the plaintiff to any election thereunder. The plaintiff should file his statement of claim on the 27th May and the defendants their defence on the 29th, the reply being delivered on the 30th, and the

case set down on the 1st June, and to be then deemed ready for trial. The examinations already had to stand for discovery with the right to either party to examine on other points. The payment into Court of the assessment to be no admission by the plaintiff of any right. The costs of the motion will be costs in the cause unless otherwise ordered by the trial Judge.

This order ought to meet the objection of the defendants that they will be unable to collect assessments if an injunction is granted, for it is granted only in terms that the plaintiff pay meanwhile, while the latter is protected, as the Court will see that his money is applied according to the result of the case. I refer to *Shaw* v. *Earl of Jersey* (1879), 4 C. P. D. 120, 359; *East Lancashire Rw. Co.* v. *Hattersley* (1849), 8 Hare, 72, 94; *Newson* v. *Pender,* 27 C. D. 43, and *Jones* v. *Pacaya Rubber & Produce Co.,* [1911] 1 K. B. 455.

HON. MR. JUSTICE BRITTON, IN CHRS. MAY 22ND, 1914.

REX EX REL SULLIVAN v. CHURCH.

6 O. W. N. 365.

Election—Municipal—Deputy Reeve—Right of Town to—Municipal Act R. S. O. (1914), c. 192, ss. 51, 161—Parties—Notice to Municipality.

Application under Municipal Act, R. S. O. c. 192, s. 161, to have determined the right of a town to a deputy reeve.

BRITTON, J., *held,* that the town had over 1,000 municipal electors and was, therefore, under s. 51 of the above Act entitled to a deputy reeve.

That it was not necessary in said proceeding either to give notice to nor add the municipality as a party.

Order of MASTER-IN-CHAMBERS reversed.

Appeal from an order of the Master-in-Chambers, 26 O. W. R. 121; 6 O. W. N. 116, setting aside the election of Thomas S. Church, to the office of deputy reeve of the municipality of the town of Arnprior.

Geo. A. Watson, K.C., and J. E. Thompson, for Church, appellant.

E. A. DuVernet, K.C., and R. J. Slattery, for relator, respondent.

HON. MR. JUSTICE BRITTON:—Section 48 of The Municipal Act provides that the council of a town, not in unorganized territory, having a population of more than 5,000, shall be composed of a reeve, as many deputy reeves as the town is entitled to, and 3 councillors for each ward, where there are less than 5 wards, or two councillors for each ward where there are 5 or more wards."

By sec. 2, sub-sec. n, of the Act, "population shall mean population as determined by the last preceding census taken under the authority of the parliament of Canada, or under a by-law of the council, or by the last preceding enumeration by the assessor, whichever shall be latest."

Section 51 provides that "A town not being a separate town shall be entitled where it has more than 1,000 and less than 2,000 municipal electors, to a first deputy reeve.

Sub-section 2: "The number of the municipal electors shall be determined by the last revised voters' list, but in counting the names, the name of the same person shall not be counted more than once."

Before the 9th day of December, 1913, the council of Arnprior instructed their clerk to ascertain the number of municipal electors on the last revised voters' list, not counting the same name more than once. This the clerk did, and on the 9th day of December, 1913, reported to the council.

This by virtue of sec. 51, if the count was correct, would entitle Arnprior to a deputy reeve. The council thereupon passed by-law No. 525, appointing a time and place for the nomination and election of mayor, reeve, deputy reeve, councillors, and public school trustees, etc., etc. The election was duly held, and the appellant, Thomas S. Church, was elected deputy reeve, by acclamation.

The relator now under sec. 161, questions the validity of the election of Church as a member of the council. The grounds alleged are that the town has not the names of over 1,000 municipal electors upon its last revised list of voters, for said town, not counting the same names more than once, and even if it had at the time the list was revised, it had not the required number at the time of the election complained of.

Upon the preliminary objection that the municipality is not a party to this proceeding, I have found considerable difficulty in satisfying myself that the objection should not

prevail. If the law is that the action of the council in ascertaining whether or not it is entitled to a deputy reeve, and the by-law of the town providing for the election of a person to that office, can be set aside by proceeding against the person elected without any notice to the municipality or making the municipality a party, it is somewhat anomalous.

Under sec. 161, there may be tried or determined (1) the validity of the election of a member of the council; or (2) the right of a member of the council to hold his seat; or (3) the right of a local municipality to a deputy reeve.

I would suppose but for the reasons I will mention—that the right of a local municipality to a deputy reeve should be tried by proceeding against the corporation—or by giving notice—allowing the corporation to come in and defend.

The deputy reeve, so called, has done no wrong; both he and the council have acted in the most perfect good faith. The electors of the town, indeed the inhabitants of the town, are all interested in the office. Many may not care about the objection of the relator to the appellant, but they may care about the office and about some person being elected to it, in the event of another election.

In this proceeding, if the election of Church is set aside, he not only drops out, but the alleged right of the town is denied. To have the by-law of the municipality virtually quashed behind its back is not the usual way.

The argument of counsel for the relator is, that as under sec. 161, sub-sec. 1, the right of the municipality may be tried and as sub-sec. 2 designates who may be relator, and as no conditions are imposed, it must be tried; even if the details applicable to trying the validity of an election are not prescribed or made applicable to a proceeding like the present. This argument is strengthened by sec. 186. This section does not, in terms, apply to the right of a municipality to a deputy reeve, but refers to the right of a person to sit in the council, and provides that "proceedings to have the right of a person to sit in council determined, shall be had and taken under the provisions under this part" (of the Act) "and not by *quo warranto* proceedings, or by an action in any Court."

I reluctantly yield to the argument and hold that neither notice or adding the municipality as a party, was necessary.

The question now is, were there more than 1,000 names of municipal electors, not counting any names a second time, on the then last revised list of voters for Arnprior. The municipal clerk said there were. He is a man of considerable experience and his integrity is not impeached.

A scrutiny was entered upon before the master. It seems clear to me that for the purpose of determining the right to a deputy reeve no scrutiny is contemplated by the Act beyond that of seeing that the name of any relator is not counted more than once.

Section 50, sub-sec. 2: "The number of municipal electors shall be determined by the last revised voters' list, but in counting the names, the name of the same person shall not be counted more than once."

Determined, in the first instance at least by the council, *prima facie* that determination shall stand. If it is wrong the onus of shewing error must be upon the attacking party.

Many sections of the Municipal Act refer to population. Population must be determined by the census, or otherwise, according to the interpretation section cited by me. That may not be correct, but it must be accepted as correct for the specific purpose.

In the scrutiny before the Master, evidence was given as to tenants who had moved away from the town, persons who had died, and tenants who had changed their places of residence in the town. I reject that and come to the count, assuming that the determination of the council, if incorrect, must be so shewn by proper evidence, and that the count must be subject to the limitation of sec. 51, sub-sec. 2.

For the purpose of my determination of the question in hand, I will accept the relator's affidavit as to the names of persons whose names are on for more than one polling sub-division, or whose names are on the list more than once.

He finds that the list, at first, contained 1098 names. There were struck off by the Judge 12, leaving 1086.

From this number, there must properly be stricken off 86 names before the municipality can be deprived of the right to a deputy reeve.

The town clerk only swears to 1006 names, but I have no means on the material before me of ascertaining the

names of the 80 which the clerk struck off, reducing the number from 1086 to 1006—so I must deal with it as between the relator and the appellant.

Of the 1086, the relator contends that there should come off 87 names of persons voting in more than one subdivision, and 2 whose names are on twice in same subdivision, making 89 to come off. 1086—89=997, 4 short of the required "more than 1,000."

Of the 87 names, the appellant challenges the relator's count to the extent of 15 names. The relator says the clerk claims only 1006. If the 15 names were all added to 997 names, there would be 1012, and as the clerk claims only 1006 the relator asks that the difference of 6 be taken from the 15, and that will leave only 9 names of those challenged to be investigated. I am of oinion that the appellant's contention as to at least 4 of the names, is correct.

Of the 9 names which the relator attacks he has been successful as to three, and perhaps another, but no more. The affidavit of Mr. O'Day is, as is the affidavit of relator, simply general—and neither is more than the affidavit of the clerk as to general count. The special scrutiny of particular names is not, and cannot be, thorough or exhaustive, and the result must necessarily depend upon the question of burden of proof. With the voters' lists before the Court, verified as to number of names, and as to the not counting any one person more than once, the onus is upon the person attacking the list to prove his case. The relator has not in my opinion established that there are not more than 1,000 municipal electors on the roll.

Restoring 4 names to the list, the number will be 1001; viz., 997 plus 4 equals 1001.

It may be that a more careful scrutiny might increase the number by restoring some of the names not counted by the clerk on his reduction to 1006. Feeling satisfied upon the evidence that the number was at least 1001, I did not go further.

The appeal will be allowed, and the motion to unseat the appellant will be dismissed, both with costs.

An order will be made in accordance with above, pursuant to sec. 177, and papers returned pursuant to sec. 178

HON. MR. JUSTICE LATCHFORD. MAY 27TH, 1914.

MARSHALL v. DOMINION MANUFACTURERS.

6 O. W. N. 385.

Process—Writ of Summons—Defendant Outside Jurisdiction—Conditional Appearance—Rules 48 and 25.

Action brought to recover shares from certain persons residing outside the jurisdiction on ground of fraud and misrepresentation and to restrain defendant company, resident within the jurisdiction, from transferring the shares upon its books. One of defendants residing outside of jurisdiction who deposed that he had no assets in Ontario and that the transaction and the obligations arising out of it took place in Quebec did not appear.

LATCHFORD, J., *held*, that under Rule 48 said defendant might enter a conditional appearance since the relief sought against him was not cognate to the injunction sought against the company.

Bain v. *University Estates* (1914), 26 O. W. R. 64, followed.

Appeal by plaintiff from an order of the Master in Chambers allowing the defendant Patton to enter a conditional appearance under Con. Rule 48.

The plaintiff brought action to recover from certain persons outside this province shares which they obtained from him in the Dominion Mftrs. Ltd. without value or consideration or upon misrepresentation of fact. He further sought to restrain the Dominion Mftrs., whose head office was in Toronto, from transferring upon their books or permitting to be transferred, any such shares.

Grayson Smith, for plaintiff.

H. S. White, for defendant Patton.

HON. MR. JUSTICE LATCHFORD:—All the defendants, except Patton, who resides in New York and has no assets in Ontario, have appeared to the writ and filed defences. Patton filed an affidavit stating that he resides outside the jurisdiction, and that all the matters referred to in the statement of claim and all negotiations in reference to them took place in Montreal. He deposed further that all obligations in regard to the matters mentioned in the statement of claim were to be performed in the province of Quebec and not in Ontario. The Master thereupon made the order appealed from.

So far as the action seeks to prevent by injunction the transfer of the shares within Ontario, it is one in which service may be properly allowed out of Ontario under Con. Rule 25 g. Is the claim against Patton cognate to the claim

against him and Dominion Manufacturers jointly? An additional claim may be made against a defendant not within the jurisdiction if cognate to the primary cause of action. *Bain* v. *University Estates* (1914), 26 O. W. R. 64.

No fraud or misrepresentation on the part of Dominion Manufacturers is alleged. The primary cause of action is against Patton and his associates and only in the event of Marshall succeeding in his contention will an injunction be granted against the Ontario defendants. The injunction may be cognate to the relief sought against Patton, but the relief sought against Patton cannot, in my opinion, be said upon the material before me to be cognate to the injunction. The case is one which must go to trial here, and when fully presented will enable the presiding Judge to determine whether there is jurisdiction or not as to the principal issue involved. In the meantime the safe course is to afford the defendant Patton an opportunity to shew at the trial that the order for service out of Ontario on him should not have been made.

Appeal dismissed. Costs in the cause.

HON. SIR JOHN BOYD, C. MAY 27TH, 1914.

WAGNER BRAISER & CO. v. ERIE Rw. CO.

6 O. W. N. 386.

Process—Writ of Summons—Agent for Service within Jurisdiction of Corporation Outside Jurisdiction—Rule 23.

Where a writ was served upon a person described as "General Canadian Agent" and who solicited freight traffic at Toronto for defendant foreign corporation:—

BOYD, C., *held*, that the person served sufficiently carried on the business of the company within Rule 23 to be agent for service within Ontario.

La Compagnie Generale Transatlantique v. *Law & Co.*, [1899] A. C. 431, 433; *Murphy* v. *Phoenix Bridge Co.* (1899), 18 P. R. 406 and 495; *Thames & Mersey Marine Ins. Co.* v. *Societa di Navigazione a Vapore del Lloyd Austraico* (1914), 30 T. L. R. 475; followed.

Order of MASTER-IN-CHAMBERS affirmed.

Appeal by defendants from an order of Master-in-Chambers, dismissing their application to set aside the service of the writ of summons upon one McGregor for defendants, a foreign corporation.

R. C. H. Cassels, for the defendants.

H. E. Rose, K.C., for the plaintiffs.

HON. SIR JOHN BOYD, C.:—The defendants are an American corporation and have an office in this city in the Board of Trade Building, for which rent is paid by the company. That office is occupied by one Malcolm McGregor, who is described as "General Canadian Agent" in connection with the words "Erie Railroad Company" on the outside of the office door and on the face of the letter paper used in the business carried on by the agent. That business consists in going round to secure freight traffic for the defendants by visiting shippers and soliciting them to ship or route their goods coming in or going out of the country via the Erie road. Rates are quoted by the agent based on fixed tariffs to the United States, and if the shipment is to foreign countries, the agent adds an ocean rate to the other figures. He does all that has to be done in order to have goods freighted from this province into the States without reference to the head office.

Substantially his business is to forward the interests of the company by securing all the trade possible from this locality to go by that line, and he calls himself traffic soliciting representative of the company for the province of Ontario. This line of operation works as an important feeder to the general traffic business of the company from Ontario and appears to me of sufficient consequence to be rightly regarded as the carrying on of its business by this agent who has been served with the writ.

The words of Rule 23 are large and comprehensive. "Any person who, within Ontario, transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without Ontario, shall, for the purpose of being served with a writ, be deemed the agent thereof." It would minimize the fair meaning of ordinary words to say that the solicitation of freight traffic for some 12 or 13 years by this agent for his company is something less than transacting business for the company. The question is one of fact and the inference I draw from these facts is this man is an agent for service. *La Compagnie Generale Transatlantique* v. *Law & Co.*, [1899] A C. 431, 433.

In *Murphy* v. *Phoenix Bridge Co.* (1899), 18 P. R. 406 and 495, the company had practically ceased to do business within the province and the person served was merely employed to settle up some trifling matters consequent on the cessation of business (p. 503).

The latest English case is *Thames & Mersey Marine Ins. Co.* v. *Societa di Navigazione a Vapore del Lloyd Austriaco* (1914), 30 T. L. R. 475, shewing business a good deal like the kind of business done by the agent in the present instance. What was done here would appear to be sufficient under the English decisions—but the language of our Rule carries the compass of business over a larger area than the English practice.

The Master's order should be affirmed with costs in cause to the plaintiffs.

HON. SIR JOHN BOYD, C. MAY 27TH, 1914.

HEWARD v. LYNCH.

6 O. W. N.

Vendor and Purchaser—Agreement for Sale and Purchase of Land—Deed to be Given when All Instalments Paid—Spoliation of Land by Purchaser in Meantime—Injunction—Default in Payments—Relief from Forfeiture upon Payment of Amount Due under Agreement.

Where under an agreement for sale the purchaser was not to get a deed until all instalments had been paid:—

BOYD, C., *held*, that in the absence of express stipulation the purchaser could not in the meantime haul off and convert to his own use parts of the premises consisting of gravel. The purchaser, however, was relieved from forfeiture and cancellation of the contract upon paying into Court the whole amount of the purchase money.

Action to recover possession of land, for an injunction restraining defendant from removing gravel therefrom, and for a declaration of forfeiture of the rights of defendant under an agreement for sale of the land to him.

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

A. F. Lobb, K.C., for the defendant.

HON. SIR JOHN BOYD, C.:—According to the agreement for sale the purchaser was to pay by instalments in four years and then to receive a deed of the land with certain covenants specified in the writing. It is to be inferred that the whole plot, laid out in lots, was to be occupied by residences, but beyond that there are no restrictions relating to the taking or excavating gravel. There is no express provision for occupation of the premises pending completion of payment, though that may be inferred; and there is certainly no term authorising the purchaser, pending the completion of the contract, to haul off and convert to his own use parts of the premises consisting of gravel. That act

was a spoliation of the land and to be enjoined against at the instance of the vendor. *A fortiori* there was no right to remove gravel after default had been made in payment. Default was made and the vendor exercised his right under the terms of the contract, cancelling the contract and forfeiting all payments already made. This was the situation when this action was begun; the purchaser offered to pay the amount in default, but claimed his right to go on excavating. At this point of difference the plaintiff could well refuse the tender and move for an injunction.

When the pleadings were put in the situation was changed by the purchaser offering to pay not only what was in default, but the whole amount of the purchase money, $661.50, and paying it into Court.

He asked to be relieved from the forfeiture and cancellation upon such terms as to the Court might seem meet. Had the matter stayed at that point, the defendant would have been reinstated in his contract, but would have been enjoined against any removal of the gravel or other disturbance of the lot. He is entitled now to be relieved from the forfeiture and thereupon to pay in full for the lot, of which he will then become the owner, with all the rights and privileges of an owner, except so far as restricted by the covenants stipulated for in the agreement and to be contained in the conveyance. The plaintiff asks for a great many conditions to be imposed upon the defendant which are far beyond any term of the contract express or implied. The maxim is invoked that he who seeks equity must do equity. The defendant is relieved from this forfeiture and as a term of relief he should be required to fence his lot and to build his house with main floor on the street level and to stop the removal of any more gravel. This would be giving the plaintiff a different contract from the one he entered into and the maxim, elastic though it be, does not extend to matters which are not of equitable import, but savour rathers of arbitrary terms which would interfere with the rights of the litigant. Whether a man shall fence his land or not depends upon himself or it may be his neighbour, under the statute respecting boundary fences. Whether he shall build his house in a particular way depends upon his own taste—in a contract such as this where no word is said about the building except that it shall cost not less than $1,000. The only equity that appears appli-

cable to the subject-matter of the suit is that the defendant should be let in to purchase for the full price on the terms that he shall not use the lot in a way detrimental to it as a residential property. This is, of course, very vague, but I think it may be sufficiently defined by saying that the defendant should not deal with the lot other than as expressed in an affidavit filed on his behalf and made by Geo. Tyndall, that sand and gravel is not to be taken from the lot to a greater depth than 8 feet along the south part of the lot so that the excavation to that depth tapered off to the north will make the surface of a uniform level. This view also accords with the general trend of the evidence.

With this declaration the judgment will be that on payment out of Court of the purchase money a deed according to the prescribed form is to be made to the defendant. That the plaintiff is to get costs up to the time the money was paid into Court and he was notified of it and that thereafter no costs should be to either party.

HON. MR. JUSTICE MIDDLETON, IN CHRS. MAR. 11TH, 1914.

RE HILKER.

6 O. W. N. 82.

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

MIDDLETON, J., refused the father of an infant the custody of his child, a ward of the Children's Aid Society, although the foster parents had moved out of the province.

Regina v. *Barnardo*, 23 Q. B. D. 305, referred to.

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

A. R. Hassard, for the applicant.

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

HON. MR. JUSTICE MIDDLETON:—There is no dispute as to the facts which are material, in the view which I take of this matter. On the 28th May, 1907, this child was made a ward of the Children's Aid Society of Waterloo, the Judge having found it to be a neglected child within the meaning of the statute (the Children's Protection Act). The child was then placed in an approved foster home, the foster parents at that time residing within Ontario. The foster

parents have now removed out of Ontario, having gone, it is said, to Alberta, taking the child with them. The father now desires to have the child restored to his custody.

I do not think that I should grant a writ of *habeas corpus,* under the circumstances. In *Regina* v. *Barnardo,* 23 Q. B. D. 305, where there was a case of strong suspicion, it was said that the writ ought to be granted so that a return might be made shewing that the child was out of the jurisdiction as alleged, and thus the truth of the return might be tried; but where the truth and the fact set up are not only admitted, but the facts are stated by the applicant, no useful purpose would be served by the formal issue of a writ and by having a formal return which it is not desired to controvert. Clearly, the applicant must resort to the Courts of the province where the child now is. These Courts alone have jurisdiction over its person.

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

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

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MARCH 20TH, 1914.

FINE v. CREIGHTON.

6 O. W. N. 115.

Vendor and Purchaser—Action for Specific Performance—Objections to Title—Clause Allowing Rescission in Case of Unwillingness or Inability to Remove—Tender of Conveyance—Non-acceptance —Termination of Agreement — Damages—Costs—Dismissal of Action.

KELLY, J., 25 O. W. R. 656; 5 O. W. N. 677, *held,* that where a contract for the sale of certain lands provided that if the purchaser made objections to title which the vendor should be unwilling or unable to remove, the agreement should be null and void, and objections were made which the vendor was unable to remove, but where nevertheless he made a tender of a signed conveyance which was not accepted, that the agreement was at an end and the purchaser could not ask for specific performance.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE KELLY, 25 O. W. R. 656.

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

Arthur Cohen, for the appellant.

L. E. Awrey, for the defendant, the respondent.

THEIR LORDSHIPS (v.v.) dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JANUARY 17TH, 1914.

KOSTENKO v. O'BRIEN.

6 O. W. N. 99.

Negligence—Master and Servant—Employee Injured by Felled Tree Falling on Him — Workmen's Compensation for Injuries Act—Lack of Notice—Defective System — Common Law Liability—Damages.

SUTHERLAND, J., 25 O. W. R. 663; 5 O. W. N. 689, *held*, that for a contractor to fell trees which might fall into the path of employees engaged in the carriage of logs, without proper superintendence of such operations, was a defective system for which defendants were liable at common law.

Kreuszynicki v. *Can. Pac. Rw. Co.*, 25 O. W. R. 262, and *Fairweather* v. *Owen Sound Stone Quarry Co.*, 26 O. R. 604, distinguished.

SUP. CT. ONT. (1st App. Div.) vacated above judgment, and ordered that the case should be opened up and trial continued before SUTHERLAND, J. Appellants to pay costs of appeal forthwith after taxation, also to pay additional costs, if any, occasioned to respondents if trial is continued at Toronto.

Appeal by the defendants from judgment of HON. MR. JUSTICE SUTHERLAND, 25 O. W. R. 663.

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

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

A. G. Slaght, for the plaintiff, the respondents.

THEIR LORDSHIPS vacated the above judgment of Hon. Mr. Justice Sutherland, which was in favour of plaintiff for the recovery of $900 and costs, and ordered that the case should be opened up and the trial continued before Hon.

Mr. Justice Sutherland. The appellants to pay the costs of the appeal forthwith after taxation, and also to pay the additional costs, if any, occasioned to the respondent if the trial is continued at Toronto.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 27TH, 1914.

RE CLAREY v. CITY OF OTTAWA.

6 O. W. N. 116.

Municipal Corporations—By-law Establishing Water Works System—Motion to Quash—Special Act, 3 & 4 Geo. V., c. 109—Order of Provincial Board of Health — Public Health Act—Detailed Plans not Prepared—Statute to be Strictly Construed—Exceeding of Powers—Necessity of Submission to Ratepayers—Works in Quebec Province—Provincial Rights—Dominion Legislation—Territorial Jurisdiction — Former By-law Quashed—Res Judicata—Costs.

LENNOX, J., 25 O. W. R. 340, 5 O. W. N. 370, *held*, that 3 & 4 Geo. V. c. 109, authorising the City of Ottawa to raise a sum not exceeding $5,000,000 for the construction of waterworks, did not authorise the city to pass a by-law providing for the issue of debentures for $5,000,000 to be applied on a waterworks scheme which would cost at the least estimate $8,000,000. By-law quashed with costs.

LENNOX, J., 25 O. W. R. 615, 5 O. W. N. 673, *held*, that the City of Ottawa has no power, even with the sanction of legislation of the Province of Ontario, to pass a by-law providing for works to be carried out in the Province of Quebec without the consent of the legislature of the latter province.

That the provisions of the Public Health Act providing that the Provincial Board of Health may order a municipality to establish a waterworks must be strictly construed, and such order cannot be given until definite plans and specifications are submitted to it.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgments.

Appeals by the Corporation of the city of Ottawa from orders made by HON. MR. JUSTICE LENNOX, on the 29th November, 1913, and the 7th January, 1914, quashing bylaws passed by the city council, 25 O. W. R. 340, 615.

The appeals to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE MAGEE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

I. F. Hellmuth, K.C., and F. B. Proctor, for the appellant corporation.

G. F. Macdonnell, for the applicant, respondent.

THEIR LORDSHIPS (v.v.) dismissed the appeals with costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MARCH 31ST, 1914.

SCHOFIELD v. BLOME.

JOHNSTON v. BLOME.

6 O. W. N. 149.

Negligence—Injury to Workman — Fall from Hoist—Negligence of Foreman—Workmen's Compensation Act—Building Trades Protection Act, 1 Geo. V., c. 71, s. 6—Reasonable Safety from Accident—Evidence—Damages.

Actions for damages for personal injuries sustained by plaintiffs, employees of defendants, by reason of the fall of a hoist being used temporarily by them while bricking up openings in a wall of a building, the said accident occurring through the alleged negligence of defendants. The hoist was operated by a cable and drum driven by a stationary engine which also operated a fixed drum for other purposes.

MIDDLETON, J., 25 O. W. R. 282; 5 O. W. N. 328, *held*, that the defendants were liable under the Workmen's Compensation Act in that plaintiffs were working as they were in obedience to the orders of their foreman, who was negligent in not forbidding the hoisting engine to be used for any other purposes while the plaintiffs were upon the hoist.

That they were also liable under the Building Traders Protection Act, 1 Geo. V. c. 71, s. 6, in that the hoist in question was not being operated so as to afford reasonable safety to those using it.

Judgment for plaintiffs for $3,500 and $2,500, respectively; if liability under Workmen's Compensation Act only, then for $2,700 and $1,500, respectively.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

Appeals by defendants from the judgments of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 282.

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

R. McKay, K.C., and C. V. Langs, for the appellants.

T. Hobson, K.C., and A. M. Telford, for the plaintiff Schofield, respondent.

A. M. Lewis, for the plaintiff Johnston, respondent.

THEIR LORDSHIPS (v.v.) dismissed the appeals with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 31ST, 1914.

LINAZUK v. CANADIAN NORTHERN COAL & ORE DOCK CO.

6 O. W. N. 150.

Negligence—Death of Workman — Breach of Statutory Duty—Contributory Negligence—Finding of Jury—Evidence—Dismissal of Action.

BRITTON, J., 25 O. W. R. 584; 5 O. W. N. 642, *held*, that contributory negligence is a defence to an action for negligence, even where the accident was occasioned by the neglect of the employer to perform a statutory duty.

SUP. CT. ONT. (2nd App. Div.) reversed above judgment, and ordered a new trial.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE BRITTON, 25 O. W. R. 584.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

H. E. Rose, K.C., for the appellant.

W. N. Tilley, for the defendants, respondents.

THEIR LORDSHIPS (v.v.) set aside the above judgment and ordered a new trial; costs of the first trial and of this appeal to be costs in the cause.

HON. MR. JUSTICE BRITTON. MAY 30TH, 1914.

SIMBERG v. WALLBERG.

6 O. W. N.

Negligence—Buildings—Demolishing—Workman Injured—Action by Administrator under Workmen's Compensation Act.

Where the evidence shewed that a workman was injured while not in his place nor doing the work assigned to him by the contractor and there being no evidence of negligence on part of owner of property,

BRITTON, J., *held*, that there could be no recovery against the contractor under Workmen's Compensation Act nor against the owner.

Action by the administrator of the estate of Jacob Simberg for damages for Simberg's death, which occurred on the 7th October, 1913. He left a wife and five children.

Simberg was in the employ of the defendant Wallberg, who had a contract with the defendant Lowes, the owner of certain property known as number 92 Sherbourne street in Toronto, to demolish and remove the dwelling house and out-houses situate thereon. While so engaged, the north wall of the out-house, which it was alleged had been left in a dangerous condition, collapsed, falling upon the deceased Simberg, causing him injuries from which he died.

It was alleged that defendant John Gosnell was the owner of the property and so was liable for the result of this accident.

Tried at Toronto before HON. MR. JUSTICE BRITTON, with a jury.

J. M. Godfrey, for plaintiff.

W. H. Irving, for defendant Lowes.

G. M. Gardner, for defendant Gosnell.

L. Davis, for defendant Wallberg.

HON. MR. JUSTICE BRITTON:—The negligence charged is that of leaving the wall in a dangerous condition and not having it shored up or properly stayed or strengthened while the work of demolition was progressing.

At the trial the action was abandoned as against Gosnell, counsel for the plaintiff consenting to judgment going in Gosnell's favour.

At the close of the case motion was made by counsel for the other defendants respectively that the action be dismissed against them.

My decision was reserved, and questions subject to my ruling upon the motion were submitted to the jury. These questions were:

1. Were the defendants or either of them guilty of negligence which caused the death of Jacob Simberg? If one defendant only guilty of negligence, which one? Yes.

2. If so, what was that negligence? By leaving this wall in a dangerous condition.

3. Was the deceased Simberg in the place and doing the work assigned to him by Wallberg at the time of the accident? No.

4. Could the deceased Simberg by the exercise of reasonable care have avoided the accident? No.

The action is brought against Wallberg under the Workmen's Compensation for Injuries Act, and as the answer to the third question is that the deceased was not at the place and doing the work assigned to him when the accident happened, the plaintiff cannot recover against the defendant Wallberg.

There was not in my opinion any evidence of negligence on the part of Lowes. There was no duty owed by him to any person unless upon the premises as of right either as owner or tenant or licensee, or in some other way. There was no invitation on the part of Lowes either expressed or implied to anyone, apart from his contract with Wallberg, to go near this wall so as to be in danger of its falling. This is not the case of a trap or of any danger to which a person not aware of it might be lured or attracted. Lowes in good faith, gave the work to an independent contractor, Wallberg, a competent man skilled in that kind of wrecking business.

There was no evidence that could properly be submitted to the jury of any interference by Lowes with the work of the contractor. Nothing was done by him that would seem to shew liability on his part in the circumstances of this case. It is stated that Lowes was on the premises day by day, but he was not on the premises within sight of the dangerous wall. The wall could not be seen by Lowes from his own home or in the ordinary course of coming and going. If the deceased was not in the place where he ought to have been under his arrangement with his employer Wallberg, that is a defence for Lowes as well as for Wallberg. There was no duty on the part of Lowes to the deceased where the deceased was at the time the accident happened.

Action dismissed with costs if demanded. Twenty days' stay.

HON. MR. JUSTICE MIDDLETON. MAY 23RD, 1914.

RE JOSEPH S. MARTIN ESTATE.

6 O. W. N. 404.

Solicitor—Fees for Surrogate Work—Tariff—Recommendation by Surrogate Judge for Increase.

MIDDLETON, J., *held*, that the tariff was intended to fix solicitor's fees at the sums named, and an increase should be only sanctioned in exceptional cases, "of an important nature."

This was the first application under the new Surrogate Court tariff for the allowance of an increased fee. The application was in re the estate of the late Joseph S. Martin.

HON. MR. JUSTICE MIDDLETON:—This is the first application under the recent Surrogate Court tariff for the allowance of an increased fee. The estate in question is comparatively small—$8,500. The accounts are simple. There was no contest of any kind. The executors appear to have done their duty satisfactorily, and no one was disposed to complain.

The learned Surrogate Court Judge has certified, pursuant to sec. 5 of the tariff, for an increase of the fee allowed by the tariff from forty dollars to one hundred dollars, basing his recommendation upon the large number of beneficiaries and upon a hypothetical bill purporting to be made under the old tariff, which would amount to $78 without any reduction on taxation, and upon the statement "my idea being that the new tariff was certainly not intended to reduce the amount of solicitors' fees."

The new tariff was intended to fix the fees at the sums named, an increase being only sanctioned where the case was one "of an important nature." This case was not either important or difficult in any way. After payment of debts and some legacies, the residue is to be divided equally between the testator's brothers and sisters and his wife's brothers and sisters; the children of any who are dead taking the parent's share. The will had been interpreted upon an application to the Court. It appears that no less than thirty copies of the appointment and fourteen copies of the accounts were sent by mail to the persons who were sup-

posed to have some interest. In the hypothetical bill fifty dollars is charged for this; an item well calculated to shock.

One solicitor attended on the reference, to represent certain beneficiaries. He would under the tariff be entitled to a fee not exceeding twenty dollars. The Judge recommends an increase to twenty-five dollars.

When this tariff was prepared, after very careful conference with the Board of County Judges, it was thoroughly understood that only in exceptional cases should the prescribed limit to the fee be exceeded. The learned Judge appears, I think erroneously, to have regarded the application for an increase as one that may be lightly made.

The recommendation cannot be approved, and the order should be amended accordingly.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. APRIL 1ST, 1914.

SMITH v. HAINES.

6 O. W. N. 150.

Fraud and Misrepresentation — Purchase of Shares in Company—Action to Set Aside—Necessity of Clear Proof of Fraud—Evidence—Dismissal of Action—Costs.

FALCONBRIDGE, C.J.K.B., 25 O. W. R. 797, 5 O. W. N. 866, *held*, that where fraud is alleged in a civil action the party alleging it must prove it clearly and distinctly, a slight preponderance of the evidence in his favour not being sufficient.

Mowatt v. *Blake*, 31 L. T. R. (O. S.) 387, referred to.

SUP. CT. ONT. (2nd App. Div.) reversed above judgment and ordered new trial.

Appeal by the plaintiff from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., 25 O. W. R. 797, dismissing the action without costs.

The appeals to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE MAGEE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

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

R. McKay, K.C., for defendants.

THEIR LORDSHIPS (v.v.) set aside the above judgment and ordered a new trial; costs of the former trial and of the appeal to be costs in the cause.

HON. MR. JUSTICE KELLY. JUNE 1ST, 1914.

ROYAL BANK OF CANADA v. LEVINSON.

6 O. W. N. 442.

Principal and Surety—Guarantee — Fiduciary Relationship—Fraud or Misrepresentation.

Where fiduciary relationship, fraud, duress and misrepresentation is pleaded as a defence to liability under a written guarantee.
KELLY, J., *held*, that the onus is on the guarantor.

Action brought upon a guarantee executed by defendant on 27th February, 1912, guaranteeing to Traders Bank certain debts and liabilities of John Galt and L. R. Mackey composing the firm of Galt & Mackey. Plaintiffs were the transferees of the guarantee from the Traders Bank.

J. H. B. Coyne and A. McLennan, for plaintiffs.

R. M. Denistoun, K.C., and J. F. MacGillivray, K.C., for defendant.

HON. MR. JUSTICE KELLY:—For several years prior to 1912 defendant carried on a tailoring business in Kenora and did his banking business with the Traders Bank, whose office was close by his store. In the course of his business he had occasion to meet drafts drawn upon him and to give promissory notes. Armstrong, the manager of the bank, was helpful to him in making out these securities, and at times in anticipation of the presentment of drafts or notes, and to meet them promptly, defendant signed in blank and left with Armstrong cheques or notes, the arrangement being that the latter on becoming aware of the amount required should complete the document without reference to defendant. The relationship between them seems to have been of the most friendly kind; defendant daily, or almost so, was in the bank very frequently in the manager's office; they were also members of the same social or benevolent order, and were accustomed to meet outside of business.

About October, 1911, defendant brought to the bank and introduced to Armstrong the two members of the firm of Galt and Mackey, who were desirous, defendant then said, of establishing business relations with that bank and there doing their banking business. Defendant had known these parties and had dealt with them in his own business for a very considerable time, and at the time of the introduction they were each indebted to him in a small amount. They then transferred their banking account from another bank to the Traders Bank, and being engaged in a wood and tie business obtained advances from time to time from the bank until the amount of these advances aggregated between $1,500 and $2,000 for which the bank, through Armstrong, had obtained from the debtors some security in the nature of assignments of contracts, etc. The original advances were made by Armstrong of his own accord and before communicating with the head office of the bank. When the head office was advised of the opening of the account and its character, they seemed dissatisfied, and insisted, as the correspondence shews, that the liability should be reduced or that further security be obtained. This correspondence extended over several weeks prior to 27th February, 1912, and during all this time Galt & Mackey were in the woods and at a distance from Kenora, with the exception of one or two occasions when Mackey came into town. On February 27th, defendant, at the request of Armstrong, executed the guarantee now sued upon. Armstrong did not, prior to obtaining the guarantee, inform Galt and Mackey that he intended asking defendant to give it, and it was not until months afterwards that any information reached them of what had taken place.

Defendant disputes liability on several grounds, chiefly that the guarantee was obtained through the fraudulent representations of Armstrong; he also sets up that Armstrong was his business advisor and confident and that he executed the guarantee upon the solicitation and under the undue influence of Armstrong and without independent advice, not understanding the nature of the obligation he assumed. He does not deny the execution of the document; he does say, however, that at the time of its execution it was only a printed blank form and that none of the writing now appearing in it had been written in. This is altogether denied by Armstrong. To substantiate his claim defendant must

either establish the fiduciary relationship he has set up or shew that through fraud or misrepresentation he was induced to sign. In this he fails. The most that can be said is that these two men were on terms of business and social friendship; that their business dealings were conduucted in an agreeable way, the manager doing defendant the favour at times of helping him in the preparation of his securities, and seeing to it that when demands upon him reached the bank they were protected without further troubling or calling upon him. This was a convenience and a protection to defendant. The evidence does not reveal that there was anything in this mode of procedure, or, in fact, in any other part of their business transactions, establishing the confidential relationship set up by defendant, or from which it can be implied. It is true their evidence does not agree on what took place at the time the guarantee was given. Armstrong's story is that, defendant being in the bank on other business, he explained to him that the head office insisted on security being given for the Galt and Mackey account or otherwise that it would be closed out, and that he asked defendant to guarantee this liability, explaining its nature, the security which the bank already held, and what business Galt and Mackey were doing and their statements; he says that he did not advise defendant to sign, but simply asked him to do so; that defendant asked no questions about the guarantee but signed willingly and without protest or objection. Defendant, on the other hand, says that when Armstrong called him into his office he put the paper before him and asked him to sign, and he did sign; and that he did so because he trusted Armstrong; but he adds that he glanced through the document to see what it was before he signed it, and that he did not ask what it was nor read it; though there was nothing to prevent his doing so.

Armstrong's whole evidence, given with straightforwardness and directness impressed me more favourably than that of the defendant especially in the light of the evidence of other circumstances which happened later on.

Mackey, who was called as a witness for the defence, says that he first learned of the giving of the guarantee in July or August of 1912 from defendant, who said that he was on the guarantee or that he was in some way 'mixed up' with the bank, and that they were holding him.

Galt says that the first he heard of the guarantee was in the fall of 1912.

Defendant himself admits that he told Mackey about it in the summer of 1912. But notwithstanding this knowledge he made no attempt to repudiate liability or deny the giving of the guarantee until after he had received from plaintiffs their letter of June 10th, 1913, requiring him to make good the indebtedness which Galt and Mackey had failed to pay. Some time previously Armstrong had discussed with defendant what steps the bank proposed taking to collect the indebtedness. He seems to have treated it as an existing obligation, though until Galt and Mackey actually defaulted, his belief may have been, and very probably was, that he would not be called upon to pay anything. Even after receipt of the letter of June 10th the only objection he made was to the bank proceeding against him before they had exhausted their resources against Galt and Mackey.

A reasonable view of the evidence is that defendant knowingly and willingly and without any undue influence, fraud or misrepresentation on the part of Armstrong, signed the guarantee, though it may be that from his knowledge of Galt and Mackey's business for many years, he felt safe in doing so,—that the probability of his being called upon by the bank for payment was remote. A careful analysis of the whole evidence, coupled with the circumstances surrounding the transaction and what followed it, leads me to the conclusion that defendant has not established any ground for escaping liability for the amount claimed.

Judgment will, therefore, go against him accordingly, with costs.

HON. MR. JUSTICE BRITTON. MAY 28TH, 1914.

DANNANGELO v. MAZZA ET AL.

6 O. W. N. 396.

Vendor and Purchaser—Agreement for Sale of Land—Rectification of Oral Agreement.

BRITTON, J., dismissed action to reform written contract for purchase of land in accordance with alleged oral agreement, without forfeiture of any money paid under agreement; defendants not to proceed to seize or sell for interest, rent, or principal in default until after one month, and not then if meanwhile plaintiff pays all arrears.

Clarke v. *Joseline*, 16 O. R. 78, followed.

Action for reformation of a written contract for sale of certain land, for an injunction and other relief, tried at Hamilton without a jury.

M. Malone, for plaintiff.

W. S. McBrayne, for defendant.

HON. MR. JUSTICE BRITTON:—In November, 1912, the plaintiff entered into an agreement with the defendants for the purchase of parts of lots 3 and 4, being part of block 33, in the subdivision by Sir Allan McNab, in the city of Hamilton. The plaintiff alleges that this agreement was that he should purchase this land and pay for it as set out in the written instrument produced, except that, in case the plaintiff was out of work, or was sick, and unable to work at the time any of the instalments fell due, then the time for the payment of such instalment should be extended and the same should not really fall due until the date when the next current instalment would become due and payable, and that the plaintiff should have the privilege of paying both of the said instalments at the latter date. The plaintiff and defendants are foreigners, and no one of them speaks the English language; but the son of the defendant speaks both languages, and it was left to him to interpret the agreement which upon the son's instruction, was prepared by defendants' solicitors. The plaintiff states that when the agreement was read to him in his own language, it purported to be, and was so read and interpreted to be, in strict accordance with the verbal agreement entered into. The

defendants deny this and say that the agreement when read and translated into the plaintiff's language and theirs was, as is now set out in English and signed by the parties. The case presents difficulties. The evidence of one party, the plaintiff, against the defendants, three—husband, wife and son—but the circumstances and the manner in which the plaintiff gave his evidence almost compel me to accept plaintiff's evidence as against the others.

As to the clauses by which the plaintiff attorns to the defendants, and which permit the defendants upon giving certain notice to retake possession of the property and to sell it and to have all payments on account of purchase money forfeited to the defendants are not complained of by the plaintiff, but these clauses are harsh and unreasonable all the same. In giving his evidence the plaintiff appeared to me to be truthful and as one who did not desire to state anything other than his objection now being dealt with, but after all and upon all the evidence I cannot say that I am free from reasonable doubt. In an action for rectification or reformation, no doubt jurisdiction must be carefully exercised, 18 Beav. 658.

This is not a question of mistake—wrongdoing is charged on the part of the son of defendants. It is possible that the plaintiff took it as a matter of course, that so comparatively small a change as he desired would be conceded. The defendants now attach much importance to the change and refuse to make any concession.

The language of Lord Thurlow, as quoted by Armour, C.J., in *Clarke* v. *Joselin,* 16 O. R. at p. 78, that to reform an instrument requires the clearest evidence—irrefragable evidence to be adduced, may be qualified, as stated by the learned Chief Justice, but so qualified, it is, that the writing must stand as embodying the true agreement between the parties until it is shewn beyond reasonable doubt that it does not embody the true agreement between them. I must dismiss the action, but it will be without costs. There will be a declaration that there will not by reason of any past default be a forfeiture of any money paid upon the land under the agreement in question to the defendants, and that the defendants shall not proceed to seize or sell for interest or rent, or for principal in default under the notice given by defendants, until after the expiration of one

month, and not then if plaintiff in the meantime pays all arrears. The plaintiff is given one month to pay such arrears of interest and principal. Upon such payment the agreement will stand as to money that thereafter may become due thereon, but the old proceedings are at an end, and new proceedings, if taken, will be as to future default, if any. If arrears are not paid within one month the defendants will be at liberty to proceed as if this action had not been taken.

Thirty days' stay.

HON. SIR JOHN BOYD, C. MAY 28TH, 1914.

RE HARRISON.

6 O. W. N. 394.

Will—Construction—Joint Tenants for Life—Tenants in Common in Tail—Remainder over.

STREET, J., in *Ledley* v. *Brazel* under clause of will, "that the whole of said real estate . . . be held by my three daughters jointly. On the death of any of them the whole to fall to the survivors or survivor. If they all die without issue, then the whole to fall to the oldest son of John Harrison then living, *held* that the three daughters of the testator were joint tenants for life and tenants in common of the inheritance in tail with cross-remainder in tail among them, with ultimate remainder over to the oldest son of John Harrison.

BOYD, C., approved of above construction, where daughter Mary died unmarried, leaving will in favour of her sister Elizabeth, and thereafter daughter Margaret died, leaving a husband and two children, and thereafter daughter Elizabeth died, leaving three sons and one daughter.

Held, that (a) Children of Elizabeth are not entitled to whole of testator's real estate; (b) Children of Margaret take undivided moiety.

Motion by certain of the grandchildren of Frederich Harrison, deceased, for an order determining a question arising upon the construction of his will.

W. R. Meredith, for the applicants.

T. G. Meredith, K.C., for J. F. Brazel.

HON. SIR JOHN BOYD, C.:—The third clause of the will reads "that the whole of said real estate . . be held by my three daughters jointly. On the death of any of them the whole to fall to the survivors or survivor. If

they all die without issue, then the whole to fall to the eldest son of John Harrison then living."

The daughter Mary died in 1885, unmarried, leaving a will in favour of her sister Elizabeth.

The daughter Margaret died in 1888, leaving a husband and two children.

The third daughter Elizabeth died in 1913, leaving three sons and one daughter.

In an action brought by Elizabeth, in 1889, against the husband and children of her sister Margaret, Mr. Justice Street construed this clause of the will thus: The three daughters of the testator were joint tenants for life and tenants in common of the inheritance in tail, with cross-remainder in tail among them, with ultimate remainder over to the oldest son of John Harrison.

This construction is now challenged by the children of Elizabeth, the plaintiff in the former suit of *Ledley* v. *Brazel;* and it is supported by the surviving child of Margaret, one of the defendants in that suit.

Treating the matter as divested of that authority, I have reconsidered the meaning and effect of the will and agree in the result of the former decision. When Mary died without issue, her interest ceased and enured to the two sisters who survived her and had issue. These two became seized of moieties as joint life tenants and as tenants in common of the inheritance in tail, with cross-remainders between them. The meaning of the will is more plain by a little transposition of clauses. The whole is to be held by the three daughters jointly; if they all die without issue, the whole property goes out of the family and to the son of Harrison (an event that did not take place). Then, as to the joint holding of the three daughters, that was to be changed on the death of any of them. For instance, when Mary died, her life estate fell to the daughters Margaret and Elizabeth, the survivors; when Margaret died, her life estate fell to the survivor Elizabeth. That was the point determined in the action by Mr. Justice Street, that the ultimate survivor of the three daughters was entitled to all the yearly rents, as against the husband and children of the daughter Margaret. It is only if all died without issue that the estate was to go over, but two died, leaving issue, and of that the legal effect is to give an estate tail in a moiety to each parent. The cases referred to, *Cook* v. *Cook* (1706),

2 Vern. 545; *Machell* v. *Weeding* (1836), 8 Sim. 4; *Forrest* v. *Whiteway* (1849), 3 Ex. 367, are decisive as to this result.

I answer the questions as follows: (a) The children of Elizabeth are not entitled to the whole of the testator's real estate; (b) the children of Margaret take an undivided moiety.

In view of the previous construction given by Mr. Justice Street, this was an unnecessary application and the applicant should pay the costs.

HON. MR. JUSTICE BRITTON. JUNE 1ST, 1914.

GUARDIAN TRUST CO. v. DOMINION CONSTRUCTION CO.

6 O. W. N. 406.

Negligence—Railway—(d) Persons—Risks Assumed by—Dangerous Road between Rails.

BRITTON, J., *held*, that a railway construction was not liable for death of workman where he was guilty of contributory negligence in taking dangerous road between rails instead of safe road alongside, and that ss. 275, 276, of Dominion Rw. Act did not apply, as accident did not take place in any thickly settled part of town or village or at a crossing.

Phillips v. *Grand Trunk Rw. Co.*, 1 O. L. R. 28, followed.

Action brought by administrator of estate of the late Antonio Andriola, who, while walking between the rails on a line of railway, was struck and killed by a moving train, which was run and operated by defendants.

The deceased left him surviving a wife and one child, also father and mother.

The deceased, with 40 or more others, was in the employ of defendants "track-lifting." Boarding cars were provided by defendants for these workmen. These cars were upon a siding, a short distance from the main line, but within the railway's right of way, but far enough removed from the main track to leave ample space for a safe way or walk between the boarding cars and the main track. At the western end of the line of boarding cars was a car used by defendants as a pay car.

Frank Denton, K.C., for plaintiff.

R. McKay, K.C., for defendants.

HON. MR. JUSTICE BRITTON:—About 10 o'clock on the evening of the accident, the deceased went, with others, from the boarding cars to the pay car, where deceased received a check for his work. On his way back from the pay car to the boarding car, deceased, walking easterly, instead of walking upon the way or space between the main line track and the boarding cars, walked upon the track, between the rails. The deceased was not invited to do this, was not told to do it, and, so far as appears, no permission had been given. The night was dark, and probably the walking was easier between the rails than upon the space mentioned. While so walking, the deceased was struck by a ballast train moving westerly, and so injured that death resulted a short time after. The ballast train which struck the deceased was being moved by a locomotive at the rear end of the train pushing it. Negligence is charged, in that no warning was given to the workmen of the approach of the gravel train, nor was the train provided with a head light or any light, nor was any bell sounded. Negligence, by way of omission of alleged duty, and by negligent acts committed, is charged in almost every possible way.

This action is not against the railway company, but against the construction company, and the defendant's admission was put in, that the train which struck the deceased was under the control of, and operated by, the defendants.

I assume that the defendants are not admitting, and are not in fact, under any greater liability in operating trains under arrangement with the railway company than the railway company would be if deceased had been working for the railway company and the railway company had been operating its own trains.

At the close of the case, the counsel for defendants moved for dismissal of action. I reserved my decision, and submitted the following questions to the jury, and asked the jury to assess the damages contingent upon plaintiff's right to recover.

"1. Were the defendants guilty of any negligence which caused the accident to the deceased Antonio Andriola? A. Yes.

2. If so, what was the negligence? A. Not sufficient light on the leading car and not enough precaution taken when approaching the boarding cars.

3. Could the deceased, by the exercise of reasonable care, have avoided the accident? A. No.

4. Damages? $1,000."

Upon the case, with the answers to the jury to questions 1 and 2, I am of opinion that the plaintiff is not entitled to judgment.

As to light on leading car, there is no duty cast upon a railway company to have a light upon a leading car.

Secs. 275 and 276 are not applicable to this case.

Sec. 275. No train shall pass in, or through, any thickly peopled portion of any town or village at a greater speed than 10 miles an hour, unless, etc. . . .

The place where this accident happened was not a thickly peopled portion of any city, town or village.

Sec. 276. Whenever, in any city, town or village, any train is passing over or along a highway at rail level, and is not headed by an engine, moving forward in the ordinary manner, the company shall station on that part of the train, or of the tender, if that is in front, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross, the track of such railway.

This accident did not occur at a crossing. The deceased was not standing on, or crossing, or about to cross, the track of the railway, and there was a man on the foremost car. There was a light—a small light. If light necessary, in the absence of statute or rule in a case like the present, a small light, like that of the ordinary lantern, should be reasonably sufficient on a train moving towards a person walking between the rails, to warn such person of the train's approach. The jury, in answering, said the defendants did not take "sufficient precaution, when approaching the boarding cars." Apart from the light, it was not suggested what should have been done, the not doing of which was negligence. Apart from the questions submitted and the answers, I am of opinion that the defendants should succeed upon their motion for dismissal of the action. Upon the undisputed evidence, the action should be dismissed.

The deceased, and those with him, had been working for months near this track, on which trains were running. The deceased took the dangerous road between the rails, instead of the safe way alongside. The deceased was a trespasser in using the railway track as a foot path.

The case of *Phillips* v. *Grand Trunk Rw. Co.*, 1 O. L. R. 28, seems expressly to govern. The trial Judge, in that case, bases his decision in part upon there being clear and undisputed evidence of contributory negligence—not necessary for jury to find it—no dispute about it.

The Division Court judgment, delivered by Street, J., is upon the ground, in part, that the plaintiff had not shewn that it was the defendants' negligence that caused the accident. I quote from p. 33:

"It is necessary, however, that the plaintiff should shew that the defendants' negligence caused the accident, and, in this, I think he has failed. He chose to walk in a place of extreme danger, that is to say, between the rails, when a place of perfect safety, that is to say, in the space between the tracks and off the line of rails, was open to him and known to him. Therefore, the accident was caused, not by the negligence of the defendants, but by his own reckless act."

There must be judgment for the defendants, dismissing the action, with costs, if costs demanded.

Twenty days' stay.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. APRIL 22ND, 1914.

RUDDY v. TOWN OF MILTON

6 O. W. N. 253.

Municipal Corporations—Action for Damages by Flooding—Inadequate Culvert—Act of Third Party — Obstruction of Natural Watercourse — Negligence — Continuing Damage—Mandatory Order to Defendants to Repair—Damages—Costs.

MIDDLETON, J., 25 O. W. R. 410; 5 O. W. N. 525, gave plaintiff $100 damages against a municipal corporation for the flooding of her house by reason of the construction by the municipality of an inadequate culvert, and refused to award any damages on the basis of a continuing damage, but ordered the municipality to repair the culvert in question.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment.

Appeal by the defendant municipality from a judgment of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 410.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by Hon. Sir Wm. Mulock, C.J.Ex., Hon. Mr. Justice Clute, Hon. Mr. Justice Sutherland and Hon. Mr. Justice Leitch.

A. McLean Macdonnell, K.C., and W. I. Dick, for the appellants.

George Bell, K.C., for the plaintiffs, respondents.

Their Lordships (v.v.) dismissed the appeal, with costs.

Hon. Mr. Justice Latchford. June 1st, 1914.

FOWLER v. NELSON.

6 O. W. N. 409.

Expropriation by Municipality—For Road—Across Fruit Farm—Award by Majority of Arbitrators under Municipal Act, R. S. O. (1914) c. 192 s. 332 et seq.—Determining Compensation—Set Aside by

Latchford, J. Damages increased from $856 to $2,256. *Held*, that where amount of award exceeded amount offered costs should be paid by party expropriating.

Appeal from an award of a majority of three arbitrators appointed under the Municipal Act, R. S. O. (1914), ch. 192, sec. 332, *et seq.*, to determine the compensation properly payable to Robert C. Fowler, a farmer, the owner of part of lot 6, concession 4, Nelson Township, Halton County, for part of his lands expropriated by the said township in the construction of a road across his farm in substitution for the present Lake Shore Road, which, by reason of the encroachment upon it of the waters of Lake Ontario, has, in places, become unsuitable for travel and costly to maintain.

C. A. Moss, for R. C. Fowler.

Evans, Hamilton, for the township of Nelson.

Hon. Mr. Justice Latchford:—That two of three arbitrators may make a valid award is clear from sec. 28 (c) of the Interpretation Act, R. S. O. ch. 1.

The present road runs east and west in front of the residence of Mr. Fowler, dividing the farm into two parts, one

of about two acres, between the road and the lake, and the other of about fifty-eight acres. A driveway, bordered by a hedge, leads westward from the road to the house; and in rear of the house are the barn and other outbuildings, an orchard, extensive plantation of small fruits and some land devoted to ordinary field crops and pasture. All the buildings are located, as to appearance and convenience, in proper relation to the road, as it now exists, and to the farm itself.

The new road will run in rear of the residence and outbuildings and diagonally through the apple orchard. Directly in its course are forty large, and four or five small, apple trees. Six or seven others stand so close to the lines of the proposed road that some of their branches will project over it.

The award allows Mr. Fowler for the 0.94 acres taken in his orchard at $400 an acre	$376	
Less 0.75 acres of old road to be conveyed to him at same rate, or $300, subject to an allowance of $30 for ploughing, or	270	
		$106

Fencing new road	$100
Improving private road from homestead to new road..	50
Value of trees in orchard taken and affected	600
	$856

The costs of the arbitration amount to no less than $816.95, two of the arbitrators charging $240 each, the other, who sat but seven days to his associates' eight, being content with $210. The award determines that each party to the submission shall pay, in addition to his own costs for counsel and witnesses, one-half of the $816.95.

Power is given to the Court, in such an appeal as this, to set aside the award, to increase, diminish or otherwise modify it, as may be deemed just (sec. 345, sub-sec. (3)).

The main grounds of appeal are that too little has been allowed for the land expropriated and for the apple trees injuriously affected; and that nothing has been allowed for the severance of the farm by the new road.

The difference in area between the old and the new road is but 0.19 of an acre. Each area has about the same value

for farm or orchard land, and the $30 seems a sufficient allowance to bring the old road into a state fit for cultivation. Upon a consideration of the whole evidence, the average value of the land of Mr. Fowler is not more than $500 an acre. At that value, he would be entitled for the 0.94 acres to $470. Less at the same value 0.75 acres amounting to $375. Leaving $95.

At the $400 rate, the difference in value is $76. So that upon the point of the value of the land as land, there is in question only the difference between $76 and $95, or $19—too little to warrant the interference of the Court.

The other matters in issue are much more serious, and have not been, in my opinion, properly appreciated by the arbitrators signing the award.

The evidence is contradictory as to the value of the apple trees actually comprised within the bounds of the new road. Mr. Hall thinks them worth but $300, Ryckman goes up to $396, Emery to $440, David to $450, and Fisher to $500. These are all witnesses called on behalf of the municipality. Mr. Fowler thinks the trees worth $1,200. Snook, an experienced fruit grower, places their value at $1,165, while others speak of amounts varying from $1,200 to $1,700 and even $2,500.

Fowler's books shew that the average net return for the five years—1909-1913—from 400 trees, after allowing $300 a year for his own labour, is $892, or $89.20 for 40 trees. The net return for 1913, again deducting the owner's labour, was $1,262—$126.20 for 40 trees, or $3.13 per tree. Yet Mr. Ryckman would not, he says, pay more than fifty cents a tree for the fruit, and his examination was made on the 18th July, 1913, when all the fruit of the season was apparent. I think it clear that too much reliance was placed on Mr. Ryckman's evidence and too little on the fixtures produced from Fowler's books.

Quite apart from any question of severance, the orchard will undoubtedly be damaged by the construction through it of the road. That wind and dust will injuriously affect the trees and fruit is satisfactorily established by credible testimony. It is difficult to estimate the amount of such damages; but, from the best consideration I have been able to give to the whole evidence, I am satisfied that the damages

awarded for the trees taken, and the trees not taken, but injuriously affected, should be increased to $1,000.

On the question of severance, one of the arbitrators signing the award says: "The evidence shewed that the new severance is not detrimental to the farm (closing up the old road), but rather adds to its sale value."

The other arbitrator, Mr. Sealey, says in effect: "If Fowler is entitled to anything for severance, he gains just the same amount by joining up the lake front to the east of his farm; but Marlatt, who is similarly situated, says there is no damage done by severance. . . . . Hall says there is no damage done through severance. . . Fowler himself says that his only damage consists in his having to make short turns in cultivating and spraying." He (Fowler) says (I here quote literally): "That his buildings are built to meet the present conditions, but he did not shew that any change would have to be made in his buildings to meet new conditions and there are no new conditions to be met." . . . "The only evidence that is reliable as to the damage from severance is Fowler's own statement of $30, and that is only his opinion. As against that, is the evidence of Hall, Davis, Fisher and Marlatt that Fowler's land between the old road and the new road will be increased in value from $5,000 to $10,000, and this land for a short distance back of the new road will also be increased in value. Fisher said in the same proportion. And I, therefore, say that when you add up the benefit that his land will be increased in value by the change in road, you only have against that Fowler's own statement that he would suffer damages to the extent of $30 a year by the short turns. All that I am prepared to give Mr. Fowler, therefore, is:

For land	$282
For trees	368
For fencing	50
	$600
Less old road	225
	$375

and half cost of arbitrators' fees."

I have not cited the whole of Mr. Sealey's statement, but only sufficient to shew his view on severance and compensating benefit.

Upon careful consideration of the evidence, I have reached the conclusion that the arbitrators erred in holding, as they did, that the benefits to Mr. Fowler resulting from the construction of the new road will equal or exceed the injury.

At present, the farm has but two acres of "Lake Front land," and the new road will give it 10.2 acres. There is, it appears, a demand for property fronting on the lake. The two acres are too narrow, having regard to erosive agencies, to form a desirable site for a gentleman's residence, while the ten acres will afford four or five excellent sites. That part of the farm north of the new road may also provide not a few other, though much less, valuable building locations, and will, therefore, have some enhanced value. Something is also said as to the advantage to be derived by Fowler from a good road as compared with the existing road. Such is in effect the evidence as to benefit accepted by two of the arbitrators.

They have, it appears to me, placed undue reliance on the view of the real estate speculator put forward by Mr. Flatt. That gentleman has invested largely in Lake Shore properties in the vicinity. Some of these he has sub-divided. His interest as a speculator in the new road is shewn by the fact that he is giving to the township for the nominal consideration of $1 the right of way for the new road through his Rose Hill farm immediately east of Fowler's. The new road will give him 18.9 acres of lake front property, where now he has practically none—the strip to the south of the present road being practically useless for building. The Marlatt property will be similarly improved and both will be enhanced in value beyond any detriment arising from the new road.

But the conditions are very different in the case of Mr. Fowler. He is using and intends to use his farm as a farm. It has afforded him a certain and increasing income for many years. He prefers his present mode of life to the variable and problematic fortunes or misfortunes of the land subdivided and speculator. The gentlemen who are seeking, or who are expected to seek Lake Shore properties, do not want them encumbered with such a house and out-buildings as Fowler has—all, with the exception of a structure where the fruit pickers sleep, south of the new road. These buildings cost $6,000 or $7,000. Even assuming that the whole 10.2 acres south of the new road are increased in value $500 an acre, the increase is less than the value of the buildings to

Mr. Fowler. It follows that even allowing for the possible increase referred to—which can affect only vacant land—Mr. Fowler derives no benefit as to the 10.2 acres which will be between the new road and Lake Ontario.

The land immediately north of the new road that can by any possibility be increased in value is now covered by a productive and profitable orchard, the trees alone on each acre of which—adopting the value of the trees on .94 of an acre, considered proper by the arbitrators—are worth at least $500 or $600, or more than the anticipated possible benefit.

It is to be remembered that Fowler's access to market will not be improved by the new road. No matter how well the road may be constructed, Fowler's shipping point will continue to be the station at the rear of his farm, approachable, as now, through the farm itself.

Another disadvantage tending to outweigh benefit is that the whole aspect of the residence and steading will be changed owing to the new approach that will of necessity have to be made from the new road. The approach will be through or near the barnyard to the rear of the dwelling. The changed appearance which the house will present to passers-by through a vista of unaesthetic outbuildings will, in my opinion, lessen not a little the value of the property.

In determining that the benefit equalled, if it did not exceed, the disadvantage from severance, the two arbitrators did not, I think, consider the damage resulting from the changed aspect and consequent depreciation of the homestead, and the fact that all the land likely to be enhanced in value as building sites is at present improved to an extent beyond any reasonably probable increase.

The damages from the severance are manifest and serious. The present appropriate relation of the residence and other buildings to the existing road and to the farm itself will undoubtedly be destroyed by the new road. Gates will be necessary in the fences the two arbitrators have thought proper to be constructed. They must be opened and closed on every occasion the cattle are brought from the pasture to the barnyard. The road will have to be crossed whenever the major part of the farm has to be resorted to for any purpose; and, if the road becomes—as the land speculators think—the leading thoroughfare between Toronto and Hamilton, and is used by motorists as other leading roads are now used, the greater

will be the danger to Fowler in his frequently necessary crossings of it.

Having regard to the fullest extent to the latitude that may be extended to them as valuators, I am convinced the two arbitrators erred in not making a reasonable allowance for the loss to which, in addition to the $30 a year mentioned by Mr. Sealey, Mr. Fowler will sustain by the severance of his farm and the total change in the present orderly adaptation of the buildings. It is difficult to estimate such damages accurately, but I think I do not err on the side of excess in placing it as I do at $1,000.

In the result the award is increased by $1,400, or to $2,256.

As to the costs, a word remains to be said. They are not only excessive, but, with deference, seem improperly apportioned. The salutary principle embodied in sec. 199 of the Railway Act should, in my opinion, be generally adopted in cases of this kind. If the amount awarded exceeds the amount offered, the costs should be borne by the party expropriating. The township offered $400, while the award was as stated, $856. The township should pay the costs of the arbitrators, $816.95, and of this appeal.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. APRIL 23RD, 1914.

BECK v. LANG.

6 O. W. N. 253.

Solicitor—Action for Bill of Costs—Services Performed for Wife of Defendant—Guarantee not Proven—Liability of Husband—Dismissal of Action.

MIDDLETON, J., 25 O. W. R. 843; 5 O. W. N. 900, dismissed an action brought by a solicitor upon a bill of costs as rendered, holding that the services were performed for the wife of defendant and no guarantee by defendant had been proven.

SUP. CT. ONT. (1st App. Div.) reversed above judgment, and ordered that judgment should be entered for such amount as should be found due by a taxing officer, or such amount as the parties should agree upon.

Appeal by the plaintiffs from a judgment of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 843.

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

H. T. Beck, the appellant, in person.

A. B. Armstrong, for the defendant, the respondent.

THEIR LORDSHIPS (v.v.) allowed the appeal, with costs, and ordered that judgment should be enteıed for such amount as should be found due by a taxing officer, or such amount as the parties should agree upon.

HON. MR. JUSTICE MIDDLETON. JUNE 4TH, 1914.

RAMSAY v. PROCTOR.

6 O. W. N. 428.

Landlord and Tenant—Lease—For 21 Years—Parcel Sub-divided by Lessee by Assignment — Property Taken over by Landlord—Valuation of Buildings—Price Accepted by Lessee—Claim of Sub-tenant for Price of his Building.

MIDDLETON, J., *held*, that the whole parcel was what was to be considered in the valuation of the buildings and any right which the sub-tenant might have was a question between himself and the lessee of the whole parcel.

Action brought to recover possession of certain land, tried at Toronto, May 29th, 1914.

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

L. F. Heyd, K.C., for defendant Hawken.

HON. MR. JUSTICE MIDDLETON:—Hawken was in possession of the lands by his tenant, Proctor, and has intervened, under the provisions of rule 53, for the purpose of defending the possession of his tenant. Proctor's tenancy has now come to an end, and he on 31st December, 1913, surrendered, and conveyed all his rights to his landlord.

The real contest arises over the provisions in regard to removal contained in a lease, bearing date 1st January, 1892, by which Messrs. Kingstone and MacDonald, executors of

the late Robert Baldwin, leased to John D. Irwin certain lands on the north side of King street and on the south side of Adelaide street for a term of 21 years from the first day of July, 1892. This lease was in pursuance of an earlier lease dated June 1st, 1871, but I cannot see that this is in any way material.

On a comparatively small portion of the entire parcel covered by the lease just referred to, there was erected a building now used as an hotel, known as the Wilson House. On July 1st, 1892, the same date as the renewal lease referred to, Irwin executed a document which is by recital declared to be an assignment and not a sub-lease, by which he demised and leased this smaller parcel for the whole term of the head lease, with all the privileges of removal contained therein, to the executors of Morphy. This so-called assignment contains certain provisions for the protection of the tenant with reference to the renewal provisions contained in the head lease, which must be mentioned later on.

Subsequently, the executors of Morphy were succeeded by the Union Trust Company. The chain of mesne conveyances is admitted, and the details are not material.

On April 13th, 1907, the Union Trust Company conveyed all its interest as executors and trustees of the Morphy estate to Hawken, who thus became tenant under this sub-lease or assignment of the Wilson House parcel. In the meantime, on September 27th, 1906, the executors of the Baldwin Estate conveyed the fee, subject to the lease, to Ramsay, the plaintiff.

Turning to the lease, it is found that there is an agreement that if the lessors shall, at the expiration of the term, have given eight months' previous notice in writing of their desire not to renew, in that event, the amount proper to be paid by the lessors to the lessee for the buildings upon the land, and also the amount proper to be paid by the lessee as the ground rent for the following term of 21 years, if such term should be granted, shall both be ascertained by three valuators, one chosen by the lessors, one chosen by the lessee, and the third to be selected by the two. The lessors are then to pay to the lessee the amount found proper to be paid for the building not less than four months before the end of the term, and, in the event of the buildings not being

paid for within the time limited or in the event of the lessors not having given the eight months' notice of the desire to grant no further term, and the lessee having given six months previous to the end of the term notice of his desire that a further term should be granted, the lessee shall be entitled to a renewal of the lease for the further term of 21 years at the annual rent ascertained by the valuators.

It is, I think, clear that this lease does not contemplate the subdivisions of the property in such a way as to confer upon any one claiming under the lessee a right to demand at the end of the term a lease of part of the property originally demised. The parcel demised, together with all the buildings upon it, was throughout to be treated as an entirety. All the buildings upon it were to be valued, the ground rent was to be fixed for it, and the renewal was to be for the whole.

This appears to have been the view of those who framed the document of July 1st, 1892, for it provides that Irwin will include the smaller parcel thereby dealt with in all renewal notices and valuation proceedings taken by him under the original lease, and, in the event of renewal, he will, in his turn, grant a renewal to his assignees, and in the event of the leases not being renewed, he will pay over to his assignee the amount ascertained as the amount to be paid by the Baldwin Estate for the buildings; and the assignor authorizes the Baldwin Estate to pay such amount direct to the assignee in discharge of its obligation under the lease *quoad* the buildings in question.

Through some oversight on the part of Ramsay, he did not give a notice of his intention not to renew eight months previous to the expiry of the lease in January, 1913. He did give a notice after the day stipulated, and those representing the Irwin Estate did not raise any objection to notice by reason of its not having been given in time; and all parties proceeded with a valuation under the terms of the lease.

In 1901, negotiations had taken place between those interested in the Irwin Estate, resulting in the agreement of the 20th April, 1901, under which the interest of that estate became vested in Mrs. Irwin, Mrs. Macnab and Mrs. Grover. On May 31st, 1913, an agreement was arrived at between the plaintiff and these three ladies by which the further

prosecution of this valuation became unnecessary. They agreed to surrender the lease to Ramsay in consideration of $75,000. This was practically an ascertainment of the value of the buildings upon the entire parcel at that sum. Hawken, acting upon the theory—which I think is erroneous—that he had under his assignment some right to compel an independent valuation and an independent determination of the amount of rent to be paid for his particular subdivided parcel, on December 30th, 1912, served a notice upon the Union Trust Company, upon the solicitor for Mr. Ramsay, and upon the solicitor for the Irwin Estate. By this notice, he appointed Mr. Tanner his arbitrator (not valuator), to determine the rent to be paid by him as a ground rent for the premises in which he was concerned, for the term of 21 years. He also served at the same time upon the same persons a notice that he desired a renewal lease of his parcel.

Apparently, and possibly in some informal way—for the document is not produced, if there was one—Mr. Garland was appointed to represent the landlord's interest. His authority appears to have been derived from the Irwin Estate only. A third arbitrator was agreed upon and these three gentlemen proceeded, not with an arbitration, but with a valuation, by which they fixed the ground rental of a renewal lease at $665.50 per annum, and ascertained the value of the buildings upon the land to be $5,000. These proceedings related to the Wilson House parcel alone.

I have already indicated that I think this valuation was something entirely outside of what was contemplated by the lease. Hawken now repudiates the valuation, in so far as it purports to determine the value of the building, but claims that it has some validity as a determination of the rental.

Even if the assignee of the term, as to one parcel, had any rights under the lease, the valuation contemplated by the lease was one valuation which would determine the two things—the value to be paid for the buildings and the amount to be paid for ground rent—so as to enable the landlord to pay the amount to be paid for the buildings, if he desired to avoid giving a renewal lease, which he would be bound to give if he made default in payment.

There is no desire on the part of either Ramsay or the Irwin Estate to deprive Hawken of the value of his build-

ing. The five thousand dollars has been tendered to him and had been refused by him. So far as I can see, Hawken has no right against Ramsay; his only claim is against the Irwin Estate. That estate is not before the Court in this litigation. They assent to payment to Hawken of the $5,000. If he has a claim for any greater sum, that claim will be recognized, but it must be ascertained in proceedings to which the Irwin Estate are parties. In the meantime, it is said Ramsay is holding a portion of the $75,000 ample to secure any claim which Hawken may have.

In this litigation, the only matter in issue is Hawken's right to retain possession of the land against Ramsay. He can have no such right unless he has the right to demand a lease of the sub-divided portion of the whole parcel. He has no such right, and judgment must, therefore, go for possession.

Ramsay is entitled to recover mesne profits. The only satisfactory evidence given at the trial indicates that the rental value of the building is $250 per month with taxes. Mr. Heyd claims that he is taken by surprise in having to deal with this issue at the hearing, and I am disposed to grant him some indulgence upon proper terms. I assess the mesne profits at that rate; but on payment into Court of the sum so ascertained, as a condition precedent, I will allow Mr. Heyd's client to have a reference, at his own expense, for the purpose of ascertaining the mesne profits.

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

HON. MR. JUSTICE MIDDLETON. MAY 14TH, 1914

FESSERTON v. WILKINSON.

6 O. W. N. 347.

Vendor and Purchaser—Agreement for Sale of Land—Material Difference in Subject-matter of Sale—Land Subject to Right of Way—Parties not ad Idem—Executory Agreement—Rescission—Lien for Money Paid and for Improvements—Use and Occupation——Costs.

Where purchaser of a house had no knowledge of a right of way, and the agreement for same made no mention of it.

MIDDLETON, J., *held* that there was an honest mistake, but the parties were never *ad idem* for the vendors never intended to sell save subject to the right. .

That the right of way made the subject-matter materially different, and the purchaser had the right to refuse to accept something other than he thought he was purchasing and for which the contract called:

Paget v. *Marshall*, 28 Ch. D. 255, and

Wilding v. *Sanderson*, [1897] 2 Ch. 534.

Action for a declaration that the defendant had no further interest in, or right to, certain lands, the subject of an agreement for sale by the plaintiff to the defendant.

H. F. Upper, for plaintiff.

A. C. Kingstone, for defendant.

HON. MR. JUSTICE MIDDLETON:—Northrup and Beaumont owned the lands in question, subject to a right of way, reserved to one Skinner over the western eight feet. This right of way was reserved to afford access to the rear of a large block, fronting on the next street, upon which Skinner proposes erecting an apartment house.

When the house in question was sold to Wilkinson by Misener, agent for the owner, he had no knowledge of the right of way, and the agreement makes no mention of it. This was an honest mistake, but the parties were never *ad idem,* for the vendors never intended to sell save subject to the right.

The right of way makes the subject matter materially different, and the purchaser has the right to refuse to accept something other than what he thought he was purchasing and which the contract calls for. *Paget* v. *Marshall,* 28 C. D. 255; *Wilding* v. *Sanderson,* [1897] 2 Ch. 534.

The contract, being executory, should be rescinded and the purchaser should be declared to have a lien on the lands

for the sum paid, with interest, and for $25, which I allow for improvements, less an allowance for use and occupation, which I fix at $25 per month, and upon which interest should be allowed, as it accrued from month to month.

The defendant should have his costs of the action added to the balance due him.

If the parties cannot agree on the amount, the Registrar may compute it on entering judgment. There was no dispute as to the figures.