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HIGH COURT OF JUSTICE.

MIDDLETON, J. DECEMBER 9TH, 1910.

COUNTY OF WENTWORTH v. TOWNSHIP OF SALTFLEET AND BURLINGTON BEACH COMMISSION.

COUNTY OF WENTWORTH v. BURLINGTON BEACH COMMISSION.

Assessment and Taxes—County Rate—Portion of Township Separated for Municipal Purposes—7 Edw. VII. ch. 22 (O.)—Burlington Beach Commission—Equalization of Assessments—Amending Act, 9 Edw. VII. ch. 25—Interpretation Act, sec. 7, sub-secs. 46, 47, 48—Assessment Act, secs. 85, 86.

Actions to recover the sums assessed by the county council for county purposes against the defendants.

J. L. Counsell, for the plaintiffs.

G. Lynch-Staunton, K.C., for the defendants the Corporation of the Township of Saltfleet.

J. G. Farmer, for the defendants the Burlington Beach Commission.

MIDDLETON, J.:—By the Act respecting Burlington Beach, 7 Edw. VII. ch. 22 (O.), some 250 acres formerly in the township of Saltfleet were vested in "The Burlington Beach Commission." For judicial purposes the territory is still a part of the county of Wentworth (sec. 25), as also for the purposes of the Liquor License Act and elections (secs. 23 and 24), but, by sec. 22, it shall be deemed to be separated from and to no longer form part of the township of Saltfleet or of the county of Wentworth for municipal purposes. By the same section the Commissioners "shall annually return . . . to the said county until the year 1933, inclusive, . . . such sum

of money as would be due to the said county for a county rate as if the said territory continued to be a portion of the said township and county municipalities." The Commissioners are given power to assess and tax the lands vested in them.

The Commission is not a "municipality" as defined by the Assessment Act.

The county council, for the purpose of raising the money required for its purposes, apportions the sum required among the municipalities over which it has jurisdiction (sec. 86 of the Assessment Act, 4 Edw. VII. ch. 23), upon the basis of the equalized assessment of these municipalities. The municipal assessments of the Wentworth municipalities were equalized in 1900, and this equalization was adopted from year to year, including the year in question. The county rate of so many mills upon the dollar determines the amount to be paid the county by each municipality. Each municipality then proceeds to collect this as an item of the contemplated expenditure from the ratepayer. Each ratepayer's share is ascertained by his own assessment—the assessment of the municipality in no way corresponding with the equalized assessment of the municipality for county purposes.

Section 85 of the Assessment Act provides for the procedure when the boundaries of existing municipalities are altered or when a new municipality is erected within a county. The section does not contemplate the taking of territory from a municipality and vesting it in a Commission. The county has not made any adjustment between the depleted township and the Commission, but has assessed the "Township of Saltfleet (including the Burlington Commission)" for the amount that should be paid by both.

Upon the territory assigned to the Commission being taken from the township, the township ceased to be liable *pro tanto* for the taxes which would be borne by that territory. This amount would not be ascertained by the proportion which the area of the territory bore to the whole township, but by the proportion which the assessment of that area bore to the whole assessment. This must be computed upon the last assessment made upon a uniform basis, and the assessment upon a higher basis made later on for the Commission cannot be considered. Upon the original legislation no hardship would flow from this view, and the county would receive its whole demand—apportioned as I have indicated—from the new township and the Commission. This view is in accordance with the fundamental principles that the tax is upon the property, the township and

its machinery are used to collect the county rate, and the township cannot be liable when by the Act of the legislature some of the taxable property is removed from its jurisdiction. On no principle either of law or justice should the taxes on this property be cast upon the remaining lands in the township.

The Amending Act of 1909, 9 Edw. VII. ch. 25, does not, in my view, affect Saltfleet at all. I do not rest my judgment in favour of the township upon the fact that originally sec. 22 imposed the duty to pay upon the Commission, but upon the fact that, when the boundary was changed, there ceased to be any liability until the assessment was equalized.

Saltfleet having paid on the basis indicated as fair, *i.e.*, the proportion due in respect of the land retained, the action should, as to it, be dismissed with costs.

Then as to the Commission. In 1909 sec. 22 was repealed and a new section substituted, providing that "from and after the passing of this Act" the Commission should pay $250 per annum to the county as its share of the county rate.

This form of amendment takes the case out of the general rule, and requires the substituted section to be read as part of the original enactment, and sec. 7, sub-sec. 46, of the Interpretation Act, 7 Edw. VII. ch. 2, does not apply, but sub-secs. 47 and 48 govern—these contain no clause such as 46 (*c*), dealing with vested or accrued rights and liabilities. The effect of the amendment is to relieve the Commission from all liability beyond the $250 per annum which they are ready to pay, and bring into Court.

Judgment will go against the Commission for this amount, without costs.

The amount lost to the county by this legislative action will, in the result, fall upon the county at large, and must be borne by all its constituent municipalities, and not by the residue of Saltfleet alone.

DIVISIONAL COURT. DECEMBER 9TH, 1910.

*MANUFACTURERS LUMBER CO. v. PIGEON.

Receiver—Equitable Execution—Fund not Presently Payable—Money Earned but Held back to Secure Performance of Contract.

Appeal by the defendant from the order of MIDDLETON, J., 22 O.L.R. 36, ante 79, reversing the order of the Local Judge at Stratford, and appointing a receiver.

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

The appeal was heard by FALCONBRIDGE, C.J.K.B., Britton and RIDDELL, JJ.

R. S. Robertson, for the defendant.

R. T. Harding, for the plaintiffs.

RIDDELL, J.:— . . . The work to be done was grading on the streets, which the defendant undertook to maintain in perfect order and in complete repair for 120 months from the date of completion, and also to make good in a permanent manner, satisfactory to the engineer, any damage or injury to the works during construction or the period of maintenance. It was provided that he should keep the pavement and all work in perfectly safe condition and in good repair at his own expense until the end of the term of maintenance, "when he is to hand over the same to the city, and every part thereof, in good and serviceable condition and satisfactory in all respects to the city engineer."

This, it seems to me, makes it quite plain that the contract could not be completed until the end of the term of maintenance. . . .

On the completion of the "work" (which here must mean the work originally done), the contractor receives ninety per cent. of the whole amount due under the contract; and at the end of the term of maintenance and after the provisions of the contract have been fully complied with, the final certificate for the balance due (if any) shall be issued and paid to the contractor; so that this ten per cent. does not become payable until the end of the 120 months. It is true that, by furnishing a bond approved by the city solicitor, the contractor may get his money in advance of the time; but, unless he does so, he cannot get the drawback until the end of the term of maintenance. He has not furnished this bond—perhaps he cannot—certainly he cannot be forced to do so—even if he were solvent, he might prefer to leave the money at interest with the city.

The law is sufficiently discussed by my learned brother, and no good end could be attained by adding cases.

I do not think the contractor is now in a position to enforce payment to him of the "drawback," and the plaintiffs are in no better position.

The appeal should be allowed, with costs in all the Courts.

BRITTON, J., gave written reasons for the same conclusion.

FALCONBRIDGE, C.J., also concurred.

DIVISIONAL COURT. DECEMBER 10TH, 1910.

*FINN v. ST. VINCENT DE PAUL HOSPITAL.

Gift—Undue Influence—Absence of Independent Advice—Pressure — Duress — Ante-Nuptial Agreement — Absence of Writing—Statute of Frauds.

Appeal by the plaintiff from the judgment of the Junior Judge of the County Court of Leeds and Grenville, dismissing the action, which was brought by Mary Josephine Finn, widow of Paschal Finn, deceased, to recover from the defendants $500, being part of the sum of $1,000 payable to her under a benefit certificate or policy issued by the Catholic Order of Foresters on the life of Paschal Finn.

The certificate as issued named the father and brother of the deceased as beneficiaries.

The defendants alleged that the plaintiff agreed with Finn that, in consideration of his marrying her and appointing her sole beneficiary, she would, on his death, pay to the defendants $500, one-half of the $1,000. The plaintiff denied that agreement.

For some years before his death, Paschal Finn was in feeble health and was in the defendants' hospital as a non-paying patient, operating the elevator without remuneration. The benefit certificate was in the keeping of the Mother Superior.

The plaintiff and the deceased were Roman Catholics, and the marriage ceremony was performed on the 25th January, 1909, by the parish priest, the Very Rev. Dean Murray, at the hospital, the deceased being very ill and confined to his bed. On the same day, the financial secretary of the Order obtained the certificate from the Mother Superior, and had it changed by Paschal Finn so as to make the plaintiff sole beneficiary. On the 28th January he died.

The plaintiff, after the death, executed a power of attorney (irrevocable) in favour of Mr. Botsford, a solicitor, who collected the $1,000, and paid $500 thereof to the plaintiff, and the remaining $500, after deducting the amount of certain expenses, to the defendants.

There was evidence that some persuasion had been used to induce the plaintiff to do this, and Dean Murray admitted that he had said to her, "Do your duty, and do not damn your soul for money."

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

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

E. G. Porter, K.C., for the plaintiff.

J. A. Hutcheson, K.C., for the defendants.

The judgment of the Court was delivered by MULOCK, C.J.:—

. . . For the defendants it was argued that, by reason of the alleged parol ante-nuptial agreement between the plaintiff and Paschal Finn, the plaintiff became legally liable to the defendants for the sum of $500, or took the certificate in trust as to the $500, part thereof, for the hospital. Such, however, was not, in my opinion, her position; for, assuming that such ante-nuptial agreement existed, being by parol it was void under the 4th section of the Statute of Frauds. . . .

[Reference to Warden v. Jones, 23 Beav. 487.]

Even if the husband appointed to his wife in pursuance of any parol ante-nuptial agreement, the benefit of such appointment passed to her free from any obligation or trust arising out of such parol agreement.

If this, then, be the correct view of the plaintiff's position, what she did was to make a gift to the hospital of $500. This gift she attacks, and the rules applicable to the question thus raised are to be found in many authorities. . . .

[Reference to Hoghton v. Hoghton, 15 Beav. 278; Hobday v. Peters, 28 Beav. 349, 351; Billage v. Southees, 9 Hare 534, 540; Cook v. Lamotte, 15 Beav. 234, 240; Holman v. Loynes, 4 D.M. & G. 270, 282; Clarke v. Hawke, 11 Gr. 553; Evans v. Llewellyn, 1 Cox 333; Allcard v. Skinner, 36 Ch. D. 145; Hunter v. Atkins, 3 Myl. & K. 113, 140; McCaffrey v. McCaffrey, 18 A.R. 599; Rhodes v. Bate, L.R. 1 Ch. 252.]

The question is, whether, having regard to the principles laid down in the foregoing cases, the plaintiff is entitled to a return of the $500.

For many years she had, as patient and employee, resided in the hospital, which was under the control of the Roman Catholic church. The Mother Superior had been the custodian of the insurance certificate, parting with it only on the day of the marriage in order to enable it to be changed in the plaintiff's favour. Finn was dying, and the Mother Superior appears to have manifested much interest in the destination of the money. On learning that some persons, including the plaintiff's brother, had obtained Finn's signature to a paper, she reported the matter to Dean Murray, adding that the plaintiff

had told her that she feared the paper was against her interest. As the plaintiff was present when this paper (her husband's will) was prepared and executed, and knew that it was in her favour, it is quite clear that she did not in fact entertain any apprehension that the paper would prejudicially affect her interests. For two nights in succession the plaintiff had watched over her dying husband, was present at his death (2 a.m.), and remained in the room till about 8 a.m., when the Mother Superior telephoned her to come to Dean Murray's room. This she did, the Mother Superior accompanying her. Thereupon the Dean observed that he had heard that she feared her brother, and said, "Mary, do your duty, don't damn your soul for money"—and advised her to engage Mr. Botsford. Dean Murray then withdrew, when the plaintiff expressed a desire to go home; but the Mother Superior urged her to remain and send for Mr. Botsford, as the Dean had suggested. The two then proceeded to the room of the Mother Superior, where the latter telephoned for Mr. Botsford. That gentleman did not come until about 10 o'clock. In the meantime the plaintiff was restless and anxious to go home, but, in deference to the wishes of the Mother Superior, she remained. When Mr. Botsford arrived, the Mother Superior engaged him in conversation and gave him his instructions. He received no instructions from the plaintiff, but proceeded to draw the irrevocable power of attorney, practically without consulting her. He was not acting as her solicitor and gave her no advice. She says that she remembered the words of Dean Murray, not to damn her soul for money, and that she was scared, and in these circumstances executed the power of attorney. The Mother Superior having temporarily withdrawn from the room, the plaintiff, according to Mr. Botsford's evidence, expressed the view that $200 ought to satisfy the hospital. He answered: "Mrs. Finn, I do not know anything about what the hospital should be satisfied with, but I presume I am here to carry out the intentions as expressed to me by Superior—Paschal Finn's intentions;" and further stated that he gave her no advice, except that he told her the best thing she could do was to sign the power of attorney to enable her to give one-half of the money to the hospital, and she acted on his word or suggestion.

The plaintiff was not advised as to her rights. The Mother Superior, knowing what Dean Murray had said to the plaintiff, urged her to do what Dean Murray had suggested. The impeached transaction occurred in the hospital, after the plaintiff had been without sleep for two nights, watching her dying

husband, under the pressure of the language addressed to her by Dean Murray and the Mother Superior, and when, for the time being, she appears to have yielded to their influence over her. It is impossible to say that the gift was spontaneous.

Nor would I think the transaction would be less open to objection even if the alleged ante-nuptial agreement were clearly established. It was not legally binding upon the plaintiff, and she had no advice as to her being entitled to disregard it.

I am unable to attach any weight to the Mother Superior's contention that the transaction was intended merely for the protection of the plaintiff against her brother. Dean Murray's injunction to her had reference only to the $500 which the defendants were anxious to obtain, and Mr. Botsford's evidence is open to the one construction only, that he was endeavouring to secure that sum for the hospital. At the interview when Mr. Botsford drew the power of attorney, no reference whatever appears to have been made to the alleged danger to the plaintiff at the hands of her brother. Nor am I able to discover any thing in the transaction which is in the plaintiff's interest.

In the presence of the Mother Superior, the plaintiff appeared unable to offer any resistance; but, in her absence, she did raise some feeble objection, which was overborne by Mr. Botsford, who in his evidence stated that the plaintiff signed the power of attorney on his suggestion, he being then in fact solicitor for the hospital.

The undue haste that characterised the transaction is open to the inference that the Mother Superior feared that, freed from the influence of the hospital environment, the plaintiff might be unwilling to give the money to the hospital.

The relations of the parties and the circumstances of the case cast the onus on the defendants of shewing that the transaction was the free act of the plaintiff. That onus has not been discharged. On the contrary, the evidence shews that an undue advantage was taken of the plaintiff's situation. Unassisted she was unable to resist the influence of those who, on behalf of the hospital, were exercising pressure upon her. She was not a free agent, and had not that protection to which she was entitled before parting with her rights. In such circumstances, it is the duty of the Court to afford her such protection by undoing the transaction.

I am, therefore, of opinion that the judgment appealed from should be set aside, and that the plaintiff is entitled to recover the money with interest and to the costs of the action and of this appeal.

DIVISIONAL COURT. DECEMBER 12TH, 1910.

*DEVLIN v. RADKEY.

Vendor and Purchaser—Contract for Sale of Land—Possession Taken by Purchaser—Vendor without Patent for Land—Purchaser Failing to make Payments—Time Clause in Contract — Waiver — Judgment — Setting aside — Balance of Purchase-money Paid into Court — Vendor Treating Contract as Subsisting—Right of Purchaser to Redeem—Improvements Made by Purchaser—Costs.

Appeal by the defendant Rowe from the judgment of RIDDELL, J., 1 O.W.N. 988.

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

G. H. Kilmer, K.C., for the appellant.
J. McCurry, for the plaintiff.

The judgment of the Court was delivered by CLUTE, J.:—The plaintiff, as locatee of the Crown lands in question, entered into an agreement for the sale of the same for $600 to the defendants Radkey and Rowe, and it was "expressly understood that time was to be considered the essence of this agreement, and, unless payments are punctually made at the time and in the manner above mentioned, the said party of the first part is to be at liberty to resell the said lands."

Radkey transferred his interest to Rowe, and has now no further interest therein.

After the execution of the agreement, Rowe entered into possession and occupation of the lands and premises, and has been in possession and occupation thereof continuously ever since, except when, for a few days, he was dispossessed by the Sheriff. He has paid from time to time $320 on account of principal and interest.

Rowe, at the time the contract was entered into, believed that the plaintiff had obtained a patent for the land and that she intended to sell him and his co-purchaser the fee simple.

In March, 1907, Rowe made permanent improvements to the amount of $300 in buildings and $40 in clearing the land.

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

The plaintiff's patent was cancelled, and Rowe applied to be located, and stopped payment of any further amount to the plaintiff, and has continued to improve the land.

The plaintiff had obtained judgment against the defendant by default, which, however, was set aside, upon the defendant paying into Court $470.70 to abide the order of the Court, and he was allowed to retain possession till the trial.

The trial Judge found that the plaintiff was—until she obtained the judgment which had been set aside—willing to accept the balance of the purchase-money due under the agreement, but is not now, the land having been discovered to be more valuable than she thought. She now asks possession of the land, an account of the profits, and damages, as well as an injunction; but does not offer back the money she has received, or offer to pay for the permanent improvements.

The defendant claims specific performance and damages for illegal ejection.

It is pointed out in the judgment below that the clause making time of the essence of the contract makes no provision for the contract becoming void upon failure to pay. . . .

The judgment appealed from is for possession, upon the money paid on the contract being repaid to the defendant, with interest—the money in Court to be paid to the defendant. The result is, that the defendant loses all his improvements.

The defendant now contends that he is entitled to redeem, upon payment of the balance of the purchase-money, which he is ready and offers to pay, and which is now in Court. That he is so entitled cannot be doubted, unless he is precluded by the clause making time of the essence of the contract. No doubt, the giving of time is only a waiver, substituting the extended time for the original time, and not a destruction of the essential character of the contract: Barclay v. Messenger, 43 L.J. Ch. 449.

But here there is something more than that. The default, in the first place, was that of the plaintiff in not having title, and the plaintiff allowed the defendant to go on and make large improvements upon the premises and continue to make those improvements without notice by the plaintiff that she could not or would not make title. During the time that proceedings were pending for the cancellation of the patent, it does not appear that she, upon her part, was insisting or intending to insist upon the time clause, or that she entertained any idea of recouping the defendant for his improvements, in case she could

not make title. His application to the Crown was made apparently to save himself, and not to defeat her claim. . . .

[Reference to Labelle v. O'Connor, 15 O.L.R. 519.]

The present case is, I think, clearly distinguishable from the Labelle case. . . .

It would appear to me that the position taken by the plaintiff, upon the motion to set aside the judgment is inconsistent with that taken at the trial. She was insisting upon a certain balance being due; that amount was paid into Court as being the amount claimed by her to be due. Having regard to the fact that the clause with reference to time was disregarded in respect of all payments subsequent to the first; to the fact that, with the knowledge of the plaintiff, the defendant entered into possession and continued in possession and made improvements during this period when the time clause was so disregarded; and to the further fact that the plaintiff continued to treat the agreement as subsisting, and claimed the balance due thereon; that the delay was partly due to the want of title and the proceedings taken by the Attorney-General; and that the defendant, in the bona fide belief—as the trial Judge has found—that he was the true owner, continued to make improvements after the default judgment had been set aside, and he had been again let into possession: in short, having regard to all the facts and circumstances of this case, the only fair inference deducible therefrom, in my judgment, is that neither party regarded time as of the essence of the contract, but that both parties treated that clause as having been waived, and that the plaintiff ought not to be heard at once to affirm the contract, with a view of compelling the defendant to pay into Court the full balance of the purchase-money, and at the trial, when the balance of the purchase-money is in Court, to take the position that the agreement had been rescinded, and that she was entitled to treat him as a trespasser. . . .

[Reference to Dart on Vendors and Purchasers, 7th ed., p. 503; Fry, 4th ed., sec. 1120; King v. Wilcox, 6 Beav. 124.]

After writ issued and possession asked, the plaintiff, in unequivocal language, claims the balance of the purchase-money as still due, and in her statement of claim (para. 15) reiterates her willingness "up and until the judgment herein to accept from the defendant the amount due under the said agreement." The balance of the purchase-money could not be due her if the agreement had in fact been put an end to. She insisted on the contract to the extent of procuring a clause to be inserted in

the order, for payment into Court of the balance of the purchase-money as an amount still due to her. It seems difficult to imagine a clearer affirmation of the contract as existing than this was. It wholly disregarded the time clause which is now relied on to defeat the defendant's right to redeem. But "insisting on the contract, after the time-limit for completion, is an act waiving the right to insist on that time as essential;" Fry, sec. 121; Pegg v. Wisden, 16 Beav. 239. See also Webb v. Hughes, L.R. 10 Eq. 281; Hudson v. Bartram, 3 Madd. 440.

The parties in the present case have, I think, by their conduct, waived the clause in regard to time. . . .

[Reference to Rose v. Watson, 10 H.L.C. 672, 678].

The entire purchase-money has been paid either to the plaintiff or into Court, in terms of an order supported by an affidavit, wherein the plaintiff claimed the amount as still due.

In my opinion, it would be a gross injustice if the plaintiff was now permitted to change her position and to refuse to accept the balance due her, thus depriving the defendant of his improvements upon the land.

In the view I take of the case, it is unnecessary to consider, further, whether, having regard to the findings of the trial Judge, the defendant would not in any event be entitled to improvements made in the bona fide belief that he was the owner of the land.

A further objection was taken by the plaintiff's counsel that the defendant was precluded from moving to set aside the judgment entered at the trial, upon the ground that the plaintiff's solicitors had delivered to the defendant's solicitor a cheque for $395, being the amount of the purchase-money paid by the defendant and interest. But the defendant's solicitor has made an affidavit, which is not contradicted, that this cheque was given merely in order to have formal judgment entered to further the appeal, as he understood that the clerk would not enter judgment unless the amount were paid, and that the same was not given or received in satisfaction or in settlement of the claim. I do not think that what took place between the solicitors ought to prejudice the defendant's right.

The judgment should be varied and the defendant let into redeem, upon payment to the plaintiff of the full amount of the purchase-money, which will include a return of the cheque given to the defendant's solicitor for $395, and the payment out to the plaintiff of the $470.70 with interest accrued, now in Court, with costs to and inclusive of payment into Court.

The plaintiff, denying the right of redemption, should, in ordinary cases, pay the costs, but the conduct of the defendant in the present case is not free from censure. While still holding possession under the agreement, he applied to the Government in his own interest to be entered for the land, without giving notice to the plaintiff. He made default from time to time, and paid into Court the amount of the purchase-money only as a term by which he was allowed to defend.

Having regard to the peculiar circumstances of this case, I think there should be no costs, except as aforesaid, in the Court below or of this appeal.

DIVISIONAL COURT. DECEMBER 12TH, 1910.

*FOSTER v. RENO.

Assessment and Taxes—Distress for Taxes—Seizure of Animal on Premises of Person Taxed—Claim of Title through Person Taxed—Assessment Act, sec. 103—Action against Tax Collector—Justification of Distress—Validity of Appointment—Resolution of Municipal Council—Sufficiency—Position of de Facto Officer of Municipality.

Appeal by the plaintiff from the judgment of the County Court of Kent dismissing an action against a tax collector for wrongful distress for taxes.

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

W. E. Gundy, for the plaintiff.

M. Wilson, K.C., for the defendant.

The judgment of the Court was delivered by MIDDLETON, J.:—Upon the argument we held that the plaintiff had not successfully attacked the finding of fact that notice had been given as required by the statute fourteen days before distraining. Judgment was reserved to enable us to consider three contentions put forward upon his behalf:—

(1) That the mare in question was not liable to distress. Adair, the person assessed as owner of the land in question and the owner of the mare, made a chattel mortgage to one Shaw. As

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

further security a collateral note was taken by the mortgagee, indorsed by three men in some way interested in the racing of the mare. After the tax bills had been distributed and demand made, some anxiety was felt by these indorsers, and an arrangement was made, evidenced by a document recorded under the Act respecting Bills of Sale and Chattel Mortgages, by which the mare was transferred to the plaintiff to hold as security for the protection of the indorsers against their liability upon the note. The owner agreed to care for and exercise her, and was to be at liberty to enter her at the races. She was then removed from the premises and boarded at certain hotel stables. When out for exercise, Adair took her upon his premises for a temporary purpose, and she was then seized by the defendant, and ultimately sold—the proceeds being paid to the municipality.

Under sec. 103 of the Assessment Act (4 Edw. VII. ch. 23), the right to distrain for taxes is placed practically upon the same plane as the landlord's right to distrain for rent. The right is given to take "any goods and chattels on the land," when title is claimed, *inter alia*, by "purchase, gift, transfer, or assignment from the person taxed . . . whether absolute . . . or by way of mortgage or otherwise."

This horse was upon the land, and the plaintiff claims title through the person taxed.

We can find no reason why full effect should not be given to the words of the statute. At common law any goods of a third party, subject to certain well-defined exceptions not now material, could be taken for rent if found by the landlord upon the land. The landlord might not bring the goods of a stranger upon the land for the purpose of then distraining them: Paton v. Carter, Cab. & El. 183. The anomalous right of the landlord to take the goods of third parties for his tenant's debt (Gorton v. Falkner, 4 T.R. 565, and Challoner v. Robinson, [1908] 1 Ch. 49) is conferred upon the municipality to enable it to enforce payment of taxes.

(2) The plaintiff then contends that the defendant was not duly appointed tax collector, and that, when the taking of the chattel in question is sought to be justified, the defendant must prove his right to take strictly.

In 1908 the defendant was, it is admitted, duly appointed collector for that year. In 1909, the year in question, his appointment was by resolution and not by by-law. This is the ground of attack. Section 325 enacts that "the powers of the council shall be exercised by by-law." It has sometimes been assumed

that this section requires that all municipal action must be by by-law. This assumption ignores the composite nature of the municipal council. It is a legislative body—a very wide law-making power has been conferred upon it. This power must be exercised by by-law. It is also an administrative body. Many duties are imposed upon it, as to which it has no discretion —these duties it can discharge without the formality of a by-law. Indeed, the term by-law—a law enacted by a subordinate legislative body—cannot be appropriately used when speaking of the discharge of a statutory duty. Section 325 refers to the exercise of a municipal legislative power, and not to the performance of a statutory duty.

This distinction is recognised in Croft v. Town Council of Peterborough, 5 C.P. 141, . . . Pratt v. City of Stratford, 14 O.R. 260, 16 A.R. 5, and in the cases there collected.

Under sec. 295 it is the duty of the council annually to appoint assessors and collectors. There is no reason why this duty should not be discharged in any way indicating corporate action, e.g., by resolution, as in this case. Every duty imposed, no doubt, implies a power to discharge that duty—manifestly many of the minor duties imposed by law cannot contemplate or require a by-law, and may be well left to officers of the corporation, and the line must be drawn in some way. The distinction between legislative power and power as incidental to the discharge of a statutory duty is logical, and can be productive of no inconvenience.

This renders it unnecessary to consider the effect of sec. 321 relied upon by the defendant, and the third point arising upon the plaintiff's case, the position of a de facto officer of a municipality when his actions are directly attacked in proceedings against him personally. On this point there is a very valuable discussion in State v. Carroll, 22 Conn. 449; see also Green v. Burke, 23 Wend. (N.Y.) 490; Patterson v. Miller, 59 Ky. 493; Lynch v. Kimball, 45 Miss. 151; Schlencker v. Risley, 3 Scammon (Ill.) 483; Cumming v. Clark, 15 Vt. 653; Viner's Abr. (Officers, G., 3 and 41, vol. 16, p. 114).

The appeal fails and should be dismissed with costs.

MEREDITH, C.J.C.P. DECEMBER 13TH, 1910.

LATIMER v. PARK.

Contract—Formation—Letters and Telegrams—Sufficiency—Statute of Frauds—Vendor and Purchaser.

Action for the specific performance of an agreement by the defendant to sell to the plaintiff the east half of lot 2 in the 6th concession of the township of Georgina.

F. Arnoldi, K.C., for the plaintiff.
J. M. Clark, K.C., for the defendant.

MEREDITH, C.J.:—At the close of the argument, I disposed of all the questions raised except as to whether a contract sufficient to satisfy the Statute of Frauds was proved.

The defendant employed a solicitor named Archibald Crozier to advertise for tenders for the purchase of the land, and in answer to the advertisement three tenders were received, the highest of which was by Richard F. Cronsberry, who offered $4,010.

On the 16th October, 1909, Crozier wrote to the defendant, who resides at Edmonton, in the province of Alberta, enclosing the tenders, and informing him that rather than lose the land the plaintiff would "go the highest bid," and requesting the defendant to "wire" him (Crozier) acceptance or refusal, "as whoever gets the place is anxious to have it at once," and adding that the deed would be made to him.

This offer "to go the highest bid" was made by Crozier with the authority of the plaintiff, and the letter is headed "Re E. ½ lot 2, con. 6, Georgina."

To this letter the defendant replied by a telegram of the 24th October, 1909, in these words: "I accept John Latimer's bid for the farm."

On the following day Crozier wrote acknowledging the telegram, and forwarded to the defendant, at Edmonton, the conveyance in duplicate for execution.

On the 10th November following, the defendant forwarded the conveyance in duplicate, which had been executed, to the manager of the Metropolitan Bank at Sutton, accompanied by a letter referring to the conveyances as "deeds in duplicate E. ½ of lot 2, con. 6, township of Georgina, to A. Crozier, barrister,

Sutton, Ontario," and instructing the manager to deliver them to Crozier, on receipt of a marked cheque for $3,809.50, which represented the purchase-price, $4,010, less $200.50, the commission which it had been arranged that Crozier should receive for effecting the sale.

On the same day the defendant wrote to Crozier informing him of what he had thus done.

Owing to a letter which the highest tenderer, Cronsberry, had written to the defendant, the latter was led to suspect that Crozier had not acted fairly by him in the transaction, and on the 13th November he telegraphed and wrote the bank manager instructing him to return the deeds. Before the recall of the deeds, Crozier had given the manager the marked cheque upon receipt of which the defendant had directed the manager to deliver the deeds to Crozier.

After some correspondence between the defendant and Crozier, in which the latter denied the charge against him which Cronsberry's letter to the defendant seemed to impute, and after Cronsberry had written to the defendant telling him that the statements in his previous letter were made on hearsay, and that he had ascertained that there was no foundation for them, the defendant, on the 22nd December, wrote to Crozier acknowledging the receipt of a letter of his of the 13th December, telling him that he (the defendant) was "prepared to put the deal through with Mr. J. B. Latimer at any time he desires," adding, "This, of course, is without prejudice," and on the 27th December Crozier wrote to the defendant as follows: "Re east half of lot 2, concession 6, Georgina: Your letter of the 22nd instant received. Mr. John G. Latimer called this p.m. and instructed me to write you and state that he is prepared to close at once. Be kind enough to forward papers to manager here and oblige. A. Crozier."

The defendant, after this, appears to have again changed his mind, and wrote to Crozier on the 4th January, 1910, acknowledging the receipt of the letter of the 27th December, and saying: "I wish to say without prejudice that I am prepared to close the deal with Mr. J. G. Latimer, but on referring the matter to my wife I find that she declines to become a party to the contract."

Crozier on the 11th January, 1910, wrote to the defendant insisting that the transaction should be carried out, and the defendant on the 16th replied, "without prejudice," that his wife

had disapproved of the sale of the farm from the very first, and saying, "The deeds of the property in question will be executed to Mr. J. G. Latimer and delivered to him or his representative in Edmonton, Alberta, on consideration of the payment of the price in cash stipulated in the deeds."

It is unnecessary to refer to the subsequent correspondence further than to say that in a letter of 16th February, 1910, the defendant took the ground that he had not sold the farm to the plaintiff, and in another justified the position he had taken on the ground that Crozier was acting not for him, but for the plaintiff and himself, in the transaction.

In my opinion, upon this state of facts, a contract sufficient to satisfy the provisions of the Statute of Frauds has been proved. The parties to the contract, the subject-matter of it, and the price to be paid, appear in the correspondence, and the authority of Crozier to make the offer which the defendant accepted is not open to question.

The acceptance of the offer by the telegram of the 24th October, 1909, was, in my opinion, a sufficient acceptance to bind the defendant, but that is not all; it was followed by the letters of the 10th November to the bank manager and to Crozier, and by the letter of the defendant of the 22nd December and Crozier's reply of the 27th of that month.

I do not understand what the defendant meant by saying that his letter of the 27th December was without prejudice, but, whatever he may have meant, the plaintiff accepted his proposal by the letter of the 27th, and that made the letter of the 22nd as effectual for contractual purposes as if it had not contained those words. There is also the letter of the 4th January, 1910, which is a further confirmation on the part of the defendant of the bargain he had made.

The plaintiff is entitled to judgment for the specific performance of the contract with costs. If desired, there may be a reference as to title and to settle the conveyance, and further directions and subsequent costs will, in that event, be reserved.

SUTHERLAND, J. DECEMBER 13TH, 1910.

ROYAL HAMILTON YACHT CLUB v. JARVIS.

Assessment and Taxes—Tax Sale—Crown Lands—Assessment of Club in Respect of Interest therein—Assessment Act, secs. 2 (7) (*b*), 35—*Assessment Notice and Roll—Insufficient Description of Land—Warrant—Advertisement—Certificate—Failure to Collect Taxes by Distress—Assessment Act, sec.* 113—*Other Irregularities—Sale Attacked before Deed—Curative Sections,* 165, 172, 173—*Onus of Proving Valid Sale—"Business Assessment" of Club—Burlington Beach Act,* 7 *Edw. VII. ch.* 22—*Amending Act,* 9 *Edw. VII. ch.* 25—*Acquiescence—Appeal to Court of Revision—Further Appeal—Protest at Sale.*

Action to set aside a tax sale.

On the 1st September, 1891, the plaintiffs, an incorporated company, obtained from the Dominion Government a lease in writing for five years from the 1st May, 1891, at an annual rental of $25, of a part of the Burlington Canal Reserve, containing one-quarter of an acre. The lease was renewed at its termination for a further period of five years, but had not since been renewed, and the plaintiffs alleged that they had since continued to occupy portions of the land under the leave and license of the Government, paying no rent.

The plaintiffs erected upon the portion of the reserve demised to them a club-house and appurtenances.

In 1906 the assessor for the township of Saltfleet assessed the property of the plaintiffs, as half an acre, at $9,300, being $1,200 for the land, $5,000 for the building, and $3,100 for "business assessment," and the amount of the taxes imposed for that year amounted to $148.43. At that time the property formed part of the township.

On the 15th February, 1910, the treasurer of the county of Wentworth assumed to sell to the defendant the right, title, and interest of the owner other than the Crown in respect of one-half acre south of the canal on the bay side for the taxes of 1906, and gave the defendant a certificate of the sale.

The plaintiffs sought a declaration that their premises were not assessable; that the tax sale was void; and that the certificate was a nullity and should be delivered up to be cancelled.

W. S. McBrayne, for the plaintiffs.

W. M. McClemont, for the defendant.

SUTHERLAND, J.:—One ground of attack is that the lands upon which the buildings are erected are Crown lands, and therefore exempt from assessment. By the treasurer's certificate . . all that was purported to be sold was "the right, title, and interest of the present owner therein other than the Crown." . . .

[Reference to sec. 2, sub-sec. 7(*d*), of the Assessment Act, 4 Edw. VII. ch. 23; also sec. 35.]

In the circumstances . . . I think that, while the land itself is not liable for the taxes, the plaintiffs might be and were properly assessable in respect of their interest therein: Niagara Falls Park and River R.W. Co. v. Town of Niagara, 31 O.R. 29. . . .

The assessment notice for the year 1906 is produced and the assessment roll which corresponds therewith. The directions to the assessor are to be found in sec. 22, sub-sec. 3, of the Assessment Act. In the 6th column of the notice, the heading of which is, "Number of concession, street, or other designation of local division," all that appears is the word "Beach." Under column 7, "Number of lot or house," nothing is shewn at all. Under column 8, "Number of acres or other measurement," there appears "½."

It seems to me that sufficient particulars to be a substantial compliance with the statute, and to make it reasonably certain what is intended to be assessed, are not set out in this notice of assessment. . . . In the list of lands attached to the warrant of the warden, dated the 6th November, 1909, "commanding the treasurer to levy upon the lands for the arrears due thereon and for his costs," the description of the lands is as follows: "Municipality of Saltfleet, ½ acre, south of canal, bay side." When the land came to be advertised in the Ontario "Gazette" for the purpose of the proposed sale, all the particulars which were inserted in the advertisement were the following: "Municipality of Saltfleet, B. Beach, south of canal, bay side . . . ½ acre."

In the certificate issued to the defendant . . . the description is as follows: "All and singular the right, title, and interest of the present owner therein other than the Crown, which said parcel might be described sufficiently to enable the surveyor to lay out the same on the ground as follows, that is to say, south of canal, bay side, Burlington Beach, and formerly assessed to Royal Hamilton Yacht Club, containing by admeasurement ½ acre, be the same more or less."

In the above description not even the township nor the county appears. It seems to me, on account of this indefiniteness of description, that the sale in question cannot be upheld, but must be set aside. . . .

It appears that little or no attempt was made to collect the taxes by distress. . . . I think it is clear that there was at all times upon the premises sufficient property available for distress from which the taxes in question might have been made: Caston v. City of Toronto, 30 O.R. 16. The collector admits that he did not comply with sec. 113 of the Assessment Act. He seems to have acted in a careless and irregular way. . . .

[Reference to other irregularities in the warrant, etc.]

As the sale was attacked within a year and before any deed had been issued, the defendants are not in a position to take advantage of the curative sections, 165, 172, 173. The onus of proving a valid sale and a compliance with the statute is upon the defendants, and I think, in the circumstances of this case, they have failed to satisfy that onus: Essery v. Bell, 18 O.L.R. 76.

A part of the assessment is an amount of $3,100 for "business assessment." Having regard to the objects of the club and the evidence of the secretary, I think the case of Rideau Club v. City of Ottawa, 15 O.L.R. 118, has application, and that the plaintiffs are not a club within the meaning of sub-sec. 3 of sec. 10(*e*) of the Assessment Act, and that this portion of the assessment, in any event, would be invalid. . . .

[Reference to the Act respecting Burlington Beach, 7 Edw. VII. ch. 22, and the amending Act, 9 Edw. VII. ch. 25, sec. 22(*b*).]

It would appear . . . that, if the proceedings leading up to the sale had been regular, there was authority to sell the land.

It was argued . . . on behalf of the defendant that the plaintiffs had taken due notice of their assessment, had appealed therefrom to the Court of Revision, their appeal had been dismissed, and they did not pretend to be and were not in fact misled by any want of definiteness in the original assessment or in any subsequent proceedings.

It does appear in evidence that the appeal of the plaintiffs to the Court of Revision was dismissed. The plaintiffs sought to shew that they had launched an appeal to the County Court Judge, and produced a copy of their notice of appeal, with a registered letter certificate attached. No evidence was adduced, however, to shew that such notice ever reached the clerk of the township of Saltfleet, or that the appeal was further prosecuted.

The plaintiffs cannot, however, be said to have been quiescent in the matter of the sale in question. Under instructions from them, their solicitor appeared at the time of the sale and objected

thereto in the presence of the defendant, and before the sale was made. In fact, upon this protest being made, the property in question was temporarily withdrawn, and the solicitor for the plaintiffs retired. The treasurer, who was called, says that he reserved the right to put it up again, and did, and thereupon sold it to the defendant for the amount of the taxes and costs.

There will be judgment for the plaintiffs declaring the tax sale void, and the certificate a nullity, and directing that the latter be delivered up to be cancelled, with costs to the plaintiffs.

MIDDLETON, J. DECEMBER 13TH, 1910.

COUNTY OF WENTWORTH v. TOWNSHIP OF WEST FLAMBOROUGH.

Highway—Township Boundary Line—Deviation—Substituted Road—Assumption by County—Evidence—By-law—Plan—Dedication—Municipal Act, 1903, *secs.* 617, 622-24, 641, 648 *et seq.*

Action to recover $627.83, alleged to be due as one-half the amount expended upon a road alleged to be a "township boundary line not assumed by the county council," under sec. 648 et seq. of the Municipal Act, 1903.

J. L. Counsell, for the plaintiffs.
G. Lynch-Staunton, K.C., for the defendants.

MIDDLETON, J.:—Part of the road in question is the original road allowance—this lies between the Dundas road and the road between the 1st and 2nd concessions. As to this road the township is ready to pay its share, and, upon the evidence, the $100 already offered is ample. The remaining portion of the road in question consists of a road marked on Carroll's plan as "the Guelph road." This is east of and parallel to the town road; as surveyed, it lies entirely within East Flamborough, and runs south from the concession road to the Plains road, along the shore of Burlington bay. The concession road is open for a short distance between these two roads (and a little easterly), thus forming the connecting link between the travelled portion of the town line and the Guelph road.

It is said in answer to this claim that a road running from the mountain, in part along the boundary between lots 26 and 27

in the 1st and 2nd concessions in West Flamborough, and connecting with the Plains road some considerable distance west of the town line road as surveyed (and which for convenience I shall call the Stone road), constitutes a deviation of the town line, and that, upon this deviation being made many years ago, the original town line as surveyed, and then unopened, ceased to be a potential road.

North of the Dundas road, and below the mountain, the town line road has never been opened. Above the mountain, the town line road has been opened northerly, and is used throughout to the northern limit of the township and beyond.

At the brow of the mountain this road connects with what I have called "the Stone road," which winds down the mountain, and then follows the course already indicated. The travel coming down from the township road north of the mountain follows this Stone road, and reaches Hamilton either by the Dundas road or the Plains road.

The origin of the Stone road is obscure. The only evidence before me, and apparently the only evidence that can be obtained, is contained in by-laws 7 and 65 of the United Counties of Wentworth and Halton.

By-law 7, passed on the 31st January, 1850, recites that it is expedient to alter the line of road at the north-west angle of lot 26, 2nd concession, Flamborough West, and enacts that a road therein described shall be established. This road commences upon the mountain, where the travelled road intersects the original town line road, and descends the mountain by devious curves, ending where "the present travelled road between lots 26 and 27" is reached. This by-law is, no doubt, for the purpose of defining and in some respects altering a road down the mountain connecting two already established and travelled roads—above the mountain upon the town line and below the mountain upon the boundary between lots 26 and 27.

The second by-law, passed on the 31st March, 1853, "to establish the line of road down the mountain on or near the township line between East and West Flamborough," establishes the same road by the same description, save that it is made 66 feet wide, instead of 50. The inference is, that prior to 1850 this Stone road had become a county road. I do not think this road can be in any way regarded as a deviation of the town road. My reasons are given later in discussing the "Guelph road."

The origin of the "Guelph road" (i.e., the short road through Carroll's property, so-called for convenience) is as follows.

One Carroll, in December, 1843, purchased the land east of the town road and south of the concession road. The road may have existed upon the ground as a travelled road, but it is not mentioned in the conveyance. In April, 1855, Carroll made a plan of this land, which was registered on the 13th June, 1857. Upon this plan this road is shewn as laid out by him upon his own property. By deed of the 12th May, 1855, Carroll sold some lots according to this plan. Upon this plan the road allowance is dealt with as Carroll's property, though he had not then acquired any title to it. Carroll, in 1863, applied to the county council for a conveyance of the original road allowance, upon the ground that by the laying out of the road upon his own property, under the law then in force (similar to the present sec. 641(1)), he was entitled to it. On the 22nd June (minutes, pp. 27 and 29) this request was referred to the standing committee on roads and bridges, which on the 23rd June (p. 34) reported that, having examined his application, they recommend the council to comply with his request, upon condition of his furnishing a surveyor's report stating that the road given is sufficient for public purposes. This report was on the same day adopted by the council (p. 30). On the 14th December, 1863, a surveyor's report was presented and referred to the same committee, who reported that Carroll had complied with the request of the committee, and had furnished the report of Thomas A. Blyth, P.L.S., certifying that he had laid out a road or street leading from the marsh across the railway, and from thence in a north-westerly direction to the road allowance between the 1st and 2nd concessions as laid down in the plan, and that the same is sufficient for public travel. The committee recommend that the council pass a by-law conveying the road allowance to Carroll (minutes, p. 52); this request was adopted (minutes, p. 45). No by-law was passed, but this allowance was conveyed to Carroll. Carroll's plan, though made long before this conveyance, assumed to deal with this road allowance as part of his lands. Carroll in 1855 sold lands with reference to this plan.

The original road allowance, by reason of ponds, ravines, and marshes, was incapable of being used as a road.

The validity of the conveyance to Carroll without a by-law may be open to question, but that is quite beside the present dispute (see sec. 641).

When Carroll made and registered his plan and conveyed lands according to it, the street laid out was dedicated by him as a highway, and, upon acceptance by the township, would be-

come a township road. The action of the county as above outlined did not in any way indicate an intention upon its part to assume it as a county road. The county desired, as required by law, to assure itself that the road so laid out by Carroll in the township was adequate to accommodate the public travel, before conveying to him in recognition of, and *pro tanto* in compensation for, the road so dedicated, the unopened allowance for which then was, in view of the substituted road, of no public use. This road so given is not, in any sense, a deviation of the original road. It is a new road. It does not form any part of the town line road. True, it may serve to accommodate the travel which would have passed over the original road, if it had been practicable to open it, and if it had been opened.

I shall not attempt to define a deviation—a definition is the most dangerous of dicta; certainly the road with its deviation must still remain in substance the same road. In the case of town line roads it must, in a general way, still define and follow the municipal boundary, though it may, when deviating to surmount some physical difficulty in an economical manner, depart from the straight line shewn in the original survey. As long as the identity of the road remains, the minor departure from the direct course is not material, but when the situation is such that the original location is entirely abandoned and a new location is taken, then the road becomes a new, independent, and substituted road, and cannot be called a deviation of the original road.

In this view, the action fails.

Sections 622-24 and 648 speak of township boundary lines and do not speak of deviations. Section 617 says that a road shall "for the purpose of this section" be regarded as a boundary road, though it may deviate so as to be at some place wholly within one municipality. This may place a further obstacle in the plaintiffs' way.

I have not said anything with reference to the failure of the county to do what may well be essential to the foundation of its case, i.e., to comply strictly with the provisions found in sec. 648 et seq., as I thought it better to deal with the matter upon broader lines.

Action dismissed with costs.

DIVISIONAL COURT. DECEMBER 14TH, 1910.

McILHARGEY v. QUEEN.

Costs—Scale of—Action in County Court—Division Court Jurisdiction—Ascertainment of Amount—Production and Proof of Signature of Several Documents—Assumption of Covenants in Lease—Division Courts Act, sec. 62(d).

Appeal by the defendant from the order of the Judge of the County Court of Perth, in Chambers, allowing the plaintiff's appeal from the taxation of his costs by the clerk upon the Division Court scale, the action being in the County Court, and directing that the costs be taxed on the County Court scale. The question was, whether the amount in question in the action was so ascertained by the signature of the defendant as to be within the jurisdiction of a Division Court, the provision of the Division Courts Act (10 Edw. VII. ch. 32, sec. 62(*d*)) being that "an amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it."

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

R. T. Harding, for the defendant.

J. J. Coughlin, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:—We cannot agree with the view taken by the learned County Court Judge. The plaintiff's case depended entirely upon the documentary evidence. The Divisional Court in Slater v. Laboree, 9 O.L.R. 545, accepted the view that the Act applied to a case where the claim was made out by the production and proof of signature of several documents, even though one of those documents was not signed by the defendant.

We are also unable to agree with Mr. Coughlin's contention that the defendant's liability depended upon the possession taken under the defectively executed assignment of the lease. The defendant's liability arose not merely by virtue of the covenant running with the land, but also by virtue of his assumption, under his hand and seal, of the lessee's covenants in the lease in question.

In construing the amendment to the Division Courts Act in question, it is safer to regard it as establishing a new and inde-

pendent test of jurisdiction, rather than as an adoption of either of the conflicting theories accepted by different Courts in their attempts to construe the former enactment.

Appeal allowed with costs.

DIVISIONAL COURT. DECEMBER 14TH, 1910.

*RE ROWLAND AND McCALLUM.

Statute — Construction — Imperative or Directory — Municipal Drainage Act, 1910, *sec.* 48—*Appeal to County Court Judge —Time for Delivering Judgment—Prohibition.*

Appeal by one McCallum and the Corporation of the Townships of McKillop from the order of MEREDITH, C.J.C.P., in Chambers, ante 319, dismissing the applicants' motion for prohibition to the Judge of the County Court of Huron in respect of an order made by him on the 24th October, 1910, allowing the appeal of Michael Rowland, a ratepayer of the township, against his assessment for certain drainage work, and reducing his assessment to $50.

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

H. S. White, for the appellants.

W. Proudfoot, K.C., for Rowland.

The judgment of the Court was delivered by BOYD, C.:—The appeal was heard by the Judge on the 28th August, and he reserved judgment till the 28th September, when he gave an inapt judgment, the enforcement of which was stopped by an order of prohibition. Then, on the 24th October, he proceeded, apparently of his own motion, to give another judgment reducing the amount assessed against the appellant's property from $80 to $50.

A second prohibition was moved for and refused by MEREDITH, C.J.C.P., following Re McFarlane v. Miller, 26 O.R. 516, rather than In re Township of Nottawasaga and County of Simcoe, 4 O.L.R. 1; and leave to appeal was granted by Mr. Justice Riddell.

The language of the statute to be considered is as follows:

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

"At the Court so holden the Judge shall hear the appeal, and may adjourn the hearing from time to time, but shall deliver judgment not later than thirty days after the hearing:" 10 Edw. VII. ch. 90, sec. 48. This section first appears in 57 Vict. ch. 56, sec. 45. . . .

[Reference to 55 Vict. ch. 48, sec. 68(7); In re Ronald and Village of Brussels, 9 P.R. 232, 237, 238; the Ditches and Watercourses Act, 57 Vict. ch. 55, sec. 22, sub-sec. 6; Re McFarlane v. Miller, supra.]

The Judge is now directed thus: he *shall* hear, he *may* adjourn, but *shall* deliver judgment not later than thirty days from the hearing. The effect of the words "shall" and "may" is here emphasised, and it is rather a misfortune than otherwise to see a disposition to read them as interchangeable and convertible. The force of the Interpretation Act was upheld by Armour, C.J.O., in In re Township of Nottawasaga and County of Simcoe, 4 O.L.R. at p. 11, and it appears to me to be a wholesome rule to bring about some certainty in the present flux of judicial opinion. The trend of legislation in this and kindred provisions for drainage suggests to my mind that the time-limits prescribed are meant to be observed, and that summary and prompt and well-defined periods are given within which to bring to a practical close these disputes of merely local importance. . .

[Reference to Bowman v. Blyth, 7 E. & B. 48.]

The burden is on the party who asserts that "shall" is to be read as permissive, and not as peremptory; and the text of this section and its history fortify that position. No reasons appear for any relaxation of the time-limit, on the facts of this case.

The method of decision . . . in In re Township of Nottawasaga and County of Simcoe has been followed in the Supreme Court of Canada in In re Trecothic Marsh, 37 S.C.R. 79.

Where the statute plainly declares that proceedings shall be taken or acts done within a time definitely fixed, it is not well to multiply exceptions so as to hold that the words do not mean what they express, but are movable to suit the exigencies of particular cases.

I would follow In re Township of Nottawasaga and County of Simcoe and hold that the Judge was functus officio at the end of the thirty days fixed by statute.

Appeal allowed and prohibition granted. No costs.

CLUTE, J. DECEMBER 14TH, 1910.

MURPHY v. TOWN OF SANDWICH.

Assessment and Taxes—Sewer Rate—Frontage Tax—By-law—Assessment of Lands not Fronting on Street Named—Confirmation by Court of Revision—Further Appeal not Taken—Sale for Taxes Illegally Imposed—Municipal Act, 1903, *secs.* 664, 665, 668, 669—4 *Edw. VII. ch.* 23, *secs.* 68, 78—10 *Edw. VII. ch.* 88, *sec.* 19—*Property not Assessable—Setting aside Tax Sale.*

The plaintiff, who was and had been since the 15th July, 1903, the owner of a lot of 50 feet in width fronting on Main street in the town of Sandwich, and running parallel with Huron street, and 8 feet distant therefrom, 280 feet to the water's edge of the river Detroit, brought this action to have it declared that her land was not liable for any part of the cost of a certain sewer drain on Huron street, and to restrain the defendant corporation from assessing the same for any part of the cost of the drain, and from executing a conveyance to the defendant Reaume, of the plaintiff's land, made in pursuance of an alleged sale thereof for taxes alleged to be due in respect of the drain.

M. Sheppard, for the plaintiff.
F. D. Davis, for the defendants.

CLUTE, J.:—A by-law No. 301 was passed on the 27th October, 1903, reciting that a sufficiently signed petition was presented to the council by the owners, praying for the construction of a sewer along that portion of the Huron Church line from the channel bank of the Detroit river to a point opposite Assumption College, and enacting that the plans and specifications of Newman, C.E., be adopted, and that the mayor be authorised to contract for the construction of the sewer, and that the cost of the sewer be met by a frontage tax, and that Newman be appointed a commissioner to ascertain and determine what real property will be immediately benefited by the construction of the sewer, and to ascertain the proportions in which an assessment is to be made on the portions of property so benefited, to meet the cost of construction.

On the 31st August, 1904, Newman made a report shewing J. L. Murphy (or Anna M. Murphy) to be owner of part of an

Indian Reserve having a frontage of 269 feet, with proportionate cost $311.50, or $23.97 a year for twenty years.

By-law No. 301 was not supported by the petition required by law in such case, and no attempt was made at the trial to support it. It shews, however, that the assessment was to be made by a frontage tax.

On the 10th February, 1905, by-law No. 321 was passed. This by-law recites that the Rev. R. McBrady and others have petitioned to have a sewer built on Huron Church line between the channel bank and a point opposite Assumption College, and also recites the frontage liable for assessment, as stated in Newman's report, which is annexed thereto. It then provides for the issue of debentures, and the raising of a sum yearly to pay the same. The lands are all described as fronting on Huron Church line street. All the other lots are described by lot number, except the plaintiff's, which is described as "Pt. Ind. Reserve," with a frontage of 269 feet on Huron street, and is assessed at $311.50 as its share, payable $23.97 yearly for 20 years. In the by-law the name first entered is J. L. Murphy, and the letters "J.L." are struck out and "Anna M." inserted both in the copy produced and in that in the registry office. It does not appear when the change was made, but it is likely that, when Newman made his report, he was not aware that the plaintiff had become a purchaser of part of the Indian Reserve. The block formerly assessed to J. L. Murphy had a frontage of 326 feet on Main street and 269 on Huron street, and it is this 269 feet frontage that Newman probably had reference to in his report.

Now, after the sale to the plaintiff in 1903, the only part of this block fronting on Huron street was the eight feet on Main street and 269 feet on Huron street. The by-law did not purport to charge any lands not fronting on Huron street.

The plaintiff's lands are described in the assessment rolls as follows: 1904, 1905, and 1908, West Main street, N. Pt. Ind. Reserve, 50 ft. In 1906, West Main street, Pt. Ind. Reserve, 50 ft. In 1907, West Main street, Pt. Ind. Reserve, 50 ft.—not stating it to be the north part.

In the collector's roll it is also declared as the north part of the Indian Reserve, except for the year 1907, when it is described as the middle part of the Indian Reserve, and the amount placed in the collector's roll against the plaintiff for each of the years 1905 to 1909, inclusive, is $23.95.

In 1904 the plaintiff gave notice of objection to the assess-

ment of her lands on account of the sewer, because there was no proper petition presented or by-law passed for said sewer, and because the property did not drain or front on Huron street, and that she was not the owner of the land fronting on Huron street. The council passed a resolution "that the matter rest as it is." The Court of Revision confirmed the assessment, and no appeal was taken therefrom. The sewer was built before the by-law of 1905 was passed.

Under a warrant dated the 10th October, 1908, at an adjourned sale after twelve publications, the lands were sold for $81.73 to the defendant Reaume, being the taxes claimed for the sewer, with interest and costs, the general rate having been paid. . . .

[Reference to the provisions of secs. 664, 665, 668, and 669 of the Municipal Act, 1903.]

It is under sec. 669 that proceedings were taken by the council. The authority for the by-law and for the assessment and roll to be made and levied thereunder is thus limited by the statute to such property benefited "according to the frontage thereof." The frontage given in the by-law and Newman's report has reference to Huron street only. The by-law expressly recites that the annual sum of "$266.53 will be a special rate on the aforesaid assessable property on the Huron Church line." The plaintiff's lot does not front on Huron Church line, and if benefited—which the plaintiff denies—does not fall within the case provided by the statute.

In my opinion, there was no authority for assessing lands not fronting on Huron street in pursuance of this by-law. Whether a by-law could be so framed and proceedings so had as to render lands benefited, but not fronting on the line of the proposed sewer, assessable, it is unnecessary here to decide. The lands in question not being within the scope of the by-law, the assessment and all further proceedings thereunder are, in my opinion, void and of no effect; there could be no taxes imposed, and so no taxes in arrear for which a valid sale could be had.

Mr. Davis urged that 10 Edw. VII. ch. 88, sec. 19, amending 4 Edw. VII. ch. 23, sec. 78, covered the present case. Section 68 of the last-mentioned Act provides for an appeal to the County Court Judge, not only against a decision of the Court of Revision on an appeal to the said Court, but also against omission, neglect, or refusal of the said Court to hear or decide an appeal. Section 78 of the same Act gives power

to the County Court Judge to re-open the whole question of the assessment, so that omissions from or errors in the assessment roll may be corrected, and the accurate amount for which the assessment should have been made and the person or persons who should be assessed may be placed upon the roll by the Judge. The Amending Act declares that the Court of Revision and the County Court Judge have and always have had jurisdiction to determine, not only the amount of any assessment, but also all questions as to whether any persons or things are or were assessable or are or were legally assessed under the Act. That is pretty broad. Does it cover the present case? If this were a case of general assessment under the Act, I should be inclined to think that, inasmuch as the statute expressly makes provision whereby the assessment roll can be so amended as to correct all errors and to have entered on the roll the proper person and property to be assessed, the neglect of a person to have this done might be fatal to his right to appeal to this Court. But in this case it is not the assessment that is the foundation of the tax, but the by-law, and it has relation only to property fronting on the line of the sewer. The provisions above referred to do not cover such a case, do not authorise the correction or extension of the scope of the by-law, without which there can be no assessment whatever. The case is not that the wrong person is assessed. It is that the property is not assessable at all under this special rate. The amending Act, indeed, gives the Court of Revision or a Judge jurisdiction to determine "all questions as to whether any person or things are or were assessable or are or were legally assessed or exempted from assessment under the provisions of the Act." That is under the Assessment Act. A case of this kind is not within the Assessment Act. . . .

[Reference to sec. 664, sub-secs. 6 and 7, of the Municipal Act, 1903.]

There is no power given by the Assessment Act or the amending Act, so far as I can see, to either Court of Revision or Judge, to amend the special by-law or the report of Newman, so as to bring the plaintiff's property within its purview.

Taking the view as above indicated, it is unnecessary to consider whether the irregularities charged in connection with the proceedings for sale are sufficient to invalidate it or not.

Let it be declared that the plaintiff's lands in the pleadings mentioned are not within by-law 321, nor liable to any assessment thereunder, nor chargeable therewith; that the tax sale

in the pleadings mentioned, and proceedings taken in connection therewith, are void and of no effect, in so far as the same assume to deal with or affect the plaintiff's said lands; and let the defendant corporation be restrained from further proceedings with the sale thereof or from executing a deed thereof to the defendant Reaume; and let the defendants be restrained from putting a cloud on the plaintiff's title to said lands or continuing the same thereon.

The plaintiff is entitled to the costs of the action against the defendant corporation; and the defendant Reaume is entitled to be repaid all sums of money paid by him on account of the purchase of the plaintiff's said lands, with interest and the costs of his defence.

DIVISIONAL COURT. DECEMBER 15TH, 1910.

*COLVILLE v. SMALL.

Champerty—Action by Assignee of Claim—Agreement to Divide Fruits—Invalidity—R.S.O. 1897 *ch.* 327, *secs.* 1, 2—*Illegality—Public Policy—Dismissal of Action—Con. Rules* 259, 616.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 22 O.L.R. 33, ante 77, dismissing the action, upon an issue of law, upon the ground that the plaintiff was suing by virtue of a champertous assignment.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

W. M. McClemont, for the plaintiff.

J. L. Counsell, for the defendant.

FALCONBRIDGE, C.J.:—I agree with the judgment appealed against, on the grounds set forth therein.

The appeal must be dismissed with costs.

BRITTON, J.:—I agree that the appeal of the present plaintiff must be dismissed, but nothing in the present action, or its result, should prevent the recovery by the assignors, Remo Gori

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

& Co., or prejudice them, in an action for any just claim they may have against the defendant, for any matter or thing mentioned in the statement of claim herein.

RIDDELL, J., for reasons stated in writing, agreed that the appeal should be dismissed with costs.

MEREDITH, C.J.C.P. DECEMBER 14TH, 1910.

RE FINGERHUT AND BARNICK.

Deed—Construction—Variance between Grant and Habendum —Estate—Survivorship—Vendor and Purchaser.

Motion under the Vendors and Purchasers Act, by the vendor, Becca Fingerhut, in respect of an objection made by the purchaser to the vendor's title.

L. M. Singer, for the vendor.
J. R. O'Connor, for the purchaser.

MEREDITH, C.J.:—The vendor claims that, having survived her husband, Jacob Fingerhut, she is now the owner in fee simple of the land sold.

The conveyance under which she claims is dated the 24th February, 1903, and is made between Michael Steinworzel, of the first part, Rosa, his wife, of the second part, and the vendor and her husband of the third part; the grant is "unto the said parties of the third part or the survivor of them in fee simple," and the habendum is in these words, "to have and to hold unto the said parties of the third part, their heirs and assigns, to and for their sole and only use, forever."

It is unnecessary, in the view I take, to determine whether the grant in this conveyance is controlled by the habendum, and the latter is to govern, or whether the habendum is to be rejected.

If the grant is to govern, the vendor, having survived her husband, is entitled as survivor to the whole, and, if the habendum is to govern, the husband and wife did not take as tenants in common by force of sec. 11 of the Law and Transfer of Property Act (R.S.O. 1897 ch. 119), because an intention sufficiently appears on the face of the conveyance that the survivor was to take, and the vendor, having survived her husband, takes the whole.

There will be a declaration that the objection taken by the purchaser is not entitled to prevail, and, as the parties have agreed that there shall be no costs awarded to either of them, there will be no order as to costs.

DIVISIONAL COURT. DECEMBER 15TH, 1910.

RE HORSESHOE QUARRY CO. AND ST. MARY'S AND WESTERN ONTARIO R.W. CO.

Arbitration and Award—Dominion Railway Act—Award under —No Provision for Enforcement—Order under Ontario Arbitration Act—Jurisdiction of High Court.

Appeal by the railway company from an order of MEREDITH, C.J.C.P., directing the enforcement of an award, by payment to the London and Western Trust Co. of $2,100, the amount awarded, together with costs of arbitration.

The appeal was on the ground that, the provisions of the Dominion Railway Act, not having been complied with, the award was of no effect, and that the respondents should accept the amount offered or there should be a new arbitration.

The question of the jurisdiction to make an order under the Ontario Arbitration Act for the enforcement of the award was raised upon the argument before BOYD, C., LATCHFORD and MIDDLETON, JJ.

C. A. Moss, for the railway company.

W. Proudfoot, K.C., for the Horseshoe Quarry Co.

R. S. Robertson, for the London and Western Trust Co.

BOYD, C.:—The Dominion statute as to railways provides no method of enforcing the award by application to the Court. An appeal is provided for, which is to be conducted according to the practice and procedure, as nearly as may be, regulating appeals from an inferior Court. It is futher provided that the right of appeal shall not affect the existing law and practice in any province as to setting aside awards: R.S.C. 1906 ch. 37, sec. 209 (2), (4).

The award as confirmed on appeal is to be final and conclusive: sec. 197; and all the papers, depositions, and exhibits

are to be filed with the records of the Court: sec. 203; that is, the High Court, in Ontario: sec. 2 (7). Section 220 provides that any preceeding relating to the ascertainment or payment of compensation, etc., shall, if commenced in a superior Court having jurisdiction, be continued therein.

These provisions recognise the supervisory and directory powers of the provincial Courts, and are also a recognition that the existing law and practice of the province as to setting aside awards is not interfered with. The argument *a silentio* is very strong, that there is no interference with the existing law and practice of the province as to enforcing awards.

The absence of any provision for enforcing the award in the Dominion statute leaves it open to refer to provincial legislation.

The Arbitration Act, now found in 9 Edw. VII. ch. 35, declares (sec. 4) that this Act shall apply to every arbitration under any Act passed before or after the commencement of the Act, as if the arbitration were pursuant to a submission, except so far as this Act is inconsistent with the Act regulating the arbitration or with any Rules or procedure authorised or recognised by that Act. And sec. 14 provides that an award may, by leave of a Court or a Judge, be enforced in the same manner as a judgment or order to the same effect.

The former practice in Equity was that, by making the submission a rule of Court, the Court became possessed of the matter, and thereafter an order to pay, to be followed by execution, would be granted whenever an action at law would lie upon the award: Armstrong v. Cayley, 2 Ch. Ch. 163. This formality is now dispensed with—by the very appeal to the Court it is seised of the whole matter, and that same Court may well act summarily in enforcing the final award which has been declared as against all objections on the appeal. This term of the decision now under appeal is to be affirmed as a most convenient and satisfactory practice.

The result is, that the order of the Chief Justice of the Common Pleas is affirmed on all points, with costs to be paid by the railway company.

LATCHFORD, J., concurred.

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

BRITTON, J., IN CHAMBERS. DECEMBER 15TH, 1910.

CANADIAN PACIFIC R.W. CO. v. ROSIN.

Evidence—Order for Examination de bene Esse of Defendant about to Go Abroad—Con. Rule 485—Discretion—Appeal.

Appeal by the plaintiffs from an order made by the Local Master at Ottawa directing that the evidence of the defendant be taken de bene esse before the Master, pursuant to Con. Rule 485.

W. L. Scott, for the plaintiffs.
T. F. Nelles, for the defendant.

BRITTON, J.:—It was not objected that such an order was outside what was contemplated by Rule 485, but it was contended that there is no precedent for such an examination of the defendant, who, merely for his own convenience or business purposes, contemplates going abroad, so that possibly he will not be able to attend the trial and give evidence viva voce in open Court.

On the merits, I should think the plaintiffs would be rather pleased than otherwise to have the evidence taken, so that they would have it in black and white long before the trial could take place; but, apart from that, there is a danger, more or less, in any case where the party is going over the ocean, that something may occur to prevent his being able to attend the trial.

In the case of Warner v. Mosses, 16 Ch. D. 100, the Master of the Rolls, at p. 102, speaks of the Rule which is identical with 485: "I do not intend to cut down the generality of its terms, but it is confined to cases in which it appears necessary for the purposes of justice."

I cannot see that any injury can be done the plaintiffs by having this evidence taken de bene esse, but it may be an injury to the defendant if it were not taken, if his proposed business trip is of so important a character that he cannot reasonably be asked to put it off and wait for the trial of this action. There is a possibility of his not being able to attend the trial through no fault of his own. There may be an accident to the defendant, or unavoidable delay either on land or of the ship on the ocean.

Upon what took place on the argument, should I allow the appeal, it would be upon the terms that, if the defendant is not able to be present at the next sittings for the trial of causes at Ottawa, the plaintiffs should not proceed with the trial at that sittings.

With the order as it stands, the plaintiffs will not be subject to any possible delay. They will be fully informed as to what the defendant intends to say in defence.

The practice under Rule 485 should be the same as that governing in an application to take the evidence, under commission, of a party to a suit who went abroad after the commencement of the action, and who could not, without loss, attend the trial. The matter was fully threshed out and considered in Ferguson v. Millican, in the Court of Appeal, 11 O.L.R. 35. There the defendants were allowed to have their evidence taken on commission for use at the trial. Before granting a commission the Court has to be satisfied that the application is made bonâ fide. There seems a good business reason in this case. As "in an application for commission, the discretion of the Court is dominant. It is impossible to lay down any general rule as to when a commission will be granted."

Here the defendant seeks not to delay the plaintiffs in going to trial. He simply asks that he be not delayed or hindered in his business.

So far as I can see, there is nothing in the circumstances of the case which would render a cross-examination of the defendant more effective if given viva voce in Court than if taken before the Master. It is an action for damages for breach of contract.

Was the alleged agent of the defendant authorised to enter into the contract of the breach of which the plaintiffs complain?

Upon consideration of the case, I cannot see that any injustice will be done to the plaintiffs by allowing the defendant to have his evidence taken de bene esse. It is the defendant who takes the risk. If he is not here to meet evidence which may be given against him, if able to meet it, so much the worse for him.

In short, dealing with the present case only, it seems to me necessary for the purposes of justice that the order stands.

I dismiss the appeal; costs in the cause to the defendant.

CLUTE, J., DECEMBER 15TH, 1910.

*HOUGHTON v. MAY.

Execution—Seizure of Ship by Sheriff under Fi. Fa.—Ship Wrongfully Brought by Execution Creditor or with his Connivance from Foreign Waters into Sheriff's Bailiwick—Issue as to whether Ship Exigible—Public Policy—International Law—Ashburton Treaty, art. 7.

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

This was an issue in which the plaintiff affirmed and the defendant denied that the ship "Houghton," seized or taken on or about the 19th April, 1910, by the Sheriff of Essex, under an execution issued in May v. Houghton, was improperly brought by the defendant, or with his connivance by others, into the bailiwick of the Sheriff of Essex, or came within his bailiwick under such circumstances that the ship was not exigible in execution, and that the seizure was an abuse of the process of the Court, and the ship should be released.

A. H. Clarke, K.C., for the plaintiff.
E. S. Wigle, K.C., for the defendant.

CLUTE, J. (after stating the facts):—All the circumstances together lead me to the conclusion, without the least doubt, that the vessel was cut away for the purpose of having her drift to the opposite shore. . . Advantage was taken of the wind and current to place her in a position where she might be seized. I find as a fact that that was done for the purpose of enabling seizure to be made. I am unable to say from the evidence that it was done by the direction of the defendant. I think it was done by his friends whom he had on the look-out, and who were acting for and on his behalf, after possibly being expressly told so to do. I think it is not going too far to say that it was expected that it would occur. . . .

Upon the whole evidence, I find as a fact that the vessel was cut loose either by the orders of the defendant or with his connivance. . . . .

Taking the fact, then, to be that the vessel was cut loose and brought from the American side to Canadian waters for the express purpose of enabling the sheriff to make a seizure, was the boat liable to seizure? . . .

[Reference to Sm. L.C., 11th ed., vol. 1, p. 117, and cases cited; De Gondouin v. Lewis, 10 A. & E. 117; Co. Litt. 148b.]

In my opinion, it would be against public policy to permit a seizure under circumstances such as are disclosed in this case. It would, I think, create international trouble if property was permitted to be brought wrongfully by an execution creditor from a foreign country within the bailiwick of a Sheriff for the purpose of seizure, no matter whether or not the execution creditor was implicated in the removal.

In the present case, upon my findings, there was a trespass committed, if not a crime, and, as the defendant seeks to take advantage of the wrongful act, he ought not to be permitted to

do so: Edgerton v. Barlow, 4 H.L.C. 1, 196; 32 Cyc. 1251, where the American cases are collected. . . .

[Reference to the Ashburton Treaty (1842), art. 7.]

It is not clearly apparent that this article of the Treaty applies to the channel between Detroit and Windsor; but, if it did apply, I do not think it could help the plaintiff, if his property was properly within the bailiwick of the Sheriff. The Treaty would not, I think, prevent the same being seized.

Since the argument, Mr. Wigle has referred me to a couple of cases in the United States Federal Court, Re Wenibogo, 205 U.S. 354, 362, and Davis v. Cleveland, 217 U.S. 157. I do not think these cases throw any light upon the present question. They have relation to the Inter-State Commerce Law, which provides for through routes, and exempts in certain cases cars from attachment.

Issue found in favour of the plaintiff, with costs of the order directing the issue and incident thereto, the extra costs occasioned by the postponement of the sale, and the costs of the trial of the issue and judgment.

WARD v. CANADIAN NORTHERN R.W. CO.—FALCONBRIDGE, C.J.K.B.—DEC. 10.

Railway—Injury to Servant in Yard—Defective System—Negligence—Evidence—Finding of Jury.]—Action for damages for injuries sustained by the plaintiff, a servant of the defendants, in a railway yard, by reason of the negligence of the defendants. The plaintiff alleged negligence at common law, and the jury found that there was a defective system, and assessed the plaintiff's damages at $2,500. A motion was made for a nonsuit. The Chief Justice holds that there was evidence to go to the jury, and that he could not properly have given effect to the motion for a nonsuit. He has nothing to say regarding the alleged disqualification of one of the jurors. Should the defendants' counsel treat the matter seriously, he must make his plea thereanent in another place. Judgment for the plaintiff for $2,500 and costs. A. G. MacKay, K.C., for the plaintiff. A. J. Reid and R. H. M. Temple, for the defendants.

VACHON v. CROWN RESERVE MINING CO.—MASTER IN CHAMBERS. —DEC. 12.

Parties—Joinder of Defendants—Separate Causes of Action—Tort—Breach of Contract—Pleading.]—Motion by the de-

fendants to strike out so much of the statement of claim and prayer for relief as dealt with the claim against the defendants the Maryland Casualty Co. The statement of claim set out that the plaintiff on or about the 28th November, 1909, was seriously injured while in the service of the defendants the Crown Reserve Mining Co., and that, upon his making a claim for damages against those defendants, the defendants the Maryland Casualty Co. began negotiations with the plaintiff on behalf of themselves and the mining company, looking to a settlement, and that finally, on the 14th May, 1910, an agreement was made between the plaintiff and defendants, under which the defendants were to pay $3,500 in full settlement to the plaintiff; but that on the 28th May the defendants refused to carry this out. The plaintiff claimed from both defendants payment of this $3,500, with interest from the 14th May, 1910, or, in the alternative, $15,000 damages from the mining company. *Held*, that the plaintiff was seeking to join two entirely separate and distinct causes of action—first, an action of tort against the mining company, and, second, an action for breach of an alleged agreement of settlement—and these could not be joined, being inconsistent and mutually destructive, and not both against the same defendants. Reference to Stitt v. Arts and Crafts Limited, 11 O.W.R. 645, 647; Andrews v. Forsyth, 7 O.L.R. 188; Quigley v. Waterloo Manufacturing Co., 1 O.L.R. 606; Evans v. Jaffray, ib. 614, 621. However numerous the defendants, there must be only one claim for relief, based on one injuria in which all are alleged to be implicated. Motion granted with costs to the defendants in any event. The plaintiff to elect in a week on which cause of action he will proceed, and time for defence to run therefrom. G. M. Clark, for the defendants. J. A. Macintosh, for the plaintiff.

CLARKSON v. LINDEN—FALCONBRIDGE, C.J.K.B.—DEC. 12.

Pleading—Statement of Claim—Motion to Strike out—Action by Liquidator—Leave of Master—Irregularities—Amendment—Parties—Company.]—Motion by the defendants to strike out the statement of claim and to dismiss the action, on the grounds that the provisional liquidator has no right to bring the action in his own name, that two alleged causes of action are unproperly joined, that no reasonable cause of action is shewn, and on other grounds. FALCONBRIDGE, C.J.:—I do not conceive that I have jurisdiction, on this application, to set aside

or treat as a nullity the order of the learned Master in Ordinary (in winding-up proceedings, allowing the action to be brought), for any of the alleged grounds of irregularity. The plaintiff has found it necessary to ask leave to amend his statement of claim, and he may amend as proposed in the memorandum filed. He also has leave, if advised, to add the insolvent company as a party plaintiff. The defendants' applications are, with this exception, dismissed. As success is divided, costs will be in the cause to the successful party. T. Hislop, for the defendants. W. A. Lamport, for the plaintiff.

MANSELL v. ROBERTSON—MEREDITH, C.J.C.P., IN CHAMBERS.—DEC. 13.

Security for Costs—Libel—Newspaper—Assets in Jurisdiction—Insufficiency.]—Appeal by the plaintiff from the order of the Master in Chambers, ante 337, requiring the plaintiff to give security for costs. Appeal dismissed with costs. C. H. Porter, for the plaintiff. J. T. White, for the defendant.

GIBSON v. TORONTO BOLT AND FORGING CO.—MEREDITH, C.J.C.P. —DEC. 13.

Particulars—Statement of Defence—Discovery.]—Appeal by the defendants from the order of the Master in Chambers, ante 257, requiring the defendants to deliver particulars of the statement of defence. Appeal dismissed with costs in the cause to the plaintiff; the defendants to have ten days for delivery of particulars. M. Lockhart Gordon, for the defendants. W. G. Thurston, K.C., for the plaintiff.

Re HOCKING—FALCONBRIDGE, C.J.K.B., IN CHAMBERS.—DEC. 13.

Payment out of Court—Absentee—Presumption of Death—Letters of Administration.]—An application for payment out of Court of moneys standing to the credit of William Hocking, presumed to be deceased, having been an absentee for twenty years. Upon production of letters of administration, an order may issue for payment out of Court to the administrator: Re Coots, 1 O.W.N. 807; Re Dwyer, ib. 889. No costs of this application either between solicitor and client or otherwise. L. M. Singer, for the applicant. J. R. Meredith, for the Official Guardian.

BLAIR v. BRUCE—DIVISIONAL COURT.—DEC. 13.

Contract—Action to Recover Money Paid—Evidence—Failure to Establish Contractual Relation between Parties.]—Appeal by the defendant from the judgment of the Judge of the District Court of Nipissing in favour of the plaintiff in an action to recover $1,100, alleged to have been paid by the plaintiff to the defendant for a mining claim. LATCHFORD, J., in a written judgment, expressed the opinion that the findings of the District Court Judge were based upon a misconception of the true nature of the transaction between one Jones, who acted for the plaintiff in purchasing the claim, and one Pullis, who was the actual vendor. He said that, apart from the form of the transfer, there was never any contractual relation whatever between the defendant and the plaintiff represented by Jones. The real transaction was a sale to Jones by Pullis, at a profit of $200, of the option which Pullis held from the defendant as attorney for one McCarthy. Apart from the suggestive questions of the plaintiff's counsel to his own witness, and the witness's affirmative answers—which could carry but slight weight in any case, and none where, as here, directly contradicted—there was nothing to shew agency on the part of Pullis, or collusion between Pullis and the defendant, or bad faith or misconduct on the defendant's part in staking the claim. FALCONBRIDGE, C.J.K.B., and BRITTON, J., agreed that, upon the evidence, the appeal should be allowed with costs and the action dismissed with costs; and that was the order of the Court. W. M. Douglas, K.C., for the defendant. R. McKay, K.C., for the plaintiff.

LAISTER v. CRAWFORD—MASTER IN CHAMBERS.—DEC. 15.

Parties—Joinder of Plaintiffs—Separate Causes of Action—Trespass to Land—Assault—Election—Pleading—Special Damage.]—Motion by the defendants (before pleading) for an order directing an amendment of the statement of claim because it is as it stands embarrassing, or requiring the plaintiffs to elect which claim they will proceed on in the action. The action was brought by a mother and daughter against the next-door neighbour of the mother, and against a contractor employed by the latter to do repairs to her house, for trespassing upon the land and premises of the elder plaintiff (the mother), and for assaulting the other plaintiff (the daughter) whereby she became ill, and her mother incurred expense for medical attendance, etc., and was deprived of the daughter's services. The Master said

that two distinct causes of action were joined, trespass to land and assault, and with the former the daughter-plaintiff had no concern. The action should be confined either to an action for the trespass by the mother alone or to an action for the assault by both plaintiffs; in the latter event, if any claim was being made for the expenses caused by the daughter's illness, details should be given, as this was a matter of special damage. The plaintiffs to elect accordingly. Reference to Bank of Hamilton v. Anderson, 7 O.L.R. 613, 8 O.L.R. 153; Agar v. Escott, 8 O.L.R. 177. A. J. Russell Snow, K.C., for the defendants. A. T. Hunter, for the plaintiffs.

DAVIDSON v. TORONTO R.W. CO.—DIVISIONAL COURT—DEC. 15.

Master and Servant—Injury to Servant—Negligence—Finding of Jury—Evidence—Negligence of Fellow-servant not in Superintendence.]—Appeal by the defendants from the judgment of MULOCK, C.J.Ex.D., upon the findings of a jury, in favour of the plaintiff, in an action by a linesman employed by the defendants on their tower repair-waggon, for damages for injuries sustained, as the plaintiff alleged, by reason of the breaking of a guy wire while he was repairing a broken connection in the trolley line, whereby he was thrown to the ground. The plaintiff's damages were assessed at $975, and judgment given for that amount, with costs. The only negligence found by the jury was that of the defendants' foreman, Sullivan, in not seeing that the ties of the guy wires with the wood-strain were safe. It was a defect in the making of one of these ties by McEachern (the plaintiff's fellow-workman) which caused the accident. Each guy wire was temporarily attached to the wood-strain by being passed through an opening and then twisted around itself. If properly twisted, the wire could not pull out. The wire which did pull out could not have been securely twined over itself, and the negligence found was that Sullivan did not observe that the tie was insecurely made. The judgment of the Court (BOYD, C., LATCHFORD and MIDDLETON, JJ.) was delivered by LATCHFORD, J., who said, after briefly stating the facts, that the plaintiff had suffered not from any negligence of the foreman, who did not see, and, if he saw, could not have noticed, the defect in the tie, but from the negligence of his fellow-workman, McEachern. Appeal allowed and action dismissed. No costs. D. L. McCarthy, K.C., for the defendants. E. E. A. DuVernet, K.C., for the plaintiff.