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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

*ADAMSON v. BELL TELEPHONE CO. OF CANADA.
*BELL TELEPHONE CO. OF CANADA v. ADAMSON.

Way—Easement—Strip of Land Set apart by Owner of Block for Use of Lots into which Block Subdivided—Effect of Conveyance—Extension of Easement—Appurtenance—Estate of Grantee in Dominant Tenement—Equitable Right—Estoppel.

Appeal by Mary Adamson, the plaintiff in the first action, and William Adamson, the defendant in the second action, from the judgment of the County Court of the County of Simcoe, dismissing the first action, and in favour of the plaintiff company in the second action.

The first action was for an injunction to restrain the defendant company from trespassing upon the plaintiff's land and for a declaration of the respective rights of the parties. The second action was to restrain the defendant from interfering with the plaintiff company's right of way, for damages, and for a declaration of the rights of the parties.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

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

A. W. Anglin, K.C., and W. A. Boys, K.C., for the company, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the question for decision was as to the right of the respondent company to a way over a strip of land 10 feet wide and 37 feet in length, being the southerly 10 feet of the westerly 37 feet of the north half of lot 16 on the east side of John street, in the town of Barrie, according to registered plan No. 115.

* This case and all others so marked to be reported in the Ontario Law Reports.

Elizabeth Ross, the mother of Mary Adamson, was the owner of a block of land bounded on the west by John street, on the north by Elizabeth street, on the east by Bayfield street, and on the south by the lands of one G. Lount. This block consisted of lots 16 and 17 on the east side of John street and lots 10 and 11 on the west side of Bayfield street. On the 9th December, 1903, Elizabeth Ross conveyed to Mary Elizabeth Perkins the westerly 37 feet of lot 17, the conveyance being registered as No. 7908; and William Adamson derived his title by various mesne conveyances from M. E. Perkins.

The right of way which the respondent company claimed as appurtenant to the land owned by it, which consisted of a part of the block owned by Elizabeth Ross, lying to the east of and separated by lots owned by other persons from the 37 feet conveyed to M. E. Perkins, was a right of way over a strip of land 10 feet in width extending from John street to Bayfield street and forming the southerly 10 feet of the north halves of lots 16 and 11.

The respondent company's right to the way over the 10-foot strip from Bayfield street to the 37 feet was not disputed; but the appellants contended that it ended there, and that the southerly 10 feet of the 37 feet were not burdened with any right of way over them.

It was clear that the intention of Elizabeth Ross was to subdivide her block of land into lots, and that there should be a lane 10 feet wide extending from John street to Bayfield street for the use of the lots which she intended should abut upon it.

The proper conclusion was, that Elizabeth Ross definitely set apart as a right of way, for the use of all the lots into which she should subdivide her block and which should abut upon it, the strip of land 10 feet wide, extending from John street to Elizabeth street, the southerly 10 feet of the north halves of lots 11 and 16.

That conclusion was sufficient to support the judgment of the County Court; but it might also be supported on the ground that the effect of the conveyance from M. E. Perkins to A. B. Wice (No. 10197) was to extend the easement to which she was undoubtedly entitled in respect of the other land then owned by her so as to include the southerly 10 feet of the 37 feet which had been conveyed to her by No. 7908.

There is no such thing as an easement in gross, in the proper sense of the word. The grantee of an easement must, at the time of the creation of it, have an estate in the tenement to which the easement is to be appurtenant; and that requirement was satisfied in this case.

Reference to Miller v. Tipling (1918), 43 O.L.R. 88, 97, 98.

Although the conveyance to Wice was not executed by him, and therefore there could be, at law, no new grant of the easement, yet in equity the grantee would not be permitted to prevent the easement from being enjoyed by his grantor or those claiming under him: see May v. Belleville, [1905] 2 Ch. 605; Canada Cement Co. v. Fitzgerald (1916,) 53 Can. S.C.R. 263.

Ackroyd v. Smith (1850), 10 C.B. 164, had no application: see Thorpe v. Brumfitt (1873), L.R. 8 Ch. 650.

Appeals dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920

DONOVAN v. CANADIAN PACIFIC R.W.CO.

New Trial—Jury—Unsatisfactory Findings—Excessive Damages—Costs.

Appeal by the defendants from the judgment of CLUTE, J., upon the findings of a jury, in favour of the plaintiffs, in an action by the administrators of the estates of Susie Donovan and Sarah Donovan, deceased, under the Fatal Accidents Act, to recover damages for their deaths. They were burned to death in a car of the defendants, near Bonheur, while on their way from Regina to Belleville. The jury assessed the damages at $2,000 for the death of Susie and $3,000 for the death of Sarah, and the trial Judge gave judgment for those amounts, with costs.

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

W. N. Tilley, K.C., and Angus MacMurchy, K.C., for the appellants.

T. H. Lennox, K.C., and J. E. Madden, for the plaintiffs, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the Court had come to the conclusion that the ends of justice would be best served by directing a new trial. The findings of the jury were not satisfactory, and the damages were excessive. The costs of the last trial and of the appeal should be costs in the cause unless the Judge before whom the new trial takes place otherwise directs.

New trial ordered.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

*DE VAULT v. ROBINSON.

Limitation of Actions—Dispute as to Ownership of Strip of Land between Houses on Adjoining Lots—Paper-title—Exclusive Adverse Possession — Evidence — Fences — Roof of House Projecting over Strip—Easement.

Appeal by the plaintiff from the judgment of the County Court of the County of Hastings dismissing an action for damages for trespass on lot 32 on the north side of Bridge street in the city of Belleville.

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

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

Eric N. Armour, for the defendant, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the trial Judge had found that, while the paper-title to the strip of land in dispute was in the plaintiff, the defendant had been in open, notorious, exclusive, and adverse possession of the strip for more than 10 years, and had thus acquired title by possession. The appellant contested this conclusion on two grounds: (1) that, while the strip in dispute was on the defendant's side of the fence, he did not acquire title by possession, because he had not maintained a gate at the street-end of the 4.5-foot alleyway between the houses of the plaintiff and defendant; (2) that the projection of the roof or eaves of the plaintiff's house over part of the land in dispute was sufficient to prevent the running of the statute in favour of the defendant.

The defendant bought his property and entered into possession thereof in the belief that he had acquired the paper-title up to the line of the plaintiff's house and the fence extending from the north-west corner of the house to the rear of the lots, and he used, occupied, and enjoyed all the lands in dispute as a part of his property, in the same manner, by the same acts, and to the same extent as he would have used, occupied, and enjoyed it, had he been, as he thought he was, the holder of the paper-title thereto.

The plaintiff did not acquire title to his lot and house until 1915, whereas the defendant purchased his property in May, 1905, having previously continuously occupied it as tenant from June, 1899.

The plaintiff and his predecessors in title resided on the lands adjoining the strip in dispute; they had notice and knowledge that the defendant, from 1899, was occupying and using it as demised to him, and later as his own, under a claim and belief that he had a title thereto, yet it was not until 1917—two years after the plaintiff became owner—that any objection or dispute was raised.

In these circumstances, although the defendant's lands were not completely enclosed by the erection of a gate on the Bridge street end of the alleyway, yet, on the principles enunciated in the accepted authority of Davis v. Henderson (1869), 29 U.C.R. 344, followed in Jackson v. Cumming (1917), 12 O.W.N. 279, he had had the open, notorious, exclusive, and adverse possession necessary to acquiring a title by possession, unless the fact that the roof or eaves of the plaintiff's house project over a small part of the land in dispute is sufficient to prevent the statute running in the defendant's favour.

That question was considered in Rooney v. Petry (1910), 22 O.L.R. 101, by Riddell, J., who came to the conclusion that the maintenance of the projecting roof served only to retain in the owner of the paper-title an easement to continue the projection, and did not prevent the statute running in favour of the person in possession of the surface.

The Court agreed with and approved the decision in that case.

The appeal should be dismissed with costs.

If, however, the plaintiff desired it, the judgment might be amended by declaring that it is without prejudice to any easement or easements which the plaintiff may have acquired or retained over the lands in dispute, in respect to the roof and eaves.

Appeal dismissed.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

RICHES v. RICHES.

Husband and Wife — Alimony — Cruelty — Desertion — Evidence — Findings of Trial Judge—Appeal.

Appeal by the defendant from the judgment of MULOCK, C.J.Ex., 17 O.W.N. 313.

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

George Wilkie, for the appellant.

J. M. Godfrey, for the plaintiff, respondent.

MAGEE, J.A., in a written judgment, said that the defendant appealed from the judgment granting alimony to the plaintiff. The trial Judge had set forth with considerable detail the evidence and his conclusions on the facts, and found the defendant to have been chargeable with assaults, ill-temper, and cruelty, causing physical and mental illness to the plaintiff, and that eventually he deserted her. The defendant, appealing to this Court, was under the disadvantage of having been discredited by the trial Judge, who had what must in this case have been the great advantage of seeing and hearing both parties and being assisted thereby in coming to a conclusion as to the physical condition of the plaintiff and the probability of her assertions as to the character and acts of the defendant. Wherever their testimonies conflicted, the trial Judge accepted hers, and indeed appeared to accept it throughout. In the face of his findings of fact, even upon the injury to the wife's health, as to which there was no medical evidence whatever, it would be of little use to enter into details as to whether one would come to the same conclusions as to the different episodes and incidents alleged against the defendant, some at least of which would appear improbable and strained. On the recognised principle of the weight to be attached to the conclusions of a trial Judge in cases of conflicting testimony and the credence to be given to witnesses, this Court would not be justified in disturbing the findings of fact in this instance. If they are granted, the conclusions of law would appear to be warranted.

However hard upon the defendant the conclusion may be, the judgment cannot, on recognised principles, be interfered with.

The appeal should be dismissed.

MEREDITH, C.J.O., in a written judgment, said that the case was distinguishable from Bagshaw v. Bagshaw, infra, in that there was here the finding that was wanting in that case, and there was evidence to support the finding. It was true that it was the testimony of the respondent only, but it was believed by the trial Judge, and there was no reason for reversing the finding.

The appeal should be dismissed.

FERGUSON, J.A., in a written judgment, said that, untrammelled by the finding of the trial Judge and unbiassed by the opinions of his associates, he would have concluded that the plaintiff had not established cruelty within the meaning of the rule re-stated and considered in Bagshaw v. Bagshaw, infra.

But the opinions of the other Judges caused him to doubt, and doubting to assent to the dismissal of the appeal.

MACLAREN, J.A., agreed with FERGUSON, J.A.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

*RE SIMONTON.

Will—Construction—Power of Appointment as to Corpus of Fund Vested in two Persons—Joint Power not Exercisable by Survivor—Donees of Power Having no Interest in Corpus.

Appeal by James Wesley Simonton, executor of the will of William Henry Simonton, deceased, from the judgment of ORDE, J., ante 9.

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

W. S. MacBrayne, for the appellant.

E. C. Cattanach, for S. Griffin, executor of the alleged will of William Henry Simonton, respondent.

Shirley Denison, K.C., for Sarah Sterch and others, representing the interests of James Simonton.

J. M. Pike, K.C., for the Toronto General Trusts Corporation, trustees.

MACLAREN, J.A., in a written judgment, said that the clause of the will of the late William Simonton to be construed is contained in the following direction to his executors: "To pay to Ebenezer W. Scane . . . $4,000, which I hereby bequeath to him in trust to invest the same . . . and to pay the interest yearly to William Henry Simonton . . . and Christy Simonton . . . in equal parts during the lifetime of said William Henry and Christy Simonton and the survivor of them, and after the death of said William Henry and Christy Simonton, then to the use of such person or persons as the said William Henry Simonton and Christy Simonton may by will appoint and nominate."

Christy died on the 12th April, 1892, intestate, and without having made any appointment or nomination with respect to this fund.

William Henry died on the 17th September, 1918, leaving a will in which he set out the bequest of $4,000, the power of appointment and the fact that Christy had died intestate without having exercised the power, and then proceeded to exercise the power "to the extent to which I am entitled as such survivor," and distributed the corpus of the fund among certain relatives of the testator.

The Judge of first instance held that the attempt by William Henry alone to make the appointment and distribution was ineffective, and that the corpus of the fund fell into the residue of the estate of William and should be distributed as directed by his will.

William Henry and Christy never held this fund either as joint tenants or tenants in common; neither of them had any right or claim upon the corpus or estate therein; they were to receive the income during their respective lives and to appoint by will the person or persons to receive the corpus upon the death of the survivor; they were in no sense trustees; nor could it be said, although there was no resulting trust, that they should be treated as absolute owners of the fund.

Reference to Sugden on Powers, 3rd ed., p. 126; In re Bacon, [1907] 1 Ch. 475, 478, 479; Farwell on Powers, 3rd ed., p. 512; Halsbury's Laws of England, vol. 23, p. 15, para. 36; Cole v. Wade (1809), 16 Ves. 27, at p. 45; Townsend v. Wilson (1818), 1 B. & Ald. 608.

The correct rule was laid down by the Judge of first instance.

The appeal should be dismissed; the costs of all parties except the appellant should be paid out of the estate, those of the trustees between solicitor and client.

MEREDITH, C.J.O., read a judgment to the same effect; he referred particularly to Farwell on Powers, 3rd ed., p. 62. He agreed that the power was a joint power not exercisable by the survivor alone.

MAGEE, J.A., was of opinion, for reasons stated in writing, that William Henry Simonton had a power of appointment by will over one half of the fund, and had by his will expressly exercised that power, and so his appointment as to that half should take effect, and as to that the appeal should be allowed. As to the other half, the appeal should be dismissed.

FERGUSON, J.A., agreed with MACLAREN, J.A.

Appeal dismissed (MAGEE, J.A., *dissenting in part*).

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

PAGE v. CAMPBELL.

Covenant—Building Scheme—Subdivision of Tract of Land—Part Reserved for Use as Residential Property—Restrictive Negative Covenant—Erection of Church-building in Breach of—Action to Restrain Use of Building and Compel Removal—Status of Plaintiff—Absence of Interest—Plaintiff not Damnified—Evidence—Circumstances of Case—Extraordinary Remedy Refused.

Appeal by the defendants from the judgment of KELLY, J., 17 O.W.N. 487.

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

E. S. Wigle, K.C., for the appellants.

E. D. Armour, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the action was brought to restrain the appellants from proceeding further with the construction of a church-building on land owned by them and from using the building as a parish-hall or boys' club-room, or for other church-purposes, and for an order that the building be taken down. That relief was awarded by the judgment appealed against.

The claim of the respondent was based upon a covenant contained in the conveyance of the land from him to the Turners, from whom the appellants acquired title. By the covenant, the grantees, for themselves and their heirs and assigns, covenanted with the grantor, his heirs and assigns, that no building should be erected on the land "except for residences," etc.

The respondent was a trustee of these and other lands, composing the Davis farm, for himself and others, spoken of as a syndicate.

The syndicate subdivided the farm into town-lots, and prepared and registered plans of the subdivisions—three in number; No. 599 was the subdivision of which the lots of the appellants formed part.

The syndicate was minded that a part of this subdivision should be used for residential purposes only, and the lots on Hall and Moy avenues were those selected for that purpose.

In all the conveyances of the lots on these two avenues, a covenant similar to that entered into by the Turners was contained; but none of them contained a covenant by the grantors

that they would take from all subsequent purchasers a similar covenant or that they would not erect any building on the lots they still held other than such as were mentioned in the Turners' covenant.

Most of the purchasers of lots on these two avenues had no objection to the building which the appellants had erected.

The syndicate had now disposed of all the lots on these two avenues, and neither it nor the respondent had now any interest in them. When the action was begun, they had some interest in one of the lots, but had since ceased to have it.

When the action was begun, the church-building was "practically completed;" and, if the judgment in appeal was to stand, the result would be that the appellants must pull it down or remove it to other land.

The respondent was not entitled to the relief awarded to him. He had no interest in the question raised, and represented no one who had an interest. If the owners of the other lots had rights, the dismissal of this action would not affect them. The extraordinary remedy sought ought not to be awarded, even if the respondent had a technical right to enforce the covenant, especially in the circumstances referred to, and he had not been damnified by what the appellants had done.

The appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

*BAGSHAW v. BAGSHAW.

Husband and Wife—Alimony—Cruelty—Meaning of, in Law—Evidence—Unreasonable Demands for Sexual Intercourse.

Appeal by the defendant from the judgment of SUTHERLAND, J., at the trial, in favour of the plaintiff in an action for alimony.

By the judgment appealed against, the plaintiff was granted alimony fixed at $50 a month, the costs of the action, and the custody of Bruce Bagshaw, infant child of the parties, with right of reasonable access by the defendant.

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

D. L. McCarthy, K.C., and D. C. Ross, for the appellant.

Gideon Grant, for the plaintiff, respondent.

FERGUSON, J.A., read a judgment in which he said that the question was, not whether cruelty in any sense of the word had been established by the evidence, but whether that kind or degree of cruelty which the Courts have recognised as justifying a wife in leaving the bed and board of her husband had been established.

The plaintiff in an alimony action has not established what our law calls cruelty unless she has shewn that the defendant has subjected her to treatment likely to produce or which did produce physical illness or mental distress of a nature calculated permanently to affect her bodily health or endanger her reason, and that there is reasonable apprehension that the same state of things will continue: Lovell v. Lovell (1906), 13 O.L.R. 569; Whimbey v. Whimbey (1919), 45 O.L.R. 228.

Cruelty, within the meaning of the foregoing rule, may be established by a course of conduct in which the husband has not committed any one offence that, standing by itself, would justify a finding, as well as by the proof of some isolated act of assault of such a grave nature as clearly to establish injury to health or a reasonable apprehension that such act will be repeated and is likely to cause injury to health of mind or body: Mackenzie v. Mackenzie, [1895] A.C. 384; Kelly v. Kelly (1869-70), L.R. 2 P. & D. 31, 59.

The Court has never been driven off the ground that the plaintiff in an alimony action, claiming on the ground of cruelty, must establish danger to life, limb, or health: Evans v. Evans (1790), 1 Hagg. Con. 35. This is in accord with the modern decisions, such as those above cited and Russell v. Russell, [1895] P. 315, [1897] A.C. 395.

After a careful perusal of the evidence, the learned Judge said, he had arrived at the conclusion that neither the respondent's physical nor mental health had been affected by the acts complained of by her, and that she did not leave her husband's home because her health was affected or because she feared it would be affected, and that there was not in the evidence any ground for reasonable apprehension that if she had remained with her husband, or if she now returned to him, her health would have been or would be affected by the appellant's course of conduct towards her.

Of the many accusations of misconduct made by the respondent against the appellant, the one on which the trial Judge based his decree was that of unreasonable demands for sexual intercourse made and persisted in by the appellant. The learned Judge's finding in this respect was not supported by the evidence.

The appeal should be allowed and the action dismissed, with the order as to costs usual in actions for alimony.

MACLAREN and MAGEE, JJ.A., agreed with FERGUSON, J.A.

MEREDITH, C.J.O., read a short judgment, in which he said that he reluctantly agreed in allowing the appeal. The present condition of the law, he said, was not in accordance with modern views as to the relations between husband and wife. A husband may subject his wife daily, and even hourly, to such treatment as makes her life a veritable hell upon earth, and she is without remedy if she is robust enough to suffer it all without impairment of her physical health or her mentality.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

*MONTREAL TRUST CO. v. RICHARDSON.

Contract—Undertaking of Investor with Promoter of Company to Underwrite Shares—Agreement to "Subscribe for" and Purchase Shares—Construction of Agreement—Conditional Undertaking—Authority to Pledge or Hypothecate Agreement to "Banking Institution"—Assignment of Agreement to Trust Company—Contingent Liability only Passing by Assignment—Action by Trust Company against Executor of Investor—Liability to Pay for Shares not Established.

Appeal by the defendant from the judgment of ROSE, J., 46 O.L.R. 598, 17 O.W.N. 346.

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

W. N. Tilley, K.C., and A. B. Cunningham, for the appellant.

J. L. Whiting, K.C., and J. B. Walkem, K.C., for the plaintiffs, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said, after stating the facts, that the agreement entered into by the deceased was not, in fact and in its legal effect, an absolute and unconditional agreement to purchase and pay for the 100 shares, but was an agreement to do so if $150,000 of the shares which J. A. Mackay & Co. Limited had subscribed for and were abou to put on the market were not taken up by the public.

The parol evidence as to the circumstances which led to the making of the agreement, and the language of the agreement itself—which speaks of it as an "underwriting"—made this clear, and it was indeed not disputed by the respondents. What they did dispute was, that it was only in respect of $150,000 of the stock that the deceased was to underwrite; and they said further that, even if the appellant's contention as to this should prevail, they were, nevertheless, as pledgees, entitled to recover, because they had no notice of the conditional nature of the agreement, and because of the provision as to the pledging or hypothecation of the "underwriting."

The proper conclusion upon the evidence was that, if and when the $150,000 of shares were taken up, the deceased's liability, as between himself and J. A. Mackay & Co. Limited, ceased; and the respondents were in no better position than the Mackay company.

The deceased's agreement provided that his "underwriting" might be pledged or hypothecated. It was plain, therefore, that his agreement to take and pay for the shares was not an absolute one, but was conditional upon $150,000 of shares being taken up by the public, and that put the respondents upon inquiry as to what the condition was. What they were seeking to do was to enforce the agreement as an unconditional and absolute agreement to take and pay for the shares. The agreement shewed on its face that it was not such an agreement, but only an underwriting agreement; the authority to pledge or hypothecate meant that it might be given to a banking institution as security for advances; and, assuming that the pledge of it passed anything to the respondents, it passed only the contingent liability that the deceased had undertaken, namely, a liability to take and pay for the shares if the $150,000 of the shares should not be taken by the public.

The appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

M. J. O'BRIEN LIMITED v. LA ROSE MINES LIMITED.

Mines and Mining—Boundaries of Mining Locations—Dispute as to Ownership of Strip of Land between Boundaries—Evidence—Failure to Establish Line Run by Surveyor—Failure to Shew Paper-title—Possession by Plaintiffs of Part of Land in Dispute—Assertion of Right and Title—Right to Retain Possession against Defendants — Declaration — Injunction — Damages——Costs.

Appeal by the plaintiffs from the judgment of ROSE, J., 17 O.W.N. 230.

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

W. N. Tilley, K.C., and R. H. Parmenter, for the appellants.

R. S. Robertson and G. H. Sedgewick, for the defendants, respondents.

FERGUSON, J.A., reading the judgment of the Court, said that the plaintiffs and defendants were mining companies, owning adjoining properties in the township of Coleman, and the dispute between them was in reference to the ownership and possession of a strip of land, containing about 3.8 acres, situated on or between the plaintiffs' western and the defendants' eastern boundaries. The plaintiffs' property, referred to as R.L. 403, was described in the Crown grant by a survey and plan made and prepared by Robert Laird, P.L.S. The defendants' property, the "Violet" claim, was described in the Crown grant by reference to a survey and plan made by James H. Smith, P.L.S. Both parties claimed title to the Laird line; each endeavoured to establish the Laird line; but the learned trial Judge, after a very careful review of the evidence, came to the conclusion that there was not before him sufficient to enable him to find the Laird line, and dismissed the plaintiffs' claim for a declaration of title, trespass, damages, and an injunction.

The trial Judge was right in refusing to find that the Laird line had been established and in not finding that the paper-title to the strip of land in dispute was in one or other of the parties, or partly in one and partly in the other, or had been granted by the Crown.

But it did not follow that the plaintiffs were not entitled to any relief. There was ample evidence that the plaintiffs entered upon the mining location R.L. 403 intending to take and hold possession of the whole property as it appeared to them to be plotted on the ground and in the belief that the eastern boundary was laid out and plotted upon the ground by the "Earl," the "Shaw," "Colonial No. 4," and the "Blair" posts, in the 6th concession of Coleman, and that such possession was at all times claimed and maintained as of right and without dispute or adverse claim down to May, 1918, when the defendants entered and planted an iron post 59.2 feet west of "Colonial No. 4," and by letter of the 29th May, 1918, notified the plaintiffs that they had caused the post to be planted as an assertion that it marked the true boundary.

For some years prior to 1917, the plaintiffs had been, and still were, engaged in prosecuting active and extensive mining operations on R.L. 403, and had thus been visibly occupying, using, developing, and working this location by the same acts and in the same manner and to the same extent as they would have occupied, worked, and developed it had they had, as they believed, the paper-title as far east as the line indicated.

These acts and claims, done and made with the intention of asserting a right and title, and in consequence of a bona fide belief in the rights claimed, amounted to a taking of possession: Lord Advocate v. Lord Lovat (1880), 5 App. Cas. 273, 288; Kirby v. Cowderoy, [1912] A.C. 599; Davis v. Henderson (1869), 29 U.C.R. 344; Humphreys v. Holmes (1861), 10 N.B.R. 59.

While the plaintiffs had not established a paper-title to any of the lands in dispute, they had established possession of part of the lands at the time the defendants planted the iron post; and the plaintiffs, on the authority of Glenwood Lumber Co. v. Phillips, [1904] A. C. 405, 410, and Jeffries v. Great Western R.W. Co. (1856), 5 E. & B. 802, 805, were entitled to be protected in their possession until the Crown, or a person shewing legal right or title under it, should make entry; and, consequently, to a declaration that they were, as against the defendants, entitled to possession of the part of the disputed lands lying west of a straight line drawn from the "Shaw" post to the "Colonial No. 4;" to an injunction restraining the defendants, their servants, workmen, and agents, from trespassing thereon until they should have established a right thereto, or a right to enter under the person having the title; and to the damages, if any, which they had suffered by reason of any trespass committed, to be ascertained by the Local Master at Haileybury if the parties could not agree.

The defendants did not counterclaim, and there should, therefore, be no declaration as to the rights of the parties in the disputed lands east of the aforesaid line.

The plaintiffs claimed much more than they were now awarded; their effort at the trial and on the hearing of the appeal was directed to establishing a paper-title to the whole of the lands in dispute; and so justice would be done by making no order as to costs here or below.

The appeal should be allowed, and judgment should be entered for the plaintiffs to the extent indicated.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

RE ROUSSEAU AND LECLAIR.

Landlord and Tenant—Monthly Tenancy—Proceedings under Overholding Tenants Provisions of Landlord and Tenant Act, R.S.O. 1914 ch. 155—Proof of Notice to Tenant—Onus—Written Notice—Oral Notices—Failure to Shew Termination of Tenancy.

Appeal by tenant of No. 16 Durham Street, Sudbury, from an order of the Judge of the District Court of the District of Sudbury, under the overholding tenants provisions of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, requiring the appellants to give the landlord immediate possession of the demised premises.

The appeal was heard by MACLAREN and MAGEE, JJ.A., MASTEN, J., and FERGUSON, J.A.

T. M. Mulligan, for the appellant.

J. E. Lawson, for the landlord, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the tenancy was a monthly one, and the rent was payable on the first of each month. On the part of the landlord it was sworn by one Turpin that on the 21st February, 1920, he gave the tenant notice, but only by word of mouth, "to leave the store premises, if possible, by the 1st March, but in any event on or before the 1st April," and on the 22nd February sent the tenant a written notice demanding possession of the premises on or before the 1st March, but not later than the 1st April. Neither of these notices was proven at the hearing, but the landlord proved and the tenant admitted a notice in writing, dated the 18th February, reading, "I would ask you to be kind enough to have the place vacant before the 1st March." Evidence of an oral notice said to have been given about the 10th February was also received. There was also evidence of a notice to quit on the 1st April, given in the month of March.

The District Court Judge based his order on the written notice of the 18th February. That notice was not directed to the tenant, but to her husband.

It was not argued for the landlord that the notice of the 18th February was sufficient. Counsel for the landlord asked the Court to find that notice was given orally on the 9th or 10th February, and was sufficient.

Section 75 of the Landlord and Tenant Act, under which the proceedings were taken before the Judge, indicates that the land-

lord is required to make out a case before he obtains an appointment; and, by serving copies of the affidavits along with the appointment, to give notice to the tenant of the reasons why he demands or is entitled to possession. Here no attempt was made to prove the notices set up in the affidavits.

The tenant's husband denies that the landlord or Turpin gave him (Leclair) any notice other than that of the 18th February; the statements as to what was said at a meeting on the 9th or 10th February differed each from the other; and the District Court Judge had not found which was the true account.

The onus was on the landlord, and he had not satisfied that onus in reference to the alleged oral notice. All the facts and circumstances, particularly the written notice of the 18th February, led to the conclusion that the landlord did not rely upon any prior oral notice. There were also the objections that at the time the notice was alleged to have been given by Turpin, he had not completed his purchase from Rousseau; that the notice was not given to the tenant, but to her husband; and that the landlord should not be allowed to set up in appeal a notice not relied upon on the application for an appointment or at the hearing.

The landlord had failed to prove a termination of the tenancy; and so the order appealed from should be vacated, with costs of the proceedings below and of the appeal to the tenant.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

S. F. BOWSER CO. LIMITED v. WILSON.

Contract—Sale of Machine—Executory Agreement for Future Sale on Performance of Conditions—Return of Machine by Purchaser—Refusal of Vendor to Accept—Machine Held to Purchaser's Order—Action for Price—Provisions of Agreement—Remedy of Vendor—Forfeiture of Deposit—No Right in Purchaser to Dictate Remedy.

Appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff for the recovery of $450 and costs.

The appeal was heard by MACLAREN and MAGEE, JJ.A., MASTEN, J., and FERGUSON, J.A.

J. R. Roaf, for the appellant.

H. F. Parkinson, for the plaintiffs, respondents.

The judgment of the Court was read by FERGUSON, J.A., who said that the action was brought for moneys due under an agreement in writing, dated the 15th September, 1919, wherein the defendant gave to the plaintiffs an order for a machine, and agreed to pay therefor $487.50.

At the time of giving the order, the defendant made an advance payment of $48.75. The balance was to be paid in instalments, and the title to the machine was not to pass until payment in full. There were provisions, in the event of default, for acceleration of payments, forfeiture of deposit, etc. The machine was shipped by the plaintiffs and received by the defendant, but some weeks later was reshipped to the plaintiffs by the defendant, because he thought he would be unable to make his subsequent payments.

The trial Judge found that the plaintiffs refused to take it back, but said that they would hold it subject to the defendant's order, and that they were so holding it.

The defendant contended that, as he had returned the machine, the plaintiffs' remedy was limited to declaring a forfeiture under clause 4 of the agreement, of the $48.75 paid as a deposit. Clause 4 provided that any advance payment made by the purchaser, at the time of the execution of the order, should be forfeited as liquidated damages to the plaintiffs if the purchaser failed to complete the contract.

The trial Judge did not agree with the defendant's contention, and in that the Judge was right.

As stated by Hagarty, C.J.O., in Sawyer v. Pringle (1891), 18 A.R. 218, at p. 221: "This agreement cannot properly be called 'a contract of sale.' It is an executory agreement for a future sale on performance of certain conditions by the defendant."

Shipment and delivery to the defendant entitled the plaintiffs to payment in the sum and at the times stated in the agreement: Tuft v. Poness (1900), 22 O.R. 51; and default in payment gave them the right to have the future payments accelerated. The plaintiffs were not obliged to take advantage of the defendant's default; but, if they chose to do so, they might, as they did, take advantage of it for the purpose of accelerating the payments. Neither were the defendants obliged to take advantage of the breach for any other purpose. They might still have the right, if they chose to exercise it, to terminate the contract and apply the payments made at the time of termination on account of rental, or to forfeit the $48.75 advance payment and sue for the purchase-price.

In the circumstances, it was not necessary to decide what would be the rights of the parties in case the plaintiffs elected to

forfeit the $48.75. They had not done so; and the defendant could not, by a breach of his contract, force the plaintiffs to elect which remedy they would first pursue.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

McCANNEL v. HILL.

Limitation of Actions—Possession of Land—Dispute as to Ownership of Narrow Strip Extending from Swamp on Boundary between two Lots to Rear of Lots—Fences—Swamp Regarded as Boundary—Encroachment—Establishment of Title by Possession—Necessity for Defining Original Line between Lots.

Appeal by the defendant from the judgment of the County Court of the County of Grey in favour of the plaintiff for the recovery of $150 damages and costs of the action, which was for trepass and cutting timber upon the plaintiff's land.

The appeal was heard by MACLAREN and MAGEE, JJ.A., MASTEN, J., and FERGUSON, J.A.

W. H. Wright, for the appellant.

W. S. Middlebro, K.C., for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the plaintiff's lot was 23 in the 19th concession of Egremont, and the defendant was the owner of the adjoining lot, 22. It was admitted that each party had the paper-title to his lot. The district was a long-settled one. On each of the lots substantial dwellings and outbuildings had been erected, and both farms had long been cultivated. The plaintiff's father settled on lot 23 about the year 1854, and the plaintiff and his father had since occupied the land. The defendant purchased lot 22 about 5 years ago.

On the boundary between the two lots, and about midway between the front and rear boundaries, there was a swamp covered with dense underbrush. For more than 30 years, a fence running from the front of the lot to the swamp had been maintained. On the other side of the swamp, running from it to the rear end of the lots, the plaintiff had erected and maintained for more than 18 years a substantial rail and post fence. If it be taken that the fence from the front to the swamp starts from the place where the

original post is planted, and a line is run from that point to the rear of the lot, according to the directions of the Surveys Act, the fence running from the swamp to the north or rear boundary of the lot encroaches on the defendant's property, and the dispute is as to the ownership of a narrow strip of land extending from the swamp to the blind line or rear of the lots.

At the trial, much evidence was given for the purpose of establishing the true line; also for the purpose of shewing that, even if the fence from the swamp to the blind line was over on the defendant, the plaintiff had acquired title by possession.

The trial Judge found both issues in favour of the plaintiff; and also found "that the fence" (from the swamp to the rear of the lot), "was erected and maintained continuously in its present position for upwards of 18 years; . . . that neither party has been troubled with cattle trespassing; . . . that the fence from the blind line to the swamp was substantially built, of a permanent character, and not merely a makeshift put up until the dividing line between the two properties could be determined."

It was contended for the defendant that, because there was no fence through the swamp, the plaintiff did not acquire title to the small strip in dispute, on which the defendant recently entered and cut 5 maple trees.

A swamp may form a boundary up to which a party will be deemed to have possession sufficient to give him a title: Jackson v. Cumming (1917), 12 O.W.N. 279; and in this case the fences and swamp formed the visible boundary of the lands visibly occupied by the plaintiff.

This was not a case of a known and intentional trespass, followed by other acts from which the Court might infer continuous use and occupation: McLeod v. McRae (1918), 43 O.L.R. 34; but an entry made as of right and an open and visible exclusion of the defendant and his predecessors in title from the land on the plaintiff's side of the fence, and of continuous occupation of the farm enclosed by the fence, and the natural barrier created by the swamp, as a whole, and of the use and occupation of the little strip now in question as part of the whole, in the same manner as it would have been used and occupied had the plaintiff been, as he thought he was, the actual owner thereof: Davis v. Henderson (1869), 29 U.C.R. 344; Piper v. Stevenson (1913), 28 O.L.R. 379.

The trial Judge was right in holding that the plaintiff had established a title by possession to the strip in question, and that it was, in the circumstances, unnecessary to define the original line between lots 22 and 23.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 25TH, 1920.

*HURST v. MURRAY.

Negligence—Reckless Driving of Motor-car on Highway—Injury to Person Struck by Car—Subsequent Death—Action under Fatal Accidents Act—Cause of Death—Injury Sustained or Disease not Arising from Injury—Trial by Jury—Directions to Jury—Form of Question—Misdirection—New Trial—Evidence—Nonsuit.

Appeal by the plaintiff from the judgment of the County Court of the County of York dismissing with costs an action, under the Fatal Accidents Act, R.S.O. 1914 ch. 151, to recover damages for the death of the plaintiff's son, alleged to have been caused by the defendant driving his motor-vehicle recklessly and at excessive speed upon Queen street east in the city of Toronto and so striking the young man and injuring him that, as alleged, he died a few days after the accident in consequence of the injury. The action was tried by a Judge and jury; and, upon the jury's findings, the Judge dismissed the action.

The appeal was heard by MACLAREN and MAGEE, JJ.A., MASTEN, J., and FERGUSON, J.A.

A. R. Hassard, for the appellant.

W. Zimmerman, for the defendant, respondent.

MACLAREN, J.A., in a written judgment, said that the plaintiff's son, after his injury on the 16th February, 1919, was taken to a hospital, where it was found that his leg was broken and that he was injured internally. Three days later, symptoms of diphtheria appeared and he was removed to an isolation hospital, where he died on the 21st February. The attending physician in his certificate gave as the cause of death "diphtheria and traumatism," the latter word having reference to the broken leg and other injuries received in the collision. The medical witnesses did not agree as to the extent to which each of these causes might have contributed to his death.

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

1. Was the accident caused by the negligence of the defendant? A. Yes.

2. If so, in what did such negligence consist? A. Excessive speed down grade and slippery pavement.

3. Was the deceased guilty of any negligence which contributed to the accident? A. No.

4. If so, what did such negligence consist of? Not answered.

5. Was the death the natural or ordinary consequence of the injuries he sustained at the accident? A. "We could not answer that, your Honour. We could not come to a decision."

The Judge asked the jury to go back and come to a decision on that. The foreman asked whether the jurors must answer it "yes" or "no;" and the Judge said that they must so answer it.

After the jury had retired, counsel for the plaintiff complained that the instruction to the jury was wrong, and that it was sufficient to entitle the plaintiff to succeed if the jury found that the death was in part the result of the accident. After some discussion, the Judge decided not to alter his direction.

The jury returned and informed the Judge that they had agreed to answer "no" to question 5, and had assessed the damages at $800. The Judge thereupon dismissed the action.

No authority was cited in support of the ruling that question 5 must be answered either "yes" or "no;" the learned Justice of Appeal was not aware of any such authority; and, on that ground, he was of opinion that the appeal should be allowed and a new trial ordered.

In framing question 5 the language of the Fatal Accidents Act, sec. 3, was not followed—the words "natural or ordinary," which are not found in the Act, were introduced. The usual question is, "Was the death the result of such negligence as you have found?" or, "Was the death caused by such negligence?"

Dunham v. Clare, [1902] 2 K.B. 292, 296, 297, and Reed v. Ellis (1916), 38 O.L.R. 123, at p. 133, referred to.

There should be a new trial—the costs of the former trial and of this appeal to abide the result.

MAGEE and FERGUSON, JJ.A., agreed with MACLAREN, J.A.

MASTEN, J., in a written judgment, said that, as the majority of the Court were of opinion that there should be a new trial, he refrained from discussing the question whether there was any evidence that the death of George Hurst was occasioned by the impact on his person of the defendant's car. It should, however, be made entirely plain that nothing in the judgment of the Court was to prejudice or affect the right of the defendant to a nonsuit in case the plaintiff failed to give any evidence from which a jury would be entitled to find that George Hurst's death resulted from the accident.

New trial ordered.

SECOND DIVISIONAL COURT. JUNE 25TH, 1920.

*RE TORONTO SUBURBAN R.W. CO. AND ROGERS.

Railway—Expropriation of Land—Ontario Railway Act, 1906—Date of "Taking"—Deposit of Plan of Location—Service of Notice of Expropriation—Registry Act—Plan of Subdivision—Sale of Lots—Rights of Purchaser—"Owner"—True Owner at Time of "Taking"—Compensation—Arbitration.

Appeal by the railway company from the judgment of MIDDLETON, J., 46 O.L.R. 201, 17 O.W.N. 108.

The appeal was heard by MAGEE, J.A., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

R. B. Henderson, for the appellants.

D. J. Coffey, for Ford and Roome, respondents.

J. M. Bullen, for Rogers, respondent.

CLUTE, J., read a judgment in which, after stating the facts, quoting from the judgment of Middleton, J., and referring to the cases therein cited, he said that counsel for the appellants contended that the decision was wrong, and that Rogers, the prior owner of the block in which Ford and Roome's lots were contained, was the only person with whom arbitration proceedings could or should be had, and that the holding of distinct arbitrations with the persons who became owners prior to expropriation was not the proper course and practice under the Act; and, therefore, the order directing arbitration with these claimants was erroneous.

These two purchasers, Ford and Roome, were, as held by Middleton, J., entitled to have the arbitration proceed to determine the compensation to be paid to them respectively, on the footing that the railway company had offered to them respectively the amounts mentioned in the schedule to the order of the 30th May, 1913—the value to be determined as of the date of service of the notice of expropriation.

Here, as in Toronto Suburban R.W. Co v. Everson (1917), 54 Can. S.C.R. 395, the Act of 1906, as amended by an Act of 1908, was the Act to be looked to, for the reason that the Act of 1913 came into force on the 1st July, 1913, and notice of expropriation was given on the 5th May, 1913. It was perfectly plain from the judgment in the Everson case that the Act of 1906, as amended, contemplated a valuation as of the date of the notice.

The appeal should be dismissed with costs.

MAGEE, J.A., agreed with CLUTE, J.

SUTHERLAND, J., was of opinion that the judgment of Middleton, J., was right, and agreed that the appeal should be dismissed with costs.

RIDDELL and MASTEN, JJ., dissenting, were of opinion, for reasons stated by MASTEN, J., in writing, that the appeal should be allowed.

Appeal dismissed (RIDDELL *and* MASTEN, JJ., *dissenting*).

HIGH COURT DIVISION.

MEREDITH, C.J.C.P., IN CHAMBERS. JUNE 23RD, 1920.

*REX v. CRAMER.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Intoxicating Liquor in a Public Place—Carrier for Hire—Absence of Control—Aiding and Abetting—Sec. 84 (2) (7 Geo. V. ch. 50, sec. 30)—Evidence—Depositions—Signing by Defendant.

Motion to quash the conviction of the defendant by a Police Magistrate.

J. E. Lawson, for the defendant.
F. P. Brennan, for the magistrate.

MEREDITH, C.J.C.P., in a written judgment, said that the applicant was convicted of unlawfully having liquor in a public place, contrary to the provisions of sec. 41 of the Ontario Temperance Act; but nothing is said in that section about a public place; that which the section condemns, in so far as such a case as this is affected by it, is having liquor "in any place whatsoever, other than the private dwelling house in which he resides." It is immaterial whether the place is a public or a private one; the question is, whether the place is or is not one where liquor might lawfully be; and no one could reasonably contend that the section in question prevents the carriage of liquor from a place where it lawfully was to a place where it lawfully might be, even if that were not expressly provided for, as it is, in sec. 43.

The liquor in question was being carried by the owner or his partner or agent from a railway station, where it lawfully was,

to a dwelling house, where it lawfully might be, if that were the private dwelling house in which the person "having" it resided. It was the dwelling house of his sister, in which he had often, but not always, resided.

The applicant was merely a driver for hire of a motor-car, employed by the other man to take him to the railway station, and, after taking him there, employed to take him and the parcels in question with him to the dwelling house mentioned.

The applicant denied having any knowledge that the parcels thus taken contained intoxicating liquor, and denied having in any way handled them. But, assuming that he did take part in loading them on his car and in unloading them and carrying them into the dwelling house, how did that alone make him guilty of the severely punishable offence of unlawfully having intoxicating liquors? It was the man who employed him who "had" them, and alone had control of them: the driver did not "have" either the man or his parcels.

Why the man who really "had" them was not prosecuted, why he was merely a witness at the trial of the applicant, was not disclosed, and was difficult to understand.

If his conduct were unlawful, if he were not taking his parcels where lawfully they might be, he should have been prosecuted for "having" them in a place where lawfully they might not be, if not for other more serious offence.

Whether one who aids and abets another in unlawfully "having" intoxicating liquor, without himself "having," in any manner, the liquor, is guilty of any offence, need not be considered; because no such case was made against the applicant, and no evidence was adduced which would support it if made: see the Ontario Temperance Amendment Act, 1917, sec. 30, adding a new sub-section to sec. 84 of the original Act.

The magistrate seemed to have been under the erroneous impressions: that having liquor in a public place constituted, alone, an offence under sec. 41; and that, because the parcels were in the applicant's "for-hire" motor-car, they were in his possession, and he "had" them, within the meaning of that section, though in fact and in law he had no possession of or power over them—no more than if they were his fare's luggage.

The conviction must be quashed on this broad ground: it was not necessary to consider any of the narrower objections to it.

Counsel concerned might observe: that the applicant had sworn that he did not sign his deposition; that there was no contradiction of this; that the name at the foot of his depositions was in writing very like that of the depositions, and unlike his signature upon his affidavits.

KELLY, J. JUNE 23RD, 1920.

HOWARD v. TORONTO BOARD OF EDUCATION.

Schools—Public Schools—Transfer and Appointment of High School Teacher to Principalship of Public School—Powers of Board of Education—Procedure at Meeting—Composition of Board—Representatives of Separate School Board—Boards of Education Act, R.S.O. 1914 ch. 269, secs. 22,23—Internal Management of Board's Affairs—Interference by Court—Confirmation of Appointment—Public Schools Act, R.S.O. 1914 ch. 266, secs. 2 (o), 73 (n), 87 (2)—Rights of Minority—Technical Qualifications of Teacher.

Action by a ratepayer of the City of Toronto, suing on his own behalf and on behalf of all other ratepayers of the city, against the Board of Education of the City of Toronto and Peter F. Munro, who, prior to July, 1919, was a teacher in Riverdale Collegiate Institute, Toronto, for a declaration that the transfer of the defendant Munro, on the 3rd July, 1919, to the principalship of Ryerson Public School, Toronto, and his appointment as principal were wrongful and improper, to restrain the defendant Board from continuing to employ the defendant Munro as principal of Ryerson School, and from employing or using the rates of the city for payment of his salary as such principal, and restraining the defendant Munro from continuing to act in that capacity.

The action was tried without a jury at a Toronto sittings.

C. Carrick, for the plaintiff.

E. P. Brown, for the defendant Board.

E. G. Black, for the defendant Munro.

KELLY, J., in a written judgment, said that the issues raised involved the power of the Board to depart from its by-laws and regulations relating to the administration of its own internal affairs, and incidentally the question of the appointee's qualifications under the requirements of the Department of Education.

By the Boards of Education Act, R.S.O. 1914 ch. 269, sec. 22, a member of a Board who is a Separate School supporter shall not vote on or otherwise take part in any of the proceedings of the Board exclusively affecting the Public Schools.

The appointment was made at a meeting of the Board held on the 3rd July, 1919.

The printed agenda for the meeting designated the matters to come up as:—

Part I. High School matters and questions not exclusively affecting Public Schools.

Part II. Exclusively Public Schools.

Members of the Board who were representatives of the Separate School Board were thus prohibited from dealing with matters of business under Part II., but were entitled to deal with those coming under Part I.

The plaintiff alleged that transferring Munro from the teaching staff of a Collegiate Institute was a matter within Part I., and should have been dealt with by the whole Board, and not, as actually happened, under Part II., by members other than those representing the Separate School Board.

Even if there had been an irregularity in the procedure at the meeting of the 3rd July, the minutes of that meeting were adopted and confirmed at a meeting of the Board on the 4th September, 1919, at which a representative of the Separate School Board was present. Moreover, at a meeting held on the 4th December, 1919, and when the Board was proceeding under Part II., a resolution was passed, by a vote not only of the majority of the members present, but by a majority of the full membership of the Board, confirming Munro in the position to which he had been appointed.

Not only was the Board acting within its powers in making the appointment, but it was discharging a statutory duty: sec. 73 (*n*) of the Public Schools Act, R.S.O. 1914 ch. 266; sec. 23 of the Boards of Education Act.

The Court has no jurisdiction to interfere with the internal management of the Board's affairs: Halsbury's Laws of England, vol. 5, p. 289, para. 471; Foss v. Harbottle (1843), 2 Hare 461; Burland v. Earle, [1902] A.C. 83; and other cases.

The minority have no right of action against the majority in respect of proceedings of which they do not approve, when the act complained of is in substance an action which the majority are entitled to do: Halsbury, vol. 8, p. 347, para. 778; Lord v. Copper Miners Co. (1848), 2 Ph. 740.

At the trial evidence was adduced as to the defendant's professional qualifications. He holds a permanent certificate as a High School teacher, but only a temporary certificate as a Public School teacher.

Section 87 (2) of the Public Schools Act, incorporated into the Boards of Education Act by sec. 23 thereof, declares that no person shall be employed to act as a teacher unless he holds a certificate of qualification. By sec. 2 (*o*) of the Public Schools Act, "teacher" means a person holding a legal certificate of qualification. The departmental records shew Munro to be the holder of an interim first class Public School certificate which is on file in the Department of Education and in full force and effect. It was shewn that in the case of a teacher who holds an

interim certificate, and who may be appointed during 1919-1920 to the principalship of a Public or Separate School having four or more teachers whose services are reported by the Inspector as satisfactory, such teacher will be permitted to remain in such school in order that he may have proper opportunity of qualifying for a permanent first class certificate. The school to which Munro was appointed was one with more than four teachers. This seemed to dispose of any question that might be raised on the ground of want of technical qualification.

Action dismissed with costs.

ROSE, J. JUNE 23RD, 1920.

CUTHILL v. LLOYD.

Patent for Land—Description—Boundaries—"Land"—Water—Accretions.

The plaintiff, the owner of part of the west half of lot 13 in the 4th concession of the township of Fredericksburg, in the county of Lennox and Addington, and also of a point of land, called "D.D.," lying west of lot 13, claimed from the defendants damages for entering upon his land and destroying certain posts with signs upon them prohibiting shooting.

The action was tried without a jury at Napanee.
W. S. Herrington, K.C., for the plaintiff.
R. S. Robertson and U. M. Wilson, for the defendants.

ROSE, J., in a written judgment, said that the entry and the destruction of the sign-posts were admitted; what was in question was the title to certain marsh or bog lands, something like 100 acres in area, which the plaintiff claimed as part of lot "D.D." These lands were the breeding-ground of musk-rats, which are valuable on account of the demand for their skins. The difficulty was in interpreting the original grant from the Crown in 1809, which described the parcel as containing 60 acres, "being a certain point of land in the 3rd concession, lying west of lot number 13, situated between Big Creek and Little Creek and distinguished by lot D.D. . . . together with all the woods and waters thereon lying and being . . . butted and bounded . . . as follows: commencing in front on the north side of Big Creek in the limit between lot 13 and D.D. and at the south-west angle

of the said tract, then north 31 degrees 30 minutes west 50 chains more or less to Little Creek, then southerly along the water's edge with the stream to Big Creek, then north-easterly up Big Creek to the place of beginning."

There was nothing in the patent to indicate what was meant by "distinguished by lot D.D."

The statement that the parcel contains 60 acres more or less and that the east limit of it is 50 chains more or less in length may be disregarded if there is in the words of the description of the boundaries a sufficiently certain definition of what was granted: Mellor v. Walmesley, [1905] 2 Ch. 164, 174.

If there was some gradual change of the courses of the streams by which the area of the lands contained within the boundaries was increased, and if the grant, properly construed, was a grant of the lands contained within such boundaries, the plaintiff's predecessor in title gained, and the plaintiff now owned, a much larger area of land than was originally granted: see Volcanic Oil and Gas Co. v. Chaplin (1912), 27 O.L.R. 34, 484, especially at pp. 494, 495.

It was impossible, even by the very artificial means of treating the words, "southerly along the water's edge with the stream," as equivalent to "southerly along the edge of the high land," to give to the patent a construction which would make the whole of the descriptions, including the acreage and the measurement, exactly fit either what the defendants admit, or what the plaintiff said was the land granted to his predecessor in title; and there was nothing for it but to follow the description on the ground, as it is at present, and to hold that the plaintiff, as the owner of "D.D.," is entitled to the land bounded by the western limit of lot 13 and the water's edge of Little Creek and Big Creek. That the whole of the area (except the ponds), within the boundaries mentioned, was "land" which passed by the grant, and could not be called "water"—as the low-lying part of it would have to be called if the construction of the grant contended for by the defendants was adopted—seemed clear upon the description given by the witnesses, and also upon the inspection made by the learned Judge; and the opinion that it is "land" is strengthened by the decision in Merritt v. City of Toronto (1911), 23 O.L.R. 365, 372.

The plaintiff should have an injunction and $25 damages, with costs.

KELLY, J. JUNE 24TH, 1920.

LUMSDEN v. GLIDDEN.

Conspiracy—Removal of Person to Hospital for Insane—Hospitals for the Insane Act, R.S.O. 1914 ch. 295, secs. 7, 8—Certificate of two Medical Practitioners—Bona Fides—Reasonable Care—Honest Belief—Release of Person from Hospital—Evidence—Failure to Prove Conspiracy or Wrong of any Kind.

Action against five defendants for conspiracy to bring about the plaintiff's removal to and detention in a Hospital for the Insane.

The action was tried without a jury at Ottawa.
W. J. Kidd, K.C., and G. S. Henderson, for the plaintiff.
F. H. Chrysler, K.C., for the defendant Church.
G. F. Henderson, K.C., for the other defendants.

KELLY, J., in a written judgment, said that there were four claims: (1) against all the defendants for conspiracy; (2) against the defendants Glidden and Church, physicians, for wrongfully and negligently certifying the plaintiff as an insane person under the Hospitals for the Insane Act, R.S.O. 1914 ch. 295; (3) against the plaintiff's wife and daughter (two of the defendants) for wrongfully procuring the plaintiff to be placed in the hospital; and (4) against the defendant Farrer for wrongfully aiding in bringing this about.

The defendants Glidden and Church signed the certificates required by secs. 7 and 8 of the Act.

It might be said, as in Regina v. Whitfield (1885), 15 Q.B.D. 122, 150, that the statute has given medical men large powers. But the statute is based upon the theory that they can be trusted. If, in the circumstances of a particular case, the medical practitioners proceed under the Act in good faith and with reasonable care, and each, after an examination made separately from any other medical practitioner, reaches the conclusion that the certificate contemplated by the Act should be issued, it would impair the efficiency of the Act—indeed it would render it altogether impractical—if medical men so acting should be liable in damages for the consequences of the issue of the certificates.

Reference to Everett v. Griffiths (1920), 36 Times L.R. 491.

The evidence did not support the contention that the defendants Glidden and Church, or either of them, were wanting in good faith or did not proceed with reasonable care.

There was sufficient ground for an honest belief that the plaintiff's actions might reasonably be attributed to mental weakness.

The plaintiff's release from the hospital was not proof that he had no mental infirmity.

Upon the evidence, none of the plaintiff's charges had been substantiated.

Action dismissed with costs.

MASTEN, J. JUNE 25TH, 1920.

*GRAHAM & STRANG v. DOMINION EXPRESS CO.

Carriers—Dominion Express Company—Common Carriers—Obligations Modified as to Tariff-rates by Railway Act of Canada—Tariff Approved by Railway Board—Carriage of Intoxicating Liquors from Export Warehouse in Ontario to another Province—Prohibition by Ontario Board of License Commissioners—Powers of Board—Ontario Temperance Act, secs. 41, 46—Constitutional Law—Powers of Ontario Legislature—British North America Act, sec. 92 (16)—Interference with Trade and Commerce.

Motion by the plaintiffs for an interim mandatory order, turned into a motion for judgment in the action.

Preliminary objections to the motion were overruled by MASTEN, J., in a judgment given on the 18th June, 1920, and noted ante 316.

In that judgment the learned Judge's decision on the merits in favour of the plaintiffs was also given.

On the 25th June, written reasons for that decision were delivered to the Registrar.

MASTEN, J., after stating the facts, said that the first question was, whether the defendants were common carriers. They were incorporated by a special Act of the Dominion Parliament, 1873, 36 Vict. ch. 113, and their powers were declared by sec. 4. In Johnson v. Dominion Express Co. (1896), 28 O.R. 203, 205, and in F. T. James Co. v. Dominion Express Co. (1907), 13 O.L.R. 211, 218, it was held that these defendants are common carriers. The defendants are fundamentally common carriers, with their obligations modified as to tariff-rates by the Railway Act of Canada; and the tariff-rates, filed by them and approved by the Board of Railway Commissioners, establishes that liquors, including whisky, come within the classes of goods which the defendants profess to carry.

Common carriers are under obligation to receive and transport only such goods as they profess to carry; and the second point urged by the defendants and by the License Board is that, since the passing of the Ontario Temperance Act, the company, even though considered common carriers of liquor, have professed to carry it only when such carriage was authorised or licensed by the Board of License Commissioners for Ontario; and that, the transportation of liquor having been interdicted by that Board, the gallon of whisky which the plaintiffs sought to compel the defendants to carry was not a commodity of the description which the defendants professed to carry. The defendants are common carriers of liquor, they cannot at their own option refuse to carry it for any single individual or for a class of persons selected by themselves, nor for a class of persons selected for them by some one else, nor do they cease to be common carriers for such a class because they have for a period of time declined to carry for that class.

The broad general contention of the plaintiffs was that, if the prohibition of the Board of License Commissioners was not warranted by the Ontario Temperance Act, it was beyond the powers of the Commissioners and nugatory; and, if warranted by the Act, the Act itself was in that respect unconstitutional.

The powers of a Provincial Legislature respecting intoxicating liquors are derived from the words of sec. 92 (16) of the British North America Act—"generally all matters of a merely local or private nature in the Province:" Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348; Attorney-General of Manitoba v. Manitoba Licence Holders' Association, [1902] A.C. 73; Re Hudson's Bay Co. and Heffernan, [1917] 3 W.W.R. 167.

The purpose and effect of the action of the Board of License Commissioners is not anything local to Ontario; it is rather to prevent the export of intoxicating liquors into Manitoba and the other Western Provinces, thus interfering with trade and commerce, which are not within the jurisdiction of the Legislature of Ontario, and therefore not within the competence of its agent, the License Board. See sec. 139 of the Ontario Temperance Act, which must be construed as an overriding section, to which other provisions of the Act must be interpreted as subsidiary if they appear to conflict with it.

Sections 41 and 46 of the Ontario Temperance Act were not intended to interfere by an indirect method with trade and commerce, but rather to afford means of insuring that export warehouses should not operate so as to defeat or evade the provisions against local traffic and use within the Province.

In other words, secs. 41 and 46 were not intended to afford a basis for interfering with the export of intoxicating liquors from Ontario—if they did, they would be ultra vires. See the cases cited above and Gold Seal Limited v. Dominion Express Co., [1917] 3 W.W.R. 649.

Summary of conclusions:—

(1) The defendants are common carriers.

(2) Carrying liquor is part of their professed business.

(3) They cannot, at their own option, refuse to carry for a particular class, though that class is desginated by the License Board.

(4) The Ontario Temperance Act does not give power to the License Board to interfere, in the manner here attempted, with the export of liquor from Ontario.

(5) If it did, the Act would be ultra vires.

KELLY, J. JUNE 25TH, 1920.

*G. TAMBLYN LIMITED v. AUSTIN.

Landlord and Tenant—Lease of Part of Building for Purposes of Store—Erection by Landlord of Stairway on Outer Wall of Store—Interference with Access of Light—Derogation from Lessee's Rights—Unauthorised Use of Wall—Demise Including both Sides of Wall—Absence of Reservation in Lease—Exclusive Use of Cellar by Lessee, though not Included in Description of Part Leased—Interpretation of Lease by Conduct of Parties—Description Explained by Possession—Use of Vacant Land Adjoining Store—Lease not under Seal—Pleading—Delay in Taking Proceedings to Stop Erection of Stairway—Injunction—Declaration—Costs.

Action to restrain the defendant, the plaintiff company's landlord, from proceeding with the erection of a stairway upon the store-premises demised to the plaintiff company, and from in any way interfering with the user by the plaintiff company of the premises, and for an order directing the removal of the stairway built by the defendant.

The defendant counterclaimed a declaration that the plaintiff company was not entitled to the use of the basement under the store, nor to the use or occupation of the lands lying immediately to the north of the store, and an injunction restraining the plaintiff from using the basement or cellar and the adjacent land.

The action and counterclaim were tried without a jury at a Toronto sittings.

A. C. McMaster, for the plaintiff company.

J. Hales, for the defendant.

KELLY, J., in a written judgment, said, after stating the facts, that the plaintiff company had had possession of the premises since 1909, under leases made by the defendant and his predecessor in the ownership of the premises. The plaintiff company was given possession of and had continued to use the cellar for the purposes of heating the premises, storing coal and other commodities, and for other purposes as well, all along believing that it had an exclusive right thereto, although the lease contained a statement that the plaintiff company "was only getting the ground-floor . . . and access to the cellar." There was no evidence that the lessor or any one but the plaintiff company made use of the cellar during all the years it had occupied the premises. The company had also used the vacant land at the rear of the store for the purpose of bringing goods to and through the door leading into the store; this also was not objected to by the lessor.

The new stairway did not very seriously interfere with the light, though it did create some obstruction, and from the plaintiff company's standpoint the interference was accentuated by the fact that that part of the company's premises had all along been used as a dispensary. To the extent to which there was such obstruction, the building of the stairway was a derogation from the company's rights under the lease.

The unauthorised use by the defendant of the exterior of the wall of the demised premises was more serious. The demise of a floor or a room or an office bounded in part by an outside wall prima facie includes both sides of that wall: Carlisle Café Co. v. Muse Brothers & Co. (1897), 77 L.T.R. 515; Hope Brothers Limited v. Cowan, [1913] 2 Ch. 312.* There was not in the demise to the plaintiff company any exception or reservation excluding the application of this rule; and the company was entitled to restrain the defendant from using the exterior wall of its store for the purpose of erecting the stairway.

In the circumstances, the defendant was not entitled to the relief asked for in his counterclaim. Having regard to the conditions which existed at the time of the original lease with respect to the cellar and what had occurred since, and on the evidence that the company had always during its occupancy of the premises had exclusive use of the cellar, and that the renewals of the lease were made with full knowledge by the lessor that it was so used,

*See also Goldfoot v. Welch, [1914] 1 Ch. 213.

the reasonable inference was that the lessor intended that the cellar should form part of the premises demised. Lessor and lessee seemed to have interpreted, by their conduct, just what the lessee should hold and enjoy. The question of parcel or no parcel is one of fact for the jury: Lyle v. Richards (1866), L.R. 1 H.L. 222. The question whether any particular property is included in the lease depends on the words of the lease as applied to the circumstances of the property—evidence being admissible to shew the state and condition of the property at the time the lease was granted: Halsbury's Laws of England, vol. 18, p. 413, para. 871. The description is capable of being explained by possession: Booth v. Ratté (1890), 15 App. Cas. 188, 192.

To the extent to which the plaintiff company had, during its tenancy, made use of the vacant land to the north of the store, the same rule should be applied—lessor and lessee having treated the lease as including the right to such use. The lease required the lessee to clean the sheds and outbuildings—which pointed to something outside of the store-building itself.

The objection that the lease was not under seal was not taken in the defendant's pleading, and the defendant admitted the existence of a valid lease.

The plaintiff company did not object or begin the action until the stairway was almost completed, and the defendant had something to complain of on that score, which should be considered in disposing of the costs of the action.

The injunction granted until the trial should be continued, and the defendant must, at his own expense, remove the stairway, the plaintiff company affording every opportunity for that being done.

The counterclaim should be dismissed; and there should be a declaration that the plaintiff company is entitled to the exclusive use of the cellar as part of the demised premises, and is also entitled to use the vacant land to the north of the building for the same purpose and to the same extent as heretofore.

The defendant should pay one-half of the costs of the action and counterclaim.

DE OLLOQUI v. COWAN—KELLY, J., IN CHAMBERS—JUNE 22.

Deed—Conveyance of Part of Land in Question in Action—Application for Order Authorising—Interests of Other Persons—Refusal of Application.]—Motion by the plaintiff for an order permitting the defendant to convey to the plaintiff a certain parcel of land, being part of the estate of Rufus A. De Olloqui, in the City of Ottawa. The motion was heard, as in Chambers,

at the Weekly Court, Ottawa. KELLY, J., in a written judgment, said that he could not—with safety to the interests of others interested in the estate—favourably entertain the plaintiff's application; and the motion must, therefore, be dismissed with costs. R. V. Sinclair, K.C., for the plaintiff. George McLaurin, for the defendant.

RE RICHER—KELLY, J., IN CHAMBERS—JUNE 22.

Death—Presumption—Absentee for Long Period—Owner of Land Expropriated for School Purposes—Compensation-money Paid into Court—Payment out to Heirs-at-Law of Absentee—Evidence of Possession—Limitations Act—Costs.]—Application by the brother and five sisters of Louis Zephir Richer, an absentee, for payment, out of the moneys paid into Court in this matter, to Henri Saint-Jacques, their solicitor in arbitration proceedings, of his costs of such proceedings, and for payment to themselves of the balance of such moneys, less the costs of this application. The application was heard, as in Chambers, at the Weekly Court, Ottawa. KELLY, J., in a written judgment, said that Louis Zephir Richer was the owner of land which was expropriated for school purposes. There was an arbitration to ascertain the proper amount of compensation, and the amount awarded was paid into Court. The application was made on the theory that, nothing having been heard of Louis since about the year 1862 (or 1865), he should be presumed to have died in such circumstances as constituted the applicants his sole heirs-at-law of the property. There was strong evidence of exhaustive efforts having been made in or about the year 1867, by the applicants and other members of his family then living, to ascertain his whereabouts and to determine whether or not he was then living, and that efforts to that end continued afterwards, but all without any result. On the return of the motion the learned Judge required evidence as to the possession of the property, and such evidence had now been submitted, shewing that from 1865 until 1919 possession was in the applicants' father (now many years dead) and themselves—evidence which satisfied the learned Judge that, apart from the question whether Louis Zephir Richer was dead, his title to and interest in the property had, prior to the arbitration proceedings, vested, and then was, in the applicants. On the consent of the School Board or its solicitor being filed, payment might be made, out of the moneys in Court, of the applicants' solicitor's costs of the arbitration proceedings, after taxation thereof, on his filing an affidavit of non-payment;

and the costs of this application, on a similar affidavit being filed of non-payment; and the balance might then be paid out, in equal shares, to the six applicants. C. A. Seguin, for the applicants.

WHITE v. ANDERSON—LENNOX, J.—JUNE 23.

Money Lent—Action for, against Executrix of Debtor—Mortgage Security Accepted by Creditor—Right to Sue for Original Debt—Injunction against Removal of Assets from Ontario.]—Action to recover money alleged to have been lent by the plaintiff to a deceased person, of whose will the defendant is executrix. The action was tried before the late Chief Justice of the King's Bench at Belleville, and was standing for judgment at the time of his death. Counsel for both parties requested LENNOX, J., to hear the case upon the pleadings and the evidence taken before the Chief Justice; and the pleadings and evidence were read and argument heard by him. LENNOX, J., in a written judgment, said that, whether the execution and delivery of mortgages were or were not arranged for or contemplated at the time of the loan, the plaintiff, having accepted and subsequently in many ways recognised the mortgages, could not now ignore or repudiate their existence. This, however, did not abridge or postpone the plaintiff's right to sue for the recovery of the money lent to the deceased, although it undoubtedly precluded him from claiming as for a simple contract debt. The learned Judge was not able to see why the plaintiff, suing in Ontario, should not be afforded the ordinary remedies available to a plaintiff suing in an Ontario Court in respect of a debt contracted and payable in Ontario, including the right to prevent assets in Ontario being removed while the debt remained unsatisfied. There were heavy arrears of taxes, but the mortgaged lands had not been put up for sale. It was said that they could be sold by private contract for nearly enough to satisfy the plaintiff's claim. Some arrangement might well be made between the parties; but, none having been made, as the learned Judge assumed, there should be judgment for the plaintiff against the defendant as executrix for the amount claimed, $1,655.31 with interest, and for an injunction against removal of assets from Ontario, with costs of the action. F. E. O'Flynn, for the plaintiff. C. A. Butler, for the defendant.

RE GLIDDEN—MASTEN, J.—JUNE 24.

Trusts and Trustees—Death of Trustees Appointed by Will—Appointment of New Trustees—Security—Construction of Will.]—An application by the executors of Elizabeth Glidden, deceased, for the appointment of new trustees, both of the trustees appointed by the testator being now deceased, and for the advice and opinion of the Court upon a question as to the construction of the will. The motion was heard in the Weekly Court, Toronto. MASTEN, J., in a written judgment, said that the parties concerned concurred in the appointment, and asked that Charles Wilmot Livingston and Mary Alice Glidden should be appointed trustees. An order should be made accordingly. A question was reserved, viz., whether the new trustees so appointed should give security. After conferring with some of his brother Judges, the learned Judge finds that the better practice is to require such security as would be required if administrators were being appointed, and that this practice has received the approval of a Divisional Court. The order should therefore go accordingly. With respect to the question submitted upon the construction of the will, the learned Judge said that this application did not come before him in proper form, so that the question might be dealt with. He made no direction in that regard. Costs should be paid out of the estate in the usual manner. C. W. Livingston, for the applicants. F. W. Harcourt, K.C., Official Guardian, for the infants.