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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MARCH 19TH, 1919.

DANFORTH GLEBE ESTATES LIMITED v. W. HARRIS & CO. LIMITED.

Nuisance—Offensive Odours—Evidence—Proof of Existence of Nuisance—Action for Injunction and Damages—Defences—Prescription—Vacant Land—Implied Grant of Easement—Right to Operate Factory with Rendering Plant—Registry Laws—Nuisance—Quantum of Damages—Appeal—Leave to Adduce Further Evidence—Terms.

Appeals by both the plaintiffs and defendants from the judgment of FALCONBRIDGE, C.J.K.B., 15 O.W.N. 21.

The appeals were heard by BRITTON, RIDDELL, and LATCHFORD, JJ., and FERGUSON, J.A.

W. E. Raney, K.C., and Fraser Raney, for the plaintiffs.

W. N. Tilley, K.C., and A. C. Heighington, for the defendants.

RIDDELL, J., read a judgment in which, after stating the facts, he said that the plaintiffs appealed on the quantum of damages; the defendants appealed both as to liability and quantum.

The appeal of the defendants could not succeed on the ground of the absence of nuisance. That there was an offensive odour from the defendants' factory was found by the Chief Justice on perfectly satisfactory evidence.

The plaintiffs were a land company and six private landowners, of whom one—Orford—was a purchaser from the plaintiff company.

The defendants claimed a right under two heads, prescription and implied grant from the Synod of the (Anglican) Diocese of Toronto, the defendants' grantor. Prescription was set up against all the plaintiffs; implied grant against the plaintiff company and Orford.

Assuming that the right to pass offensive odours from one messuage over another can be acquired by user, and making other assumptions in the defendants' favour, the claim of prescription was not tenable. The time at which prescription must begin is when an actionable wrong is committed; and, so long as the land was vacant, no action would lie, for no one suffered injury by the passing of smells over it. Sturges v. Bridgman (1879), 11 Ch. D. 852, seemed wholly in point. So long as the adjoining land remained wholly vacant, and no attempt was made to sell it, and no other damage could be shewn, the time did not begin to run. Nothing of the kind was shewn to have taken place 20 years before this action. This defence failed as against all the defendants.

It was said that there was an implied grant of an easement over the land acquired by the plaintiff company, based upon the fact that in 1893 the owner of lots 2, 3, 4, and 5 sold to the defendants, or their predecessors in title, lot 5 with an existing building thereon, then used as a rendering plant, and consequently must be considered as impliedly granting the right to operate the plant.

Reference to Hall v. Lund (1863), 1 H. & C. 676, 682, and other cases.

The evidence made it clear that the offensive odours were quite as great and noticeable when the Synod conveyed in 1893 as at the commencement of this action; and so, by implication, the right was given to the grantees to operate their works as they had been doing without interference from the Synod as owners of lots 2, 3, and 4. No difficulty arose from the tenancy by the defendants or their predecessors in title of lots 3 and 4; and the easement now in fact enjoyed did not differ from that of which there was an implied grant. The plaintiff company could not set up the Registry Act, for it had express notice of the nuisance, made inquiries about it, and bought on the hypothesis that it was to be abated.

The plaintiff company and the plaintiff Orford set up a quit-claim deed of the 20th January, 1914; and, if they could rely upon its express terms in their fullest sense, they might make out an answer to the claim of implied grant. But this deed was not put in evidence, and it seemed reasonably clear that it was never intended to have the wide effect contended for. If these plaintiffs desired to set up this deed, they should be allowed to have an issue as to it upon paying the costs of this appeal, and in the issue the defendants should be at liberty to ask for rectification etc. If these plaintiffs, within 10 days, elect to take an issue, and pay the costs of this appeal within 10 days after taxation thereof, the further disposition of this appeal as to these plaintiffs will be reserved until after the trial of the issue—otherwise the appeal of the

defendants against them will be allowed and the action dismissed, but without costs, and their appeal will be dismissed with costs.

The appeal of the defendants against the plaintiffs as to the quantum of damages could not succeed.

As against all the plaintiffs except the company and Orford the appeal of the defendants should be dismissed, with costs on the Supreme Court scale.

BRITTON, J., agreed with RIDDELL, J.

FERGUSON, J.A., read a judgment, in which, after a discussion of the facts and law, he stated his conclusion that the defences failed, and that the damages awarded to the respective plaintiffs should not be increased or diminished. But, in view of the fact that the plaintiffs at the trial established their right to an injunction, and in view of the possible, if not probable, damage that the plaintiffs would suffer during the suspension of the injunction—that suspension being in ease of the defendants—the enforcement of the injunction should not have been postponed for nearly a year; and, unless the defendants were now willing to make some reasonable compensation to the plaintiffs therefor, the judgment of the trial Judge should be amended by striking out the words "from and after the 15th day of May, 1919." In other respects, the judgment should be affirmed, and the appeals of both plaintiffs and defendants dismissed with costs.

The application of the plaintiff company to put the quit-claim deed in evidence should be granted, upon the terms stated by RIDDELL, J.

LATCHFORD, J., agreed with FERGUSON, J.A.

In the result the appeals of both plaintiffs and defendants were dismissed with costs on the Supreme Court scale, with the exception of the defendants' appeal as to the plaintiff company and the plaintiff Orford. If these plaintiffs elect, within 10 days, to take an issue and pay the costs of the appeal, an issue may be framed and the further disposition of the defendants' appeal as to them reserved until after the trial of the issue; otherwise, the appeal of the defendants against these plaintiffs will be dismissed, but without costs.

SECOND DIVISIONAL COURT. MARCH 19TH, 1919.

*HAWLEY v. HAND.

Costs—Death of Defendant pendente Lite—Revivor in Name of Executrix—Rule 301—Order to Continue Issued by Executrix—Costs of Action Adjudged against her—Personal Liability—Assets of Deceased—Discretion of Trial Judge—Appeal without Leave.

Appeal by Jessica H. Hand, executrix of Havelock E. Hand, the original defendant, from the judgment of FALCONBRIDGE, C.J.K.B., 15 O.W.N. 170, in so far as it required the appellant personally to pay the costs of the action, which had been continued against her, upon the death of her husband pendente lite, under an order to proceed issued under Rule 301.

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

J. M. Ferguson, for the appellant.

R. S. Robertson and J. W. Pickup, for the plaintiff, respondent.

MEREDITH, C.J.C.P., delivering the judgment of the Court at the conclusion of the hearing, said that the proper form of judgment against an executor has always been that the plaintiff recover debt and costs out of the assets of the testator, if the defendant have so much, but, if not, the costs out of the defendant's own property: executors and administrators have no advantage over other litigants as to costs; they were always liable to pay them de bonis propriis if there were no assets.

In this case the executrix voluntarily assumed the defence of the action, taking out herself the order continuing it against her—no doubt in the expectation or hope that the judgment would be in her favour; but it was not.

There was, therefore, no good reason in law, or as a matter of discretion, why she should not pay the costs out of the estate or personally according to the rule stated.

It was, of course, enough to dispose of this appeal to consider that there was power so to impose costs as mentioned: the Court could not review the discretion exercised in awarding them, no leave to appeal having been obtained.

The appeal should be dismissed.

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

SECOND DIVISIONAL COURT. MARCH 19TH, 1919.

*SIMPKIN AND MAY v. TOWN OF ENGLEHART.

Municipal Corporations—By-law—Water Supply of Town—Public Utilities Act, secs. 9, 26, 27, 45—Municipal Act, secs. 399 (70), (72) — Ratepayers — "Consumers" — Drawing Water from Hydrants in Streets.

Appeal by the defendants from the judgment of LOGIE, J., 15 O.W.N. 398.

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

J. M. Ferguson, for the appellants.

R. T. Harding, for the plaintiffs, respondents.

MEREDITH, C.J.C.P., delivering the judgment of the Court at the conclusion of the hearing, said that, in the interests of public health, the law permitted the municipality to require that all ratepayers, tenants and occupants, residing in the limits of the corporation should use for drinking and domestic purposes the water supplied by the corporation and no other; and the municipality did so, by by-law, providing also for the punishment of any contravention of such by-law.

The plaintiffs admittedly came within the provisions of the by-law.

The municipality also required by by-law, as they had power to do, that all consumers of water not directly abutting water mains or services should pay certain low water rates, and that all persons abutting the water mains or services should pay a higher rate.

The plaintiffs were persons not "directly abutting water mains or services," and were rated as such.

But they said that they were not "consumers" and so could not be rated.

The by-law, however, compelled them to be consumers: they were by law "compelled to 'use' . . . the water supplied by the corporation," and no other; and so were plainly intended to be included in the word "consumers," whether they actually consumed much or little or none. They were in the eye of the law consumers, and could not escape from paying for their rights in this public benefit, by setting up that they were offenders against the law: if in truth they really were.

The case was not one in which it would be practically impossible for the plaintiffs to obey the law; if it were, rates would not be imposed until the water should be brought near enough to be used as the law required.

The appeal should be allowed and the action dismissed.

SECOND DIVISIONAL COURT. MARCH 20TH, 1919.

*BAILEY v. BAILEY.

Husband and Wife—Alimony—Wife Leaving Husband on Account of Cruelty—Offer to Receive her back—Bona Fides—Findings of Fact as to Cruelty—Dismissal of Action—Undertaking of Husband—Appeal.

Appeal by the plaintiff from the judgment of MASTEN, J., 15 O.W.N. 356.

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

A. G. Slaght, for the appellant.

R. McKay, K.C., for the defendant, respondent.

THE COURT dismissed the appeal.

SECOND DIVISIONAL COURT. MARCH 21ST, 1919.

*McARTHUR v. NILES LIMITED.

Contract—Formal Lease of Land for one Year—Rent Payable by Yielding Portion of Crop—Agreement for "Working on Shares"—Agreement of Lessee with Stranger to Grow Crop on Demised Land for Stranger—Conversion of Crop by Stranger—Action by Lessor for Damages.

Appeal by the defendants from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiff for the recovery of $147 and costs in an action in the County Court of the County of York, brought to recover damages for wrongful entry on the plaintiff's land and removal and conversion of 40 bushels of pease.

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

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

J. J. Maclennan, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that the plaintiff owned the land upon which the crop of pease in question was grown; one Stutt acquired some interest in the land—either as "cropper" or tenant—and afterwards entered into the contract

with the defendants under which they claimed and took possession of the pease.

Under this agreement—quite a common one in these days—Stutt was to grow, upon the plaintiff's land, the pease in question, for the defendants, who were to supply the seed and might supervise the crop and enter on the land to bestow upon it, before or after harvest, any labour of their own to enhance its quality or purity or to avoid unreasonable dealy in the delivery thereof; "and whose property the crop growing in all its conditions shall be and remain at all times."

It could not reasonably be doubted that such an agreement was quite a valid one in law, whether the pease became or did not become at any time part of the land. The agreement was in writing signed by both parties to it.

The only question there could be was whether the plaintiff had a prior right to the pease in question under the transaction between Stutt and him.

That transaction was evidenced by a printed lease of a very formal character, signed by the parties to it, which purported, in proper technical language, to be a demise of the land for one year, the rent reserved being one dollar, payable on the day of the date of the lease, "and one-third share or portion of the whole crop of the different kinds and qualities which shall be grown upon the said demised premises."

If the transaction were really a demise of the land, giving the tenant the exclusive right of possession of it for the year, with a right in the landlord only to distrain for rent at the end of the year, it ought to be obvious that he had no right which could prevent Stutt making the bargain he did make with the defendants; and that no delivery of the pease by Stutt to the plaintiff could deprive them of their rights to them.

On the other hand, if the form of the transaction were disregarded and it were considered one under which the plaintiff was at all times to have a one-third share of all the crops grown upon his land, it might well be that that earlier right should prevail over the later-acquired rights of the defendants, provided that, under the real agreement between the plaintiff and Stutt, Stutt had not power to make such an agreement as that which he actually made with the defendants to grow the seed-pease for them.

So that it really all came down to the simple question: did the plaintiff acquire a right to one-third of all crops grown by Stutt on the plaintiff's land, without any right in Stutt to make for the plaintiff as well as himself the agreement he did make with the defendants—acquire it when the lease was made; if so, this appeal should be dismissed; otherwise, it should be allowed and the action should be dismissed.

In all the somewhat unusual circumstances of the case, the learned Chief Justice inclined to the view that the plaintiff did acquire such a right without conferring on Stutt such a power, and so would dismiss the appeal. The plaintiff was to have one-third of the crop; and no time was fixed for payment of the rent if the one-third of the crop were merely rent reserved. All the circumstances pointed perhaps more to "working on shares" than to a real demise, though there was much to be said in favour of the view that the one-third of the crop which the landlord was to have was, as to the crop of pease in question, one-third of the gross income from the transaction with the defendants.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

LATCHFORD and MIDDLETON, JJ., agreed in the result, for reasons stated by each in writing.

Appeal dismissed.

SECOND DIVISIONAL COURT. MARCH 21ST, 1919.

PIERCE v. CITY OF TORONTO.

Highway—Nonrepair—Snow and Ice upon Crossing—Injury to Pedestrian—Dangerous Condition—Notice—Inadequate Attempt to Remedy—Liability of Municipal Corporation—Municipal Act, sec. 460(3)—"Gross Negligence."

Appeal by the defendants from the judgment of the County Court of the County of York, in favour of the plaintiffs (husband and wife) for the recovery of $500 and costs in an action for damages arising from an injury sustained by the wife by a fall upon the crossing of a street in the city of Toronto, alleged to have been out of repair and in a dangerous condition by reason of snow and ice accumulating and being allowed to remain thereon without proper measures being taken by the defendants to remedy the condition.

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

C. M. Colquhoun, for the appellants.

J. H. Bone, for the plaintiff, respondent.

LATCHFORD, J., read a judgment in which he said that, as found by the trial Judge, the crossing at which Mrs. Pierce was injured

was a particularly dangerous one, and was known to be such by the defendants, who had not taken effective measures to render it reasonably safe for persons lawfully using the street. Whether the condition of the crossing was due to "gross negligence" (Municipal Act, sec. 460 (3)) must depend, as pointed out by Anglin, J., in German v. City of Ottawa (1917), 56 Can. S.C.R. 80, at p. 89, "upon the notice of the existence of the dangerous condition which the city authorities actually had, or which should be imputed to them, and their opportunity of remedying it."

In this case the city authorities were well aware that the crossing was in a dangerous condition, but the means which they adopted to provide a remedy were insufficient and ineffective.

There was no reason to doubt the correctness of the conclusions arrived at by the Court below. The appeal should be dismissed.

BRITTON, J., agreed in the result.

MIDDLETON, J., in a written judgment, said that there was a condition full of peril known to the defendants, and an attempt to cope with the situation which was quite inadequate and which ought to have been appreciated as inadequate by those in charge. This constituted gross negligence.

The appeal should be dismissed.

MEREDITH, C.J.C.P., read a dissenting judgment in which he discussed the facts and reviewed the evidence with care. His conclusion was, that, upon all the testimony, it was impossible to find the defendants guilty of gross neglect of their duty to keep the highways in repair.

Appeal dismissed with costs (MEREDITH, C.J.C.P., *dissenting*)

SECOND DIVISIONAL COURT. MARCH 21ST, 1919.

*POHLMAN v. HERALD PRINTING CO. OF HAMILTON LIMITED.

Libel—Newspaper—Libel and Slander Act, sec. 8—Notice before Action Specifying Statement Complained of—Inadequate Notice—Failure to Specify Portions of Newspaper Article Said to be Libellous—Faults of Notice not Curable—Dismissal of Action, notwithstanding Verdict for Plaintiff—Refusal of New Trial—Effect of sec. 15 of Act—Statement in Newspaper of Names of Proprietor and Publisher.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., upon the verdict of a jury, in favour of the plaintiff for the recovery of $100 and costs in an action for libel.

Three actions by the same plaintiff against different defendants, the publishers of newspapers, were tried together.

The judgment of FALCONBRIDGE, C.J., is noted in 15 O.W.N. 215, sub nom. Pohlman v. Times Printing Co.

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

J. A. Soule, for the appellants.

T. N. Phelan, for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the single question involved in the appeal was, whether the defendants were entitled to have the judgment set aside and the action dismissed under and by reason of the provisions of sec. 8 of the Libel and Slander Act—"No action for libel contained in a newspaper shall lie unless the plaintiff has . . . given to the defendant notice in writing specifying the statement complained of . . ."

The plaintiff did give notice in writing, and the publication referred to in the notice obviously contained several libellous statements if all the statements were untrue; but they were not; and the plaintiff did not now nor at any time complain of those which one might consider, even in war-time, the graver statements, as far as the plaintiff's character might be affected by them. All that he had complained of, and recovered judgment for, were those which related to his nationality and matters connected with it.

It could not be held that in his notice he "specified the statement complained of." His notice could not be read as a complaint of every statement contained in the whole publication—in the notice he said, "which article is largely untrue and libellous," not altogether so.

Section 8 must be treated as remedial. In other like legislation as to giving notice, power to excuse want of notice and to aid faulty notice is sometimes given, but none is given in this enactment; it is peremptory—"No action . . . shall lie."

Therefore, if the case was within the provisions of sec. 8, the faults of the notice could not be cured or avoided; and the appeal must be allowed and the action dismissed. It was not a case for a new trial. Reasonable men could not find that the notice specified the statement complained of, even if the words could be considered capable of such a meaning.

The contention that sec. 15 of the Act deprived the defendants of the benefit of sec. 8 was abandoned, after it had been made upon the hearing of the appeal, in view of the pleadings and the

ruling of the Supreme Court of Canada in Scown v. Herald Publishing Co. (1918), 56 Can. S.C.R. 305.

The appeal should be allowed and the action dismissed upon the defence of want of notice only.

Appeal allowed.

SECOND DIVISIONAL COURT. MARCH 21ST, 1919.

BAIKIE v. BRADLEY.

Title to Land—Survey—Boundaries—Non-compliance with sec. 14. of Surveys Act—Evidence—Onus.

Appeal by the plaintiff from the judgment of the County Court of the County of Wentworth dismissing an action for possession of a small piece of land and to compel the removal of a fence and house from the land.

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

H. S. White, for the appellant.

C. W. Bell, for the defendant, respondent.

Main, a third party, was not represented.

LATCHFORD, J., read a judgment in which he said that, until a survey was made in 1914, the westerly line of Hughson street was assumed by both plaintiff and defendant to be identical with the line of the old fence, as indicated plainly, at the time they purchased from Main, by certain posts and by other remnants of the fence itself. Had the plaintiff thought otherwise, it was unlikely that he would have allowed the defendant to proceed with the erection of his house—still less probable that he would have united with his neighbours on the north and south in adopting for the fences which they built along the rear a line almost exactly 57 feet from the present line of Hughson street, and therefore, according to the evidence, 60 feet from the line of the old fence.

The plaintiff was entitled, as against the defendant, to a parcel of land 60 feet in depth from Hughson street, as shewn on McKenzie's map of the City of Hamilton in James Hughson's survey. The plaintiff had not proved that the westerly boundary of Hughson street, as established by the survey of 1914, was identical with the westerly boundary of that street as shewn on McKenzie's map in Hughson's survey. Had he established that identity, he

would have been entitled, in the circumstances, to the $25 fixed as possible damages; but, having failed in that, he could not succeed in the action.

The appeal should be dismissed.

MEREDITH, C.J.C.P., read a judgment in which he said that he agreed with Latchford, J., as to the failure of proof of the plaintiff's title; and desired to add that, although the plaintiff's claim was based entirely upon sec. 14 of the Surveys Act, he not only failed to bring his case within it, but plainly proved that it was not within it. Indeed, the line which was adopted was but the "best guess they could make," as the trial Judge said; and, as he found, the real purpose of the proceedings taken was not to place monuments marking the boundaries of the lots, but was that the municipality might get the full width of the street in view of the construction of a street railway upon it. The whole ground upon which the action rested failed, and the action must fail with it: see Regina v. Cosby (1892), 21 O.R. 591. And if that were not so, other questions, arising out of the enactment, would need to be answered in the plaintiff's favour before it could be held to support his claim: for instance, as to the onus of proof or disproof of compliance with the several requirements of the section: see Boley v. McLean (1877), 41 U.C.R. 260, and Regina v. McGregor (1868), 19 U.C.C.P. 69; and what effect, if any, the section should have upon the question in issue in this action if its terms had been complied with.

BRITTON and MIDDLETON, JJ., concurred.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 21ST, 1919.

RE McCLEMONT AND CRAIN.

Creditors Relief Act—Claim to Share in Fund Realised by Sheriff—R.S.O. 1914 ch. 81, sec. 7—"Debts which are Overdue"—Solicitor's Claim for Costs Incurred by Debtor—Necessity for Delivery of Bills of Costs—Solicitors Act, R.S.O. 1914 ch. 159.

Appeal by the liquidator of a company from an order of the Judge of the County Court of the County of Lincoln, in Chambers, under the Creditors Relief Act, allowing the claim of W. M. McClemont to a share in a fund in the hands of the Sheriff of Lincoln.

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

A. C. McMaster, for the appellant.

The claimant, respondent, in person.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the facts upon which the rights of the parties to this appeal depended were so vaguely and insufficiently set out, that they could not be finally dealt with upon this appeal.

The first question was, whether the respondent's claim against the execution debtor was one within the provisions of sec. 7 of the Creditors Relief Act, R.S.O. 1914 ch. 81. "Debts which are overdue" only are within such provisions: and there was no evidence that this claim was for overdue debts. It was said to be mainly for law costs of the unsuccessful defence of the action in which the execution, upon which the moneys in question were levied, was issued: but no bills of costs had been produced at any stage of the proceedings, if in truth any really existed. The affidavit of the claimant, sworn on the 22nd August last, did not prove their existence. The words "details and particulars of which have been rendered to the debtor" might refer to the immediately preceding words "other small miscellaneous accounts."

It was extraordinary that the claimant, a solicitor, should obtain that which was equivalent to a judgment and execution for nearly $3,000 without production of his bills of costs or even particulars of his other small accounts.

There was at present no evidence upon which it could properly be found that his claim was for debts which were overdue. If the bills had not been rendered as the law required, it could not be considered that they embraced a debt overdue within the meaning of the Act, for the solicitor could not bring an action for the recovery of the costs until one month after the bills had been delivered, as required by the Solicitors Act, R.S.O. 1914 ch. 159. If the claim were for overdue debts, debts overdue at the time when the claim was made under the Act, it would not have been made out of time: that question was settled by the statement made by the Sheriff, in the proceedings before the County Court Judge, on the 24th October last, that "he has never completed Form 1 of the schedule to the Act, as required by section 6:" a statement not questioned in the proceedings before the County Court Judge.

The matter should be referred back to the County Court Judge, so that he might consider whether the claim was really one within the provisions of sec. 7, and, if not, reject it: but, if it were, to tax, or have taxed, the bills of costs; and determine finally then for what amount the claimant should rank with the other creditors upon the money in the Sheriff's hands.

There should be no order as to costs of this appeal.

SECOND DIVISIONAL COURT. MARCH 21ST, 1919.

ONTARIO HUGHES-OWENS LIMITED v. OTTAWA ELECTRIC R.W. CO.

Negligence—Street Railway—Collision of Street-car with Automobile on Highway—Negligence of Motorman—Negligence of Chauffeur—Findings of Jury—Evidence—Contributory Negligence—Ultimate Negligence.

Appeal by the defendants from the judgment of LENNOX, J., 15 O.W.N. 413, upon the findings of a jury, in favour of the plaintiffs.

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

Taylor McVeity, for the appellants.

A. E. Fripp, K.C., for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. MARCH 21ST, 1919.

*ROBSON v. WILSON.

Way—Easement—Road Giving Access to Farm through Neighbour's Land—Action to Restrain Defendants from Using Road—User for Long Period—Defences—Express Grant—Lost Grant—Limitations Act—Trespass—Cutting Trees—Damages—Appeal—Costs.

Appeal by the defendants from the judgment of the County Court of the County of York, in favour of the plaintiffs, in an action for an injunction restraining the defendants from trespassing upon the plaintiffs' land and cutting and destroying trees, for damages, for an account, and for a declaration of the plaintiffs' rights. The defendants asserted a right of way over the plaintiffs' land.

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

J. Gilchrist, for the appellants.

A. J. Anderson, for the plaintiffs, respondents.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the judgment appealed against deprives the defendants not only of their only means of access from the front to the back of their farm, but also of their only means of access to their farm, upon which one of them resides, in any way; and does so notwithstanding the fact that such means of access have been in constant use by the defendants, and those through whom they acquired title to their land, for half a century, and have been the only means of such access ever since the land was occupied or used in any manner. The Court had to consider whether this was a case in which the plaintiffs were entitled to the right which the judgment in appeal gave them, notwithstanding the defendants' possession, in all the circumstances of the case.

The following defences were open to the defendants: that they had been and were lawfully entitled to the right of way under: (1) an expressed grant; (2) an implied grant; (3) a lost grant; and (4) the Limitations Act.

The learned Chief Justice, after reviewing the evidence and discussing the authorities, said that the defendants, if they should fail upon the other three defences, should succeed upon the fourth; but, in his opinion, they should succeed upon the first, which excluded the second and fourth, and also upon the third.

The appeal should be allowed and the action dismissed upon its main branch, involving the question of right of way. On the minor branch, trespass in cutting down and carrying away some trees, the plaintiffs had judgment for $10 damages; that judgment was not appealed against, and so must stand. The plaintiffs should have their costs of this appeal and the general costs of the action, and no order should be made as to costs of the minor branch of it, if there were any separable costs applicable to it.

Appeal allowed.

FIRST DIVISIONAL COURT. MARCH 21ST, 1919.

*REX v. SPENCE.

Prohibition—Power of Supreme Court of Ontario to Prohibit Provincial Magistrate if Proceeding with Investigation of Criminal Charge without Jurisdiction—No Power to Review Proceedings of Magistrate within his Jurisdiction—Dismissal of Motion for Prohibition—Appeal—Costs.

Motion by the Crown for an order quashing an appeal, entered by the defendant, from the order of SUTHERLAND, J., ante 9,

dismissing the application of the defendant for an order prohibiting one of the Police Magistrates for the City of Toronto from taking any further proceedings upon a certain information against the defendant.

The motion was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ., and FERGUSON, J.A.

Edward Bayly, K.C., for the Crown.

W. E. Raney, K.C., for the defendant.

MEREDITH, C.J.C.P., in a written judgment, said that the only question which could be raised properly upon this motion for prohibition was, whether the provincial police officer who was proceeding with the investigation of this criminal matter had jurisdiction in the matter; and that was quite a proper matter for consideration in this provincial Court—the Supreme Court of Ontario: if the officer were usurping a power which he had not, this Court should have prohibited him. It was quite competent for the appellant to prosecute his appeal from the order dismissing the application for prohibition on the ground of want of jurisdiction.

But it was equally plain that the question considered upon the application for prohibition, and discussed here again, was not one of jurisdiction, but was one for consideration in the criminal proceedings and there only: and so the motion for prohibition was misconceived, and ought to have been dismissed for that reason.

The one ground upon which prohibition was and is sought was and is: that the applicant had before been prosecuted for the same offence, and that that prosecution ended finally in his favour —in short that the present criminal proceedings must fail because the applicant was in effect acquitted in the earlier proceeding and should not be twice vexed.

But such a contention is in no sense an objection to the magistrate's jurisdiction: the subject-matter of the charge was one admittedly within it; and so the contention, instead of shewing want of jurisdiction, shewed the contrary—shewed the need of the criminal proceedings to determine in fact and in law whether the earlier prosecution was a bar to the later one.

And in that way the case was one within the criminal law, which affords ample opportunity to have this defence fully and fairly tried by the magistrate, and to have his rulings in it reviewed in the manner provided in the Criminal Code.

For these reasons, and on that ground only, the learned Chief Justice was in favour of dismissing this appeal. There was no jurisdiction in this Court upon this application to consider the question upon which the application was dismissed in the High

Court Division. The case was, therefore, one in which no order as to costs should be made.

LATCHFORD, J., read a short judgment. He said that prohibition would not lie unless there was a lack of jurisdiction in the judicial officer or Court dealing with the proceedings: Rex v. Phillips (1906), 11 O.L.R. 478. The lack of such jurisdiction was not suggested, and the appeal should be dismissed; no costs.

MIDDLETON, J., also read a short judgment. He was of opinion that the motion for prohibition was misconceived and was rightly dismissed. There was no want of jurisdiction in the magistrate; and the Supreme Court could not, by the exercise of its prerogative jurisdiction, control the decision of the magistrate on a matter within his competence.

BRITTON, J., and FERGUSON, J.A., agreed in the result.

Appeal dismissed without costs.

HIGH COURT DIVISION.

LENNOX, J. MARCH 17TH, 1919.

DELORY v. GUYETT.

Agent—Payment of Mortgage-moneys by Mortgagor to Solicitor Ostensibly Acting for Mortgagee—Misappropriation by Solicitor—Payment by Cheque—Authority of Agent to Receive Money—Evidence—Holding out—Estoppel.

Action for a declaration that a mortgage made by the plaintiff to the defendant had been fully paid and satisfied and for an order upon the defendant to discharge the mortgage or reconvey the land.

The action was tried without a jury at a Toronto sittings.
Arthur J. Thomson, for the plaintiff.
T. R. Ferguson, for the defendant.

LENNOX, J., in a written judgment, said that the plaintiff had by cheque paid the amount due upon the mortgage to one Loftus, a solicitor, apparently acting for the defendant; Loftus had mis-

appropriated the money; and the question was, who should bear the loss?

The plaintiff said that the defendant told her to pay the amount due to Loftus; the defendant said that the plaintiff asked him whether it would do to pay to Loftus, and admitted that he (the defendant) said, "I guess so."

The plaintiff went to Loftus's office in Toronto, found the deed, the mortgage, and the insurance policy in his hands, gave him a cheque signed by her, payable to Loftus, for an amount sufficient to cover the principal and interest due, exchange upon the cheque, which was drawn upon a bank in Hamilton, and the costs of a discharge. She received from Loftus the three documents mentioned, but no discharge. The defendant had not in fact signed a discharge. Loftus told the plaintiff that the discharge would be sent on when the cheque was paid. He deposited the cheque to his own credit in a bank in Toronto, but the bank refused to allow it to be drawn upon until next day, when advised that it had been paid.

It was argued for the defendant that Loftus was the defendant's agent at the most only to receive money, not a cheque. The following cases were referred to: Baker v. Greenwood (1837), 2 Y. & C. Ex. 414; Bridges v. Garrett (1869), L.R. 4 C.P. 580; Blumberg v. Life Interests and Reversionary Securities Corporation, [1897] 1 Ch. 171; Sykes v. Giles (1839), 5 M. & W. 645; Hine Brothers v. Steamship Insurance Syndicate (1895), 72 L.T.R. 79; Williams v. Evans (1866), L.R. 1 Q.B. 352; but the learned Judge thought that none of them was in point.

Loftus was held out as the defendant's agent to receive the money, and the defendant was estopped from disputing the agency.

Judgment for the plaintiff as prayed, with costs if demanded.

ROSE, J. MARCH 17TH, 1919.

*BAKER v. CITY OF TORONTO.

*SPEAL v. CITY OF TORONTO.

Municipal Corporations—Liability of City Corporation for Neglect of Police Force to Protect Property of Ratepayers from Theft and Violence—Relation of Police Force to Municipality—Municipal Act, secs. 354-358 — Pleading—Rule 124 — Summary Dismissal of Actions.

Motions by the Corporation of the City of Toronto, the defendants in both actions, for orders (under Rule 124) striking out the statements of claim and dismissing the actions, upon the ground

that the statements of claim disclosed no reasonable causes of action against the defendants.

The motion was heard in the Weekly Court, Toronto.

C. M. Colquhoun, for the defendants.

H. H. Dewart, K.C., for the plaintiffs.

ROSE, J., in a written judgment, said that in the Speal case the allegations in the statement of claim were: that the plaintiffs were for more than a year preceding the occurrences thereinafter mentioned, and still were, residents and ratepayers of the city, owning and operating a restaurant; that they duly paid the rates and taxes levied against their business; that the defendants, under the provisions of the Municipal Act, employed and maintained a police force charged with the duty of preserving the peace and preventing robbery and other crimes, which force was maintained and paid out of the rates and taxes to which the plaintiffs had contributed; that on the 2nd August, 1918, the plaintiffs learned that a number of persons had been threatening violence to the plaintiffs' premises and were conspiring with the intention of destroying or damaging the plaintiffs' restaurant at about 6 p.m. on that day; that the plaintiffs notified the officers in charge of one of the police-stations of the threatened violence; that two policemen were sent to the plaintiffs' premises, but the defendants and the police force negligently failed to take any other precaution or to furnish any other protection; that, about 6 p.m. on the said day, a large number of persons, without any provocation from the plaintiffs, unlawfully, tumultuously, and riotously assembled, and broke into the restaurant and destroyed or stole the contents thereof; that, although there were members of the police force on duty in the neighbourhood, and although the defendants and the police force could readily have prevented the damage, destruction, and theft, they negligently refrained from attempting to do so; that it was the duty of the defendants and their police force to protect the plaintiffs' premises and to prevent the riotous conduct aforesaid; and that the defendants were liable for the damages sustained by the plaintiffs, placed at $5,700.

The statement of claim in the Baker case was similar.

It appeared to the learned Judge that proof of the facts alleged in their pleadings would not establish legal liability on the part of the defendants.

He referred to secs. 354, 358, 359, 360, 361, 362, 363, 367, 368; and said that there was no suggestion in the statement of claim that the defendants failed to perform any of the duties expressly cast upon them or their council by any of these sections.

There had been in many cases attempts to render municipalities liable for wrongs done by constables where acting, as it was alleged, as servants of municipalities. In nearly all it had been held that the constables were not the servants of the municipalities, and that the municipalities were not responsible for the wrongs done by them. The position of the defendants in the present cases was even stronger; for what was complained of here was merely inaction; and, unless the act left undone was an act which the defendants were under legal obligation to do, the failure to do it did not bring the defendants under liability, even if the person who was charged with the duty of doing it was a person who, for some purposes and in respect of certain matters, could be looked upon as the servant of the defendants.

It was true that the defendants collected taxes from the plaintiffs, and that the members of the police force were paid out of the taxes; but the collection of the money was in performance of the defendants' statutory duty to assess and levy on the whole ratable property within the municipality a sum sufficient to pay all debts of the corporation; and the use of a portion of the money so raised in paying for the maintenance of the police force was in performance of the statutory duty to appropriate for and pay such remuneration to the force as the Board of Police Commissioners might determine, and to provide and pay for all such things as the Board might require for the use of the force—a very different thing from collecting the money as the consideration for a promise on the part of the defendants to protect the plaintiffs against crimes of violence.

The statements of claim must be struck out and the actions dismissed, with costs if demanded.

MASTEN, J. MARCH 18TH, 1919.

ROTHSCHILD v. TOWN OF COCHRANE.

Municipal Corporations—Destruction by Fire of Buildings in Town—By-laws Authorising Issue and Sale of Debentures to Provide Fund for Restoration—Validation by Statute—Remission of Taxes for one Year in Respect of Private Buildings Destroyed—Disposition of Surplus of Fund—Powers of Council—Action by Ratepayer for Declaration as to Administration of Fund—Plaintiff Suing on Behalf of all Ratepayers—Style of Cause—Amendment.

Action by a ratepayer of the Town of Cochrane for a declaration with respect to the administration by the defendants, the Corpora-

tion of the Town of Cochrane, of a certain fund, the proceeds of debentures issued under by-law 168 of the corporation.

The action was tried without a jury at Haileybury.

J. M. Ferguson, for the plaintiff.

R. S. Robertson, for the defendants.

MASTEN, J., in a written judgment, said that the plaintiff, in the body of his statement of claim, professed to sue on behalf of himself and all other ratepayers of the town; the style of cause, which did not shew that the plaintiff was suing in that way, should be amended: Henderson v. Strang (1918), 43 O.L.R. 617, 618, 619.

By 7 Geo. V. ch. 9 (O.) by-laws 168, 169, and 170 of the Town of Cochrane were confirmed.

By-law 168 provided for the issue of debentures for the borrowing of $40,000 to replace property destroyed and to make good loss sustained through fire.

By-law 169 provided that one-half of the municipal taxes imposed for 1916 on all buildings in the town destroyed by forest fires in July, 1916, should be cancelled, and also one-half of all taxes imposed for 1916 in respect of business assessment upon buildings so destroyed.

By-law No. 170 provided that, in the event of moneys realised from the sale of the debentures authorised by by-law 168 being more than sufficient to cover and provide for all loss occasioned by the fires and to make good the deficit occasioned by the cancellation of the 1916 taxes, the surplus, if any, should be applied and expended, up to the amount of $7,000, on extensions and improvements of the waterworks system of the town, and any further surplus should be expended for the installation of a duplicate pumping system and for increasing the water supply of the town.

The debentures realised $37,752; the defendants paid out $18,330.09, and expended, in addition, $7,000 for building water-mains.

The plaintiff sought a declaration that, in the administration of the fund, the defendants were under obligation to apply the balance in hand from year to year in ease of the taxes to be levied, so that the rate should in no year exceed the rate for 1916; and also a declaration that no part of the fund should be expended under the provisions of by-law 170 unless and until it was demonstrated that every individual property lessened in taxable value by the fire had been restored so so to possess the same assessable value as before the fire, and all losses (actual and potential) made good and restored.

The learned Judge did not agree with the contention of the

plaintiff. The deficit which was to be made good was the deficit occasioned by the cancellation of the 1916 taxes. No power to cancel or rebate in 1917 or 1918, or in any other year, was provided; and, therefore, in each of those years, it was or would be the duty of the corporation, in compliance with sec. 297 of the Municipal Act, to assess and levy a sum sufficient to pay all the debts of the corporation falling due within the year, subject only to this, that the fund, proceeds of the debentures, might be applied to rebuild and restore so much of the sidewalks and other physical assets of the corporation as had been destroyed by the fire of 1916.

At the time of the passing of the by-laws (February, 1917), it was entirely uncertain how much would have to be expended in restoring the sidewalks, waterworks plant, and other permanent improvements which had been destroyed in the town, and it was intended to provide a fund for the restoration of this property; but it was not intended that the by-laws or the statute should destroy or cancel the discretion and authority exercisable by the municipal council, so as to compel it to effect such restoration if it were valueless, or, in the opinion of the council, not worth restoring. See Norfolk v. Roberts (1913-14), 28 O.L.R. 593, 602, 50 Can. S.C.R. 283.

The defendants had acted in good faith; and, in passing by-law 182, had recited that there was an apparent surplus of $7,000 which might be used for the extension of the waterworks according to by-law 170. They had thus declared that a surplus existed to that extent; and with their declaration in that respect the Court should not interfere.

Action dismissed with costs.

LOGIE, J. MARCH 18TH, 1919.

RE BRITISH CATTLE SUPPLY CO. LIMITED.

McHUGH'S CASE.

Company—Winding-up—Contributory—Application by Land Corporation for Shares—Acceptance by Directors—Allotment of Shares to Nominee of Corporation—Question whether Shares Paid for by Effect of Agreement between Company and Corporation—Independent Agreement—Liability of Nominee as Shareholder—Estoppel—Companies Act, R.S.C. 1906 ch. 79, sec. 41—Trustee.

Appeal by George P. McHugh from an order of the Master in Ordinary, upon a reference for the winding-up of the company,

placing the appellant's name upon the list of contributories in respect of 3,969 shares of the capital stock of the company.

The appeal was heard in the Weekly Court, Toronto.
R. J. McLaughlin, K.C., for the appellant.
Casey Wood, for the liquidator.

LOGIE, J., in a written judgment, said that, by the minutes of a meeting of the directors of the cattle company, dated the 13th February, 1917, it appeared that the secretary placed before the directors an application from the British Dominion Land Corporation Limited for 24,993 shares of the capital stock of the cattle company, to be paid for by $2,199,300 in cash and the balance by a promissory note at 12 months, viz., $300,000, the stock to be allotted to the land corporation or its nominees.

This application was accepted by the directors of the cattle company, and the secretary was instructed to issue the shares to the land corporation or to such persons as it should under its corporate seal direct.

No cash was ever paid by the land corporation, but its note for $300,000 was given to the cattle company.

By an instrument dated the same day, the land corporation under its corporate seal requested and authorised the cattle company to allot and issue 24,993 shares of its capital stock to certain individuals, among them the appellant, who was to receive 22,215 shares.

The cattle company complied with this request, and share certificate No. 26 of that company was, on the 26th February, 1917, issued to the appellant for 22,215 shares.

These shares were not on the face of them expressed to be fully paid-up.

There was no pretence that the appellant or any one else paid for them in cash or in kind, unless by the effect of an agreement, dated the 13th February, 1917, between the two companies under their corporate seals, whereby the land corporation acknowledged receipt of $2,199,300, and covenanted and agreed to convey or cause to be conveyed to the cattle company the lands described in the schedule thereto.

No money was in fact paid under this agreement by the cattle company, nor were any lands conveyed to the cattle company.

Apart from the discrepancy in amount between 24,993 shares at a par value of $100 each and the alleged cash payment of $2,199,300 (represented by the land corporation's note for $300,000) there was no agreement expressed or implied either in the minutes of the cattle company or in the agreement that the stock of the cattle company should be paid for by the transfer to it of the land

corporation's land. On the contrary, the stock was to be paid for in cash, and the land in like manner. The agreements were independent, within the meaning of the judgment in Re Modern House Manufacturing Co. (1913), 28 O.L.R. 237; and each company was to carry out its own contract separately and for cash.

Therefore, the stock standing in the appellant's name was unpaid stock, for which no consideration in cash or in kind had been given, and it is liable to call, upon a winding-up order being made against the cattle company.

The appellant must be held to be a shareholder and to be estopped from denying that he was. He was secretary and solicitor of the company throughout its existence. He attended all its meetings, recorded and signed all its minutes, and accepted certificate No. 26. He had knowledge of all its proceedings. He had possession of the books, and made entries therein shewing himself to be a shareholder for these very shares. He knew that this stock was unpaid. He broke up the certificate No. 26, and, leaving the shares in question in his own name, issued and signed certificates for stock representing the balance. He took no steps to have his name removed from the register.

The cumulative effect of all these facts, although there was no express contract to take these shares, constituted him a shareholder and estopped him from denying that he was one in respect of the shares in question; and there was an implied contract on his part with the company to accept and pay for these shares in some way best known to himself, evidenced in part by his allowing his name to be put forward by the land corporation as one of its nominees.

The appellant was described in the books of the company and in share certificate No. 26 as a trustee. He could have rid himself of personal liability by taking steps under sec. 41 of the Companies Act, R.S.C. 1906 ch. 79. He did not do this, and so must be declared a shareholder and a contributory in respect of the shares in question.

No question arose on the appeal as to the appellant's liability upon the additional 50 shares said to have been personally purchased by him, and the order of the Master in Ordinary must stand as to these shares.

Appeal dismissed with costs.

MIDDLETON, J. MARCH 18TH, 1919.

*RE PORT ARTHUR WAGGON CO. LIMITED.

TUDHOPE'S CASE.

SHELDEN'S CASE.

Company — Winding-up — Contributories — Special Contract with Subscriber for Shares—Allotment—Notice—Acting as Shareholder—Transfer of Shares not Paid for—Approval of Directors —Liability to Calls—Dominion Companies Act, R.S.C. 1906 ch. 79, secs. 58, 59, 65, 66—Call Made upon Directors' Shares only—Invalidity—Novation—Surrender—Compromise.

Appeals by Tudhope and Shelden from an order of the Master in Ordinary, in the course of the winding-up of the company, placing the appellants upon the list of contributories.

The appeals were heard in the Weekly Court, Toronto.
W. N. Tilley, K.C., for Tudhope.
D. C. Ross, for Shelden.
J. W. Bain, K.C., for the liquidator.

MIDDLETON, J., in a written judgment, said that the company was incorporated under the Dominion Companies Act, R.S.C. 1906 ch. 79, on the 11th January, 1910. It was declared to be insolvent and ordered to be wound up, on the 25th January, 1913.

At the time of the organisation of the company it was contemplated that an agreement should be made between it and the Tudhope Anderson Company, carrying on business in Winnipeg, under which that company should manufacture waggons for the Port Arthur company. On the strength of this contemplated arrangement, Tudhope, who was largely interested in the Tudhope Anderson Company, subscribed for stock in the Port Arthur company. But, before this company commenced operations, negotiations were entered into with the Speight Waggon Company, and the contemplated arrangement with the Tudhope Anderson Company was not completed. As a matter of fairness, it was recognised that Tudhope should be relieved from his subscription, and he was allowed to transfer his stock to Lindsay, one of the promoters of the Port Arthur company; and an agreement was executed cancelling a contract that had been signed by the Port Arthur company and the Tudhope company. All this took place in 1910, while the company was yet in an embryonic condition. After the agreement with the Speight company had been

executed, the Port Arthur company went actively into business, incurred large liabilities, and in a short time became insolvent. Until after the liquidation had been begun, it was assumed that Tudhope's retirement had been effectual, and he was not regarded or treated as a shareholder.

When Tudhope retired, it was thought that persons who had subscribed for the stock might have been induced to do so by reason of his connection with the company, and such persons were given an opportunity to transfer their shares. Shelden availed himself of this option, transferred his stock, and thereafter assumed that he had no further connection with the company.

In all this every one acted honestly. There were substantially no creditors; and all that was done was done in good faith.

In the application of Tudhope for the shares he applied and subscribed for 100 shares and agreed to accept them and to pay for them 20 per cent. on signing the application and 10 per cent. each succeeding month until fully paid. The shares were allotted to him, notice of the allotment was given to him, and he was registered in the books of the company as a shareholder. He became a director and president of the company, and attended meetings. No part of the price of his shares was paid. By resolution of the directors, at a meeting held on the 5th August, 1910, the cancellation of the agreement with the Tudhope company and Tudhope's release from liability for his stock and the other arrangements were approved; and at a meeting on the 26th August, the day on which the transfer by Tudhope to Lindsay was recorded, a call of 25 per cent. upon the directors' subscriptions was authorised.

The Master held that Tudhope was liable because the payments were in arrear under the terms of his subscription, and therefore the stock could not be validly or effectually transferred. He also regarded the arrangement made as in effect a surrender of the shares and not a transfer. He also suggested that the transaction between Tudhope and the company could not be regarded as a "compromise."

In addition to contesting his liability, Tudhope attacked the validity of the entire proceedings under which it was sought to make him liable, upon the ground that the liquidation had come to an end.

The learned Judge said that, in his opinion, the allotment of the stock and the notice of the allotment amounted to an acceptance of the offer contained in the application. A contract was thus formed, under which Tudhope did not become a subscriber for stock subject to call, but a subscriber for stock upon the terms of the contract. The payments of 20 per cent. upon the signing of the subscription and 10 per cent. in each succeeding month became

due by virtue of the contract, and were not "calls" within the meaning of the Act. Assuming that such an agreement was competent, the first question was, whether the liability in respect of the stock brought the case within the prohibition of the statute (Canada Companies Act, secs. 65, 66) against the transfer of stock upon which a call is in arrear.

Reference to Re Peterborough Cold Storage Co. (1907), 14 O.L.R. 475; Halsbury's Laws of England, vol. 5, para. 268; secs. 58 and 59 of the Canada Companies Act; Croskey v. Bank of Wales (1863), 4 Giff. 314, 330, 331; Hubbersty v. Manchester Sheffield and Lincolnshire R.W. Co. (1867), 8 B. & S. 420, 421; Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56, 64.

The learned Judge concluded that the liability of Tudhope upon his subscription was not a liability for "call," and that the stock held by him was not subject to call.

The resolution of the 26th August purporting to make a call could, accordingly, have no operation on Tudhope's stock; but, in the second place, it was not a valid call, for it purported to be a call upon the stock held by the directors. The very essence of a call is that it should bear equally upon all stock allotted. It could not have been intended to be a call, within the technical meaning of the statute, so as to prevent the transfer of Tudhope's stock, for it was contemporaneous with the resolution permitting the transfer.

There was nothing to prevent a novation, and it was clear upon the evidence that there was a novation—the company accepting Lindsay as transferee of the shares, and Lindsay accepting Tudhope's position as holder of the shares. The shares continued to exist—they were not surrendered nor destroyed, but transferred.

Even if there was not a novation, Tudhope's liability was not one that could be enforced as a call; it could be enforced only by an action upon his promise to pay.

Reference to In re Hoylake R.W. Co., Ex p. Littledale (1874), L.R. 9 Ch. 257, an authority binding upon the learned Judge, and to be followed in preference to the dictum of Duff, J., in Smith v. Gow-Ganda Mines Limited (1911), 44 Can. S.C.R. 621, 625, 626.

For these reasons, Tudhope must be considered not liable as a contributory; and it was not necessary to consider fully the other questions argued.

What had been said applied with equal force to the case of Shelden.

The appeals should be allowed, and the liquidator should pay the costs throughout.

LOGIE, J. MARCH 21ST, 1919.

RE BUDD AND TRIPP.

Husband and Wife—Conveyance of Land by Husband to Wife—Right of Wife to Convey without Assent of Husband—Tenancy by Curtesy—Inchoate Right—Married Women's Property Act, secs. 4(1), 6(3).

Motion by a purchaser of land for an order, under the Vendors and Purchasers Act, declaring that an objection to the title is valid and that a good title has not been shewn.

The motion was heard in the Weekly Court, Toronto.

W. Lawr, for the purchaser.

J. Y. Murdoch, for the vendor.

LOGIE, J., in a written judgment, said that Mary Christina Budd married Albert Thomas Budd in 1895. There was issue born alive. By deed dated the 4th January, 1908, Albert Thomas Budd conveyed the land in question to his wife, who now desired to sell the same without his consent. The purchaser objected that the husband was entitled to a tenancy by the curtesy in this land, and should be a party to the deed.

The learned Judge was not of that opinion. He pointed out that there is no inchoate right of tenancy by the curtesy. As to the position of a married woman, he referred to Shuttleworth v. McGillivray (1903), 5 O.L.R. 536; the Married Women's Property Act, R.S.O. 1897 ch. 163, sec. 3 (1), now R.S.O. 1914 ch. 149, sec. 4(1).

But it was contended that sec. 6(3) of the present Act limits the generality of sec. 4(1) and prevents its application to property received by a married woman during coverture from her husband.

With that contention the learned Judge did not agree. He pointed out that sub-sec. 3 of sec. 6 of the present Act was the last paragraph of sub-sec. 2 of sec. 5 of the former Act, and in that Act affected only the rights which a woman married between the 4th May, 1859, and the 2nd March, 1872, had under that sub-section. Its reprint as a separate sub-section in the Act of 1914, following as it does sub-sec. 2 of sec. 6 of that Act (a reprint of the remainder of sub-sec. 2 of sec. 5 of the Act of 1897), did not widen it or give it any greater effect.

To hold otherwise would stultify the whole Act and run contrary not only to judicial opinion but to the whole trend of legislative action.

Therefore Albert Thomas Budd was not a necessary party to

the deed in question by reason of his being the husband of the vendor.

Each party to pay his or her own costs; purchaser to take out the order.

LENNOX, J. MARCH 22ND, 1919.

RE JACKSON.

Land Titles Act—Building Restrictions in Registered Transfer—Modification—Order under R.S.O. 1914 ch. 126, sec. 99(2)—Consents—"Beneficial to the Persons Principally Interested"—Evidence.

Motion by Arthur J. Jackson, the registered owner of lot 40 according to registered plan No. M. 298, for an order modifying building restrictions or conditions 7 and 9 set out in transfer No. 54066, registered in the Land Titles office, Toronto.

The motion was heard in the Weekly Court, Toronto.

R. A. Montgomery, for the applicant.

LENNOX, J., in a written judgment, referred to sec. 99, sub-sec. 2, of the Land Titles Act, R.S.O. 1914 ch. 126, which, among other things, provides that "any such condition or covenant may be modified or discharged by order of the Court, on proof to the satisfaction of the Court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant."

The applicant produced consents of the owners of lots 36, 37, 38, 39, 41, 42, and 43 on plan M. 298, and of all persons or companies having registered charges upon these lots, except a charge on lot 42 in favour of one Matthews, which had been paid, as was satisfactorily shewn by the affidavits of the applicant and J. A. Rowland, and as was admitted by Matthews, although no cessation of the charge had been registered.

Before making the order, the Judge must be satisfied that "the modification will be beneficial to the persons principally interested." The learned Judge said that he could not see that any one was appreciably either benefited or affected by the proposed modification, except the owners and chargees of the applicant's lot, 40, and lot 39 to the west and lot 41 to the south. Even as to the adjoining lots, while there was no suggestion that the proposed modification was detrimental, it was not obviously beneficial—it looked rather like a case of little or no concern to anybody except

the owner and chargee of lot 40. But many arguments in favour of benefit could undoubtedly be advanced; and consents in such a case may very fairly be regarded as equivalent to requests. The persons in a position to consent or oppose are the best judges in this instance as to whether it is beneficial or not; and the zone of interest had been very amply covered in the area taken in.

The order taken out should recite all the documents referred to, and they should be left on file.

There should be an order modifying conditions 7 and 9 as set out in registered transfer 54066 to the extent of permitting the buildings now upon lot 40 to be maintained as they now are upon that lot.

O'CONNOR v. FITZGERALD—FALCONBRIDGE, C.J.K.B.—MARCH 18.

Amendment—Action for Dower against Executors—Application of Plaintiff at Close of Trial for Leave to Amend by Adding a New Claim—Amendment Allowed on Terms—Directions for Trial.]—Action by a widow against her deceased husband's executors for dower out of his lands. The action was tried without a jury at Peterborough. FALCONBRIDGE, C.J.K.B., in a written judgment, said that at the close of the case the plaintiff's counsel asked to be allowed to amend by claiming the proceeds of certain insurance policies which the plaintiff transferred to her late husband, in consideration of his making a will in the manner agreed on between them, which will did not prove to be the last will of the husband. It was plain that the defendants would have had no proper opportunity then to make their defence. But it was equally plain that the executors, the defendants, ought not to be exposed to another action. The learned Chief Justice had, therefore, determined to allow the amendment on such terms as to costs and otherwise as he should impose when giving final judgment on all matters in question. The plaintiff should deliver her proposed amendment, and the defendants should amend their pleadings accordingly—all as promptly as possible. Any further evidence forthcoming should be adduced before the Chief Justice during the week commencing the 31st instant, either in Toronto or Peterborough—preferably Peterborough. H. H. Davis, for the plaintiff. J. H. Corkery, for the defendants.

CRAVEN v. CAMPBELL—FALCONBRIDGE, C.J.K.B.—MARCH 19.

Fraud and Misrepresentation—Inducement for Making Contract—Evidence—Reckless Statements Made without Regard to Truth or Falsehood—Delay in Asserting Rights—Absence of Prejudice—Estoppel—Refusal of Leave to Amend.]—Action for rescission of an agreement on account of misrepresentations made by the defendant which induced the plaintiff to enter into the agreement, for a declaration of the nullity of everything done under the agreement, and for damages. The action was tried without a jury at a Hamilton sittings. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he accepted as true the evidence of the plaintiff as to the representations made by the defendant which induced plaintiff to enter into the contract. Those representations were in fact false. The plaintiff seemed to hesitate about charging fraud—saying, "For all I know he may have believed his statement about the value of the property," and "the defendant may have been as innocent as I was." But the misrepresentations, if not in fact fraudulent, were so recklessly made, without knowing or caring whether they were true or not, that the legal effect was the same. The chief difficulty in disposing of the case arose from the fact that the plaintiff had allowed so long a time to elapse before asserting his rights, after he discovered or ought to have discovered the imposition which had been practised upon him. But the situation of the parties had not been in any substantial way altered either by the delay or by anything done during the interval. There should be judgment for the plaintiff as prayed with costs, with a reference to the Master at Hamilton. The defendant should not be allowed to amend his statement of defence, as proposed, by setting up an estoppel. George Lynch-Staunton, K.C., for the plaintiff. F. H. Thompson, K.C., for the defendant.

MISNER v. ANDERSON—LENNOX, J.—MARCH 19.

Negligence—Collision of Vehicles in Highway—Finding of Jury—Negligence of Defendant "to a Slight Extent"—Small Amount of Damages Awarded—Costs.]—The plaintiffs (father and son) claimed damages for injuries sustained in a collision of the defendant's automobile with their horse and buggy on a highway. The harness and buggy were damaged. The action was tried with a jury at Sarnia. LENNOX, J., in a written judgment, said that the plaintiff Frank Misner swore that he had three ribs broken, that he had been pretty much incapacitated for work since the 28th September last, that he still suffered pain at times, and that he was not completely recovered. As to the personal injuries he was, in

the main, corroborated by his medical attendant. The actual direct money loss, aside from loss of time, amounted to $31, as deposed to. In answer to questions the jury found that the plaintiffs were not negligent; that the accident was caused "to a slight extent" by the negligence of the defendant; and that his negligence was "in trying to pass in too narrow a margin." They assessed the damages at $30. The learned Judge pointed out to the jury that, as to the assessment, their finding did not appear to be a fair result of the evidence, and, after instructing them that the amount of damages must in the end be determined by their view, requested them to retire and further consider this question. They returned to Court with the assessment unaltered. Frank Misner gave his evidence as to the personal injuries he sustained, and consequent inability to work, in what appeared to the Judge a fair and honest way, but, of course, the Judge knew nothing as to his character or reputation. If Frank Misner was entitled to judgment, and if his evidence was reliable, $300 or $400 would not be an unreasonable assessment of his damages; but the jury in all probability had knowledge of local conditions, and the amount was peculiarly a question for the jury. The $30 awarded should be apportioned as follows: $22 to Frank Misner and $8 to his son. The learned Judge said that he had carefully weighed the question of costs. There should be judgment for the plaintiffs for the sums respectively above mentioned with costs, and there should be no set-off of costs. J. R. Logan, for the plaintiffs. R. I. Towers, for the defendant.

NIBLOCK v. GRAND TRUNK R.W. CO.—FALCONBRIDGE, C.J.K.B. —MARCH 20.

Sale of Goods—Contract—Action for Price—Defence—Adverse Claim of Railway Company to Price of Goods—Interpleader—Payment into Court—Costs.]—The plaintiff, as trustee of the O'Gara Coal Company, sued for $24,053.51 for goods sold and delivered under a contract. The action was tried without a jury at Hamilton. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he did not think that the claim of the New York Central and Hudson River Railroad Company against the defendants was mere camouflage on the part of the defendants. Let the defendants pay into Court the sum of $19,283.17, with interest from the 15th August, 1913, less their costs as of an interpleader application, fixed at $60. The plaintiff may apply to the Court, on notice to the New York Central company, for payment out. No other order as to costs. George Lynch-Staunton, K.C., and G. H. Levy, for the plaintiff. D. L. McCarthy, K.C., for the defendants.