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HON. MR. JUSTICE KELLY. MARCH 10TH, 1914.

SCRIMGER v. TOWN OF GALT.

6 O. W. N. 75.

Municipal Corporations—Construction of Sewer—Draining of Surface Water—Pollution of Stream—Increase of Flow—Rights of Riparian Owners—Evidence—Estoppel—Consent—Injunction.

KELLY, J., *held*, that an owner of land has no right to rid his land of surface-water or superficially percolating water by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor, or into a natural watercourse, thereby polluting the same or increasing the flow, and a municipal corporation has no greater righ.s in this respect than a private landowner.

Action for an injunction restraining defendants from constructing or maintaining a sewer or drain from the easterly part of the town of Galt in a southerly direction to what is known as Moffat's Creek, and from bringing water into the creek in excess of the natural flow; from injuriously affecting plaintiffs' rights in respect of the water of the creek, and from laying down a drain across the lands of plaintiff Scrimger, and for a mandatory order compelling defendants to remove tile or other material from that land.

P. Kerwin, for plaintiffs.

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

HON. MR. JUSTICE KELLY:—Questions are here involved which are common to both plaintiffs; the joinder of the plaintiffs has neither embarrassed nor delayed the trial, and I see no reason for giving effect to defendants' plea that they are improperly joined.

Moffat's Creek runs in a westerly direction and discharges into the Grand river, its course being through plaintiff Scrimger's lands, which lie a short distance west of the line of the proposed sewer, and also through plaintiff Wil-

liamson's lands further down the stream. The northerly part of Scrimger's land is about 14 acres in extent, is within the limits of the town of Galt, the remainder of it being in the township of North Dumfries. None of Williamson's land is within the town limits. Adjoining Scrimger's lands on the east is the land of McKenzie, also running southerly from the limit of the town to and across Moffat's Creek. Scrimger is also the owner of or interested in a lane running easterly from his other lands through McKenzie's lands to Elgin street (or St. George road). The course of the sewer or drain, the construction of which was begun before this action, is southerly from the town limits through McKenzie's land to the creek, a distance of about 2,500 feet. It passes through or under this land of Scrimger's. Plaintiffs use the water of the creek for purposes connected with their lands, Williamson being engaged in dairying, and for that purpose keeping cows on his lands (about 170 acres in extent), and Scrimger being a farmer. For many years Williamson has leased to another party a part of his lands not far distant from his westerly boundary for use in obtaining ice for commercial purposes, the lessee having the right to dam the creek; the lease has still several years to run.

The object of the proposed sewer or drain is to collect the surface water from an area of the town about 140 or 150 acres in extent, and to carry it to and discharge it into Moffat's Creek, and defendants have attempted to shew that if their project be carried through it will not subject plaintiffs to conditions to which they have a right to object, contending that the sewer, if constructed, will carry towards the creek only what under present conditions flows towards or into it, the general grade of the land in the locality being in that direction. That proposition is far from being substantiated. There is a marked difference between leaving the surface water from the area intended to be drained to find its own way over or through soil of the character found here, and collecting and passing it through the sewer or pipe to the point of discharge at the creek, without the possibility of escape in its course, by percolation, absorption or other means, of objectionable and dangerous matter. This is borne out by the evidence of competent witnesses, whom I unhesitatingly believe, who say that the character of the soil between the area intended to be drained and the creek is very open, gravelly and porous, in which, by natural

filtration, the surface water is purified; while, on the other hand, by the use of the sewer all this water would be carried directly and quickly to the creek, bringing with it substantially all its objectionable and dangerous elements except such as would be arrested and retained in proposed catch basins at the inlets to the sewer. I find on the evidence that much of the objectionable matter would not be arrested or disposed of by these catch basins, and that notwithstanding their use the flow into the creek would pollute it, unless some efficient means, not included in defendants' proposed scheme, were adopted of overcoming that objectionable feature.

Another position taken by defendants is that the waters of the creek are, under present conditions, polluted by the use of the adjoining lands for pasturing of cattle, and by the natural flow from farm buildings and barnyards nearby. It is possible, and indeed very probable, that pollution to some extent arises from these causes, but the evidence shews that the water is now clear and fairly pure. Mr. Murray, an expert witness called for plaintiffs, says the use of this sewer will increase the pollution of the creek and absolutely spoil it. Campbell, a civil engineer called for defendants, says the use of the sewer will much increase the flow of the stream. In a word, the evidence makes it quite clear that to adopt the expedient of collecting the surface water from the area it is intended to serve, and carrying through this sewer to and into the creek will cause a serious pollution of the waters, as well as unreasonably add to the flow of the creek, and there is nothing to justify defendants in their contention that plaintiffs are not entitled to object or insist that they would be subject to the damaging conditions which the building or operation of the sewer or drain would impose on them. One proprietor of land has no right to cause a flow of the surface water from his own land over that of his neighbour, by collecting it into drains or culverts or artificial channels. (Angell on Watercourses, 7th ed. 133.)

An owner of land has no right to rid his land of surface water, or superficially percolating water, by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor; and a municipal corporation has no greater right in this respect than a private landowner. (Gould on Waters, 2nd ed., 529-530.) Cities and towns have no greater right than individuals to collect

in artificial channels upon their streets and highways mere surface water, distributed in rain and snow over large districts and precipitate it upon the premises of private owners (p. 531.)

Nor does the Municipal Act in giving municipalities, in a proper case, power to pass by-laws in relation to the disposal of surface water, so enlarge the power of defendants as to justify them in the course they here adopted.

It is of importance to bear in mind that defendants' scheme does not end with collecting and carrying the surface water onto the adjoining owner's lands, but provides for carrying it through that land in order that it may reach the land of the plaintiffs. But it is said that at a meeting in July, 1912, in Galt, plaintiffs consented to the building of this sewer; I do not find that to be the case. Even had their consent been then given it was founded on the proposal by defendants that a settling tank would be installed near the outlet of the sewer in which the water flowing from the sewer would be treated by sedimentation. This was a proposal made by the Provincial Health Inspector who in his evidence says that he contemplated a proper basin for that purpose being installed. The basin designed by defendants would not be sufficient to produce the proposed results. The evidence establishes that efficient sedimentation would not have the effect of removing elements which would cause pollution to the water. Fuce, a civil engineer, called for the defence, and who had to do with the designing of defendants' proposed scheme, gave it as his opinion that that method of treatment—that is, the use of a settling tank—is a proper one, and that if it were adopted the pollution would be slight, if any; but on cross-examination he admitted that in making that statement he had no data to go upon. He had never seen surface water treated for its purification; he had no experience in that direction, and could not estimate the extent of the pollution if the proposed drain were put into use. The problem of disposing of the water from this area was one which involved no little difficulty for defendants, having regard to the economy which they thought it necessary to observe. Other schemes for accomplishing their purpose were suggested, all of which necessitated larger expenditure. In designing an acceptable scheme the engineers had regard to the cost. Fuce says the scheme he worked on was a compromise between efficiency and economy.

As a further defence to Scrimger's claim, defendants have set up what they contend is a written consent on his part to their plans. This was signed on March 4th, 1912, and dealt with and referred only to the lane leading from Scrimger's land to St. George road through which defendants were thereby permitted to construct a storm drain. Scrimger afterwards delivered to defendants a document dated 15th March, 1913, revoking "the license granted by me to you on or about March 4th, 1912," and forbidding defendants entering upon the lands. I do not think that that affords any relief to defendants; apart from any right of Scrimger to revoke what he calls a license, that document did no more than permit defendants to carry the storm drain through the lane and give them the right to enter upon the land for that purpose; and moreover the method of disposal of the water as contemplated by defendants was not of the efficient kind required there by the health authorities.

What I have so far found to be the facts are quite sufficient in my judgment to entitle plaintiffs to relief. In that view it is unnecessary to deal with other aspects of the case, such as defendants having proceeded without a by-law, and against the express written objection, more than once made, of the council of the township of North Dumfries into which municipality the sewer or drain was to be carried.

At the close of the trial I thought, and so expressed myself, that the facts elicited in the evidence would have enabled the parties to arrive at some reasonable solution of their differences, and for that reason I withheld judgment. I have since learned that they have not been able to reach an agreement.

Judgment will be in plaintiffs' favour, with costs.

HON. MR. JUSTCE BRITTON. MARCH 10TH, 1914.

LAWSON v. HUNT.

6 O. W. N. 89.

Vendor and Purchaser—Specific Performance — Purchase of Land— Day Named for Closing—Time Essence of Contract—Default by Vendor—Rescission—Registration of Plan—Dismissal of Action.

BRITTON, J., *held*, that where a sale of certain lands was to be closed upon a certain date and the vendor was unable to complete, the purchaser was justified in rescinding after reasonable notice.

Tried at Toronto without a jury.

An action to compel specific performance by defendant of an agreement by him to purchase five acres of land in the township of Scarboro. This agreement was made by an offer on the part of the defendant on the 10th day of July, 1913, and accepted on the same day by the plaintiff. This document is, in part, as follows:—

"Toronto, July 10th, 1913.

To W. A. Lawson:

In consideration of dollars, I hereby make the following offer, good for days, that is to say, 'I offer to buy that certain parcel or tract of land, being blocks 9, 10 and south half of 11, part of lot 30, con. D. Township of Scarboro, County York, together with all improvements thereon, being five acres, more or less, according to proposed plan of subdivision made by W. S. Gibson, O.L.S., for the price or sum of $2,500, payable as follows . . . . This offer if accepted as aforesaid, shall with such acceptance constitute a binding contract of purchase and sale on each of the parties and their respective heirs, executors, administrators, or assigns, and time shall in all respects be strictly the essence of this agreement."

The adjustment of taxes, interest and insurance, was to as of 15th August, 1913, and possession was to have been given on or before that date.

B. N. Davis, for plaintiff.

H. W. A. Foster, for defendant.

HON. MR. JUSTICE BRITTON:—The defendant was a stranger to the locality. His general knowledge of how townships are laid out in Ontario enabled him, no doubt, to find concession D. of Scarboro, and lot thirty in that concession,

but he could know nothing of blocks 9, 10 and 11 without a plan.

He was taken by a Mr. Smith, who acted for the plaintiff in getting the contract in question, to see the land. No doubt Mr. Smith correctly, and in a general way, pointed out the land. The defendant was satisfied with the quality of the soil.

The plaintiff told the defendant that he intended to get a plan made which would shew the location of the five acres he proposed to sell to defendant. The alleged contract was drawn up by the plaintiff, and upon the representation by the plaintiff as to the plan, the defendant signed the offer for blocks 9, 10 and south half of 11, part of lot 30, concession D. . . . containing five acres more or less, according to proposed plan of subdivision made by W. S. Gibson, O. L. S.

The defendant employed a solicitor to search the title. This writing does not say whether the subdivision would be of north half or south half of lot 30, and the plaintiff was interested in each half.

Unfortunately the solicitor began his search upon the north half, and soon found difficulty. The plaintiff had not a satisfactory title to part of the north half, and the solicitor so reported, and was informed that these blocks were part of the south half of lot 30; but the search was not continued, by reason of there being no registered plan of the proposed subdivision. The plan was not completed before the 30th July. Plaintiff's letter of that date, apologizing for not replying sooner to requisition of defendant's solicitor, says that the surveyor expected to have the plan ready that evening.

On the 20th August, defendant's solicitor wrote to plaintiff's solicitor as follows:—

"Toronto, Aug. 20th, 1913.

B. N. Davis, Esq.,
Barrister, &c.,
Continental Life Bldg., City.

Dear Sir: Re Hunt & Lawson.

Our client is anxious to have this matter closed immediately as we are satisfied with the title. As you know we are unable to certify to same, and have not yet been able to get from you the draft deed, although the sale was to be closed on the 15th of August.

Will you kindly advise us immediately when your client expects to be in a position to furnish us with draft deed, and oblige,

Yours truly,

(Sgd.) Denison & Foster."

This letter could not be taken literally, that defendant's solicitors were satisfied as to title, without further search, as the solicitors said they were not in a position to certify.

In reply to above letter plaintiff's solicitor wrote:—

"Toronto, Aug. 21st, 1913.

Messrs. Denison & Foster,

Toronto.

Dear Sirs: Re Lawson & Hunt.

I have your letter herein of yesterday's date. The delay herein has been caused by the proposed plan to be filed by my client not having been approved of by the township council. I understand this will not be done for ten days or so, when a draft deed will be submitted to you.

Yours truly,

(Sgd.) B. N. Davis."

On the 22nd August the defendant called "the deal" off, and demanded his deposit.

Further correspondence followed with no change in result thereof. The defendant wanted the land for a proposed market garden. Time was not only made of the essence of the agreement, but it was of importance to defendant. He was not obliged to accept possession until satisfied with the title, and without the plans being registered. The plaintiff must be responsible, and not the defendant, for plaintiff's neglect or inability to have plans prepared and registered, so that defendant could complete before 15th August. The defendant could, after the 15th August, give plaintiff a reasonable time to complete. The "ten days or so" mentioned in the letter of plaintiff's solicitor of 21st August was an unreasonable delay under the circumstances. On the 20th August, the plaintiff executed a conveyance to the defendant describing the land by metes and bounds. This conveyance was not tendered to the defendant. The description is the same as in the statement of claim, and does not mention blocks 9, 10 and south half of 11. It was not executed until after the defendant had withdrawn his offer and demanded his deposit. The plaintiff, as vendor, does not complain that the land would not sell for as much as plaintiff was to

get for it. From his standpoint that was not necessary, as he does not claim damages as an alternative remedy.

Then, by the contract, the plaintiff might have asserted his right to retain the $50 deposited, by exercising the option given him of taking that amount as liquidated damages. The plaintiff has not done that, but insists upon the defendant completing the purchase. The defendant has since the 30th August last rented other lands for his business as market gardener. The plaintiff sought to establish by parts of defendant's examination for discovery, that defendant waived the condition of time being of the essence of the contract.

I prefer accepting the correspondence, as to what was done, rather than the defendant's memory. The defendant is apparently a fair man. He desired to carry out the purchase and to acquire the property for a market garden, and he wanted it by the 15th August. He placed the matter in the hands of his solicitor, and was quite right in being guided by him. The plan proposed was by plaintiff, and presumably for his benefit, in regard to the whole subdivision of part of lot 30. By it a street, or way, or lane might have been laid down and dedicated, which the defendant might regard as to his prejudice. The defendant was entitled to have the proposed plan prepared and registered, or at all events submitted, before he could be called upon to accept the conveyance. The plaintiff was not ready to complete his part of the contract. Even if the plaintiff could, within the time, have compelled the defendant, having no regard to the plan of subdivision, the plaintiff was not ready until after the 15th of August, and, time being of the essence of the contract, the defendant was not bound to accept. In my opinion this is not a case in which specific performance should be ordered.

Judgment will be for the defendant, dismissing plaintiff's action with costs and awarding the defendant $52.50 upon his counterclaim against the plaintiff.

Twenty days' stay.

HON. MR. JUSTICE MIDDLETON. MARCH 11TH, 1914.

SNIDER v. SNIDER.

6 O. W. N. 80.

Pleading—Reply—Action on Promissory Note — Embarrassment—Order Permitting Pleading to Remain—Leave to Appeal from.

MIDDLETON, J., gave leave to appeal from the order herein of Mr. Justice Britton, 26 O. W. R. 13, reversing an order of the Master-in-Chambers striking out plaintiff's replication.

Motion for leave to appeal from an order of HON. MR. JUSTICE BRITTON, pronounced 23rd February, 1914, reversing an order of the Master in Chambers striking out the replication of the plaintiff.

W. J. Elliott, for foreign executor.

F. C. Snider, for Ontario executor.

H. E. Irwin, K.C., for plaintiff.

HON. MR. JUSTICE MIDDLETON:—The facts giving rise to this litigation are simple. The plaintiff alleges that his brother, the late T. A. Snider, having made his will by which he left the plaintiff a legacy of $10,000, from which was to be deducted the amount of any advance that might be made during the testator's lifetime, made him advances to the extent of the face amount of the legacy, but thereafter his brother desiring to release him from these advances, so that he might receive his legacy in full, adopted the device of giving him promissory notes to the amount of $10,000, which he was to be at liberty to use as a set-off against the advance, and so leave him free to receive the legacy.

Instead of setting out these facts in simple language, and relying upon them as constituting his cause of action, the plaintiff sued upon the promissory notes. When he came to put in his statement of claim he followed up his claim upon the promissory notes with a long and rambling account of the transaction between his brother and himself.

My Lord the Chancellor, regarding the action as still an action on the notes, struck out this discursive matter, which was apparently intended to be pleaded by way of confession and avoidance of some expected defence. The defendants then plead, simply stating that the notes in question were without consideration, and do not constitute a valid claim

against the estate of the deceased; whereupon the plaintiff filed a replication, which is a complete departure from his statement of claim. Put shortly, and stripped of its verbiage, it is no more than an allegation that if the plaintiff is not entitled to recover upon the notes he ought to be entitled to recover his legacy. The plaintiff has also done his best to embarrass the situation by issuing another writ claiming the legacy.

Upon the hearing of the motion I suggested that the actions ought to be consolidated and all necessary amendments made so that the plaintiff's real claim might be placed before the Court in a way that would be calculated to ensure an adjudication upon the real dispute; and this was assented to by counsel. Counsel for the plaintiff now tells me that this was under some strange misapprehension, and I have therefore given leave to withdraw the consent so given.

Although the art of pleading has fallen into disrepute, it seems to me that, quite apart from the Rules, reason and logic are not entirely dethroned, and that a litigant ought to be compelled to present his case decently clothed in appropriate English.

It is said that the true purpose of language is to conceal thought; yet in the preparation of pleadings some evidence of at least rudimentary thought ought to be apparent.

In this case, owing to the fact that the Canadian executor may not be liable, and that the American executor, who is directed to pay the legacy, may not be subject to the jurisdiction of this Court at all, so that whatever the result of this litigation here, other litigation may follow in the United States, it is important that the issue should be clearly defined, so that as to make the result of the litigation intelligible, I therefore think, it is important that the pleadings should be put in better shape, and I give leave to appeal as sought, upon the terms which may be assented to by the appellants, that if necessary the Appellate Court is to be at liberty to modify or review the order made by the learned Chancellor without a formal appeal being taken.

Costs will, of course, be dealt with by the Appellate Court.

I again suggest to the parties the desirability of consenting to some order on the lines already indicated, as I believe it will be found to be in their mutual interest.

HON. MR. JUSTICE MIDDLETON. MARCH 11TH, 1914.

BAIN v. UNIVERSITY ESTATES.

CONNOR v. WEST RYDAL LIMITED.

6 O. W. N. 79.

Writ of Summons—Service out of Jurisdiction—Appearance—Application for Leave to Enter Conditional Appearance—Jurisdiction of Court—Con. Rule 25 (g)—Cognate Claims—Leave to Appeal—Refusal of.

MIDDLETON, J., refused leave to appeal from the judgment of LATCHFORD, J., 25 O. W. R. 895.

A foreign defendant can be sued upon a claim cognate to that made against a defendant within the jurisdiction.

Collins v. *North British*, 1894, 3 Ch. 228, distinguished.

Motions for leave to appeal to the Appellate Division from a judgment of HON. MR. JUSTICE LATCHFORD, 2nd March, 1914, 25 O. W. R. 895.

Grayson Smith, for defendant company in each case.

A. B. Cunningham, for plaintiff in each case.

HON. MR. JUSTICE MIDDLETON:—Like my brother Latchford, I trust that I may be found ever ready to relieve a solicitor from the consequences of a mistake or default; but in this case I do not think that this question really arises, as the action appears to me plainly to be one falling within the provisions of Rule 25 (*g*), as determined by my learned brother.

To determine the nature of the action it is necessary to look at the statement of claim, and at it alone. From this it appears that the defendant company is incorporated under the laws of the province of Manitoba, and has its head office there. The defendant Farrell is a real estate agent residing and carrying on his business in Toronto. The defendant company, through Farrell, sold certain lands in Manitoba to the plaintiffs. The greater portion of the purchase money has been paid. It is alleged, rightly or wrongly, that the plaintiff was induced in each case to enter into the agreements by the fraud of the defendant company and its agent Farrell. The claim is made against both defendants for the refund of the money paid, with interest, and against the company to rescind the contract.

It is plain that both Farrell and the company are liable to the plaintiffs for the moneys received if fraud can be established. Bowstead, 4th ed., 332. So far as this branch of the case is concerned, they are each undoubtedly proper parties to the action against them jointly.

So far as release is claimed against the defendant company, beyond that which can be claimed against Farrell, this is cognate to the action against them jointly. This distinguishes the case from the class of cases of which *Collins* v. *North British*, [1894] 3 Ch. 228, may be regarded as a type. There it was sought to add a totally independent and quite distinct claim against the foreign defendant. This is plainly not admissible; but in that case, as in all others, it was said that an additional claim cognate to the primary cause of action may be added.

At present I am inclined to think that the case might be brought under one of the other heads mentioned in Rule 25; but it is not necessary to determine this point in these cases.

The motion must be refused, with costs to the plaintiffs, in any event.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MARCH 9TH, 1914.

CLARK v. ROBINET.

6 O. W. N. 66.

Charge on Land—Agreement—Duration — Payment of Claims—Discharge of Land—Payment into Court—Contingent Agreement—Failure of Same—Appeal—Allowance of Dismissal of Action.

Action for a declaration that the plaintiff's farm was free from any claim or claims by the defendants or either of them under what was called a "syndicate agreement" or otherwise. No time was fixed for the duration of the agreement, which was made in September, 1909.

LENNOX, J. (25 O. W. R. 76) *held*, that on return of money paid him plaintiff was entitled to relief asked and costs of action, he having duly tendered the money to defendants.

SUP. CT. ONT. (1st App. Div.) *held*, that the syndicate agreement was not at an end and the action must be dismissed with costs.

Appeal allowed with costs.

Appeal by the defendants from a judgment of HON. MR. JUSTICE LENNOX, dated 13th October, 1913, directed to be entered after the trial of the action without a jury at Sandwich, on the 28th and 29th May, 1913.

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

F. D. Davis, for appellants.

E. S. Wigle, K.C., for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The nature of the action and of the judgment appealed from as well as most of the material facts are stated in the reasons for judgment in *Page* v. *Clark,* and need not be repeated.

It is clear, I think, that whether or not the agreement for the release of the rights of the appellants and Parker under the syndicate agreement was an agreement with the respondent or only with Jacques, it was intended that it should be dependent on the agreement for the sale to Jacques and that it should not be obligatory on the appellants and Parker if the sale should not be completed.

There is no evidence of any antecedent agreement, although an unsuccessful attempt was made to shew that the syndicate agreement had been previously abandoned. The agreement in question treats the syndicate agreement as being still in existence, and its language is inconsistent with there having been a previous abandonment of that agreement. It is "and we . . . having an agreement with David Clark registered . . . hereby agree to sign a release of the same at any time on being paid . . ."

What took place between the parties during the negotiations with Jacques leads to the same conclusion. According to the testimony of Healy, which on this point was uncontradicted, he spoke of himself and Robinet and Parker as being entitled under the syndicate agreement to part of the purchase money, but upon its being pointed out by the respondent, that the house and lot which he had reserved under that agreement was included in the sale to Jacques, Healy recognized the fairness of the position taken by the respondent, and did not press the claim. What I understand by this is that taking out of the price Jacques was to pay the value of the house and lot that the respondent had reserved under the syndicate agreement he would not realize from the sale more than the $10,000, he was to be entitled to rceeive before the members of the syndicate would be entitled to anything.

If the view I have expressed as to the nature and effect of the agreement in question is correct, it follows that, the action for specific performance having been dismissed and the agreement with Jacques having been set aside, this action should also have been dismissed.

I would, therefore, allow the appeal with costs and substitute for the judgment pronounced by the learned trial Judge judgment dismissing the action with costs.

HON. MR. JUSTICE LENNOX. MARCH 11TH, 1914.

BINGEMAN v. KLIPPERT.

6 O. W. N. 85.

Assignments and Preferences — Assignment of Policy of Life Insurance to Sister—Bona Fide Cash Advance—Lack of Knowledge of Creditor's Claim — Evidence — Findings of Fact — Lack of Fraud—Issue between Assignee and Execution Creditor—Costs.

LENNOX, J., dismissed an action by an execution creditor to set aside an assignment of the proceeds of an insurance policy upon the debtor's life, holding that there was an absence of fraud or of knowledge or notice of creditor's claims.

An issue to determine the ownership of $980 paid into Court by the Mutual Life Assurance Company of Canada.

The plaintiff claimed to be entitled to the money as an execution creditor of Hannah Boehmer; and the defendant claimed it under an assignment from Hannah Boehmer, her sister.

W. H. Gregory, for plaintiff.

E. P. Clement, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—Mr. Gregory presented his case with marked ability and earnestness, but the evidence does not establish that the assignment to the defendant was a colourable transaction or that she acted in bad faith. I judge the defendant to be a truthful, honest woman, and feel satisfied that she gave a truthful, and substantially accurate, account of the transaction down to and including the payment over of the $1,000 to her sister Mrs. Boehmer and the subsequent handing of $750 of this money to her, by her sister, for safe keeping. Mrs. Boehmer's evidence is certainly trustworthy in every way and she corroborates the

defendant upon nearly every important fact. I accept the evidence of those two ladies, that the defendant did not know that Mrs. Boehmer was indebted to any outsider; and the indebtedness to the defendant, if it could be said to exist—for it was not only outlawed, but the defendant had abandoned all claim and destroyed the promissory note—could not vitiate the defendant's security if taken in good faith for an actual cash advance of $1,000; and I find that the policy was assigned and accepted in good faith and for an adequate consideration, and without notice or knowledge of any circumstance suggesting dishonesty.

Excepting as to some minor matters of detail upon which he alone speaks, and which are vouched for by the surrounding circumstances, I am not influenced by Mr. Boehmer's evidence, whether for or against the defendant's interests.

I am not, however, sure that the defendant was able to give a correct statement as to how or when it happened that her husband filled out the cheque for the return of Mrs. Boehmer's money, but I am satisfied that the defendant gave honest testimony as to this transaction. It is quite possible I think that the husband's preparation of this cheque before leaving home had some connection with the knowledge that litigation had been commenced. This brings me to the only point upon which I have felt any difficulty. I am convinced that when the defendant handed over her cheque to her sister, for $1,000, that she regarded the transaction closed—that there was no string upon it, and no understanding express or implied, that any of it would be handed back, or that she had anything to look to beyond the policy assigned to her; and I am also convinced that afterwards and from first to last, she regarded and treated the $750 placed in her hands by her sister as her sister's money. But I have pondered a good deal as to whether the defendant was bound to shift her ground when she learned of the litigation, repudiate her obligation to her sister, and, in effect, fight for the plaintiff. Every dollar of this money has been accounted for, and all of it has already gone to the creditors of Abraham Boehmer. I have come to the conclusion that the defendant was not legally or morally called upon to act otherwise than as she did.

There will be judgment for the defendant.

Mr. Gregory submitted that in any case his client should not be compelled to pay the defendant's costs. These transactions are always suspicious. Mr. Boehmer, by unwarrant-

ably projecting himself into this matter, when his wife opened her bank account—too clever by far, but not too honest—invited suspicion, and although the defendant was in no sense responsible for this, I have decided not to give costs against the plaintiff.

References: R. S. O. ch. 334, secs. 1 and 4; Parker on Frauds on Creditors, 1903, ed. pp. 59, 81 and 91; *Webb* v. *Hamilton* (1908), 12 O. W. R. 381; *Hickerson* v. *Parrington,* 18 O. A. R. 635; *Langley* v. *Beardsley,* 18 O. L. R. 67; *Campbell* v. *Patterson,* 21 S. C. R. 645; *Brown* v. *Sweet,* 7 O. A. R. 725, at p. 738.

HON. MR. JUSTICE MIDDLETON. MARCH 11TH, 1914.

WHITE v. NATIONAL.

6 O. W. N. 83.

Principal and Agent—Contract for Payment of Commissions—"Accepted Orders"—Commission Earned when Orders Accepted—Agent not Responsible for Subsequent Default—Judgment for Plaintiff.

MIDDLETON, J., *held,* that where a contract provided that an agent was to receive a commission on all accepted orders, the commission was earned when the order was accepted, even though it was never carried out thereafter.

Austin v. *Canadian Fire Engine*, 4 E. L. R. 277, disapproved.

That a clause in the contract rendering the agent responsible "failing the customer paying the account" referred to a default in payment and not in ordering goods.

Action by an agent to recover commission under a contract evidenced by two letters of 15th and 19th January, 1912. Tried at Toronto on 9th March, 1914.

H. Cassels, K.C., for plaintiff.

C. A. Masten, K.C., and F. H. Spence, for defendants.

HON. MR. JUSTICE MIDDLETON:—The sole question between the parties is the right to commission, amounting to $1,491.36, claimed with respect to a contract entered into with the Buntin, Reid Co., under which that company agree to purchase $35,000 worth of paper of a certain class within one year.

Under this contract paper to about one-fifth of the amount contracted for was supplied and accepted. The right

to commission with respect to this is not denied. The contest is over the right to commission with respect to paper that was not in fact supplied. The plaintiff contends that he is entitled to commission "upon all accepted orders," and that the failure of the defendants to supply to the Buntin, Reid Co., the full amount contracted for does not affect his right to recover. If necessary to support his claim he goes further, and says that the failure is to be attributed to the fault of the defendants, who did not on their part live up to the contract made by the purchasers.

The contract in the first place provides for payment of commission on all accepted orders, and this I think is the dominating and controlling clause, to which all other provisions are subsidiary. This general provision is followed by a clause providing that the commission is to be payable "immediately the order is shipped, and failing the customer paying the account we shall deduct from the first settlement with you the commission paid on said order."

It is contended by defendants that this limits the generality of the primary obligation and shews that the commission is not to be paid unless the order is actually shipped.

I do not think that this is the true construction of the clause. The parties were contracting upon the assumption that each would perform its obligations. The commission was to be paid upon all orders accepted. Some of these orders would be for immediate delivery, some for future delivery. The commission was not to be paid until the goods were shipped, that is, until the time provided for shipment. The defendants cannot free themselves from liability to pay commission, by breach of contract.

The Buntin, Reid Co., are undoubtedly of good financial standing, and if they are in default, can readily be made answerable for damages. I think the defendants are in this dilemma: If the failure to complete the Buntin, Reid contract arose from their own fault, then they must pay the plaintiff's commission. If the failure arises from the fault of the Buntin, Reid Co., the defendants have an adequate right of action against them for damages, and this does not relieve from payment of commission.

If driven to determine the issue as to whose fault it was that the contract was not completed, I should find that the defendants and not the Buntin, Reid Co. were to blame. In every aspect of the case the plaintiff, I think, is entitled to succeed.

Little assistance is gained from the cases. There is no difficulty about the law. In each case the plaintiff has to shew that he has complied with his contract.

Austin v. *Canadian Fire Engine,* 4 E. L. R. 277, shews the danger of attempting to base a general principle upon a statement originally made with reference to a particular contract. There a citation is made from what is said by Lindley, L.J., in *Lott* v. *Outhwaite,* 10 T. L. R. 76, that in order to entitle himself to his commission the agent must prove that the purchase had been completed, or that if it had not been the non-completion was due to the fault of the vendor. On referring to the case, it will be found that that was spoken with reference to a contract upon which the commission became payable only upon completion; so that the Lord Justice was not laying down any such general doctrine, but only applying well-understood law to the facts of that particular case.

Costs will follow the event.

MASTER-IN-CHAMBERS. MARCH 9TH, 1914.

HAYNES v. VANSICKLE.

6 O. W. N. 88.

Evidence—Foreign Commission — Relevancy of Evidence Sought—Refusal of Commission.

MASTER-IN-CHAMBERS refused a foreign commission to take evidence where it was not established that the evidence sought was relevant to the issues in the action.

Motion by the plaintiff for a commission to take the evidence of Anesley Wilcox in Buffalo.

It was alleged by the plaintiff that this witness is a necessary and material witness, and would give evidence to shew whether the defendant received a commission on the sale of certain Buffalo lands; as to whether the agreement referred to in paragraph 4 of the statement of defence was procured by misrepresentation, and in support of the plaintiff's claim that his signature to the document referred to in paragraph 11 of the statement of defence was procured by misrepresentation and concealment of material facts.

N. W. Rowell, K.C., for plaintiff.

H. S. White, for defendant.

CAMERON, MASTER-IN-CHAMBERS:—The defendant was examined for discovery and refused to answer any question in reference to the Buffalo undertaking. That he was strictly within his rights in refusing to answer was decided by Hon. Mr. Justice Middleton on appeal from the Senior Registrar, acting Master-in-Chambers. See *Haynes* v. *Vansickle*, 25 O. W. R. 526. It was held on appeal that the case fell within the principle of *Bedell* v. *Ryckman*, 5 O. L. R. 670, and that further discovery should not be granted until the right to participate in the profits of the Buffalo undertaking was established. Until this right is established I am clearly of opinion that the plaintiff has no right in any way to give evidence as to the Buffalo undertaking. If at the trial the plaintiff establishes such a right the trial Judge no doubt will direct a reference to take an account of the profits of the Buffalo undertaking. The motion for a commission will be refused with costs.

HON. MR. JUSTICE KELLY. MARCH 14TH, 1914.

ROBERTSON v. VILLAGE OF HAVELOCK.

6 O. W. N. 90.

Negligence—Fatal Accidents Act—Death of Children in Sand-Pit—Duty Towards — Municipal Corporation Owners of Pit—Negligence of Carter—Master and Servant—Scope of Employment—Findings of Jury—Damages—Apportionment.

KELLY, J., *held* the defendants, a municipal corporation, responsible for the death of plaintiff's three children which occurred while they were playing in a sand-pit the property of the defendants, by reason of falling sand caused by the negligence of a carter in the employ of defendants.

An action to recover damages for the death of plaintiff's three children, caused by falling sand and earth in a sandpit on defendants' property.

D. O'Connell and D. J. Lynch, for plaintiff.

F. D. Kerr and V. J. McElderry, for defendants.

HON. MR. JUSTICE KELLY:—The jury have found that these children and other children resorted to and played in this sandpit with the knowledge and permission of the defendants; that there was an invitation to the plaintiff's children to use the sandpit, and that they entered it directly

from the highway; that when they went to the pit on the day of the accident there was the excavation or hole in which they were killed; that previous to the accident defendants did not have any knowledge and they could not as reasonable men have known that there was a likelihood of children being injured there; that there was no negligence on the part of the parents of the children or others in whose charge they were; that their death was not brought about or contributed to by any act of their own. There was evidence to go to the jury on which they reached these findings. They also found that the children's death was caused by the negligence of the defendants in Leeson having dug the hole in which the children were killed, and left it unprotected. Defendants' lands, in which was the sandpit, adjoins the public highway, and counsel admitted that there was no fence between the two properties except for a short distance at one end.

According to the evidence the place at which the children met their death was about 40 feet from the highway; one witness who measured it, said it was 43 feet.

Leeson's relationship to the defendants, as shewn by the evidence of the reeve of the defendant municipality, was this: Defendants used considerable sand and gravel from this pit of theirs for their own purposes, and they also sold gravel and sand from it to others. The reeve says that Leeson did most of the hauling of the gravel from the pit, that he is employed by the defendants when they need him to draw gravel and sand; that he runs the snow-plow in the winter months, keeping the sidewalks clean; that he is paid by the day or by the hour for himself and his team for sand and gravel drawing, and by the trip for snow cleaning; and that he also draws sand from the pit for outside parties. Of Leeson's duties with reference to these others, the reeve says:—

Q. What does he do in regard to collecting for that or charging for it? A. He does not collect any money for it.

Q. What are his duties in that respect when he draws the sand and gravel for somebody else? A. Sometimes he reports to council; he is supposed to report to council, and then we charge for it. There is quite a bit of sand and gravel taken out we have no record of it.

Q. Then he is supposed to keep track of the gravel drawn from there by other people and send a report into the council? A. He usually tells.

Q. Makes a report? A. He does not make any written report, usually a verbal report.

Q. Who collects? A. The council, usually a constable.

The reeve also says that when outsiders wanted gravel from the pit they usually spoke to him (the reeve) and one or two of the councillors, and that such persons employed whomever they chose to draw the gravel from the pit.

There was evidence that Leeson on the day of the accident was employed in drawing stone, tiles, etc., for defendants, and that shortly before the accident happened, an outsider (Seabrooke) asked him to bring him a load of sand; this Leeson took from the place of the accident, and while absent from the pit delivering it, the children met their death.

It is contended for the defendants that the negligence of Leeson as found by the jury, is not negligence for which they are liable. Having regard to the proposition of law that a master is not wholly responsible for a wrong done by his servant unless it be done in the course of, or within the scope or sphere of his employment, there may be some doubt as to the liability of the defendants for Leeson's act in this instance; but taking into consideration the evidence of the relationship between them with respect to his employment and the services he performed for them; the evidence of his having taken sand from the place of the accident and that there is no direct evidence of any other person but Leeson having drawn sand from the pit; and the evidence of the reeve of what Leeson's duties were in relation to the dealing with outsiders who obtaind material from the pit, I think a reasonable interpretation of the answers of the jury is that they meant that Leeson's negligence in digging the hole and leaving it unprotected was committed in the course or within the scope of his employment, and in that view they are liable.

Plaintiff claimed in respect of the death of three children; the jury, in the case of the youngest, a child of less than three years old, negatived any damage. I am of opinion that the findings of the jury on the evidence submitted to them warrant me in directing judgment to be entered in the plaintiff's favour, which I do for the amount assessed, $725, with costs.

The action is framed for the benefit of plaintiff and his wife and surviving children. In view of the circumstances of the family it seems to me the apportionment should be

such as to give the wife the much the greater portion of the amount awarded. Counsel may speak to me on the matter before I make the apportionment.

HON. MR. JUSTICE KELLY. MARCH 14TH, 1914.

WIGHTMAN v. COFFIN.

6 O. W. N. 112.

Action—Res Judicata—Abuse of Process — Attempt to Re-litigate Matters Adjudicated upon—Dismissal of Action.

KELLY, J., dismissed an action as an abuse of the process of the Court which was in effect an effort to re-litigate matters already judicially decided.

Macdougall v. *Knight*, 25 Q. B. D. 1, and other cases referred to.

Motion by defendants for an order dismissing this action on the ground that it is frivolous, vexatious, and an abuse of the process of the Court, inasmuch as it is an attempt to re-litigate questions which have been determined and disposed of in an action by plaintiffs against The Dominion Nickel Copper Company, Limited.

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

J. T. White, for plaintiff.

HON. MR. JUSTICE KELLY:—The claim in the present action is for a declaration that an agreement of 28th January, 1911, between defendants and plaintiff Wightman is in full force and effect in respect of certain lands described in the endorsement of the writ of summons, and for an injunction restraining defendants from disposing of or otherwise dealing with these lands to the prejudice of plaintiffs. This same agreement was in issue in the prior action, the claim there made being for an injunction restraining the defendants in that action from operating or trespassing on the lands to which the agreement referred. That action failed, the Court holding (1) that the agreement was not binding; and (2) even if it had been binding it was put an end to prior to the action. An appeal to the Appellate Division was dismissed and the judgment upheld. In effect the present action is to re-litigate the case disposed of in the former one. Plaintiffs' case rests on the agreement

of 28th January, 1911, and that alone; the question of the right to succeed upon it having been disposed of—and adversely to them—in the former action, they are not at liberty to set up the same case again, and the action should be dismissed with costs.

Macdougall v. *Knight,* 25 Q. B. D. 1; *Stephenson* v. *Garnett,* [1898] 1 Q. B. 677; *Reichel* v. *Magrath,* 14 App. Cas. 665.

Defendants also ask that a caution filed on behalf of plaintiffs against the lands described in the endorsement of the writ of summons be discharged. From an affidavit of plaintiffs' solicitor filed on the motion, I take it that plaintiffs' sole right to file this caution rests on the claim set up in the action. If that be so the caution should be discharged.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 14TH, 1914.

ST. CATHARINES IMPROVEMENT CO. v. RUTHERFORD AND RILEY.

6 O. W. N. 87.

Contract—Breach—Provision for Liquidated Damages — Construed as Penalty—Actual Damage not Proven — Nominal Damages—Costs—Set-off—Third Party—Liability for Balance of Costs.

FALCONBRIDGE, C.J.K.B., *held,* that a clause in a contract providing for liquidated damages was in fact a penalty clause and must be construed as such.

Townsend v. *Rumball,* 19 O. L. R. 435, approved.

Action to recover $1,200 as liquidated damages for delay and default of the defendant in removing structures from land as agreed upon between plaintiff and defendant.

The defendant brought in one Riley, as a third party, and claimed relief over against him.

Trial at St. Catharines.

H. H. Collier, K.C., for plaintiffs.

G. F. Peterson, for defendant.

M. Brennan, for third party.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Notwithstanding the use of the words "liquidated damages" in the agreement, I am of the opinion that this is a case of penalty.

The law is clearly laid down in the Encyclopedia of the Laws of England, vol. 4, at p. 325 (cited in full in *Townsend* v. *Rumball* (1909), 19 O. L. R. at pp. 435, 436). The contract here is for the removal of several different structures of different degrees of size and importance, *e.g.*, there is a hen house still on the premises. In *Townsend* v. *Toronto, Hamilton & Buffalo Rw. Co.* (1896), 28 O. R. 195, and in *Pelee Island Navigation Co.* v. *Doty* (1911), 23 O. L. R. 402, the defendants agreed to do one particular thing, and the sum contracted to be paid had reference to a single obligation.

In the present case there is no actual damage. The plaintiffs wished to get their property "away from the farm effect," and make it look like residential city property. No sale has been lost in consequence of defendant's default.

I enter a verdict for the plaintiffs for $5 damages with Division Court costs, defendant Rutherford to have the usual set-off of High Court costs.

As regards the third party, he is the one who has made the trouble, and he is adjudged to pay to the defendant Rutherford a sum sufficient to make good to the defendant whatever deduction he suffers from his full amount of costs as between party and party, including defendant's costs of and incidental to the third party procedure, otherwise no order as to costs for or against the third party.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. MARCH 16TH, 1914.

CARRIQUE v. PILGAR.

6 O. W. N. 101.

Mortgage—Covenant to Insure—Inability to Find Company to Take Risk—Covenant Broken — Right of Mortgagee to Possession—Costs.

MIDDLETON, J., *held*, that where a mortgagor covenanted to insure, his inability to find a company ready to insure is no excuse for his failure to perform his covenant, and the mortgagee is entitled to possession.

Action for foreclosure and possession under a mortgage.

G. G. Plaxton, for plaintiff.

J. M. Godfrey, for defendant.

HON. MR. JUSTICE MIDDLETON:—The mortgage was originally for $3,400 payable $100 per annum on account of principal each year from its date, 2nd April, 1906. Nothing is in arrear. More than the yearly instalment has been paid under a clause so permitting. $2,000 and interest from the last gale day is yet to be paid.

The mortgage contains a covenant to insure for $1,450. The covenants are the ordinary short form covenants.

The husband of the mortgagor was found guilty of arson committed on an adjoining farm, and committed for two years in the central prison. His term will soon be up.

On learning of the fact of the conviction the insurance company cancelled its policy and though new insurance has been twice placed on the property, in each case the company has cancelled the risk, and counsel agreed that no insurance can be placed.

Some evidence was given to shew the value of the land, but this seemed to me to be quite beside the real point of the case. The mortgagor has contracted to give the mortgagee not only the land, but insurance on the buildings as security for the debt and the rights of the parties must depend upon the agreement.

When the aid of the Court is invoked in "scant security" cases the question of value is, of course, material, but I know of no power given to the Court to relieve a mortgagor from his contract.

If the property has the value the defendant thinks there can be no real trouble in finding a new mortgagee who will lend enough to pay the plaintiff off, and the plaintiff must abide by his readiness (stated in Court), to receive his debt at any time, even if not yet due.

No provision is made in the mortgage expressly dealing with the case of the mortgagor's inability to find a company ready to insure. There is the covenant to insure, and it is broken, and this, I think, gives the mortgagee the right to possession as the re-demise clause (17), only gives the mortgagor the right to possession, so long as there is no breach of any agreement to be found in the mortgage. On the breach of any covenant the right of the mortgagee, incident to his ownership of the land in law, to possession of the land revives.

There is no right to foreclosure, but the mortgagee may take possession, if he is ready to become a mortgagee in

possession, and to become liable to account for his use and occupation.

The mortgagee may have his costs. They may be added to his debt or be set off against occupation rent, but I do not make any personal order for payment.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 16TH, 1914.

LANGLEY v. SIMONS FRUIT CO.

6 O. W. N. 104.

Assignments and Preferences — Assignment of Goods—Assignor in Insolvent Circumstances—Lack of Knowledge of Insolvency by Assignee—Cash Advance — No Intent to Defraud or Prefer—Transaction Upheld.

FALCONBRIDGE, C.J.K.B., *held*, that an assignment by a firm in insolvent circumstances of certain goods to a firm which did not know of such insolvency, in return for a money advance, without any fraudulent or preferential intent, was valid.

Action in the name of plaintiff, assignee of the Better Fruit Distributors Limited, insolvent, by Norman H. Karn, a creditor of said Better Fruit Distributors Limited, authorized by order of Friday, 25th April, 1913, under sec. 12 of the Assignments and Preferences Act, 10 Edw. VII. ch. 64. Tried at Hamilton.

W. S. MacBrayne and W. M. Brandon, for plaintiff.

H. Howitt, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—On the 7th November, 1912, the said Better Fruit Distributors Limited, being then indebted to Karn and to the defendants, and also to other persons and being insolvent and unable to pay its debts in full, and not being warehousemen or otherwise entitled to issue warehouse receipts, assumed and purported to transfer and convey to the defendant company 4,500 barrels of apples then in the premises of said Better Fruit Distributors Limited, at Hamilton, and on the 5th December, 1912, the said Better Fruit Distributors Limited, purported further to transfer and convey to the defendant 3,000 barrels of apples..

David L. Dick, manager of the defendant company, admits on oath that Mr. Mallinson, president and general man-

ager of the Better Fruit Distributors Limited, must have known that there was a "shortage," *i.e.*, that the Better Fruit Distributors Limited was insolvent.

I do not think that on the whole evidence I would be justified in finding that Dick knew they were insolvent.

And I do not find that the transaction impeached was with intent and design to give defendants a preference or privilege over other creditors, or with intent to defraud, hinder, delay or prejudice other creditors, or that it had that effect.

It was a very common and ordinary arrangement—an advance of money by defendants to the Better Fruit Distributors Limited on apples consigned to defendants for sale, and for the proceeds of which defendants had to account.

In the present instance they made an actual cash advance of $6,750 plus $3,750—$10,500. The apples were bad and there was a deficit on the consignments of $35.41 besides above advances.

Action dismissed with costs.

Thirty days' stay.

HON. MR. JUSTICE LATCHFORD. MARCH 16TH, 1914.

RUSSELL v. KLOEPFER LTD.

6 O. W. N. 102.

Assignments and Preferences—Mortgage Given by Insolvent for Past Debt—Knowledge of Insolvency—Preference over other Creditors—Assignments and Preferences Act, 10 Edw. VII. c. 64, s. 6—Transaction Set Aside.

LATCHFORD, J., *held*, that a mortgage given a creditor to secure a past debt, the mortgagee being aware that the mortgagor was in insolvent circumstances, was fraudulent and void as against the other creditors of the mortgagor.

Action to set aside a mortgage made by one Leatherdale to the defendant company, on the ground that it was preferential as against the creditors of Leatherdale, other than the defendant company, and, therefore, fraudulent and void.

J. T. Mulcahy, for plaintiff.

J. F. Boland, for defendants.

HON. MR. JUSTICE LATCHFORD:—I found as a fact at the close of the case that Leatherdale was insolvent to the knowledge of the defendant company's manager at the time the mortgage impeached was given, and reserved judgment merely to enable Mr. Boland to submit—as he considered he could—authority to establish that the verbal agreement made by Dawson, acting for the defendants, with Leatherdale to fill the orders, the defendants had theretofore refused to fill and to supply additional goods, coupled with the supply afterward of small lots of goods, brought the case within the exceptions mentioned in sec. 6 of The Assignments and preferences Act, 10 Edw. VII. ch. 64, now R. S. O. ch. 134.

Numerous cases have been submitted, but none has application to the facts established in this.

The mortgage was not made "in consideration of a present actual *bona fide* sale or delivery of goods," and therefore does not fall within the protection afforded by sub-sec. 1 of sec. 6.

Nor is it validated by sub-sec. 5 (*d*) of the same section. The mortgage was indeed given for a pre-existing debt; but no advance in money was made by the defendants to their debtor in the *bona fide* belief that the advance would enable him to continue his trade or business, and to pay his debts in full.

Mr. Dawson knew Leatherdale's position was hopeless. His real and dominating purpose was to obtain from a person in insolvent circumstancts security for a past, stale debt to the prejudice of the debtor's other creditors—the very kind of a preference the statute was passed to prevent.

There will be judgment declaring the mortgage void, and directing that the registration thereof be vacated—with costs.

MASTER IN CHAMBERS. MARCH 16TH, 1914.

McINTOSH v. STEWART.

6 O. W. N. 113.

Trial—Motion to Change Venue—Balance of Convenience—Expense —View by Trial Judge—Motion Granted.

MASTER-IN-CHAMBERS granted a change of venue from Toronto to Walkerton where the balance of convenience warranted it; a view at Walkerton by the trial Judge being necessary, and the expense at the latter place being less.

MacDonald v. *Dawson*, 8 O. L. R. 72, referred to.

Motion by defendant to change venue from Toronto to Walkerton.

CAMERON, MASTER: — From the affidavits filed it is clearly established that a trial at Walkerton would be less expensive than a trial at Toronto. This, however, is not a sufficient reason to change the venue, particularly as plaintiff's counsel on the hearing agreed to pay the extra expense of a trial at Toronto. (See *McDonald* v. *Dawson*, 8 O. L. R. 72). It seems clear to me that a view will be required on this case by the trial Judge. Bearing this fact in mind and taking into consideration that a trial at Walkerton would be less expensive, I think that there is a preponderance of convenience in favour of a trial there. Order will go changing place of trial to Walkerton. Costs of application costs in the cause.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 6TH, 1914.

FRETTS v. LENNOX & ADDINGTON MUTUAL FIRE INS. CO.

6 O. W. N. 13.

Insurance—Fire Insurance — Insurance of Automobile—Change in Policy at Request of Insured—"Owned by Insured"—No Reference to Place of Storage — Literal Meaning of Words to be Adopted—Third Statutory Condition—Isolated Risk—License of Company—Limitation of Amount Recoverable—Evidence.

SUP. CT. ONT. (2nd App. Div.) *held*, that where an automobile was insured "while in the storage house or on the road or owned by the insured," the assured could recover wherever the antomobile was when damaged by fire, as long as it was still owned by him.

Judgment of PRICE, Co.C.J., affirmed.

Appeal from a judgment of His Honour Judge Price of the County Court of the County of Frontenac in favour of the plaintiff for $375 and costs.

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

W. S. Herrington, K.C., for defendants, appellants.

E. Gus Porter, K.C., contra.

Hon. Sir Wm. Mulock, C.J.Ex.:—The action is on a fire insurance policy, issued by the defendants on the 23rd day of March, 1911, whereby they insured the plaintiff for three years from the 23rd day of March, 1911, against loss by fire to the extent of $500, in respect of an automobile, which was thereafter, namely, on the 23rd day of April, 1913, damaged by fire. The following are the defendants' grounds of appeal; first, that the automobile is in the plaintiff's application for insurance described as situate on lots 18 and 19 in the third concession of the township of Fredericksburg; that the said application also described the buildings on the said lands consisting of ordinary farm buildings and an automobile house, and that the plaintiff thereby represented to the defendants that the automobile when not in use was being stored in said automobile house, whilst at the time of its being damaged by fire, it was, and for several weeks had been, stored in a paint shop and garage in the city of Kingston, and its removal from said lands to said paint shop and garage was a change material to the risk within the meaning of the third statutory condition; that the plaintiff omitted to notify the defendants in writing of such change, and that by reason of such omission the policy became void.

Second, that the defendant company by its license was not entitled to insure other than isolated risks, and that the risk in question was not one of that kind.

Third, that by reason of certain terms in the application for insurance the plaintiff is not entitled to recover more than 70 per cent. of the loss.

The application for insurance, as it was originally signed by the plaintiff, thus refers to the automobile house and automobile; description of the automobile house and automobile, "automobile house and hen house combined; automobile in the storage house or on the road."

When the plaintiff received the policy he was not satisfied with the reference therein to the automobile and returned it to the defendants, and to meet his objection the company's board amended the application and the policy by inserting in the application and in the policy the words "or owned by the assured." Thus the description in the application for insurance is now in these words; "automobile in the storage house or on the road, or owned by the assured." The plaintiff accepted the policy as amended and thereafter paid subsequent assessments on his premium note given for the policy.

The words of the policy do not, I think, admit of the interpretation sought to be placed upon them on behalf of the defendants. The company insured the automobile "while in the storage house or on the road or owned by the assured." It was owned by the assured at the time of the fire. The words "or owned by the assured" deliberately added to the policy, had the effect of freeing the plaintiff from any obligation to store the automobile in his own storage house. If it had been intended that such obligation should still exist then other words should have been used, for example, instead of the word "or" the word "whilst."

Inasmuch, however, as the two parties deliberately adopted the precise words added to the application and to the policy, we are not entitled, I think, to give to them any other than their fair literal meaning. I therefore think that the policy as amended insured the automobile without reference to where it might be from time to time. Thus the plaintiff being entitled by the wording of the policy to place the automobile where it was when burnt, the third statutory condition is not applicable to the facts of the case.

The second objection that the company by its license must confine its insurance to isolated risks must also fail. The policy was dated and issued on the 23rd day of March, 1911. Its alteration was authorised on the 3rd of June, 1911. The policy is for three years, dated from the 23rd of March, 1911, and the plaintiff has paid the three annual premiums payable under the policy. The alteration relates back to the commencement of the policy, namely, the 23rd of March, 1911. The defendant put in licenses to do business for the three years commencing with the 1st day of July, 1911, but no license was given in evidence as to the powers of the company prior to that date.

Thus it does not appear that the defendants were limited to effecting isolated risks of insurance when the policy in question was issued.

As to the defendants' contention that at most they are only liable to an amount not exceeding 70 per cent. of the value of the property destroyed, the words of the application on which the defendants rely are as follows: "And it is further understood and agreed between the assured and the company that where the buildings are not the property of the assured this company will in no case pay an amount to exceed 70 per cent. of the actual cash value on the loss of the

property destroyed or damaged by fire. The buildings here referred to are those mentioned in the application and even if the words "property destroyed or damaged by fire" apply to the automobile, or if the claim itself applies to the automobile which was insured at large, there is no evidence that "the buildings are not the property of the assured" so that the plaintiff's claim is not limited to 70 per cent. of his loss.

For these reasons I think the appeal should be dismissed with costs.

Hon. Mr. Justice Magee, Hon. Mr. Justice Sutherland, and Hon. Mr. Justice Leitch, agreed.

SUPREME COURT OF ONTARIO.

First Appellate Division. March 16th, 1914.

SWALE v. CANADIAN PACIFIC Rw. CO.

6 O. W. N. 93.

Railways — Action for Conversion of Goods Entrusted to Them—Railway Act (Can.) s. 345—Sale to Realize Charges—Negligence of Auctioneer—Loss—Third Parties — Limitation of Liability—Want of Endorsement of Bill of Lading—Right of Third Parties to Set up—Liability of Railway—Involuntary Bailee—Statutory Bailee—Statutory Duties—Onus—Proof of Delivery to Defendants—Unsatisfactory Evidence—New Trial—Set-off—Costs.

Lennox, J., 24 O. W. R. 224 gave judgment for plaintiffs against defendants, a railway company, as common carriers for $1,066.40 damages for loss or conversion of certain goods entrusted to them and for defendants against the third parties, auctioneers, for the same amount, as the loss had occurred by reason of the negligence of the latter, to whom the goods were entrusted for sale under sec. 345 of the Railway Act, in order to realize certain charges due and owing by plaintiffs to defendants.

Sup. Ct. Ont. (2nd App. Div.) reduced the amount of the plaintiff's judgment to $50.97, holding that the evidence of delivery of the goods to the defendants was unsatisfactory but gave plaintiff the option of a new trial as to $887.50, the value of goods unaccounted for.

Per Hodgins, J.A.:—"The liability of the railway company which held the goods under the statute at the risk of the owner is only that of an involuntary bailee and it can only be made liable for wilful neglect or misconduct such as conversion or misdelivery."

Shaw v. *Great Eastern Rw. Co.*, 1894, 1 Q. B. 373, referred to.

Appeal by defendants and third parties from judgment of Hon. Mr. Justice Lennox at the trial (24 O. W. R. 224), in favour of plaintiffs in an action against a railway company for damages for conversion of goods entrusted to their care (see also 29 O. L. R. 634).

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

J. Bicknell, K.C., and Wm. Laidlaw, K.C., for appellants, the defendant and third parties.

S. Denison, K.C., for defendants, the Canadian Pacific Rw. Co., on appeal of the third parties.

W. M. Hall, for plaintiff, respondent.

HON. MR. JUSTICE HODGINS:—The respondent Swale has so pleaded in this action as to base her claim upon the abstraction by the railway company and its agents, and the conversion to their own use, of the goods in question. There is no evidence to support this charge, but the making of it caused the parties to insist on their legal rights, and has made it necessary to deal with the issues more exactly than the case would otherwise seem to demand. The liability of the railway company is only that of an involuntary bailee, and it held the goods under the statute, at the risk of the owner. It can only be made liable for wilful neglect or misconduct, such as conversion or wilful misdelivery. *Shaw* v. *Great Eastern Rw. Co.,* [1894] 1 Q. B. 373, or if it did not act as reasonable men would act. See *Swale* v. *Can. Pac. Rw. Co.,* 5 O. W. N. 402; 29 O. L. R. 634. On this basis the claim against the railway company, and their claim over against the third parties, must be dealt with.

The railway company admit the sale of the ninety-seven packages or cases of settlers' goods and effects, except the goods removed by the respondent Swale, but there is no admission that the goods removed by the latter as missing, were among those settlers' goods and effects, and the contention is strongly pressed that the respondent Swale has failed to prove the delivery to the railway company of the actual goods set out in this list. These goods are said to have been among those packed up in England, partly by T. Swale and partly by Davies, Turner Co. The onus is upon the respondent Swale to prove her damages and such a cause therefor as will render the railway company liable upon the principle already laid down, and it is not incumbent on the appellants to prove affirmatively that they had used reasonable care. *Marsh* v. *Herne* (1826), 5 B. & C. 322.

The respondent's case as opened was for "nearly one hundred articles missing," and for "eight or ten overcharges," *i.e.*, less accounted for than received, and her counsel stated that he was not concerned as to how the accounts were rendered by the third parties to the railway company, but only how the latter rendered them to the respondent, and that the real point of the case was with regard to the missing articles.

It is to be regretted that in a case depending so largely upon details, and intimate knowledge of the varied assortment called settlers' effects, so little assistance has been given to the Court of first instance or to this Court in ascertaining the real facts as to these missing articles. The railway company apparently decided to throw all responsibility on the third parties, and pursued this course at the trial. They had previously abandoned the English commission asked for by them. The third parties devoted themselves to dealing with the allegation that goods were abstracted while in their possession. In the result no attempt was made before trial by comparison of the rough list, packer's list and shipper's list, whether admissible or not—and by enquiries from the shippers, to determine if there was any real loss of the respondent's goods, quite apart from the legal liability. This might have been done, or at all events, the case might have been much simplified, if counsel concerned had endeavoured, after these lists were produced on 13th May, 1910, on the examination for discovery, to ascertain the identity of the goods said to be missing with those mentioned in these lists, a fact quite impossible to be done by merely comparing one list with another. Nor is the respondent's husband free from blame. I attach a good deal of importance to his action in regard to the goods taken away before the sale. These articles were selected when the goods were being placed for sale, and it is of what was then left that Suckling made his list, Ex. 29, with T. Swale assisting, certainly as to the pictures. Suckling says the latter was on very friendly terms with them all, and gave him a lot of information in making up the list. It must be obvious that no list made prior to his selection would be of any value, unless he himself kept a record of what he was taking away. Hence, what he did and his assistance to Suckling in making a list of the remaining goods, and his abstention from any complaint till November, and then only as to the Sevres china, is of impor-

tance as shewing that the absence of a prior list cannot be deemed negligence on the part of Suckling. It appears that the respondent's husband having, through her solicitor, asked to have withdrawn from sale a quantity of baby clothes, of old letters and correspondence, some old books of a business once carried on in England, only good as waste paper, certain household linen with Mrs. Swale's name on it, all of very little commercial value, was told he would have to attend the sale and buy them in. Swale, however, before the sale, went to Suckling and mentioned to him that he wanted to select things of sentimental value (p. 46), and was referred to Butler, the manager. He was told by Butler to pick them out, put them in a pile and shew Butler after. This took him from 1 p.m. till 5 or 6 p.m., and from 8.30 to 11 a.m., next day. He says he shewed Butler the pile, priced them at $15 and was told to get them away. He says that, in addition to what the letter mentioned, he took family portraits, china and bedding and a violin and guitar, and the list produced (Ex. 13) contains a long schedule of goods quite different from what he had asked to be allowed to remove, e.g., wall bracket, sewing machine, two marble clocks, equestrian group, three feather beds, seventeen pair lace curtains, three crown derby vases, walnut filing cabinet, walnut coal box, three plush curtains, and etc. These goods were packed by Swale on Tuesday and Wednesday and shipped by him to Gravenhurst the night before the sale, notwithstanding that "the C. P. R. people came around and they were creating bother and wanted to know what Suckling was allowing these things to be taken away for." Swale did not pay the $15. The goods filled six hogsheads and one barrel weighing 1,950 pounds (Ex. 20), and no list was then made of them by Swale or anyone else, and the list now produced appears to have been prepared, owing to a demand in this action, begun 4th March, 1912, five months after the sale.

I can hardly reconcile this transaction with a desire on Swale's part to deal honestly with Suckling. He admits that $15 was not a fair value. Indeed this is obvious, and his offer of it was, I think, intended to mislead Butler, and enable him to get the goods aways without remark or payment of their value, which he did as they were packed up before Butler saw them, so the latter says. The learned trial Judge has, however, accepted the list given by Swale

of these goods as accurate, and, I think, his finding cannot be disturbed.

During the sale Swale followed Suckling around and jotted down the sales in a little book, but examination of it shews that it does not profess to include all, but only those which Swale thought well to note. Others he made no memorandum of. After the sale, Swale claimed the unsold goods on behalf of the respondent, and Suckling, it is said, agreed to his taking them away. He took a velvet pile table cover and two large linen sheets, sold the grandfather clock for $90, found a mirror unsold and asked for a case of Sevres china, which has since been returned. He has accepted $25 for two Chippendale chairs said to be missing. Swale had an accounting with Suckling for the articles bought by him, amounting to $418.85 on October 22nd.

The actual receipt of the missing goods, a list of which is produced by the respondent, is strongly disputed by both the railway company and the third parties. It may be mentioned in passing that, while there is a multiplicity of lists now, there were none at the time when a list would have been useful and would have prevented a lawsuit. The respondent had the three lists I have mentioned, and he now produces lists of what were removed before the sale, and of the missing goods, and there are two auctioneers' lists. The list of missing goods is a compilation made long after the sale during the next year and from a black book. When he made his selection of goods before the sale he made no list of them, nor of the goods as laid out, nor of those left over, nor did he at the sale or previous to it, nor after it while on the spot make any complaint or shew any of the lists he had. And this has made it almost impossible for any effective check to be had of the belated list made up from his private sources and depending for its validity entirely upon the fact, if proved, that Davies, Turner & Co. properly packed all he left and safely kept all he gave them.

It is best put in T. Swale's own language:—

"Q. You had it in your mind that there were goods missing? A. Yes.

"Q. And you just carried that thought in your mind without putting it on paper for some considerable length of time? A. No, the early part of the year following when we were requested to produce the list I got a rough list of my own, a rough idea.

"Q. But there was an order made for particulars afterwards, and it was the result of that order made subsequently, that you made out this formal list? A. That I could not tell you; it has been made since.

"Q. It would be some time since? A. Yes.

"Q. What basis had you, when you made out the formal list, what were you depending on in inserting those articles? A. Prior to calling in Davis, Turner & Co. of Liverpool to take delivery of the goods at Monmouth, I went through the house and made a complete list of everything that was in there, and I also made a complete list of everything that was put into each individual case that I packed myself. When I got the black book home the list I had at home, I compared it with this list, and that is how I make up my list of missing articles."

The evidence given by the third parties accounts very fully for the receipt of the cases and the seven or eight opened in the land (owing to their size, making it impossible to take them in to the elevator), the contents of the latter being stored on top of the other pieces in the cellar. No one had access to the cellar except employees of Suckling, and all the keys of the warehouse are accounted for. The evidence of Jenkins, coupled with that of Suckling's employees, traces the contents of all the pieces up to the floor above Suckling's trade sales room. The room on this floor was hired for the sale, and was part of the premises of one Sanderson. It was sworn to and not questioned that so far as display, publicity and general conduct of the sale were concerned, everything was done to produce what, in the estimation of all, was a most successful result. This is concurred in by the respondent and by his counsel at the trial. This is most important as the complaint with which this action was begun has been continued and is limited to this, that the missing goods were abstracted. Counsel for the respondent during the trial at p. 159, after stating that he had no complaint as to the way the goods were sold, adds: "The only complaint I have is about the way the goods were exhibited," and then explains: "In regard to dealing with the goods shipped, for instance, they might be easily abstracted or lost." In the examination of T. Swale he had asked him, speaking of the Brussels carpet, "unless it was sold and included in the sale your theory would be that it had been stolen," to which Swale answered,

"Yes." In T. Swale's examination for discovery, read at the trial, this occurs:—

"209. You state in your wife's statement of claim that, while the goods were in the custody of the railway company a large quantity of the goods and effects were abstracted and converted by the company to their own use. What information have you to support that allegation? A. The fact that the goods were not there.

"210. And you have no more reason to suppose that they were taken while they were in the company's freight sheds or in the company's possession, than you have to suppose that they were taken out while they were in Davies, Turner & Co.'s warehouse or in England? A. The only reason I would say that they were abstracted by the C. P. R. Co., or their agents, is the way in which they were handled in the sale room."

"211. How do you mean they were handled in the sale room? A. For instance, they were in a flat, and above that flat there was a manufacturer of neckwear, and he employs a lot of young people, and I myself saw those people wandering around the flat where the things were before the sale.

"212. How long before the sale? A. I did not get up until Monday.

"213. When was the sale? A. Thursday; I came up on Monday from Gravenhurst, and I should not have known anything at all about it had I not heard from an outside source that they were going to be sold.

"269. What class of stuff was it that was sold in cases? A. Kitchen stuff principally; they were put in the original boxes that they came over from England.

"270. What do you say about the prices that were realized on the sale? A. They were far more than I ever anticipated."

In reply to the suggestion made in these answers, evidence was given that the goods were displayed on tables, and at certain hours of the day the girls employed by Sanderson went through one corner and down a stairway, and that there was always a caretaker there, and that on the day when the public were admitted to view there were sufficient caretakers to look after them. Neither Swale nor any witness was called to question this, although Swale had been there from Monday till the following Thursday. It is a fair conclusion from the evidence given on behalf of

the third parties, if accepted, that the missing goods could not have been stolen from their premises.

In the judgment at the trial it is said:—

"No account was taken of the goods as they were taken in, or when they were unpacked and distributed about the warehouse, although there were goods of other customers there as well. No effort was made to care for the smaller articles—many of them now missing—although this firm were not in exclusive occupation, and although the premises were during business hours open to the public.

"It is said there were men taking care of the goods. There was no specific evidence of this, and I cannot find that any men were there outside the regular staff of porters and clerks. No catalogue of the goods was ever made. They were advertised as ninety, instead of ninety-seven cases; as the goods of parties who had no interest in them; the list of the goods sold cannot be found; and Mr. Suckling now admits that in one instance, at all events, out of many similar errors claimed, they credit less than thirty per cent. of the amount actually received.

"But the worst feature is the manner of keeping the accounts."

In dealing with this finding it must be observed that when the goods were received they were stored in their cases in the basement from 14th, 15th and 16th September, 1908, till some days before the sale on the 21st October, and the goods unpacked from the seven or eight cases were stacked on top of the unopened packages. When the sale was imminent Jenkins was sent for and unpacked the goods from the cases or packages, perhaps from seventy-five or eighty of them, he say, and had them delivered by the elevator into the room set apart for the sale. Their custody there I have already spoken of. I can find no evidence of the unpacked goods being distributed through the warehouse, except in the sale room, and the goods of the other customers spoken of as being there as well, were taken in on the day of the sale and the evening before. Some of the smaller packages containing small china and things were not unpacked by Jenkins nor by Swale, but Jenkins saw the contents upon the tables in the sale room all sorted and says that he re-sorted into lots those broken. Swale, arriving there on the Monday, before the sale, occupied his time on Tuesday and Wednesday picking out what he wanted, and was most likely conversant with what was being done

in the unpacking and laying out of the goods. He made no complaint then, nor after the sale until November. Evidence was given as to caretakers, who may of course have been part of the regular staff, but there is to that extent specific evidence of men taking care of the goods. No catalogue was made when the goods were received, nor when opened up, but a list known as Warren's list (used in the interpleader proceedings) was sent with them by the railway company, and no doubt caused the insertion of Warren's name in the advertisement. This list, although a copy was in counsel's brief at the trial, was not put in. The list of goods sold, *i.e.*, the clerk's list of goods as they are sold with the names of purchasers and the prices, is lost. It was not in their regular weekly sales book, a heavy volume, but in a small book, which was afterwards sent to Rawlinson on account of some dispute raised by Swale about a picture he bought. That was the last heard of it, and although diligent search has been made, it has not turned up. But the account sales sent to the railway company was founded upon it and made up from it, and is in evidence. Exhibit 29 is also a list of the goods as laid out made out by Suckling with Swale's assistance.

But even if all this were as viewed by the learned trial Judge, it falls far short, in my judgment, of proving abstraction by them or loss by wilful misconduct, such as would render the appellants liable. The method of keeping the accounts is not germane to the question of the abstraction or loss of the goods, and throws no light on it. As this Court has held that the railway company are liable only for wilful neglect or misconduct, what the third parties did or omitted to do, either as found by the trial Judge or as modified by the considerations just mentioned, is quite distinct from that sort of wilful misconduct which renders its perpetrator liable where in custody of goods of a third person. Nor, as will be observed, does it throw any real light on the point which is vital to the respondent, in view of the fact that no attention at the proper time was called to any goods as missing, except some specific ones since accounted for. Did these missing goods actually arrive in these cases or were they lost or abstracted in England or forgotten to be packed by the employees of Davies, Turner & Co. there? This is the point, and it is, except in a few instances, left entirely in doubt. The view of the learned trial Judge is apparently covered by what I quote later as

said by him during the progress of the trial, for in his subsequent reasons he merely says that he is satisfied that the ninety-seven cases delivered to the third parties contained all the goods said to have been shipped from England.

To properly realize the situation the evidence of Swale as to what he actually knows, must be studied.

It seems that he left Monmouth on 21st December, 1907, and never saw any of the goods till they were in Suckling's warehouse. He packed in December, 1907, some fourteen or fifteen cases as he calls them, but later on describes them as small cases used for packing sugar and stout, *i.e.*, cases used by grocers for things of that sort, two feet or two feet six square, and he gave them to the railway company. On an examination of the packer's list (Ex. 23) it would appear that those not put in barrels or cases appear as fifty-four packages, comprising boxes of books, etc. (11); of tools, (2); cupboard, part of cupboard, (4); bedsteads, (2); table and chairs, kitchen table, etc. (5); chairs (5); stepladder, sides of wood bedstead, flour bin and contents, iron folding chair, rolls of oil cloth, meat safe, garden roller, wire mattresses. The shipper's list (Ex. 22) shews the smaller cases packed by Swale to be as follows:—

"Cases, etc. packed by T. Swale. Hinged box T. S. 9, contains old china, Crown Derby service, Old English, etc.

"Gray painted box hinged, contains sheets, valances, curtains (lace) and games, etc. Old oak chest, contains blankets, lace curtains, sheets, table and baby linen. Diamond match box, contains plate, cutlery, cushions, etc. Five small cases, contain books, 1 large rough box (wood) contains books. Portfolio contains sketches, etc. Flat box, contains office books, music, etc. One painted cupboard, contains office stationery and furnishings, etc. Hinged box, T. S. 12, contains china, office books, music, etc. This was packed by your man Long."

These lists were objected to as evidence, and I think rightly so. But if they are of any value it is clear they carry the matter of identification no further. They differ radically. The packer's list gives fifteen barrels, twenty-eight cases and fifty-four packages of various kinds, while the other shews fourteen cases as packed by Swale, to which nothing in the other list corresponds, unless one can guess that what is headed "barrels" means small

packages, as all the cases are shewn to be of dimensions much larger than two feet or two feet six square.

So far then as what was packed by Swale, the packer's list does not help. It was prepared and is stamped 1st July, 1908, and rather indicates a re-packing of what Swale had packed and delivered. Swale, however, says he recognized in Suckling's warehouse some of these cases packed by him, which evidence, in its turn, rebuts that inference. These were (1) the oak chest opened by Jenkins, and which itself sold; (2) gray box with hinges; (3) two deal boxes; and (4) flat wooden box; and he saw the typewriter stand, brussels carpet, fitted luncheon basket, two pair garden shears, one having brass syringe, wolf skin robe. He got the things taken before the sale, which are given on his list, the things he bought, also listed, and afterwards the grandfather clock, the carved walnut mirror, the table cover and linen sheets, the Chippendale chairs and the Sevres china, since paid for.

This is the whole of his identification of the goods packed by him. Of these Suckling says he saw the brussels carpet in lot 168, and the wolf robe in the pile of rugs sold, so that the identification is confined, apart from those taken by him before the sale, those sold to him and those sold to the public, to a typewriter stand, a fitted luncheon basket, two pair garden shears, and a brass syringe, all valued at $26.25.

The history of the goods which he alleged were packed by Davies, Turner & Co. is as follows: He produces as Exhibit 21, a list of goods that were in the house at Monmouth previous to being packed. The list, he says, was an inventory taken by him in Monmouth before they were shipped. They were put, unpacked, into large vans, sent to Liverpool and packed there by Davies, Turner & Co. in their warehouse. These he never saw after they were taken loose into the vans. Exhibit 22, the shipping list is an inventory taken by Davies, Turner & Co.'s men before the goods left Monmouth and is unverified. Exhibit 23, the packer's list, came, so Swale says, with the bill of lading, but it is also unverified. The appellant's argument is that any of these goods were liable to abstraction in the vans, and in Davies Turner warehouse and that some may have been forgotten and that the small cases into which Swale packed his goods, were also subject to the same contingency.

To found a claim upon the railway company here or

against Suckling, it is obvious that this argument must be met. Did they all actually arrive in Toronto is the point which to my mind admits of question. Bearing in mind that the onus is on the plaintiff to shew wilful neglect or abstraction, it seems impossible to assume against the appellants the arrival of all these goods and then to found upon that assumption the finding that the appellants were guilty under the circumstances already stated of not merely want of ordinary care but wilful neglect. This would be to carry responsibility too far. On the other hand to cut down the respondent's claim to the $26.25 might result in a denial of justice, if evidence can be had to shew that these goods were actually packed in Liverpool and securely kept until shipped to Canada. There is nothing to shew when the endorsement on the bill of lading as to the condition of some of the packages was made or by whom. Swale says the endorsement was not there when he got it. P. 51.

The learned trial Judge when admitting, subject to objection, the shippers' and packers' list says:—

"I do not think it is any evidence at all, because this list is furnished that these goods were actually sent. It may be a reason to me to think it could be proved, but it does not prove it; but I do not see any objection at all to his saying which are the goods that are in this that you claim are identical with the goods you have lost. It does not prove the point. It may help me to identify what he is talking about." And later he says:—

"It seems to me you are giving away your case a little on that point, but assume that Mr. Swale is ever so honest, that he packed these goods and so on, yet there is a point, were they ever shipped at all, as Mr. Laidlaw says." . . .

"He says that he packed those goods which were missing in 12 or 14 cases and perhaps he is not able to say, "I know, as a matter of fact, that those 12 or 14 cases came to Canada," but I think the notices or something which comes from the company covers that point, because it shews 97 cases."

It may be observed that some of the goods said to be missing, are similar in character and description to those taken away before the sale by T. Swale, and this makes it the more necessary to have the best evidence that can be obtained of what actually arrived here. What he took is known only to himself and some more thorough examina-

tion and comparison of that list seems to me to be quite a reasonable thing to do.

I think the respondent should have the opportunity of giving evidence to clear up this vital point. The only solution, therefore, is a new trial, which should be confined to the goods in the list of those missing which are not covered by this judgment.

There are some matters dealt with by the judgment in appeal which might be disposed of now. The learned trial Judge allows $84.75 for goods sold and accounted for at less than their sale price. This appears to have been allowed on the evidence given by T. Swale that he had entered in a little book as the sale was going on. At p. 16 this occurs:—

"Q. You were going around with Mr. Suckling; tell us what you did in going around the different lots? A. I followed him around and jotted them down in a black book that is here.

Q. Is this the book? A. Yes, and as the lot was called, out, the number, I put it down and just made a rough note of what the article was and the price it fetched at the sale."

On the list, Exhibit 18, all of which is allowed by the learned trial Judge, the following items, out of fourteen, were not entered by Swale in his book, Exhibit 15, when following Suckling around and noting the prices:—

Item	24	1 chair	$ 6.00	sold	for	$ 6.50	difference	$ 50
"	32/3	stand and mirror	20.00	"	"	30.00	"	10.00
"	34	stand	1.35	"	"	1.75	"	.40
"	46	table	5.25	"	"	10.25	"	5.00
"	805	picture	9.00	"	"	10.50	"	1.50
"	830	print	1.30	"	"	1.50	"	.20
"	848/9	2 pictures	2.00	"	"	2.20	"	.20
								$17.80

Two other items are unsatisfactory. Items 37 and 38 are respectively a clothes closet and a wardrobe, in the Suckling list Exhibit 9, and sold for $15 and $25 respectively. In Swale's book No. 37 is given as a wardrobe sold at $25 while item 38 is not noted at all. Item 136 in Exhibit 9 is 14 pieces crockery sold for $17.50, while in Swale's book it is given as 136, china 15, at $1.25, equals $19.75, a difference of one piece and $1.

Speaking for myself, I would not allow any of these items as against the auctioneer's book as they should depend upon a memorandum taken at the time and cannot

possibly have been remembered at the trial as an effort of memory. This would deduct $29.05 from the $84.75 allowed by the judgment.

The packing cases are allowed at $75. The evidence is that Rawlinson got the 7 or 8 cases opened in the lane for which he paid his own carter $7. The rest, according to Jenkins, had to be broken up owing to the lack of space and the size of these cases, and he says they were of no value in that condition. In this Suckling and Butler agree, the latter saying that 50 cents on the dollar is all they can get when used for re-packing, which was not the situation here. The evidence of Rawlinson that he would have paid $150 for them with all the packing, may be contrasted with what he actually disbursed for the 7 or 8 he got. He also says he paid $25 for 4 cases to St. Michael's College, and that he knows of no way of getting at their market value.

But I do not think the respondent can, in any case, receive any allowance for them. She surely must be subject to the exigencies of space and the actual conditions surrounding the sale. If it was necessary, and it is not contradicted, to break up these cases and reduce them to a state where they are useless, the respondent cannot complain, if they therefore had no commercial value, any more than she can contend that her goods did not bring the price they would have if she had been selling them in her own way, and without pressure.

I see no reason for disallowing the advertising, except $5 which is admittedly a discount received by the auctioneers and that item should be allowed at $40. The repairs seem also to be a fair charge $36.65.

The general account would seem to stand as follows:—

Accounted for		$1,790.20	
Paid for (chairs)		25.00	
To be paid for		26.25	
Additional receipts	$84.75		
less	29.05	55.70	
Still in dispute		887.50	$2,784.65
Paid over		$1,505.63	
Chairs paid for		25.00	
Commission		190.00	
Cartage		18.80	
Paid Jenkins		30 10	
Advertising		40.00	
Repairs		36.65	
Still in dispute		887.50	$2,733.68
Leaving due the respondent			$ 50.97

The account regarding the missing goods so far as it can be taken, is as follows:—

List of missing articles		$1,168.75
China case returned	$ 100.00	
2 chairs paid for	25.00	
Brussels carpet (sold in lot)	30.00	
Wolf skin robe	25.00	
Packing cases disallowed	75.00	255.00
		$ 913.75
To be paid for		
Typewriter stand yost	$ 6.25	
Fitted luncheon basket	5.00	
Pair garden shears	7.50	
Brass syringe	7.50	26.25
Balance still to be investigated		$ 887.50

The full claim of the railway company is	$1,657.79
on which has been paid	1,505.63
Leaving due the railway company	$ 152.16, for which they should have judgment.

I think the proper disposition of this troublesome matter would be to give the respondent judgment for the $50.97 to be paid to her now, and direct a new trial limited to the items in the list of missing articles totalling $887.50, the evidence already taken to be read at the new trial with the right to all parties to give additional evidence as they may be advised; the respondent to have, if she desires it, a commission to examine witnesses in England in which all parties may join. The costs of the former trial, including the third party costs, to be reserved to be dealt with at the new trial, and the railway company to await the result thereof before being entitled to enforce their judgment for $152.16. Upon that trial all questions between the railway company and the third parties are to be open. One set of costs of this appeal, excepting therefrom the costs of the earlier argument upon which judgment was given of the 4th December, 1913, to be to the appellants in any event of the action when finally disposed of. The judgment to be now entered should be considered as disposing of the questions of law already decided, as well as the question of fact now dealt with, so that any appeal may include both. If the respondent does not elect within one month to take a new trial, judgment is to be entered for her for $50.97 with the general costs of the action and for the railway company for $152.16, with costs of this appeal as above mentioned, to be set off *pro tanto*, against the respondent's judgment. There should also then be judgment against the third parties for

the balance paid by the railway company, without costs, and no costs of the appeal as between the railway company and the third parties.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE MAGEE agreed.

HON. MR. JUSTICE LENNOX. MARCH 17TH, 1914.

RE DARCH.

6 O. W. N. 107.

Estates—Settled—Repairs — Necessity of — Authority to Mortgage —Application of Mortgage Moneys—Taxes—Mortgage Interest—Insurance Premiums—Division of, between Life Tenant and Remaindermen—Order—Terms of.

LENNOX, J., on a petition under the Settled Estates Act authorised a mortgage to be placed upon the property in question in order to secure repairs and ordered that the property be insured to its full insurable value, the life tenant to pay one-third of the premiums on such insurance and the remaindermen two-thirds.

Petition by Thomas Darch under the Settled Estates Act, heard at London Weekly Court.

T. G. Meredith, K.C., for applicant, Thomas Darch.

N. P. Graydon, for James Darch.

M. P. McDonagh, for Official Guardian.

HON. MR. JUSTICE LENNOX:—There was not any sharp divergence of opinion between counsel in this matter. The need of repairs is admitted on all hands; and that they can only be made by affecting a mortgage upon the property.

There are taxes in arrear, which must be paid before long. These will amount to more than $100 and, it was thought, less than $200. It will take $900 to put the premises in repair and $100 for legal expenses.

There will be an order declaring that Thomas Darch is a tenant for life, of the lands in question, and authorizing and empowering him to borrow by way of mortgage upon the security of these lands, the sum of $1,000, and in addition a sum sufficient to discharge the taxes in arrear, the expenses of the loan, and the probable expenses of the Official Guardian in seeing to the application of the mortgage money, and if the parties desire it may include a premium for three years insurance.

The mortgage will provide for an insurance to the full insurable value of the buildings when put into a state of repair by the expenditure of the $900 referred to. The mortgage money when obtained, will be placed in the hands of the Official Guardian, to be applied for the purposes aforesaid; the $900 to be paid out from time to time upon proper certificates of the contractor, approved by the solicitor for applicant.

In the absence of any special provision in the will or settlement, as here, the life tenant has a right to the full enjoyment of the property, and is not liable for permissive waste: Halsbury's Laws of England, vol. 24, p. 175, par. 333. He is not liable for accidental injury or inevitable accident, as for instance loss by fire or tempest: Halsbury, vol. 18, p. 498, par. 981, and is not bound to insure: Halsbury, vol. 25, p. 614, par. 1084. But there must be insurance as a condition of authorizing this incumbrance upon the property, and to obtain the loan upon favourable terms; and both parties, life tenant and remaindermen, are interested. The insurance premiums, therefore, from time to time will be borne in the proportion of one third by the life tenant and two thirds by those in remainder.

The order will provide that the life tenant is to pay the taxes and interest charges upon the mortgage from time to time as they fall due, and subsequent premiums of insurance, as required, to keep the insurance upon the property in force, and also the amount of taxes now in arrear, and one-third of the initial premium of insurance; these two latter sums to be added together and to be repaid to the mortgagee in three equal annual payments; and as to all the payments provided for in this paragraph if the life tenant makes default in payment of them or any of them for one month after they respectively become due, the order will confer upon the Official Guardian, authority to collect the rents of the premises until sufficient has been collected to make good the payments in default as aforesaid, together with the expenses of collecting the same, and so from time to time as often as defaults shall occur.

As to subsequent premiums above provided for, not included in the mortgage, the life tenant shall have the right to recover from those in remainder or out of the property anything he pays, or which is paid out of rents, beyond his one third-share.

HON. MR. JUSTICE KELLY. MARCH 17TH, 1914.

BAND v. McVEITY.

6 O. W. N. 105.

Elections—Municipal Elections—Quo Warranto—Office of Mayor—Inability to Serve Process — Extension of Time for—Municipal Act (1913)—s. 165—No Evasion Shewn—Illness of Defendant—Jurisdiction of Judge or Master-in-Chambers.

KELLY, J., *held*, that under Municipal Act, (1913), s. 165, the time can be extended for the service of notice of *quo warranto* proceedings, without any actual evasion of service by the party to be served being proven, e.g., where the latter is too ill to be approached by a process-server.

Appeal by the defendant from two orders of the Master-in-Chambers of the 6th March, the first refusing to set aside a previous order extending until the 6th of March, the time for service upon the defendant of a notice of motion in the nature of a *quo warranto* under the Municipal Act, and the second extending the time for ten days further.

The defendant also asked for an order dismissing the *quo warranto* proceeding on the ground that he was not served within the time prescribed by sec. 165 of the Municipal Act, 1913.

W. N. Tilley, for defendant (appellant).

J. A. MacIntosh, for plaintiff (respondent).

HON. MR. JUSTICE KELLY:—On a fiat issued on February 7th, 1914, proceedings were instituted to void the election of the defendant as Mayor of the City of Ottawa, and a notice of motion to that end, returnable on February 21st, was issued. On the same day (February 7th) the sheriff's officer was instructed to serve the notice on defendant, and attempts were made to personally serve him, but without effect, he being seriously ill and confined to the hospital; his medical attendant refusing to permit any person to have access to him. That continued to be the state of affairs until February 18th, when, on an application by plaintiff to the Master in Chambers for an order for substitutional service, an order was made extending the time for service until March 6th. On February 28th, defendant moved before the Master in Chambers for an order rescinding the order of February 18th, relying in part upon his sworn statement that he knew of no attempt to serve him personally with the

notice of motion or other proceeding; that he made no attempt to avoid service, and did not give instructions to any other person to prevent service being affected; and that he first learned of the order of February 18th, on February 23rd from Mr. Beament, who appears from the proceedings to be the defendant's solicitor.

The application came on for hearing on March 6th, as well as another application by plaintiff for an order for substitutional service. The application for the rescinding order was refused, and on plaintiff's motion for an order for substitutional service, the time for service was further extended for ten days from that date. Personal service of the original notice of motion on defendant was effected on March 7th.

The present application is by way of appeal from these two orders and for an order that these proceedings be dismissed on the ground that defendant was not served within the time prescribed by sec. 165 of the Municipal Act, 1913. That section provides that "the notice of motion shall be served within two weeks from the date of the fiat, unless upon a motion to allow substituted service the Judge or Master in Chambers otherwise orders, and that it "shall be served personally unless the person to be served avoids personal service, in which case an order may be made for substitutional service."

The position taken by defendant is in effect that it is not shewn that he avoided personal service, and that, therefore, there is no power to grant an extension of time for the service. If that be the proper interpretation of the section, an extension of time for service could only be granted on practically the same state of facts as would justify the making of an order for substitutional service.

That is not my view of the construction of that section. In my opinion, on an application for leave to serve substitutionally where it has not been made to appear to the Judge or Master in Chambers that there has been such an evasion of service as to warrant the making of an order for substitutional service, and where the failure to effect personal service is not due to inactivity or want of diligence on the part of those attempting the service, the time for service may be properly extended. Here, personal service within the prescribed time was impossible, not through any fault or want of diligence of the plaintiff, but by reason of defendant's

serious illness and owing to the absolute refusal of his medical advisers and others under whose charge he was to permit of his being approached or of any service being made upon him. It may be that the legislature in conferring the power to extend the time, had in mind, just such a case as the present one. It requires no straining of the language of sec. 165 to so construe it as to make it applicable to the conditions which we find in this case, and I cannot accept the narrower view contended for by counsel for the appellant that the section has failed to make provision for an extension of time in the circumstances which here exist.

After careful consideration I have reached the conclusion that the extension of time was properly granted.

The appeal must be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. MARCH 18TH, 1914.

WOLSELEY TOOL & MOTOR CAR CO. v. JACKSON POTTS & CO.

6 O. W. N. 109.

Appearance—Conditional Appearance — Function of—Third Party Notice — Service out of Jurisdiction on one of Several Third Parties—Rule 25 (g)—Necessity for Previous Service on Party in Jurisdiction—Leave to Withdraw Conditional Appearance—Order for Service Set Aside—Leave to Make Fresh Service Given.

MIDDLETON, J., *held*, that a conditional appearance is not intended in Ontario to be a provisional appearance as in England, but a form of appearance to be used where for some reason it is not convenient to determine the question whether the case can be brought within Rule 25 until the hearing of the action, and should be used only in rare cases.

Appeal and cross-appeal from an order of the Master-in-Chambers, permitting the withdrawal of the conditional appearance entered to the third party notice and setting aside the service of the third party notice, but giving leave to re-serve it.

J. J. Maclennan, for defendants.

R. C. H. Cassels, for third parties.

HON. MR. JUSTICE MIDDLETON:—What is called a conditional appearance was entered by the Turnbulls, reserving to them leave to move to set aside the third party notice. This appearance was entered upon some misapprehension as

to the true function of a conditional appearance. A conditional appearance is not intended to be a provisional appearance, as in England, but a form of appearance to be used where for some reason it is not convenient to determine the question whether the case can be brought within Rule 25 until the hearing of the action. Sometimes this question depends upon a finding of fact collateral to the issues in the action, which cannot conveniently be made without a trial upon oral evidence. The conditional appearance is substituted for the practice which prevailed in the common law Courts of requiring the plaintiff to prove at the hearing the facts necessary to bring the case within the provisions of the law permitting service out of the jurisdiction and in default to submit to a non-suit.

Experience has shewn that it is only in rare cases that this or any similar expedient should be resorted to, it being generally desirable to determine the question of jurisdiction once and for all at the earliest possible stage of the action.

Under the circumstances disclosed, the Master exercised an entirely proper discretion in allowing the withdrawal of the conditional appearance.

Upon the cross-appeal I also think the Master was right. The case can only be brought within Rule 25 (g), and that does not apply unless the person within Ontario has been served at the time of the making of the application for an order permitting service out of the jurisdiction. This service not having been effected at the time the notice was served upon the Turnbulls, the order was properly set aside. Such service now having been made, the Master quite properly made a new order permitting fresh service out of Ontario.

As success is divided, costs here and below may be in the cause as between the defendant and the third parties.

Since this judgment was delivered the order made by the Master has been shewn me. It does not contain as it should an order vacating the former irregular order permitting service out of the jurisdiction, and the service made under it. This clause should now be added.

HON. MR. JUSTICE LEITCH. MARCH 19TH, 1914.

BRITISH COLUMBIA HOP CO. v. ST. LAWRENCE BREWERY CO.

6 O. W. N. 114.

Sale of Goods—Refusal of Purchaser to Accept—Terms of Contract —Evidence—Damages—Quantum.

LEITCH, J., gave plaintiffs, a hop company, $1,230.33 damages against defendants, a brewery company, consequent upon the latter company's refusal to accept and pay for certain hops purchased from the plaintiff company.

Action to recover damages for an alleged breach of contract bearing dated 20th September, 1912, made between plaintiffs and defendants, for the sale to defendants of a hundred bales of hops.

The contract, which was in writing, provided that the British Columbia Hop Co., called the seller, agreed with the St. Lawrence Brewery Co., called the buyer, as follows:—

"The seller agrees to sell to the buyer 100 bales of hops, equal to or better than choice brewing British Columbia hops of the crop of the year 1912, equal sample of lot 2058. The said hops to be delivered on or at cars or ex dock or store, Cornwall, Ont., or at the delivery lines terminals convenient thereto. The buyer agrees to pay on each bale of hops at the rate of 25 cents per pound (tare 5 pounds) plus freight from Pacific coast. Terms, net cash. Time of shipment and or delivery during the months, inclusive of latter part of February, 1913, following the harvest of each year's crop with such extra time as provided in paragraphs 12 and 16 endorsed hereon. It is agreed that this contract is severable as to each bale. The seller may treat entire unfulfilled portion of this contract as violated by the buyer upon or at any time after buyer's refusal to pay for any hops, or any note or acceptance given in payment of hops that have been delivered and accepted hereunder, or, if this contract or any part of it is otherwise violated by the buyer. This agreement is subject to the printed conditions endorsed hereon.

"15. The buyer waives all rights to rejection or to allowances on any delivery on account of quality unless such claim be delivered to seller by telegraph or by writing within 5 days after arrival of the hops at place of delivery and unless such claim be so made prior to buyer's exercise of any right of ownership of the said hops."

The terms were net cash. The contract was subject to the printed conditions endorsed thereon.

Hugh E. Rose, K.C., for plaintiffs.
George A. Stiles, for defendants.

Hon. Mr. Justice Leitch:—The words "or sight draft against bill of lading," were struck out of the printed contract at the instance of the brewery company before it was signed. The erasure of these words was advantageous to the brewery company. Had these words been allowed to remain in the contract, the brewery company would have been bound to pay for the hops upon presentation of the bills of lading, whether the hops had arrived or not. By the elimination of these words the brewery company were only obliged to pay for the hops on arrival, and after they had been given an opportunity of inspection. The hop company were not bound to divest themselves of the property in the hops and vest the ownership in the brewery company until they received the cash.

A controversy arose, as appears by the correspondence, as to the mode of payment, and the parties got at cross-purposes. I think, however, the brewery company were to blame, and that they had no just or legal right to refuse to accept the hops, and thus violate the contract.

The hop company instructed the carriers to permit inspection without surrender of the bills of lading. The carriers were ready to permit such inspection. The brewery company were also afforded by the carriers, acting on the instructions of the hop company, ample opportunity to inspect, sample, and re-weigh the hops. The brewery company never asserted that the hops were not according to sample; the weights were not questioned; the hops were choice hops.

The hop company did everything necessary to entitle them to be paid for the hops. The brewery company at one time contended that net cash meant thirty days' credit. They offered a cheque in payment instead of the cash. The hop company declined to hand over the bills of lading, the evidence of ownership, until they were paid the cash.

The hop company was ready and willing, and in a position to hand over the bills of lading, and the hops, the moment they were paid the cash. The upshot was that the brewery company did not pay the cash, cancelled the contract and refused to take the hops. The hops were delivered on cars, and were in the hands of the carriers, the Grand Trunk Railway and the Ottawa New York Railway, at Cornwall. These companies were in a position to hand over the hops to the brewery company as soon as instructed by the hop company.

After the cancellation by the brewery company and their refusal to take the hops, the hop company advertised the hops for sale in Toronto, and sold them to the best advantage.

The carriers damaged 21 bales of hops and the hop company recovered for this lot 25 cents per pound from the carriers. At the trial these 21 bales were eliminated from the plaintiff's claim.

Of the 79 remaining bales 25 were used by the hop company in filling a contract at 25 cents per pound, so that there was no loss on this lot.

The remaining 43 bales were sold in Toronto, and realized 16 cents per pound. The damages to which I think the hop company are entitled, I make up as follows:—

	Pounds.	
Net weight of the 75 bales	14,342	
In respect of 21 bales, there was no loss, weight	4,127	
	10,215	
The price was 25 cents per pound plus freight. The amount received was 16 cents. The difference, 9 cents per pound, on 10,215 pounds amounts to ..'.....		$919 35
Adding freight and demurrage	$352 50	
Expenses of sale	75 00	427 50
		$1,346 85
From that amount deduct freight to Cornwall on the 21 bales as agreed at the trial		75 00
		$1,271 85
The 25 bales, 4,625 pounds, was sold in Quebec at 25 cents per pound. I have concluded not to allow any damages on this lot. I, therefore deduct		$41 62
Which leaves		$1,230 23

to which I think the plaintiffs are entitled.

See Halsbury, vol. 10, pp. 333, 335; vol. 25, pp. 204, 205, 229, 267, 268. *Biddell Bros. v. Clemens Horst Co.,* [1911] 1 K. B. 214, 934, [1912] A. C. 18.