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APPELLATE DIVISION.

DECEMBER 23RD, 1913.

*THOMSON v. STIKEMAN.

Banks and Banking—Mortgages of Land to Bank to Secure Debt of Customer and Future Advances—Increased Indebtedness—Interest—Account—Bank Act, R.S.C. 1906 *ch.* 29, *sec.* 76, *sub-sec.* 2(*c*)—*Unsecured Debt—Appropriation of Payments — Mortgagee in Possession — Purchasers from Mortgagor—Redemption.*

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 29 O.L.R. 146, 4 O.W.N. 1546.

The appeal was heard by MULOCK, C.J.Ex., HODGINS, J.A., and SUTHERLAND and LEITCH, JJ.

J. W. Bain, K.C., and M. L. Gordon, for the appellants.

W. N. Tilley and G. L. Smith, for the defendants, the respondents.

The judgment of the Court was delivered by SUTHERLAND, J., who, in a short written opinion, briefly stated the facts, referred to the authorities cited below, with the addition of McHugh v. Union Bank of Canada, [1913] A.C. 299, and stated that the Court agreed with the findings of facts and conclusions of law of the trial Judge.

Appeal dismissed with costs.

*To be reported in the Ontario Law Reports.

DECEMBER 23RD, 1913.

*RAMSAY v. TORONTO R.W. CO.

Street Railway—Injury to and Death of Person Crossing Track—Negligence—Contributory Negligence—Findings of Jury—Nonsuit—Reversal on Appeal.

Appeal by the plaintiff, the administrator of the estate of Jean Spence, deceased, from the judgment of LENNOX, J., ante 20, dismissing an action brought to recover damages for her death by reason of the negligence of the defendants, as alleged.

The jury made findings mostly in favour of the plaintiff, which are set out at pp. 21 and 22, but the trial Judge was of opinion that, notwithstanding the findings, there should be a nonsuit.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. P. MacGregor, for the appellant.

D. L. McCarthy, K.C., for the defendants, the respondents.

The judgment of the Court was delivered by MULOCK, C.J.Ex., who, after setting out the facts and the findings of the jury, first referred to the answer of the jury to question 5, which was: "If Jean Spence, or her sister, had been on the alert or keeping a look-out for cars and vehicles as they crossed the street, would the accident, in your opinion, have occurred?" And the answer was: "It might have." The learned Chief Justice then proceeded:—

The answer to question 5 affirms nothing, and may be disregarded: Rowan v. Toronto R.W. Co. (1899), 29 S.C.R. 717; Flannery v. Waterford and Limerick R.W. Co., I.R. 11 C.L. 30.

The substance of the jury's findings is, that the death of the deceased was caused by the negligence of the defendant company in operating their car at an excessive rate of speed and in failing to warn her of the approaching car, and that the deceased, having looked up and down the street and seen no car, had exercised reasonable care.

With respect, I am unable to agree with the learned trial Judge's disposition of the case in directing a nonsuit, on the

*To be reported in the Ontario Law Reports.

ground, as I understand his judgment, of contributory negligence on the part of the deceased. There was ample evidence in support of the jury's finding that the car was being negligently operated; and, unless the deceased was guilty of contributory negligence, the defendant company are liable.

In view of the evidence, that issue could not properly have been withdrawn from the jury; and their finding, being justified by the evidence, is conclusive that the deceased exercised reasonable care. She and her sister looked before leaving the sidewalk; and, according to the sister, no car was in sight. The inference may be drawn that they assumed that no car operated at a reasonable speed could overtake them, and that it was unnecessary for them to look again while crossing the street. Persons crossing street railway tracks are entitled to assume that cars using those streets will be driven moderately and prudently. If a person crosses in front of an approaching car, which is so far off that, if driven moderately, it cannot overtake such person, even though he do not look again and is injured, he is not guilty of contributory negligence: Gosnell v. Toronto R.W. Co. (1895), 24 S.C.R. 582. . . .

The jury was entitled to take into consideration these excusatory circumstances in order to determine whether the deceased had been negligent: Wright v. Grand Trunk R.W. Co. (1906), 12 O.L.R. 114. This was not a case where the accident was caused by the pure folly and recklessness of the deceased, which was the species of negligence commented upon by Lord Cairns in Dublin Wicklow and Wexford R.W. Co. v. Slattery, 3 App. Cas. at p. 1166.

From the facts proved, it cannot be said that two reasonable views may not be taken of the conduct of the deceased.

[Reference to Davey v. London and South Western R.W. Co. (1883), 12 Q.B.D. at p. 76; Cooper v. London Street R.W. Co. (1913), 4 O.W.N. 623, 624.]

It was contended before us on behalf of the defendant company that, as a matter of law, a person was bound to look before crossing a railway track, and that failure to do so was per se negligence; and McAlpine v. Grand Trunk R.W. Co. (1913), 29 Times L.R. 680, was cited in support of that proposition. That case lays down no such doctrine. . . .

The duty of a person about to cross a railway track is, not to be guilty of negligence, which is another way of saying that he must exercise reasonable care. In each case, what is reasonable care is a question to be decided by the jury according to the facts of the case. . . .

On the facts here, the jury having found that the deceased exercised reasonable care, the learned trial Judge was not, in my opinion, entitled to disregard that finding.

I, therefore, think that this appeal should be allowed, and that judgment should be entered for the amount of the verdict, with costs of action, including the costs of this appeal.

DECEMBER 23RD, 1913.

LESLIE v. CANADIAN BIRKBECK CO.

Company—Partly Prepaid Shares—Representation — Profits—By-law—Account—"Expense Fund"—"Reserve Fund"—"Entire Profits of the Company"—Dividends—Book-keeping Methods.

Appeal by the plaintiff from the judgment of BRITTON, J., 4 O.W.N. 1102.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. R. Roaf, for the appellant.

Wallace Nesbitt, K.C., and H. S. Osler, K.C., for the defendants, the respondents.

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

The facts are accurately, and, with a trifling exception, fully, stated in the reasons for judgment.

The objections taken before us by the appellant are two in number—one a matter of principle and of great importance, the other rather a matter of book-keeping. They are as follows:—

1. That the plaintiff and those in like case with her should not have their dividend diminished by the payment of any expenses, etc., beyond the "Expense Fund."

2. That the new "Reserve Fund" should not have been formed, and the stock of the plaintiff and others in like case should have been credited year by year with such dividend as they were entitled to out of the profits actually received.

1. The plaintiff contends that her stock cannot be affected by expense, etc., beyond the amount of the "Expense Fund;" but that, if and when the expenses are in excess of the amount

but that, if and when the expenses are in excess of the amount provided by that fund, the general shareholders must suffer the loss.

This is based upon the wording of the documents; it is pointed out that "this stock is entitled to receive in addition" (to six per cent. per annum) "its proportion of the entire profits of the company:" this, it is argued, means something more than the net profits. The argument has no force. "Entire profits" means nothing more than or different from "all the profits," and that is the same as "the profits," and may mean net profits or gross profits according to the contract, etc., in which the phrase appears.

In Guthrie v. Wheeler (1883), 51 Conn. 207, the expression "the entire rents and profits of the estate" came up for interpretation. The Court said, p. 213: "The testator doubtless meant by the expression 'the entire rents and profits' all the rents and profits: and it is as applicable to the net income as to the gross income. We think the better view is that . . . as in ordinary cases the income shall bear the expenses."

Such an "expression must in a business document receive a business interpretation:" Whicher v. National Trust Co. (1909), 19 O.L.R. 605, at p. 612; National Trust Co. v. Whicher, [1912] A.C. 377. And in a business sense, as applied to a stock company's profits, out of which a dividend should be declared, it means the excess of receipts over expenses properly chargeable to revenue account, with care taken as a rule properly to write down bad debts. The cases on this are very numerous—many of them are to be found in Stroud's Judicial Dictionary, sub voc. "Profits," pp. 1571, 1572. Lost capital may be made good before estimating those profits, and it is well recognised that "it may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ:" Re National Bank of Wales, [1899] 2 Ch. 629, at p. 671, per Lindley, M.R., giving the judgment of the Court composed of Lindley, M.R., Sir F. H. Jeune, and Romer, L.J.

I can see no reason why the "entire profits" in the contract are not simply the "profits out of which a dividend may be declared."

2. The second contention is, under the circumstances, of this case equally untenable.

The scheme as to such stock as that of the plaintiff is pro-

perly explained by the learned trial Judge. The sum of $50 per share is paid in by the subscriber; he receives $3 per annum on this, payable semi-annually in cash by way of dividend—the remainder, if any, of the "profits earned," i.e., of the dividend properly declared, is retained by the company;" when, and not till when, the sum of the amounts so retained amounts to $50, the stock becomes paid-up stock, and thereafter the dividend is not upon $50 per share, but upon $100 per share. It is plain that the shareholder on this plan does not realise a dividend upon his interest in the company, once there is some "balance of the earnings" to be "credited to the stock, until the amount of the several "balances" is $50—his dividend in the meantime is only upon the $50 originally paid in. He may have in addition to the $50 originally paid on a share, surplus earnings or dividends to the amount of $49.99 applied upon his share, making his interest in the company $99.99, and yet receive a dividend only upon $50. It is obvious that the best of good faith is called for on the part of the directors, who have it in their power to enable a shareholder to double his income.

In the present case there is no doubt of the uberrima fides of the directors or of their competency as business men—and the "Reserve Fund," composed of all the surplus money of the company which could be at all considered applicable to a dividend, falls far short of sufficient to pay $50 on each share like those of the plaintiff. (This is the only fact which the learned trial Judge does not mention, which I think can be material). Even supposing the formation of the "Reserve Fund" was improper (and I do not say that it was), it is at the most and at the worst but a piece of bad book-keeping, by which the plaintiff is not, as yet at least, injured. No money has been or is intended to be paid out of the company by reason of the formation of this fund, and no money is lost—it is but a matter of internal regulation and management.

The gist of the complaint is, of course, that the company have not, year by year, applied on their books to the plaintiff's stock any dividend, but they have, on the contrary, transferred to the "Reserve Fund" the sum of $36.43 previously credited upon her stock. This is mere book-keeping, and has not in fact deprived her of anything; but she says that she was entitled to have the credit remain, and that year by year her stock should receive a credit on the books of the company so that she might know at any time the amount of her investment in the company.

I can find nothing expressly binding the company to credit

balances on the stock yearly or half-yearly; the dividends of cash are to be semi-annual, but it is not stated when the "balance of the earnings" are to be "credited to the stock." So long as the balances are credited to the stock when such a crediting will be of advantage, i.e., when the stock is thereby made paid-up, I think the undertaking of the company is implemented. The transfer of the $36.43 to the "Reserve Fund" in the books was not intended to deprive the plaintiff of so much dividend. If it were intended to take away from her a dividend already declared, and apply that to pay expenses or make up a deficiency of capital, another question would arise—but nothing of the kind is intended or suggested.

And, since the cessation of adding dividends to the stock, the directors have in the exercise of an honest judgment considered that there are no surplus earnings.

We were invited to express an opinion as to what the directors should do in respect of the entries against such stock—and, accordingly, while I think they are within their contract, speaking for myself I can see great advantages in the plan previously pursued of entering against such stock as the plaintiff's, the accrued balance of profits from time to time.

I think the appeal should be dismissed, but without costs.

DECEMBER 23RD, 1913.

ELLIS v. ELLIS.

Husband and Wife—Separation—Consent Judgment for Alimony—Claim of Wife for Separate Moneys Intrusted to Husband as Agent—Gift or Trust—Statute of Limitations—Laches—Evidence—Income of Wife Arising from Investment—Use by Husband before Separation—Effect of—Joint Household Expenditure—Res Judicata—Chattel Property of Wife—Recovery—Interest.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of BOYD, C., 4 O.W.N. 1461, in an action by a wife against her husband for the recovery of goods alleged to be detained by the husband, and for an account of the moneys of the wife received by the husband, and for other relief.

The defendant appealed from the portion of the judgment directing payment to the plaintiff of $2,288, with interest from

October, 1910; and the plaintiff appealed because of the disallowance of her claim for $500 received by the defendant, being part of the purchase-money of her house, which had been sold through her husband's agency; and she also appealed because of the disallowance of interest prior to October, 1910, on certain moneys of hers in the defendant's hands.

The appeal and cross-appeal were heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. M. Douglas, K.C., for the defendant.

J. Rowe, for the plaintiff.

MULOCK, C.J. Ex. (after setting out the facts) :—The learned Chancellor, before whom the parties appeared personally at the trial in giving their evidence, accepted the plaintiff's version of the transaction; and a perusal of the evidence satisfies me that he was correct in holding that the plaintiff had established her contention that she had intrusted to her husband the moneys in question for investment for her. The onus was on the defendant to prove a gift of the principal moneys; this he has failed to do.

As to the contention that the claim is barred by the statute or by acquiescence, the Statute of Limitations cannot here apply, inasmuch as it is a case of express trust.

It was, however, argued that the plaintiff was barred by her laches; that in 1899 the defendant had repudiated her claim, and that she slept on her rights until the commencement of this action. There appears to be no doubt that in the year 1899 the defendant did refuse to recognise the plaintiff's claim for a return of her money; but, according to the plaintiff's evidence, he receded from that position in the year 1900, when he agreed with her to purchase a house for her, out of her moneys then in his hands. This agreement was followed up by his making the purchase, and also by his accounting to her for $1,170, part of the money realised from the sale of this house when sold some nine years later.

Further, whilst they lived in this house, the husband, by arrangement with his wife, from time to time caused improvements to be made upon it out of her moneys in his hands. These transactions in respect of the house are a recognition of the existence of the trust, and were a fair intimation to the plaintiff that the defendant had abandoned his attitude of 1899, when he refused to pay over the money to her.

It was argued that, when he so refused, the plaintiff should then have brought her action; but it is to be borne in mind that the parties were husband and wife and living together. For the wife to have instituted an action against her husband in 1899, to recover this fund, would, in all probability, have resulted in separation.

There is no equitable doctrine that in a case like this a married woman is chargeable with laches because during the continuance of marital relations she forbears instituting an action against her husband for the recovery of her moneys in his hands.

Further, the defendant has in no way been prejudiced by his wife's forbearance.

For these reasons, I think that the Chancellor was right in awarding judgment for the plaintiff for $2,288.

The action for alimony did not call into question this money; and it is, therefore, no bar to the plaintiff's claim; and the defendant's appeal fails and should be dismissed with costs.

As to the plaintiff's cross-appeal, for $500, I agree with the learned Chancellor's reasons for disallowing that claim.

The plaintiff's claim for interest must also fail. The rule applicable to such a case is thus stated in Alexander v. Barnhill, 21 L.R. Ir. at p. 515: "There is a great difference between the receipt of the income of a wife's separate property by her husband and of the corpus. In the latter case, the onus of proof of a gift by the wife to the husband lies upon him, and must be clearly established, or else the husband will be held to be a trustee for his wife. In the former, the onus lies on the wife, save perhaps as to the last year's income, and she must establish clearly and conclusively that her husband received her income by way of a loan."

It is not possible, I think, with certainty, to say that the evidence proves a mere loan of the interest to the husband. Thus the plaintiff's cross-appeal fails.

As to the costs of the cross-appeal, it seems that but for the defendant's appeal there would have been no cross-appeal, the one provoking the other; nevertheless the plaintiff's appeal in no way increased the costs; and I, therefore, think that there should be no costs to either party in respect of the cross-appeal.

RIDDELL, J., agreed in the result.

SUTHERLAND and LEITCH, JJ., agreed with MULOCK, C.J. Ex.

Appeal and cross-appeal dismissed.

DECEMBER 23RD, 1913.

*VANVALKENBURG v. NORTHERN NAVIGATION CO.

Negligence—Death by Drowning of Seaman Employed on Ship—Action for Damages Arising from—Falling Overboard Caused by Deceased's own Negligence—Legal Duty of Employers as to Rescue—Evidence—Contract of Hiring—Master and Servant.

Appeal by the plaintiffs, the parents of Charles Vanvalkenburg, deceased, from the judgment of LENNOX, J., at the trial, withdrawing the case from the jury and dismissing the action, which was brought to recover damages for the death by drowning of Charles Vanvalkenburg, while in the service of the defendants, by reason of their negligence, as alleged.

The deceased was a seaman on board the passenger steamer "Hamonic," owned and operated by the defendants. He fell overboard, when "skylarking," and was drowned.

The acts of negligence causing the accident, as charged by the plaintiffs, were a defective ladder and failure to adopt proper means to rescue the deceased when in the water.

The appeal was heard by MULOCK, C.J.Ex., LATCHFORD, SUTHERLAND, and LEITCH, JJ.

J. R. Logan, for the plaintiffs.

R. I. Towers, for the defendants.

The judgment of the Court was delivered by MULOCK, C.J. Ex. (after setting out the facts):—Even admitting that the ladder was defective, I fail to see that it played any part in causing the deceased to fall into the water. After safely descending by it from the promenade to the spar deck, he left the ladder and stood on the rail. There was nothing to prevent him stepping down upon the deck, where he would have been perfectly safe, but he remained on the rail; thus there was a new starting-point, unconnected with the ladder, for the subsequent occurrence, and I concur in the view of the learned trial Judge that the condition of the ladder did not cause the accident.

The evidence shews that the deceased was not on duty at the time of the accident, and had recklessly put himself in a position of great peril, and that his own want of care caused the accident. Thus the defendants are not responsible for his having fallen into the water.

*To be reported in the Ontario Law Reports.

The question then arises whether the defendants were guilty of any actionable negligence in not using all reasonable means in order to rescue the drowning man. Undoubtedly such is one's moral duty; but what legal duty did the defendants owe to the deceased to rescue him, if possible, from his position of danger, brought about, not by their, but his own, negligence?

At the conclusion of the argument, counsel were requested to hand in any authorities dealing with this point but failed to do so. After careful search, I can find but one case, Melhado v. Poughkeepsie Transportation Co., 27 Hun (N.Y.) 99, which affirms such a duty. That case does declare that a common carrier was liable for the death of a passenger which was due to failure to stop the boat in order to rescue him after he had fallen overboard.

The plaintiffs' counsel cited Connolly v. Grenier, Q.R. 34 S.C. 405, affirmed in 42 S.C.R. 242, in support of the proposition. In that case the wreck of the vessel, with its attendant loss of life of seamen, was caused by the negligence of those in charge. Where one by negligence puts another in danger, it is manifestly his duty, if possible, to undo such negligence by preventing injury therefrom. But in the present case the deceased's position of danger was caused by his own negligence, and not that of the defendants. And, further, the Civil Code of Quebec applied to Connolly v. Grenier—art. 1054 of which, in the circumstances of that case, made the vessel-owners liable for the negligence of fellow-servants. The doctrine of common employment, however, obtains in Ontario, except when otherwise provided by the Workmen's Compensation for Injuries Act, and the facts of this case do not bring it within any of the exceptions mentioned in that Act; thus Connolly v. Grenier, ante, is not an authority in this case.

It is further argued that the vessel was unseaworthy, in that the electric bell system was out of order, thereby causing a fatal loss of time in attempting the rescue.

The evidence, I think, warrants the finding that the bells were out of order, and that in this respect the vessel was unseaworthy, contrary to the provisions of sec. 342 of the Canada Shipping Act. The evidence also shews that the seamen were never instructed in regard to the use of life buoys, and it may be inferred from Ray Dale's failure to throw the life buoy overboard at once that he was an incompetent and inefficient seaman, and that such inefficiency also constituted unseaworthiness. It is not the case of negligence by a competent seaman, in which case the doctrine of common employment would apply, and the owner of the ship

not be liable: Hedley v. Pinkney & Sons Steamship Co., [1892] 1 Q.B. 58.

There was evidence, further, upon which the jury might have found that, if Dale had promptly thrown the life buoy to the deceased on his falling into the water, and if the vessel had reversed immediately on Dale touching the electric button, the deceased would, in all reasonable probability, have been saved; and, if the defendants owed to the deceased the legal duty of using all reasonable means to rescue him, then they were guilty of negligence in not having done so; but, notwithstanding Melhado v. Poughkeepsie Transportation Co., ante, I am unable to see wherein they owed such legal duty to the deceased. He fell overboard solely because of his own negligence. His voluntary act in thus putting himself in a position of danger, from the fatal consequences of which, unfortunately, there was no escape, except through the defendants' intervention, could not create a legal obligation on the defendants' part to stop the ship or adopt other means to save the deceased. It was no term, express or implied, of the contract of hiring, that they should protect him from the consequences of his own negligence. To do so would be a voluntary act on their part: Loader v. London Docks Co., 65 L.T.R. 674. . . .

[Reference to Eckert v. Long Island R.R. Co., 43 N.Y. 508.]

I, therefore, am of opinion that the learned trial Judge's disposition of the case cannot be interfered with, and that this appeal must be dismissed with costs.

DECEMBER 23RD, 1913.

*STEINACKER v. SQUIRE.

Contract — Sale of Animal — Failure to Furnish Pedigree — Diminished Value—Damages—Costs.

Appeal by the defendant from the judgment of BARRON, Co. C.J., in favour of the plaintiff, in an action for damages for breach of a warranty and breach of a contract, brought in the County Court of the County of Perth.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

*To be reported in the Ontario Law Reports.

Glyn Osler, for the appellant.
J. C. Makins, K.C., for the plaintiff, the respondent.

MULOCK, C.J. Ex.:—This action arises out of the sale by the defendant to the plaintiff of a mare at public auction. The statement of claim alleges that at the sale "the defendant warranted that the said mare was standard-bred, and that he was in possession of her pedigree, shewing that she was standard-bred, and agreed that the said pedigree would be furnished forthwith to the purchaser of the said mare at the sale."

The plaintiff, being the highest bidder, became the purchaser at the price of $178, but the defendant refused to furnish the promised pedigree. Hence this action.

The case was tried without a jury, and the plaintiff sought to shew that the mare was not standard-bred, but failed on that issue; and his only ground of complaint is the non-delivery of the pedigree, the absence of which prevents the registration of the animal's colts in the registry for standard horses.

The learned trial Judge disallowed any claim for damages because of the non-delivery of the pedigree, but allowed damages in these words: "But I do think that the plaintiff is entitled to damages for the failure to provide the pedigree, using it in this enlarged sense so far as the foals are concerned." That is, he holds the plaintiff entitled to damages because of the loss of profits from the mare's colts.

With respect, I am unable to agree with either of the conclusions of the learned trial Judge. He has found as a fact that what was sold and bought was a standard-bred mare, with a pedigree, but what the defendant got was a standard-bred mare without a pedigree. For this breach of contract the plaintiff is entitled to recover as damages a sum equal to the difference in value of the mare with and without a pedigree. Her value with a pedigree was established at the auction sale as being $178; without a pedigree, the evidence, I think, shews the value to be about $78, and the plaintiff is entitled to judgment for the difference, namely, $100.

The general principle on which damages are awarded for breach of contract is, that the plaintiff is entitled to only such damages as may reasonably be supposed to have been in the contemplation of the parties when they made the contract as the probable result of a breach of it: Hadley v. Baxendale, 9 Ex. 341; Halsbury's Laws of England, vol. 10, p. 313; Thomas v. Dingley, 70 Me. 102.

If the plaintiff seeks to enlarge the defendant's liability by reason of special circumstances existing at the time of the making of the contract, as, for example, the plaintiff's intention to breed from the mare registrable stock, he must shew that such special circumstances were brought to the defendant's knowledge at the time of the contract, and were accepted by him as the basis on which the contract was made. If such a case had been shewn here, then damages because of the non-production of the pedigree might, under such special circumstances, be said to have been in the contemplation of the parties in the event of a breach of the contract, and therefore recoverable: Hammond & Co. v. Bussy (1887), 20 Q.B.D. 79; Randall v. Raper, E. B. & E. 84.

But no such case was made. The parties were strangers to each other, and no communication had passed between them as to the purpose for which the plaintiff was purchasing the animal. It is true that she was offered for sale as standard-bred with a pedigree, but that circumstance does not, with reasonable certainty, imply that she was being bought for breeding purposes; and, therefore, it would not justify imputing to the defendant knowledge of the plaintiff's object.

I, therefore, think that damages because of inability to register the mare's progeny were not within the contemplation of the parties at the time of the contract; and, therefore, were not the reasonable and natural result of the defendant's breach of contract: Sapwell v. Bass, [1910] 2 K.B. 486.

For these reasons, I think that the only damages recoverable by the plaintiff are the $100, being the mare's diminished value because of the absence of the pedigree.

The judgment, therefore, should be reduced to $100, with costs on the County Court scale up to the time of payment into Court of $100 by the defendant, with a set-off of the defendant's subsequent costs; no costs of this appeal to either party.

SUTHERLAND and LEITCH, JJ., agreed with MULOCK, C.J. Ex.

RIDDELL, J., agreed in the result, for reasons stated in writing. He referred to the following cases: Hadley v. Baxendale, 9 Ex. 341; Sapwell v. Bass, [1910] 2 K.B. 486; Powell v. Vickers Sons & Maxim, [1907] 1 K.B. 71; Gretton v. Mees (1878), 7 Ch. D. 839; Buckstone v. Higgs (1889), 44 Ch. D. 174; Wheeler v. United Telephone Co. (1884), 13 Q.B.D. 597; Mullett v. Mason (1886), L.R. 1 C.P. 559; Sherrod v. Longdon (1886), 21 Iowa 518; Smith v. Green (1879), 1 C.P.D. 92.

Judgment below varied.

DECEMBER 23RD, 1913.

*RE MACKENZIE.

Will—Construction — Annuity Payable out of Income from "Moneys and Securities"—Land Acquired by Testator after Execution of Will—Mortgage thereon Paid by Executors out of Personalty—Personalty Insufficient to Produce Amount of Annuity—Intestacy as to After-acquired Land—Rights of Widow as to Land—Election to Take Third in Lieu of Dower—Effect of Payment of Mortgage—Investment—Charge on Land—Right of Widow as Annuitant not Limited to Income.

Appeal by the nephews and nieces of Donald Macleod Mackenzie, deceased, from the judgment of MIDDLETON, J., 4 O.W.N. 1392, declaring the construction of the will of the deceased.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

George Bell, K.C., for the appellants.

E. P. Clement, K.C., for the executors of the testator's widow.

J. W. Elliott, K.C., for the testator's executor.

RIDDELL, J. (after setting out the will and briefly stating the facts):—1. It is contended that the Gallery property into which the testator converted some of his money, comes within the phrase "securities for money" in the 5th and 7th paragraphs, and that accordingly the appellants are, under the 7th paragraph, entitled to it.

The meaning of "securities for money" has been considered both here and in England; the English cases may be found by a reference to Stroud's Judicial Dictionary, sub voc.: some of our own in Re J. H. (1911), 25 O.L.R. 132. A security for money, unless something is found to modify the meaning, means "something which makes the payment of money more secure:" Re J. H.; Worts v. Worts (1889), 18 O. R. 332.

There may be something in the case, as in the will under discussion in Re J. H., which shews that the testator used the expression in a peculiar sense, a sense different from that which is usual and ordinary; but, in the absence of anything of the kind, the words must be given their ordinary sense. The appeal must fail on this point.

*To be reported in the Ontario Law Reports.

2. Mr. Justice Middleton has held that "the widow is entitled to receive the balance of her annuity; and, if it is material, resort should first be had to the proceeds of the land descended." The widow having elected under the Devolution of Estates Act to take the half of the land descended in lieu of her dower, the other half is undisposed of, and descends as on an intestacy. The appellants represent the class entitled to this half, and claim that their land should be exonerated.

That recourse can in no event be had to the corpus of the fund invested under clause 5 is clear. That corpus is specifically, and not by way of residuary gift, bequeathed to the appellants: Foster v. Smith, 1 Ph. 629; Earle v. Burlingham, 24 Beav. 445; Aldecott v. Aldecott, 29 Beav. 460; Sheppard v. Sheppard, 32 Beav. 194; In re Matthews Estate, 7 L.R. Ir. 269.

There is here "a gift . . . importing the specific bequest of a sum . . . accompanied by an expression of his intention that that sum should pass intact to the legatee:" per Lord Watson in Carmichael v. Gee, 5 App. Cas. 588, at p. 598.

But full effect must be given to the express and specific bequest of an annuity contained in the 4th clause, so far as that is possible.

Where an amount is given in general terms, followed by the creation of a fund out of the income of which the amount is to be paid, it is a matter of interpretation of the wording of the particular will whether the annuitant is confined to that income.

It may be that the will is so worded that the Court interprets it as meaning that the annuitant is entitled for life to the income of a fund, and nothing else. Such was Baker v. Baker, 6 H.L.C. 616, and there are many such cases.

But the more usual case is the gift of an amount with a direction to form a fund wherewith to pay it, without any indication that the annuitant is so to be limited. In that case the amount becomes payable out of the estate not specifically bequeathed (including the corpus of the fund, if that be not bequeathed specifically, but as a residue): Gee v. Mahood (1879), 11 Ch.D. 891; S.C., sub nom. Carmichael v. Gee, 5 App. Cas. 588.

There are many such cases in England and Ireland mentioned in Theobald on Wills, Can. ed., p. 508, and in Ontario, pp. 512 b, c. To these I add Re Plaetzer Estate (1911), 2 O.W.N. 1143.

The deficiency, therefore, should be paid out of the estate not specifically disposed of, and out of that only.

I understand that the Gallery property, which is not specifically disposed of, is sufficient to pay all the deficit; if so, the order appealed from is wholly right.

The appeal should be dismissed with costs to be paid by the appellants.

LEITCH, J., agreed with the judgment of RIDDELL, J.

SUTHERLAND, J., was of opinion, for reasons stated in writing, that the appeal should be dismissed with costs.

MULOCK, C.J.Ex., was of opinion, for reasons stated in writing, that the appeal should be allowed as to that portion of the order which authorised payment of the deficiency out of the corpus of the testator's "moneys or securities for money," but in other respects should be dismissed.

Appeal dismissed.

DECEMBER 23RD, 1913.

*HAYES v. HARSHAW.

Master and Servant—Wrongful Dismissal of Servant—Action for—Previous Recovery in Action for Wages—Contract—Estoppel—Res Judicata.

An appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Dufferin, dismissing an action brought in that Court, to recover damages for the wrongful dismissal of the plaintiff from the service of the defendant.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ

C. R. McKeown, K.C., for the appellant.

G. H. Watson, K.C., and A. A. Hughson, for the defendant, the respondent.

MULOCK, C.J.Ex.:—On the 1st February, 1912, the defendant engaged the plaintiff as assistant in the Orangeville post-office, of which the defendant was post-master, for one year, at the

*To be reported in the Ontario Law Reports.

rate of $900, payable monthly, that is, $75 per month. The plaintiff accepted the engagement and entered and continued upon the work until the 11th October, 1912, when he was dismissed without cause. The plaintiff then withdrew from the post-office. In a few days thereafter the defendant offered to re-engage him on different terms. The plaintiff refused the offer; from time to time he proferred his services to the defendant under the contract, but the same were not accepted.

On the 7th November, 1912, the plaintiff sued the defendant in a Division Court for $75, the claim in that action being "wages due to the said George B. Hayes by the said George H. Harshaw for the month of October, 1912, under contract," etc. On the 13th December, 1912, the plaintiff obtained judgment for the $75 thus sued for, namely, wages for the whole month of October.

On the 27th December thereafter, the plaintiff sued the defendant in a Division Court for $75 for his November wages, but that action was discontinued; and the present one begun, for $225 damages for breach of contract, the sum claimed being equal to $75 per month for the three remaining months of his year's engagement. To this claim the defendant pleads recovery by the plaintiff of $75 for his wages for October as a bar.

The judgment in the plaintiff's favour for $75, being for wages due to the plaintiff for that month, estops the parties from saying that the plaintiff was not entitled to that sum qua wages for the month of October; and, therefore, whatever be the facts, negatives the contention that the wrongful dismissal applied to the month of October. In the face of that judgment, the wrongful dismissal did not take effect before the 1st November; and the plaintiff is entitled to damages therefor.

I, therefore, with respect, think that the judgment of the learned Judge should be reversed, and that judgment should be entered in the plaintiff's favour for the amount of damages awarded to him by the jury, namely, $225 (less $5 earned by the plaintiff during the three months), together with the costs below and of this appeal.

RIDDELL, J., was also of opinion, for reasons stated in writing, that the plaintiff was entitled to recover. Reference was made to the following authorities: Gandell v. Pontigny (1816), 4 Camp. 375; Goodman v. Pocock, 15 Q.B. 576; Elderton v. Emmons, 6 C.B. 160, 4 H.L.C. 624; Snelling v. Huntingfield, 1 C.M. & R. 26, note (b); Walstab v. Spottiswoode, 15 M. & W. 50;

Wickham v. Lee, 12 Q.B. 526; Read v. Brown, 22 Q.B.D. 128; Grace v. Walsh, 3 O.R. 196; Adkin v. Frind, 38 L.T.N.S. 393.

LEITCH, J., concurred.

SUTHERLAND, J., dissented, for reasons stated in writing; citing Goodman v. Pocock, 15 Q.B. 576; Smith v. Haywood, 7 A. & E. at p. 544; Doherty v. Vancouver Gas Co. (1905), 1 W.L.R. 522; Halsbury's Laws of England, vol. 20, p. 110; Foreman v. Davidson, 12 O.W.R. 521, 523; Smith's Law of Master and Servant, 6th ed. (1906), p. 146; Leake on Contracts, 6th ed. (Can.), p. 37; 2 Sm. L.C. 48; Lockyer v. Ferryman, 2 App. Cas. 519; Henderson v. Henderson, 3 Hare at p. 114.

Appeal allowed; SUTHERLAND, J., *dissenting.*

DECEMBER 23RD, 1913.

*MATTHEWSON v. BURNS.

Vendor and Purchaser—Contract for Sale of Land—Option of Purchase Contained in Lease not under Seal — Consideration — Acceptance — Authority of Agent of Vendor—Power of Attorney—Revocation of Option—Waiver—Execution of New and Inconsistent Lease—Specific Performance.

Appeal by the defendant from the judgment of BOYD, C., 4 O.W.N. 1477, establishing a contract for the sale by the defendant's testator to the plaintiff of a house and lot in the city of Ottawa, and directing specific performance.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. C. McCarthy, for the appellant.

G. F. Henderson, K.C., for the plaintiff, the respondent.

RIDDELL, J.:—The main facts sufficiently appear in the Chancellor's reasons for judgment.

The first objection is, that the agent Hurdman had no power to give to the plaintiff an option to purchase under the power

*To be reported in the Ontario Law Reports.

of attorney. This objection is wholly untenable when the fact appears that the agent dismissed the whole matter with his principal, and the principal approved of the whole transaction.

The next and chief objection is, that the option given was revocable, and it was revoked. This depends upon what, I venture to think, is a misunderstanding of the decisions; and, therefore, I shall examine these. . . .

[Reference to Davis v. Shaw (1910), 21 O.L.R. 474; Maltezos v. Brouse (1911), 2 O.W.N. 990; Miller v. Allen (1912), 4 O.W.N. 346; Gustin v. Union School District (1893), 94 Mich. 502, 34 Am. St. Repr. 361; Hanralty v. Warren (1866), 18 N.J.Eq. 124, 90 Am. Dec. 613; Souffrani v. McDonald (1866), 27 Ind. 269; Stansbury v. Fringer (1840), 11 McG. & John. (Md.) 149; Hayes v. O'Brien (1894), 149 Ill. 403, 412; Schroeder v. Gemeinder (1875), 10 Nev. 355, 364; House v. Jackson (1893), 24 Or. 89; Maughlin v. Perry, 35 Ind. 353; De Rutte v. Muldrow (1860), 16 Cal. 505; Hall v. Center (1870), 40 Cal. 63; Hilliard on Vendors, 2nd ed., p. 296.]

No authority has been cited to us, and I can find none, which supports the contention of the defendant that the option to purchase was a distinct and separate offer without consideration, and therefore revocable, and the argument is wholly without foundation on principle. I am of opinion that the law intends the rent, etc., "as fixed at the amount reserved," as consideration as well for the option as any other agreement by the landlord. . . .

The next point has given me more difficulty.

On or about the 1st May, 1911, during the existence of the term created by the lease, the defendant, for the estate of his deceased brother, gave to the plaintiff a written notice of withdrawal of the option to purchase. . . . I think that this was wholly inoperative; but there is no room to think that it was not in good faith and under full conviction that this was his legal right. The plaintiff knew that the defendant "was taking the position" thereafter that she "had no right to the option" (p. 27). In the fall of 1912, some negotiations took place concerning a mortgage the plaintiff had, and it was represented (I do not make the expression more definite) that the plaintiff would accept payment of her mortgage if the defendant gave a new lease (p. 41). Afterwards, some negotiations took place in regard to leasing the premises for another year, and the defendant's solicitor, preparing a lease, wrote the plaintiff that she must execute the lease at once, if at all, where-

upon she, on the 10th March, 1913, executed a lease for one year beginning on the 1st May, 1913; the defendant also executed the lease, which was not under seal. She had, on the 5th February, written to the defendant's solicitor: "I will take the house . . . for another year at $30 per month, provided he does the necessary repairs: the cellar is wet all the year, and a few boards are rotted—there are only two bedrooms fit for use, the back room . . . isn't heated. The . . . drawing and dining rooms need papering badly, the paper is torn in several places . . ." On the 17th February, this is answered: "Mr. Burns has decided to let you have the house at $30 without the repairs you asked for . . . he . . . does not intend spending any more money on this property. I want to mention to you that the fence between the house 138 and 134 must be put in the same position as it was when you took the house, otherwise proceedings will be taken to compel you to do so." She writes the same day: "I am glad to have the house for another year . . . I will see the fence is put back." The following day she writes: "I will take the house . . . at $30 a month; will agree that before leaving will see that the fence is put back as it was when I rented the house;" and goes on to complain of the slight amount of repairs done by the deceased. On the 24th February, the defendant's solicitor writes: "The fence has to be replaced in its former position by the 1st May next, this whether you keep the house or not. In case you would not keep the house, on account of rebuilding the fence, please let me know at once. Mr. Burns wants his property perfectly enclosed as it was when you became tenant." It was after this correspondence that the lease was drawn up, already referred to. This is not under seal: it purports to lease the premises for twelve months from the 1st May, 1913, at $30 per month, the plaintiff agreeing to pay rent, keep up the premises, etc.; "the lessor to have the right at any time within three months before the expiration of the said term to affix 'Notice to Let' on said premises, and will permit all persons having written authority therefore (sic) to view the said premises at all reasonable hours." "The lessee agrees to allow the said lessor or his agent to enter the said premises from time to time and to view the state of repair of same, and to make repairs if he thinks proper . . ." The contract generally does not mention any parties but lessor and lessee, and does not extend to assigns, etc., etc. There is inserted a clause intended to compel the plaintiff to replace the fence, which had been a matter of controversy. "It is also

understood that the fence formerly dividing the property between W. G. Hurdman and that of the lessor W. A. Burns is to be replaced in its former position on or before the 1st May, 1913, otherwise this lease shall be null and void." It was stated by both parties before us that this fence had not been replaced, but the plaintiff cannot take advantage of that fact to avoid the lease. "In a long series of decisions the Courts have construed clauses of forfeiture in leases declaring in terms, however clear and explicit, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors:" Davenport v. The Queen (1877), 3 App. Cas. 115, at p. 128. Some of the cases referred to in this decision of the Judicial Committee are Roberts v. Davey (1833), 4 B. & Ad. 664; Pennington v. Cardale (1858), 3 H. & N. 656; Hughes v. Palmer (1865), 19 C.B.N.S. 393, 407.

The lessor here is not desirous of avoiding the lease, but affirms it. I think it must be obvious that the plaintiff has in this new lease agreed that the defendant, as against her, has and after the 1st May shall have rights wholly inconsistent with the exercise by her of her right to buy. Knowing and appreciating that the defendant contended that she had no right to exercise the option originally given, she changes her position and becomes possessed of an interesse termini, wholly inconsistent with having a right to become owner. All rights of the owner of the premises in the first lease are, of course, subject to her right to purchase; but not so in the later lease.

The law is fully discussed in the locus classicus, the note on p. 425 to Greeton v. Howard (1818), 1 Swans. 409. The maxim "allegans contraria non est audiendus" applies.

I think that the appeal should be allowed with costs and the action dismissed with costs.

SUTHERLAND and LEITCH, JJ., agreed in the result, for reasons stated in writing by SUTHERLAND, J.

MULOCK, C.J.Ex., dissented, for reasons stated in writing.

Appeal allowed; MULOCK, C.J.Ex., *dissenting.*

DECEMBER 23RD, 1913.

*IRESON v. HOLT TIMBER CO.

Nuisance—Floatable and Navigable Stream—Lumbering Operations—Riparian Owner—Injury to Lands—Chain Reserve—High Water Mark—Access to Water—Saw Logs Driving Act, R.S.O. 1897 *ch.* 143—*Unreasonable Obstruction to Stream—Statutory Rights of Timber Licensees—Status of Plaintiff—Special Damage—Encroachment on Plaintiff's Land—Extent of—Damages—Injunction—Removal of Logs—Counterclaim—Damages by Reason of Interim Injunction.*

Appeal by the defendant company from the judgment of KELLY, J., 4 O.W.N. 1106.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

E. B. Ryckman, K.C,. and J. Fraser, for the appellant company.

W. G. Thurston, K.C., for the plaintiff.

MULOCK, C.J.Ex.:— . . . In 1911, the plaintiff became the owner of parts of lots 34 and 35 in the 14th concession of the township of Burton, containing together about thirteen acres of land, more particularly described in the grant thereof from the Crown, excepting thereout the right of way of the Canadian Northern Railway, and also "an allowance of one chain in perpendicular width along the shore of the Magnetewan river, as contained in the original patent from the Crown."

That portion of lot 34 owned by the plaintiff is situate on a point of land made by a bend in the South Magnetewan river, and is separated from lot 35 by that river, which flows between the two properties in a southerly direction. A bay, of considerable area, extends from the river easterly along the plaintiff's point of land, and affords the only means of water communication between the residence of the plaintiff and the post-office and the place where he obtains his household supplies. On this point he has erected a residence with various outbuildings, and on the opposite side of the river a boat-house. Throughout part of the summer of 1912, he and his family occupied the property.

*To be reported in the Ontario Law Reports.

The defendant company, under a license from the Ontario Government, has the right to cut logs on the upper waters of the Magnetewan river; and, previous to the year 1912, had floated their logs to market down the North Magnetewan river; but in 1912 decided to float them down the South Magnetewan river, past the plaintiff's land, and into the bay . . . and there, by means of a jack-ladder, to load them on the cars. . . .

Some six or seven miles below the plaintiff's property, a dam had been erected in order to improve the navigability of the river. Between that dam and the plaintiff's property and to the easterly limit of the bay the waters of the river and bay were navigable for boats, and constituted a public highway.

The defendant company, in order to carry out its plan, put in stop-logs in the dam already referred to, whereby the water was raised about seven feet above its normal level. They also erected three other dams, one across the river just above the plaintiff's property, another across the river some distance below it, and a third across the mouth of the bay.

As the defendant company's logs floated down from the upper waters, they were stopped by the dam above the plaintiff's property, and in consequence accumulated there in large quantities.

At intervals they were liberated, and floated down past the plaintiff's property, but were prevented by the lower dam from going beyond that point. By means of these different obstructions, large quantities of logs were retained within the enclosure thus created, and, drifting about, were at times blown upon the shore around the plaintiff's property, and in such quantities as to have the effect, as found by the trial Judge, of wholly depriving the plaintiff of access to the water by means of his boats. . . .

The defendant company also caused large quantities of logs to be stored and kept in the bay by means of the dam across its mouth; and, as found by the trial Judge, the plaintiff was thereby prevented from navigating the waters of the bay for the purpose of getting from place to place on his own property or to places where he obtained his supplies or to the post-office, whereby he and his family were put to special inconvenience and damage.

The learned trial Judge also found that the defendant company had erected and was maintaining at least a portion of a jack-ladder on the plaintiff's property. . . .

The findings of fact of the trial Judge are, I think, abundantly warranted by the evidence.

To the plaintiff's claim, however, the defendant company says that the plaintiff is not entitled to maintain this action, on the ground that what is complained of constitutes a public nuisance only; and, therefore, the remedy is by way of indictment only.

The authorities, however, shew that, if a person makes use of a highway to such an unreasonable extent that the user amounts to a public nuisance, and if such nuisance causes a particular injury to another, beyond that which is suffered by the rest of the public, and if such injury is substantial and direct, and not merely consequential, the injured party is entitled to maintain an action in his own name. . . .

[Reference to Benjamin v. Storr (1874), L.R. 9 C.P. 406; Crandall v. Mooney (1874), 23 C.P. 212; Drake v. Sault Ste. Marie Pulp and Paper Co. (1898), 25 A.R. 251.]

The only question is, whether the facts here bring the case within the rule above set forth On that point I entertain no doubt. The river afforded the only means of communication to the plaintiff and his family between their residence and the outside world. To be hemmed in by a fringe of logs for days at a time, and thereby prevented from obtaining necessary household supplies or mail matter, or . . . medical assistance, was a position in which the defendant company had no legal right to place the plaintiff. That he was not thereby damaged in a special, direct, and substantial manner, is not, I think, arguable; and the plaintiff is entitled to maintain this action.

Another answer of the defendant company is that it was authorised to do what it did by R.S.O. 1897 chs. 142 and 143; but provincial legislation cannot authorise interference with the right of navigation—that subject, under sec. 91 of the British North America Act, being under the exclusive jurisdiction of the Parliament of Canada: see The Queen v. Fisher (1891), 2 Can. Ex. C.R. 365.

Nor does ch. 143 (the Saw Logs Driving Act) even purport to authorise the defendant company to do the acts complained of. Section 3 of that Act, not from necessity but ex abundantiâ, declaring that persons floating logs on lakes, rivers, etc., shall so conduct their operations as not unnecessarily to obstruct the floating or navigation of such water.

I, therefore, think that the defendant company has no statutory right to do what it has been found guilty of doing.

The defendant company further urges that, inasmuch as the plaintiff's property is separated from the water front by an allowance of one chain in width, he is not a riparian proprietor, and, therefore, has no right to maintain this action.

The plaintiff's right does not depend upon his being a riparian owner. He is shewn to be the owner, and occupant during part of the year, of certain lands, access to and from which by the river is necessary to the reasonable enjoyment thereof, and to the exercise of his civil rights when in such occupation; and the cause of action is the infringement of these rights by the defendant company.

The defendant company also objects to the portion of the judgment declaring that the jack-ladder encroaches on the plaintiff's land to the extent of at least 720 square feet and ordering its removal. . . . If the defendant company desires it, it may have the portion of land occupied by the ladder described by metes and bounds in the judgment; . . . the defendant company to be at the expense of the survey and within one week to deposit $100 towards the cost; otherwise the description in the judgment to stand. . . .

There is no foundation for the counterclaim for damages because of the granting of the interim injunction. . . .

The appeal should be dismissed with costs; the order to issue at the expiration of one week if the defendant company fails to make the deposit of $100. If it is made, then the order not to issue until after the surveyor's description is completed. Any question that may arise out of such description may be spoken to before the order issues.

RIDDELL, J., was of opinion that the appeal should be dismissed with costs, for reasons stated in writing. He referred to O'Neil v. Harper (1913), 28 O.L.R. 635; Warden, etc., of Dover v. London Chatham and Dover R.W. Co. (1861), 3 DeG. F. & J. 559, 564; Cather v. Midland R.W. Co. (1845), 2 Ph. 472; Low v. Innes (1864), 4 DeG. J. & S. 295; Hackett v. Baiss (1875), L.R. 20 Eq. 499; Parker v. First Avenue Hotel Co. (1883), 24 Ch.D. 286, 287; Seton on Judgments, 6th ed., vol. 1, pp. 604 et seq.; North Eastern R.W. Co. v. Crossland (1862), 2 J. & H. 565; Elliott v. North Eastern R.W. Co. (1863), 10 H. L.C. 333, 359; Dunning v. Grosvenor Davies, [1900] W.N. 265; Batcheller v. Tunbridge Wells, etc., Co. (1901), 84 L.T.R. 765; Barber v. Penley, [1893] 2 Ch. 447, 460; Grasett v. Carter (1883), 10 S.C.R. 105.

SUTHERLAND, J., agreed that the appeal should be dismissed with costs.

LEITCH, J., agreed in the result, for the reasons given by RIDDELL, J.

Appeal dismissed with costs.

DECEMBER 23RD, 1913.

*TYRRELL v. MURPHY.

Chose in Action—Assignment of—Debt Due upon Promissory Notes—Assignment in Form of Order for Payment of Amount Due—Validity of—Right of Assignee to Recover—Death of Assignor—Promissory Notes not Endorsed—Delivery up by Assignee to Maker.

Appeal by the defendant from the judgment of WINCHESTER, Co.C.J., in favour of the plaintiff, in an action in the County Court of the County of York, brought to recover the amount due upon three promissory notes made by the defendant.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. M. Ferguson, for the defendant.

R. U. McPherson, for the plaintiff.

MULOCK, C.J.Ex.:—This action is brought to recover from the defendant certain moneys owing by the defendant, and represented by three promissory notes made by him, payable each to the order of Catherine Murphy. . . .

The plaintiff claims title to the moneys and notes by virtue of three written documents, the first two made by Catherine Murphy and the last one by Maria Christie, and worded as follows:—

"Croydon, March 13, 1906.

"$575.00.

"James Murphy.

"Sir: Will you kindly pay to my sister Maria Christie the amount of your notes made on 27th January, 1906, nineteen hundred and six, and oblige.

"CATHERINE MURPHY."

"Camden, May 2, 1908.

"James and Thomas Murphy please pay to my sister Maria Christie the full amount of all notes and accounts you owe me, and oblige.

"CATHERINE MURPHY."

*To be reported in the Ontario Law Reports.

"Toronto, June 17th, 1912.

"Will my brothers James, Patrick, and Thomas Murphy please pay to my niece Cassie Tyrrell the full amount of all their notes in my possession, and oblige.

"MARIA CHRISTIE."

Catherine Murphy died in 1910, having first made her will, whereby she appointed Maria Christie her sole executrix, and the plaintiff relies on this will, if necessary, as vesting in Maria Christie the right to the notes and moneys represented by them and formerly owing to Catherine Murphy. Maria Christie died in December, 1912; and, about ten days before her death, delivered to the plaintiff the three documents above set forth, and also the three notes sued on, and at the same time informed her to the effect that the notes and moneys in question were given to her for her own use absolutely. Mrs. Christie was childless, and the plaintiff, who was her niece, had lived with her from early childhood.

At the trial, the defendant's counsel, in writing, admitted "for the purpose of this action that each of the said notes was made by the defendant for good consideration, and that nothing had been paid on the said notes or any of them. The above is not to be taken as an admission or acknowledgment of liability to the plaintiff or to any other party or person whomsoever."

For the defendant, it was contended that these documents were not assignments of the moneys owing on the notes, but merely orders, and that each was revoked by the death of its signer. Numerous authorities shew that such documents are interpreted as assignments. . . .

[Reference to Harding v. Harding (1886), 17 Q.B.D. 442; Farquhar v. City of Toronto (1865), 12 Gr. 187; Bank of British North America v. Gibson (1891), 21 O.R. 613.]

It is unnecessary to multiply authorities in support of the plaintiff's contention that under the documents in question the plaintiff became the beneficial owner of the moneys owing by James Murphy and represented by the said three notes, and as such owner is entitled to maintain this action to recover the same.

The defendant's counsel having admitted that the notes were given for good consideration, the plaintiff, although not an endorsee of the notes and although a volunteer, and so unable to compel endorsement, is entitled to hold them as against all the world, and, therefore, is in a position to deliver them to

the maker. Therefore, the absence of endorsement is no bar to her right to recover the consideration.

The defendant pleads want of consideration from the plaintiff, but he is a stranger to the assignment, and cannot set up want of consideration: Walker v. Bradford Old Bank (1884), 12 Q.B.D. 511.

For the foregoing reasons, I am of opinion that, by reason of the assignments in question, the plaintiff is entitled to maintain this action and to retain the judgment given her in the Court below, she delivering up the notes to the defendant. Such a provision should be inserted in the order; and, subject to that modification, the appeal should be dismissed with costs.

RIDDELL, J., was of opinion that the appeal should be dismissed with costs, for reasons stated in writing, in which he referred to the following cases, in addition to those cited by the Chief Justice: Ex p. South (1818), 3 Swans. 392; Jones v. Farrell (1857), 1 DeG. & J. 208; In re Sheward, [1893] 3 Ch. 502; Brice v. Bannister (1878), 3 Q.B.D. 569; Buck v. Robson (1878), 3 Q.B.D. 686, 689, 690, 691; Ex p. Shellard, L.R. 17 Eq. 109; Fisher v. Calvert (1879), 27 W.R. 301; In re Russell's Trusts (1872), L.R. 15 Eq., at p. 29; Walker v. Bradford Old Bank (1884), 12 Q.B.D. 511.

SUTHERLAND and LEITCH, JJ., concurred.

Appeal dismissed with costs.

DECEMBER 24TH, 1913.

CITY OF BRANTFORD v. GRAND VALLEY R.W. CO.

Street Railways—Agreement with Municipal Corporation—Default of Street Railway Companies—Breach of Agreement—Notice—Forbearance—Waiver—Acquiescence—Action—Declaration of Forfeiture—Jurisdiction of Supreme Court of Ontario—Jurisdiction of Dominion Board of Railway Commissioners—Railway Act, R.S.C. 1906 *ch.* 37, *sec.* 26*A*—*British North America Act, sec.* 92(13), (14); *sec.* 101.

Appeal by the defendants other than the National Trust Company from the judgment of MEREDITH, C.J.C.P., at the trial, on the 17th September, 1913.

The action was brought to have it declared that the defendants the Brantford Street Railway Company and the Grand Valley Railway Company had forfeited all the privileges and rights held by them under the terms of the various agreements set forth in the pleadings, and that they be enjoined from further operating their street railway system upon the streets of the city of Brantford; and to have it declared that the railway and ties upon the streets of the city of Brantford were, in the exercise of the city corporation's option, vested in the city corporation, the plaintiffs, and that the plaintiffs were at liberty to grant a franchise to another company.

The learned Chief Justice found that the companies did not perform the agreement on their part, that they made various substantial defaults, and that by the terms of the agreements it was provided that, if there were defaults after notice, the companies would forfeit all their rights. He found that such notice was given, not only to the Grand Valley Railway Company, but also to the Brantford Street Railway Company, and that they made default in the following matters: in not reconstructing the line as required; in not providing coloured signal-lights at night for the cars; in not paying for the portion of the pavement of the streets which the companies agreed to pay; and in not placing and continuing on the railway good cars with all modern improvements. He held that there was a serious breach of the agreement in that respect, and that these defendants had forfeited all their rights under the agreement. He found that, after notice of the different defaults was given to both companies, nothing was done by the companies to cure the defaults or to avoid the forfeiture. He gave these defendant companies an opportunity to relieve themselves from the forfeiture by fulfilling certain terms set forth in paragraph 2 of the formal judgment—in effect what they had agreed to carry out and perform. The companies were to elect to accept the terms and thereby save the forfeiture on or before the 14th November, 1913; but they did not so elect.

The appeal was heard by MULOCK, C.J.Ex., LATCHFORD, SUTHERLAND, and LEITCH, JJ.

G. H. Watson, K.C., and Grayson Smith, for the appellants.

W. T. Henderson, for the plaintiffs, the respondents.

J. A. Paterson, K.C., for the defendants the National Trust Company.

The judgment of the Court was delivered by LEITCH, J. (after

setting out the facts):—In the list, handed to us on the argument, of what Mr. Watson called acts of waiver and acquiescence, we cannot find in the evidence anything more than mere forbearance. There has been no waiver of any of these rights by the plaintiffs, the Corporation of the City of Brantford. They have been patient and long-suffering, but they never acquiesced in any of the defaults that were made or wrongs that were done to them by the companies.

It was strongly urged in argument that the jurisdiction conferred upon the Dominion Board of Railway Commissioners by the Railway Act of Canada, and amendments, ousted the jurisdiction of the Supreme Court of Ontario, and that that Court had no power to decree a forfeiture in this case. We cannot subscribe to that argument.

It was urged that sec. 26A of the Dominion Railway Act, R.S.C. 1906 ch. 37, as added by 8 & 9 Edw. VII. ch. 32, sec. 1, conferred such powers upon the Board as to make it the only tribunal competent to adjudicate in this matter. The following language in the Act was relied upon in support of this contention: "The Board shall hear all matters relating to such alleged violation or breach, and shall make such order as to the Board may seem, having regard to all the circumstances of the case, reasonable and expedient, and any such order may, in its discretion, direct the company, or such corporation or person, to do such things as are necessary for the proper fulfilment of such agreement, or to refrain from such acts as constitute a violation or a breach thereof." The Dominion Railway Board was not created for the purpose of adjudicating upon all claims against or disputes with the railway company. The Board is purely a creature of the statute. The general principle applicable to such a body is, that its jurisdiction is only such as the statute gives in express terms or by the implication therefrom rendered necessary in order to carry out the operation of the Railway Act.

The British North America Act, 1867, sec. 92, sub-secs. 13 and 14, assigns to the Provincial Legislature the subjects of "property and civil rights in the Province;" and "the administration of justice in the Province, including the constitution, maintenance and organisation of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts."

Corporations created by the Parliament of Canada are ordinarily subject to the provincial laws relating to property and civil rights, and, primâ facie, civil claims against them should be pro-

secuted in the Provincial Courts. The Parliament of Canada is empowered to provide "for the establishment of any additional Courts for the better administration of the laws of Canada:" British North America Act, 1867, sec. 101.

In the exercise of its powers to legislate on certain subjects, the Parliament of Canada may, incidentally, trespass upon the field of provincial legislation. Such encroachments, however, are not to be presumed, but must be clearly indicated, and be limited to the extent necessary for the giving effect to the enactments of the Parliament of Canada upon subjects within its powers. It was for the purpose of enforcing and carrying out the railway legislation of the Parliament of Canada that the Board was given the jurisdiction conferred by the Railway Act. It was not created for the purpose of enforcing the rights or duties imposed on the Provincial Courts. To enable the Board to adjudicate upon a matter, that matter must be one as to which the Board is expressly empowered or directed to act; or it must relate to some violation of the Railway Act, or the special Act, or some regulation, order, or direction made thereunder: MacMurchy and Denison's Canadian Railway Law, p. 304. The Board is not a Court. It is an administrative and an executive tribunal. It has power to construe agreements which, in carrying out the Railway Act, it may be called upon to enforce, but it has no power such as the Supreme Court of Ontario possesses of adjudicating upon questions of construction in the abstract, or decreeing forfeiture, or of relieving therefrom.

It was stated in a memorandum handed to the Court after the argument that Town of Waterloo v. City of Berlin, 4 O.W.N. 256, 709, 28 O.L.R. 206, is an authority for the proposition that the jurisdiction of the Courts is ousted by the Ontario Railway and Municipal Board, under a statutory provision in almost identically the same words as the Dominion Act conferring power on the Dominion Board. From an examination of this case, it is clear that the questions involved arose under orders made by the Ontario Board. It was simply held that the Board having laid hold of a matter within their jurisdiction, it was for the Board to interpret and give effect to its own orders, and to deal with differences arising out of their orders.

It was held by the Ontario Railway and Municipal Board, in an action by the Corporation of the City of Hamilton to recover from the Hamilton Street Railway Company a large amount for repairs of the asphalt pavement on certain streets which the company, under an agreement with the city corporation and under the by-laws of the city, were obliged to make, that

the action was within the jurisdiction of the Courts, and that the Board were not bound to try an action for damages: Report of the Ontario Railway and Municipal Board of 1910, p. 36.

I am of opinion that the Courts have jurisdiction to try this action and to give the relief adjudged.

The appeal should be dismissed with costs.

DECEMBER 24TH, 1913.

*MYERS v. TORONTO R.W. CO.

Street Railways—Injury to Person Crossing Track—Car Travelling at High Speed—Proximate Cause of Injury—Negligence of Person Attempting to Cross—Evidence—Finding of Trial Judge—Appeal—New Trial—Costs.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 4 O.W.N. 1120, dismissing the action, which was tried before him without a jury, and was brought to recover damages for injuries sustained by the plaintiff by being struck by a car of the defendants, while she was attempting to cross Queen street, in the city of Toronto, on foot, by reason, as she alleged, of the negligence of the defendants' motorman.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

D. L. McCarthy, K.C., for the defendants, the respondents.

SUTHERLAND, J.:—. . . I quote from the judgment of the trial Judge: "When one ventures to cross in front of a moving car, rapidly approaching as this was, I think it is incumbent on the person to keep the car in sight, and not to trust blindly to the opinion formed on leaving the sidewalk that there is ample time to cross. If the plaintiff had exercised any kind of care, she could readily have escaped the disaster which overtook her."

In view of the definite finding of contributory negligence, and that it was the proximate cause of the accident, one is disposed at first blush to think the appeal a difficult one for the appellant to maintain. A careful perusal, however, of the portion

*To be reported in the Ontario Law Reports.

of the learned trial Judge's opinion just quoted leads one to ask one's self the question, has he not too broadly and generally stated the law as to the duty of a pedestrian under circumstances such as are disclosed in the evidence in this case?

The plaintiff complains also that the learned Judge, in coming to his own conclusions as to the facts, misconceived and hence inadvertently misstated, in part, the evidence, and in consequence deduced therefrom an unwarranted conclusion. . . .

There is no express statement by the plaintiff that she realised that this car was getting close. . . . The proper inference . . . to be drawn from her evidence is . . . that, seeing the car moving at such a distance away, she thought it safe to venture across the short distance she had to go, namely, from the . . . north side of the north track across a portion of that track, then across the devil-strip, and across the south track to the point at which the accident occurred. Would this be an unreasonable assumption to make, if, in addition, she had the right to assume, as I think she had, that the car was being operated properly and not at an excessive rate of speed?

I am of opinion that the appellant has ground to complain of the way in which the plaintiff's evidence has been stated by the learned Judge and the deductions he has drawn therefrom.

But was the trial Judge warranted in stating the law to be as he has indicated? Is it the law that it is incumbent upon a person who has taken the precaution to look once, and has reasonably formed the opinion that it is safe to cross the track, because an approaching car is at such a distance that, if operated in a usual and proper manner, she can do so, to look again or continue looking and keep the car in sight, or otherwise she can in no case recover?

If that is what is meant by the learned Judge, and his decision is based on that view, I am unable to agree with him. . . .

[Reference to Ramsay v. Toronto R.W. Co., ante 556; McAlpine v. Grand Trunk R.W. Co. (1913), 29 Times L.R. 674, 680; Gosnell v. Toronto R.W. Co., 23 S.C.R. 582.]

In the present case, the plaintiff did look, and concluded from the distance the car appeared to be from her that she could cross in safety. She had a right to assume that the car was being operated at a proper and moderate rate of speed and prudently. There is no finding as to this nor as to the defendants' negligence.

Upon the facts, her conduct may not have been negligent, and the defendants may have been guilty of negligence which occa-

sioned the accident. These issues do not appear to me to have been passed upon in a satisfactory way.

I think that the plaintiff has reasonable grounds for seeking, and is entitled to, a new trial. The costs of the former trial and of this appeal may well abide the event.

MULOCK, C.J.Ex., and LEITCH, J., concurred.

RIDDELL, J., gave a "grudging assent" to an order for a new trial—briefly stating his view, in a written memorandum.

New trial ordered.

DECEMBER 23RD, 1913.

*CALDWELL v. COCKSHUTT PLOW CO.

Contract—Sale of Engine—Fitness for Specific Purpose—Promissory Notes Given for Price—Action for Return—Payment of one Note under Protest, when Action Brought on—Denial of Recovery—Rescission of Contract—Damages for Breach of Warranty—Failure to Return Engine—Waiver—Damages—Innocent Misrepresentation by Vendor's Agent—Evidence—Fraud—Amendment—New Trial—Findings of Jury—Answers to Questions—New Trial.

Appeal by the defendants from the judgment of the Judge of the County Court of the County of Peel, in favour of the plaintiff, upon the findings of a jury, in an action for rescission of a contract for the purchase of an engine for cutting corn, on the ground that it did not work properly, for the return of the cash paid and promissory notes made and delivered by the plaintiff, or for damages for breach of warranty.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. Harley, K.C., for the appellants.

B. F. Justin, K.C, for the plaintiff, the respondent.

RIDDELL, J. (after setting out the facts):—The case came on for trial before the County Court Judge with a jury. The jury found as follows:—

*To be reported in the Ontario Law Reports.

(1) Q. Was there a verbal agreement, separate from and independent of the written agreement, between the plaintiff and the agents of the defendant company, at the time the order of the 12th February was signed, that the engine would be fit for the purpose of cutting corn and filling the silos of the plaintiff and his neighbours? A. Yes.

(2) Q. Was there a similar agreement made at the time the order of the 28th March was signed? A. Yes.

(3) Q. In making the contract, did the plaintiff rely upon the skill, judgment, and advice of the agents of the defendant company and the representations made by them that the engine would be fit for that purpose? A. Yes.

(4) Q. Was the engine fit for that purpose? A. No.

(5) Q. Was it the verbal agreement that induced the plaintiff to enter into the written agreement? A. Yes.

(6) Q. Did the plaintiff understand that he was to have one day in the fall to try the engine cutting corn and filling the silo? A. Yes.

(7) Q. Did the agents of the company fraudulently represent to the plaintiff that the engine was fit for the purpose of cutting corn and filling silos therewith? A. We believe the agents stated that the engine would cut corn and fill the silo, but not with the intent to defraud.

(8) Q. Was the engine delivered to the plaintiff in accordance with the written agreement? A. Yes. (This was originally written "Was the engine delivered to the plaintiff a 12 H.P. engine?" But it was altered so as to be perfectly general before being left to the jury.)

(9) Q. Is the plaintiff entitled to a return of the money paid under protest and the promissory notes now held by the defendant company? A. Yes.

(10) Q. Over and above the money paid, and the promissory notes held by the defendant company, did the plaintiff sustain any special damages, and, if so, what? A. Ten dollars for specialist, fifteen dollars, help and feeding same.

The jury add: "We are of opinion that the plaintiff should take the engine back to Bolton station. We bring in a verdict in favour of the plaintiff."

Judgment was then entered for the plaintiff for a return of the notes still unpaid, and costs.

The defendants now appeal. There is no cross-appeal.

In the consideration of the case we must wholly disregard the general verdict for the plaintiff added by the jury to their answers. Section 112 of the Judicature Act provides that "the

Judge . . may direct the jury to answer any questions of fact stated to them by the Judge for the purpose, and in such case the jury shall answer such questions and shall not give any verdict."

At the trial the learned County Court Judge seems to have intended to leave the matter to the jury generally; but, after his charge was concluded, it was decided to submit questions to the jury. Considerable discussion took place between the Judge and counsel as to the questions to be submitted, but at length they took the form we have seen. Objection was taken to questions 9 and 10, but overruled, the objection to question 9 being that it was matter of law and not matter of fact.

Again, an appeal being against the judgment and not against the reasons for it, the precise form of the judgment must be regarded. It is simply for a return of the two unpaid notes (and costs) without any other relief to either party. No judgment is given for the return of the money paid in the Division Court action, and rightly so. Ever since Marriott v. Hampton (1797), 4 T.R. 269, it has been consistently held that where an action is brought in good faith, and money is paid by the defendant, with his eyes open, in order to settle it, he cannot recover the money back: Hamlet v. Richardson (1833), 9 Bing. 644; Davis v. Hedges (1871), L.R. 6 Q.B. 687, at p. 692, per Lush, J.; Moore v. Fulham, [1895] 1 Q.B. 399. And he is not at all assisted by the fact that the payment is "under protest:" Brown v. McKinally (1795), 1 Esp. 279; Davis v. Hedges, ut supra, at p. 692; see also Cushen v. City of Hamilton (1902), 4 O.L.R. 265. If the claim be fraudulent, the result is different: De Cadaval v. Collins (1836), 4 A. & E. 858; Thomas v. Brown (1876), 1 Q.B.D. 714, at p. 722.

The judgment for return of the notes can, in my view, be supported only on a rescission of the written contract into which admittedly the plaintiff entered on the 26th March, 1912, the former contract of the 12th February having already gone by the board.

Subject to what will be said later, the notes cannot be returnable under the terms of the contract itself, because it has been found that the engine was in accordance with the contract. The finding that the engine is in accordance with the contract is fully borne out by the evidence. . . .

The jury were perfectly justified in finding, as they have found in effect, that the engine answered the description and the warranty, but that the work of filling silos required more

than 12 H.P. It was suggested that the warranty that the engine was "capable of doing good work" might mean "capable of filling silos;" that, however, in my view cannot be the case. The trouble about filling silos was not the manner in which an engine might work but the amount of power it developed, and the representation that it would fill silos is not as to its manner of working, but as to its power. In the circumstances of this case "capable of doing good work" must mean "capable of doing well the work of a 12 H.P. engine."

If, however, the contention should prevail, the plaintiff is met by the difficulty spoken of at the trial.

The agreement reads: "The purchaser shall have one day to give it a fair trial, and if it should not work well he is to give written notice . . . and allow reasonable time to get to it and remedy the defects . . . when if it cannot be made to do good work, he shall return it to the place where received, free of charge, in as good a condition as when received, except the natural wear, and a new implement will be given in its place or the notes and money, if given, will be refunded."

Even if we assume that all the use made of the machine at various times by the plaintiff before his trial in October, did not exhaust the "one day to give it a fair trial;" assuming also that the jury meant by their answer to the question that the "one day" was "one day in the fall at filling a silo," and that it was so agreed and not simply "understood" by the plaintiff; assuming further that they were justified in so finding, and that such an agreement would be effective, the plaintiff was first to give notice, which he did; and then, when it was found that the engine was not capable of doing good work, he was to return it, free of charge, to the station in as good condition as when received; then and only then the defendants were either to give him another engine or return him his notes. No complaint can be made (in the plaintiff's view of his bargain) that the defendants had not, by the 19th November, a reasonable time to "remedy the defects;" and their letter of the 30th October was such as to entitle the plaintiff to say that the engine could "not be made to do good work." He was consequently in the position, in this view, of being entitled to take the engine to Bolton free of charge. He does not take it to Bolton; he calls upon the defendants "to take it back," and says: "Unless you take it back and return our notes or give us an engine that will sufficiently answer our purpose, we will seek our remedy in Court." There is nowhere an offer to take the engine free of charge to Bolton. The defendants, on the 20th November, assert their position that

the engine is as sold, and request payment, but offer to make a new bargain for another engine. They do not say or suggest that the plaintiff need not deliver the engine at Bolton if for any reason he is entitled to do so. . . .

No doubt "a positive absolute refusal by one party to carry out the contract, is a breach of the contract on his part, and dispenses the other party from the useless formality of tendering the performance of a condition precedent:" McCowan v. Mackay (1901), 22 C.L.T. Occ. N. 100; but it must be something of a positive unequivocal character equivalent to a statement by the one that, even if the other should perform his part, he himself would not perform his. Such a case was Withers v. Reynolds (1831), 2 B. & Ad. 882. . . . The authorities are summed up in Mersey Co. v. Naylor (1884), 9 App. Cas. 434.

Under the contract, the plaintiff must draw the engine to Bolton, a matter which would cost the defendants some expense; he must give the defendants a reasonable time to examine the engine, to determine whether it was in fact in as good a condition as when received, except the natural wear (Isherwood v. Whitmore (1843), 11 M. & W. 347); and then the defendants would be bound either to give him another engine or return his notes. How can it be said that there was a waiver of all this—the offer, so far as it went, never going beyond an offer for them to take the engine where it was?

The return of the notes can, as I have said, only be awarded following a rescission of the agreement. The jury have found that an innocent misrepresentation on the part of the defendants' agents brought about the contract. I think that the first branch of this finding may be supported; i.e., (1) that the contract was procured by misrepresentation. The defendants are bound by the misrepresentation of their agent in the course of his employment, even if fraudulent: Lloyd v. Grace Smith & Co., [1912] A.C. 716; and "where rescission is claimed, it is only necessary to prove that there was misrepresentation. Then, however honestly it may have been made, however free from blame the person who made it, the contract having been obtained by misrepresentation, cannot stand:" per Herschell, L.C., in Derry v. Peek (1889), 14 App. Cas. 337, at p. 359.

But where the misrepresentation is innocent, "it is not a ground for rescission unless it was such as that there is a complete difference in substance between the thing bargained for and that obtained as to constitute a failure of consideration:" per Armour, C.J., in Northey Manufacturing Co. v. Sanders (1899), 31 O.R. 475, at p. 478, referring to Kennedy v. Panama,

etc., Mail Co. (1867), L.R. 2 Q.B. 580. Other cases are Mackay v. Dick (1881), 6 App. Cas. 251, at p. 265, per Lord Blackburn; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; Seddon v. North Eastern Salt Co., [1905] 1 Ch. 326. This law has never been questioned, and it is quite settled.

Unless we are prepared to overrule the judgment of the very strong Court which decided Northey Manufacturing Co. v. Sanders, 31 O.R. 475, we must hold that such a representation as was made in the present case is not sufficient ground for rescission. . . .

The case in the Court of Appeal of Canadian Gas Power and Launches Limited v. Orr Brothers Limited (1911), 23 O.L.R. 616, is cited as laying down the law differently. . . .

I am unable to distinguish the cases; there are minute differences, but subtle distinctions are not to be drawn in ordinary business transactions. So far as the case differs from the Northey case, it must be taken to have overruled it. Alabastine Co. Paris Limited v. Canada Producer and Gas Engine Co. Limited (1912), 4 O.W.N. 486, and Eisler v. Canadian Fairbanks Co. (1912), 22 W.L.R. 888, are in the same direction.

These cases seem to establish that, if the article supplied will not do what it was bought for, the purchaser may rescind the contract. Granting that the right to rescind did at any time accrue, I think that the plaintiff by his contract has lost it. His claim is that he was induced to believe that the engine would fill a silo. As early as the 29th October, he knew that it would not, and so said. He knew as early as the end of October that the defendants asserted that they had made no guarantee that the engine would do the work required. Then he should have taken his stand: "The contract is void, the engine is yours;" and stuck to it. He does not do that. He first claims his notes or a new engine, i.e., under the contract; and then, when that is not acceded to, he treats the engine as his own by having it tested, i.e., worked sufficiently to shew its horse power, by an outsider. He had no right to do this unless the contract was in force; and he thereby asserted the existence of the contract; in other words, he dealt with the engine in a manner inconsistent with the rescission of the contract.

The letter of the 11th January is consistent with this view, rather than with the view that he considered the contract at an end. When he discovered (if he did discover) by the expert's test that the engine was not 12 H.P., this did not give a new right to rescind: Campbell v. Fleming (1834), 1 A. & E. 40, at

p. 43; Walton v. Simpson (1884), 6 O.R. 213; Webb v. Roberts (1907), 16 O.L.R. 279. Moreover, the jury have found that the engine was 12 H.P.

The above would be sufficient to dispose of the appeal from the judgment as it stands; but it must not be forgotten that the action is in the alternative form; either for rescission with consequent relief, or for damages for breach of warranty; and, if the latter claim could succeed, we should, in allowing the appeal, either find the damages or direct a reference on that matter.

The jury have found that an agreement was made that this engine would be capable of filling silos; and the learned County Court Judge in beginning his charge told them: "In this case the plaintiff wishes to recover on a written agreement and on a collateral verbal agreement; that is, an agreement made at the same time and not embodied in the written agreement."

Nothing is better established than that, where a description or representation is made concerning the subject-matter of a contract, which, being untrue, entitles the purchaser to rescind the contract, if he receives the article sold and deals with it in such a way as to lose the right to rescind, that description or representation becomes a stipulation by way of agreement, for the breach of which compensation may be sought in damages: Behn v. Burness (1863), 3 B. & S. 751 (Cam. Seacc). See cases cited in New Hamburg Manufacturing Co. v. Webb (1911), 23 O.L.R. 44, at pp. 53, 54.

Such a stipulation, however, has no such effect "unless the representation was made fraudulently either by reason of its being made with a knowledge of its untruth or by reason of its being made dishonestly with a reckless ignorance, whether it was true or untrue:" Behn v. Burness, 3 B. & S. 751 (head-note); Newbigging v. Adam (1886), 34 Ch. D. 582, at p. 592, per Bowen, L.J.; Adam v. Newbigging (1888), 13 App. Cas. 308; Whittington v. Seale Hayne, [1900] W.N. 31.

Here the jury have found that the actual misrepresentation by the agent was not fraudulent; this express representation must prevent any implied representation in the same matter—"Expressum facit cessare tacitum." The only stipulation that was made was, say the jury, innocent, and was not such as that under the authorities an action could be founded thereon.

We have not to deal with the question as to whether the evidence of such oral representation was properly received. That I understand to have been concluded by the judgment of the Court of Appeal in the case in 23 O.L.R.; otherwise we might have had trouble with Ellis v. Abel (1882), 10 O.R. 226; Betts v.

Smith (1888), 15 O.R. 413, 16 O.R. 421; McNeely v. McWilliams (1886), 13 A.R. 421; Sawyer & Massey Co. v. Ritchie (1910), 43 S.C.R. 614.

Nor is there any difficulty in the plaintiff's way from the Division Court action. There was no adjudication by a Court as to his rights, and his voluntary payment only deprived him of so much money without the chance of recovering it again.

On the case as it stands, the appeal should be allowed with costs and the action dismissed with costs.

But there are two matters that require consideration:—

(1) The jury have found (A. 7), on evidence which is sufficient, that "the agents stated that the engine would cut corn and fill the silo," as is sworn to by the plaintiff (p. 14). The agent, McIntosh, says (p. 65), "that the engine was not big enough;" (p. 61), that he "never asserted that twelve horse power would run a blower;" (p. 65), that he did not know the plaintiff wanted it to fill a silo; (p. 66) that "there was nothing said about what that power was required for or what it would do," and (p. 71), "I knew it wouldn't cut the corn."

On this evidence it must be manifest that, if McIntosh made the representation the jury find he did make, he made it knowing that it was untrue. This is fraud. The answers of the jury are not satisfactory, although perhaps not absolutely contradictory.

It is true that fraud is not charged in the pleadings; even before us no amendment was asked for; and it is not too much to require any one who intends to charge another with fraud or dishonesty to take the responsibility of making that charge in plain terms: Low v. Guthrie, [1909] A.C. 278, at p. 282, per Lord Loreburn, L.C.; Badenach v. Inglis (1913), 4 O.W.N. 1495, 29 O.L.R. 165.

If, however, the plaintiff is willing squarely to take the attitude on the record that the defendants were guilty of fraud, I think that he may have an opportunity of doing so. If he elects to do this, the judgment below will be set aside and a new trial ordered; costs of the former trial and of this appeal to be in the cause, unless otherwise ordered by the trial Judge. If such an election be made, the other matter referred to may be fully developed, i.e.: (2) a few days after the second contract was written, the agents of the defendants were desirous of obtaining the notes promised; the plaintiff demurred, and, as he says, was promised (in effect) that the defendants would make the engine right, whereupon he gave the notes.

The facts as to this are not developed, and we express no opinion upon this point; but the plaintiff may, if he is so advised, set up in his amended pleadings a new contract entered into at that time.

If this option be not accepted, the appeal should be allowed and the action dismissed, both with costs.

That an action lies for fraud, even when the contract is not set aside, appears from such cases as S. Pearson & Son Limited v. Dublin Corporation, [1907] A.C. 351.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed in the result.

LEITCH, J., agreed with RIDDELL, J.

Order accordingly.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. DECEMBER 22ND, 1913.

JOLICOUR v. TOWN OF CORNWALL.

Costs—Taxation—Rules of 1913—New Tariff—Frame of Bill—Estoppel—Appeal—Witness Fees—Surveyors—Quantum of Allowance—Conflict between Rules and Statute.

Appeal by the plaintiff from the taxation of his costs of the action against the defendants by the local officer at Cornwall.

Featherston Aylesworth, for the plaintiff.
H. S. White, for the defendants.

MIDDLETON, J.:—First, it is said that part of the work was done before the Rules of 1913 came into force, yet the taxation has been upon the tariff appended to those Rules.

The plaintiff brought in for taxation a bill framed upon the present tariff, and the defendants did not object to taxation upon that tariff. The plaintiff now seeks to withdraw the bill which he has taxed and substitute for it a bill based upon the old tariff for all the work done up to the 1st September; contending that, notwithstanding the foot-note to the tariff, it does not apply to that work. I do not think it necessary to determine this ques-

tion, as I think that the appellant is estopped by his conduct. I have little regret in arriving at this conclusion, as, having run over the bill, it appears to me that fully as much has been allowed as will be taxable if what is sought is permitted.

The other matter argued was a conflict between the Rules and the statute with reference to witness fees taxed. The Rules provide for payment of professional fees of surveyors at $4 per day; the statute entitles the surveyor to charge $5. The surveyors were paid the statutory fee, but the allowance between party and party has been in accordance with the tariff. If there is any conflict, the Rules, having statutory effect, must govern, and the taxation must stand.

The appeal will be dismissed, but, under the circumstances, without costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 22ND, 1913.

REX v. GAMBLE-ROBINSON FRUIT CO. LIMITED.

Alien Labour—Importation of Manager of Company from United States—Alien Labour Act, R.S.C. 1906 *ch.* 97—*Similar Law in Force in United States—"Contract Labourers"—Offence against Statute—Evidence of Prior Agreement—Motion to Quash Magistrate's Conviction—Costs.*

Motion by the defendant company to quash a magistrate's conviction.

H. S. White, for the defendant company.
J. R. Cartwright, K.C., for the magistrate.
C. A. Batson, for the prosecutor.

MIDDLETON, J.:—Motion to quash a conviction made by J. T. Mackay, Police Magistrate at St. Mary's, on the 24th November, 1913, for that the accused did knowingly encourage or solicit the immigration or importation of one Carl J. Sanders, then being an alien, to perform labour or services in Canada for the accused, under a contract or agreement made between the accused and the said Sanders, previous to his becoming a citizen of Canada.

Two questions of importance were argued. A number of minor objections were taken which either have no foundation or are correctible by amendment.

It is argued that, inasmuch as the Alien Labour Act, R.S.C.

1906 ch. 97, under which this prosecution took place, provides that the Act shall apply only to immigration from such foreign countries as have in force a law applying to Canada "of a character similar to this Act," it must be shewn that in the United States there is in force a law of a character similar to this Act.

The law in force in the United States was proved at the trial. That Act is not in all respects similar to the Alien Labour Act, but it is of a character similar to the Act in question, because it prohibits, in almost precisely the same terms as our statute, the immigration or importation in the United States of "contract labourers." "Contract labourers," by an earlier section, are those who have been induced or solicited to immigrate to the United States by offers or promises of employment, or in consequence of agreements, oral, written, or printed, express or implied, to perform labour in that country, of any kind, skilled or unskilled.

The point most strongly argued was that, under the circumstances, what was done was not an offence against the statute. The accused is a subsidiary organisation, subordinate to the Gamble-Robinson Commission Company, an organisation carrying on business at Minneapolis. The accused company is incorporated under Ontario law, but appears to be really operated from Minneapolis. Negotiations took place in Minneapolis between Sanders, who is an American, and the officers of the commission company, looking to the employment of Sanders as manager of the business of the Ontario company, in place of Duncan, who was retiring from that position. Duncan was a stockholder, and it was understood that Sanders should take over his stock. Before Sanders left Minneapolis, he received a letter from the Ontario company, signed by Mr. Ross A. Gamble, its president, to the manager of the Royal Bank at Sault Ste. Marie, introducing him as "Mr. Carl J. Sanders, who is to succeed Mr. E. C. Duncan as manager of the Gamble-Robinson Fruit Company Limited, in your city. Mr. Sanders will have full charge as soon as the audit has been made and everything is turned over by Mr. Duncan." This is followed by a direction to the bank to honour the cheques of the company signed by Mr. Sanders.

In view of this, it is impossible to say that there was no evidence upon which the magistrate could find that there was a contract or agreement between the company and sanders for his employment, previous to his becoming resident in Canada.

The motion fails, and I dismiss it with costs, to be paid to the magistrate, which I fix at $25. I make no order as to the informant's costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 22ND, 1913.

RE AMERICAN STANDARD JEWELRY CO. v. GORTH.

Division Court—Jurisdiction—Division Courts Act, 10 Edw. VII. ch. 32, sec. 77—Contract—Bills of Exchange—Place of Payment—Amount in Question—Interest by Way of Damages—Prohibition—Costs.

Motion by the defendant for prohibition to the Seventh Division Court in the County of Essex.

H. S. White, for the defendant.
R. W. Hart, for the plaintiffs.

MIDDLETON, J.:—The defendant resides at Galt, and must be sued there unless the case falls within the provision of sec. 77 of the Division Courts Act, 10 Edw. VII. ch. 32, as the whole cause of action did not arise in the limits of the Essex Division Court, the drafts sued on having been accepted at Galt.

The action is brought upon five drafts, drawn upon and accepted by the defendant, payable at Windsor. Each draft is for $20, and does not bear interest. Interest after maturity is sought in the claim as damages payable under the statute.

The section in question provides that where the debt or money payable exceeds $100, and is made payable by the contract of the parties at a place therein named, the action may be brought in the Court of the division of the place of payment.

In re Brazill v. Johns, 24 O.R. 209, has determined that this section does not confer jurisdiction where the principal amount does not exceed $100, merely because interest may be allowed by way of damages upon the overdue payment. Re McCallum v. Gracey, 10 P.R. 514, is not in any way in conflict with this, as there the note itself stipulated for payment of interest—so that it was payable by way of debt, and not damages.

The prohibition must, therefore, be granted, and I can see no reason why costs should not follow.

MIDDLETON, J., IN CHAMBERS. DECEMBER 22ND, 1913.

TILL v. TOWN OF OAKVILLE.

HARKER v. TOWN OF OAKVILLE.

Appeal—Leave to Appeal to Appellate Division from Orders of Judge in Chambers—Parties—Joinder of Defendants—Alternative Claims—Third Parties—Claim for Relief over—Rules 67, 165.

Motion by the Bell Telephone Company of Canada for leave to appeal from the orders of LENNOX, J., ante 441, 443.

The motion was heard on the 19th December, 1913.

A. W. Anglin, K.C., for the applicants.

D. Inglis Grant, for the defendants the Corporation of the Town of Oakville.

M. H. Ludwig, K.C., for the plaintiff Till.

No one appeared for the plaintiff Harker.

MIDDLETON, J.:—The facts are sufficiently set forth in the judgments below. Shortly they are, that the defendants the municipal corporation have erected, for the purpose of supplying lighting current to their customers, high tension and low tension wires in the streets. In some way, the high tension electricity was discharged through the low tension wires; and on the 11th April, Till, represented by the plaintiff in the first action, was electrocuted, and on the 13th, Harker, represented by the plaintiff in the second action, was also electrocuted. The way in which this discharge of the dangerous current was brought about is difficult of ascertainment, and perhaps not yet known. It is suggested that the Bell Telephone Company of Canada or its employees brought about a condition of affairs resulting in the escape of the electricity and the consequent deaths of these two men.

In the Till action the plaintiff has joined as defendants both the municipality and the telephone company, relying upon the provisions of Rule 67, saying that they are "in doubt as to the person from whom they are entitled to redress," and are therefore justified in joining as defendants all persons against whom they claim any right to relief, whether jointly, severally, or in the alternative.

This is precisely the kind of case which this Rule was in-

tended to meet. It relieves a plaintiff from a difficulty which he ought not to be called upon to face, and it imposes no unfair burden upon the defendants. Apart from this Rule, if the plaintiff has any doubt as to which of two persons actually inflicted the wrong complained of, there is nothing to prevent two suits being brought, one against each defendant. If these cases are tried separately, then discordant findings may follow. It is true that a recovery in the action first tried would prevent a recovery in the second action; but a failure to recover in one would not necessarily mean success in the second, even if it should be plain that one or other of the defendants was at fault.

To avoid this travesty of justice, and to enable the whole matter to be litigated at once, and the responsibility, if any, to be laid upon the proper shoulders at the trial, is the express object of this enactment. The whole scheme of the legislation would be defeated if the plaintiff could be compelled to elect upon a Chambers motion.

In the other case the plaintiff is content to seek relief against the town corporation; and the town corporation claim relief over against the telephone company. I think that the town corporation have as much right to have this claim tried by this procedure as they would have to bring an independent action claiming indemnity and to have it tried. The third party summons is practically the institution of a new action by the defendant against the third party. For convenience this summons is issued in the old action, and culminates in a trial either at the same time as the trial of the plaintiff's claim, or at some other time, as may be directed; but the fundamental object is to have the issues in relation to the plaintiff's claim determined in a way that will be binding upon the third party, as well as the defendant. It is not intended that questions of law or fact should be determined upon a Chambers motion. The Court has, no doubt, power to set aside third party proceedings when the case is one clearly beyond what is contemplated by the Rules; but here the claim is made in good faith, and is far from being frivolous or vexatious.

This is only an example of the principle, which has been slowly evolved as the result of experience, that all interlocutory and preliminary proceedings are only of value when they lead up to the trial, and are pernicious where they are in any way made to prejudge matters that can be better determined at the trial. We have learned that it is better to ascertain the facts and apply the law to them than to have any interlocutory rulings on legal points upon an assumed state of facts.

I do not think that I should give leave to appeal in either case, as the judgments in review seem to me, if I may say so with deference, clearly right.

The motions will be refused, and the costs will be payable by the telephone company in any event of the litigation.

LENNOX, J. DECEMBER 22ND, 1913.

MAHER v. ROBERTS.

Assignments and Preferences—Chattel Mortgage—Money Advanced to Insolvent Firm to Pay Creditor—Absence of Knowledge of Insolvency—Action by Assignee for Benefit of Creditors—Validity of Chattel Mortgage—Bona Fides—Findings of Fact of Trial Judge.

Action by the assignee for the benefit of creditors of Chisholm & Morley to set aside a chattel mortgage made by that firm to the defendant as preferential and void.

F. M. Field, K.C., and J. B. McColl, for the plaintiff.
E. E. A. DuVernet, K.C., and W. F. Kerr, for the defendant.

LENNOX, J.:—Was this mortgage, so far as as the defendant is concerned, taken by way of security for "a present actual bona fide advance in money?" I think it was. Of course, I can properly reach this conclusion only if the facts in this case are clearly distinguishable in substance and effect from the facts founding the judgments in Burns v. Wilson (1897), 28 S.C.R. 207, and Allan v. McLean (1906), 8 O.W.R. 223, in appeal at p. 761; and I think that they are.

Mr. Hargraft, the bank manager, gave his evidence in a frank, unhesitating way, and I accept his account and statements as trustworthy. I am satisfied that when he placed the $2,500 to the credit of Chisholm & Morley, he did so upon the understanding—whether Morley actually said so or not—that Morley had ascertained that the Dominion Construction Company would accept and recognise the assignment then being made by Chisholm & Morley to the bank. Without this recognition or acceptance, the transaction was irregular; and, when it was discovered, after the lapse of a good deal of time, that the construction company would do nothing, Mr. Hargraft

was in trouble; not because of any idea that the borrowers were insolvent, or that the loan was insecure, but because the loan, whether good or bad, was made in a way that he could not justify to the bank. Although it is true, then, that Mr. Hargraft was very active in procuring this loan, and although, as a result, the bank was repaid, it cannot in this instance be fairly said that the "transaction was carried through at the instance and for the benefit of the bank." The bank never knew of the irregularity, made no complaint, and took no action. The anxiety of the manager was for his own safety—he had to get the assignment out of the way or, perhaps, lose his position. He was willing to use his own money for the purpose, and I believe him when he recounts the satisfactory shewing made by Mr. Morley, and when he says he believed what Morley told him, and that, although he knew that the firm owed money, he had no thought that they were insolvent. He had a right to insist, as he did, upon Chisholm & Morley getting this transaction off the bank books; and believing, as I find he did, that the firm was financially sound, I see no reason why he could not have made a direct loan out of his own funds to Chisholm & Morley upon the security of their chattels for the express purpose of straightening out the bank account; except that a chattel mortgage to their manager from customers of the bank might attract the attention of the head office and lead to inquiries and disclosures, with consequent loss of confidence in Mr. Hargraft as a manager: Johnson v. Hope (1890), 17 A.R. 10.

I come now to the position of the defendant. He was approached by Mr. Armstrong, a friend of Mr. Hargraft, but not the bank solicitor, as was attempted to be shewn. Armstrong was instructed by Morley, and Hargraft had conversations with him as well. The defendant was in the habit of lending money on chattel mortgages, and to do this borrowed money from the Bank of Toronto, through Hargraft, as manager, at 6 per cent., and made something on the transactions by exacting a higher rate of interest than he paid. This, no doubt, led to the offer of Hargraft to lend him money, which he could lend out at a higher rate. In his anxiety to relieve Hargraft, I have no doubt that Morley would have paid more, but Armstrong, acting in the interest of the firm, succeeded in keeping the interest down to seven per cent.

About the money being furnished by Hargraft out of his own means, without reference to the bank, or contingent claim against the bank, of any kind, there is no question whatever.

But this leads to another inquiry, namely, was this a loan by the defendant at all, or was it a loan by Hargraft, with the defendant as a mere figurehead? I have already indicated that, in my view, there was no legal obstacle in the way of a loan from Hargraft directly to the mortgagors; and it may be, if no indebtedness arose in favour of Hargraft, that the defendant could be treated as a trustee for him; but my judgment in no way hinges upon either of these views. The evidence satisfies me that there was in fact and in law an actual bona fide loan of $2,500 from Hargraft to the defendant, with all its ordinary legal incidents, without any string upon it, and without any secret reservations, conditions, or qualifications of any kind. I find, too, that the defendant relied upon what Armstrong told him as to the value and sufficiency of the security, and that he lent this money as his own money, and in good faith, and without knowledge or suspicion that the mortgagors were insolvent or financially embarrassed. Further, it is a fact that up to the time when he decided to go into the transaction, and had said so, he had not even heard that the bank had a claim, and he went into it as a business transaction, although it is not improbable that he felt the flattery of becoming the mortgagee in a large transaction, and appreciated the evident confidence of his banker. It is certainly to be remarked that, as it turned out, there was nothing very big in it for the defendant; but it probably compared favourably with his other mortgage deals; and, as he says, making the mortgage payable on demand was Mr. Armstrong's idea, not his.

Now as to the mortgagors—although their motives may not be very important except as a link, or break, in the chain of good faith. First, then, as to insolvency. There was evidence of debts, but I cannot recall any evidence to shew that on the 14th November, 1912, the mortgagors were unable to pay their debts generally as they became due. Again, offsetting the assets of the firm at that time as a going concern—with the most profitable part of their contract yet to be worked out and drawn upon—against the debts then outstanding, I find it difficult, if not impossible, even now, and certainly I should have found it quite impossible on the 14th November, 1912, to pronounce this firm as then being in insolvent circumstances. I am pretty strongly of opinion that, if the firm had been nursed and enabled to complete their contract, instead of being cut off as they were, even with the bad weather to be reckoned with, they might have made good in the end. This, however, is, as much as anything, for the purpose of following up the question

of good faith, and ascertaining the real meaning and purpose of what was done on the 14th November. I am satisfied that when Morley, at about this time, gave the bank manager a summary of the firm's financial position, shewing a substantial surplus, he acted in good faith, believing what he stated to be true; and that the mortgage was not executed with an actual intent of preferring or benefiting the bank, but solely for the purpose of extricating Mr. Hargraft from an awkward predicament, for which Morley, very properly, felt himself responsible. The result is, that the bank neither stands to win nor lose by the decision in this case. Its money was let out without its consent, it was repaid without effort or action upon its part. If the mortgage is void, the loss falls upon the mortgagee, if he is worth it; if he is not, the loss, of necessity, falls upon his creditor. The sole purpose of Mr. Hargraft was to avert personal disaster. Was his action, and the acts of those whom he set in motion, justifiable and legal as against the creditors of Chisholm & Morley? I think what was done was lawful and right. I refused at the trial to add the bank as a party unless an opportunity was given to defend. The application was renewed upon the argument. I adhered to the view I first expressed; and, in addition, upon the evidence, can see no purpose in bringing them in.

There will be judgment dismissing the action with costs.

Gibbons v. Wilson (1890), 17 A.R. 1, Ashley v. Brown (1890), 17 A.R. 500, Davies v. Gillard (1891), 21 O.R. 431, Molsons Bank v. Halter (1890), 18 S.C.R. 88, and Campbell v. Patterson (1892), 21 S.C.R. 645, may be referred to.

BOYD, C. DECEMBER 23RD, 1913.

CROFT v. McKECHNIE.

Mortgage—Sale under Power in First Mortgage—Purchase by Second Mortgagee—Action by Purchaser against Mortgagor on Covenant for Payment—Right of Mortgagor to Redeem—Admission — Onus—Judgment—Motion to Vary Minutes—Costs.

Motion by the plaintiff to vary the minutes of a judgment as settled.

J. P. Ebbs, for the plaintiff.

J. I. MacCraken, for the defendant.

BOYD, C.:—I do not think that I should consider the cases put in in order to determine whether the plaintiff can recover on the covenants and refuse to be redeemed. When I looked at the record and my notes at the trial, I found that the defendant set up that the exercise of the power of sale by the first mortgagee was fraudulently procured by the plaintiff. But, on the opening examination of the plaintiff as his own witness, it was stated by his counsel that "the plaintiff admits the right to redeem as to the land and as to purchase by Croft," whereupon I ruled that the onus rested on the defendant to make out that he was not bound by his mortgage.

The course of the trial was stopped and changed by this admission, and I do not think that the plaintiff should be allowed now to recede from it. It is no hardship for the plaintiff to give up the land on being paid the mortgage and all his outlay.

This direction will be without costs to either party. The endorsement as made at the time on the record will stand.

BOYD, C. DECEMBER 23RD, 1913.

RE BECKINGHAM.

Will—Construction—Specific Bequests not Exhausting Personalty—Intestacy — Devise of Land—Contract for Sale of Land between Date of Will and Death of Testator—Sale not Completed by Payment—Conversion of Realty into Personalty—Ademption of Devise—Purchase-money to be Received—Benefit of Next of Kin—Ascertainment of Next of Kin.

Motion by William Rogers for an order determining questions arising upon the will of Edwin Beckingham, deceased.

W. J. Code, for the applicant.
G. F. Henderson, K.C., for certain beneficiaries.
J. A. Hutcheson, K.C., for the executors.

BOYD, C.:—The testator's will is dated the 5th October, 1910, and he died on the 22nd of that month. He directs debts and funeral and testamentary expenses to be paid by his executors, and directs them to erect a head-stone over his

grave; he also gives a few hundred dollars in pecuniary legacies and directs some chattels to be distributed, but makes no other disposition of his personalty—as to which, therefore, he dies intestate (i.e., as to the surplus which remains after answering these demands).

He gives all real estate specifically to devisees named, and in particular the lot No. 16, situate in Brockville, to Mrs. Jones (now Boyce). This lot, however, he contracted to sell for $1,050 to Charles Hammond on the 10th October, 1910, five days after his will and twelve days before his death. Possession was to be given in March next, and the price was to be paid by $50 then paid and afterwards by monthly instalments of $10 each, including interest and principal in each payment, and then, on completion of payment, a deed to be given. Provision is made in the agreement for the cancellation of the contract in case of default in payment. The purchaser has paid the first $50 and been let into possession; and, though he has been late in some of his after-payments, the executors have not sought to take advantage of this. The terms render this forfeiture optional, and the executors appear to have a large discretion as to that.

The question was discussed as to the effect which this transaction entered into by the testator had upon the status of Mrs. Jones and whether the realty had been converted.

I think the authorities shew that the devise of land and the subsequent sale of it by the testator, even though the purchase is not to be completed till after the death, changes the nature of the property so that it is no longer under the control of the testator as land but as personalty in the shape of the purchase-money to be received. The same result follows as the result of a valid contract to sell, even though the purchaser subsequently —i.e., after the death of the testator—may lose his right to specific performance, by laches. The estate in the latter case would go to the next of kin and not to the heir at law. Both points were decided in Farrar v. Winterton, 5 Beav. 1, and in a case of Curre v. Bowyer, cited in a note at p. 6 in that volume.

Following the case of Re Dods, 1 O.L.R. 7, I answer the question by saying that Mrs. Jones has no interest in the purchase-money, and that it must all go to the next of kin of the testator.

There is difficulty about the next of kin because it is somewhat in evidence that there is a deceased wife in England who has had children by the testator—though this was not known to the public during his life in this country. He had a reputed wife here, who predeceased him, leaving no issue.

It will be referred to the Master at Ottawa to ascertain the next of kin and make distribution according to their respective rights—meanwhile the personalty should be paid into Court after the taxation of and less the costs of the parties appearing on this motion.

LABINE v. LABINE—LATCHFORD, J.—DEC. 24.

Partnership—Action to Establish Agreement and for Share of Profits—Mining Claim—Sale of—Evidence—Finding of Fact of Trial Judge—Counterclaim—Promissory Notes—Collateral Agreement as to Time of Payment.]—Action by Gilbert and Charles Labine, brothers, against James Labine, their cousin, to establish a partnership in regard to a mining claim in the Night-Hawk Lake District, in which the defendant had a share, which he sold for $75,000—the plaintiffs each claiming $25,000. The learned Judge finds that there was no general partnership at any time between the three parties. This was in effect admitted at the trial. The plaintiffs' right, then, to share in the $75,000 depended upon their establishing the agreement which they set up, that the defendant was to buy interests near Night-Hawk lake for the three. The plaintiffs both swore to the agreement, and it was denied by the defendant. The learned Judge was satisfied, upon the evidence, that no such agreement was in fact made. Action dismissed with costs.—The defendant counterclaimed upon five promissory notes, three made by the plaintiff Gilbert, and two by the plaintiff Charles. One of the notes made by Gilbert was for $1,000; it was agreed, when it was made, that it was not to be paid until Gilbert had made a "pull." The learned Judge said that, if effect could be given to this agreement, he would dismiss the counterclaim so far as it related to the claim upon the $1,000 note; but the contract expressed upon the face of the note must as a matter of law be given effect to: Abrey v. Crux (1869), L.R. 5 C.P. 37. Judgment for the defendant against the plaintiff Gilbert Labine for $1,200 with interest and costs, and against the plaintiff Charles Labine for $200 with interest and costs. T. W. McGarry, K.C., and J. Lorn McDougall, for the plaintiffs. R. McKay, K.C., and A. G. Slaght, for the defendant.

CONNELL v. BUCKNALL—LATCHFORD, J.—DEC. 24.

Principal and Agent—Agent's Commission on Sale of Mining Claim — Commission-agreement — Lost Document — Dispute as to Rate of Commission — Finding of Fact of Trial Judge.]—The plaintiff, a mining engineer, brought this action against the defendants for the balance of a commission upon the sale of a mining claim owned by the defendants in the township of Casey. The agreement to pay the commission was made in August, 1906, and was put in writing; but the writing was lost or destroyed in a fire; and there was a dispute as to the rate of commission. The sale was for $100,000; the plaintiff averred that the commission was at the rate of ten per cent.; the defendants admitted an agreement, but said that the rate was five per cent.; and they had in fact paid the plaintiff $5,000; so that the action was to recover another $5,000. Upon conflicting evidence, discussed in a written opinion, the learned Judge found that the agreement of August, 1906, was for the payment of five per cent. commission, and not ten; and that the $5,000 received by the plaintiff from the defendants on the 25th June, 1907, was accepted by the plaintiff in full payment of all commission payable under the lost agreement. Action dismissed with costs. R. McKay, K.C., and J. M. Hall, for the plaintiff. S. A. Jones, K.C., for the defendants.